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MEMORANDUM FOR CLAIMANT

UNIVERSITY OF WASHINGTON SCHOOL OF LAW

SEATTLE, WASHINGTON USA

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COMMENTARIES AND ARTICLES

BUND, JENNIFER M.
Force majeure Clauses: Drafting Advice for the CISG Practitioner
Pace Law School Institute of International Commercial Law (1999)
Cited as: BUND
In paras: 99

BUSCH, DANNY
The Principles of European Contract and Dutch Law
Kluwer Law International (2002)
Cited as: BUSCH
In paras:

CISG ADVISORY COUNCIL
Opinion No. 16: Exclusion of the CISG Under Article 6 (2014)
Cited as: CISG AC OP. 16
In paras: 104, 105

Exemption of Liability for Damages Under Article 79 of the CISG
(2007)
Cited as: CISG AC OP. 7
In paras: 110, 118

CRAWFORD, JAMES
The International Law Commission's Articles on State Responsibility, Introduction, Text, and Commentaries
Cambridge University Press (2002)
Cited as: CRAWFORD
In paras: 36

ENDERLEIN, FRITZ
MASKOW, DEITRICH
Excerpt From International Sales Law
Oceana Publications (1992)
Cited as: ENDERLEIN/MASKOW
In paras: 93, 109, 112

FLETCHNER, HARRY M.
Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, *Nachfrist*, Contract Interpretation, Parol Evidence, Analogical Application, and much more
18 J. of L. & Commerce 191 (1999)
Cited as: FLETCHNER
In paras: 122

FORTESE, FABRICIO
HEMMI, LOTTA
Procedural Fairness and Efficiency in International Arbitration
3 Groningen J. of Int'l L. 110 (2015)
Cited as: FORTESE/HEMMI
In paras: 28, 29

GIRSBERGER, DANIEL
ZAPOSKIS, PAULIUS
Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption
Jurisprudencija/Jurisprudence (2012)
Cited as: GIRSBERGER/ZAPOSKIS
In paras: 111, 113

HONG KONG INTERNATIONAL ARBITRATION CENTRE
HKIAC Establishes Nomination Committee
Hong Kong International Arbitration Centre (2018)
Cited as: HKIAC Nomination Committee
In paras: 26

Frequently Asked Questions
Hong Kong International Arbitration Centre (2018)
Cited as: HKIAC FAQs
In paras: 41

Arbitration Guidelines
Hong Kong International Arbitration Centre (2018)
Cited as: HKIAC Arb. Guidelines
In paras: 39, 58

HUBER, PETER
Some Introductory Remarks on the CISG
International Handelsrecht, Sellier, European Law Publishers (2006)
Cited as: HUBER
In paras: 125

INTERNATIONAL BAR ASSOCIATION ARBITRATION GUIDELINES AND RULES SUBCOMMITTEE
Report on the reception of the IBA arbitration soft law products
International Bar Association (2016)
Cited as: IBA Soft Law Report
In paras: 39

IBA Guidelines for Drafting International Arbitration Clauses
International Bar Association (2010)
Cited as: IBA Guidelines
In paras: 58, 60

IBA Rules on the Taking of Evidence in International Arbitration
International Bar Association (2010)

Cited as: IBA Rules
In paras: 39, 40, 41, 59

ISHIDA, YASUTOSHI
CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness--Full of Sound And Fury, but Signifying Something
30 PACE INT'L L. REV. 331 (2018)
Cited as: ISHIDA
In paras: 105, 110, 111, 113, 118, 122

LEONG, HOI SENG
TAN, JUN HONG
The Law Governing Arbitration Agreements: BCY V BCZ and Beyond
Singapore Academy of Law (2018)
Cited as: LEONG/TAN
In paras: 48, 50, 51, 54

LINDSTROM, NIKLAS
Changed Circumstances and Hardship in the International Sale of Goods
Nordic J. of Commercial L. (2006)
Cited as: LINDSTROM
In paras: 110, 111

LOOKOFSKY, JOSEPH
Freedom of Contract: Convention as Supplementary Regime
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Cited as: LOOKOFSKY
In paras: 106

KLEPAC, LOVRO
The Availability of a Hardship Defense under the UN Convention on Contracts for the International Sale of Goods (CISG)
Central European University (2017)
Cited as: KLEPAC
In paras: 113

KOS, RAFAL
DUBRAS, MACIEJ
The Arbitrators' (Perceived) Power to Revise a Contract vs. the Power of the Public Policy Clause
Austrian Yearbook on International Arbitration (2014)
Cited as: KOS/DUBRAS
In paras: 70

MAGNUS, ULRICH
Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts
10 PACE INT'L L. REV. 89 (1998)
Cited as: MAGNUS
In paras: 119

MARCHISIO, GIACOMA
Rebus Sic Stantibus: A Comparative Analysis for International Arbitration
(2012)
Cited as: MARCHISIO
In paras: 65, 66

MASKOW, DEITRICH
Hardship and Force Majeure
40 AM. J. OF COMP. L. 657 (1992)
Cited as: MASKOW
In paras: 99

MEITTINEN, JENNI
Interpreting CISG Article 79(1): Economic Impediment and the Reasonability Requirement
University of Lapland (2015)
Cited as: MEITTINEN
In paras: 104, 105

NAGY, BRANDON
Unreliable Excuses: How do Differing Persuasive Interpretation of CISG Article 79 Affect its Goal of Harmony?
26 NYU INT'L L. REV. 61 (2013)
Cited as: NAGY
In paras: 109

NAZZINI, RENATO
The Law Applicable to the Arbitration Agreement: Towards Transnational Principles
65 INT'L & COMP. L. Q. 681 (2016)
Cited as: NAZZINI
In paras: 54

RIMKE, JOERN
Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts
Pace Law School Institute of International Commercial Law (2001)
Cited as: RIMKE
In paras: 99

ROMERO, MERCEDES
LÓPEZ, LUIS
Falling Oil Prices: Is it Possible to Revise the Contract Price?
Oil and Gas Newsletter October (2015)
Cited as: ROMERO/LÓPEZ
In paras: 65

SCHLECHTRIEM, PETER
SCHWENZER, INGEBORG
Commentary on the UN Convention on the International Sale of Goods (CISG)
4th ed., Oxford University Press (2016)
Cited as: AUTHOR in Schlechtriem/Schwenzer
In paras: 78, 84, 88, 89, 109, 111, 112, 129

SCHMITTOFF, CLIVE M.
Hardship and Intervener Clauses
J. OF BUS. L. 82 (1980)
Cited as: SCHMITTOFF
In paras: 99

SCHWENZER, INGEBORG
Force Majeure and Hardship in International Sales Contracts
39 VICTORIA UNIV. OF WELLINGTON L. REV. 709 (2005)
Cited as: SCHWENZER "Force Majeure and Hardship"
In paras: 105, 113, 120

SCHWENZER, INGEBORG
HACHEM, PASCAL
The CISG – Successes and Pitfalls
57 AM. J. OF COMP. L. 457 (2009)
Cited as: SCHWENZER/HACHEM
In paras: 110

SCHWENZER, INGEBORH
HACHEM, PASCAL
KEE, CHRISTOPHER
Global Sales and Contract Law
Oxford University Press (2012)
Cited as: SCHWENZER/HACHEM/KEE
In paras: 89, 101, 129

VAN HOUTTE, HANS
Changed Circumstances and Pacta Sunt Servanda
Transnational Rules in International Commercial Arbitration (1993)
Cited as: VAN HOUTTE
In paras: 66

VISCASILLAS, PILAR PERALES — Interpretation and Gap-Filling Under the CISG: Contrast and Convergence with the UNIDROIT Principles
22 UNIFORM L. REV. 4 (2017)
Cited as: VISCILLAS
In paras: 125

RULES, TREATIES, & STATUTES

CISG — United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Cited as: CISG
In paras: 78, 104, 105, 108, 109, 118, 119, 129, 131

HONG KONG INTERNATIONAL ARBITRATION CENTRE — 2013 Administered Arbitration Rules
Hong Kong International Arbitration Centre
Cited as: 2013 HKIAC Rules
In paras: 22, 34

2018 Administered Arbitration Rules
Hong Kong International Arbitration Centre
Cited as: 2018 HKIAC Rules
In paras: 22, 25, 44, 58

INTERNATIONAL CHAMBER OF COMMERCE — ICC INCOTERMS 2010
International Chamber of Commerce (2010)
Cited as: ICC INCOTERMS 2010
In paras:

PARLIAMENT OF THE UNITED KINGDOM — Arbitration Act 1996
Parliament of the United Kingdom (1996)
Cited as: ENGLISH ARB. ACT
In paras: 62

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW — UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
United Nations (2013)
Cited as: UNCITRAL Rules on Transparency
In paras: 26

UNCITRAL Model Law on International Commercial Arbitration
United Nations (2006)
Cited as: Model Law
In paras: 21, 44, 70

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
United Nations (1958)
Cited as: N.Y. Conv.
In paras: 70

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International Institute for the Unification of Private Law (2016)
Cited as: UNIDROIT
In paras: 65, 127

CASES

AUSTRIA — Oberster Gerichtshof (Supreme Court)
22 October 2001
1 Ob 77/01g
Cited as: Gasoline & Gas Oil Case
In paras: 104, 106

Oberster Gerichtshof (Supreme Court)
4 July 2007
2 Ob 95/06v
Cited as: Auto Case
In paras: 104

BELGIUM — *Scafom International BV v. Lorraine Tubes S.A.S.*
Court of Cassation (Supreme Court)
19 June 2009
C.07.0289.N
Cited as: Scafom Case
In paras: 110, 125, 126

FRANCE — *Dupiré Invicta industrie v. Gabo*
Court of Cassation – Commercial Division
17 February 2015
13-20230
Cited as: Gabo Case
In paras: 130

Société Romay AG v. SARL Behr France
Appellate Court Colmar
12 June 2001
I A 199800359
Cited as: Société Romay Case
In paras: 110

GREAT BRITAIN

Fiona Trust & Holding Corp. & Ors v. Privalov & Ors
[2007] UKHL 40
17 October 2007
Cited as: Fiona Trust Case
In paras: 62, 68

Hamlyn & Co v Talisker Distillery
[1894] UKHL A.C. 202
Cited as: Hamlyn Case
In paras: 50

Peterson Farms Inc. v. C&M Farming Ltd
[2004] EWHC 121
4 February 2004
Cited as: Peterson Farms Case
In paras: 54

Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA
[2012] EWCA Civ 638
16 May 2012
Cited as: Sulamerica Case
In paras: 46, 48, 51

ICSID

Caratube International Oil Company & Mr Devincci Salah Hourani v. Kazakhstan
ICSID
28 June 2013
ICSID Case No. ARB/13/13
Cited as: Caratube Oil Case
In paras: 27

Libananco Holdings Co. Ltd. v. Republic of Turkey
ICSID
11 August 2008
ICSID Case No. ARB/06/9
Cited as: Libananco Holdings Case
In paras: 35

ConocoPhillips Company et al v. Bolivarian Republic of Venezuela
ICSID
3 September 2013
ICSID Case No. ARB/07/30
Cited as: ConocoPhillips Case
In paras: 35

IRAN-UNITED STATES CLAIM TRIBUNAL	*Sedco, Inc. v. Islamic Republic of Iran* Iran-United States Claims Tribunal 7 July 1987 15 Iran-US C.T.R 23 *Cited as: Sedco Case* *In paras: 32*
	Computer Sciences Corp. v. Islamic Republic of Iran Iran-United States Claims Tribunal 16 April 1986 10 Iran-US C.T.R. 269 *Cited as: Computer Sciences Case* *In paras: 32*
NAFTA ARBITRATION PANEL	*Eli Lily & Co. v. Govt. of Canada* NAFTA Arbitration Panel 13 June 2013 ICSID Case No. UNCT/14/2 *Cited as: Eli Lily Case* *In paras: 27*
	Methanex Corp. v. United States NAFTA Arbitration Panel 7 August 2002 44 ILM 1345 *Cited as: Methanex Case* *In paras: 35*
NEW ZEALAND	*Hideo Yoshimoto v. Canterbury Golf International Ltd.* Court of Appeal – Wellington 27 November 2000 2000 NZCA 350 *Cited as: Golf Course Case* *In paras: 78, 84*
RUSSIA	Russian Federation Arbitration Proceeding 155/1996 of 22 January 1997 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry *Cited as: Butter Case* *In paras: 109*
SINGAPORE	*BCY v. BCZ* High Court of the Republic of Singapore 9 November 2016 [2016] SGHC 249 *Cited as: BCY Case* *In paras: 46, 48. 51*

SWITZERLAND	Bundesgerichtshof (Federal Supreme Court) 18 May 2009 4A_68/2009 *Cited as: Packaging Machine Case* *In para: 93, 97*
UKRAINE	Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade 15 February 2006 *Cited as: Coal Case* *In paras: 109*

INDEX OF ABBREVIATIONS

&	And
AC	Advisory council
Arb.	Arbitration
Ans.	Answer
Art./Arts.	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
Cl.	Claimant
Cmt.	Comment
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	*Idem* (the same)
i.e.	*Id est* (that is)
Inc.	Incorporated
Ltd.	Limited
Ltr.	Letter
No.	Number
Ntc.	Notice
Op.	Opinion
Ord.	Order
¶/¶¶	Paragraph(s)
Proc.	Procedural
R.	Respondent
U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts Investor-State Arbitration
v.	*Versus* (against)

STATEMENT OF FACTS

1. CLAIMANT, Phar Lap Allevamento, is Mediterraneo's oldest and most renowned stud farm. Hosting over 300 horses, including its own mare herd and stallion depot, CLAIMANT is a centre of excellence for horse breeding and development. Among its many services, CLAIMANT offers frozen semen for artificial insemination from its stable of champion stallions.
2. RESPONDENT, Black Beauty Equestrian, is a horse breeding corporation registered in Equatoriana. In response to the growing popularity of horse racing in the country, RESPONDENT is aggressively expanding its horse racing division.
3. On **21 March 2017**, RESPONDENT inquired into the availability of frozen semen from CLAIMANT's champion racehorse Nijinsky III [*Cl. Ex. C1*]. RESPONDENT informed CLAIMANT that a new restriction on the importation of live horses had led the Equatorianian government to temporarily lift its ban on the importation of frozen horse semen for breeding purposes [*Id.*]. Accordingly, RESPONDENT expressed its eagerness to conclude a deal because of its concern that Equatoriana would reinstate its ban on artificial insemination [*Id.*]. This was also the explanation RESPONDENT offered for requesting 100 doses from Nijinsky III [*Id.*].
4. After receiving RESPONDENT's inquiry, CLAIMANT initially expressed reservations about both the form and quantity of the order [*Cl. Ex. C2*]. However, after having suffered an unexpected financial setback in a previous breeding contract, CLAIMANT was very interested in engaging with RESPONDENT because of RESPONDENT's "outstanding reputation" and apparent interest in a "long-term mutually beneficial relationship" [*Cl. Ex. C2*; *P.O. #2* ¶29]. Therefore, CLAIMANT decided to make an exception to its general approach and begin negotiations with RESPONDENT [*Cl. Ex. C2*].
5. On **24 March 2017**, CLAIMANT proposed to send RESPONDENT 100 doses of semen from Nijinsky III for US$ 99,500.00 per dose, with delivery occurring at CLAIMANT's place of business [*Cl. Ex. C2*]. RESPONDENT accepted most of the terms but objected to both the forum selection and choice of law clauses. It also requested delivery DDP [*Cl. Ex. C2*]. Because of CLAIMANT's experiences with expensive and sudden changes to custom and import regulations, CLAIMANT was unwilling to accept the risks of delivery DDP. It therefore proposed a price increase, transfer of certain risks to RESPONDENT, and the inclusion of a hardship clause to account for potentially onerous increased shipping costs [*Cl. Ex. C4*].
6. The Parties eventually agreed on hardship, forum selection, and choice of law provisions. Tragically, before the Contract could be finalized, the Parties' negotiators were involved in a car accident. The deal was later completed by different negotiators on **6 May 2017** [*Cl. Ex. C5*].

7. The Parties agreed on three shipments of Nijinsky III semen. CLAIMANT delivered the first shipment of twenty-five doses on **20 May 2017** and the second twenty-five dose shipment on **3 October 2017**. However, prior to delivery of the final fifty dose shipment, Mediterraneo's newly elected president announced a twenty-five percent tariff on all agricultural goods from Equatoriana. This tariff came as a surprise to both Parties as the tariff was never discussed in any of the Mediterraneo president's strategy papers or in the party platform [*Ntc. Arb.* ¶9]. This tariff was met with an even more surprising retaliatory thirty percent tariff on live animals, including frozen horse semen, from Equatoriana. Not only has Equatoriana been a staunch advocate of free trade but living animal tariffs normally do not extend to horse semen [*Cl. Ex. C6*; *Ntc. Arb.* ¶¶10–11].
8. CLAIMANT immediately contacted Mr. Shoemaker, RESPONDENT's point of contact for the Contract, to inform RESPONDENT of the tariff's effect and to find a fair price increase to reflect the changed circumstances [*Cl. Ex. C7*]. RESPONDENT made clear the extreme importance of a timely delivery and appeared to generally accept the need for a price adjustment [*Cl. Ex. C8*]. Based on these representations, CLAIMANT promptly delivered the final fifty dose shipment on **23 January 2018** without an agreed-upon price adaptation [*Ntc. Arb.* ¶13]. Only later did CLAIMANT learn that RESPONDENT was in fact planning to resell the Nijinsky III samples and needed the shipment to honor its other contractual obligations [*Ntc. Arb.* ¶6; *R. Ex. R4*].
9. After the delivery of the final shipment, CLAIMANT attended an annual horse breeder conference. While there, CLAIMANT's CEO learned that RESPONDENT was involved in an earlier arbitration over the sale of a mare to a company in Mediterraneo [*Ltr. Langweiler* 50]. In that arbitration, RESPONDENT argued that Mediterraneo's twenty-five percent tariff constituted a hardship and justified a price adaptation [*Id.*]. Apparently, RESPONDENT refused to ship the horse until the Mediterranean company agreed to a price adjustment [*Proc. Ord. #2* ¶40].
10. Claimant received this information when it was approached by Mr. Kieron Velazquez [*Proc. Ord. #2* ¶40]. Prior to Mr. Velazquez's new position as CEO of one of CLAIMANT's regular customers, he worked for the Mediterranean buyer in the earlier arbitration with RESPONDENT [*Id.*].
11. On **12 February 2018**, the Parties met to discuss a price adjustment for the final shipment. During this meeting, CLAIMANT informed RESPONDENT that it had learned RESPONDENT breached the Parties' contract by reselling Nijinsky III doses to other breeders in Equatoriana [*Cl. Ex. C8*]. In response to CLAIMANT's concerns, RESPONDENT's CEO became angry and aggressive [*Id.*]. They immediately ended the meeting and its relationship with CLAIMANT, again without agreeing to a price adjustment [*Id.*].

12. After the failed **12 February 2018** meeting, CLAIMANT invoked the Contract's arbitration clause and nominated Ms. Wantha Davis as its appointed arbitrator [*Ltr. Langweiler* 28].

SUMMARY OF ARGUMENT

13. Trust is the foundation of all international contracts: trust that parties will act in good faith, trust in the parties' intent to enter into a mutually beneficial relationship, and trust that the parties will work together in the face of changing circumstances. CLAIMANT consistently carried out these expectations.
14. RESPONDENT, however, broke that trust. It lied about reselling the semen, it lied about renegotiations, and it lied about arguments made in previous arbitrations. CLAIMANT asks this Tribunal to help rebuild trust; not the trust between the Parties, but the inherent trust necessary for a functioning system of international contracting.
15. One of the first steps to restoring that trust is to allow CLAIMANT to fully plead its case. CLAIMANT seeks to admit evidence of RESPONDENT's contradictory arguments in a previous arbitration [**Issue I**]. Declining to admit the evidence results in unfair arbitral proceedings. CLAIMANT would be unable to present its case, while RESPONDENT would reap the benefits of its hypocrisy. As this arbitration is being conducted under the 2018 HKIAC Rules, those rules should determine admissibility. The 2018 HKIAC Rules call for the application of the UNCITRAL Rules on Transparency, and, ultimately, the admission of the evidence. Even if the Tribunal applies the 2013 HKIAC Rules, the evidence is still admissible.
16. Restoring trust in the contract is integral to restoring trust in the process. The Tribunal has jurisdiction to hear a claim for increased remuneration because the Arbitration Agreement includes the Tribunal's power to adapt the Contract [**Issue II**]. Mediterranean law governs the Arbitration Agreement and its interpretation because there is a strong presumption in favor of applying the law of the substantive contract. The validation principle and the separability doctrine do not rebut the presumption.
17. Under Mediterranean law, contracts are construed broadly. The Tribunal has the authority to adapt the Parties' Contract because the scope of Arbitration Agreement should be broadly construed, and the tariff resulted in a vital change [**Issue II**]. And even if the Tribunal construes the Arbitration Agreement to be governed by Danubian law, the Tribunal should still deem adaptation to be within its arbitral powers in the interest of commercial reasonableness and public policy.

18. Honoring party intent will further restore trust. The Parties intended the Contract to protect CLAIMANT from hardship related to international shipping. Because the Equatorianian tariff is a hardship specifically contemplated by the Contract, the Tribunal should adapt the Contract to award CLAIMANT US$ 1,250,000 [**Issue III**].
19. Finally, the Tribunal has the authority under Art. 79 CISG to adapt the Contract [**Issue IV**]. Therefore, whether it acts under the Contract or the CISG, relying on the trust inherent in international contract law, the Tribunal should adapt the Contract to restore the Parties' expectations and account for changed circumstances.

ARGUMENT

I. VARIOUS ARBITRAL RULES SUPPORT THE ADMISSION OF THE EVIDENCE.

20. CLAIMANT seeks to admit evidence of arguments made by RESPONDENT in a previous arbitration. The question of admissibility is within the scope of the Tribunal's jurisdiction [**A**]. Acting upon this jurisdiction, the Tribunal should admit the evidence as CLAIMANT requests [**B**].

A. The Tribunal has Jurisdiction to Rule on the Admission of the Evidence.

21. Both the Model Law and the HKIAC Rules allow the Tribunal to rule on the admission of evidence. The applicable *lex arbitri*, the UNCITRAL Model Law, provides that "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence" [*Model Law Art. 19(2)*; *see also* BORN 1851]. Parties choose to arbitrate disputes because of the flexibility and amicability offered by arbitration. Strict rules of evidence, either from the national or international level, should not be applied here. Arbitration offers freedom in the resolution of admissibility questions because "technical rules of evidence are usually not observed in arbitration, and the tribunal will err substantially on the side of permitting presentation of the facts that a party desires" [*BORN* 1853].

22. The HKIAC grants this same level of freedom. It is up to this Tribunal to decide on matters relating to "the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" [*2018 HKIAC Rules Art. 22.2*; *2013 HKIAC Rules Art. 22.2*]. It is solely within the power of the Tribunal to "admit or exclude any documents, exhibits or other evidence" [*2018 HKIAC Rules Art. 22.3*; *2013 HKIAC Rules Art. 22.3*]. Regardless of which rules the Tribunal ultimately applies, the Tribunal has, and should use, the freedom to admit the evidence related to RESPONDENT's previous arbitration.

B. The Tribunal should admit the evidence related to RESPONDENT's previous arbitration.

23. Critical evidence regarding RESPONDENT's previous arbitration should be considered admissible. General principles underlying the applicable arbitral rules support inclusion of the evidence [1]. Even if the Tribunal applies the 2013 HKIAC Rules, the evidence should still be admitted [2].

1. The applicable arbitral rules support inclusion of the evidence.

24. CLAIMANT urges the Tribunal to admit the evidence, which is the prescribed response under various arbitral rules. The 2018 HKIAC Rules [*i*], the UNCITRAL Rules on Transparency [*ii*], the New York Convention [*iii*], and the general power of tribunals to draw inferences [*iv*] all support that admission of the evidence is the proper procedural decision.

i. The 2018 HKIAC Rules do not bar the evidence.

25. Art. 45.1 of the 2018 HKIAC Rules prohibits disclosure of information relating to a confidential arbitration [*2018 HKIAC 45.1*]. But the Rules do not "prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative: (a)(i) to protect or pursue a legal right or interest of the party" [*2018 HKIAC 45.3*]. The disclosure of the previous arguments should be allowed to protect CLAIMANT's legal right to plead its case. Without this evidence, CLAIMANT would be unable to present its case to the fullest, fairest extent possible.

ii. Under the UNCITRAL Rules on Transparency, the evidence should be admitted to preserve the values of transparency and fairness.

26. Because of the close relationship between the previous arbitration and today's dispute, the 2018 HKIAC Rules should apply. Because the evidence should be admitted in this dispute governed by the 2018 HKIAC Rules, these are the rules that the Tribunal should use to determine admissibility of evidence. In 2018, the HKIAC announced the formation of a new committee designed, in part, to "enhance transparency" [*HKIAC Nominations Committee*]. This goal of enhancing transparency supports the integration of the UNCITRAL Rules on Transparency in this dispute. General principles on transparency, as codified in the UNCITRAL Rules on Transparency, dictate that when a tribunal weighs the admissibility of the evidence it should consider "(a) The public interest in transparency in … the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute" [*UNCITRAL Rules on Transparency Art. 1(4)*].
27. If a decision has an effect on the general public, then the public will, "by extension[,] have an interest in its management, including procedural time lines, evidentiary standards and expert witness statements" [*Eli Lilly Case*]. Declining to admit evidence that is in the public domain reduces market transparency, which is essential for business entities to be open and amicable with each other. Evidence obtained from a public source should be admitted to avoid an unreasonable decision [*Caratube Oil Case*]. A decision that has not considered available evidence is a conclusion that is incomplete, unsound, and unfair overall. A third party approached CLAIMANT with information about RESPONDENT's previous arbitration; this information was publicly available through no bad faith on CLAIMANT's part [*Proc. Ord. #2* ¶40].
28. The information relating to RESPONDENT's arguments in the previous arbitration should be admitted into evidence in the interest of resolving this dispute fairly and efficiently. Arbitration is designed to reach a fair conclusion between parties. Scholars recognize the inherent tension between obtaining efficient resolution of a dispute and arriving at a "well-founded outcome"

[*FORTESE/HEMMI* 116]. Admission of the evidence is fair because RESPONDENT argued CLAIMANT's position in a previous arbitration. This fact indicates that not only does CLAIMANT's argument have merit today, but RESPONDENT sees and does not challenge that merit.

29. Further, arbitrators ought to be "'courageous enough' to use their procedural discretion" in order to promote efficiency whenever possible [*Id.*]. Admission of the evidence promotes efficiency because it will prevent RESPONDENT from concealing the arguments it made on this very topic in a previous proceeding duplicating arbitral efforts in an underhanded, dishonest manner. Promoting transparency in this proceeding promotes fair dealing, good faith, and amicable resolution: the basic tenets of arbitration.

iii. The New York Convention encourages that the Tribunal admit the evidence.

30. The New York Convention requires that a party be able to present its case [*N.Y. Conv. Art. V(1)(b)*; *see also BORN* 1765]. Generally, "arbitral tribunals are acutely conscious of their obligations . . . to afford each party the opportunity to present its case. Defects in evidence are therefore usually taken into account in evaluating its credibility, weight and value, rather than rulings on admissibility" [*BORN* 1853]. An award rendered by this Tribunal without the admission of this evidence would be unenforceable under the New York Convention. For the sake of efficiency, the Tribunal should admit this evidence.

iv. The Tribunal may draw a negative inference from RESPONDENT's refusal to cooperate.

31. If RESPONDENT declines to provide more information related to CLAIMANT's discovery, the Tribunal should take RESPONDENT's recalcitrance as an indication that CLAIMANT's extrapolations have merit.
32. This Tribunal is "permitted to rely on presumptions or inferences regarding evidence" [*BORN* 1855]. Further, the Tribunal may draw "negative inferences drawn from a party's failure to produce obviously material documents or witnesses in its control" [*Id.*; *Sedco Case*; *Computer Sciences Case*]. The Tribunal should apply this rationale to the evidence at issue and infer that Velazquez's assertions of RESPONDENT's prior arbitration are true and that RESPONDENT is attempting to unjustly benefit from its change of argument.

2. <u>The doctrines of clean hands and privilege require admission of the evidence under the 2013 HKIAC Rules.</u>

33. Despite RESPONDENT'S contention otherwise, the evidence is still admissible under the 2013 HKIAC Rules. If the Tribunal does not apply the 2018 HKIAC Rules, and therefore does not look to the UNCITRAL Rules on Transparency, the Tribunal should follow the two-step approach

applied by other tribunals: if the party submitting the evidence has "clean hands" in the public disclosure of the evidence, and the evidence in question is not privileged, then tribunals should admit the evidence [*Bergsten Lecture, Vienna, Austria, 2018*]. Therefore, the evidence is admissible for two reasons. First, the 2013 HKIAC Rules allow for the admission of this evidence [*i*]. Second, applying the two-step approach yields the same result. CLAIMANT played no role in the document leak and therefore should not be punished with the exclusion [*ii*], the IBA Rules inform the privilege standard by implementing a standard of fairness and support the admission of the evidence [*iii*].

i. The 2013 HKIAC Rules allow the admission of the evidence.

34. Identical to the standard set form in the 2018 HKIAC Rules, the 2013 HKIAC Rules indicate that "provisions in Article 42.1 do not prevent the publication, disclosure or communication of information referred to in Article 42.1 by a party" when it is to protect a legal right or interest [*2013 HKIAC Rules Art. 42.3*]. Pursuant to the New York Convention, as discussed in [**2**][**A**] above, this requires the Tribunal to admit the evidence to satisfy CLAIMANT's legal right to plead its case.

ii. The Tribunal should consider CLAIMANT's clean hands in weighing admissibility of the evidence.

35. The confidential documents related to the previous arbitration were disclosed through no fault of CLAIMANT. Its lack of involvement in this development must not be punished. Tribunals from across jurisdictions have applied a "clean hands" standard [*ConocoPhillips Case*; *Methanex Case*; *Libananco Holdings Case*].

36. CLAIMANT was neither aware of, nor involved in, the original dissemination of the information. Although RESPONDENT may complain that the evidence was improperly disclosed, CLAIMANT came upon the evidence by chance. CLAIMANT did not seek out impeaching evidence about RESPONDENT; a third party approached CLAIMANT with this information on its own accord [*Ltr. Langweiler* 49]. If two former employees of RESPONDENT disclosed the evidence, thereby breaching their confidentiality agreement [*Ltr. Fasttrack* 51], while CLAIMANT is sympathetic, RESPONDENT should seek to recover damages through a breach of contract claim against those employees. Where the source of the information is outside the scope of the arbitration and the discovery is no fault of CLAIMANT's, RESPONDENT should bear the consequences. RESPONDENT could seek an investigation of, and damages from, the hackers. RESPONDENT was also irresponsible in protecting its sensitive information: RESPONDENT "used an outdated firewall to protect its computer system which had made it easy for the hackers to enter the system" [*Proc. Ord. #2* ¶42]. Where a party is harmed through its own actions, the opposing party should not be prejudiced [*CRAWFORD* 240–41]. CLAIMANT should not be deprived of its legal right because of RESPONDENT's negligence in the

management of its computer system. While RESPONDENT may have legal recourse against the bad actors, that dispute is irrelevant to CLAIMANT and outside the scope of this arbitration.

37. Finally, CLAIMANT has acted in good faith throughout its interactions with RESPONDENT. CLAIMANT carried through with the shipment even when concern regarding the tariffs arose [*Cl. Ex. C8*]. At the same time, RESPONDENT urged CLAIMANT to set aside the issue of the tariffs for a later time in anticipation of breaching its contractual obligations not to resell the product [*Ntc. Arb. ¶ 6*]. Despite this, CLAIMANT continued in good faith by attempting to renegotiate the Contract because it sought a long-term relationship with RESPONDENT [*Cl. Ex. C2, C8*]. Now, it is with this same value of good faith that CLAIMANT seeks to introduce the evidence.
38. The Tribunal should follow the doctrine of clean hands and decline to punish CLAIMANT for attempting to introduce relevant information presented to it by a third party.

iii. Under the IBA Rules, the information should not be considered privileged.

39. The documents themselves should not be protected for any reason of privilege. While the IBA Rules are not binding, the HKIAC points to these rules as "a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration" [*HKIAC Arb. Guidelines*]. The Parties need not have agreed to apply the IBA Rules of Evidence; rather it is within the Tribunal's authority to determine to apply the IBA Rules, which "shall govern the taking of evidence" [*IBA Rules Art. 1(1)*]. Because the IBA Rules are "almost universally recognized as the international standard for an effective, pragmatic, and relatively economical document production regime," their application would comport with international standards [*REDFERN/HUNTER* 6.107]. Nearly half of the international arbitrations surveyed use these IBA Rules, with 57% of the arbitrations taking place in the region that primarily employs the HKIAC Rules [*IBA Soft Law Report* 9–10]. The broad international adoption of the IBA Rules, as well as the HKIAC's explicit reference to them, indicates that their application is an appropriate exercise of the Tribunal's authority. Neither Party would be caught unaware by their application.
40. The IBA Rules provide insight into why this information should not be considered privileged. In considering the admissibility of challenged evidence, the Tribunal "may take into account . . . the need to maintain fairness and equality as between the Parties" [*IBA Rules Art. 9(3)*]. Excluding evidence that RESPONDENT previously took a contrary position on this argument would disadvantage CLAIMANT and allow RESPONDENT to benefit from its dishonesty.
41. If RESPONDENT is truly concerned with the disclosure of a confidential argument, the Tribunal has the ability to keep the evidence confidential in the future while still admitting it in this dispute. The

IBA Rules allow a tribunal to "make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection" [*IBA Rules Art. 9(4)*]. Traditionally, the HKIAC does not publish arbitral awards, and any document produced by a Party to the arbitration would be kept confidential [*IBA Rules Art. 3.13*; *HKIAC FAQs*]. While CLAIMANT contends that the disclosure of this evidence is in the best interest of transparency and fairness moving forward, the Tribunal can keep the evidence from being exposed beyond this arbitration.

42. Thus, RESPONDENT's contradictory legal stance in its prior arbitration should be admitted as non-privileged evidence, or, at the very least, admitted with the caveat of confidentiality.

II. THE TRIBUNAL HAS JURISDICTION TO HEAR A CLAIM FOR INCREASED REMUNERATION BECAUSE THE ARBITRATION AGREEMENT INCLUDES THE TRIBUNAL'S POWER TO ADAPT THE CONTRACT.

43. The Tribunal has jurisdiction to hear a claim on the issue of Contract adaptation because Mediterranean law allows for broad interpretation of contracts. The Tribunal has the authority to rule on its own jurisdiction regarding its power to adapt the Contract [**A**]. Further, Mediterranean law governs the Arbitration Agreement and its interpretation [**B**]. Applying Mediterranean law to the Arbitration Agreement, the Tribunal has the power to adapt the Contract [**C**].

A. The Tribunal Has the Authority to Rule on Its Own Jurisdiction.

44. Tribunals have the right to determine their own jurisdiction under the doctrine of *Kompetenz-Kompetenz* [*REDFERN/HUNTER* 5.99; *BORN* 853]. The selected procedural rules, the 2018 HKIAC Rules, and the relevant *lex arbitri*, the UNCITRAL Model Law [hereinafter Model Law], affirm the application of *Kompetenz-Kompetenz* to this case [*2018 HKIAC Rules Art. 36.1*; *Model Law Art. 16(1)*]. Therefore, the Tribunal has the authority to rule on its own jurisdiction.

B. Mediterranean Law Governs the Arbitration Clause.

45. Mediterranean law, which governs the substantive contract, also governs the arbitration clause. When the law of the substantive contract and the law of the seat are different, the HKIAC model clause encourages the inclusion of language expressly indicating the governing law of the arbitration agreement [*HKIAC Model Clauses*]. Although the law of the substantive contract and law of the seat of arbitration are different in this dispute, neither party clarified which law governs the arbitration clause. In this case, the 2018 HKIAC Rules do not provide a default rule regarding which law ought to govern. However, guidance developed by similar tribunals strongly weighs in favor of applying the law of the substantive contract.

46. Other tribunals have applied a three-step inquiry to determine whether the law of the substantive contract or the law of the seat applies to an arbitration agreement: (1) whether an express choice has been made by the parties; and (2) in the absence of an express choice, whether an implied choice had been made; and (3) finally, if the parties neither expressly or impliedly made any choice, the applicable law is the one that has the closest and most real connection to the arbitration agreement [*Sulamerica Case*; *BCY Case*]. Applying this inquiry here, the law of the substantive contract governs.
47. The Parties did not select an express choice of law for the arbitration clause. Therefore, the Tribunal proceeds to the second step: whether the parties made an implied choice of law. The Tribunal should find that the Parties impliedly selected Mediterranean law because in the absence of an express choice, there is a strong presumption for the law of the substantive contract [1]. Furthermore, the validation principle does not negate this presumption [2], and the doctrine of separability also dictates that the law of the substantive contract governs [3].

1. There is a strong presumption in favor of following the law of the substantive contract.

48. When parties do not expressly state otherwise, there is a strong presumption that they intend to subject all their disputes to the same body of law that already governs the underlying contract [*Sulmerica Case*; *LEONG/TAN* 79; *REDFERN/HUNTER* 3.12; *BORN* 446–47, 449 (*see* fn 182, 184)]. This presumption flows from the rationale that arbitration clauses are typically negotiated as part of the main contract and are not likely to be negotiated separately [*LEONG/TAN* 74 citing *BCY Case*] Only if the arbitration agreement is a freestanding document should the law of the seat be considered the implied choice [*BCY Case*]. Furthermore, the presumption is strengthened because many parties choose arbitrations to avoid peculiar jurisdictional and choice-of-law complexities [*BORN* 455, 456]. Applying the law of the substantive contract to the Parties' arbitration agreement avoids complexities and uncertainties that would likely result from other approaches [*Id.*].
49. CLAIMANT submits that because the Parties negotiated the contract as a whole, rather than as two separate agreements, the Tribunal should presume that the law of the substantive contract governs the arbitration clause. Furthermore, CLAIMANT emphasized to RESPONDENT in its 11 April 2017 email that its offer rested on the condition that the law of the substantive contract be Mediterranean law [*R. Ex. R2*]. The negotiation process also demonstrates that the Parties intended the law governing the arbitration agreement to be the same as the law governing the Contract. Notably, RESPONDENT did not take any action to overcome the presumption by proposing a different law. RESPONDENT thereby impliedly agreed that the law of the substantive contract would govern the arbitration clause. To avoid complexity and uncertainty, the presumption should be applied.

2. The validation principle does not disturb this presumption.

50. RESPONDENT cannot rely on the validation principle to rebut this presumption because Mediterranean law does not invalidate the arbitration clause. Arbitral tribunals, national legislatures, and courts increasingly embrace a "validation principle,"—or *favorem validitatis*—which states that an arbitration agreement should be considered valid to the fullest extent possible [*BORN* 497, 503; *LEONG/TAN* 80]. The validation principle exists because it is more reasonable to hold that the parties contracted with the intent of giving effect to every clause, rather than of "mutilating or destroying" one of the most important provisions and rendering it "mere waste paper" [*LEONG/TAN* 81, citing *Hamlyn Case*; *See BORN* 456–57, 498–99].
51. Applying this principle to arbitration clauses, if the substantive law would invalidate the arbitration clause it should not be applied to that clause [*LEONG/TAN* 81–82; *BORN* 448, 500]. For instance, although the *Sulamerica* Tribunal supported application of the substantive law of the main contract in principle, it ultimately concluded that the law of the seat of arbitration governed because the substantive law would have invalidated the arbitration agreement [*Sulamerica Case*; *see also BCY Case*].
52. Because neither Party asserts that Mediterranean or Danubian law invalidates the arbitration clause, the validation principle does not prevent the Tribunal from following the strong presumption in favor of applying the law of the substantive contract.

3. The substantive contract and the Arbitration Agreement are separate for only a limited purpose.

53. RESPONDENT incorrectly relies on the doctrine of separability to claim that the law of the substantive contract does not apply to the arbitration clause [*Ans. Ntc. Arb.* ¶14]. RESPONDENT ignores that the doctrine of separability is a narrow doctrine used only to avoid invalidating the arbitration agreement in cases where the substantive contract becomes null or void [*LEONG/TAN* 75]. As RESPONDENT does not contend that the Contract is null or void, the doctrine is inapplicable.
54. The doctrine of separability stands for the proposition that "the arbitration clause in a contract is considered to be separate from the main contract . . . and, as such, survives the termination of that contract" [*REDFERN/HUNTER* 2.89]. Further, the separability presumption means that the substantive contract and the arbitration agreement are "severable" in only limited circumstances, and not automatically "separate" [*BORN* 354, 412; *NAZZINI* 681, 684]. In addition, other tribunals have explicitly stated that notwithstanding the express recognition of the separability of the arbitration agreement, the arbitration clause is governed by the law of the underlying contract [*BORN* 475, citing *Peterson Farms Case*]. RESPONDENT's approach moves the doctrine of separability beyond its narrow

purpose, thereby undermining the legitimate expectations of parties who made the conscious decision to include their arbitral clause as part of the main contract rather than keep it as a separate document [*See LEONG/TAN* 79].

55. Therefore, because the strong presumption for applying the law of the substantive contract is applicable regardless of the validation principle and doctrine of separability, the implied choice of law for arbitration agreement remains that of Mediterraneo.

C. Under the Arbitration Clause, the Tribunal Has the Authority to Adapt the Contract.

56. The Tribunal has jurisdiction over this dispute and therefore has the power to adapt the Contract. The law of Mediterraneo provides for a broad interpretation of arbitration agreements. Given this broad interpretation, as well as the internationally-accepted meanings of the "scope" of an arbitration agreement [1] and "disputes arising out of" a contract [2], the Arbitration Agreement extends to a claim for increased remuneration. Furthermore, the Tribunal can adapt this Contract because the abrupt tariff increase resulted in a vital change to the original contractual circumstances [3]. Even if the Tribunal applies Danubian law to the interpretation of the arbitration agreement, principles of commercial reasonability and public policy nonetheless permit the Tribunal to adapt the contract [4].

1. The scope of the Arbitration Agreement is broad and allows for contractual adaptation.

57. Both the HKIAC and the international arbitration community at large construe agreements broadly enough to permit adaptation when necessary. The scope of the Parties' Arbitration Agreement should therefore encompass contractual adaptation for increased remuneration.

58. Art. 19.1 of the 2018 HKIAC Rules specifies that the "arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement." The IBA Guidelines for Drafting International Arbitration Clauses can provide insight to the purpose of this article. Although not binding, the Guidelines "are designed to help achieve effective arbitration clauses which unambiguously embody the parties' willingness to have their dispute(s) resolved by arbitration" [*HKIAC Arbitration Guidelines*]. "Scope" refers to the type and range of disputes that are subject to arbitration [*IBA Guidelines Art. 3(14)*]. Unless otherwise stipulated, the scope of an arbitration clause should be construed broadly to encompass all disputes "arising out of" a contract, as well as disputes "in connection with" or "relating to" a contract [*Id.*]. Importantly, when parties include an arbitration agreement in their contract, they usually intend its scope to encompass any and all disputes unless a specific exception is expressly stipulated [*REDFERN/HUNTER* 2.57–59].

59. Because the default scope of arbitral jurisdiction is so broad, the IBA Guidelines prescribe specific language to narrow jurisdiction, and still caution that this language does not necessarily strip tribunals of jurisdiction. If parties do want to exclude a specific type of dispute from a tribunal's jurisdiction, the IBA Guidelines highly recommend usage of the following text: "Except for matters that are specifically excluded from arbitration hereunder, all disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under [selected arbitration rules]" [*IBA Rules Art. 3(19)*]. The IBA Guidelines emphasize that even express exclusions written into the arbitration agreement may nonetheless be arbitrable: "The parties should bear in mind that, even when drafted carefully, exclusions may not avoid preliminary arguments over whether a given dispute is subject to arbitration" [*Id.*]. Thus, tribunals may rule on matters of arbitrability despite the parties' express wishes otherwise [*Id.*].
60. The Arbitration Agreement does not contain language that explicitly, or even implicitly, states that disputes regarding adaptation for increased remuneration are excluded from the Tribunal's jurisdiction [*Cl. Ex. C5*]. RESPONDENT could have used the template provided by the IBA Guidelines if it wanted to exclude adaptations to the contract from being subject to arbitration [*IBA Guidelines Art. 3(19)*]. RESPONDENT's failure to do so, combined with the common practice of broadly construing the scope of arbitration agreements, confirms this dispute is arbitrable.

2. <u>The Parties' dispute over adaptation of the Contract is a dispute "arising out of" the Agreement.</u>

61. The Parties' Arbitration Agreement includes the phrase "arising out of," which should be broadly construed to grant the Tribunal authority to adapt the contract.
62. The term "dispute" has a broad meaning in international arbitration [*BERGER* 1376]. "Disputes" encompass not only genuine legal disputes, but also mere differences of opinion [*Id.*; *English Arbitration Act Art. 82(1)*; *REDFERN/HUNTER* 2.60; *BRUNNER* 496]. Tribunals construe the phrase "arising out of" to include all disputes capable of being submitted to arbitration, which would include a demand for increased remuneration. [*REDFERN/HUNTER* 2.61]. If a party wants to exclude certain disputes, it should do so expressly [*Id.*; *see generally Fiona Trust Case*]. Therefore, in the absence of clear language to the contrary, the parties are assumed to have intended to apply comprehensive meaning to the term "any dispute arising out of" [*Fiona Trust Case* ¶7, 27].
63. The Parties' use of the phrase "arising out of" encompasses disputes regarding adaptations for increased remuneration [*Cl. Ex. C5*; *Ntc. Arb.* ¶14, 16]. RESPONDENT claims that it removed

everything that can be interpreted to broaden the scope of the arbitration clause [*Ans. Ntc. Arb.* ¶*13*]. But merely deleting the terms that are synonymous to "dispute" (e.g., difference, claim, or controversy) does not support RESPONDENT's position [*Id.*; *Cl. Ex. C5*]. If RESPONDENT wanted to exclude any type of dispute from the definition, it should have explicitly stated exclusions rather than expecting the Tribunal to narrowly interpret terms that are traditionally construed broadly.

3. Imposition of the tariff is a change of contractual circumstances, which places adaptation within the Tribunal's authority.

64. The vital change in contractual circumstances—the abrupt tariff enactment—necessitates that the Tribunal adapt the contract to allow increased remuneration.

65. While it is true that most tribunals "shrink from changing the terms of a contract unless the arbitration agreement provides th[at] tribunal with the express power," they will do so absent an express provision if the circumstances surrounding the original contract have changed considerably [*REDFERN/HUNTER* 9.68]. That is to say, the change must have been "unforeseen, substantial, and fundamental" [*ROMERO/LÓPEZ* 12; *see also MARCHISIO* 16 *quoting BUSCH* (modification may be ordered in cases of "unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained unmodified"]. When such a considerable change has occurred, the contract can be adapted under the doctrine of *rebus sic stantibus* [*REDFERN/HUNTER* 9.69]. This doctrine holds that contracts are binding only "so long as things stand as they are" [*Id.*] If a "vital change" of circumstances occurs, however, then the express contract terms may need to be adapted to compensate for the changed situations [*Id.*]. *Rebus sic stantibus* is "well developed in public international law" [*Id.* n.81] and is "destined to find an increasing application" [*MARCHISIO* 4]. The UNIDROIT concept of hardship supports and parallels this doctrine and permits adaptation in certain circumstances [*Art. 6.2 UNIDROIT*]. Despite the lack of an explicit reference in the arbitration agreement, the change in circumstances authorizes the Tribunal to adapt the Contract.

66. The circumstances surrounding the Contract drastically changed when the President of Equatoriana implemented the thirty percent tariff on imported animal products from Mediterraneo [*Ntc. of Arb.* ¶10]. This constitutes a "vital change," as CLAIMANT's profit margin went from five percent to negative twenty-five percent [*Id.* ¶18]. It is not reasonable to expect that CLAIMANT would have agreed to the Contract had it known it would suffer a net monetary loss. CLAIMANT did not know—and, based on Equatoriana's history as a proponent of free trade, had no reason to know—that trade policy would be upended overnight. The tariffs were unforeseeable and thus not comparable to

mere political variances, which are potentially foreseeable and therefore do not trigger a tribunal's application of *rebus sic stantibus* [*See MARCHISIO* 16, 17*; VAN HOUTTE* 116]. The Parties could not have reasonably anticipated this considerable change in the circumstances surrounding the Contract, and therefore, the Tribunal may engage in *ex post facto* adaptation.

4. Even if Danubian law applies, contractual adaptation is a commercially reasonable response to the sudden tariff and is in the interest of public policy.

67. The trend towards broad interpretation of arbitration agreements in international law, as well as public policy at large, supports the Tribunal's adaptation powers despite Danubian arbitration rules.
68. In general, arbitrators are likely to take a less restrictive approach than courts when it comes to issues of arbitrability [*REDFERN/HUNTER* 2.59]. Parties often choose arbitration for this reason. It is both practical and efficient to try to resolve all disputes between parties in the same set of proceedings [*Id.* 2.61–62]; *Fiona Trust Case*].
69. Common practice in international arbitration is trending away from the formal "all-or-nothing" rule of sanctity of contracts (*pacta sunt servanda*) [*BERGER* 1377–78]. *Pacta sunt servanda* is often replaced with a more flexible and pragmatic approach based on fair dealing and reasonableness [*Id.*]. Especially in long-term arrangements, a blind insistence on the application of *pacta sunt servanda* is impractical [*Id.* n.130]. Instead, the well-developed international doctrine of *rebus sic stantibus* is implied [*REDFERN/HUNTER* 9.69].
70. Additionally, tribunals have long placed great importance on the interests of promoting international trade and comity when weighing the arbitrability of disputes [*REDFERN/HUNTER* 2.114–16]. Both the New York Convention and the Model Law emphasize the importance of an arbitration award that adheres to the public policy of the countries in which it is recognized and enforced [*N.Y. Conv. Art. V(2)(b)*; *Model Law Art. 34(2)(b)(ii)*]. One principle of contract law that forms part of Polish public policy is that "the compensation should reflect the damage (the full compensation principle)" [*KOS/DUBRAS* 143–44]. Polish Contract Law is based almost entirely on the UNCITRAL Model Law and, therefore "shares the common features of all Model Law jurisdictions" [*Id.* 136]. The full compensation principle is also codified in the Art. 7.4.2 UNIDROIT.
71. The full compensation principle is highly likely to influence the public policy considerations of the countries in which the arbitral award could be recognized or enforced given the applicable Model Law, UNIDROIT, and New York Convention principles [*Proc. Ord. #1* III, 4]. The dispute over adaptation for increased remuneration was the direct result of the thirty percent tariff increase. Without adaptation for increased remuneration, the compensation that CLAIMANT has thus far

received does not reflect the damage it incurred. The damage—the 100 doses of horse semen and the negative profit margin of twenty-five percent—would be significantly more than the compensation it received from RESPONDENT [*Ntc. Arb.* ¶18; *Cl. Ex. C7*]. Additionally, taking into consideration the modern trend away from *pacta sunt servanda*, the Tribunal can adapt the contract.

72. Current Danubian law adheres to an unreasonably narrow, inflexible, and outdated standard [*See Ans. Ntc. Arb.* ¶16; *Proc. Ord. #1* II]. Accordingly, this Tribunal should adopt the more flexible, Mediterranean approach. However, even if Danubian law is chosen, the Tribunal should nonetheless apply *rebus sic stantibus* because the Tribunal's primary concern is maintaining commercial reasonableness.

73. Therefore, irrespective of whether Danubian or Mediterranean law governs the Arbitration Agreement, the Tribunal has the authority to adapt the contract. To rule otherwise would go against the well-established full-compensation principle and the current trend in international arbitration toward the more flexible, *rebus sic stantibus* approach to contractual adaption.

III. UNDER CLAUSE 12, CLAIMANT IS ENTITLED TO US$ 1,250,000.

74. CLAIMANT is entitled to the payment of US$ 1,250,000 under Clause 12 of the Contract. The 30% tariff levied by the Equatorianian government created severe financial hardship for CLAIMANT [**A**]. This is precisely the type of hardship that Clause 12 remedies [**B**]. The remedy provided by Clause 12 is renegotiation or, subsequently, adaptation [**C**].

A. The Equatorianian Tariff Has Caused CLAIMANT Financial Hardship

75. The unforeseen Equatorianian tariff fundamentally altered the equilibrium of the Contract and caused CLAIMANT financial hardship. Hardship does not have a clearly defined scope [*RIMKE*]. Rather, it should be evaluated based on the subjective effect on the person concerned [*Id.*]. It can include any matter of appreciable detriment, including financial harm [*Id.*].

76. CLAIMANT carefully calculated its costs to retain 5% of the 15% profit it typically receives from artificial insemination transactions [*Proc. Ord. #2* ¶31]. Due to the imposition of the tariff, shipping the semen cost an additional US$ 300,000. Because CLAIMANT paid this cost upfront, relying on RESPONDENT's "promise that a solution would be found" [*Cl. Ex. C8*], CLAIMANT is now facing a 25% loss on the transaction. This loss will seriously endanger CLAIMANT's ability to meet the requirements of its creditors, likely resulting in CLAIMANT's financial ruin [*Proc. Ord. #2* ¶29]. Thus, the retaliatory tariff constitutes a significant financial hardship for CLAIMANT triggering Clause 12.

B. Clause 12 Contemplates Financial Hardships Resulting from Import Restrictions.

77. CLAIMANT is facing the exact type of hardship covered by Clause 12. The Parties included hardship language in Clause 12 specifically to protect CLAIMANT from onerous risks associated with international shipping. The Clause balances RESPONDENT's need for expedited delivery and CLAIMANT's desire to avoid costs stemming from "custom regulations and import restrictions." [*Cl. Ex. C4*]. Although Respondent initially proposed a standard DDP term, the Parties' negotiations and Contract demonstrate this was a DDP agreement in name only. Clause 12 allocates risks traditionally associated with ICC INCOTERMS 2010 DDP, including costs related to import restrictions, away from CLAIMANT and onto RESPONDENT.

78. When there is a disagreement as to the scope of a contractual provision, the Tribunal should effectuate party intent [*Art. 8 CISG*]. If a party knew, or could not have been unaware, of the other party's subjective intent at the time of contracting, that subjective intent governs [*Art. 8(1) CISG*]. If the subjective intent is unclear, the contract must be interpreted according to the understanding of a reasonable person in the same position as the other party [*Art. 8(2) CISG*]. In either situation, due consideration must be given to all relevant circumstances, including the Parties' knowledge, their negotiations, and the structure of the Contract itself [*Art. 8(3) CISG*; *SCHMIDT-KESSEL in Schelectriem/Schwenzer Art. 8* ¶30; *Golf Course Case*]. Here, RESPONDENT knew, or could not have been unaware, that CLAIMANT understood Clause 12 to protect it from increased costs caused by import restrictions [1]. Further, a reasonable person in RESPONDENT's position would understand Clause 12 applies to the retaliatory tariff [2].

1. RESPONDENT knew, or could not have been unaware, that Clause 12 protects CLAIMANT from import restrictions causing financial hardship.

79. RESPONDENT consistently demonstrated its awareness that CLAIMANT's agreement to a modified DDP term was contingent upon inclusion of a hardship clause. Throughout negotiations, CLAIMANT communicated its unambiguous intent to avoid risks traditionally associated with DDP [i]. Further, Respondent expressed its understanding of CLAIMANT's intent throughout its communications [ii]. Therefore, the "comparable unforeseen events making the contract more onerous" referenced in Clause 12 include the present tariff.

i. CLAIMANT communicated its intent to avoid risks associated with traditional DDP shipping.

80. CLAIMANT consistently stated it was "not willing to take over any further risks associated with [DDP], in particular those associated with changes in customs regulation or import restrictions" [*Cl. Ex. C4*]. CLAIMANT expressed concern these risks would destroy the commercial viability of the

deal, and insisted upon a hardship clause that covered these concerns [*Id.*]. CLAIMANT agreed to take on the shipping of the semen, but made clear it would not accept the increased costs associated with that shipping [*Id.*]. Therefore, the Tribunal should find that Claimant unambiguously communicated its intent to avoid responsibility for increased costs associated with DDP.

ii. RESPONDENT knew, or could not have been unaware, that CLAIMANT intended to avoid the risks of import restrictions.

81. RESPONDENT requested DDP to benefit from CLAIMANT's "greater experience in the shipment of frozen semen, including the necessary export and import documentation"—not to burden CLAIMANT with increased costs [*Cl. Ex. C3*]. Because the Parties agreed that Claimant should not bear increased shipping costs, the Parties agreed to regulate such costs with a hardship clause [*Cl. Ex. C4*; *Ans. Ntc. Arb.* ¶4]. The Parties eventually settled on the present Clause when RESPONDENT, referencing the concerns in CLAIMANT's 31 March 2017 email, suggested the hardship language now incorporated [*Proc. Ord. #2* ¶12]. This illustrates RESPONDENT's knowledge that CLAIMANT wished to avoid risks from the DDP term. Therefore, RESPONDENT knew that relying on CLAIMANT's shipping expertise would entail it shouldering increased costs from custom regulations and import restrictions [*Cl. Ex. C3–5*].
82. RESPONDENT's knowledge of CLAIMANT's previous trouble with changing custom regulations demonstrates its understanding that CLAIMANT was unwilling to bear increased costs from DDP [*Proc. Ord. #2* ¶21]. CLAIMANT's past experience with an unforeseen quarantine led to a 40% increase in expenses and brought significant financial hardship to CLAIMANT [*Id.*]. RESPONDENT learned of CLAIMANT's rumored financial situation stemming from this transaction prior to its negotiations with CLAIMANT [*Id.* ¶22]. RESPONDENT confirmed this knowledge when CLAIMANT deliberately described the disastrous Danubian deal during deliberations [*Cl. Ex. C4*]. Accordingly, RESPONDENT could not have been unaware of CLAIMANT's intent for Clause 12 to protect it from onerous costs imposed by unforeseen international shipping restrictions.

2. Under Article 8(2) CISG, a reasonable person in RESPONDENT's position would understand CLAIMANT intended to avoid onerous costs through Clause 12.

83. Even if the Tribunal finds RESPONDENT did not know or was unaware of CLAIMANT's intent, a reasonable person in RESPONDENT's position would understand the onerous tariff to be a "comparable unforeseen event" encompassed by Clause 12. Because CLAIMANT stated its intent to avoid risk associated with import restrictions throughout negotiations, a reasonable person in RESPONDENT's position would interpret "comparable unforeseen events" to include the present

tariff [*i*]. Further, the structure of the Contract supports this understanding [*ii*]. Finally, interpreting the language "other such circumstances" to exclude tariffs would render the clause meaningless [*iii*].

i. The Parties negotiated Clause 12 to protect CLAIMANT from onerous shipping costs.

84. A reasonable person in RESPONDENT's position would understand Clause 12 protects CLAIMANT from onerous shipping costs related to DDP. In deciphering the objective intent of RESPONDENT, the Tribunal should look to the prior negotiations [*SCHMIDT-KESSEL in Schlechtriem/Schwenzer Art. 8* ¶29; *Golf Course Case*]. Here, the negotiations show that the Parties intended to rely on CLAIMANT's shipping expertise in exchange for RESPONDENT bearing shipping risks [*Cl. Ex. C3–4*].
85. A reasonable person in RESPONDENT's position would understand that RESPONDENT took on the risk of increased costs caused by import restrictions to access CLAIMANT's shipping expertise. As discussed above, RESPONDENT's need for expedited delivery resulted in it assuming risk traditionally borne by the seller [*Cl. Ex. C3–5*]. A reasonable person would understand the Parties' correspondences as establishing this transfer of risk in exchange for expedited delivery.
86. Additionally, a reasonable person in RESPONDENT's position would have understood that CLAIMANT intended to engage in a commercially sustainable transaction [*Cl. Ex. C2*, *C4*, *C8*]. For example, when RESPONDENT requested a more competitive price, CLAIMANT reiterated that it had already offered a lucrative deal [*Cl. Ex. C4*]. Further, when RESPONDENT insisted on modifying CLAIMANT's requested shipping terms, CLAIMANT increased the cost per dose by US$ 1,000 to specifically counter the fixed costs associated with physical delivery to Equatoriana [*Id.*]. Finally, in the Parties' correspondences, CLAIMANT expressly grouped "health and safety requirements . . . increas[ing] the cost by up to 40%" and "changes in customs regulation or import restrictions" as events which would "destroy the commercial basis of the deal" [*Id.*].
87. Thus, a reasonable person in RESPONDENT's position would understand any interpretation excluding import restrictions from Clause 12's coverage as contrary to the Parties' intent.

ii. Other provisions within the Contract support that Clause 12 covers the tariff.

88. In determining the understanding of a reasonable person in RESPONDENT's position, the Tribunal should view Clause 12 within the context of the entire Contract [*SCHMIDT-KESSEL in Schlectriem/Schwenzer Art. 8* ¶30]. The structure of the Contract would lead a reasonable person in RESPONDENT's position to interpret Clause 12 to encompass onerous tariffs. The Contract shifts financial burdens typically associated with DDP shipping from CLAIMANT to RESPONDENT. For instance, while tank rental and handling fees would be assumed by CLAIMANT under traditional

DDP, Clause 10 specifically allocates this burden to RESPONDENT [*ICC INCOTERMS 2010 DDP*; *Cl. Ex. C5*]. Therefore, the Contract was structured to limit CLAIMANT's financial exposure.

1. Interpreting Clause 12 to exclude the present tariff would render the clause meaningless and, therefore, unreasonable.

89. A foundational principle of contract interpretation is that parties intend to give meaning to their agreements [*SCHMIDT-KESSEL in Schlechtriem/Schwenzer Art. 8* ¶31]. Thus, it is presumed that every term in a contract has a purpose [id.]. As such, terms of a contract must be interpreted to render the clause meaningful [*SCHWENZER/HACHAM/KEE* ¶26.59].

90. Considering CLAIMANT's intent to engage in a commercially viable transaction, the Parties drafted Clause 12 to preserve the commercial viability of the deal in case of changed circumstances. CLAIMANT explicitly voiced concern over the unforeseen expenses imposed by foreign governments that CLAIMANT may incur if it proceeded with RESPONDENT's request for DDP shipping [*Cl. Ex. C4*]. CLAIMANT pointed to its previous experience with Danubian health and safety requirements to illustrate an unforeseen circumstance that had destroyed the commercial viability of a transaction [*Id.*] As the Parties agreed to a term that included both "health and safety requirements" and "other such circumstances" the term necessarily includes other financially onerous risks associated with international shipping. Therefore, any interpretation of Clause 12 excluding circumstances related to the costs of international shipping would render the term "comparable unforeseen events" meaningless.

B. Under Clause 12, the Tribunal Should Adapt the Contract.

91. Because RESPONDENT prematurely ended renegotiations without the Parties coming to an agreement, the sole remaining remedy under Clause 12 is adaptation. The Parties' subjective intent shows Clause 12 provides for adaptation [1], and a reasonable person in RESPONDENT's position would understand adaptation is a remedy implicit within Clause 12 [2].

1. The Parties intended Clause 12 to provide for adaptation.

92. Both the Parties' negotiations and RESPONDENT's subsequent conduct show CLAIMANT expressed, and RESPONDENT understood, its intent for Clause 12 to allow adaptation.

93. In negotiations, CLAIMANT made clear it would only agree to a change in shipping conditions if a hardship clause was included in the Contract. Further, CLAIMANT expressly stated its desire to task the arbitrators with adaptation of the Contract if the Parties could not agree [*Cl. Ex. C8*]. Express statements exchanged by the Parties in the process of preparing the contract may be offered to prove intent, even if such statements are not expressed in the contract itself [*ENDERLEIN/MASKOW*

64; *The Packaging Machine Case*]. Further, the Tribunal should consider the subsequent conduct of the Parties to evaluate how they have actually understood their respective declarations [*The Packaging Machine Case*]. Thus, while the Contract does not reference adaptation specifically, RESPONDENT nonetheless knew adaptation was the intended remedy.

94. In preliminary negotiations, CLAIMANT insisted upon the inclusion of a hardship clause addressing "changes in customs regulation or import restrictions" [*Cl. Ex. C4*]. RESPONDENT agreed, and, referencing CLAIMANT's expressed concerns, suggested the language later incorporated into Clause 12 [*Proc. Ord. #2* ¶14]. In the Parties' continued negotiations on 12 April 2017, CLAIMANT voiced concern over the lack of an express reference to adaptation within the contract, "irrespective of the fact that from a legal point of view [it] was not necessary" to include such a reference [*Cl. Ex. C8*]. RESPONDENT agreed, stating, "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [*Cl. Ex. C8*]. Tragically, the Parties' original negotiators were injured in a car accident before concluding negotiations. Their successors ultimately included both Clause 12, alleviating CLAIMANT of its responsibility for hardship due to unforeseen, onerous shipping costs, and Clause 15, permitting arbitration proceedings to govern any dispute arising out of the Contract [*Cl. Ex. C5 ¶12, 15*]. In agreeing to the inclusion of a hardship clause, RESPONDENT understood that this included the possibility of renegotiation and then adaptation [*Cl. Ex. C8*]. Thus, while neither the hardship clause nor the arbitration agreement specified adaptation as a remedy in the event renegotiations fail, the Parties' preliminary negotiations show both understood the clauses provided for adaptation in such a scenario.

95. RESPONDENT's subsequent conduct further proves it knew CLAIMANT intended for renegotiation and adaptation to be potential remedies under Clause 12. In an e-mail conversation between the Parties on 20 January 2018, CLAIMANT informed RESPONDENT it could not proceed with shipment until a solution was found regarding the increased shipping cost caused by the retaliatory tariff [*Cl Ex. C7*]. RESPONDENT did not immediately respond to CLAIMANT. Instead, RESPONDENT's point of contact, Mr. Shoemaker, sought the advice of his wife to craft a statement which would mislead CLAIMANT to believe meaningful renegotiations would commence after the shipment of the semen [*R. Ex. R4*]. Because RESPONDENT's normal counsel was unavailable, Mr. Shoemaker, aware that Respondent did not intend to adjust the price, sought the advice of his wife on how to ensure that Claimant would complete delivery without making any binding commitments on behalf of RESPONDENT [*Proc. Ord. #2* ¶34]. RESPONDENT's only goal was to ensure prompt shipment by misleading CLAIMANT about its intended course of action.

96. While the Parties did engage in renegotiations on 12 February 2018, RESPONDENT, unsurprisingly, quickly became angry and aggressive, and refused to cooperate with CLAIMANT, rendering the renegotiations unsuccessful [*Cl. Ex. C8*]. RESPONDENT's deliberate deception shows RESPONDENT knew or could not have been unaware that Claimant intended Clause 12 to permit adaptation.

97. CLAIMANT's position is supported by *The Packaging Machine Case*. There, the Federal Supreme Court of Switzerland held that the parties' stated subjective intent governs in the absence of an explicit contractual provision. During preliminary negotiations, the buyer expressed its intent to purchase a machine operating at a specific velocity. The Seller failed to object to this request and concluded negotiations. The Court held that despite the lack of a specific term in the contract, the subjective intent of the parties was determinative. The Court further relied on the Seller's subsequent conduct to determine that both parties were aware of the velocity requirement despite the missing contractual term. Here, the Tribunal should find, as did the Court in *The Packaging Machine Case*, that the Parties' subjective intent governs and therefore Clause 12 includes adaptation as a remedy.

2. A reasonable person in RESPONDENT's position would understand adaptation to be a remedy implicit within a hardship clause.

98. Even if the Tribunal finds that it cannot discern RESPONDENT's subjective intent, a reasonable person in RESPONDENT's position would understand adaptation to be a remedy provided by Clause 12. A reasonable person in RESPONDENT's position would be familiar with the necessary remedies and subsequent sanctions provided by hardship clauses [*i*]. Further, the Parties' desire to foster a long-term relationship supports adaptation as the appropriate remedy [*ii*]. Therefore, the Tribunal should find that adaptation is a remedy under Clause 12.

i. A reasonable person with RESPONDENT's experience with international contracts would understand Clause 12 includes adaptation.

99. Because of the heightened element of uncertainty underlying international trade transactions, special provisions for excuse*, force majeure*, or hardship are common in international contracts [*RIMKE* 13]. In the face of changed circumstances, excuse and *force majeure* clauses speculate non-performance, while hardship clauses focus on contract fulfilment [*BUND* 392; *MASKOW* 667–68]. Thus, absent the parties' contrary intent, these clauses provide for renegotiation as a means to restore equilibrium [*MASKOW* 658–60]. However, "[t]he stipulation of revision of a contract is only useful if it is followed by a sanction that deals with the situation in which no agreement can [be] reached" [*RIMKE* 13]. "A hardship clause without a sanction is hardly worth the paper on which it was written" [*SCHMITTHOFF* 420]. Sanctions take the form of contract termination or adaptation [*RIMKE* 14]. As

evidenced by RESPONDENT's other arbitral proceedings regarding the same tariff [*Proc. Ord. #2* ¶40], RESPONDENT is familiar with international sales practices. Accordingly, a reasonable person in RESPONDENT's position would have understood the language in Clause 12 stating that "[s]eller shall not be responsible for . . . hardship" [*Cl. Ex. C5*] meant that renegotiation and thus adaptation are available remedies.

ii. The Parties' intent to engage in a long-term business relationship supports CLAIMANT's understanding that Clause 12 allows adaptation.

100. A reasonable person in RESPONDENT's position would consider adaptation to be the only remedy consistent with the Parties' goal for a long-term relationship. While CLAIMANT initially suggested reliance on the ICC Hardship Clause—which would have permitted CLAIMANT to unilaterally terminate the Contract—the Parties' ultimately considered this clause overly broad, and, thus, inconsistent with their goal [*Ans. Ntc. Arb.* ¶4]. Instead, the Parties agreed to add hardship wording to the existing *force majeure* clause [*Id.*]. Clause 12 therefore contemplates two distinct circumstances—events causing impossibility and events making performance more burdensome. It follows Clause 12 provides two distinct remedies as well. Interpreting the hardship language of Clause 12 through the lens of *force majeure* allows CLAIMANT to avoid performance, even if performance is possible. This is contradictory to the Parties' mutual intent to maintain a long-term relationship.

101. By contrast, "a duty to renegotiate in the face of hardship is the most practical solution" [*SCWENZER/HACHEM/KEE* ¶45.111(a)] and fosters the Parties' goal of a long-term relationship. However, due to the unique time constraints of the Parties, commencing renegotiations prior to authorizing RESPONDENT's third shipment was impractical. RESPONDENT had expressed to CLAIMANT it was necessary to receive this shipment prior to the breeding season [*Proc. Ord. #2* ¶33]. Meanwhile, CLAIMANT, due to the aforementioned Danubian disaster, was bound to a restructured loan payment plan [*Proc. Ord. #2* ¶29]. CLAIMANT had relied on RESPONDENT's second payment installment, as well as the future purchases RESPONDENT expressed an interest in, to meet the plan's requirements [*Id.*]. Because the Parties failed to engage in a meaningful renegotiation, a reasonable person in RESPONDENT's position would understand adaptation to be the appropriate remedy.

102. Because Clause 12 permits adaptation under these circumstances, CLAIMANT is entitled to US$ 1,250,000.

IV. UNDER THE CISG, CLAIMANT IS ENTITLED TO AN ADDITIONAL 25% OF THE PURCHASE PRICE.

103. While CLAIMANT is entitled to relief under the Contract, the CISG also entitles CLAIMANT to a price adaptation. Art. 79 CISG, which applies to the Contract [**A**], entitles CLAIMANT to avoid delivery for the original Contract price [**B**]. Further, the CISG gives the Tribunal the authority to adapt the Contract [**C**]. And finally, the Tribunal should use its authority to require Respondent to pay US$ 1,250,000 to CLAIMANT to restore contractual equilibrium [**D**].

A. Art. 79 CISG Applies to the Contract.

104. Art. 79 CISG applies to the Contract because the Parties did not express a clear intent to derogate from Art. 79 CISG in either the language of, or the negotiations surrounding, Clause 12. The CISG presumptively applies to international sales contracts between parties from contracting states [*Gasoline and Gas Oil Case*; *Auto Case*]. While parties may "exclude the application" of the CISG or "derogate from or vary the effect of any of its provisions," [*Art. 6 CISG*], the party claiming a derogation must prove that the parties manifested a clear intent to exclude its application [*CISG AC Op. 16* ¶3; *Gasoline and Gas Oil Case*; *Auto Case*]. As parties can exclude Art. 79 CISG with a simple sentence in the contract, absent a "clearly worded exclusion" a hardship clause should not be seen as a derogation of Art. 79 CISG [*MIETTINEN* 38].

105. Rather than a clear manifestation of the Parties' intent to derogate from Art. 79 CISG, Clause 12 simply allocates certain risks away from CLAIMANT without claiming that the Clause is exhaustive in nature [*Cl. Ex. C5*]. During negotiations, the Parties discussed certain issues that might arise during performance of the Contract and provided for those events in Clause 12 [*Cl. Ex.C4–5*; *Proc. Ord. #2* ¶12]. The Clause is merely a codification of the Parties' allocation of the risk that reasonably foreseeable events will occur. Art. 79 CISG expressly covers reasonably *unforeseeable* risks [*Art. 79(1) CISG*; *ISHIDA* 340; *see also SCHWENZER "Force Majeure and Hardship"* 719 (noting that Art. 79 covers unforeseeable risks and parties are expected to deal with foreseeable risks directly in their contracts)]. Without evidence of a clearly manifested intent to derogate from Art. 79 CISG, CLAIMANT may rely on it to avoid the effects of the tariff [*See MIETTINEN* 38; *CISG AC Op. 16* ¶3].

106. Further, even if the Tribunal finds that the Parties intended Clause 12 to amend the effect of Art. 79 CISG, the Clause only succeeds in doing so if it clearly provides a remedy for CLAIMANT. If parties deviate from a part of the CISG, the parties' agreement is governed by a *combination* of the contractual terms and non-conflicting CISG rules [*LOOKOFSKY* ¶71–73]. Derogation applies only to the portion of the CISG expressly modified in the contract; a contract may define a term differently

than it is defined in a CISG Article without rendering the general rules of the CISG's remedial scheme inapplicable [*Id.*; *Gasoline and Gas Oil Case*; *Computer Hardware Case*].

107. Thus, if the Tribunal finds that the Contract language is insufficient to support CLAIMANT's Contract claim, it is also insufficient to derogate from Art. 79 CISG. As discussed above, the Clause states that CLAIMANT "shall not be responsible" for "comparable unforeseen events making the contract more onerous" [*Cl Ex. C5*]. The phrase "shall not be responsible," rather than derogating from an exemption of liability, is, in fact, directly in line with the exemption in Art. 79 CISG. At worst, the language is ambiguous as to the exact remedies available to CLAIMANT but not to the fact that CLAIMANT is not responsible. As the plain meaning of Clause 12 supports the remedies available under Art. 79 CISG, and there is no evidence that the parties manifested a clear intention to exclude the article, Art. 79 CISG applies to the contract. As discussed, this is especially true if the Tribunal finds that neither interpretation of Clause 12 nor Clause 15 provide a remedy.

B. Under Art. 79(1) CISG, CLAIMANT Is Entitled to a Remedy.

108. As the Parties did not derogate from the remedial scheme of the CISG, the Tribunal should find that CLAIMANT is entitled to an exemption under Art. 79 CISG. CLAIMANT could refuse to deliver the final shipment at the original contract price because the tariff imposed an extremely onerous financial burden on CLAIMANT. CLAIMANT is exempt if it proves "that [its] failure was due to an impediment beyond [its] control and that [it] could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" [*Art. 79(1) CISG*]. Here, the tariff was beyond CLAIMANT's control [1] and CLAIMANT could not reasonably be expected to have foreseen or overcome it [2].

1. The tariff was beyond CLAIMANT's Control.

109. To qualify for relief, CLAIMANT must show that the tariff was outside the sphere of its control [*Art. 79(1) CISG*; *SCHWENZER in Schlechtriem/Schwenzer Art. 79* ¶11]. Impediments within a party's control are "all those factors which are connected with the orderly organization of [its] manufacturing and/or procurement process" [*ENDERLEIN/MASKOW* ¶4.1]. This includes, for example, issues involving CLAIMANT's employees or a failure of production, accounting systems, or data processing equipment [*SCHWENZER in Schlechtriem/Schwenzer Art. 79* ¶18]. Courts have also found that import and export restrictions are beyond a party's control [*Coal Case*; *Butter Case*]. Further, government restrictions fall outside a party's sphere of control [*NAGY* 24; *SCHWENZER in Schlechtriem/Schwenzer Art. 79* ¶17]. As CLAIMANT has no control over the Equatorianian government, its decision to impose the tariff cannot be considered within CLAIMANT's control.

2. CLAIMANT could not reasonably be expected to have foreseen or to overcome the tariff.

110. Forcing CLAIMANT to bear the 30% tariff would result in severe economic hardship. Economic hardship qualifies as an impediment under Art. 79 CISG [*CISG AC Op. 7* ¶2.3; *ISHIDA* 332; *SCHWENZER/HACHEM* 473–74; *LINDSTROM* 13]. Both the Belgian Court of Cassation and the French Appellate Court have acknowledged that economic hardship can be an Art. 79(1) impediment [*Scafom Case*; *Société Romay Case*].

111. Whether the hardship is objectively "onerous" enough to qualify as an "impediment" is subsumed into an analysis of what can reasonably be expected of CLAIMANT in these specific circumstances [*ISHIDA* 359–60; *see also GIRSBERGER/ZAPOLSKIS* 129–30]. There is no minimum loss CLAIMANT must show, rather the Tribunal must determine whether it would be reasonable to require CLAIMANT to overcome its effects [*SCHWENZER in Schlechtriem/Schwenzer Art. 79* ¶13; *ISHIDA 374–75*; *LINDSTROM* 10]. Therefore, "[t]he decisive test is whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices, ought to have foreseen the impediment's initial or subsequent existence" [*SCHWENZER Art. 79* ¶13 *in Schlechtriem/Schwenzer*; *accord ISHIDA* 360; *LINDSTROM* 10], and whether having not foreseen the impediment CLAIMANT can be reasonably expected to overcome it. Here, a reasonable person in CLAIMANT's position would not have foreseen the possibility of the tariff [*i*], and a reasonable person would not expect CLAIMANT to overcome it [*ii*].

i. It is unreasonable to expect CLAIMANT to have foreseen the tariff.

112. A reasonable person in CLAIMANT's position would not have foreseen the imposition of the retaliatory tariff. In determining whether an event is foreseeable, special attention should be paid to trade practice and usage [*SCHWENZER in Schlectriem/Schwenzer Art. 79* ¶13]. Further, a party is not expected to foresee every possible event; even foreseeable events fall within the ambit of Art. 79 CISG if it is not foreseeable that the event will affect the contract [*ENDERLEIN/MASKOW* ¶5.3]. Prior to the retaliatory tariff, the Equatorianian government had always been a strong advocate of free trade [*Cl. Ex. C6*]. Equatoriana had imposed only one retaliatory tariff in its history [*Id.*]. Even close observers of the economic situation in Equatoriana were surprised by the tariff [*Id.*]. Further, prior agricultural tariffs, even those that included animal products, had not regulated racehorses or racehorse semen [*Ntc. Arb.* ¶11]. Therefore, even if the Tribunal finds that a retaliatory tariff in general was foreseeable, normal trade practice would show that the inclusion of frozen racehorse semen in the tariff would not be reasonably foreseeable.

ii. It is unreasonable to expect CLAIMANT to overcome the tariff.

113. It is unreasonable to expect CLAIMANT to overcome the tariff because doing so would be financially ruinous for CLAIMANT. A reasonable person would not expect CLAIMANT to engage in economically irrational behavior [*ISHIDA* 367]. In determining whether a reasonable person would overcome the impediment, a tribunal may consider the effect of the impediment on the party's business, the expected profit margin considering the type of contract and industry custom, and whether the parties have concluded a short- or long-term contract [*KLEPAC* 47]. "[I]n cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered." [*SCHWENZER "Force Majeure and Hardship"* 716; *accord GIRSBERGER/ZAPOLSKIS* 131 ("The essential criterion in [determining whether risk of financial ruin qualifies as hardship] is the fact that performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor")].

114. Here, the 30% tariff dramatically affects the economic viability of the Contract. Typically, the profit margin for semen from a horse of Nijinsky III's caliber is 15% [*Proc. Ord. #2* ¶19] However, in hopes of establishing a long-term business relationship with RESPONDENT, CLAIMANT agreed to a purchase price that left CLAIMANT with only a 5% profit margin [*Ntc. Arb.* ¶18]. Bearing the full effect of Equatoriana's 30% tariff would require CLAIMANT to take a 25% loss on the shipment; a loss that is significantly greater than would be incurred under customary trade circumstances [*Id.*; *Proc. Ord. #2* ¶19] This potential loss will likely have a severe negative impact on CLAIMANT, potentially resulting in CLAIMANT's bankruptcy or a significant restructuring of its business [*Proc. Ord. #2* ¶29]. Therefore, when looking at the circumstances here it is unreasonable to expect CLAIMANT to take such a loss [*See ISHIDA* 367].

115. Because CLAIMANT faces potential insolvency if required to bear the full cost of the tariff and the imposition of the tariff was both reasonably unforeseeable and beyond CLAIMANT's control, CLAIMANT is entitled to relief from delivering the last shipment at the original contract price.

C. The CISG Grants the Tribunal the Authority to Restore Contractual Equilibrium.

116. As CLAIMANT has shown that it qualifies for exemption under Art. 79(1) CISG, the Tribunal should grant CLAIMANT the relief necessary to restore contractual equilibrium. Because CLAIMANT has already delivered the final shipment, relying on RESPONDENT's promise that it would engage in good faith renegotiations, an exemption from damages is insufficient. Therefore, the Tribunal should instead adapt the Contract and require RESPONDENT to bear the majority of the increased cost from the tariff. The Tribunal has the authority to adapt the Contract through Arts. 7 and 79 CISG [1].

Finally, the Tribunal also has the authority to adapt the Contract through incorporation of the UNIDROIT principles [2].

1. Adaptation is proper under Art. 79 CISG and the general principles underlying the CISG.

117. If the Tribunal finds that CLAIMANT is exempt from providing delivery at the original Contract price, the Tribunal should find that it has the power under Art. 79 CISG to adapt the Contract [*i*]. If the Tribunal disagrees with respect to Art. 79 CISG, it should nonetheless find that it has the authority to adapt the Contract under the general principle of good faith underlying the CISG [*ii*].

i. Adaptation is a remedy under Art. 79 CISG.

118. When a party successfully claims hardship under Art. 79(1) CISG, that party is exempt from damages claims based on non-performance [*Art. 79(5) CISG*]. However, "nothing in this article prevents *either* party from exercising any right other than to claim damages under this Convention" [*Id.* (emphasis added)]. The CISG Advisory Council has agreed that Art. 79(5) allows the Tribunal to grant relief beyond exemption from damages [*CISG AC Op. 7* ¶3.2]. This includes the ability of the Tribunal to adapt the contract [*CISG AC Op. 7 cmt* 40]. The Tribunal can "adapt a contract through the interpretation of the reasonable expectation expressly incorporated in Article 79(1)" [*ISHIDA* 381]. Therefore, the Tribunal should find that inherent in Art. 79 CISG is the power to adapt the Contract to comport with the Parties' reasonable expectations.

ii. The general principles underlying the CISG allow the Tribunal to adapt the Contract in this situation.

119. If the Tribunal determines that it does not have the power to adapt the contract under Art. 79 CISG, it still has the power to adapt the Contract through the general principles of good faith and the Tribunal's innate authority to interpret the Contract under Art. 7(2) CISG. "Questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with general principles on which it is based . . . ." [*Art. 7(2) CISG*]. One of the general principles on which the CISG is based is the principal of good faith. [*See generally MAGNUS*]. Upon a finding of hardship, a tribunal can rely on the principle of good faith to adapt the contract to restore contractual equilibrium [*BRUNNER "Force Majeure and Hardship Under General Contract Principles"* 213–19].

120. Further, the principle of good faith, in combination with the duty to mitigate, also allows the Tribunal to adapt the Contract [*See SCHWENZER "Force Majeure and Hardship"* 724]. When a party experiencing hardship offers to continue a contract at a different price, if the buyer refuses and

claims fundamental breach, the tribunal "will have to consider whether it would have been just and reasonable for the buyer, in the circumstances of the given case, to accept the different terms offered by the seller. If it finds that the buyer should have consented to an adaptation on the basis of good faith, it will find for the seller" [*Id.*].

121. Although CLAIMANT has already delivered the final shipment to RESPONDENT and therefore can no longer withhold delivery, the principles underlying this adaptation remedy remain intact. Here, CLAIMANT's offer (and subsequent delivery) were contingent on a new purchase price. RESPONDENT's refusal to agree to this new purchase price does not comport with its obligation to act in good faith. Therefore, on the basis of the underlying principle of good faith, the Tribunal should find for CLAIMANT and require RESPONDENT to pay a higher price.

122. Finally, adaptation of the Contract comports with many other provisions of the CISG that implicitly allow for adaptation. "[I]t is the very function of the CISG to interpret and supplement what parties have expressly agreed to . . . [and a tribunal] applying the CISG always rewrites or supplements a contract. That is all the more true of provisions with the word 'reasonable' in their texts" [*ISHIDA* 379]. Examples include Art. 39(1) (authorizing a judge to determine a reasonable amount of time to discover non-conformity), Art. 60 (authorizing a judge to determine what acts are reasonably expected of a buyer attempting to take delivery), and even Art. 8 (authorizing a judge to read in contract clauses from parties' negotiations and conduct) [*Id.* 379–80; *see also FLECHTNER* 236 (Scholar Schlechtriem argues that the ability of a tribunal to rectify a "disturbance of the equilibrium or balance of the exchanged performances" is a general principal underlying the CISG)].

123. Thus, the Tribunal may rely on both the principle of good faith and the Tribunal's inherent ability to restore contractual equilibrium to require RESPONDENT to pay a fair price.

2. The UNIDROIT Principles give the Tribunal the authority to adapt the Contract.

124. Alternatively, the Tribunal should find that the UNIDROIT Principles are applicable and direct the Tribunal to adapt the Contract. First, the UNIDROIT Principles apply as an interpretive aid to the CISG [*i*]. Second, the UNIDROIT Principles establish a trade usage between the Parties [*ii*]. And third, the Principles may be applied as a last resort as the domestic law of both Parties' countries [*iii*].

i. The UNIDROIT Principles supplement interpretation of the CISG.

125. The UNIDROIT Principles can be used by the Tribunal as an aid in interpreting the CISG [*VISCACILLAS* 19–22]. In this function, they can both supplement the Articles of the CISG and serve as corroboration for the existence of a general principle underlying it [*Id.*; *HUBER* 233–34]. Specifically, the Belgium Court of Cassation has held that the there is a gap in the remedies available

under Art. 79 CISG, and the UNIDROIT Principles are an appropriate supplement to fill that gap, by allowing for renegotiation and adaptation [*Scafom Case*].

126. In the *Scafom* case, the Belgium Court of Cassation adapted a contract for the sale of steel tubes because of economic hardship. The Court held that a 70% increase in the price of steel constituted an impediment under Art. 79(1) CISG and the seller could not reasonably be expected to have foreseen the increase or overcome it [*Id.*]. Despite the seller's attempts to renegotiate the contract, the buyer refused any price increase and demanded delivery. Although the Court found it did not have the power under Article 79 CISG to adapt the contract to account for the changed circumstances, it found that the lack of a remedy was a gap in the CISG. Further, the Court held the UNIDROIT principles could be used under Art. 7(2) CISG as general principles of international commercial law and that, through the UNIDROIT principles, the Court had the power to require the parties to follow the remedy set out in the UNIDROIT principles.
127. Under the UNIDROIT Principles, "[t]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished" [*Art. 6.2.2 UNIDROIT*]. In order to claim hardship, a party must show that "(a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party." [*Art. 6.2.2 UNIDROIT*]. As explained above, CLAIMANT can establish each element. [*See also BRUNNER* 219("The requirements of Article 79 CISG and Article 6.2.2. UPICC ("Definition of hardship") are essentially the same.")]. The UNIDROIT principles thus provide that CLAIMANT was entitled to request re-negotiations and to have those negotiations take place in good faith, but not to withhold performance [*Art. 6.2.3 UNIDROIT*]. However, once re-negotiations failed, the Tribunal may "if reasonable . . . adapt the contract with a view to restoring its equilibrium" [*Art. 6.2.3 UNIDROIT*].
128. Here, CLAIMANT, as required by the hardship provision of the UNIDROIT principles, notified RESPONDENT of the hardship imposed by the unforeseen tariff and immediately requested renegotiations to restore contractual equilibrium [*Cl. Ex. C7*]. Because CLAIMANT was led to believe that RESPONDENT would engage in good faith re-negotiations, CLAIMANT continued with the delivery as required by Art. 6.2.3 UNIDROIT [*Id.*]. While RESPONDENT originally engaged in re-negotiations [*Cl. Ex. C8*], after CLAIMANT provided evidence that RESPONDENT was improperly

reselling the semen at a 20% markup, RESPONDENT broke off negotiations and refused to cooperate further with CLAIMANT [*Id.*]. As RESPONDENT refused to renegotiate the Contract in good faith, the Tribunal should, like the Belgium Court of Cassation in *Scafom*, look to the UNIDROIT principles for a remedy if the Tribunal finds that no remedy exists under Art. 79 CISG. As the parties have already failed to renegotiate, the Tribunal should rely on Art. 6.2.3 UNIDROIT and adapt the Contract to restore its equilibrium.

ii. The UNIDROIT Principles are a binding trade usage applicable to the Parties.

129. Individual provisions of the UNIDROIT Principles may be considered a binding "usage" within the CISG [*SCHWENZER/HACHIM/KEE* ¶45.1115, *BONELL "The CISG and the Unidroit Principles"* 112]. Parties are bound to any usage to which they have actually or implicitly agreed [*Art. 9 CISG*]. If the parties have not explicitly agreed on the usage in question, the particular usage must be widely known to, and regularly observed by, parties to contracts of the type involved [*SCHMIDT KESSEL IN SCHLECHTRIEM & SCHWENZER* ¶16(a)]. The UNIDROIT Principles reflect a world-wide consensus in most of the basic matters of contract law, and have been incorporated as trade usages in international transactions [*BONELL "The CISG and the Unidroit Principles"* 112].

130. Courts frequently supplement the CISG with the UNIDROIT Principles. For instance, in *Dupire Invicta Industrie v. Gabo*, the parties did not have a hardship clause providing a remedy. The Court of Cassation nonetheless held that hardship falls within the CISG, and the UNIDROIT Principles defined hardship's scope and consequences [*Gabo Case*]. Similarly, in the present case, because both parties were proficient in the international sale of goods, the Tribunal should consider supplementing the Parties' intent with Art. 6.2.3 UNIDROIT and deem it an agreed-upon usage, so as to permit adaptation.

iii. The UNIDROIT Principles are the domestic law gap-filler.

131. Finally, if the Tribunal finds that hardship is not governed by the CISG or that this situation is not contemplated nor governed by the CISG, the Tribunal must look to the applicable domestic law [*Art. 7(2) CISG*]. Further, if the Tribunal finds that the Parties did derogate from the CISG by adopting Clause 12 but failed to provide a clear remedy, recourse should be had to domestic law [*BONELL "Article 6"* 59–62] Here, both countries' domestic contract law is a verbatim adoption of the UNIDROIT Principles [*Prod. Ord. #1,* ¶4]. Therefore, either as an interpretive aid or domestic law gap-filler, the Tribunal may apply the UNIDROIT Principles to the Contract.

D. The Tribunal Should Require RESPONDENT to Pay CLAIMANT US$1,250,000.

132. As CLAIMANT has shown that it is entitled to adaptation, the Tribunal should restore contractual equilibrium by requiring RESPONDENT to pay for a purchase price 25% higher than the original price, US$ 1,250,000. Although true contractual equilibrium would only be restored by requiring RESPONDENT to bear the full amount of the tariff, CLAIMANT has, from the outset, offered to forego any profit associated with this shipment [*Ntc. Arb.* ¶18]. Requiring RESPONDENT to bear the rest of the tariff will restore the contractual equilibrium and ensure that RESPONDENT does not receive a windfall from the impediment. Further, as RESPONDENT has resold at least some of the semen at a 20% profit [*Proc. Ord. #2* ¶20], this redistribution makes it more likely that both Parties suffer a 5% decrease in their expected outcomes from the Contract.

133. In conclusion, requiring CLAIMANT to bear the burden of the unforeseen 30% tariff would result in severe economic hardship and CLAIMANT is entitled to seek relief under Art. 79 CISG. Further, Art. 79 CISG provides the Tribunal with the authority to adapt the contract with an eye towards restoring contractual equilibrium. However, even if the Tribunal finds that the Art. 79 CISG does not provide such authority, the Tribunal may rely on either the general principles of the CISG or the UNIDROIT Principles to adapt the Contract. Therefore, the Tribunal should adapt the Contract and require RESPONDENT to share the burden imposed by the tariff.

PRAYER FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Arbitral Tribunal, while dismissing all contrary requests and submissions by RESPONDENT,

TO ADJUDGE AND DECLARE that:

a. The evidence relating to RESPONDENT's previous arbitration be admissible;
b. The Tribunal has the authority to adapt the Contract; and
c. CLAIMANT is entitled to adaptation of the Contract.

And to **ORDER** RESPONDENT to:

1. Pay CLAIMANT US$ 1,250,000; and
2. Pay the costs of the arbitration, including CLAIMANT's expenses for legal representation.

Washington, United States, 4 December 2018

On behalf of Phar Lap Allevamento

Ben Moore

Kirsten Parris

Danika Duffy

Gabrielle Lindquist

Colin Patrick

Wonji Kerper