TWENTY SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

On Behalf Of:

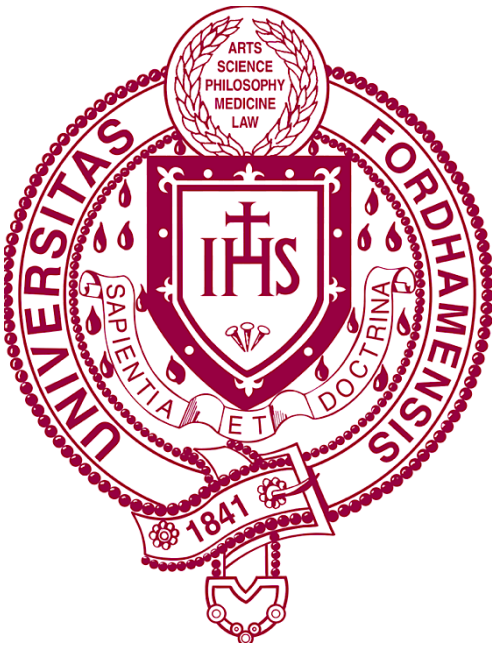
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana

RESPONDENT

Against:

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterrano

CLAIMANT



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Redfern/Hunter	Alan Redfern and Martin Hunter, International Arbitration (6th ed.) (Blackaby, Partasides, Redfern, et al. 2015).
Schlechtriem	Peter Schlechtriem, excerpt from Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods, Manz, Vienna: 1986.
Survey	2018 International Arbitration Survey: The Evolution of International Arbitration.
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ABBREVIATION	**CITATION**
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Methanex Case	Methanex Corporation v. United States of America, UNCITRAL (2005).

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Tomato Concentrate Case	Germany 4 July 1997 Appellate Court Hamburg.

TABLE OF ABBREVIATIONS

CITED AS	REFERENCE
Ans. to NoA	Answer to Notice of Arbitration
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
CLAIMANT	Phar Lap Allevamento
CLAIMANT Memo	Universidad Nacional Autónoma De México (UNAM) Memorandum for Claimant
Cmt.	Comment
DDP	Delivery Duty Paid
Ex.	Exhibit
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre

HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules
ICC	International Chamber of Commerce
INCOTERMS	International Commercial Terms
NoA	Notice of Arbitration
No(s).	Number(s)
Parties	Claimant and Respondent, collectively
PECL	Principles of the European Contract Law
Proc. Ord.	Procedural Order
Req.	Request
Resp.	Respondent
RESPONDENT	Black Beauty Equestrian
UNCITRAL	United Nations Commission on International Trade Law

UNIDROIT	International Institute for the Unification of Private Law (Institut International pour L'nification du Droit Privé)
USD	United States Dollar(s)

STATEMENT OF FACTS

1 RESPONDENT, Black Beauty Equestrian, is an Equatorianian owner of broodmare lines that have produced world champion show jumpers and international dressage champions [*NoA* 5]. RESPONDENT recently established a racehorse stable of ten mares with an "excellent racehorse pedigree" [*Id. at* 5].

2 CLAIMANT, Phar Lap Allevamento, is the operator of a Mediterranean stud farm [*Id. at 4*]. Claimant provides stallions for breeding and offers for sale frozen semen of its champion stallions for artificial insemination [*Id.*]. One such racehorse is Nijinsky III [*Id. at 5*].

I. CLAIMANT Accepted RESPONDENT's Offer to Purchase Racehorse Doses

3 In 2017, the Equatorianian Government restricted transportation of all living animals and byproducts due to an outbreak of foot and mouth disease [*Id.*]. However, the Equatorianian Government temporarily lifted the ban on artificial insemination for racehorses to protect the country's racehorse industry [*Id.*; *Cl. Ex.* 1].

4 On **21 March 2017**, RESPONDENT sought to take advantage of Equatoriana's regulatory landscape and expressed to CLAIMANT its interest in becoming a leading racehorse breeder [*Cl. Ex.* 1]. RESPONDENT offered to purchase 100 doses of Nijinsky III's frozen semen [*Id.*]. As Equatoriana's horse racing industry projected stable growth, CLAIMANT agreed to sell RESPONDENT the requested doses [*NoA 5*;*Cl. Ex.* 2]. The Parties stated an interest in establishing a long-term relationship [*Cl. Ex.* 2,3].

5 In negotiating the Sales Agreement, the Parties agreed to abide by CLAIMANT's Standard Frozen Semen Sales Agreement, but with significant modifications made to the terms of price, delivery, and dispute resolution [*Cl. Ex.* 2; *Cl. Ex. 3-5*]. RESPONDENT negotiated for a DDP delivery, provided that: (a) RESPONDENT pay CLAIMANT USD $1000 per dose; and (b) the contract include a hardship clause [*Cl. Ex. 3,4*].

6 The Parties did not agree to jurisdiction in either Mediterraneo nor Equatoriania, so RESPONDENT and CLAIMANT agreed to resolve disputes by arbitral proceedings in Danubia [*Cl. Ex. 3-5; Resp. Ex. 1-3*].

II. The Parties Finalized the Contract After an Accident Involving Main Negotiators Disrupted Negotiations

7 On **12 April 2017**, the Parties' two main negotiators, Ms. Julie Napravnik for CLAIMANT and Mr. Chris Antley for RESPONDENT, were severely injured in a car accident [*NoA, p.* 5]. John Ferguson replaced Mr. Antley for CLAIMANT and Julian Krone replaced Ms. Napravnik for RESPONDENT [*Id.*]. Mr. Ferguson and Mr. Krone and finalized the contract on **6 May 2017** [*Cl. Ex.* 5].

8 In the final contract, the Parties agreed that: (a) CLAIMANT bore responsibility for delays in delivery not caused by missed flights, weather delays, failure of third party service, or acts of God (Clause 12); (b) the Sales Agreement would be governed by the law of Mediterraneo; (c) disputes would be resolved by arbitration administered by HKIAC under HKIAC Rules; and (d) the law of the seat of arbitration would be in Danubia [*Cl. Ex.* 5].

III. CLAIMANT Performed and Assumed Risks, as Stipulated in the Contract

9 In **December 2015**, CLAIMANT shipped two of the three agreed-upon shipments [Cl. Ex. 6]. After the second shipments, the Mediterraneo government unexpectedly imposed a 25% tariff on agricultural products from Equatoriana [*NoA* 6]. In response, the Equatorianian Government imposed a 30% retaliatory tariff on all goods from Mediterraneo, including animal semen [*Id.*].

10 In **January 2018**, Ms. Napravnik contacted Mr. Shoemaker about the possibility of a price adjustment due to the tariff [*Cl. Ex. 7-8*]. Mr. Shoemaker never committed to adaptation of the price and made it clear that he would need to check with RESPONDENT's legal department [*Resp. Ex. 4*]. Mr. Shoemaker explicitly stated that he lacked the authority to commit to CLAIMANT's request for a price adaptation [*Id.*]. Despite knowledge of Mr. Shoemaker's reservations, Ms. Napravnik authorized the final shipment anyway [*Resp. Ex. 4; Cl. Ex. 8*].

11 In February 2018, CLAIMANT alleged that RESPONDENT breached the Sales Agreement by reselling doses to third parties [*Cl. Ex.* 8]. In response to the allegation, Ms. Espinoza, the CEO of the RESPONDENT, ceased communications with CLAIMANT [*Id.*].

IV. CLAIMANT Initiated Arbitral Proceedings

12 CLAIMANT submitted a Notice of Arbitration to RESPONDENT on **31 July 2018** pursuant to the 2013 HKIAC Rules [*31 July 2018 Letter 3*; *NoA 4*]. RESPONDENT submitted an Answer to the Notice of Arbitration on **24 August 2018** [*24 August 2018 Letter 28*; *Ans. to NoA 29*].

13 CLAIMANT later alleged that RESPONDENT demanded a price adaptation in another dispute with a Mediterranean party [*2 October 2018 Letter 50*]. This information was presumably acquired by violation of the Parties' confidentiality obligations [*3 October 2018 Letter 51*].

SUMMARY OF ARGUMENTS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

The Arbitral Tribunal should find that it does not have jurisdiction to hear the case because the issue is outside the scope of the arbitration agreement. If the Tribunal determines that it does have jurisdiction to hear the case, the arbitration agreement should be governed by Danubian Law, the law of the seat of the arbitration. The seat of the arbitration is in line with the Parties' expectations and uncertainties in the law will result if the law of the seat and the underlying arbitration agreement diverge. Pursuant to the Law of Danubia, the Tribunal may not adapt the sales contract without an express conferral of power. There is no such power stated in the Sales Agreement. As such, the Tribunal does not have the power to adapt the contract because it is governed by the Law of Danubia.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION PROCEEDINGS

CLAIMANT violated its duty of confidentiality by seeking to submit evidence from RESPONDENT's other arbitration. CLAIMANT is bound by the duty of confidentially not only pursuant to the 2013 and 2018 HKIAC Rules, but also due to its implied application to arbitral proceedings. Contrary to CLAIMANT's suggestion, transparency cannot overcome confidentiality in these circumstances. However, even if this Tribunal finds that the duty of confidentiality was not violated, the evidence is nevertheless inadmissible due to its illegal acquisition. The application of the "independent source" or "clean hands" doctrines will result in further issues and are insufficient to defeat public policy requiring arbitral parties to act in good faith towards each other and the tribunal.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO A PRICE INCREASE RESULTING FROM A CONTRACT ADAPTATION UNDER EITHER CLAUSE 12 OF THE CONTRACT OR ARTICLE 79 OF THE CISG

CLAIMANT is not entitled to an increase in the contract price. The plain language of the Frozen Semen Sales Agreement provides that CLAIMANT is not entitled to a price increase as Clause 12 of the Agreement is inapplicable to the imposition of an agricultural tariff. The proper interpretation of CISG Article 8 is for CLAIMANT to be liable because the parties intended to implement DDP delivery. Furthermore, CLAIMANT is not entitled to any price adaptation under CISG Article 79 whether or not the Tribunal finds that Article 79 governs or settles the issue. Finally, the Tribunal should find that RESPONDENT is not liable

because such a ruling would create perverse incentives and would contradict the central tenet of the CISG, which is to provide uniformity across international transactions.

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1 The Parties agreed that "disputes arising out of this contract . . . shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Center (HKIAC) under the HKIAC Administered Arbitration Rules" [*Cl. Ex. 5*].

2 RESPONDENT submits that: **(I)** The Arbitral Tribunal does not have the jurisdiction under the arbitration agreement to hear the case. The claim is outside the scope of the arbitration agreement because the contract does not confer powers onto the tribunal to adapt the contract. **(II)** The seat of the arbitration should be the law governing the arbitration agreement. **(III)** Pursuant to Danubia's "four corners rule," an arbitrator can only adapt the contract if there is an express conferral of power. There is no such power stated in the Sales Agreement.

I. The Arbitral Tribunal Does Not Have Jurisdiction to Hear the Case

3 Pursuant to Article 16, "an arbitral tribunal may rule on its own jurisdiction" [*UNCITRAL Model Law Art. 16*]. The arbitral tribunal should rule that it does not have the jurisdiction to hear this case.

4 The tribunal's jurisdiction is limited by the arbitration agreement. "An arbitral tribunal may validly resolve only those disputes that the Parties have agreed that it should resolve" [*Redfern/Hunter* 335]. Claimant alleges that the present arbitration agreements broadly covers all issues arising from the contract, including the present dispute because the price adjustment arose from the Parties' negotiations and performance under the contract.

5 However, the arbitration agreement is narrowly constructed and does not cover the present dispute. The agreement states that the arbitrator has jurisdiction over "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination" [*Cl. Ex.* 5]. The agreement does not give the tribunal the authority to adapt the contract, which is the basis of Claimant's claim. The contract explicitly states that the Respondent is supposed to pay two installments of $5,000,000 [*Cl. Ex.* 5]. However, Claimant is asking the tribunal to adapt the contract by allowing a 30% price increase on the goods in response to a newly enacted tariff on agricultural products [*Cl. Ex.* 7]. The present dispute is outside the scope of the arbitration agreement because the contract does not confer powers onto the tribunal to adapt the contract.

II. If the Arbitral Tribunal Determines that it has Jurisdiction to Hear the Case, the Arbitration Agreement Should be Governed by the law of Danubia

6 The Parties' Sales Agreement is governed by the law of Meditteraneo, and the seat of the arbitration is Danubia [*Cl. Ex.* 5]. However, there is no explicit choice-of-law governing the arbitration agreement [*Id.*]. The seat of the arbitration, Danubia, is the applicable law for the arbitration agreement.

7 Respondent submits that: **(A)** the conflict of law rules supports the Respondent's position that the arbitration agreement is not governed by the law of the contract; **(B)** the presumption is that the seat of the arbitration should govern the law of the arbitration agreement; and **(C)** this Tribunal should apply the law most in line with the Parties expectations, which is the seat of the arbitration.

A. The Hague Principles Support Respondent's Position that the Law Governing the Arbitration Should Not Be the Law of the Underlying Contract

8 The Hague Principles on the Choice of Law in International Commercial Contracts governs Danubia and Meditteraneo [*Proc. Ord. 2*]. The Hauge Principles support the Respondent's position that the arbitration agreement is not governed by the law of the contract.

9 The Claimant erroneously states that, according to the Hague Principles, there must be an express choice of law clause for the law governing the arbitration agreement if the law is to be different from the law governing the underlying contract. However, "[t]he Principles do not provide for the method of determining the law applicable to an international commercial contract in the absence of a choice of law (express or tacit) by the Parties" [*Hauge Principles Art. 2.2*].

10 Furthermore, Article 2 of the Hague Principles states that "a choice of law agreement is autonomous and independent from the contract that contains it or the contract to which it applies" [*Hauge Principles Art. 7.1*]. This means that an "arbitration agreement is presumptively separable from the Parties' underlying contract" [*Born* 2014 at 350]. The Parties do not have to expressly state the law governing the arbitration agreement for this doctrine to apply, as Claimant otherwise suggests.

B. The Presumption is That the Seat of the Arbitration Should Govern the Law of The Arbitration Agreement

11 Claimant attempts to show that the seat of the arbitration does not have any bearing on the choice of applicable law for the arbitration agreement. Claimant references two arbitral awards where the law of the contract governed the arbitration agreement in the absence of an express choice of law. In the absence of an express

choice of law, some jurisdictions may apply the law of the contract to the arbitration agreement. However, this approach is not widely accepted [*Redfern/Hunter* at 171].

12 On the contrary, it is a well-established principle of international arbitration that an arbitration agreement is governed by the law of the seat of the arbitration [*Id.*]. Article 2 of the Geneva Protocol states that "[t]he arbitral procedure . . . shall be governed by the will of the Parties and by the law of the country in whose territory the arbitration takes place." [*Id.*]. Article V(1)(a) of the New York Convention refers to "the law of the country where the arbitration took place" and "the law of the country where the award is governing that arbitration: the lex arbitri" [*Id.*]. The UNICTRAL Model Rules uses wording similar to that of the New York Convention as well. [*Id.*].

13 Likewise, common law reflects the principle that the seat of the arbitration is presumed to be the law governing the arbitration agreement [*Redfern/Hunter* 172-3]. "In Singapore, where the parties had chosen a seat (but not the governing law of the arbitration agreement), it was reasoned that 'the very choice of an arbitral seat presupposes parties' intention to have the law of that seat recognize and enforce the arbitration agreement" [*FirstLink Case* in *Kaplan/Moser* 390]. Similarly, in England, the Court of Appeal held that "it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration" [*C v. D* in *Kaplan/Moser* 390].

14 Finally, there are policy considerations for why the default rule is for the seat of the arbitration to be the law governing the arbitration. "When parties do select a procedural law other than that of the seat, it gives rise to significant uncertainties," such as which courts can select and remove arbitrators, rescind awards, or provide judicial assistance [*Born 2014* 119]. Applying local law gives arbitrators more flexibility and control over the arbitral process to limit these risks, and most importantly to ensure awards are binding and enforceable [*Id. 115*].

C. The Tribunal Should Apply the Arbitration Law Most Consistent with the Parties' Expectations

15 The Tribunal may look to "the proper law of the arbitration agreement to the extent it has been chosen by the parties or can be established under the circumstances." [*Waincymer* at 137]. "The aim of such approach is to ultimately determine what is the 'subjectively fair and objectively reasonable expectations of each one of the parties . . ." [*Id.* at 135]. Under the circumstances, the Parties would have reasonably expected the seat of the arbitration, Danubia, to govern the arbitration agreement.

16 The Hong Kong International Arbitration Centre (HKIAC) rules suggest that the law of the arbitration should be explicitly stated when the substantive contract differs from the law of the seat [*Id.*]. However, the final version excluded the law of the arbitration clause [*Cl. Ex.* 5]. Therefore, the Tribunal must turn to Respondent's first draft to understand the Parties' expectations because it is the only communication that explicitly states the law that should govern the arbitration agreement [Resp. Ex. 1].

17 The first draft of the arbitration agreement contained an express choice of law provision for the arbitration clause [*Resp. Ex.* 1]. The draft states: "The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana" [Resp. Ex. 1]. This draft shows that Respondent intended the law of the arbitration to be the same as the seat of the arbitration. Although this provision was left out of later versions, there was never a deliberate choice to have the law of the contract govern the law of the arbitration.

18 In addition to Respondent's first draft of the Sales Agreement, there are other indications that the Parties intended the law of the seat of the arbitration to govern the underlying arbitration agreement. Mr. Antley, who was in charge of negotiating the Sales Agreement before his accident, kept notes after each round of negotiations on issues that remained open [*Resp. Ex.* 3]. In fact, he wrote a note the morning of his accident that said, "clarify in arbitration clause that neutral venue and applicable law" [*Id.*]. Although the meaning of "applicable law" was not immediately clear to Ms. Krone, Mr. Antley's replacement, it later came to light that "applicable law" was referring to the law applicable to the arbitration agreement and not the law of the contract. [*Id.*]. Ms. Krone admitted that, if she had known this at the time, she would have included an explicit clause that the law of Danubia apply to the arbitration agreement [*Id.*].

19 Thus, the Parties' expectations demonstrate that the arbitration agreement should be governed by the law of Danubia.

III. The Arbitral Tribunal Does Not Have the Power to Adapt the Contract

20 The arbitration agreement is governed by the law of Danubia. Danubian law adheres to the "four corners rule," which means that one can only look at the text of the contract to understand the meaning of the arbitration agreement [*Ans. to NoA* p 32]. No extrinsic evidence may be used [*Id.*]. "The arbitration agreement can confer only powers that are permissible under the law applicable to the arbitration agreement and under the lex arbitri" [*Redfern/Hunter* 342]. Pursuant to Danubia's "four corners rule," an arbitrator can only adapt the contract if there is an express conferral of power [*Ans. to NoA* p 31]. There is no such power stated in the Sales Agreement [*Id.*].

21 Claimant states that the law of Danubia, with its restrictive four corners rule, cannot be applied to the arbitration agreement because it contradicts Mediterraneo Law, a less restrictive law governing the main contract. However, the relationship between the main contract and the arbitration agreement is negligible. Under the four corners rule and the doctrine of separability, the arbitration agreement is considered separate from the main contract [*Ans. to NoA* p 32]. The consequences of separability include, "the possible application of a different national law . . . to the arbitration agreement than to the underlying contract" [*Born* 2014 351].

22 Claimant turns to clauses of the main contract, specifically Clause 8 and 12, to support its assertion that the law governing the arbitration agreement should be the law of Meditteraneo. Claimant is looking beyond the arbitration agreement into the main contract. However, an "arbitration agreement is presumptively separable from the parties' underlying contract" [*Born* 2014 350]. In fact, "[t]he non-existence, ineffectiveness, invalidity, or illegality of the underlying contract does not necessarily mean that the associated arbitration clause is also nonexistent, ineffective, or invalid" [Born 2014 402]. Thus, Claimant cannot apply clauses of the main contract to determine the powers of the Tribunal under the arbitration agreement since they are separate agreements, as one can be considered valid while the other void.

23 **Conclusion to Issue 1:** The Arbitral Tribunal should find that it does not have the jurisdiction to hear this case. However, if the Tribunal determines that it does have jurisdiction, the law governing the arbitration agreement should be the seat of the arbitration, the law of Danubia. Pursuant to the law of Danubia, the Tribunal may not adopt the contract without an express conferral of power.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION PROCEEDINGS

24 CLAIMANT argues that evidence gathered from RESPONDENT's other arbitration proceeding ("Prior Arbitration") is admissible in the present proceeding because it is not protected under the duty of confidentiality and, further, the evidence was rightfully obtained. However, contrary to CLAIMANT's claims, the evidence is inadmissible because **(I)** CLAIMANT did breach a binding duty of confidentiality, and **(II)** even if it did not, the evidence was procured illegally.

I. Evidence Obtained from RESPONDENT'S Prior Arbitration is Inadmissible due to the Prevailing Duty of Confidentiality

25 CLAIMANT maintains that the arbitral tribunal has authority to rule on the admissibility of evidence [*CLAIMANT Memo, p. 12-14, para. 58-62*]. This is correct pursuant to both Art. 22 of the HKIAC 2018 Rules, which states "[t]he arbitral tribunal shall determine the admissibility . . . of the evidence," and Art. 19 of the

Model Law, which states "[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility . . . of any evidence." [*See also Born 2014 2307-08*]

26 However, CLAIMANT's suggestion that the tribunal use this authority to admit evidence from the Prior Arbitration is incorrect. On the contrary, **(A)** the governing duty of confidentiality prohibits CLAIMANT from submitting any evidence obtained from the Prior Arbitration and **(B)** the principles of transparency do not defeat the duty of confidentiality.

A. CLAIMANT is Bound by a Duty of Confidentiality

27 CLAIMANT mistakenly contends that neither it nor Mr. Velazquez is bound by a duty of confidentiality since first, they are "unrelated parties" who fall outside the scope of the HKIAC Articles on confidentiality and second, because "there was no express confidentiality clause" [*CLAIMANT Memo, p. 14-15, para. 63-67*].

i. CLAIMANT is Bound by the HKIAC Rules' Confidentiality Provisions

28 CLAIMANT argues that it is an unrelated party not bound by the duty of confidentiality because it is not named among those explicitly subjected to the duty under Art. 45.1 and 45.2 of the HKIAC 2018 Rules (or the corresponding Art. 42.1 and 42.2 of the HKIAC 2013 Rules) [*CLAIMANT Memo, p. 15, para. 66-67*]. First, this is an overly textualist interpretation that can equally be construed in the opposite manner: since CLAIMANT is not explicitly listed among those who are *not* bound by the duty under Art. 45.3, it must be bound by the duty of confidentiality.

29 CLAIMANT's narrow reading of the Rules disregards the inherent purpose of arbitration, which is to ensure confidentiality. The confidentiality of arbitral proceedings is "one of the important advantages of arbitration" [*Redfern/Hunter 124; Born 2780*]. Indeed, the 2018 International Arbitration Survey found that 87% of the participants believe confidentiality is so important that it should be an opt-out, rather than opt-in feature in international arbitrations [*Survey 41*]. As such, the correct interpretation of Articles 42 and 45 of the 2013 and 2018 HKIAC Rules bind CLAIMANT with the duty of confidentiality.

ii. An Express Confidentiality Clause is Not Needed for the Duty of Confidentiality to Arise

30 The importance of confidentiality is reflected in extensive arbitral precedent, which demonstrates that, unlike CLAIMANT's argument, confidentiality is implied in arbitration proceedings [*Ali Shipping Case*]. This assumption is a natural extension of the undisputed privacy of arbitral hearings [*Id.*; *Redfern/Hunter 124-25*]. Failure to assure confidentiality is unthinkable as it would be "almost equivalent to opening the door of the arbitration room to [a] third party" [*Mew Case*].

31 While CLAIMANT can, and does, point to isolated examples of contradictory interpretations, decades of case law supports the notion of implied confidentiality: "there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration . . . or the award" [*Emmott Case*]. As such, CLAIMANT's argument that "had RESPONDENT wanted confidential proceedings, it would have made it explicit" is unsubstantiated [*CLAIMANT Memo, p. 14, para. 63*].

B. The Principles of Transparency Do Not Defeat the Binding Duty of Confidentiality

32 CLAIMANT argues that submitting evidence from the Prior Arbitration would be in line with the principles of transparency as outlined in the Transparency Rules of UNCITRAL [*CLAIMANT Memo, p. 17-18, para. 73-75*]. However, as CLAIMANT itself concedes, the applicable Model Law does not contain any express requirements regarding transparency of international arbitrations and, further, the Transparency Rules are limited to treaty-based investor-state arbitration [*CLAIMANT Memo, p. 17, para. 73-74*].

33 Nevertheless, RESPONDENT accepts that transparency is an increasingly important feature of arbitration, especially because it makes arbitration more accessible to a wider audience [*Born 2014 2821-22*]. However, developments in transparency have had "virtually *no effect* on the disclosure of details regarding the submissions and evidence in *ongoing arbitrations*" [*Id. at 2822*]. "These aspects of the arbitral procedure have retained their presumptively confidential character, precisely because they most directly serve the basic objectives of the arbitral process" [*Id.*].

34 RESPONDENT's Prior Arbitration is estimated to conclude in August 2019 [*Proc. Ord. 2*]. In other words, it is an ongoing arbitration. The developments in transparency therefore have "virtually no effect" on the Prior Arbitration, which still benefits from a "presumptively confidential character" [*Born 2822*]. As a result, CLAIMANT's reliance on transparency to justify a lack of confidentiality is unjustified.

II. Even if the Duty of Confidentiality is Inapplicable, the Evidence Remains Inadmissible due to its Illegal Acquisition, Regardless of the Independent Source Doctrine

35 The evidence CLAIMANT seeks to submit was obtained illegally from RESPONDENT [*Letter Fasttrack, 3 Oct 50*]. As a result of the illegal acquisition, the evidence remains inadmissible even if it is not protected under the duty of confidentiality. However, CLAIMANT mistakenly contends that the "clean hands" (or the "independent source") doctrine allows it to submit the evidence despite its illegal acquisition, since CLAIMANT itself did not procure the evidence [*CLAIMANT Memo, p. 18-19, para. 76-78*].

36 First, contrary to CLAIMANT's implications, the record is silent on whether CLAIMANT was directly involved in the illegal acquisition of the evidence [*Letter Fasttrack, 3 Oct 50*]. The identity of the hackers, a potential source for the evidence, remains unknown [*3 October 2018 Letter 51*]. This calls into question the applicability of the independent source doctrine because it is not, in fact, certain that CLAIMANT's hands are clean.

37 Nevertheless, even if CLAIMANT does indeed have "clean hands," the evidence does not automatically become admissible based on that fact alone [*Boykin/Havalic 33-34*]. Instead, "clean hands" merely triggers additional considerations for the tribunal in reaching an admissibility decision. For example, an ICSID tribunal found that certain evidence obtained following a hacking of the Kazakh government's computer network was inadmissible even though the party seeking to submit it had "clean hands" [*Caratube Case*]. The tribunal found that, despite the applicability of the clean hands doctrine, privileged documents remained inadmissible [*Id.*]. In doing so, the tribunal demonstrated that "clean hands" does not automatically render evidence admissible. This is particularly indicative of the role confidential documents, as discussed in Part I, should play in the present arbitration.

38 Not only is the protection afforded by the "independent source" or "clean hands" doctrine minimal, but there are overwhelming policy reasons in favor of rejecting illegally obtained evidence, even if the evidence is probative [Waincymer 793]. In one of the most notable awards to consider the evidentiary subject, the tribunal found that admitting unlawfully obtained evidence would violate the duty of good faith parties owe to each other and the tribunal [*Methanex Case*]. The tribunal also referred to Art. 15(1) of the Model Law in finding that admitting such evidence would disrespect principles of equal treatment [*Id.*]. Finally, the tribunal held that admitting illegal evidence would also offend "basic principles of justice and fairness required of all parties in every international arbitration" [*Id.*]. Accordingly, based on both the clean hands doctrine and public policy, this Tribunal should disregard the illegally acquired evidence presented by CLAIMANT.

39 **Conclusion to Issue 2:** The Tribunal should find that CLAIMANT violated its duty of confidentiality by seeking to submit evidence from the Prior Arbitration, and that the principle of transparency does not overcome this duty. Even if the Tribunal determines the duty of confidentiality does not prevail, it should nevertheless find the evidence inadmissible due to its illegal acquisition.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO ANY INCREASE IN PRICE RESULTING FROM AN ADAPTATION OF THE CONTRACT UNDER EITHER CLAUSE 12 OF THE CONTRACT OR UNDER ARTICLE 79 OF THE CISG

40 This tribunal should find that CLAIMANT is not entitled to any price adaptation of the contract. **(I)** The plain language of the Frozen Semen Sales Agreement provides that Claimant is not entitled to any increase of the contract price. **(II)** Clause 12 of the Agreement is inapplicable to the imposition of this agricultural tariff. **(III)** The proper interpretation of Clause 12 under CISG Article 8 is for the Claimant to be liable. **(IV)** Inclusion of Clause 12 in the contract precludes the application of CISG Article 79. **(V)** Article 79 of the CISG does not exempt CLAIMANT from responsibility for the increased cost because CLAIMANT fully performed. **(VI)** RESPONDENT need not pay the USD $1,250,000.

I. The Plain Language of the Frozen Semen Sales Agreement is Sufficient to Show that CLAIMANT is Not Entitled to Any Increase of the Contract Price

41 According to the Frozen Semen Sales Agreement, CLAIMANT is not entitled to any price increase because of the DDP clause. According to the ICC, under a DDP contract, all risks and costs are the responsibility of the party tasked with delivery up until delivery is made [INCOTERMS 2010].

42 RESPONDENT asked for delivery DDP, and CLAIMANT raised the nonrefundable price per dose as a result[*Cl. Ex.* 3]. RESPONDENT agreed to these changes and paid an increased price to secure a delivery DDP [*Cl. Ex.* 3].

43 Clause 8 of the frozen Semen Sales Agreement reflects this agreement stating in relevant part "[s]eller will ship 3 installments DDP." [*Cl. Ex.* 5]. Moreover, the parties agreed to the addition of a delivery DDP before the drafting of the contract itself [*Cl. Ex.* 4]. The terms of the contract are clear that the seller will deliver DDP [*Cl. Ex.* 6]. When the terms of the contract are clear, they are to be given their literal meaning [*UNICTRAL Digest of Case Law* 54].

44 DDP delivery allocates all risk and costs related to delivery upon the seller [INCOTERMS 2010]. Costs encompass all transportation costs including, but not limited to, customs and other export clearance, costs of transportation insurance, cost of customs, permits, taxation, and import clearance, and transport to buyer [*See Bergami* 3].

45 The Frozen Semen Sales Agreement included three very specific and narrow exceptions to DDP delivery [*Cl. Ex.* 5]. Clause 9 of the Frozen Semen Sales Agreement states that the Buyer (RESPONDENT) will be responsible for registration fees for the use of frozen semen [*Cl. Ex.* 5]. Clause 10 states that the buyer will

pay for all tank rentals and handling fees associated with delivery [*Cl. Ex.* 5]. Clause 13 states that the buyer is not responsible for any additional insurance fees [*Cl. Ex.* 5].

46 UNIDROIT Article 4.4 states that the terms of a contract must be interpreted in the context of the "whole contract or statement in which they appear" [UNIDROIT Art. 4.4]. In the context of these exceptions, the correct interpretation would find that the list of terms in Clause 12 constitutes an exhaustive list.

47 Finally, there is no clause in the Frozen Semen Sales Agreement that required the buyer (RESPONDENT) to pay for any customs import tax [*Cl. Ex.* 5]. In fact, according to INCOTERMS, "which are a series of pre-defined commercial terms published by the International Chamber of Commerce relating to international commercial law," customs and import taxes are included in the risks and costs associated with DDP [INCOTERMS 2010].

48 Thus, based upon the plain language of the Frozen Semen Sales Agreement, RESPONDENT has no contractual obligation to pay any import or customs agricultural tariff.

II. Clause 12 of the Agreement is Inapplicable to the Imposition of this Agricultural Tariff

49 Clause 12 of this agreement states, in relevant part, "[s]eller shall not be responsible . . . for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Cl. Ex.* 5]. CLAIMANT states that risks involving changes in customs health and safety requirements and the costs associated with it were risks CLAIMANT was not willing to bear [*Cl. Ex.* 4].

A. Clause 12 of the Agreement is Inapplicable Because this Additional Cost was Not Due to a Lost Shipment, Delay in Shipment, or an Additional Health and Safety Requirement

50 Clause 12 of the Frozen Semen Sales Agreement specifically lists many potential costs or risks that CLAIMANT did not want to be responsible for including, lost shipments, delays in delivery not within the control of the seller, and additional health and safety requirements [*Cl. Ex.* 5]. This imposed tariff, however, does not fall within any of the listed categories. Courts have stated that where a contract includes a hardship clause and lists the circumstances that are grounds for exemption of liability, such a list must be deemed exhaustive [*Queen Mary Case*].

51 CLAIMANT made it clear that they were concerned with specific risks involved with delivery, one of them being additional health and safety requirements that can be very costly [*Cl. Ex.* 4]. CLAIMANT specifically mentioned the example of the requirement for highly expensive health and safety testing [*Cl. Ex.* 4]. This

specific language regarding health and safety requirements is a part of a list of circumstances where the seller would be exempt from liability [*Cl. Ex.* 5].

52 Absent from this list, however, is agricultural tariffs. The tariff in question is not a health and safety related tariff and does not require any additional testing or extraneous requirements [*Cl. Ex.* 6]. According to "Peak Business News," the entity who published the article in the record, this is a tariff on all agricultural goods coming from Mediterraneo [*Cl. Ex.* 6].

53 Thus, Clause 12 of the Frozen Semen Sales Agreement is inapplicable to the imposition of an agricultural tariff. The tariff imposed is not a health and safety requirement, and Courts have recognized that when there is a list of exemptions in a hardship clause that list of exemptions is considered to be exhaustive.

B. Clause 12 of the Agreement is Inapplicable Because this Tariff was Not Unforeseeable for a Sophisticated Party that has Knowledge and Experience Dealing with these Specialized Goods

54 The agricultural tariff imposed by the state of Equatoriana was not, and should not, have been unforeseeable to CLAIMANT. CLAIMANT is a sophisticated party who deals in this particularly specialized good [*Cl. Ex.* 2, 4]. CLAIMANT stated that they had seen reports about Black Beauty's purchases of top-class mares, evidencing their commitment to staying up-to-date with their industry [*Cl. Ex.* 2]. CLAIMANT also stated that they were not surprised when Black Beauty reached out to them showing interest in Nijinsky III [*Cl. Ex.* 2]. Moreover, CLAIMANT admits that they have evaluated Black Beauty's mares and have determined that Nijinsky III would be a "perfect match" [*Cl. Ex.* 2].

55 CLAIMANT also became aware of Black Beauty's location in the state of Equatoriana because the first correspondence from Black Beauty to CLAIMANT includes Black Beauty's address and discusses the lifting of the artificial insemination ban [*Cl. Ex.* 1]. CLAIMANT states that they have had past experiences with changing regulations in health and safety that has caused them to provide extra testing and submit to other such health and safety requirements [*Cl. Ex.* 4].

56 Moreover, CLAIMANT states in their notice of arbitration that, "[t]he purpose of [DDP] . . . was not to burden CLAIMANT with all the risks associated with a DDP-delivery but to profit from CLAIMANT's experience in the transportation of frozen semen." [*NoA* 5] This expertise, according to CLAIMANT, included "a greater likelihood of a speedy and non-problematic compliance with export and import formalities and the required paperwork." [*NoA* 5]. CLAIMANT admits that it is their expertise in the import and export of frozen semen that led to the addition of the DDP, thereby demonstrating its sophistication. [*NoA* 5].

57 Although the tariff was larger than expected, the tariff itself was not unforeseeable to a party as knowledgeable as CLAIMANT. In January 2017, The newly elected President of Mediterraneo, CLAIMANT's home country, announced a preference for a more protectionist approach to international trade and imposed restrictions upon the state of Equatoriana [*Cl. Ex.* 6].

58 As Equatoriana had retaliated in the face of restrictions on a previous occasion[*Cl. Ex.* 6], such events would put most parties who have dealt in imports and exports on notice of potential changes in trade restrictions.

59 Thus, the tariff imposed by Equatoriana was not unforeseeable, especially to a sophisticated party like CLAIMANT who, by their own admission, is experienced in the import and export of frozen semen [*NoA* 5]. Clause 12 should not apply, as this tariff was foreseeable to CLAIMANT.

C. The Phrase "Comparable Unforeseen Events" in Clause 12 of the Agreement is Overly Broad and Ambiguous, and Should be Construed Against CLAIMANT

60 Clause 12 of the Frozen Semen Sales Agreement does not mention tariffs or taxes. Clause 12 mentions only a few specific circumstances and followed by a broad term stating that the "[s]eller shall be responsible for … [any] comparable unforeseen events making the contract more onerous [*Cl. Ex.* 6].

61 This phrase, "comparable unforeseen events," is ambiguous, and should be construed narrowly by this tribunal. Courts have historically construed hardship clauses very narrowly as the application of a hardship clause has the potential to excuse a party from liability [*See Kessedijan*].

62 Furthermore, UNIDROIT Article 4.6 explains how to address ambiguity in a contractual term. It states, "[i]f contract terms supplied by one party are unclear, an interpretation against that party is preferred" [*UNIDROIT Art.* 4.6]. The CLAIMANT provided the contract [*Cl. Ex.* 6]. Given the ambiguity in whether "comparable unforeseen events," includes an agricultural tariff, this ambiguity should be construed against CLAIMANT, the drafting party [*UNIDROIT Art.* 4.6].

III. The Proper Interpretation of Clause 12 under CISG Article 8 is for the CLAIMANT to Be Liable

63 RESPONDENT intended for CLAIMANT to be liable for risk and asked to include DDP delivery [Cl. Ex. 3]. CLAIMANT agreed to these terms [Cl. Ex. 4]. Article 8 of the CISG states that statements and conduct of a party are to be interpreted according to their intent "where the other party knew or could not have been unaware what that intent was" [Art. 8(1) CISG].

64 CLAIMANT states that RESPONDENT intended for DDP delivery to be only for better transportation, but DDP clearly goes beyond simple delivery by the seller. Sophisticated parties understand that DDP allocates all risk to the seller until delivery is complete.

65 CLAIMANT unequivocally provided for DDP delivery in the contract though it ensured that CLAIMANT would not be responsible for all associated risks [*Cl. Ex.* 8].by [*Cl. Ex.* 6] This is reflected directly in the contract as many of the risks are allocated to RESPONDENT, namely in clauses 9, 10, 12, and 13 [*Cl. Ex.* 6]. However, at no point was RESPONDENT made explicitly responsible for any tariffs. Courts have stated that where a contract includes a hardship clause and lists the circumstances that are grounds for exemption of liability, such a list must be deemed exhaustive [*Queen Mary Case*]. Thus, tariffs are a cost allocated vis-à-vis DDP delivery to the CLAIMANT.

66 Moreover, CLAIMANT never disavowed the INCOTERMS application of DDP. When the terms of the contract are clear, they are to be given their literal meaning, "so parties cannot later claim that their undeclared intentions should prevail" [*UNICTRAL Digest of Case Law* 54]. Here, CLAIMANT is asking for their undeclared intentions to prevail. Clause 12 was negotiated for and covers certain instances where the seller would not be held responsible [*Cl. Ex. 4*]. However, this instance of an agricultural tariff (or any tariff at all) is not mentioned.

67 Likewise, Article 8(2) of the CISG provides in relevant part that the conduct of the party is to be interpreted according to the understanding "that a reasonable person of the same kind as the other party would have had in the same circumstance" [*Art.* 8(2) *CISG*]. A reasonable party would understand that DDP delivery would allocate all the risk upon the seller up until the point of delivery. Mr. Shoemaker explicitly stated that his understanding of DDP was that all risks were borne by the seller [R4]. A reasonable party of the same kind as CLAIMANT should have reached a similar understanding.

68 Finally, CLAIMANT argues that the phone call with Mr. Shoemaker on the morning of 21 January 2018, was a modification of the contract. However, the call does not represent a modification. Mr. Shoemaker acted in good faith when he called CLAIMANT and made it clear that in his position at the company he was not the negotiator and could not directly authorize any payment [*Cl. Ex.* 8; *Resp. Ex.* 4]. Mr. Shoemaker stated that "if the contract provides for an increased price" then the parties will certainly find an agreement [*Resp. Ex.* 4]. Mr. Shoemaker simply stated that the parties would adhere to the contract. The contract was not modified to provide for a price adaptation under any circumstance nor was the contract modified to provide that tariffs

would be paid for by the buyer. On the contrary, the contract remained as it was initially conceived and provided for DDP delivery, which allocates all the risks, other than those explicitly stated, to the seller.

69 Thus, CLAIMANT is not entitled to an increase of the contract price resulting from an adaptation of the contract under Clause 12 of the Frozen Semen Sales Agreement or the CISG.

IV. Inclusion of Clause 12 in the Contract Precludes the Application of CISG Article 79

70 CLAIMANT is not entitled to a price adaptation under clause 12 of the contract. Moreover, the parties included a hardship clause in clause 12, which precludes the application of CISG Article 79 [*C*4; Queen Mary Case].

71 Even if the Tribunal accepts CLAIMANT's argument that clause 12 is not exhaustive, and thus leaves gaps to be filled by Article 79, CLAIMANT is still not entitled to a price adaptation.

V. Article 79 of the CISG Does Not Exempt CLAIMANT from Responsibility for the Increased Cost Because CLAIMANT Fully Performed

72 Should the Tribunal find that (A) Article 79 of the CISG governs and settles the matter, then (B) CLAIMANT cannot claim an exemption because the contract was not breached and thus Article 79 does not cover CLAIMANT's claim. Should the Tribunal find that (C) Article 79 of the CISG governs but does not settle the matter, then (D) CLAIMANT cannot claim an exemption based on the narrow readings of similar Tribunals about the extent of Article 79.

A. Article 79 Governs and Settles the Matter

73 In the Sales Agreement, the parties stipulated that the CISG would govern their contract [*Art. 14 Agreement*]. Issues that are governed and settled by the CISG are decided under the CISG alone, without any other principles informing the issue [*Ferrari et al.*]. Comparatively, issues that are governed but not settled by the CISG may be informed by the general principles of the CISG, as well as other sources of law [*Id.*; *Art.*7(2) *CISG*]. Here, the issue should be governed and settled by the CISG as performance was completed, and thus not included under the purview of Article 79.

i. CLAIMANT is Not Excused from Liability because Article 79 Does Not Apply when Performance Has Occurred

74 To be exempt from liability under Article 79, the impediment must actually prevent performance, amounting to a "failure to perform" [*Honnold* 427; *Art.79(1) CISG*]. The performance must have "objective impossibility" to be excused [*Steel Ropes* case]. CLAIMANT delivered all shipments of the goods as required by the Sales Agreement, and thus did not fail to perform and clearly did not have an objective impossibility preventing

their performance. Accordingly, CLAIMANT cannot request an exemption for breach of a contract that they, in fact, did not breach. Article 79 does not extend to CLAIMANT's situation where performance occurred, and thus Article 79 governs and settles the matter through exclusion.

75 Likewise, the drafting history of Article 79 makes it clear that the exemption was to be reserved for narrow situations [*Honnold* 534-37]. When ULIS was converted to CISG in 1980, the term "circumstances" was changed to "impediment" [*Id.*]. Circumstances broadly refer to any situation, whereas an impediment carries more negative and challenging implications. Article 79 was intended to narrow the broad application of the ULIS, reserving exemption for situations where an impediment impacts performance in narrow and limited situations [*Id.*]. Moreover, Tribunals have reserved the exemption under Article 79 for "few marginal circumstances" [*CISG Advisory Op. No. 7,* ¶12].

76 CLAIMANT claims that the tariff led to "contractual disequilibrium" in the form of economic hardship, which they argue should qualify as one of the narrow circumstances [*CLAIMANT's Brief 27*]. CLAIMANT describes how the tariff has led to a price increase that worsens CLAIMANT's poor financial situation [*CLAIMANT's Brief 26*]. While RESPONDENT is sympathetic to CLAIMANT's situation, RESPONDENT does not become responsible simply because CLAIMANT's business has been struggling for years – a fact extraneous to the Sales Agreement. Moreover, a seller normally guarantees his ability to procure the goods, regardless of their financial situation, so "increased procurement and production costs do not constitute exempting impediments" [*Schlechtreim,* ¶*422a*].

77 While economic hardship has been considered an impediment under Article 79(1), the tariff does not meet the high standard [*CISG Advisory Op. No. 7,* ¶3.1; *Suez Canal* cases]. Professor Schlechtriem described that economic hardship includes unaffordability only in narrow circumstances [*Schlechtriem, Uniform Sales Law 101*]. For example, in the *Steel Tubes* case, a price increase of 70 percent was sufficient to excuse liability [*Steel Tubes*]. However, the present tariff increasing the cost by 30 percent does not amount to an economic hardship because it is less than half of the amount in the *Steel Tubes* case. In fact, an Italian Tribunal held that 30 percent market increase was not an impediment because it did not render the contract impossible [*Nuova Fucinati S.p.A. Case*]. Instead, the present 30 percent increase is closer to the 13 percent increase in the *Steel Bars* case, which the Tribunal held insufficient to be an impediment [*Steel Bars* case].

78 Thus, if this tribunal adopts a narrow reading of the intention of Article 79, then the text of the CISG governs and settles the matter by excluding the tariff as an economic hardship. RESPONDENT is not liable for the increased price because it does not satisfy the narrow exemption created by the CISG Article 79.

ii. If Article 79 Applies, CLAIMANT is Not Excused from Liability Because the Tariff was Reasonably Foreseeable and Reasonably Avoidable

79 If the Tribunal decides that Article 79 does apply to the situation, CLAIMANT is still not exempted. Under Article 79(1) of the CISG, a party is excused from liability if the impediment is not reasonably foreseeable and not avoidable [*Art.79(1) CISG*].

iii. CLAIMANT Could Reasonably Foresee the Tariff

80 CLAIMANT writes at length about how the tariffs were outside their control, but that does not imply a lack of foreseeability. Instead, "[f]luctuations of price are foreseeable events" and are "included in the normal risk of commercial activities" [*Frozen Raspberries* Case; *Tomato Concentrate* Case].

81 Moreover, CLAIMANT argues that the tariffs were an "act of government which are generally outside parties sphere of control" [sic] [*CLAIMANT's Brief 26*]. RESPONDENT concedes that the tariff was a government action, rather than the result of an action of either party. However, CLAIMANT could reasonably foresee that the Equatorianian government would impose a tariff. In their discussions around DDP, CLAIMANT admitted they were worried about tariffs and regulations, demonstrating prior consideration [*C4*]. Furthermore, CLAIMANT discusses how the government action must lead to a "failure to perform" which again is not what occurred; CLAIMANT did deliver the goods [*CLAIMANT's Brief 26*].

iv. CLAIMANT Could Reasonably Avoid or Overcome the Tariff

82 CLAIMANT did overcome the impediment. Although they took on a financial loss to do so, CLAIMANT delivered and thus, the tariff was not an impediment that prevented the delivery.

83 CLAIMANT points to a case where an American seller was delivering frozen chicken parts to a Romanian buyer [*Chicken Parts* case]. In this case, an Avian flu outbreak led the Romanian government to prohibit the import of chicken, causing the American shipment to be delayed [*Id.*]. The Romanian buyer suggested that the shipment be sent to a third-party port to speed up the delivery [*Id.*]. The Tribunal held that by failing to ship to the alternative port, the seller was keeping for themselves profits that were due to the buyer, and were not exempted under Article 79 [*Id.*].

84 CLAIMANT argues that there was no alternative port available to them, so they should not be held to the same standard as the seller in the *Chicken Parts* case. However, that point became moot as soon as CLAIMANT delivered. If the ports were closed, a seller could not deliver unless they went elsewhere. Instead, CLAIMANT delivered and absorbed the extra cost, just as the Tribunal expected the seller to do in the *Chicken Parts* case.

B. Article 79 Governs but Does Not Settle the Matter

85 Should the Tribunal accept CLAIMANT's argument that Article 79 governs but does not settle the matter, the Tribunal may look to the general principles of the CISG [*CLAIMANT Brief 109*; *Art.7(2) CISG*; *Jacobs* 425]. Furthermore, the Tribunal may rely on UNIDROIT Principles, the PECL, and other nations' laws as gap-filling tools to better understand the application of the CISG to the specific facts [*Bonell*; *UNIDROIT Principles 33*; *Flambouras 2*].

86 The Tribunal should look to the principles adopted by France and Belgium, which follow a narrow exemption for liability. Under the French Civil Code, a debtor is excused only if they are prevented or forbidden from delivering [*Art. 1147-1148 French Code*]. Belgium has adopted similar language. In one case, a Belgian court held that changes in price are foreseeable and do not create an exception under Article 79, unless the parties affirmatively write it into their contract [*Scanforn International BV & Orion Metal v. Exma*]. The Tribunal should follow the narrow interpretations of France and Belgium and reject CLAIMANT's argument that RESPONDENT pays.

87 Furthermore, the Tribunal should inform Article 79 of the CISG by looking to the PECL. The comments to Article 8:108 describe that "unlike the equivalent article of CISG[,] Article 8:108 has to apply only in cases where an impediment prevents performance" [*Flambouras* 18]. The Tribunal should affirm the PECL and find that the CISG is intended only to exempt situations that actually prevent performance [*Id.*]. Should the Tribunal instead hold that the comments distinguish the PECL from the CISG, meaning that the CISG be applied where performance is not prevented but very impractical, CLAIMANT should still not be exempt. CLAIMANT already delivered, so performance was not preventively impractical.

VI. RESPONDENT Need Not Pay the USD$1,250,000

88 CLAIMANT argues that RESPONDENT must pay the USD $1,250,000 because of their subsequent behavior, and because of the ongoing relationship between the parties [*CLAIMANT Brief 116, 119*]. Furthermore, CLAIMANT argues that RESPONDENT was the party who invoked the changed circumstances, so they should be responsible [*CLAIMANT Brief 122*].

89 RESPONDENT's subsequent behavior does not amount to acceptance of the price increase, despite CLAIMANT's assertions [*CLAIMANT Brief 116*]. CLAIMANT states that RESPONDENT's payment for the second shipment indicated acceptance of the increased price [*Id.*]. However, the delivery at issue is the third shipment of the frozen horse semen. By paying for the third delivery, RESPONDENT was merely complying with the Sales Agreement, rather than agreeing to any additional expenses. This is confirmed by Mr.

Shoemaker's letter in which he explains that he told Ms. Napravnik that he could not obligate RESPONDENT without confirmation from his superiors, and that he was under the impression that CLAIMANT had agreed to cover all costs under DDP [*R4*]. RESPONDENT's subsequent behavior did not amount to accepting the increased cost, but only compliance with the pre-existing contract.

90 CLAIMANT argues that RESPONDENT is liable due to their ongoing relationship [*CLAIMANT Brief 119*]. However, the Sales Agreement is the first such contract between the parties to this dispute, as they only recently met at Equestrian World [*C1*]. As such, there is no ongoing relationship to justify CLAIMANT's delivery.

91 Moreover, CLAIMANT asserts that the party who invoked the changed circumstances should pay. Accordingly, CLAIMANT states that they attempted to change the circumstances but that RESPONDENT stopped the negotiations [*CLAIMANT's Brief 119*]. Not only is this inaccurate–RESPONDENT fully engaged in all conversations, as demonstrated by the calls between Mr. Shoemaker and Ms. Napravnik–but it also contradicts CLAIMANT's prior argument [*R4*]. CLAIMANT previously stated that the tariff was out of their control as a government action, but later claims that they initiated the changed circumstances [*CLAIMANT's Brief 106*]. Either the circumstances were unavoidable as government action or CLAIMANT initiated the breach and thus cannot seek a remedy from RESPONDENT.

92 Lastly, the Tribunal should find that RESPONDENT is not liable for policy reasons. Forcing RESPONDENT to pay would give CLAIMANT a windfall, which is against the goal of the CISG [*Steel Tubes* case]. Furthermore, the Tribunal should follow a standard reading of the CISG to avoid forum shopping. The founding principle of the CISG was to provide uniformity across international transactions [*Art.7(1) CISG*]. Thus, allowing an unpredictable and inconsistent system would harm the CISG as a whole by chilling commercial transactions and the international economy.

93 **Conclusion to Issue 3:** CLAIMANT is not entitled to an increase in the contract price. The plain language of the Frozen Semen Sales Agreement provides that CLAIMANT is not entitled to an increase in price. Moreover, Clause 12 of the Agreement is inapplicable to the imposition of an agricultural tariff. And, the proper interpretation of CISG Article 8 is for CLAIMANT to be liable because the parties intended to implement DDP delivery. Furthermore, CLAIMANT is not entitled to any price adaptation under CISG Article 79 whether the Tribunal finds that Article 79 governs or settles the issue. Finally, the Tribunal should find that RESPONDENT is not liable because such a ruling would create perverse incentives and would contradict central, underpinning tenets of the CISG, to provide uniformity across international transactions.

PRAYER FOR RELIEF

In light of the foregoing submissions, counsel respectfully submits that the Tribunal should:

1 Find that the Tribunal does not have jurisdiction under the arbitration agreement to adapt the contract;

2 Disallow CLAIMANT to submit evidence from RESPONDENT's other arbitration proceeding.

3 Find that CLAIMANT is not allowed to adapt the contract under either Clause 12 or the CISG.

RESPONDENT also requests that the Tribunal order CLAIMANT to bear all costs of this arbitration.

(signed)

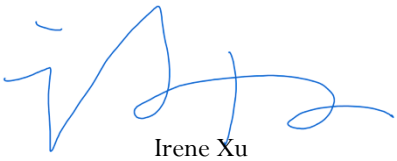
Lena Bruce

Alexis Gannaway

Aryian Kohandel-Shirazi

Rebecca Rubin

Michelle Van Sleet



Irene Xu