SIXTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

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

NATIONAL RESEARCH UNIVERSITY
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LIST OF ABBREVIATIONS

§	Paragraph
AC	Advisory Council
ANoA	Answer to the Notice of Arbitration
Arbitration Clause	Exhibit C5, Frozen Semen Sales Agreement, Clause 15
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	Phar Lap Allevamento
Contract	Exhibit C5, Frozen Semen Sales Agreement between Phar Lap Allevamento and Black Beauty Equestrian
Exhibit Cx	CLAIMANT's Exhibit number x
Exhibit Rx	RESPONDENT's Exhibit number x
Hardship Clause/ Clause 12	Exhibit C5, Frozen Semen Sales Agreement, Clause 12
i.e.	Id est (that is)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
Ibid	Ibidem (in the same place)
ICC	International Chamber of Commerce
MfC	Memorandum for CLAIMANT
MfR	Memorandum for RESPONDENT
HKIAC Model Clause	HKIAC Rules Model Arbitration Clause
NoA	Notice of Arbitration
p.	Page
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Record	The 26th Annual Willem C. Vis Moot Problem
RESPONDENT	Black Beauty Equestrian
UNCITRAL	United Nations Commission for International Trade Law
UNIDROIT Principles, UNIDROIT	UNIDROIT Principles of International Commercial Contracts (2010)
Rules	HKIAC 2018 Arbitration Rules

STATEMENT OF FACTS

21 March 2017	RESPONDENT asked CLAIMANT for delivery of frozen semen from CLAIMANT's stallion Nijinsky III following temporal lifting of the ban on artificial insemination for racehorses in Equatoriana.
24 March 2017	CLAIMANT offered 100 doses of Nijinsky III's frozen semen for 99.500 USD per dose to be picked up at CLAIMANT's premises.
28 March 2017	RESPONDENT accepted most of the proposed terms though insisting on a delivery DDP.
31 March 2017	CLAIMANT expressed its consent on delivery DDP against lifting some risks connected with possible adoption of additional health and safety requirements in Equatoriana.
12 April 2017	The Parties' original negotiators got involved into the car accident and were replaced by the new ones, who subsequently finalized the Contract.
6 May 2017	CLAIMANT and RESPONDENT concluded the Contract.
November 2018	Government of Mediterraneo imposed a tariff of 25 per cent on agricultural products from Equatoriana.
December 2018	Government of Equatoriana imposed a tariff of 30 per cent upon all agricultural goods from Mediterraneo.
20 January 2018	CLAIMANT asked RESPONDENT for adjustment of the price after finding that the newly imposed tariffs also applied to racehorse semen.
21 January 2018	RESPONDENT asked CLAIMANT to make the shipment urgently and promised to clarify the legal situation.
21 January 2018	CLAIMANT made the shipment and paid the tariff.
31 July 2018	CLAIMANT initiated these arbitration proceedings asking the Tribunal for adaptation of the Contract.
2 October 2018	CLAIMANT informed the Tribunal that it would like to submit a copy of the award from another arbitration, where RESPONDENT asked for adaptation.
3 October 2018	RESPONDENT strongly objected, stating that the award was confidential and would have been obtained either through illegal hack or breach of confidentiality agreement.

SUMMARY OF ARGUMENTS

ISSUE A. *First*, the Arbitral Tribunal does not have jurisdiction to adapt the Contract, since narrow wording of the Arbitration Clause is not sufficient to cover adaptation and adaptation cannot be regarded as mere interpretation of the Contract. *Second*, the Arbitral Tribunal does not have power to adapt the Contract, as Danubian Arbitration Law (*lex arbitri*) requires express authorization of arbitral tribunal to enjoy this power, and such an authorization lacks in the Arbitration Clause. *Furthermore*, CLAIMANT cannot refer to pre-contractual negotiations to deduce jurisdiction and power to adapt. The Arbitration Clause is governed by the law of Danubia, which prohibits any reference to parol evidence for interpretation.

ISSUE B. The evidence is inadmissible pursuant to the IBA Rules and standard arbitration practice. *First*, the Partial Interim Award cannot be disclosed, as it is confidential under the applicable rules and its confidentiality is implied by law. *Second*, admission of the evidence obtained through illegal hack violates principles of justice and fairness, as it would provide the procedural advantage at the cost of RESPONDENT. *Third*, the Partial Interim Award is irrelevant to the present case, as the circumstances of these two disputes significantly differ. *Finally*, the Partial Interim Award is immaterial to the outcome of the case, since factual findings of another tribunal do not bind the Arbitral Tribunal and the fact that RESPONDENT might hold different positions in separate proceedings have no legal value in the present case.

ISSUE C. CLAIMANT is not entitled to increase of the purchase price due to imposition of tariffs. *First*, the parties never agreed on adaptation of the Contract, as CLAIMANT took over the risk of possible price increase and the relevant provision was included in the Contract (Clause 12). The clause mainly deals with additional health and safety requirements and interpretation of it demonstrates that imposition of additional tariffs can in no way be deemed comparable. Moreover, interpretation of the Clause 12 of the Contract shows that the Parties did not agree on any price adjustment mechanism. *Second*, Art. 79 CISG does not provide for adaptation in case of hardship. The parties derogated from the conventional regime by including Clause 12 in the Contract. Even if the Tribunal finds thatArt. 79 CISG applies, the criteria of economic hardship set under the CISG are not met in the present case. Namely, the imposition of tariffs does not constitute an "impediment beyond control", which CLAIMANT could not foresee, avoid or overcome. In any event, the Art. 79 CISG deals only with exemption from liability and does not provide for the remedy of adaptation.

JURISDICTION OF THE ARBITRAL TRIBUNAL AND APPLICABLE LAW

1. According to the avowed principle of *Kompetenz-Kompetenz,* an arbitral tribunal, as an initial matter, has the authority to determine its own jurisdiction [*Reisman/Craig/Park/Paulsson, p. 646*]. The seat of arbitration, Danubia, has adopted the UNCITRAL Model Law with the 2006 amendments (*lex arbitri*) [*PO1, §4*] and the UNCITRAL Model Law, therefore, governs the arbitration. In Art. 7 Danubian Arbitration Law provides that to be valid parties' arbitration agreement shall be in writing and in the form of a separate agreement or, like in our case, an arbitration clause incorporated to a contract.
2. In May 2017, the Parties concluded the Contract [*NoA, §5*], which included an Arbitration Clause giving the Arbitral Tribunal the power to settle the disputes arising out of the Contract [*Exhibit C5, §15*]. The law of Danubia applies to the Arbitration Clause and its interpretation [*MfR, §§23-44*]. Neither of the Parties questions the jurisdiction of the Arbitral Tribunal in general [*PO2, §48*]. The HKIAC Arbitration Rules [*Exhibit C5*], in conjunction with the UNCITRAL Model Law [*PO1, §4*], govern the procedure in present arbitration.

CLAIMANT'S ARGUMENTS

ISSUE A. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION AND POWER TO ADAPT THE CONTRACT

3. CLAIMANT undertook to supply "100 dozens of frozen semen" to RESPONDENT under the DDP basis of supply for the fixed price of 10.000.000 USD [*Exhibit C5*]. However, now CLAIMANT asks the Tribunal to increase this agreed price by 1.250.000 USD, because CLAIMANT had to pay an additional customs tariff to import the goods to RESPONDENT's country [*NoA, §20*].
4. However, in order to hear this request for adaptation on the merits, the Arbitral Tribunal must have both jurisdiction, *i.e.* adaptation should fall within the scope of matters the parties agreed to submit to arbitration, and powers to adapt the Contract, *i.e.* adaptation must be part of actions that the arbitral tribunal may undertake to resolve the claim [*Redfern/Hunter, p. 305–306; Wigwe, p. 242–243*]. The presence of jurisdiction and powers is defined by the parties' arbitration agreement [*Born, p. 490*] and the law of the seat of arbitration (*lex arbitri*) [*Redfern/Hunter, p. 306*].
5. In the present case, RESPONDENT submits that the Arbitral Tribunal lacks both jurisdiction and powers, as the Parties have not agreed to submit matters relating to adaptation to arbitration [**I**] and have not expressly vested the Arbitral Tribunal with the extraordinary power to adapt the Contract as required by Danubian Arbitration Law (*lex*

arbitri) [**II**]. Further, CLAIMANT's allegations that the Tribunal's jurisdiction and powers to adapt the Contract stem from the Parties' pre-contractual negotiations should be dismissed regardless of the law chosen to interpret the Arbitration Clause [**III**].

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO ADAPT THE CONTRACT, AS THE ARBITRATION CLAUSE DOES NOT COVER CLAIMS FOR ADAPTATION

6. The Arbitral Tribunal cannot decide on adaptation of the Contract, since adaptation is not covered by the narrow-worded Arbitration Clause [**A**], and, contrary to CLAIMANT's allegations, it cannot be regarded as a mere interpretation of the Contract [**B**].

A. Adaptation is not a "dispute arising out of the Contract" within the meaning of the Parties' Arbitration Clause

7. Adaptation is not consistent with the ordinary definition of arbitration, as "an arbitrator is supposed to solve legal disputes, *i.e.* disputes over existing rights and duties. The person who adapts contract terms merely rearranges the contractual relationship on behalf of the parties" [*Zaccaria, p. 156, Houtte, p. 122*]. For this reason, international case law recognizes that adaptation is not a "dispute arising out of the contract" but is in fact a non-contractual controversy [*Ibid*], as unlike contract interpretation adaptation requires the arbitrators to construct new contract provisions [*Klass, p. 3*].
8. In the present case, the Parties intentionally "narrowed down" the Arbitration Clause as compared to the standard HKIAC clause [*Record, p. 33*], excluding "controversies, differences or claims" and "non-contractual disputes" from its wording [*HKIAC Model Clause*]. The final version of the Arbitration Clause only allows the resolution of the disputes "arising out of […] existence, validity, interpretation, performance, breach or termination" of the Contract, without any reference to "adaptation" [*ANoA, §13; Exhibit R1; NoA, §15*].
9. Therefore, adaptation does not fall within the scope of the Arbitration Clause, which deprives the Arbitral Tribunal of jurisdiction to hear CLAIMANT's allegations.

B. Contrary to CLAIMANT's allegations, adaptation of the Contract is not its mere interpretation

10. RESPONDENT objects to the allegation of CLAIMANT that "the primary claim before the tribunal is a question of interpretation of the contract that contains the arbitration agreement" [*MfC, §5*].
11. Interpretation refers to the meaning and application of the existing contractual terms, whereas adaptation equals to construction of new contractual terms [*Klass, p. 11*]. The

difference between the mere interpretation and construction is that interpretation allows an arbitral tribunal only to ascertain the meaning of contractual words [*Fashion Fabrics v. Retail Corporation*], rather than change them.

12. It is not in dispute that the Contract does not contain any provision that would automatically change the price in case of given circumstances. Accordingly, CLAIMANT's request is aimed at constructing and/or changing the Contract provisions instead of the Parties, rather than Contract interpretation.

13. Accordingly, since arbitration does not fall within the scope of the Arbitration Clause, the Arbitral Tribunal lacks jurisdiction in this case.

II. THE ARBITRAL TRIBUNAL DOES NOT HAVE POWER TO ADAPT THE CONTRACT

14. The Arbitral Tribunal is not authorized to adapt the Contract since there is no express authorization either in the Arbitration Clause [**A**] or in other provisions of the Contract [**B**]. What is more, contrary to CLAIMANT's allegations, the power to adapt is not an inherent power of the Arbitral Tribunal [**C**].

A. Danubian Arbitration Law requires express conferral of the power to adapt the Contract to arbitral tribunals, which is lacking in this case

15. The arbitrators' powers, *i.e.* actions that the arbitrators may undertake to resolve the dispute [*Redfern/Hunter, p. 305–306*], are limited by the arbitration law of the country where the arbitration takes place (*lex arbitri*). If the arbitral tribunal exceeds its powers in violation of such limitations, the resultant arbitral award would be unenforceable and could be set aside pursuant to Art. V(1)(d) of the 1958 New York Convention [*New York Convention*].

16. In the present case, Danubian law is *lex arbitri,* as the Parties agreed on Danubia as the seat of arbitration [*Exhibit C5, §15*]. Under Art. 28(3) of Danubian Arbitration Law, which is identical to Art. 28(3) of UNCITRAL Model Law [*PO2, §36*], the arbitral tribunal may "decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so" [*UNCITRAL Model Law, Art. 28(3)*]. The courts of Danubia consider that Art. 28(3) applies to adaptation, as adaptation is considered an "exceptional power" that involves deciding a dispute not based on law, but on the rules of equity (*ex aequo et bono*) [*PO2, §36*]. Accordingly, in Danubia "an express conferral of powers is required" in order for the Arbitral Tribunal to "adapt contracts" [*PO2, §36*].

17. The Arbitration Clause does not expressly confer the powers to adapt the Contract to the Arbitral Tribunal. In such circumstances, the Arbitral Tribunal is not empowered to adapt

the Contract pursuant to Art. 28(3) of Danubian Arbitration Law.

B. Power to adapt the Contract cannot be deduced from the "hardship" wording in Clause 12 of the Contract

18. CLAIMANT may also argue that such authorization may be derived from Clause 12 of the Contract, which states that CLAIMANT is not "responsible for (…) hardship" [*Exhibit C8*]. However, for a hardship provision to confer the power of adaptation, it should have an explicit reference to the arbitration clause or the adaptatation mechanism [*Berger, p. 8*].

19. In the present case, however, there is only a partial hardship clause, allowing only for exemption from liability [*Exhibit C8*] without any reference to the Arbitration Clause or the power of adaptation. Therefore, the existing Clause 12 is not sufficient to authorize the Arbitral Tribunal for adaptation of the Contract.

C. The power to adapt is not part of the Tribunal's inherent powers

20. CLAIMANT argues that "no special authorization by the parties is required as this [adaptation] is an inherent part of deciding the legal dispute and consequently an inherent power of the tribunal" [*MfC, §39*].

21. However, this position is inconsistent with Danubian Arbitration Law, which considers that a separate authorization is required for the power to adapt to arise [*PO2, §36*]. Further, as widely recognized, inherent powers are "very limited powers" that involve matters of procedure, such as exclusion of evidence [*Landau, p. 520-523*].

22. Since the power to adapt a contract is a procedural power, it is not part of the Tribunal's inherent powers. Accordingly, the Arbitral Tribunal is not vested with powers to adapt the Contract in the present case.

III. CLAIMANT CANNOT REFER TO PRE-CONTRACTUAL NEGOTIATIONS TO DEDUCE JURISDICTION AND POWERS OF ADAPTATION

23. To artificially broaden the scope of the Parties' narrow arbitration clause and deduce jurisdiction and powers for contract adaptation, CLAIMANT argues that there was an "oral agreement between the contract negotiators" during the pre-contractual negotiations to "enable the Tribunal to adapt the Contract" [*MfC, §14*].

24. However, pre-contractual negotiations cannot be used to interpret the arbitration clause in this case, as Danubian law, which governs the arbitration clause (*lex causae*), is based on the parol evidence rule [**A**]. Alternatively, even if the Arbitration Clause is governed by Mediterranean law as CLAIMANT alleges [*MfC, §§16–21*], correct interpretation of the Parties' pre-contractual negotiations confirms that the Parties never agreed to confer

jurisdiction on adaptation to the Arbitral Tribunal [**B**].

A. The Arbitration Clause is governed by the law of Danubia, which prohibits reference to pre-contractual negotiations for interpretation (parol evidence rule)

25. Under the principle of separability of the arbitration clause, the arbitration clause is considered to be legally a "separate agreement," which therefore may "well be governed by a law different from that applicable to the underlying contract" [*Born II, p. 819; Berger, p. 7; ICC 1507*].

26. Law applicable to the arbitration clause is therefore a matter to be assessed separately from the law applicable to the main contract [*Born, p. 514*]. The law governing the arbitration clause should be determined based on choice of law made by the Parties or, in the absence of such choice, the applicable law is that which has the closest and most real connection to the arbitration agreement [*Ibid*].

27. For this reason, CLAIMANT wrongfully argues that the mere fact that the Parties subjected the Sales Contract to the law of Mediterraneo means that Mediterranean law also governs the Arbitration Clause [*MfC, §§16–17*]. Instead, the Parties have not reached an express agreement on the law applicable to the arbitration agreement. Contrarily, the Arbitration Clause is governed by the law of Danubia since the Parties impliedly chose the law of Danubia [**1**]. Alternatively, the law of Danubia applies since it has the closest and most real connection to the Arbitration Clause [**2**]. Accordingly, CLAIMANT cannot refer to prior negotiations under Danubian law to broaden the scope of the Arbitration Clause beyond its plain wording [**3**].

1. The Parties impliedly chose the law of Danubia to govern the Arbitration Clause

28. The Parties implicitly chose the law of Danubia to govern the Arbitration Clause, by choosing Danubia a seat of arbitration [**a**]. Contrary to CLAIMANT, there is no implied choice of the law of Mediterraneo and it cannot be inferred from the Parties' negotiations [**b**].

a) The Parties' agreement to subject the Arbitration Clause to Danubian law stems from their chosen seat of arbitration

29. It is widely recognized that when there is no express choice of law specifically with respect to the arbitration agreement, the choice of law may be inferred from the indication of the seat of arbitration [*Born II, p. 829; Tunisienne case*]. For instance, in *First Link case* it was held that the very choice of an arbitral seat presupposes parties' intention to have the law of that

seat recognize and enforce the arbitration agreement [*First Link case*].

30. Likewise, in *Citation v Equinox* the tribunal stated that "[t]here is […] a presumption that the parties have intended that […] the law governing [the] arbitration agreement is the same as the law of the country in which the arbitration is agreed to be held" [*Citation v Equinox*]. What is more, it is recognized that express choice-of-law clause is displaced by indication of the seat of arbitration in another country [*Arsanovia case*].

31. In the present case, the Parties' arbitration clause expressly provides that "[t]he seat of arbitration shall be Danubia" [*NoA, §14*]. Accordingly, the Parties impliedly chose the law of Danubia to govern the arbitration agreement based on the abovementioned presumption.

32. Therefore, the law of Danubia governs the Arbitration Clause.

b) Implied choice of law of Mediterraneo cannot be inferred from the negotiations between the Parties

33. Implied choice of law may only be assumed if there is clear evidence that the parties mutually intended to agree on a certain law but did not expressly stipulate their common intention [*Czernich, p. 79*]. However, there never was an agreement or indication of the Parties in their pre-contractual negotiations that the Arbitration Clause should be governed by the law of Mediterraneo. Neither there was a compromise between the Parties that CLAIMANT accepted arbitration in Danubia provided that the applicable law remained the law of Mediterraneo, as CLAIMANT alleges [*MfC, §20*]

34. Firstly, RESPONDENT clearly objected to the choice of Mediterraneo as the seat of arbitration [*Exhibit C3*]. Secondly, the law of Mediterraneo was only referred to by RESPONDENT in context of choice of law governing the main contract, whereas the law of Equatoriana was indicated as the law governing the Arbitration Clause [*Exhibit R1*]. CLAIMANT only replied that "offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo" [*Exhibit R2*], so that it could only be understood as referring to the law of the main contract in the context of the previous e-mail.

35. Therefore, there are no grounds to state that there was implied choice of the law of Mediterraneo based on the negotiations between the Parties.

2. **In any event, the law of Danubia applies to the Arbitration Clause as it has the closest and most real connection to it**

36. In case when there is neither express, nor implied choice of law in an arbitration agreement, an arbitral tribunal should apply the law which has the closest and most real connection to an arbitration agreement [*Leong/Tan, p. 94; Sulamerica case*].

37. According to doctrine and case law, the law of the seat of arbitration has the closest and the most real connection to the arbitration clause, since it governs procedural aspects of the dispute [*Born II, p. 830; C. v. D. case; Shashoua & Ors v. Sharma case*]. As ruled in *Sulamerica case,* when the law of the seat of arbitration differs from the law of the main contract, the former should apply to the arbitration agreement, since this is "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" [*Sulamerica case*].

38. What is more, the UN Working Group that drafted the UNCITRAL Model Law emphasized that "to use the place of arbitration as a secondary criterion was beneficial in that it provided the parties with a degree of certainty which was lacking under [other suggested approaches, like the application of the law of the main contract]" [*A/40/17*].

39. Since the law of the seat of arbitration is Danubia, it has the closest and the most real connection to the Arbitration Clause, therefore, should be applied for the purposes of the interpretation of the Arbitration Clause.

3. Given that the law of Danubia applies, CLAIMANT cannot refer to pre-contractual negotiations to interpret the Arbitration Clause

40. Parol evidence rule is a widely applied common law principle according to which contracts have to be interpreted based on their written text only, and excluding any extrinsic evidence, such as statements made during the negotiations, in order to preserve the integrity of written contracts [*CISG AC Opinion No. 3, §1.2.1*]. Extrinsic evidence can only be introduced when the contract is not fully integrated in writing and has ambiguous terms [*Martorana, p. 34*]. A contract is presumed to be fully integrated when it is signed by the parties and does not refer to outside agreements reached in other documents or orally [*CISG AC Opinion No.3, §§1.2.5, 1.2.6*]. A provision is not deemed ambiguous simply because the parties disagree as to its construction or urge alternative interpretations [*Martorana, p. 16; GMG Capital Investments v. Athenian Venture Partners*].

41. In the case at hand, Danubia is a common law jurisdiction [*PO2, §44*]. Accordingly, its law is based on parol evidence rule [*PO2, §45*], prohibiting the courts and arbitral tribunals from reviewing pre-contractual negotiations to assess wholly integrated contracts.

42. Contrary to CLAIMANT's allegations [*MfC, §33*], parol evidence rule should apply in this case, as the Arbitration Clause is wholly integrated in writing, given that the Contract was signed by the Parties, and it does not have any references to outside factors. Further, the Arbitration Clause cannot be considered as ambiguous, as it is based on the standard arbitration clause provided by HKIAC and thus operates with wording that is common in

arbitration [*HKIAC Model Clause*].

43. The same view, that in case if the law of Danubia applies to the Arbitration Clause, there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation, was confirmed by the Arbitral Tribunal, based on the agreement of the Parties before the start of the proceedings [*PO1, §II (3)*].

44. Therefore, CLAIMANT's request for adaptation should be rejected.

B. Even if the law of Mediterraneo is applicable to the Arbitration Clause, the Arbitral Tribunal still has no jurisdiction and powers to adapt the Contract

45. CLAIMANT's attempts to broaden the scope of the Arbitration Clause by reference to the Parties' negotiations are based on one oral conversation "between the primary negotiators of each party," who orally discussed on one occasion that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*MfC, §41*; *Exhibit C8, p. 17*].

46. However, RESPONDENT believes that this single pre-contractual discussion, even if admissible as evidence under Mediterranean law, does not lead to the conclusion that the Parties in fact agreed to submit issues of adaptation to arbitration.

47. According to consistent jurisprudence in Mediterraneo, CISG applies to the interpretation of arbitration agreements [*PO1, §III(4)*]. As follows from the Art. 8 CISG, if the Parties have different understanding of contractual terms, they should be interpreted in accordance with the reasonable person test. An intention of one party is binding for the other party where such intention was known or should have been known to the other party at the time of contracting [*Schlectreim/Schwenzer, Art. 8, §19*].

48. In the present case, these requirements are not met for two reasons. First, the Parties' initial negotiators did not participate in finalizing the Contract, as they had been "involved in a severe car accident" and were "hospitalized" [*Exhibit C8, p. 17*]. There is no evidence that their discussions were known to the subsequent negotiators which finalized the Contract. Contrarily, RESPONDENT's subsequent representative Mr. Krone could not have been aware of this oral discussion, as he has testified that RESPONDENT's previous negotiator Mr. Antley never "report[ed] about" previous negotiations [*Exhibit R3*]. Further, RESPONDENT's Mr. Krone states that he "would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion" if asked about the same during subsequent discussions [*Exhibit R3*].

49. Second, even the Parties' previous negotiators did not reach an affirmative agreement to resort adaptation issues to arbitration. Instead, as CLAIMANT's Mr. Napravnik herself admits, they merely "shortly exchanged views," and RESPONDENT's Mr. Antley merely

stated that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" (emphasis added) [*Exhibit C8, p. 17*]. Such an informal probabilistic statement does not manifest an agreement as CLAIMANT alleges.

50. Accordingly, interpreted from the reasonable person perspective, such a brief exchange of opinions between persons that did not participate in finalizing the Contract, cannot be deemed an affirmative agreement to transfer issues of adaptation to the Arbitral Tribunal. This is especially so given that Danubian Arbitration Law requires an express agreement to this effect, rather than a mere implication [*MfR, §§15-17*].

51. For all the aforesaid, CLAIMANT's claim should be dismissed on procedural grounds, as the Arbitral Tribunal lacks both jurisdiction and powers to hear issues of adaptation.

ISSUE B. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE OBTAINED THROUGH ILLEGAL HACK OR BREACH OF CONFIDENTIALITY

52. CLAIMANT wishes to submit the Partial Interim Award from another arbitration proceedings which RESPONDENT is a party to as an evidence [*Record, p. 50*]. RESPONDENT's investigation revealed that the award "would have been obtained by illegal means" [*Record, p. 51*]. RESPONDENT firmly believes that CLAIMANT is not entitled to submit the Partial Interim Award.

53. The arbitral tribunal shall "determine the admissibility, relevance, materiality and weight of the evidence" [*Rules, Art. 22; UNCITRAL Model Law, Art. 19(2)*]. Accordingly, the tribunal has broad discretion to reject any evidence, especially where the criteria of admissibility, relevance and materiality are not met [*Pilkov, p. 148; Waincymer, p. 750; Moser/Bao, §9.150; Holtzmann/Neuhaus, §4, p. 583*].

54. In the present case, contrary to CLAIMANT"s argument, the evidence from another arbitration, i.e. the Partial Interim Award obtained by CLAIMANT through illicit means, shall not be admitted by the Arbitral Tribunal, since it is inadmissible in law [**I**], irrelevant to the case and immaterial to its outcome [**II**].

I. THE EVIDENCE IS INADMISSIBLE IN LAW, SINCE IT IS CONFIDENTIAL AND WAS OBTAINED ILLEGALLY

55. The Arbitral Tribunal shall reject the evidence due to the confidentiality protecting it[**A**]. Further, the evidence is inadmissible, as it was obtained in a manner contrary to international public policy and good judicial order [**B**].

A. The considerations of confidentiality are sufficient to warrant the exclusion of the evidence

56. The Arbitral Tribunal has the power to follow its own rules of evidence [*Holtzmann/Neuhaus, p. 567, 577*], such as the IBA Rules on Taking of Evidence [*Moser/Bao, §9.155*], which should be applied in the present case as reflecting best practice in international commercial arbitration [**1**].

57. Pursuant to the IBA Rules, the Arbitral Tribunal shall reject the Partial Interim Award, since it constitutes confidential information [**2**] and is not covered by any exceptions thereto [**3**]. Finally, contrary to CLAIMANT's allegations, the evidence cannot be disclosed under the principles of transparency, as they are not applicable to the present proceedings [**4**].

1. The IBA Rules are applicable to the present case

58. Contrary to CLAIMANT [*MfC, §52*], the IBA Rules provide a persuasive authority on the issues of taking of evidence, which have guided many tribunals in their practice [*O'Malley, §1.24*], even though they are not directly binding [*RDC v. Guatemala; ICC 13225; LCIA 5699; Moser/Bao, §9.155*]. Thus, the IBA Rules can be regarded as best practice and can be applied as default rules for the taking of evidence [*Hanotiau, p. 114; Shenton, p. 188*].

59. Accordingly, the Arbitral Tribunal should follow IBA Rules in this case in order to assess whether to admit the evidence in the present proceedings.

2. The Partial Interim Award is covered by confidentiality

60. Art. 9.2(b) of the IBA Rules provides that "the Tribunal shall exclude [...] any document on which a legal impediment [...] rests" [*IBA Rules, Art. 9.2(b)*]. A general principle inferred therefrom provides that a decision on admissibility should be based on consideration of privileges and secrets that protect the evidence [*Schlaepfer/Bärtsch, p. 214*], including the confidentiality regime [*ICSID Case No. UNCT/17/1, §15*].

61. The confidentiality of awards depends on what the applicable rules provide [*Chung/Hwang, p. 612; Cox, §7.07, p. 151*]. The HKIAC Rules expressly state that duty of confidentiality extends to "any information relating to an award made in the arbitration" [*Rules 2013, Art. 42.3; Rules, Art. 45*].

62. The other arbitration where RESPONDENT participated was conducted under the HKIAC Rules 2013 [*Record, p. 51*]. Thus, the Partial Interim Award from other arbitration proceedings is confidential.

3. There are no exceptions that would justify admission of the confidential Partial Interim Award

63. CLAIMANT might have argued that the Partial Interim Award falls within the exceptions to the duty of confidentiality. However, this is not the case. RESPONDENT admits that, in principle, confidentiality of the arbitral award may be lifted, when a third party seeks an order from the court for disclosure, which implies a requirement of due process to be respected [*Dolling Baker v. Merret, p. 1215; Hassneh case, p. 249*]. Additionally, such measure can only be applied when there is an unavoidable or, at least, reasonable necessity [*Insurance Co v. Lloyd's Syndicate, p. 275; Ali Shipping case, §37*], which is a higher standard than a mere requirement of evidential relevance [*Cox, §7.33, p. 166*].

64. In the case at hand, the Partial Interim Award that CLAIMANT wants to submit, was obtained with no respect to due process and through illegal means. Moreover, it is neither relevant nor material [*MfR, §78–94*]. It is not of reasonable necessity, as CLAIMANT could provide another legally obtained evidence or rely on available case practice to prove "circumstances that warrant adaptation of the contract" [*MfC, §57*]. However, CLAIMANT tries to seek the easiest way.

65. Thus, CLAIMANT's interests cannot outweigh trust in confidentiality that the parties to the other arbitral proceedings put in it.

4. The evidence cannot be disclosed under the principles of transparency

66. CLAIMANT argues that the disclosure of the evidence "would be in line with the prevailing principles of transparency as now evidenced in the Transparency Rules of UNCITRAL" [*Record, p. 50*]. However, principles of transparency are not applicable in the present case. What is more, transparency is not the prevailing principle in international commercial arbitration. It is mainly limited to investment arbitration system and is unattractive to business-people [*Feliciano, p. 24–25; Cox, §7.33, p. 166*]. Instead, confidentiality is considered as a major advantage of arbitration [*Garnett/Gabriel/Waincymer, p. 14*].

67. First, according to the Art. 1 of the UNCITRAL Transparency Rules, they "apply to investor-State arbitration [...] pursuant to a treaty providing for the protection of investment". The other arbitration was based on the arbitration agreement but not an investment treaty providing for application of the UNCITRAL Transparency Rules [*PO2, §39*]. Thus, criteria for their application are not met.

68. Second, the parties in the other proceedings have chosen HKIAC Rules, expressly conferring the duty of confidentiality, to govern their procedure, and the parties' choice should be respected [*Record, p. 51*].

69. Therefore, the Partial Interim Award cannot be disclosed due to transparency principle.

B. In any event, admission of illegally obtained evidence would contradict the principle of good judicial order

70. One of the most important limitations on arbitrator's discretion to admit evidence is the good judicial order, which encompasses an internal procedural fairness [*Reisman/Freedman, p. 741*]. In the present case, CLAIMANT should not be entitled to submit the evidence, as it was obtained through illegal hack and violates the "equality of arms" principle [**1**]. CLAIMANT's allegation that the evidence was publicly available cannot justify its behaviour, as this is not the case [**2**].

1. Admission of illegally obtained evidence is contrary to the "equality of arms" principle

71. Both of the parties enjoy an equal and fair opportunity to present their case [*Rules, Art. 13.1; UNCITRAL Model Law, Art. 18*] due to the so-called "equality of arms" principle, which champions good faith and discourages party behaviour aimed at obtaining unjust procedural disadvantage [*O'Malley II, p. 79*; *Reisman/Crawford, p. 1086; Waste Management case, §49*]. As applied to evidence, this simply means that parties are not allowed to benefit from illegal means of gathering evidence at the cost of their opponent and may exclude any document "for considerations of fairness and equality" [*O'Malley II, p. 80; O'Sullivan; IBA Rules, Art. 9(g)*].

72. The same rationale was followed in the case of *Methanex v. USA*, in which Methanex sought to admit the evidence, illegally obtained by private investigators retained by lawyers representing Methanex [*Methanex v. USA, Part II, Chapter I, §§14, 35*]. Although Methanex itself acted with "reckless indifference", the tribunal stated that admission of illegally obtained documents would be a violation of "the basic principles of justice and fairness required of all parties in every international arbitration" [*Methanex v. USA, Part II, Chapter I, §§55, 59; O'Malley, §9.117*].

73. Similarly, in the present case, CLAIMANT acted with indifference and requested the evidence from private investigator with "doubtful information as to where it gets its information from" [*PO2, §41*]. One of the possible sources to get the Partial Interim Award was illegal hack of RESPONDENT's computer system "where the hackers managed to retrieve a considerable amount of data" [*Record, p. 51*]. Admitting Partial Interim Award obtained by illegal hack would be unfair and would provide the procedural advantage at the cost of RESPONDENT.

74. Therefore, CLAIMANT should not benefit from an illegal action which puts RESPONDENT at a disadvantage and causes the procedure to be unequal.

2. The evidence was not publicly available

75. RESPONDENT admits that evidence could be admissible, if it was publicly available, e.g. on the Internet [*Bible v. USA Funds*]. Keeping this position in mind, CLAIMANT manipulates facts to show the admissibility of evidence and claims that the evidence "was available on the Internet" [*MfC, §§63–64*].

76. However, this is not the case. There is no evidence that the Partial Interim Award had been publicly available on the Internet prior to these proceedings. Furthermore, all the people familiar with the Partial Interim Award, namely arbitrators, parties to those proceedings and RESPONDENT's employees, were under confidentiality obligations [*Rules 2013, Art. 42; PO2, §41*]. Moreover, as it stems from the facts, the only way for CLAIMANT to get a copy of the award was to buy it from the private investigator [*PO2, §41*]. Accordingly, the fact that the document was not freely available to the public is confirmed by CLAIMANT's decision to pay 1000 USD for access to it [*Ibid*].

77. Therefore, the evidence was not in the public domain, and therefore it is inadmissible.

II. THE EVIDENCE IS IRRELEVANT TO THE CASE AND IMMATERIAL TO ITS OUTCOME

78. Pursuant to Art. 9.2(b) of the IBA Rules, any document shall be excluded for "lack of sufficient relevance to the case or materiality to its outcome" [*IBA Rules, Art. 9.2(b)*], and it is at arbitral tribunal's discretion to reject any evidence that is irrelevant or unsuitable to prove facts [*Sussman, p. 2; Pilkov, p. 147*]. The relevance of evidence means that it has a logical connection with what the evidence purports to prove, and evidence can be useful to establish the truth of factual allegations [*Pilkov, p. 148; Raeschke-Kessler, p. 427*]. Materiality of evidence, in turn, means that the factual background cannot be complete without it [*Waincymer, p. 859; Raeschke-Kessler, p. 427*].

79. CLAIMANT asserts that admission of the Partial Interim Award would provide "factual clarity to the case", "would assist the Tribunal in determining conditions for the satisfaction of a hardship clause" and "[reveal] the candid views of RESPONDENT" [*MfC, §§57, 67, 69–70*].

80. However, the evidence has no connection to the case at hand, since circumstances significantly differ [**A**]. Further, factual findings of another tribunal do not bind the Arbitral Tribunal and cannot establish the truth in the present proceedings, as the Partial Interim

Award does not have *res judicata* effect [**B**]. Moreover, RESPONDENT's different positions in separate proceedings have no legal value in the present case [**C**].

A. The evidence has no connection to the case at hand

81. In regard to prior awards, arbitral tribunals admit them as evidence only if they are closely connected to the case before the tribunal [*Schaffstein, ∫ 487, p. 159; Smithkline Beecham Biologicals, S.A. v Biogen, Inc.*]. The evidence shall be rejected on grounds of relevance when party is attempting to raise a wholly collateral issue [*Cooley/Lubet, p. 125*].

82. CLAIMANT asserts that "the only difference to the present case is that in the other case RESPONDENT was negatively affected by the tariffs" [*Record, p. 50*]. However, RESPONDENT "is authorized by the opponent in another proceedings to state that allegations by CLAIMANT do not reflect reality" [*Record, p. 51*]. Indeed, the Partial Interim Award has no connection with the instant case, since the circumstances significantly differ.

83. First, the disputes have different factual background. The present case arose out of the additional tariffs imposed in Equatoriana [*NoA, ∫10*], while another "dispute concerned the sale [...] to a buyer in Mediterraneo" [*PO2, ∫39*] and, thus, the contract was affected by tariffs imposed in Mediterraneo [*NoA, ∫9*].

84. Second, hardship clauses in contracts are different. In another proceedings the contract "contained an ICC Hardship Clause 2003" [*PO2, ∫39*], while CLAIMANT and RESPONDENT included "a very narrowly worded" "hardship reference into the force majeure clause" [*ANoA, ∫9; Exhibit R3*].

85. Third, applicable substantive law differs. The Contract is governed by the CISG and Mediterranean law as a source of supplementation [*Exhibit C5, ∫14; CISG, Art. 7(2)*]. On the contrary, the contract in another proceedings "contained [...] a choice of law clause in favor of Mediterranean law" [*PO2, ∫39*].

86. Finally, arbitration clauses are dissimilar. The contract in another dispute included "the Model HKIAC-Arbitration Clause with all additions", "with a place of arbitration in Mediterraneo" and Mediterranean law applicable to it [*PO2, ∫39*]. By contrast, the Arbitration Clause in the Contract was "narrowed down" during the negotiations [*Exhibit R1*] and declared Danubia a seat of arbitration [*Exhibit C5, ∫15*].

87. Therefore, the Partial Interim Award establishes the facts that has no logical connection to the present case and, thus, cannot provide the Arbitral Tribunal with factual clarity.

B. The Partial Interim Award does not have *res judicata* effect

88. *Res judicata* applies only where the "triple identity" test is met [*Schaffstein, ∫436, p. 140;*

Hanotiau II, §511, 517, p. 239, 241]. The "triple identity" test means the determination whether there is identity of parties, cause and object in both proceedings [*ICC 6363; ICC 4126*]. Identity of cause and object is usually referred to as identity of questions and means that competing claims address the same type of relief and the same legal arguments [*Schaffstein, p. 85, 239*].

89. In the present case, the parties to the two proceedings are not identical, since CLAIMANT was not a party to that dispute [*Record, p. 50–51*]. The questions at issue in these proceedings are distinct as well. In the other case RESPONDENT "asked for [adaptation] under [...] Art. 6.2.3 of the Mediterranean Contract Law" [*PO2, §39*], whilst CLAIMANT asks for adaptation under the CISG [*PO1, §III(1); MfC, §§108–136*].

90. Moreover, only final decisions may operate as *res judicata*, to the exclusion of preliminary decisions, including prior partial awards [*ICC 3267*]. CLAIMANT, in turn, refers to the Partial Interim Award, but the final "award on merits [...] is expected for the August 2019" [*PO2, §39*].

91. Therefore, the Partial Interim Award is not binding for the Arbitral Tribunal and, thus, immaterial to the outcome of the present case.

C. RESPONDENT's position in the separate proceedings creates no legal consequences for the present case

92. CLAIMANT tries to draw arbitrators' attention to "candid views of RESPONDENT" without any legal evaluation of this fact [*MfC, §70*]. Contrary to CLAIMANT's potential argument, RESPONDENT is not estopped from taking different positions in separate legal actions. This could only be the case, if the disputes were essentially the same and taken positions were clearly inconsistent [*Kurawa case, p. 8*].

93. However, as demonstrated in §89 above there are two distinct cases with different parties, cause and object, and the facts of these two cases significantly differ [*MfR, §83–86; 89*]. This difference affects RESPONDENT's application of law to the facts. Accordingly, RESPONDENT could not be forced to repeat the same legal position in the present case to its disadvantage.

94. Therefore, RESPONDENT's position in the separate proceedings does not affect the course of the present case.

ISSUE C. CLAIMANT IS NOT ENTITLED TO CLAIM FOR ADDITIONAL REMUNERATION IN THE AMOUNT OF 1,250,000 USD

I. CLAUSE 12 OF THE CONTRACT DOES NOT APPLY TO CHANGED CUSTOMS TARIFFS AND DOES NOT ALLOW ADAPTATION

95. In its claim for adaptation resulting from the imposition of a higher customs tariff CLAIMANT relies on Clause 12 of the Contract, which provides that "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" (emphasis added) [*Exhibit C5*]. In CLAIMANT's view, imposition of the customs tariff "meet[s] threshold required by [Art. 12]" [*MfC, §102*], which thus entitles "Tribunal [to] […] adapt the Contract" [*MfC, §107*].

96. However, interpreted under Art. 8 CISG, Clause 12 of the Contract was never intended to cover imposition of a higher customs tariff [**A**]. Alternatively, even if this Tribunal finds that Clause 12 of the Contract encompasses imposition of a higher customs tariff, Clause 12 of the Contract still does not provide for the remedy of adaptation [**B**].

A. Clause 12 of the Contract was never intended to cover imposition of a higher customs tariff

97. Since the Parties to the present dispute have different understanding of Clause 12 of the Contract, it should be interpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances" [*CISG, Art. 8(2); Roland Schmidt GmbH v. Textil-Werke Blumenegg AG*; *Honnold, p. 119*].

98. RESPONDENT will demonstrate that Clause 12 of the Contract does not encompass imposition of a new tariff, as it was intended to narrowly cover only events arising out of potential governmental restrictions caused by the ongoing foot and mouth disease crisis in Equatoriana, which does not include imposition of the new tariffs [**1**]**,** and that by accepting DDP basis of supply CLAIMANT took the risk of changes of customs tariffs [**2**]**.**

1. Clause 12 of the Contract was intended to cover only events arising from the foot and mouth disease crisis in Equatoriana, which were the main concern for CLAIMANT

99. For the purposes of determining the scope of particular contract term under Art. 8(2) CISG "the exact wording chosen by the parties as well as the systematic context are of particular relevance" [*Fruit and vegetables case; see also Russia Arbitration proceeding 2005*].

100. The Parties' negotiations on the conditions of delivery of frozen semen were held in the context of a "temporary lift of the ban on artificial insemination" in Equatoriana [*NoA, §6*],

which was experiencing "severe […] foot and mouth disease which already lasted for two years" [*NoA, ∫5; Exhibit C1*]. In particular, after the RESPONDENT's proposal for the DDP basis of supply CLAIMANT insisted on inclusion of a "hardship clause" referring to its unpleasant "past experience" [*Exhibit C4*] with the DDP based supply contracts with farms in Danubia, where "a rare aggressive type of foot and mouth disease was discovered" [*PO2, ∫21*]. In 2014 Danubia adopted "very strict new health and safety requirements", which "amounted to 40 % of the sales price" and "nearly resulted in the insolvency of CLAIMANT" [*PO2, ∫21*].

101. CLAIMANT was aware that the disease crisis in Equatoriana entailed "serious restrictions on the transportation of all living animals" [*NoA, ∫5*] and was particularly concerned of any new health and safety regulations that would be applied to the frozen semen and result in the significant increase of the sales price. CLAIMANT was not willing to bear the risks of such possible events [*Exhibit C4*] and "suggest[ed] reliance on the ICC-Hardship clause" [*Exhibit R2*]. However, since the ICC-Hardship clause largely "amalgamates elements of […] Article 6.2.2 of the UNIDROIT Principles…" [*ICC-Hardship Clause 2003*], it was rejected by the Parties as being "too broad […] the objectives pursued" by Clause 12 of the Contract [*PO2, ∫12*]. The agreed clause was narrowly drafted with regard to the risks particularly mentioned by CLAIMANT, *i.e.* arising from the disease crisis in Equatoriana [*PO2, ∫12*].

102. Accordingly, bearing in mind the context in which the Parties' negotiations took place, the wording "additional health and safety requirements and comparable unforeseen events" in Clause 12 of the Contract was intended to encompass only those regulatory restrictions that would be imposed by Equatoriana as a means of addressing the ongoing disease crisis and securing health and safety. In turn, increase of tariffs is a "retaliatory measure" against equal measures taken by the Mediterranean government [*NoA, ∫10*] and therefore has no connection with the foot and mouth disease occurring in Equatoriana. Applying Clause 12 to this unrelated "retaliatory measure" would require such a broad interpretation, which the Parties precisely wished to avoid when they excluded the ICC-Hardship Clause. Accordingly, the interpretation promoted by CLAIMANT is against the rules of Art. 8 CISG as it does not honor the Parties' initial intent.

103. Moreover, the scope of losses incurred by CLAIMANT is no way comparable to those from which CLAIMANT requested to be protected when Clause 12 was drafted. In justifying the need to add the hardship wording to Clause 12, CLAIMANT referred to the increase up "to 40% of the sales price" [*Exhibit C4*; *PO2, ∫21*], while imposition of a new import tariff caused only 25% increase of the sales price, which is 1,6 times less.

104. Thus, interpreted under Art. 8(2) CISG the narrow hardship wording in Clause 12 of the Contract does not cover the imposition of a higher import tariff, as it is not comparable to health and safety requirements specifically mentioned by CLAIMANT.

2. By accepting DDP basis of supply CLAIMANT took the risk of changes in customs tariffs

105. From the reasonable person perspective, exemption clauses, *i.e.* clauses which constitute an exemption from the general risk allocation, are to be interpreted restrictively and in the light of other terms of the contract [*CISG, Art. 8(3); Schlectreim/Schwenzer, Art. 8, §30*]. Particularly, acceptance of certain Incoterms "can impliedly demonstrate party's intent" to assume certain risks, not specifically mentioned in an exemption clause [*Johnson, p. 395; Treibacher Industrie, A.G. v. Allegheny Techs*]. For instance, selection of the DDP Incoterms generally means that the Seller, if not specifically exempted, bears all risks and costs connected with customs clearance [*Guide to Incoterms 2010*].

106. In the present case, during the Parties' discussions, RESPONDENT stated that it "would insist for this contract on a delivery on the basis of DDP" [*Exhibit C3*], under which CLAIMANT is fully liable for customs clearance and, accordingly, is obliged "to pay any duty for […] import and to carry out all customs formalities" [*Incoterms 2010*]. In response, CLAIMANT accepted the DDP basis of supply, though requiring that "a hardship clause should be included into the contract to address" risks connected with "unforeseeable additional health and safety requirements" [*Exhibit C4*], which did not anyhow mention possible increase of customs tariffs.

107. The Parties had already exercised their right to modify a default risk allocation by emphasizing specific events that CLAIMANT was not responsible for [*PO2, §21*]. Was CLAIMANT not willing to bear any risks arising in connection with custom clearance the Parties "could have simply used a different delivery term" [*Johnson, p. 417*].

108. Consequently, through acceptance of the DDP CLAIMANT impliedly agreed on all the risks and costs prescribed thereby and not specifically addressed in Clause 12 of the Contract. In turn, as it was demonstrated above, Clause 12 does not contain any explicit or implied reference to changes in the customs tariffs [*MfR, §99–104*]. Accordingly, since CLAIMANT accepted the DDP basis of supply, CLAIMANT impliedly accepted the risk of possible changes in customs tariffs.

B. Clause 12 of the Contract does not provide for the remedy of adaptation

109. RESPONDENT submits that CLAIMANT cannot claim for adaptation by reference to

Clause 12 of the Contract, as it was not intended to provide for adaptation of the Contract in case of hardship [**1**] and, contrary to CLAIMANT's allegations, the mere inclusion of the word "hardship" into Clause 12 of the Contract does not imply the possibility of adaptation [**2**]. Moreover, CLAIMANT's allegations that RESPONDENT's subsequent conduct demonstrated an intention to adapt the Contract are meritless [**3**]. Finally, since Clause 12 of the Contract in the relevant part is part of CLAIMANT's standard contract template, it should be interpreted against CLAIMANT's interests (*contra proferentem*) [**4**].

1. Clause 12 of the Contract was not intended to provide for adaptation of the Contract in case of hardship

110. CLAIMANT argues that Ms. Napravnik and Mr. Antley, the persons that were initially involved in discussing the Contract, discussed "a mechanism […] [to] ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment" [*Exhibit C8, p. 17*]. By reference to this discussion CLAIMANT alleges that the Parties intended for Clause 12 to allow contract adaptation by the arbitrators, even though this is not expressly stated in its wording [*Exhibit C5*].

111. However, RESPONDENT submits that the discussions of Ms. Napravnik and Mr. Antley are irrelevant to the case at hand, as they were not known to or accepted by the authorized representatives of the Parties that subsequently finalized and signed the Contract.

112. Under Art. 8 CISG, the intention of the Parties is to be established "at the time the contract was made" [*Farnsworth, §§95–102; Schlectreim/Schwenzer, Art. 8, §19*] by reference to its explicit manifestation at the time of contracting [*Packaging machine case; Office furniture case; Case involving machine for repair of bricks*]. Accordingly, pre-contractual discussions between employees of the Parties have no legal relevance if these discussions were not known to the authorized representatives that concluded the Contract [*Farnsworth, §100*].

113. Based on this rationale, CLAIMANT's reference to the "first discussion of the adaptation clause" [*NoA, §16; Exhibit C8*] has to be disregarded, as Ms. Napravnik and Mr. Antley, which participated in this discussion, were replaced after a car accident involving both of them [*NoA, §8*] and therefore could not have expressed any intent at the time of the conclusion of the Contract.

114. The case file contains no evidence that subsequent negotiators of both parties were aware of prior negotiators' intent to include adaptation clause into the contract. Contrarily, RESPONDENT's new representative Mr. Krone could not have been aware of the CLAIMANT's intention as he was not "involved in the detailed negotiations nor did [RESPONDENT's previous negotiator Mr. Antley] report about them" [*Exhibit R3*].

Neither was CLAIMANT's Mr. Ferguson aware of the suggestions made by Mr. Antley during the last meeting [*PO2, §7*]. Moreover, Mr. Krone himself puts it that he "would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion" [*Exhibit R3*]. The same conclusion follows from the wording of Clause 12 of the Contract, which clearly provides that CLAIMANT would not be "responsible" in cases of hardship but does not mention contract adaptation [*Exhibit C5*].

115. Therefore, common intention of the Parties at the moment of the conclusion of the Contract was not directed to stipulate any price adjustment mechanism in the Contract. The Parties just added narrow hardship wording into CLAIMANT's standard *force majeure* clause, which provides only for the excuse from obligations, but not for adaptation [*Exhibit C5*].

2. The mere inclusion of the word "hardship" into Clause 12 of the Contract does not imply the possibility of adaptation

116. The Parties' reference to the particular legal terms "indicates a presumption that the parties intended the usual interpretation of these terms to apply" [*Schlechtriem/Schwenzer, Art. 8, §41; Staudinger/Magnus, Art 8, §20*].

117. Based on this rule, CLAIMANT asserts that, although Clause 12 of the Contract does not contain explicit indication to the remedy of adaptation, the mere fact that the Parties used the word "hardship" in their *force majeure* clause implies the possibility of adapting the Contract in case of changed economic circumstances [*MfC, §§103–107*]. However, RESPONDENT submits that the notion of "hardship" or "changed circumstances" does not generally encompass the remedy of adaptation, and therefore an express agreement to the contrary would be required.

118. There is no "usual" interpretation of the word "hardship" internationally, which deprives CLAIMANT's position of any grounds. For instance, in a number of civil-law countries, which generally accept the doctrine of hardship, the remedy of adaptation is not provided by domestic legislation [*e.g. France, Italy, Brazil; Ullman, Art. 6, p. 20*]. Instead, a disadvantaged party usually can only request termination of the contract [*Fucci, p. 31*].

119. Further, common law jurisdictions, such as U.S., traditionally reject the possibility of court or arbitrators' powers to modify the contract, although granting excuse from obligations in case of hardship [*Declercq, p. 5*].

120. Moreover, during the course of negotiations concerning hardship clause CLAIMANT was referring to ICC-Hardship clause [*Exhibit R2*], which only stipulates termination as a remedy, but does not allow court-ordered adaptation of the contract [*ICC-Hardship clause; Brunner*]. Accordingly, CLAIMANT itself always understood that "hardship" would at best involve an

excuse from performing an obligation, rather than affirmative price adaptation.

121. Consequently, the "hardship" wording in Clause 12 does not enable adaptation.

3. RESPONDENT's subsequent conduct did not demonstrate an intention to provide for adaptation of the Contract

122. CLAIMANT states that RESPONDENT allegedly demonstrated its intention to adapt the Contract by its "subsequent conduct" [*CISG, Art. 8(3)*], *i.e.* by accepting the third shipment of the frozen semen [*NoA, §§12, 13*]. However, considering that the remedy of adaptation had not been previously agreed by the Parties, RESPONDENT submits that CLAIMANT's request for adaptation following the imposition of new tariffs actually amounted to an attempt of "one-sided subsequent modification" [*Schlechtreim/Schwenzer, Art. 8, §52*] of the Contract, which lacked proper acceptance by RESPONDENT.

123. The issue of whether party by its subsequent conduct expressed an intention to agree on modification within the meaning of Art. 29 CISG is resolved under CISG general contract formation rules [*CISG, Art. 14, 18, 19; DiMatteo/Dhooge/Greene/Maurer/ Pagnattaro, p. 331*]. Following these rules, if the addressee's subsequent conduct does not "evidence any affirmative assent" [*Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*] to the to the terms proposed in the offer, such terms have no effect [*Cámara Agraria v. André Margaron*].

124. After the CLAIMANT's request for a price adjustment [*Exhibit C8*] RESPONDENT's Mr. Shoemaker stated that "if the contract provides for an increased price […] [RESPONDENT] will certainly find an agreement on the price" [*Exhibit R4*]. This statement in no way demonstrates RESPONDENT's unconditional acceptance of the price adaptation, offered by CLAIMANT.

125. Thus, RESPONDENT's subsequent conduct did not demonstrate an intention to provide for adaptation of the Contract.

4. Clause 12 interpreted under *contra proferentem* rule does not provide for adaptation

126. According to the *contra proferentem* rule, embodied in Art. 8 CISG, the terms "individually drafted by one side" are interpreted against the drafter [*Schlechtriem/Schwenzer, Art. 8, §49*].

127. All the terms and conditions in the Contract are "based on a [standard] basic industry template" of CLAIMANT, except those that are italicized [*PO2, §3*]. Considering that the wording "seller shall not be responsible…" in Clause 12 of the Contract is not italicized [*Exhibit C5*], it must be regarded a part of CLAIMANT's standard terms [*Mediterraneo Guidelines for Semen Production and Quality*].

128. Accordingly, since CLAIMANT itself drafted the wording of Clause 12 of the Contract and only expressly included a reference to exclusion from liability ("seller shall not be responsible"), this wording should be interpreted against CLAIMANT's interests as not providing for adaptation.

129. For all the aforesaid, CLAIMANT's request for the Contract adaptation must be rejected.

II. THE CISG DOES NOT PROVIDE FOR ADAPTATION OF CONTRACT DUE TO THE IMPOSITION OF TARIFFS

130. As an alternative submission to its contractual claim, CLAIMANT argues that even if the Contract itself does not provide for adaptation of the price in case of changed customs tariffs, the same conclusion still follows from the default rule of Art. 79 CISG.

131. However, the CISG is not applicable in this case, as the Parties have derogated from the standard CISG regime by including narrow wording in the Clause 12 of the Contract, which does not provide for adaptation and does not apply to changed customs tariffs [**A**]. Alternatively, even if the Parties did not derogate from the CISG, Art. 79 CISG still does not allow adaptation in case of economic hardship and only excuses liability in case of f*orce majeure* [**B**]. In any event, even if the CISG can be applied to economic hardship, in this case the conventional criteria of economic hardship are not met [**C**].

A. The CISG does not apply in this case, as the *P*arties derogated from the standard regime of Art. 79 CISG and therefore the dispute should be resolved based on Clause 12 of the Contract only

132. As demonstrated above in §97–104, the Parties have specifically agreed on a narrow clause in their Contract (Clause 12), which does not provide for the remedy of adaptation, and does not apply to changed customs tariffs. Nonetheless, to override this narrow agreement of the Parties, CLAIMANT refers to the default rules contained in Art. 79 of the CISG [*MfC, §115*], which are broader in nature.

133. Under Art. 6 of the CISG, the Parties can agree on replacement of any statutory provision of the Convention with individually negotiated contractual terms [*Schlechtriem/Schwenzer, Art. 6, 79*]. However, in such cases only the individually agreed contractual terms apply, precluding reference to the default statutory rules of the CISG [*Schlechtriem/Butler, p. 301*]. For instance, parties may derogate from Art. 79 CISG and create their own *force majeure* regime, which would prevail over Art. 79 CISG [*Schlechtriem/Schwenzer, Art. 6; Arbitral Award No. 123/1992*; *Saidov, §5*]. Whether derogation in fact took place is a matter of contract interpretation [*Schlechtriem/Schwenzer, Art. 6; Stoll/Gruber, p. 618*].

134. In the present case CLAIMANT argues that the mere presence of the hardship wording in the Contract does not exclude the application of Art. 79 CISG [*MfC, §112*]. However, this statement contradicts the explicit will of the Parties as during negotiations the Parties discussed the possibility to include ICC-hardship clause and it was considered "too broad" for the purposes of the Contract [*Exhibit R3*].

135. As a result, the Parties individually agreed on Clause 12 of the Contract, which does not provide for adaptation of the Contract in case of changed customs tariffs [*MfR, §115*]. Pursuant to Art. 6 of the CISG, CLAIMANT cannot refer to the default rule of Art. 79 CISG to achieve the same effect, as this would allow CLAIMANT to unilaterally avoid the Parties' agreements and makes it meaningless.

136. Therefore, CLAIMANT cannot refer to the CISG, and the dispute should be resolved based on Clause 12 of the Contract, which, as demonstrated in *§116*, does not allow adaptation.

B. Alternatively, even if the Parties did not derogate from the CISG, the CISG still does not allow adaptation in case of economic hardship, but only excuses liability in case of *force majeure*

137. Even if the Arbitral Tribunal finds that Clause 12 of the Contract does not constitute a derogation from the CISG, and allows CLAIMANT to rely on Art. 79 CISG, RESPONDENT insists that Art. 79 CISG still cannot be applied in this case, as Art. 79 CISG is in principle not applicable to economic hardship, but only deals with *force majeure* [**1**]. In any case, the CISG in principle does not provide the remedy of adaptation [**2**]. Accordingly, CLAIMANT's plea for adaptation resulting from economic hardship is futile under the CISG.

1. Art. 79 CISG in principle does not apply to economic hardship, but deals only with force majeure

138. Art. 79 of the CISG, to which CLAIMANT refers, provides that "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control" [*CISG, Art. 79(1)*].

1. As follows from the CISG's preparatory work (*travaux preparatoires*), the term "impediment beyond control" should be interpreted narrowly, as dealing only with *force majeure* events (acts of God), such as "wars, storms, fires, the closing of international waterways" which make contract performance entirely impossible, rather than merely more expensive [*Schlechtriem/Schwenzer, Art. 79, Art. 6*].

139. Further, it is recognized that economic "hardship provisions are contrary to the spirit of the

Convention" as by concluding international sale agreements merchants assume the risks associated with increased costs of contract performance [*Azerdo Da Silveira, p. 328–333; Slater, p. 231; Lookofsky, p. 101*; *Iron molybdenum case*; *Brauer & Co v. James Clark*].

140. For instance, in *Nuova Fucinati v. Fondmetall International* the court ruled that even if the price had increased by 30% the Seller is not entitled to avoid contract performance, "the excessive onerousness doctrine" is not set in Art. 79 CISG and "does not fit within the structure of the Convention" [*Nuova Fucinati v. Fondmetall International*].

141. In the present case, CLAIMANT does not refer to *force majeure* situations making its performance impossible, but merely argues that introduction of new tariffs "makes this shipment 30% more expensive than anticipated" and "resulting in considerable hardship" [*Exhibit C8, p. 17*]

142. However, since the scope of Art. 79 CISG does not include the occurrence of economic hardship, but only deals with supervening impossibility of performance, these allegations of CLAIMANT should be rejected.

2. The CISG does not provide for the remedy of adaptation

143. Even if the Arbitral Tribunal finds that the CISG can be applied to economic hardship, neither Art. 79 CISG [**a**], nor the general principles of the CISG [**b**] provide for adaptation, as the only remedy available under the CISG is exemption from liability, which is not the subject matter of the present proceedings.

a) Art. 79 CISG does not set out the remedy of adaptation

144. Under Art. 31(1) of the Vienna Convention on the Law of Treaties, which should be used to interpret the CISG [*Wethmar-Lemmer, §3*], terms of international treaties should be interpreted in accordance with their "ordinary meaning" [*VCLT, Art. 31(1)*].

145. Art. 79 of the CISG clearly sets that in case of impediment beyond the party's control a party is merely "not liable for a failure to perform his obligations" [*CISG, Art. 79(1)*]. As follows from the ordinary meaning of these words, the only remedy available under Art. 79 CISG is exemption "from liability for damages", and not contract adaptation [*Secretariat Commentary, Art. 79*]. Accordingly, the remedy of adaptation or other remedies "are not expressly allowed in the Convention and must be regarded as impossible…as the only remedy available under the CISG is avoidance" of liability [*Tallon, p. 572–595*; *Rimke, §4*].

146. The same conclusion is supported by court practice, as various international courts refuse to apply any "other types of reliefs", such as recovery of "lost profits" under the CISG [*Schlechtriem II*, *§2*].

147. Accordingly, contract adaptation is not possible in the present case, as Art. 79 CISG, to which CLAIMANT refers, only allows for the avoidance of liability for damages.

b) The general principles of the CISG also do not allow for the remedy of adaptation, and CLAIMANT cannot refer to the UNIDROIT Principles to avoid this effect, as there is no gap in the CISG

148. Under Art. 7(2) of the CISG, "questions concerning matters governed by [the CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based" [*CISG, Art. 7(2)*]. In the absence of general principles, relevant matters should be resolved "in conformity with [domestic] law" [*Schlechtriem/Schwenzer, Art. 7*].

149. Based on this rule, CLAIMANT argues that even if Art. 79 CISG does not expressly provide for the remedy of adaptation, this gap can be overcome by recourse to its general principles, which allegedly allow contract adaptation [*MfC, §142*], or by recourse to the domestic law of Mediterranea (the UNIDROIT Principles), which explicitly allows adaptation [*MfC, §144*].

150. However, this CLAIMANT's allegation is unavailing, as there is no gap in the CISG with regard to the remedy of adaptation [**i**], especially given that this remedy was intentionally omitted by the drafters of the CISG [**ii**]. Further, a contrary conclusion would be inconsistent with the principles of the CISG [**iii**].

i) There is no gap in the CISG with regard to adaptation

151. The main aim of interpretation of the Convention is "to promote uniformity in the application", this principle "must also apply to… whether a certain matter falls within the scope of the Convention", thus, "domestic remedies, such as avoidance based on mistake, should not be available…even though mistake is not expressly mentioned in the Convention" [*Schlechtriem III, §IV*]. The aforementioned is based on presumption that under the CISG there are possibilities to restore the contractual equilibrium without reference to non-conventional remedies [*Schwenzer/Fountoulakis/Dimsey, p. 585–586*].

152. As to the remedy of adaptation "it can hardly be conceived that there is a gap in the CISG that can be filled by giving the court or tribunal the power to adapt the contract to the changed circumstances" [*Schwenzer, p. 723–725*]. Consequently, adaptation of a contract is possible only if parties are willing to invoke it under the Art. 77 CISG and in case a party to a contract ignores an offer, it is possible only to claim for damages [*Schwenzer/Hachem/Kee, p. 673–674*].

153. Therefore, as there are other types of remedies available under the Art. 79 CISG it is not possible to invoke the gap filling principle in case of plea for adaptation under the CISG.

ii) The remedy of adaptation was deliberately omitted by the drafters of the CISG

154. Remedy of adaptation cannot be used under the CISG, as "the legislative history of CISG reveals that delegates to the Convention were cognizant of the concept of adaptation", but deliberately rejected the proposal to include this concept into the CISG [*Slater, p. 260*] For this reason, it is recognized that the history of Art. 79 "excludes the possibility that there is an unstated hardship in the Convention" [*Rimke, §4*].

155. Therefore, CLAIMANT cannot seek adaptation under the Art. 79 CISG as the doctrine of hardship was deliberately omitted and cannot be invoked under CISG's gap filling rules.

iii) The remedy of adaptation in case of hardship is contrary to the principles of the CISG

156. CLAIMANT submits that the general principles of CISG allow for adaptation and should be used as a gap filling instrument [*MfC, §140*]. However, this statement contradicts the principles of the CISG.

157. Firstly, contract adaptation due to economic hardship is inconsistent with the principle of *pacta sunt servanda*, on which the CISG is based [*Horn, p. 6*]. Any derogation from this principle requires an express authorization under the CISG, which is lacking in this case [*Slater, p. 241; Azerdo Da Silveira, p. 328–333*].

158. Secondly, the remedy of adaptation is inconsistent with the need to promote uniformity in the application of the CISG, as required by Art. 7(1) of the CISG. Since domestic legal systems differ greatly from each other as regards their contractual rules on "economic impossibility" and "frustration", a decision to treat hardship as a gap in the CISG would be dangerous "as the CISG's system of liability would 'burst'" [*Schlechtriem/Schwenzer, Art. 79; Azerdo Da Silveira, p. 328–323; Rimke, §4; Flambouras, §4*].

159. Therefore, since the remedy of adaptation is not explicitly or implicitly allowed under the CISG, it should be avoided as it is contrary to the basic principle of *pacta sunt servanda* and the need to promote uniformity in the application of the CISG.

160. Consequently, CLAIMANT's allegations should be rejected, as the CISG in principle neither allows recourse to the doctrine of economic hardship nor allows for the remedy of adaptation.

C. Even if the CISG in principle applies to economic hardship, the conventional criteria of economic hardship are not met in this case

161. Even if the Tribunal decides that the CISG can in principle be applied to adapt the Contract

in case of economic hardship, CLAIMANT cannot refer to the doctrine of hardship, as it has already performed the Contract [**1**]. In any case, the change in customs tariffs [**2**], RESPONDENT's alleged resale of CLAIMANT's goods [**3**], nor CLAIMANT's alleged poor financial condition [**4**], to which CLAIMANT may refer to justify its claim, cannot qualify as hardship according to conventional criteria.

1. CLAIMANT cannot refer to the doctrine of hardship, as it has already performed the Contract in full

162. International jurisprudence unequivocally recognizes that "[b]y its very nature hardship can only become of relevance with respect to performances still to be rendered: once a party has performed, it is no longer entitled to invoke" hardship [*UNIDROIT Principles 2010, Art. 6.2.2*]. This means that hardship is relevant only to performance not yet rendered.

163. However, in the present case CLAIMANT has in fact fully performed its obligations [*NoA, ∫13*]. Such a due performance is the consequence of fact that the imposition of tariffs did not make the Contract performance excessively onerous as CLAIMANT suggests.

164. Thus, CLAIMANT cannot refer to the occurrence of hardship after the performance of contractual obligations.

2. Changed customs tariffs cannot qualify as economic hardship under the CISG

165. CLAIMANT argues that imposition of 30 per cent import tariffs made the performance of the Contract more onerous due to increase of the price up to 25 per cent and loss of "profit margin of 5 per cent" [*NoA, ∫7*].

166. However, to prevail CLAIMANT must prove aggregately [*DiMatteo*] all criteria of Art. 79 CISG, namely that changed customs tariffs is an "impediment beyond his control" [**a**], which CLAIMANT could not foresee at the time of concluding the Contract and [**b**] could not avoid or overcome [**c**]. In the present case none of these criteria are met, and accordingly hardship did not occur.

a) The imposition of tariffs does not constitute an impediment beyond CLAIMANT's control as required by Art. 79 CISG

167. To constitute an impediment the event shall be "beyond [CLAIMANT's] control" [*CISG, Art. 79*]. However, in the present case imposition of tariffs does not exceed the "limit of sacrifice" inherent in the CISG [**i**] and in any case this risk was assumed by CLAIMANT, and thus is not "beyond control" of CLAIMANT [**ii**].

i) The imposition of tariffs does not exceed the "limit of sacrifice" required by the CISG

168. In order to qualify as an impediment within the meaning of the CISG, an event generally has to make contract performance "impossible" [*Flambouras II, p. 277*]. However, even if the CISG is applied to mere increase in costs of performance as an "impediment", the CISG requires extremely high standards, which has practically never been met in decisions of the courts in various jurisdictions [*UNCITRAL CISG case law digest 2016*].

169. Particularly, to trigger hardship, the increase in costs of performance must "cross a limit of sacrifice above which the party cannot reasonably be expected to fulfil the contract" [*Schwenzer, p. 1069*]. The mere possibility of receiving "a loss resulting from the transaction", rather than the expected profit, cannot be considered sufficient to quality as an impediment [*Ibid*]. For this reason, the courts have demanded commercial parties to perform their obligations despite a 100% increase [*FeMo alloy case; Steel ropes case; Vital Berry Marketing v. Dira-Frost case*] or 300% of cost increase [*Tomato concentrate case*], as such cost increase is not considered to trigger Art. 79 CISG [*Schwenzer, p. 1069*]. Moreover, "no arbitral awards are known [...] where arbitrators would have granted relief merely because the costs of performance have increased by 50% or less" [*Zaccaria, p. 169; Girsberger/Zapolskis, p. 126*].

170. In the present case, however, CLAIMANT merely argues that introduction of new customs tariffs "made the shipment 30% more expensive than anticipated", which made the Contract less profitable than expected [*Exhibit C8, p. 17*]. Such 30% increase is significantly below the required threshold under the CISG, as it does not trigger the "limit of sacrifice" required by the CISG to refer to the doctrine of hardship and is much less than in the above cases. Further, the fact that Contract performance did not become excessively onerous for CLAIMANT is also indirectly proven by the fact that CLAIMANT has already performed the Contract in full [*NoA, §13*].

171. Therefore, imposition of customs tariffs does not qualify as an "impediment" in this case.

ii) Changed customs tariffs were not "beyond control" of CLAIMANT, as CLAIMANT assumed the risks of changed customs tariffs

172. In order to argue that an event is an "impediment", the seller should prove that it was "beyond control", namely that the event was not "within its sphere of risk" [*CISG AC Opinion No. 7*]. In determining whether an event is within the seller's sphere of risk, regard should be had to the contractual arrangements and "implicit economic logic" [*Rapsomanikas, p. 567*]. Particularly, the risk should generally be placed with "the party that is the more efficient bearer of the particular risk in question", *i.e.* the party that is generally "in the better

position to estimate both the extent of the loss and the probability of the event and provide self or market insurance against it" [*Ibid*].

173. In the present case, CLAIMANT supplied the goods based on the DDP Incoterms basis of supply [*PO2, §10*]. Since the DDP basis of supply required CLAIMANT to fully perform customs clearance of the goods and bear all respective costs [*Exhibit C4*], customs tariffs were within the sphere of CLAIMANT's contractual risk.

174. Further, implicit economic logic in this case dictates that the risk of customs tariffs be allocated to CLAIMANT as the superior risk bearer, since CLAIMANT was in a better position to estimate the risk and provide insurance against it. The Parties decided that CLAIMANT would supply the goods under the DDP basis of supply precisely because of CLAIMANT's "much greater experience in the shipment of frozen semen" [*Exhibit C3*]. Therefore, unlike RESPONDENT, CLAIMANT was directly engaged with local customs authorities and could assess the risk of changed customs tariffs and provide for adequate insurance against it. Accordingly, since CLAIMANT failed to do so, the respective risk should remain with CLAIMANT and cannot be shifted to RESPONDENT, which had no means whatsoever to control this risk.

175. Consequently, the imposition of tariffs does not qualify as an impediment beyond CLAIMANT's control under the CISG.

b) CLAIMANT could foresee the imposition of tariffs

176. Art. 79 CISG does not apply "if the impediment was already known or could have been known at the time the contract was formed" [*Claeys, p. 266; Scaforn International BV & Orion Metal BVBA v. Exma CPI SA*].

177. As follows from international jurisprudence, whether an event is foreseeable is determined on whether such an event previously occurred in international practice [*Secretariat Commentary; UNCITRAL Secretariat commentary*]. For instance, in the *Himpurna* case, the tribunal found sharp economic crisis in Indonesia to be foreseeable as economic crises are common in the world, and therefore "parties entering into international contracts cannot claim unawareness of the risks of macro-economic adversities", whose "effects may be extreme but are nonetheless within the contemplation of the signatories" [*Himpurna case*].

178. Similarly, Chamber of Commerce and Industry of Bulgaria denied claim of exemption based on regulations prohibiting the export of coal [*Coal case*] because it is common for governments to enact the regulations governing import and export restrictions, and merchants are therefore expected to take into account this possibility at the time of the conclusion of the contract.

179. In the present case, CLAIMANT alleges that introduction of new import customs tariffs by Equatoriana was unforeseeable, as CLAIMANT "was told to […] great surprise by the customs officials" [*Exhibit C8, p. 17*]. However, such regulatory measures are a common practice both within the WTO and the countries involved in this case.

180. First, it is well-known that the WTO countries, to which Equatoriana and Mediterraneo are parties, impose import customs tariffs [*WTO explanation on market access for agricultural goods*]. For instance, in 2018 the USA imposed customs tariffs of 25% on steel and 10% on aluminium [*USA Additional Duty on Imports of Steel and Aluminum*].

181. Second, Equatoriana and Mediterraneo themselves previously imposed governmental measures aimed at regulating import of horse semen into their territories. For instance, Equatoriana introduced a "ban on artificial insemination for race horses", which was particularly known to CLAIMANT as it affected its deliveries [*Exhibit C1*].

182. Therefore, much like economic crises, governmental regulatory measures aimed at regulating imports were within the contemplation of CLAIMANT and RESPONDENT at the time of contracting, given the prior history of such measures in the WTO and in the countries involved.

183. Thus, the imposition of import tariffs was not unforeseeable for CLAIMANT.

c) CLAIMANT could avoid the imposition of tariffs and overcome its negative consequences by supplying the goods prior to the supply date

184. In order to refer to Art. 79 CISG, the Seller must attempt to avoid the impediment and overcome its consequences "in order to perform the contract in the agreed manner, even when this results in him incurring greatly increased costs and even a loss resulting from the transaction" [*Schwenzer, p. 1069; Schlechtriem*]. Particularly, where "a disturbance has already revealed itself, it has to be overcome as quickly as possible; to overcome means to take the necessary steps to preclude the consequences of the impediment" [*Rimke, p. 215*].

185. In the present case, the customs tariffs were announced on 19 December 2017 and took effect from 15 January 2018 onwards [*PO2, §25*]. However, CLAIMANT only took notice of this event and informed RESPONDENT thereof on 19 January 2018, one month after the announcement of the new customs tariffs and three days prior to the supply date (22 January 2018) [*Exhibit C8, p. 18*].

186. Had CLAIMANT acted with due care and took note of the changes in customs regulations earlier, it would be able to deliver the goods prematurely, after 19 December 2017 but before 19 January 2018, in order to avoid the customs tariffs.

187. Thus, the CLAIMANT did not exercise a reasonable care to overcome the consequences of

the imposition of tariffs, thus breaching Art. 79 CISG.

188. For all the aforesaid, the change of customs tariffs in Equatoriana cannot be deemed hardship under the CISG, and therefore CLAIMANT's claim in this part should be rejected.

3. RESPONDENT's alleged resale of goods cannot qualify as hardship

189. CLAIMANT may argue that alleged violation of resell prohibition by RESPONDENT can qualify as being impediment and invoke hardship [*NoA, §20*]. This argument is based on CLAIMANTs possible suggestion that as goods are usually bought for "for a specific mare" the price for the availability to resell would be higher [*PO2, §19*]. Consequently, CLAIMANT argues that as resale was prohibited by the Contract, the price of the Contract was established on the assumption that the goods would not be resold, and if this assumption had been different the price would have been higher [*NoA, §20; PO2, §8*].

190. RESPONDENT objects to the truthfulness of these CLAIMANT's allegations and considers them "baseless" [*ANoA, §11*]. However, even assuming for the sake of argument that RESPONDENT indeed resold CLAIMANT's goods, RESPONDENT still submits that alleged resale of goods cannot qualify as hardship under the CISG, as an impediment cannot be a consequence of the parties' actions, but should generally be an extraneous supervening event [**a**], CLAIMANT can plea for contractual remedies, as modification of the Contract is not possible in case of resale [**b**], and in any case CLAIMANT's unilateral expectation that the goods would not be resold constitute a motive which is legally irrelevant and cannot be considered as a ground for hardship [**c**].

a) An impediment cannot depend on the Parties' actions

191. Even though Art. 79 CISG does not explicitly provide for hardship, the CISG and Art. 6.2.3. UNIDROIT set similar criterion to establish the occurrence of impediment [*Kofod, §3.1*].

192. Thus, under well recognized concept of hardship included in Art. 6.2.3. UNIDROIT an impediment should be an "export ban…or natural event, such as flooding or earthquake" [*Vogenauer/Kleinheisterkamp, Art. 6.2.3*]. Similarly, under the CISG the term impediment has the same objective interpretation and should ensure only "narrow and objective understanding" and be "external to the promisor". [*Schlechtriem/Schwenzer, Art. 79; Schwenzer/Fountoulakis/Dimsey, p. 566*]. Accordingly, both the UNIDROIT and the CISG "adopted objective approach to hardship", and therefore do not consider mere "assumptions of the parties with respect to circumstances surrounding the performance of contract" to fall under the definition of hardship [*Girsberger/Zapolskis, p. 124*].

193. Only limited number of legal systems recognize that mistakes of one party to a contract

about the conduct of another party can be considered as being impediment and invoke hardship [*Hannes, p. 489*]. To the contrary, under the CISG situations the conduct of the adverse party to the Contract that are not "beyond control of a party" are deemed to be a party's own sphere of risk [*Schlechtriem/Schwenzer, Art. 79*]. For example, "the purpose of recipient with respect to the use of goods not shared by both parties" cannot be deemed as impediment as it is placed within control of one party [*Brunner, p. 468*].

194. In the present case the prohibition to resell is within CLAIMANTs sphere of control as it was not included in the Contract and was not shared by RESPONDENT as a reason for the establishing of a particular price [*PO2, §8; Exhibit C5*]. This is based on the fact that "there is no real market for the resale of frozen semen" and price was determined merely based on the uniqueness of goods [*PO2, §19*].

195. Thus, an impediment cannot be invoked under the Party's own cause of actions.

b) CLAIMANT can plea for other remedies in case of resale as modification of the Contract is not possible

196. If there is a possibility to restore contractual equilibrium within provisions included in the CISG, the reference to non-contractual remedies is not possible [*Schlechtriem III, §IV; Schwenzer/ Fountoulakis/Dimsey, p. 585–586*]. For instance, non-conformity of goods is a matter of Art. 35 CISG and cannot be seen as hardship resulting in reviewing the price of the goods [*Brunner, p. 468*].

197. Likewise, in the present case, even if RESPONDENT resold the goods contrary to the Parties' agreements, this would allow CLAIMANT to recover damages or use other contractual remedies.

198. Therefore, CLAIMANT cannot refer to hardship with regard to alleged resale of goods.

c) Mere expectations or motivations of CLAIMANT with regard to the intended purpose of sold goods cannot qualify as hardship

199. Mere "expectations" of the seller, particularly with regard to the purpose of goods, constitute a motive to the transaction, and therefore are legally irrelevant, particularly for the Contract formation [*Zeller, section G*]

200. For example, in FeMo Alloy case the court sets that beyond principles of fairness and good faith the CISG does not set out "frustration of purpose", which makes a performance less valuable to purposes of only one of the parties, as there is "no legal basis to incorporate frustration of purpose within the meaning of impediment principle" under the Art. 79 CISG [*DiMatteo, p. 39–40; Hubbard, p. 93; FeMo Alloy case*].

201. Therefore, CLAIMANT cannot plea that its allegations about the Contract price should invoke hardship as mistakes in motives as to the purpose of the goods that are considered to be irrelevant under the CISG and are within the risk of CLAIMANT.

4. Contrary to CLAIMANT's potential allegations, its poor financial condition does not affect the constitution of hardship

202. "The promisor's own financial capacity lies within his typical sphere of responsibility" [*Schwenzer, p. 1071; Secretariat Commentary II*]. For instance, in *Chinese goods case* the tribunal held that "the financial straits of the manufacturer and its need for cash are not an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness" [*Chinese goods case*]. Poor financial condition could, exceptionally, be relevant for the purposes of hardship only in "exceptional cases", where "performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy", not merely due to "lack of […] resources" [*Girsberger/Zapolskis, p. 131*]. Further, in cases where some shipments of goods were "financially detrimental" while others were "profitable", hardship cannot be invoked [*Ibid, p. 132*].
203. In the present case CLAIMANT cannot refer to its poor financial situation as a reason for adaptation of the Contract, as CLAIMANT's poor financial condition existed before the Contract was concluded, as it was caused by the regulatory measures taken by Danubia back in 2014 [*Exhibit C8; PO2, §21*].
204. Further, performance of the Contract itself cannot lead to "financial ruin" or "bankruptcy" of CLAIMANT, as CLAIMANT only claims the last shipment of goods to be affected by hardship, which amounts only to 1.250.000 USD requested by CLAIMANT. Other previous shipments of goods were profitable for CLAIMANT.
205. Thus, the financial condition of CLAIMANT does not affect hardship occurrence.
206. For all the aforesaid, CLAIMANT's claim should be dismissed.

PRAYER FOR RELIEF:

207. RESPONDENT respectfully requests the Arbitral Tribunal to find that:
    A. The Arbitral Tribunal does not have the jurisdiction and the powers under the Arbitration Clause to adapt the Contract;
    B. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings;
    C. CLAIMANT is not entitled to the payment of 1,250,000 USD resulting from an adaptation of the price under both Clause 12 of the Contract and the CISG.