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

MEMORANDUM FOR RESPONDENT

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

UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW

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TABLE OF ABBREVIATIONS

&	and
¶/¶¶	paragraph/paragraphs
§/§§	section/sections
Arbitration Clause	clause 15 of the Frozen Semen Sales Agreement
Art./Artt.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
Convention	United Nations Convention on Contracts for the International Sale of Goods
e.g.	for example
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
Id.	the same
Incoterms	International Commercial Terms
Letter Fasttrack	Letter from Julia Clara Fasttrack to this Tribunal of 3 October 2018
Letter Langweiler	Letter from Joseph Langweiler to this Tribunal of 2 October 2018
Mr.	Mister
Ms.	Miss
No.	number/numbers
NoA	CLAIMANT's Notice of Arbitration
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p./pp.	page/pages
pacta sunt servanda	agreements must be kept
Partial Interim Award	Separate arbitration between RESPONDENT and a Mediterranean buyer
PO1	Procedural Order No. 1 of 5 October 2018

PO2	Procedural Order No. 2 of 2 November 2018
RNoA	RESPONDENT's Response to Notice of Arbitration of 24 August 2018
Sales Agreement	Frozen Semen Sales Agreement
supra	above
travaux préparatoires	preparatory work(s)
Tribunal	Arbitral Tribunal
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
US$	United States Dollars
v.	*versus* (against)

STATEMENT OF FACTS

1 **PHAR LAP ALLEVAMENTO ("CLAIMANT")** operates a stud farm in Mediterraneo. CLAIMANT is particularly well-known for its racing stallions, which it makes available throughout the breeding season for natural coverage. Additionally, CLAIMANT sells frozen semen of its champion stallions in other areas of equestrian sport and is highly skilled in the storage and shipment of frozen semen.

2 **BLACK BEAUTY EQUESTRIAN ("RESPONDENT")** is an experienced Equatorianian breeder of show jumpers and international dressage horses. RESPONDENT recently started a booming racehorse breeding program, for which it sought a sale of frozen semen from CLAIMANT.

3 On **March 21, 2017**, RESPONDENT emailed CLAIMANT to inquire about the availability of Nijinsky III—one of CLAIMANT's most successful racehorses—for its new racehorse breeding program [*Exh. C1*]. Due to a foot and mouth disease crisis in Equatoriana, the Equatorianian government temporarily lifted the ban on racehorse artificial insemination [*Id.*]. Because of this, RESPONDENT sought to acquire frozen semen [*Id.*].

4 In response to RESPONDENT's inquiry, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen at a price of US$ 99,500 per dose [*Exh. C2*].

5 RESPONDENT found many of CLAIMANT's proposed terms of sale acceptable, but insisted that the contract be on the basis of "delivery DDP" [*Exh. C3*]. CLAIMANT expressed its willingness to accept delivery DDP against a US$ 1,000 per dose price increase and the transfer of the obligation to undertake conduct associated with additional health and safety regulations through a hardship provision [*Exh. C4*]. To resolve this and other outstanding topics of negotiation, the parties planned an additional in-person negotiation [*Id.*].

6 In the course of these further negotiations, CLAIMANT suggested inclusion of the ICC Hardship Clause [*Exh. R2*]. While this clause was not incorporated in its entirety into the Sales Agreement, narrow hardship language was agreed upon by CLAIMANT and RESPONDENT and included at clause 12 of the parties' agreement (**"Sales Agreement"**) [*Exh. R3, C5*].

7 Additionally, RESPONDENT proposed that the Arbitration Clause be governed by the law of Equatoriana [*Exh. R1*]. CLAIMANT objected and expressed that it would be amenable to arbitration in a neutral jurisdiction [*Exh. R2*].

8 Immediately following the in-person meeting regarding these outstanding topics of negotiation, the primary negotiators for both CLAIMANT and RESPONDENT were involved in a car accident that rendered each of them incapacitated [*Exh. C8, R3*]. The accident precluded RESPONDENT's initial

negotiator from incorporating some of the parties' mutual understandings into the next draft of the contract [*Exh. R3*].

9 On **May 20, 2017**, the Sales Agreement was concluded between CLAIMANT and RESPONDENT for 100 doses of Nijinsky III's frozen semen for a price of US$ 100,000 per dose [*Exh. C5*]. The Sales Agreement called for shipment in three installments by CLAIMANT on the basis of "delivery DDP" [*Id.*]. While the Sales Agreement contained a choice of law provision in favor of the law of Mediterraneo, the arbitration clause therein (**"Arbitration Clause"**) only designated the seat as Danubia and subjected the proceedings to administration under the Hong Kong International Arbitration Centre Rules [*Id.*].

10 Approximately one month prior to the shipment date for the third installment of frozen semen, the government of Equatoriana announced a 30% tariff on Mediterranean imports of agricultural products, including frozen horse semen [*Exh. C6*].

11 Three days before the scheduled date of shipment, CLAIMANT contacted RESPONDENT in an attempt to obtain an adaptation of price [*Exh. C7*].

12 The next day, speaking on RESPONDENT's behalf, Mr. Shoemaker informed CLAIMANT that he had no authority to grant an adaptation of price, but very carefully informed CLAIMANT that "if the contract provides for an increased price in the case of such a high additional tariff, he was sure that the parties could reach a solution" [*Exh. R4*]. Mr. Shoemaker was not involved in negotiations of the Sales Agreement [*Id.*].

13 On **January 21, 2018**, CLAIMANT authorized shipment of the third installment of frozen semen and paid the tariffs associated therewith on its own volition, despite Mr. Shoemaker's explicit statement that he could not authorize an adaptation of price [*Exh. C8, R4*].

14 On **February 12, 2018**, RESPONDENT informed CLAIMANT that RESPONDENT would no longer participate in negotiations for an adaptation of price, and accordingly that RESPONDENT would not pay any additional amount for the tariffs [*Exh. C8*].

15 On **July 31, 2018**, CLAIMANT filed its Notice of Arbitration requesting payment of US$ 1,250,000 by way of an adaptation of price.

16 On **October 2, 2018**, CLAIMANT notified this arbitral tribunal (**"Tribunal"**) that CLAIMANT had become aware of confidential information about another arbitral proceeding to which CLAIMANT was a party [*Letter Langweiler*]. CLAIMANT did not disclose to this Tribunal or to RESPONDENT the source of this information [*Id.*]. In fact, CLAIMANT had arranged to pay an unrelated third party US$ 1,000

for a copy of the award (**"Partial Interim Award"**) [*PO2*]. The Partial Interim Award concerned a completely different factual scenario governed by different law and different contractual language [*Id.*].

17 On **October 3, 2018**, RESPONDENT objected to CLAIMANT's attempt to submit evidence from the other arbitral proceeding on the grounds that it was obtained improperly and constitutes a breach of confidentiality [*Letter Fasttrack*].

SUMMARY OF ARGUMENT

18 "You don't change your horse midstream" is a common adage in the horseracing industry. This maxim–which stands for the proposition that one cannot change their bet mid-race–has particular relevance in the issue before this Tribunal. As evidenced in the Sales Agreement and correspondence between the parties, CLAIMANT is responsible for the unfortunate circumstances it endured. For this Tribunal to instead penalize RESPONDENT for terms RESPONDENT did not agree to and circumstances it had no ability to control would stand to reward the undeserving CLAIMANT for "chang[ing] [its] horse midstream."

19 **THE LAW OF DANUBIA, WHICH GOVERNS THE ARBITRATION CLAUSE AND ITS INTERPRETATION, DOES NOT GRANT THIS TRIBUNAL THE POWER OR JURISDICTION TO ADAPT THE CONTRACT (PART 1).** The parties agreed for the law of Danubia to govern the Arbitration Clause and its interpretation. A finding that Danubian law governs the Arbitration Clause and its interpretation satisfies aims of the NY Convention's "validation principle." Furthermore, the narrow and distinct issue of whether this Tribunal has the power or jurisdiction to adapt the contract is inherently a procedural question and should accordingly be governed by the procedural law: the law of Danubia. As a result, since the parties did not satisfy the Danubian requirement of an express conferral of the power to adapt the contract, this Tribunal has neither the power nor the jurisdiction to adapt the contract.

20 **CLAIMANT MUST NOT BE PERMITTED TO SUBMIT EVIDENCE WITH NO PROBATIVE VALUE AND THAT UNFAIRLY PREJUDICES RESPONDENT (PART 2).** Art. 34 UNCITRAL Model Law and Art. V(1)(b) NY Convention empower a reviewing court to deny enforcement of an arbitral award where a party to the arbitration was denied procedural fairness and equal treatment. To admit evidence from the other arbitral proceeding would deny RESPONDENT these fundamental rights. Furthermore, this Tribunal is bound by Art. 45.2 HKIAC Rules to preserve the confidentiality of the other arbitral proceeding. Such confidentiality must be maintained because this evidence is not "publicly available."

Additionally, it would contravene international public policy to incentivize litigants to engage in unlawful conduct in order to obtain evidence.

21 **CLAUSE 12 DOES NOT PROVIDE FOR AN ADAPTATION OF PRICE AND THE TARIFF FALLS OUTSIDE THE SCOPE OF CLAUSE 12'S APPLICABILITY (PART 3).** CLAIMANT "knew or could not have been unaware" that RESPONDENT intended for clause 12 to merely excuse liability for nonperformance in the event of a hardship. Furthermore, a "reasonable person of the same kind" as CLAIMANT would have understood that clause 12 does not provide for an adaptation of price in the event of hardship. Additionally, the meaning of the plain language of clause 12 does not provide an adaptation of price in the event of a tariff.

22 **CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF PRICE UNDER THE CISG BECAUSE CLAIMANT DID NOT ENCOUNTER AN "IMPEDIMENT" AND BECAUSE CLAIMANT ULTIMATELY PERFORMED ITS CONTRACTUAL OBLIGATION TO DELIVER THE GOODS (PART 4).** The 30% tariff CLAIMANT encountered did not rise to the definition of "impediment" necessary for a remedy under Article 79 CISG. Because Article 79 CISG expressly settles the remedies available for changed circumstances arising after conclusion of the contract and denies a remedy when the change in circumstances cannot be deemed an "impediment", CLAIMANT is not entitled to adaptation. In addition, CLAIMANT is not entitled to adaptation under the general principles of detrimental reliance, good faith and *pacta sunt servanda*. CLAIMANT may not invoke Article 6.2.3 UNIDROIT Principles as a gap-filler pursuant to Article 7(2) CISG or Article 9(2) CISG.

PART 1: THE LAW OF DANUBIA, WHICH GOVERNS THE ARBITRATION CLAUSE AND ITS INTERPRETATION, DOES NOT GRANT THIS TRIBUNAL THE POWER OR JURISDICTION TO ADAPT THE CONTRACT

23 This Tribunal may rule on its own jurisdiction [*Art. 16(1) UNCITRAL Model Law*; *Born II p. 68*]. Accordingly, this Tribunal does not have the power or the jurisdiction to adapt the contract because the parties agreed for the law of Danubia to govern the Arbitration Clause and its interpretation **(I)**. A finding by this Tribunal that Danubian law governs the Arbitration Clause would not run afoul of the NY Convention's "validation principle" **(II)**, and since the question of whether this Tribunal has the jurisdiction to adapt the contract is a "procedural" issue, the applicable procedural law—the law of Danubia—must apply to the Arbitration Clause and its interpretation **(III)**. Since Danubian law governs the Arbitration Clause and its interpretation, this Tribunal has neither the power nor the

jurisdiction to adapt the contract because the parties did not satisfy the Danubian requirement of expressly conferring such power upon this Tribunal **(IV)**.

I. The parties agreed for the law of Danubia to govern the Arbitration Clause and its interpretation

24 The parties in this case did not make an express choice of law with regards to the Arbitration Clause [*Exh. C5*]. Therefore, it is up to this Tribunal to determine what implied choice was made [*Sulamérica*; *BCY v. BCZ*]. The parties' express designation of Danubia as the seat reflects their choice that Danubian law governs the Arbitration Clause and its interpretation **(A)**. Furthermore, the parties' negotiations and the contractual language demonstrate that CLAIMANT and RESPONDENT agreed for Danubian law to govern the Arbitration Clause and its interpretation **(B)**. Finally, the doctrine of separability precludes this Tribunal from drawing a presumption that the choice of law governing the general contract also governs the arbitration clause **(C)**.

25 To discern the parties' agreement as to what law governs the Arbitration Clause and its interpretation, this Tribunal may consider extrinsic evidence. Art. 19(2) UNCITRAL Model Law provides that this Tribunal may assess evidence as it sees appropriate. Evidence that is integral to understanding the true meaning of a contract is admissible [*Zurich Insurance*; *Icepearl*; *Wagners*]. Therefore, evidence of the parties' correspondence, negotiations, and surrounding circumstances are worthy of consideration by this Tribunal [*see id.*].

A. In the absence of an express choice of law for the Arbitration Clause and its interpretation, the parties' designation of a seat law that differs from the law governing the Sales Agreement indicates their agreement that the law of the seat—here, the law of Danubia—governs the Arbitration Clause and its interpretation

26 The primary factor in determining the applicable law is party autonomy [*Lew, Mistelis, & Kröll p. 124*]. Therefore, this Tribunal must give effect to the parties' agreement with respect to the law applicable to their arbitration clause, whether express or implied [*Born I p. 579*; *Manufacturer Y SA*]. In the absence of an express choice of law provision in the arbitration clause, it must be implied that the parties' chosen seat of arbitration is also the parties' choice of law [*Petrasol BV*; *XL Insurance*; *Slovenian Company*; *see Born II p. 116*]. This is especially true when the law of the designated seat differs from the choice of law that governs the general contract [*BCY v. BCZ*].

27 CLAIMANT and RESPONDENT selected Danubia as the law of the seat but failed to include language indicating the law governing the Arbitration Clause and its interpretation [*Exh. C5*]. Therefore, CLAIMANT's and RESPONDENT's choice of a seat law that differs from the law governing the Sales

Agreement is a strong indicator that they agreed for the law of the seat to govern the Arbitration Clause and its interpretation because they intended for the Arbitration Clause to stand separately and distinctly from the Sales Agreement [*Leong & Tan p. 95; see BCY v. BCZ*]. The parties' intent for the Arbitration Clause and Sales Agreement to be governed by different laws is apparent from their negotiations.

28 In its email on April 10, 2017, RESPONDENT made a direct reference to the separable nature of the Arbitration Clause by proposing that the law governing the Arbitration Clause be that of Equatoriana "in light of the fact that the Sales Agreement is governed by the law of Mediterraneo" [*Exh. R1*]. This reflects RESPONDENT's intent that the Arbitration Clause and Sales Agreement be governed by the laws of different jurisdictions, specifically, that the Arbitration Clause be governed by a law other than the law of Mediterraneo.

29 CLAIMANT shared this intent. In fact, CLAIMANT's counter-proposal was made precisely "to accommodate [RESPONDENT's] wish not to be submitted to the jurisdiction of the courts in Mediterraneo," and was made on condition "that the law applicable to the Sales Agreements remains the law of Mediterraneo" [*Exh. R2*]. Here, CLAIMANT emphasized the fact that the Sales Agreement and Arbitration Clause are separate and are to be governed by different sets of laws. Therefore, the law ultimately chosen by the parties for the Arbitration Clause—the law of Danubia—governs the Arbitration Clause and its interpretation [*Exh. C5*].

B. CLAIMANT's and RESPONDENT's negotiations and the contract itself indicate that the parties reached an implied agreement that the law of Danubia, not the law of Mediterraneo, governs the Arbitration Clause and its interpretation

30 CLAIMANT's assertion that the parties reached an implied agreement that the law of Mediterraneo governs the Arbitration Clause rests on improperly drawn inferences and is unsupported by the record. On the contrary, there is abundant evidence of the parties' "meeting of the minds" for the law of Danubia to govern the Arbitration Clause and its interpretation.

31 Where evidence of the parties' externally manifested intent constitutes a "meeting of the minds," a contract is formed on the basis of that intent [*Holmes p. 457*; *Manufacturer D*]. Accordingly, the parties' negotiations of the Arbitration Clause reflect an implied choice of law in favor of Danubia ***(i)***. Additionally, because the parties did not intend for clause 12 of the Sales Agreement to provide for adaptation, they could not have intended for the Arbitration Clause to confer upon this Tribunal the power of adaptation ***(ii)***. Similarly, the fact that the parties agreed for the CISG to govern the Sales

Agreement is further evidence that they did not intend for this Tribunal to have the power to adapt the contract ***(iii)***.

i. Like all topics of negotiation between the parties, CLAIMANT and RESPONDENT ascribed great importance to the seat of arbitration, so much so that it also served as the agreed-upon law governing the Arbitration Clause and its interpretation

32 "The importance of the place of arbitration cannot be overestimated" [*Bond p. 153*]. This is because the choice of an arbitral seat results in significant legal consequences and is considered by practitioners and tribunals alike to be of "paramount importance" [*Born I p. 2052*; *Star Shipping AS*]. CLAIMANT and RESPONDENT meticulously negotiated every aspect of this contract. The seat of the arbitration was no exception.

33 Given the importance of the seat of arbitration, CLAIMANT did not merely overlook the express designation of Danubia as the seat and—without manifesting its objection or contrary intent to RESPONDENT—expect that the law of Mediterraneo governs the Arbitration Clause and its interpretation [*see Exh. C5*]. Rather, given the inherent importance of the seat of the arbitration and the deliberate nature of the parties' negotiations, CLAIMANT and RESPONDENT agreed for the law of Danubia to govern the Arbitration Clause and its interpretation, not the law of Mediterraneo [*see id.*].

34 Since CLAIMANT would not initially agree to an Arbitration Clause submitted to a foreign law, CLAIMANT suggested in the alternative that the parties agree "on arbitration in a neutral country" [*Exh. R2*]. For this exact reason, CLAIMANT proposed the Arbitration Clause that ultimately was incorporated into the contract, which read: "The seat of arbitration shall be [Vindobona,] Danubia" [*Id.*; *Exh. C5*]. Given the importance of a designated seat that differs from the law governing the general contract, selecting Danubia as the seat could not have been a mere formality, but instead a careful and deliberate choice of law in favor of "a neutral country," Danubia [*Exh. R2*].

35 Furthermore, this proposal was made "on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo," a condition that RESPONDENT ultimately fulfilled [*Exh. R2, C5*]. CLAIMANT's use of the word "remains" in this exchange naturally indicates that a change in the law governing the Arbitration Clause was to follow, and that such change should have no impact on the law governing the Sales Agreement [*see Exh. R2*]. This exchange between the parties reflects CLAIMANT's understanding that the Arbitration Clause is not subject to Mediterranean law, but rather it would be separately governed by Danubian law.

36 Therefore, even though the parties did reach an agreement that the law of Danubia governs the Arbitration Clause and its interpretation, the car accident caused the parties to not include their

agreement in the Arbitration Clause [*Exh. R3*]. However, every aspect of the negotiations and the contract itself indicate that they did intend for the law of Danubia to govern the Arbitration Clause and its interpretation.

37 In fact, Mr. Krone (RESPONDENT's negotiator that took over for Mr. Antley following the car accident) stated that if he had known Mr. Antley and CLAIMANT agreed for the Arbitration Clause to be governed by the law of Danubia, he "would have definitely included an express reference to the law of Danubia into the arbitration agreement" [*Exh. R3*]. Regardless of the lack of contractual language, the underlying agreement between RESPONDENT and CLAIMANT that Danubian law governs the Arbitration Clause remains in effect.

38 But for the car accident, the parties' choice of law in favor of Danubia would have been expressly incorporated into the Arbitration Clause [*see id.*]. Because this lack of communication between Mr. Antley and Mr. Krone was not the product of a change in RESPONDENT's or CLAIMANT's intent that Danubian law must govern the Arbitration Clause, the parties' agreement to that effect remains in place.

ii. Because the Sales Agreement does not provide for an adaptation of price in the face of hardship, the parties selected an applicable law that does not confer the power or jurisdiction to adapt the price

39 The Sales Agreement does not shift any financial burdens incurred by CLAIMANT to RESPONDENT via an adaptation of price [*see Exh. C5*]. Rather, clause 12 merely shifts additional *conduct* associated with a hardship to RESPONDENT [*see id.*]. This is apparent from the phrase "Seller shall not be responsible for . . .," which makes no reference to payment, increased price, or any other mechanism for altering the price term of the Sales Agreement [*Id.*].

40 Instead, the obligation created in clause 12 is simply RESPONDENT's responsibility to perform additional conduct associated with a hardship [*see id.*]. The specific circumstances contemplated by the parties are expressly listed as "additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Id.*]. This language was deliberately included by the parties to define the types of scenarios that could result in additional required conduct.

41 In fact, such a scenario afflicted CLAIMANT in a prior, unrelated transaction. During a prior sale of mares to a Danubian buyer, CLAIMANT encountered a significant hardship when Danubia imposed strict health and safety requirements involving a long quarantine time and additional testing [*PO2*]. It was CLAIMANT's hope that should such a scenario arise in this transaction, clause 12 would shift the burden for such conduct to RESPONDENT.

42 As a result of this prior incident, CLAIMANT informed RESPONDENT that it was "not willing to take over any further risks . . . *in particular those associated with changes in customs regulation or import restrictions*" [*Exh. C4 (emphasis added)*]. Therefore, the parties incorporated the hardship clause into clause 12 to ensure that if "additional health and safety requirements" arise, CLAIMANT would not be responsible for undertaking the additional conduct associated with them, such as establishing a quarantine, performing additional testing, or otherwise [*see Exh. C4, C5*].

43 Clause 12's conduct-shifting effect is furthered by the fact that the parties included a "delivery DDP" term in the Sales Agreement [*see Exh. C5*]. "Delivery DDP" is a reference to the Incoterm "Delivered Duty Paid," which means that "the seller bears the costs and risks involved in the delivery of the goods, including tariffs" [*Incoterms Rules*]. Unlike the conduct-focused language of clause 12, the definition of "Delivery DDP"—understood by both CLAIMANT and RESPONDENT—explicitly encompasses both general "costs . . . involved in the delivery" and tariffs [*Id.*]. Therefore, in the event of a hardship, clause 12 was intended to shift additional conduct to RESPONDENT, but CLAIMANT retained all "costs . . . involved in the delivery" by way of the "Delivery DDP" term [*Id.*].

44 The parties' inclusion of a "Delivery DDP" term was both mutually and purposely agreed upon. The term was included in the Sales Agreement without any additional language to limit its scope, which the parties could have done [*Exh. C5*]. Additionally, it was a substantial subject of the parties' negotiations, reflecting the deliberate nature of its inclusion [*see, e.g. Exh. C3, C4, C5, C8, R3, R4, PO2*]. In fact, RESPONDENT even paid additional consideration to CLAIMANT in exchange for CLAIMANT's agreement to deliver the semen "DDP." Specifically, CLAIMANT requested an additional US$ 1,000 per dose in exchange for its agreement to "Delivery DDP" [*Exh. C4*]. While the final Sales Agreement only reflects a US$ 500 per dose increase from CLAIMANT's initial proposal, that US$ 500 per dose price increase covers the additional US$ 200 per dose CLAIMANT incurred in costs associated with "delivery DDP" [*Exh. C2, C4, C5*; *PO2*].

45 Therefore, because the parties drafted a Sales Agreement that did not provide for adaptation, they accordingly selected a governing law that does not confer the jurisdiction to adapt the contract.

iii. Because the CISG—which governs the Sales Agreement—does not provide for an adaptation of price in the face of hardship, the parties selected an applicable law that does not confer the power or jurisdiction to adapt the price

46 The parties agreed for the CISG to govern the Sales Agreement [*Exh. C5*]. The CISG does not confer upon a tribunal the power or jurisdiction to adapt a contract when the performing party encounters a hardship [*Tallon p. 591*; *Rimke p. 226*]. Therefore, the parties did not possess the intent for this Tribunal

to have the power or jurisdiction to adapt the contract. As a result, the parties agreed that the law of Danubia, which does not confer such power upon this Tribunal, shall govern the Arbitration Clause and its interpretation.

47 CLAIMANT asserts that it is entitled to an adaptation of price in the face of a "hardship." However, CLAIMANT's agreement that the CISG govern the Sales Agreement indicates that it did not intend for this Tribunal to possess the power or jurisdiction to adapt the contract. This is because the CISG does not have any provision that concerns "hardship" situations [*Rimke p. 239*; *Ishida p. 361*]. In fact, the drafters rejected proposed amendments that addressed "hardship" [*Honnold II*; *Slater pp. 259-60*].

48 Furthermore, the remedy of adaptation is an extraordinary remedy found only in select domestic legal systems [*Nagy p. 34*; *see, e.g. German Civil Code (BGB) § 313, Swiss Civil Code (ZGB) SR 210*]. Moreover, this very remedy, like the concept of hardship itself, was explicitly rejected by the drafters of the Convention [*Honnold II p. 350*].

49 It would be absurd for CLAIMANT to provide for hardship adaptation in the Sales Agreement yet preclude an arbitral tribunal from awarding such a remedy by choosing Danubian law to govern the Arbitration Clause. Rather the choice of law in favor of the CISG indicates that CLAIMANT never intended to receive such a remedy, and to parallel that position it agreed for Danubian law to govern the Arbitration Clause and its interpretation.

50 By agreeing for the CISG to govern the Sales Agreement, the parties could not have intended for this Tribunal to have the power or jurisdiction to adapt the contract. Such an intention would have served no purpose and would have contradicted the parties' wishes, intentions, and understandings with respect to this transaction. Because the parties never intended for adaptation of price in the face of a hardship, CLAIMANT and RESPONDENT agreed that the law of Danubia governs the Arbitration Clause and its interpretation because Danubian law does not confer such power to the arbitral tribunal.

C. International public policy, including the doctrine of separability, precludes this Tribunal from drawing the presumption that the choice of law governing the Sales Agreement impliedly governs the Arbitration Clause

51 Where the parties do not want their rights and obligations under the Arbitration Clause to be governed by the substantive law of the dispute, a finding that the law of the seat governs the arbitration clause is more appropriate [*Nazzini p. 681*; *FirstLink Investments*]. This is because the law of the seat bears a significantly closer connection to the Arbitration Clause than the law of the general contract [*Nazzini p. 681*; *Sulamérica*; *Black Clawson*]. In this case, not only is there no basis for an inference that the parties

intended for the law of Mediterraneo to govern both the Sales Agreement and the Arbitration Clause, but there is affirmative evidence to the contrary [*see supra PART (1)(I)(B)(i)-I(B)(iii)*].

52 Furthermore, the principle of "separability" precludes this Tribunal from finding that the law of Mediterraneo applies to the Arbitration Clause on the basis that it was selected to apply to the Sales Agreement alone. The parties agreed that the law of Mediteraneo should generally govern the Sales Agreement, but its domain ends there [*see Exh. C5*]. This is because a general choice of law clause does not encompass an arbitration clause contained within the underlying contract [*Born I p. 583*; *Consultant*; *Rhone Mediterranee*].

53 An arbitration clause is autonomous and separable from other clauses of the agreement [*Redfern and Hunter p. 159*; *Born I pp. 349-50*]. This principle of "separability" allows for an arbitration clause to be governed by a different law from that which governs the main agreement [*Redfern and Hunter p. 159*; *Born I p. 464*; *Dow Chemical*]. In this case, the parties did not manifest any intention to override the doctrine of separability, and therefore their choice of law in favor of Danubia prevails.

II. The NY Convention's "validation principle" is inapplicable to this case. Even if applied, the doctrine leads to a finding that the law of Danubia governs the Arbitration Clause and its interpretation.

54 CLAIMANT relies on the NY convention's "validation principle" as grounds for application of the law of Mediterraneo to the Arbitration Clause and its interpretation. However, this principle is inapplicable where an applicable law has been chosen by the parties **(A)**, and even if applied, the inquiry still results in the law of Danubia governing the Arbitration Clause and its interpretation **(B)**.

A. The "validation principle" is inapplicable where an applicable law has been chosen by the parties

55 This "validation principle," located at Art. V(1)(a) NY Convention, should only be relied on by a tribunal when no choice of law has been made by the parties [*Lew, Mistelis, & Kröll p. 124*; *see Clothing Case*]. In this case, however, the parties chose the law of Danubia as the law governing the Arbitration Clause and its interpretation [*see supra PART (1)(I)(B)(i)-I(B)(iii)*].

56 In order to apply the "validation principle," there must be "two equally plausible interpretations" leading to a choice between governing laws [*Born I p. 547*; *R GmbH v. O B.V.*]. However, only one choice of law is plausible in this case—the choice in favor of the law of Danubia. This choice is amply supported by the parties' negotiations, the contractual language, the surrounding circumstances, and by international public policy. No such doctrine or fact supports a choice to the contrary.

B. Even if the "validation principle" is applied, it would not preclude this Tribunal from applying the law of Danubia to the Arbitration Clause

57 The "validation principle" provides for application of the law of the jurisdiction that will give effect to the parties' agreement to arbitrate [*Born I p. 542*]. Application of Danubian law to the Arbitration Clause will give effect to the parties' Arbitration Clause. An arbitration agreement is only invalid if the arbitration "cannot effectively be set in motion" [*Lew, Mistelis, & Kröll p. 344*].

58 The "validation principle" embodies the tenet that the parties' overriding intention in entering into an international arbitration agreement is to make an agreement that is valid and enforceable [*Born I p. 545*]. Thus, CLAIMANT's entire argument rests on the incorrect conclusion that the Arbitration Clause would be invalid and unenforceable under Danubian law. This is not the case. Rather, CLAIMANT fruitlessly confuses invalidity with an adverse result.

59 Should Danubian law govern the Arbitration Clause and its interpretation, and should this Tribunal lack the power and jurisdiction to adapt the contract, this arbitration will still proceed. The unavailability of the petitioned-for remedy does not invalidate the parties' ability to arbitrate on the whole. Rather, it simply eliminates one of many avenues through which CLAIMANT may seek financial recompense. Put otherwise, the lack of this Tribunal's power to adapt the contract does not eliminate this Tribunal's jurisdiction to hear CLAIMANT's grounds for entitlement to US$ 1,250,000 or some other amount. Therefore, under Danubian law, this arbitration can proceed.

60 Most importantly, the "validation principle" rests fundamentally on the parties' intentions [*Born I pp. 548-49*]. Thus, to the extent that the "validation principle" is applied in this case, the parties' manifest intent that the law of Danubia apply to the Arbitration Clause—not the law of Mediterraneo—must prevail. Therefore, because courts look primarily to the common intentions of the parties, CLAIMANT's and RESPONDENT's common intent that the law of Danubia govern the Arbitration Clause and its interpretation predominates this Tribunal's authority to choose between governing laws, even when the validation principle is applied to this case [*Municipalité*].

III. Because the issue or whether this Tribunal has the jurisdiction to adapt the contract is a procedural issue, the law of Danubia applies

61 The nature of the Arbitration Clause is procedural, thus it follows that the law of the seat is the law governing the Arbitration Clause [*Nazzini p. 681*]. CLAIMANT's contention that the issue of whether this Tribunal has the jurisdiction to adapt the contract is one governed by substantive law is misplaced. While CLAIMANT's purported entitlement to an adaptation of price under the Sales Agreement and

the CISG is indeed an issue of substantive nature, the distinct and narrow issue of whether this Tribunal has the very ability to adapt the contract is surely a procedural question.

62 An arbitration clause and the jurisdiction it confers or fails to confer is inherently a "procedural contract" [*Born I p. 359-60*; *All-Union*]. This is because the arbitration clause provides for the distinct dispute resolution *mechanism* which must be considered separate and distinct from the substantive contract [*Born I p. 360 (emphasis added)*].

63 As applied to this case, the Arbitration Clause does not confer the jurisdiction to adapt the contract. This sharply contrasts with the question of whether the events that transpired between the parties—interpreted under the provisions of the substantive contract and its governing law—entitle CLAIMANT to an adaptation of price. Thus, the line between procedure and substance can be easily drawn between the separate questions of whether CLAIMANT is entitled to an adaptation of price, and whether this Tribunal—notwithstanding CLAIMANT's purported entitlement—has the power to award such a remedy. In fact, even if this Tribunal were to find that CLAIMANT was entitled to an adaptation of price, under the governing procedural law—the law of Danubia—this Tribunal lacks the power and jurisdiction to award such a remedy.

64 Because these two questions are distinctly procedural and substantive, and because the jurisdictional question is inherently procedural, the Arbitration Clause and its interpretation must be governed by the procedural law of this arbitration: the law of Danubia.

IV. The parties did not satisfy the Danubian requirement of expressly empowering this Tribunal with the power or jurisdiction to adapt the contract

65 According to Danubian contract law, this Tribunal must not interpret the Arbitration Clause as conferring the power or jurisdiction to adapt the contract [*PO1*]. Even though courts in Danubia are of the view that Art. 28(3) Danubian arbitration law allows parties to authorize an arbitral tribunal adapt the contract, no such express conferral of power occurred in this case [*PO2*].

66 Art. 28(3) Danubian arbitration law, a verbatim recitation of Art. 28(3) UNCITRAL Model Law, requires CLAIMANT and RESPONDENT to expressly confer upon this Tribunal the power and jurisdiction to adapt the contract [*PO2*].

67 The Arbitration Clause does not discuss this Tribunal's power or jurisdiction to adapt the contract [*Exh. C5*]. The Arbitration Clause merely grants this Tribunal jurisdiction over "[a]ny dispute arising out of th[e Sales Agreement], including the existence, validity, interpretation, performance, breach or termination thereof . . ." [*Id.*]. While this clause affords this Tribunal jurisdiction over a wide range of issues, it makes no reference to the types of remedies this Tribunal may award [*see id.*]. Art. 28(3)

UNCITRAL Model Law requires an affirmative and express designation of the power of adaptation, and CLAIMANT failed to establish any such designation within the Arbitration Clause.

68 Additionally, the Sales Agreement does not discuss this Tribunal's power or jurisdiction to adapt the contract [*Exh. C5*]. Clause 12, which CLAIMANT contends provides for the remedy of an adaptation, fails to make any reference to either adaptation itself or this Tribunal's jurisdiction to award it [*Id.*]. Rather, in the event of a hardship, clause 12 merely shifts the obligation to undertake additional conduct to RESPONDENT [*see supra Part 1(I)(B)(ii)*]. Even if this Tribunal were to find that clause 12 contained a price shifting mechanism, the Sales Agreement fails to affirmatively and expressly confer the jurisdiction upon this Tribunal to award such a remedy. Because this conferral is required by Danubian law, this Tribunal has neither the power nor the jurisdiction to adapt the contract.

CONCLUSION ON PART 1

69 The law of Danubia, which governs the Arbitration Clause and its interpretation, does not grant this Tribunal the power or the jurisdiction to adapt the contract. The parties' designation of the seat as Danubia reflects their mutual agreement for the law of Danubia to govern the Arbitration Clause and its interpretation. Furthermore, even if this Tribunal considers the "validation principle" controlling in this case, Danubian law is the only plausible choice of law, and would not nullify the parties' ability to arbitrate. Additionally, since the narrow issue of whether this Tribunal has the power or jurisdiction to adapt the contract is inherently a procedural question, the applicable procedural law—the law of Danubia—must apply. Therefore, since the parties did not satisfy the Danubian requirement of an express conferral upon this Tribunal of the power to adapt, this Tribunal possesses neither the power nor the jurisdiction to adapt the contract.

PART 2: CLAIMANT MUST NOT BE PERMITTED TO SUBMIT EVIDENCE WITH NO PROBATIVE VALUE AND THAT UNFAIRLY PREJUDICES RESPONDENT

70 CLAIMANT's last-ditch effort to submit evidence from a separate and unrelated arbitral proceeding must be denied by this Tribunal. Admission of evidence from the other proceeding constitutes a violation of RESPONDENT's right to procedural fairness and equal treatment guaranteed under Art. 34 UNCITRAL Model Law and Art. V(1)(b) NY Convention **(I)**. Furthermore, this Tribunal is bound by Art. 45 HKIAC Rules to preserve the confidentiality of the other arbitral proceedings **(II)**, and such confidentiality has not been destroyed because the information from the other arbitral proceeding is not "publicly available" **(III)**. Additionally, in determining whether to admit evidence from the other arbitration, this Tribunal must consider that the evidence is neither relevant nor

material to this proceeding **(IV)**. Finally, it would contravene international public policy to allow CLAIMANT to submit evidence that was obtained by improper means **(V)**.

I. Admission of evidence from the other proceeding will violate RESPONDENT's right to procedural fairness and equal treatment and serve as grounds under Art. 34 UNCITRAL Model Law and Art. V(1)(b) NY Convention for challenging this Tribunal's award

71 CLAIMANT must not be permitted to submit evidence that was obtained by improper or illegal means because to allow CLAIMANT to submit such evidence would violate RESPONDENT's right to procedural fairness and equal treatment in the proceedings and subject the award ultimately rendered by this tribunal to challenge.

72 RESPONDENT is entitled to procedural fairness and equal treatment in these arbitral proceedings [*Fortese & Hemmi p. 113*; *Pullé p. 65*; *EDF (Services) Limited*]. The guarantee of these rights—referred to as the "Magna Carta" of arbitration—is reflected in the provisions for setting aside an award at Art. 34(2)*(a)*(ii) UNCITRAL Model Law and at Art. V(1)(b) NY Convention [*Holtzmann & Neuhaus p. 564*].

73 The concepts of procedural fairness and equal treatment are embodied in Art. 18 UNCITRAL Model Law, which provides that "[t]he parties shall be treated with equality . . ." [*Explanatory Note*; *Fortese & Hemmi p. 115*; *Tavender p. 515*]. Tribunals have previously held that a party who attempts to rely on unlawfully obtained evidence violates its Art. 18 UNCITRAL Model Law duty to uphold these concepts [*Methanex Corporation*; *see Libananco Holdings*]. This is because such conduct constitutes a "breach of the general duty to the other and to the Tribunal to conduct [oneself] in good faith . . ." [*Methanex Corporation*].

74 Evidence from the other arbitration was obtained through an illegal hack of RESPONDENT's computer system and constitutes a breach of the confidentiality provisions governing the other arbitration [*PO1*; *PO2*; *see Art. 45 HKIAC Rules*]. To permit CLAIMANT to submit evidence from the other arbitration would be to infringe upon RESPONDENT's expectation of confidentiality in its other arbitration. Furthermore, the evidence would offer no probative value to this proceeding at the expense of unfairly prejudicing RESPONDENT. This amounts to a denial of equal and fair treatment of RESPONDENT in this proceeding, and will serve as grounds to challenge this Tribunal's ultimate award under Art. 34(2)*(a)*(ii) UNCITRAL Model Law and Art. V(1)(b) NY Convention.

II. In any event, this Tribunal bound by the Art. 45.2 HKIAC Rules to preserve the confidentiality of the other arbitration

75 Confidentiality is a core advantage of international commercial arbitration [*Refern & Hunter p. 124*; *Born I p. 2780*; *International Arbitration Survey*]. The HKIAC Rules embody this cornerstone of arbitral

culture by providing, at Art. 45.1, that "[u]nless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to" the arbitration. Even more importantly, Art. 45.2 HKIAC Rules applies Art. 45.1's duty to maintain confidentiality "to the arbitral tribunal . . ." Therefore, this Tribunal must preserve the confidentiality of the other arbitration by denying CLAIMANT the opportunity to submit evidence from that confidential proceeding.

76 While many rules of arbitration are silent on the issue of confidentiality, the HKIAC Rules impose an express duty to maintain confidentiality on the parties and on this Tribunal [*Moser & Bao p.*]. Specifically, Art. 45 HKIAC Rules provides that parties are prohibited from publishing, disclosing, or communicating any information that is related either to arbitration proceedings or arbitral awards like the Partial Interim Award at issue in this case [*see Moser & Bao p.*]. This duty extends over this Tribunal by way of Art. 45.2 HKIAC Rules and as a result of a confidentiality provision in the arbitration clause in the other proceeding [*see Exh. C5*, *PO1*, *PO2*].

77 Though CLAIMANT asserts that the duty of confidentiality is not absolute, CLAIMANT failed to establish that the Partial Interim Award falls within any of the enumerated exceptions in Art. 45.3 HKIAC Rules. In fact, these exceptions do not even extend to a disinterested third party such as CLAIMANT [*see Art. 45.3 HKIAC Rules*]. Rather, the exceptions may be claimed exclusively by a party or party representative [*Id.*]. CLAIMANT was neither a party to, nor a party representative of a party to, the other arbitration, which was between RESPONDENT and an unknown Mediterranean buyer [*PO2*].

III. This Tribunal must preserve the confidentiality of the other arbitral proceedings because the information therein is not "publicly available"

78 To bypass applicable confidentiality provisions, CLAIMANT relies on the assertion that the evidence from the other arbitration is in fact not confidential, but publicly available. This "public availability" doctrine has been successfully utilized by parties who seek to introduce privileged information that has been leaked or released into the public sphere [*ConocoPhillips Petrozuata*; *Caratube*].

79 In this case, however, evidence from the other arbitration has not been "leaked," released, or otherwise disseminated into the public domain. Rather, CLAIMANT has merely arranged to purchase this information from an undisclosed third party [*PO2*]. In admitting "publicly available" evidence, the tribunal in *Caratube* emphasized that the information was "lawfully available to the public." In stark contrast, the evidence from the other arbitration is not "lawfully available to the public." In fact, it is not even lawfully available to the undisclosed third party that obtained it [*PO2*].

IV. In determining the admissibility of evidence from the other arbitration, this Tribunal must consider that evidence from the other arbitral proceeding is neither relevant nor material to this proceeding

80 The parties agreed to conduct this arbitration based on the HKIAC Rules [*PO1*]. Art. 22 HKIAC Rules provides a framework for handling evidentiary issues, and empowers this Tribunal to "determine the admissibility, relevance, materiality, and weight of the evidence . . ." This Tribunal, however, is not bound by any strict rules of evidence [*Art. 22 HKIAC Rules*]. Rather, it enjoys broad discretion to determine the standards for assessing evidence [*Born p. 775*; *Saipem*].

81 Generally, only relevant evidence that is material to the outcome of the arbitration is admissible [*Art. 22.3 HKIAC Rules*; *Moser & Bao p. 193*]. These requirements of "relevance" and "materiality" transcend international rules of arbitral procedure, and can be found in similar form in the UNCITRAL Model Law, the IBA Evidence Rules, and domestic evidentiary codes [*see, e.g. Art. 19(2) UNCITRAL Model Law, Art. 9(1) IBA Evidence Rules, Art. 20(6) AAA Rules*]. Therefore, uniform arbitration rules and law, such as the UNCITRAL Model Law and IBA Evidence Rules should be referred to for specific guidance and commentary on the evidence provision contained at Art. 22 HKIAC Rules [*Moser & Bao p. 191*; *Intel Capital*].

82 Under this evidentiary framework, RESPONDENT respectfully requests that this Tribunal exclude evidence from the other arbitration because it is not relevant to establish CLAIMANT's submission that the parties contemplated adaptation in this case **(A)**, and because evidence of RESPONDENT's position in a wholly unrelated arbitration is not material to the outcome of this case **(B)**.

A. Evidence from the other arbitral proceeding is not relevant to establish CLAIMANT's submission that the parties contemplated adaptation of price in this case

83 The IBA Evidence Rules are commonly adopted or referred to in HKIAC arbitration [*see Moser & Bao p. 191, Intel Capital supra ¶ 48*]. The IBA's concept of "relevance" suggests that the requested evidence must be useful in establishing the truth of CLAIMANT's factual allegations on which its legal conclusions are based [*Raeschke-Kessler p. 22*].

84 The legal position RESPONDENT took in a completely separate and unrelated arbitral proceeding is neither relevant nor material to CLAIMANT's allegations in this case. CLAIMANT purports to draw parallels between RESPONDENT's request for an adaptation in the other arbitration and RESPONDENT's intent that adaptation be available in this case [*NoA*]. However, even though RESPONDENT did seek adaptation in that case, the circumstances were so different from the facts of

this case as to preclude this Tribunal from basing its decision in any way on evidence from the other proceedings.

85 First, the transaction in the other arbitration proceeding was between different parties [*PO2*]. The contract was negotiated exclusively by Mr. Antley—rather than both Mr. Antley and Mr. Krone—in tandem with the other party's negotiators [*Id.*]. The details and correspondence that took place in those negotiations is unknown, but certainly were far from identical to the negotiations that took place in this case. Therefore, the details of the other arbitral proceeding bear no relevance to CLAIMANT's submissions in this case.

86 Second, the contractual language was different from the Sales Agreement and Arbitration Clause in this case. Specifically, the contract in the other arbitration proceeding contained an ICC Hardship Clause [*PO2*]. The language of the hardship clause undoubtedly plays a critical role in the remedies available to a party, and since the language differed significantly in the other arbitration, evidence from that proceeding bears no relevance to RESPONDENT's intent in this case.

87 Third, in the other case, RESPONDENT refused delivery pending its requested renegotiations [*PO2*]. This is a stark factual contrast to this case, in which CLAIMANT shipped the frozen semen concurrently with its request for renegotiations.

B. Evidence from a separate and unrelated arbitral proceeding is not material to the outcome of this case

88 To satisfy the "materiality" requirement, evidence from the other arbitral proceeding must be deemed necessary to determine whether a factual allegation is true [*Raeschke-Kessler p. 22*]. This requirement restricts this Tribunal to consider only evidence that is necessary "to substantiate a contention" [*O'Malley p. 57*]. To be "necessary" in this respect means such evidence would have a tendency to influence this Tribunal's determination on the merits [*Waincymer p. 859*; *UNCITRAL Draft Guidelines*].

89 Evidence of RESPONDENT's position in a separate arbitral proceeding that occurred under completely different factual circumstances and different governing law has no tendency to influence this Tribunal's determination on the merits [*see PO2 supra* ¶¶ *62-65*]. Even though RESPONDENT did indeed seek an adaptation of price in the other arbitration, that position bears no correlation to its position in this case because RESPONDENT's request for adaptation in the other proceeding was the product of a differently negotiated contract and different contractual language [*Id.*]. This Tribunal could draw no plausible correlation from the other arbitration to RESPONDENT's legal position or factual intent in this case.

V. It would contravene international public policy to permit CLAIMANT to submit evidence obtained by improper and illegal means

90 Art. V(2)(b) NY Convention allows a reviewing court to refuse enforcement of an arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of that country." While "that country" refers to Danubia, the seat of the arbitration, courts in practice have interchangeably used international public policy to satisfy the exception [*Allsop Automatic Inc.*; *Ansell*; *Tensacciai*].

91 To permit CLAIMANT to submit evidence that has been improperly and illegally obtained is to send a message to litigants that illegal or improper efforts to obtain favorable evidence will be condoned by this Tribunal. Such policy encourages bad faith conduct and unlawful activity. To incentivize this behavior would contravene international public policy and any arbitral award that does so will be challenged under Art. V(2)(b) NY Convention.

92 Enforcement of arbitral awards will be denied "where enforcement would violate . . . basic notions of morality and justice" [*Parsons & Whittemore Overseas*; *BCB Holdings Limited*; *Traxys Europe*]. If an arbitral award encourages parties to engage in illicit activities that violate the confidentiality and privacy of their adversaries, such an award would violate "basic notions of morality and justice" [*Id.*].

CONCLUSION ON PART 2

93 The evidence CLAIMANT attempts to submit possesses no probative value and unduly and unfairly prejudices RESPONDENT. To permit CLAIMANT to submit such evidence would deny RESPONDENT the fundamental rights of procedural fairness and equal treatment. According to Art. 34 UNCITRAL Model Law and Art. V(1)(b) NY Convention, to deny RESPONDENT these rights would jeopardize the award ultimately rendered by this Tribunal. Additionally, this Tribunal is bound by Art. 45.2 HKIAC Rules to preserve the confidentiality of the other arbitral proceedings. Finally, to permit CLAIMANT to submit this evidence would violate fundamental notions of international public policy, as it would incentivize litigants to act unlawfully to obtain evidence. This too, may serve as grounds for refusal of enforcement of the award under Art. V(2)(b) NY Convention.

PART 3: CLAUSE 12 DOES NOT PROVIDE FOR AN ADAPTATION OF PRICE AND THE TARIFF FALLS OUTSIDE THE SCOPE OF CLAUSE 12'S APPLICABILITY

94 The parties agreed for the law of Mediterraneo, including the CISG, to govern the Sales Agreement [*Exh. C5*]. Since a dominant theme of the CISG is the role of the contract made by the parties, the

inquiry into whether the price can be adapted due to an economic hardship should begin with an analysis of the contract itself [*Honnold p. 2*].

95 The CISG may be used to interpret a contractual term [*CISG-AC 3*; *Honnold p. 152*]. Although Art. 8 CISG is generally used to interpret the unilateral conduct of a party, it "is equally applicable to the interpretation of 'the contract' when the document is embodied in a single document" [*UN Conference*; *Cowhides Case*].

96 Clause 12 does not provide for an adaptation of price because CLAIMANT "knew or could not have been unaware" of RESPONDENT's intent that it not provide for adaptation [*see Art. 8(1) CISG*] **(I)**. Furthermore, a "reasonable person of the same kind" as RESPONDENT would have interpreted clause 12 as not providing for adaptation [*Art. 8(2) CISG*] **(II)**.

I. Clause 12 does not provide for an adaptation of price because CLAIMANT "knew or could not have been unaware" of RESPONDENT's intent that clause 12 merely excuses nonperformance in the event of a hardship

97 The salient function of Art. 8(1) CISG is that if the parties share a common understanding of the meaning of contractual language, that understating prevails [*Farnsworth pp. 96-99*; *UN Commission*; *MCC Marble*]. In this case, the prevailing shared understanding was that clause 12 only excused CLAIMANT's nonperformance where "additional health and safety requirements" constitute a hardship for CLAIMANT [*see Exh. C5*].

98 Art. 8(1) CISG instructs this Tribunal to apply a subjective test to discern the parties' intended interpretation and understanding of the contractual language, and Art. 8(3) CISG requires consideration of "all relevant circumstances of the case . . ." [*Farnsworth pp. 95-102*; *Frigaliment Importing Co.*]. Accordingly, RESPONDENT's intent that clause 12 only excuse nonperformance in the event of a hardship prevails because CLAIMANT "knew or could not have been unaware" of this exact intent [*Art. 8(1) CISG* ;*see Schmidt-Kessel ¶ 15*, *CA Grenoble*].

99 CLAIMANT "knew or could not have been unaware" of RESPONDENT's intent that clause 12 only excuses nonperformance in the event of hardship because CLAIMANT assumed all the financial risks associated with delivery by agreeing to incorporate the Incoterm "delivery DDP" [*see Art. 8(1) CISG*] **(A)**. Furthermore, CLAIMANT "knew or could not have been unaware" of RESPONDENT's intent that clause 12 only apply to "additional health and safety requirements," which does not include tariffs [*see Art. 8(1) CISG*, *Exh. C5*] **(B)**.

A. By agreeing to use the Incoterm "delivery DDP," CLAIMANT "knew or could not have been unaware" that it accepted all financial risks associated with delivery of the goods, including the obligation to pay tariffs

100 In an email on March 28, 2017, RESPONDENT proposed to CLAIMANT that delivery be "on the basis of DDP" [*Exh. C3*]. CLAIMANT responded by expressing to RESPONDENT that "[CLAIMANT] can accept for this contract a delivery DDP" [*Exh. C4*]. CLAIMANT's only condition was that it required an increase in price by US$ 1,000 per dose [*Id.*]. While this Tribunal can merely speculate as to what portion of the ultimate price of US$ 10,000 per dose included additional consideration paid by RESPONDENT in exchange for the "delivery DDP" term, it can be concluded that the price increased US$ 500 per dose, and that CLAIMANT only incurred approximately a US$ 200 per dose increase in costs as a result of the "delivery DDP" term [*see PO2*, *Exh. C5*].

101 Therefore, CLAIMANT "knew or could not have been unaware" that it reached an agreement with RESPONDENT to deliver the frozen semen on the basis of "delivery DDP" [*see Art. 8(1) CISG*, *Exh. C5*].

102 The official definition of "delivery DDP" states that "the seller bears the costs and risks involved in the delivery of the goods, *including tariffs*" [*Incoterms Rules (emphasis added)*]. Accordingly, by agreeing to a "delivery DDP" term in the contract, CLAIMANT agreed to bear all of these financial risks, namely, tariffs [*see Exh. C5*]. Furthermore, no language limiting the scope or legal effect of a "delivery DDP" term was incorporated in the contract [*Exh. C5*].

103 Therefore, CLAIMANT "knew or could not have been unaware" that it was responsible for all financial risks associated with "delivery DDP," including the 30% tariff in this case [*see Art. 8(1) CISG*].

104 CLAIMANT did express an interest in limiting specific risks associated with delivery [*Exh. C4*]. However, these risks did not include payment of tariffs, but rather "those associated with changes in customs regulation or import restrictions" [*Id.*]. This statement by CLAIMANT was made in reference to a prior incident in which Danubia imposed quarantine and testing regulations on CLAIMANT's shipment at the final hour, resulting in a 40% increase in costs [*Id.*; *PO2*]. Because of this concern, CLAIMANT and RESPONDENT agreed to excuse CLAIMANT from responsibility for meeting "additional health and safety requirements" [*Id.*; *Exh. C5*].

105 Therefore, CLAIMANT "knew or could not have been unaware" that, while it was no longer responsible for "additional health and safety requirements," it was still bound to deliver on the basis of "delivery DDP," which includes the obligation to pay tariffs [*see Art. 8(1) CISG*; *Id.*, *Exh. C5*].

B. CLAIMANT "knew or could not have been unaware" that clasue 12 did not provide for an adaptation of price in the event of a hardship

106 The only time the parties discussed the concept of "adaptation" during negotiations was during a single, oral conversation between Ms. Napravnik (CLAIMANT's negotiator) and Mr. Antley (RESPONDENT's negotiator) [*Exh. C8*]. However, the result of this conversation was not a mutual agreement that clause 12 should provide for adaptation. Therefore, since RESPONDENT never manifested an agreement to adaptation of price and because adaptation language was not incorporated into the Sales Agreement, CLAIMANT "knew or could not have been unaware" of RESPONDENT's intent for clause 12 not to provide an adaptation of price in the event of an economic hardship.

107 During that conversation, Ms. Napravnik "mentioned to Mr. Antley that for [CLAIMANT] it was important to have a mechanism in place which would ensure an adaptation of the contract . . ." [*Exh. C8*]. According to Ms. Napravnik's Witness Statement, Mr. Antley replied to Ms. Napravnik's request, stating that "in his view [] it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*Id.*]. Mr. Antley's statement was far from an assent to a "mechanism for adaptation" [*see id.*]. In fact, in Mr. Antley's notes from the conversation, he did not make a note to incorporate a "mechanism for adaptation" [*Exh. R3*].

108 While it is difficult to determine what the true meaning of this verbal exchange was, it can be concluded that no outward manifestation was made by RESPONDENT to CLAIMANT that the contract would provide for adaptation. Therefore, CLAIMANT "knew or could not have been unaware" that RESPONDENT did not intend for clause 12 to provide for an adaptation in the event of an economic hardship [*see Art. 8(1) CISG*].

109 Adaptation was never agreed upon by the parties. As a result, CLAIMANT "knew or could not have been unaware" that RESPONDENT intended for and understood clause 12 to only excuse CLAIMANT from performance under the narrowly enumerated circumstances therein, and accordingly that clause 12 does not provide for an adaptation of price [*see Art. 8(1) CISG*].

II. In any case, a "reasonable person of the same kind" as CLAIMANT would have understood that clause 12 does not provide for an adaptation of price in the event of an economic hardship

110 Where subjective intent cannot be discerned, Art. 8(2) CISG contains a completely objective standard. Therefore, should this Tribunal find that the parties had different understandings of clause 12, the language should be interpreted according to Art. 8(2) CISG [*Used Rotary Case*]. Under Art. 8(2) CISG, the focus shifts from the party making the statement to the listener. Statements and conduct of a party should be interpreted the way "a reasonable person of the same kind as the other party" would

have interpreted them [*Art. 8(2) CISG*]. Like Art. 8(1) CISG, Art. 8(2) CISG may be used to interpret contractual language [*see CISG-AC 3*, *Honnold p. 153*, *UN Conference supra* ¶ *45*, *Heaters Case supra* ¶ *45*].

111 Even if CLAIMANT asserts that it was unaware of RESPONDENT's intent or of the meaning of the contractual language, Art. 8(2) CISG instructs this Tribunal to apply an objective reasonable person standard [*Saenger* ¶ *2*]. In utilizing this reasonable person standard, Art. 8(3) CISG requires consideration of "all relevant circumstances of the case." As such, a reasonable person would find that clause 12 does not provide for an adaptation in the face of economic hardship.

112 A "reasonable person of the same kind" as CLAIMANT would have understood that RESPONDENT's objection to the broad ICC Hardship Clause and its subsequent narrowing meant that clause 12 did not provide for an adaptation of price in the event of an economic hardship [*see Art. 8(2) CISG*] **(A)**. Additionally, because clause 12 was drafted with the mutual intent to preserve the commercial basis of the deal, a "reasonable person of the same kind" as CLAIMANT would not have expected clause 12 to provide the extraordinary remedy of an adaptation of price **(B)**.

A. A "reasonable person of the same kind" as CLAIMANT would have understood that RESPONDENT's objection to the broad ICC Hardship Clause and its subsequent narrowing meant that clause 12 did not provide for an adaptation of price in the event of an economic hardship

113 In an email to RESPONDENT on April 11, 2017, CLAIMANT suggested use of the ICC Hardship Clause in the Sales Agreement [*Exh. R2*]. During further negotiations, Mr. Krone (RESPONDENT's negotiator) expressed to Mr. Ferguson (CLAIMANT's negotiator) that the ICC Hardship Clause was "too broad for the purposes of the contract and the objectives pursued" [*PO2*]. In order to account for CLAIMANT's concerns regarding additional health and safety requirements, the parties still incorporated a narrowed version of the ICC Hardship language into the Sales Agreement [*see Exh. C5*, *PO2*].

114 A "reasonable person of the same kind" as CLAIMANT would have understood that the scope of the ICC Hardship Clause had been narrowed to "additional health and safety requirements . . ." [*see Art. 8(2) CISG*, *Exh. C5*]. The ICC Hardship Clause issues blanket coverage for "events beyond [a party's] control which it could not reasonably have been expected to have taken into account at the time of conclusion of the contract" and that the party "could not have reasonably have avoided or overcome . . ." [*ICC Hardship Clause*]. Clause 12, however, covers only "additional health and safety requirements . . ." [*Exh. C5*].

115 A "reasonable person of the same kind" as CLAIMANT could not have interpreted clause 12 to offer the same coverage as the original ICC Hardship Clause. Therefore, a "reasonable person of the same kind" as CLAIMANT could not have interpreted clause 12 to afford coverage for a tariff, especially since CLAIMANT already assumed the financial obligation to pay all tariffs associated with delivery through the "delivery DDP" term [*see Art. 8(2) CISG*, *ICC Hardship Clause*, *Exh. C5*].

116 Furthermore, a "reasonable person of the same kind" as CLAIMANT would have interpreted clause 12 to provide only excusal from nonperformance in the event of an economic hardship, and not an adaptation of price [*see Art. 8(2) CISG*]. In the event of a hardship, the ICC Hardship Clause directs the parties "to negotiate alternative contractual terms . . ." [*ICC Hardship Clause*]. This instruction was not incorporated into clause 12 because this was not the legal effect the parties intended for clause 12 to possess [*compare id. with Exh. C5*]. Rather, clause 12 merely states "seller shall not be responsible for . . ." [*Exh. C5*].

117 Nowhere in clause 12 are the parties bound to renegotiate and nowhere in clause 12 is a financial burden reallocated to RESPONDENT [*see Exh. C5*]. Therefore, a "reasonable person of the same kind" as CLAIMANT could not have interpreted clause 12 to provide as such, especially given the fact that language to this effect was deliberately removed from the ICC Hardship Clause so as to narrow its effect [*see Art. 8(2) CISG*]. And therefore, a "reasonable person of the same kind" as CLAIMANT could not have expected renegotiations or an adaptation of price under clause 12 [*see Art. 8(2) CISG*].

B. Since clause 12 was drafted with the mutual intent to preserve the commercial basis of the deal, a "reasonable person of the same kind" as CLAIMANT would not have interpreted clause 12 to provide the extraordinary remedy of an adaptation of price

118 When CLAIMANT expressed to RESPONDENT its concerns regarding a prior incident that increased its costs by 40%, CLAIMANT noted that the 40% increase "destroy[ed] the commercial basis of the deal" [*Exh. C4*]. It was for this exact reason that CLAIMANT suggested that "a hardship clause [] be included in the contract . . ." [*Id.*]. In that light, CLAIMANT also expressed interest "in entering into a long-term mutually beneficial relationship . . ." [*Exh. C2*, *C4*, *C8*]. RESPONDENT shared this interest [*Exh. C3*].

119 A "reasonable person of the same kind" as CLAIMANT could not have expected that a "long-term mutually beneficial" transaction would include a contractual term that allowed for the retroactive shifting of a million-dollar payment obligation. In fact, such a shift would "destroy the commercial basis of" RESPONDENT's deal. Given the fact that RESPONDENT never agreed to such a term, and no language to that effect was incorporated in the Sales Agreement, a "reasonable person of the same kind" as CLAIMANT could not have interpreted clause 12 to provide for adaptation of price.

III. The meaning of the plain language of clause 12 does not provide for an adaptation of price in the event of a tariff

120 When analyzing clause 12 objectively, the meaning of the plain language of clause 12 must be examined. Under Art. 8(3) CISG, the scope of contractual responsibility is examined according to the parties' intent and the plain meaning of the contractual language [*Peterkova pp. 153-54*]. Art. 8(3) CISG requires that consideration be given to the typical meaning of the words used by the parties within the standard language [*Schlechtriem & Schwnzer §§ 41-42*; *Bugg p. 49*; *Coke Case*; *Mattress Case*].

121 The stated legal effect of clause 12 is "Seller shall not be responsible . . ." [*Exh. C5*]. CLAIMANT's assertion that this language affords it an adaptation of price requires conjecture and a strained construction of the plain language of the clause. The much simpler and more plausible interpretation is that this language excuses the seller (CLAIMANT) from *responsibility* for the enumerated circumstances.

122 An excusal from responsibility is wholly distinct from an adaptation of price. Should CLAIMANT "not be responsible . . ." for an "additional health and safety requirement," CLAIMANT merely is not bound by the obligation of undertaking whatever conduct—for example, additional testing—is required of it [*see Exh. C5*]. The plain language of clause 12 indicates that this is simply an excusal from liability for nonperformance of an enumerated obligation [*see id.*]. Nothing in the plain language shifts financial obligations to RESPONDENT by way of an adaptation of price. In fact, the words "adaptation" and "price"—along with any synonymous words—are absent from clause 12 [*Exh. C5*].

123 Additionally, the tariff levied by the Equatorianian government does not fall under the meaning of the plain language "additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Exh. C5*]. In order to be excused from performing, an "additional health and safety requirement[] . . ." must occur [*Exh. C5*].

124 The 30% tariff levied by the Equatorianian government does not fall under this language. Rather, the word "requirement" means "something wanted or needed" that is associated with "health and safety" [*Merriam-Webster*; *Exh. C5*]. A tariff is not a "health and safety requirement." Rather, a "tariff" is a duty imposed on imported goods [*Merriam-Webster*]. Furthermore, this particular tariff was retaliatory in nature, and bore no connection to "health and safety" [*Exh. C6*; *see Exh. C5*].

125 Given the stark contrast between a tariff and a "health and safety requirement," the tariff is also not a "comparable unforeseen event . . ." [*see Exh. C5*]. The word "comparable" refers to the category "health and safety requirement," and thus, other "unforeseen event[s]" that come under the scope of clause 12 are only those events that are "comparable" to a "health and safety requirement[]" [*see Exh.*

C5]. Since a tariff is not comparable to a requirement related to health and safety, clause 12—interpreted in accordance with the plain meaning of its language—does not apply to tariffs.

CONCLUSION ON PART 3

126 The parties' agreement—memorialized in writing—must serve as the primary source of inquiry in this Tribunal's determinations on the merits. Clause 12 of the Sales Agreement does not provide for an adaptation of price because CLAIMANT "knew or could not have been unaware" of RESPONDENT's intent that clause 12 merely excuse CLAIMANT from performing the enumerated obligations in the event of a hardship. Furthermore, "a reasonable person of the same kind" as CLAIMANT would have understood that clause 12 does not provide for an adaptation of price in the event of an economic hardship. Finally, the meaning of the plain language of clause 12 does not provide for an adaptation of price under such circumstances.

PART 4: CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF PRICE UNDER THE CISG BECAUSE CLAIMANT DID NOT ENCOUNTER AN "IMPEDIMENT" AND BECAUSE CLAIMANT ULTIMATELY PERFORMED ITS CONTRACTUAL OBLIGATION TO DELIVER THE GOODS

127 The Sales Agreement is governed by the CISG [*Exh. C5*]. CLAIMANT relies on an internal gap in the CISG for the proposition that—when interpreted in accordance with the general principles on which the Convention is based—the CISG entitles CLAIMANT to an adaptation of price in the face of a hardship. However, no such internal gap exists.

128 Conversely, the question of whether CLAIMANT is entitled to its requested relief is settled by the express terms of Art. 79 CISG, which flatly denies CLAIMANT an adaptation of price in the face of hardship because CLAIMANT did not encounter an "impediment," and because CLAIMANT ultimately performed its contractual obligation to deliver the goods **(I)**. However, even if this Tribunal finds that the CISG governs but does not expressly settle the question of CLAIMANT's entitlement to an adaptation of price in the face of hardship, the CISG—when interpreted in accordance with the general principles on which it is based—still does not afford CLAIMANT its requested remedy **(II)**. Finally, CLAIMANT may not invoke use of the UNIDROIT Principles, and therefore is not entitled to request renegotiations or request that this Tribunal adapt the contract **(III)**.

I. Art. 79 CISG expressly denies Claimant adaptation due to mere hardship because Claimant did not encounter an "impediment" and Claimant performed its obligations under the Sales Agreement

129 Contrary to CLAIMANT's position, Art. 79 CISG directly settles the issue of available remedies in the face of changed circumstances that affect a party's ability to perform its contractual obligations. Therefore, this Tribunal should not look to the general principles upon which the CISG is based, but instead should decide this case based on the express provisions of the Convention itself [*Art. 7(1) CISG*].

130 In order to forego application of the express terms of the CISG and instead apply the Convention's general principles, this Tribunal must find that the issue is one governed by but "not expressly settled" in the CISG [*Art. 7(2) CISG*]. CLAIMANT's assertion of an internal gap is simply an attempt to circumvent the very law that the parties agreed upon to govern the Sales Agreement.

131 CLAIMANT asserts that Art. 79 CISG governs, but does not expressly settle, the issue of adaptation of price in the face of hardship. However, the provisions of Art. 79 CISG were crafted to both govern and expressly settle the facts of this case by denying CLAIMANT the remedy of adaptation of price. First, CLAIMANT did not encounter an "impediment" as contemplated by Art. 79 CISG **(A)**. Second, the requested remedy of an adaptation of price is categorically rejected by the language of Art. 79 CISG, which only grants the remedy of excusal from liability "for failure to perform" **(B)**. Third, the drafting history of Art. 79 CISG demonstrates that the drafters did not intend for the Convention to afford CLAIMANT an adaptation under these circumstances **(C)**.

A. Art. 79 CISG expressly denies CLAIMANT an adaptation of price because the 30% tariff did not constitute an "impediment"

132 As a prerequisite to claiming relief under Art. 79 CISG, the disadvantaged party must prove that it encountered "an impediment beyond his control and that he could not reasonably be expected to have taken into account at the time of the conclusion of the contract or to have overcome it or its consequences." CLAIMANT did not encounter such an affliction.

133 The 30% tariff was foreseeable. The Equatorianian government publicly expressed its intention to employ a protectionist approach to foreign trade as early as January 2017, four months prior to conclusion of the Sales Agreement [*Exh. C6*]. Furthermore, the 30% tariff was retaliatory in nature, as it was prompted by a 25% tariff imposed by the Mediterranean government [*Id.*; *PO2*]. Additionally, CLAIMANT was able to "overcome" the 30% tariff and its consequences. This Tribunal need not even speculate about CLAIMANT's ability to do so because CLAIMANT did in fact overcome the tariff by performing its contractual obligation to deliver the frozen semen [*Exh. C8*]. From a financial perspective, CLAIMANT's assertions that its business will come under dire circumstances if it bears the

cost of the tariff are mere speculation. All that is known is that securing future credit financing may become more difficult [*PO2*].

134 It is true that "impediments" encompass more scenarios than exclusively those that render performance impossible. However, to constitute an "impediment," performance must still be disproportionately or prejudicially more burdensome to the performing party compared to the benefit received by the other party [*DiMatteo p. 278*; *Smits p. 162*]. The 30% tariff did not impose such a burden on CLAIMANT.

B. Even if CLAIMANT encountered an "impediment," Art. 79 CISG denies Claimant the remedy of adaptation and exclusively provides excusal from nonperformance.

135 CLAIMANT may not claim a remedy under Art. 79 CISG because CLAIMANT performed its contractual duty to deliver the frozen semen [*Exh. C8*]. In the event of an "impediment," Art. 79(1) CISG only excuses a disadvantaged party from *liability* for failure to perform its contractual obligations. The fact that this is the only remedy available under the circumstances defined in Art. 79 CISG serves as a direct and express rejection of the availability of any other remedy, including an adaptation of price.

C. The drafting history of Art. 79 CISG demonstrates that the drafters did not intend for the Convention to afford CLAIMANT an adaptation of price under the circumstances of this case

136 The drafting history of Article 79 CISG does not contain a gap concerning the availability of an adaptation of price in the face of hardship [*see Rimke p. 221*; *Tallon p. 578*]. Instead, it provides quite the opposite. Prior to the adoption of the CISG, Art. 74 ULIS provided parties who encountered obstacles to performance a remedy to recoup the costs they incurred [*Art. 74 ULIS*]. Due to abuse of this rule, the drafters of the CISG narrowed the scope of this exemption and excluded the availability of remedies for circumstances that only made performance more difficult [*Rimke p. 221*].

137 Art. 79 CISG represents a retreat from the more lenient Art. 74 ULIS [*Id.*]. And while various proposals were made to expand the scope of Art. 79 CISG to include remedies that more closely resembled those available under ULIS (most notably the proposal of the Norwegian Delegation during the Vienna Convention), all of these proposals were struck down. This signals a clear intent by the drafters that the CISG does not provide adaptation to a party who encountered mere hardship [*Rimke p. 222*; *Honnold p. 602*].

II. Even if this Tribunal were to find that the CISG contains a gap regarding invocation of hardship and the remedy of an adaptation of price, the CISG—interpreted in accordance with the general principles on which it is based—nonetheless precludes this Tribunal from awarding CLAIMANT an adaptation of price

138 If this Tribunal agrees with CLAIMANT that the CISG governs but fails to expressly settle the issue of available remedies where changed circumstances only make performance more difficult, this Tribunal must settle this dispute in conformity with the general principles upon which the CISG is based [*Art. 7(2) CISG*]. Still, when interpreted in accordance with the general principle of *pacta sunt servanda*, the CISG does not afford CLAIMANT an adaptation of price in the face of hardship **(A)**. Additionally, the general principles of detrimental reliance and good faith—when applied to the facts of this case—do not entitle CLAIMANT to an adaptation of price **(B)**. Finally, no general principle [of] adaptation or non-liability for unforeseeable impediment exists, resulting in an interpretation of the CISG that weighs in RESPONDENT's favor **(C)**.

A. When interpreted in accordance with the general principle of *pacta sunt servanda*, the CISG does not afford CLAIMANT an adaptation of price in the face of hardship

139 *Pacta sunt servanda* represents the notion that transactions should be performed as agreed upon, and is unanimously considered a general principle on which the CISG is based [*Liu p. 1*; *Flambouras p. 269; Magnus n. 39; Van Houtte p. 109; Viscasillas p. 16*]. Pursuant to this tenet, CLAIMANT had an obligation to ship the third shipment of goods on January 23, 2017 [*Exh. C5*]. As such, RESPONDENT had an obligation to pay CLAIMANT a total of $10,000,000 USD for all three shipments combined [*Id.*]. While the CISG modifies the applicability of *pacta sunt servanda* – primarily by the exception outlined in Article 79 CISG for instances where performance is nearly impossible – when a circumstance does not rise to the level of that exception, this principle stands to provide assurance that a party will perform as agreed upon.

140 As this is the case here, CLAIMANT had an obligation to ship the goods on the agreed upon date absent near impossibility pursuant to *pacta sunt servanda.* The mere increase in the price of materials cannot serve as a basis to discharge performance [*Supra ¶132*]. Instead, CLAIMANT is forced to base its plea for adaptation on the fact that 30% tariff it endured could stand to bankrupt CLAIMANT, and thus *could have* served as an exception to the general principle of *pacta sunt servanda* [*PO2*]. However, circumstances within the personal sphere of the CLAIMANT such as business failures, foreclosure, bankruptcy – or in this case *alleged potential bankruptcy* - do not discharge CLAIMANT's obligation to perform as necessary [*Enderlein & Maskow 322*; *Flambouras 267*]. Because CLAIMANT had no acceptable excuse from performance, an award in CLAIMANT's favor would stand to reward CLAIMANT for performing a pre-existing, contractually required duty. CLAIMANT should not be rewarded at all for performing what it was already required to perform–let alone to the detriment of an innocent

RESPONDENT. To do so would not only violate the general principle of *pacta sunt servanda*, but would stand to undermine the most basic expectations of any party to a contract [*Van Houtte p. 109*].

B. The general principles of detrimental reliance and good faith—when applied to the facts of this case—do not entitle CLAIMANT to an adaptation of price

141 Even in light of the general principle of detrimental reliance, CLAIMANT is not entitled to a remedy under the CISG because CLAIMANT did not reasonably rely on RESPONDENT's conduct to its detriment. The general principle of detrimental reliance contemplates that a remedy is appropriate where reliance by a party based on the conduct of another *reasonably* and subsequently causes harm to the relying party [*NoA*; *Alban p. 171*; *Ferrari p. 225*].

142 It is CLAIMANT's position that it incurred the additional costs associated with the tariff only because RESPONDENT assured CLAIMANT that the parties would reach an agreement on an adaptation of price [*NoA*]. However, RESPONDENT explicitly stated to CLAIMANT that RESPONDENT could not authorize an adaptation of price before the third shipment [*Exh. R4*].

143 Even if CLAIMANT did rely on RESPONDENT's statements, such reliance was unreasonable. RESPONDENT explicitly warned CLAIMANT that it could not authorize any additional payment for the third shipment, yet CLAIMANT still shipped the goods [*Exh. C8, R4*]. At most, RESPONDENT impressed upon CLAIMANT that RESPONDENT was open to entering negotiations to see if a solution could be reached [*Exh. R4*]. In fact, the parties did enter into negotiations after this conversation [*Id.*].

144 It is critical to this Tribunal's inquiry that RESPONDENT never represented to CLAIMANT that it would make additional payment for the third installment, nor that it was under a duty to renegotiate a new price by way of the contract or governing laws. Therefore, any understanding by CLAIMANT in authorizing shipment that CLAIMANT would not be responsible for the additional tariff costs was unfounded and unreasonable.

145 When interpreted in accordance with the general principle of detrimental reliance, the CISG lends no assistance to CLAIMANT. CLAIMANT did not *reasonably* rely to its detriment and is therefore not entitled to recompense.

C. No general principle of adaptation or non-liability for unforeseeable impediments exists

146 While there is not a definitive list of "general principles" under the CISG they tend to be characterized as one of the following: (1) a general principle derived from a single article of the CISG that can be applied to the CISG as a whole, (2) a general principle mentioned in several articles throughout the CISG, or (3) a general principle deriving from a single clause without uniform application but that can be generalized to apply to the CISG as a whole [*Janssen & Kiene p. 271*]. These "general principles"

are distinguishable from "rules," which are definite, detailed legal consequences applicable only when applied to a detailed set of facts [*Rheinstein p. 597*]. "Rules" are not to be considered in an internal gap analysis under Art. 7(2) CISG [*Id.*].

147 As support for CLAIMANT's position that it is owed adaptation under the CISG, CLAIMANT asserts that there exists a general principle of non-liability for unforeseeable impediments beyond the control of a party [*Cl. Brief ¶110*]. This is not a general principle on which the CISG is based.

148 Unforeseeability of impediments and their effect on contractual performance cannot be applied to the CISG as a whole because it only applies to a limited set of factual circumstances. Impediments are only mentioned in a single article of the CISG, and thus cannot be considered a general principle [*Art. 79 CISG*; *Rimke p. 219; see Janssen & Kiene p. 271*].

149 Furthermore, CLAIMANT cannot successfully demonstrate that this purported general principle can be generalized to the CISG as a whole because generalization of the principle cannot result from the specific wording of the clause or its position in the CISG [*Janssen & Kiene p. 272*]. The generalization of CLAIMANT's suggested principle rests completely on the specific wording of the clause, which CLAIMANT conveniently omitted when referencing important limitations on non-liability for impediments expressed in Art. 79 CISG itself; principally, the fact that non-liability only applies in situations of non-performance. Therefore, if anything, this "general principle" upon which CLAIMANT relies is not a general principle at all, but merely a rule that one could draw from a broad reading of Art. 79 CISG. Nonetheless, it cannot be used as a basis for an interpretation under Art. 7(2) CISG as it is not a general principle upon which the CISG is based.

150 In addition, even if CLAIMANT's assertion can be construed as a general principle, that general principle still requires CLAIMANT to endure an "impediment." As discussed previously, the 30% tariff that CLAIMANT encountered during the third shipment does not rise to the level that the CISG deems an "impediment," and thus CLAIMANT cannot receive a remedy under such a theory [*Supra ¶133*].

III. CLAIMANT may not invoke the UNIDROIT Principles, and therefore may not assert a right to renegotiations or to seek adaptation of price from this Tribunal

151 CLAIMANT's ability to claim adaptation as an available remedy relies solely on this Tribunal applying Article 6.2.3 UNIDROIT Principles to this arbitration. While the CISG contains no gaps in its application to this case and thus looking outside of the CISG is warrantless, even if this Tribunal were to find that gaps exist, the UNIDROIT Principles cannot be invoked as an appropriate gap filler under Art. 7(2) CISG **(A)**, nor as the applicable source of trade usage **(B)**.

A. The UNIDROIT Principles cannot be applied to this arbitration because they are not an appropriate gap-filler pursuant to Article 7(2) CISG

152 If the Tribunal were to come across an issue governed by the CISG, but not expressly settled within it, the Tribunal should determine the issue in conformity with the general principles upon which the CISG is based [*Art. 7(2) CISG*]. While scholars vary dramatically in their views as to whether and to what extent the UNIDROIT Principles can be used as a gap filler, these same scholars are generally unanimous in asserting that individual provisions within a uniform body of law, Article 6.2.2 UNIDROIT Principles, may only be used as gap-fillers when they express a general principle found in the CISG [*see Bonnell p. 349*; *see Ferrari p. 138*]. As such, the UNIDROIT Principles are only applicable to the extent that they serve as examples of express provisions of the CISG [*see Bonnell p. 349*; *see Perillo p. 281*].

153 Here, invoking Article 6.2.2 of the UNIDROIT Principles as an example of the general principles of the CISG completely ignores the drafting history of the CISG itself [*Supra ¶136*]. Because the drafting history of the CISG shows that the CISG's framers explicitly denied providing a remedy for mere hardship despite such a remedy being commonplace in international trade law at the time, Article 6.2.2 of the UNIDROIT Principles is clearly not one of those principles that "serve as an example" of the express provisions of the CISG. Therefore, CLAIMANT may not invoke the UNIDROIT Principles as a gap filler under Article 7(2) CISG.

B. Article 6.2.3 UNIDROIT Principles cannot be invoked as a trade usage in this arbitration because it is not "widely known and regularly observed" pursuant to Article 9(2) CISG

154 Article 6.2.3 UNIDROIT was not agreed to by the parties to be a trade usage of which the parties would be bound, nor is 6.2.3 UNIDROIT widely known and regularly observed by parties to contracts of this type. Therefore, it cannot be invoked as a "trade usage" pursuant to Article 9 CISG [*Art. 9 CISG*]. For CLAIMANT to invoke 6.2.3 UNIDROIT as a recognized "trade usage" under the CISG, this Tribunal would have to find that the parties expressly agreed to be governed by Article 6.2.3 UNIDROIT, or that 6.2.3 UNIDROIT is a widely known and regularly observed trade usage for parties to contracts of this type *and* that the parties knew or ought to have known that they would be bound by such provisions [*Id.*].

155 CLAIMANT does not assert that the parties expressly agreed to be bound by 6.2.3 UNIDROIT to the extent that it would be considered a trade usage under Article 9(1) CISG. It is clear that the parties

only agreed explicitly that the Sales Agreement would be governed by the laws of Mediterraneo, which includes the CISG [*Exh. C5*].

156 Instead, CLAIMANT asserts that the parties are bound by 6.2.3 UNIDROIT pursuant to Article 9(2) CISG. In order for parties to be bound by trade usages pursuant to Article 9(2) CISG, the Tribunal must find that 6.2.3 UNIDROIT is a "widely known and regularly observed" trade usage by parties to contracts of this type, *and* that both parties "knew or ought to have known" through negotiations or previous courses of dealing between the parties that they would be bound by such a usage [*Art. 9(2) CISG*; *Gotanda p. 24*; *Schlechtriem p. 39*].

157 Scholarship is divided as to whether the CISG provides for adaptation in the face of hardship [*see Rimke p. 221*; *see Tallon p. 578*; *see Honnold p. 602*; *see Atamer p. 1061*; *see Enderlein & Maskow p. 319*]. Aside from scholarship, this controversy is further evidenced by mere existence of this arbitration. For CLAIMANT to assert that 6.2.3 UNIDROIT – which provides a party with adaptation in the face of hardship – is a "widely known and regularly observed" trade usage when there is so much controversy surrounding its application in the CISG – the premier and most widely applied source of international contract law in the world – is absurd. While RESPONDENT maintains that an appropriate interpretation of the CISG explicitly rejects adaptation as a remedy for hardship, the controversy surrounding this idea cannot be ignored. Certainly, it cannot be said that its application is "widely known and regularly observed."

CONCLUSION ON PART 4

158 CLAIMANT is not entitled to an adaptation of price for mere hardship under the CISG. Article 79 CISG explicitly rejects CLAIMANT's prayer for relief because CLAIMANT performed its obligations under the Sales Agreement and thus the circumstances CLAIMANT encountered did not rise to the definition of "impediment" expressed in Article 79 CISG. While this is expressly settled by Article 79 CISG, even if this Tribunal were to consider the general principles upon which the CISG is based, the general principles of detrimental reliance, good faith, and *pacta sunt servanda* preclude an award in favor of CLAIMANT. This Tribunal should not invoke Article 6.2.3 UNIDROIT Principles as a gap-filler pursuant to Article 7(2) CISG or Article 9(2) CISG because 6.2.3 UNIDROIT is not an example of an express provision of the CISG, nor is it a "widely known and regularly observed" trade usage.

PRAYER FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to find that:

1) the law of Danubia governs the Arbitration Clause and its interpretation, and therefore this Tribunal has neither the jurisdiction nor the power under the Arbitration Clause to adapt the contract;
2) CLAIMANT is not entitled to submit evidence from the other arbitration proceedings;
3) CLAIMANT is not entitled to payment of US$ 1,250,000 or any other amount resulting from an adaptation of price
    i) under clause 12 of the contract; or
    ii) under the CISG.

RESPONDENT reserves the right to amend its prayer for relief as may be required.