TWENTY SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On Behalf of:

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterrano

CLAIMANT

Against:

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana

RESPONDENT

Fordham University School of Law

LENA BRUCE • ALEXIS GANNAWAY • KRISTINE ITLIONG • ARYIAN KOHANDEL-SHIRAZI

TOM ROBINSON • REBECCA RUBIN • EMMA SANZOTTA • MOYOSOLA SOYEMI

MICHELLE VAN SLEET • SAM WECHSLER • IRENE XU

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ABBREVIATION	CITATION
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Chemical Products Case	Switzerland 5 April 2005 *Bundesgericht* [Supreme Court].
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Yukos Case	Yukos Shareholders v. The Russian Federation, UNCITRAL, PCA Case No. AA 227.

TABLE OF ABBREVIATIONS

CITED AS	REFERENCE
Ans. to NoA	Answer to Notice of Arbitration
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
Claimant	Phar Lap Allevamento
Cmt.	Comment
DDP	Delivery Duty Paid
Ex.	Exhibit
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules

NoA	Notice of Arbitration
No(s).	Number(s)
Parties	Claimant and Respondent, collectively
Proc. Ord.	Procedural Order
Req.	Request
Resp.	Respondent
Respondent	Black Beauty Equestrian
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law (Institut International pour L'nification du Droit Privé)
USD	United States Dollar(s)

STATEMENT OF FACTS

1 Claimant, Phar Lap Allevamento, is the operator of Mediterraneo's oldest and most renowned stud farm [*NoA, p.* 4]. Claimant provides stallions for breeding and offers frozen semen of its champion stallions for artificial insemination [*Id.*]. Claimant's star stallion is Nijinsky III, one of the most successful racehorses ever and one of the most sought-after stallions for breeding [*Id. at* 4-5].

2 Respondent, Black Beauty Equestrian, is an Equatorianian owner of broodmare lines with a recently established racehorse stable [*Id. at* 5].

I. Respondent Initiated Negotiation of Sale of Goods with Claimant

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

4 On 21 March 2017, given Equatoriana's current regulatory landscape and Respondent's interest in becoming a leading racehorse breeder, Respondent inquired Claimant about the availability of 100 doses of Nijinsky III's frozen semen [*NoA, p.* 5; *Cl. Ex.* 1]. Though Respondent's request for a high quantity of doses was unusual, Claimant agreed to Respondent's request on the conditions that: (a) doses to third parties could not be resold without their written consent; and (b) Respondent would inform Claimant about the use of every dose [*Cl. Ex.* 2]. The Parties both expressed interest in a long-term mutually beneficial relationship and cooperation [*Id.*; *Cl. Ex.* 3].

5 In negotiating their Sales Agreement, the Parties agreed to abide by Claimant's Standard Frozen Semen Sales Agreement, albeit with modifications to price, delivery, and dispute resolution terms [*Cl. Ex.* 2; *Cl. Ex.* 3-5].

6 Respondent insisted upon and prevailed in negotiating a contract for a DDP delivery, provided that: (a) Respondent pay Claimant 1000 USD per dose, accounting for the additional costs associated with a DDP delivery; and (b) the Parties include a hardship clause in the contract to allocate delivery risks to Respondent [*Cl. Ex.* 3,4].

7 Respondent noted that they could accept the application of the Law of Mediterraneo should a dispute arise [*Cl. Ex.* 3]. But because Respondent would not agree to jurisdiction in Mediterranean courts, the Parties agreed to dispute resolution by arbitral proceedings [*Cl. Ex.* 3-5].

II. Negotiations Were Ongoing Prior to Accident Involving Main Negotiators, But the Parties Nevertheless Finalized the Contract

8 On 12 April 2017, the Parties' main negotiators–Claimant's Ms. Julie Napravnik and Respondent's Mr. Chris Antley–were injured in a car accident [*NoA, p.* 5]. Claimant's John Ferguson and Respondent's Julian Krone replaced Ms. Napravnik and Mr. Antley for finalization of the contract on 6 May 2017 [*Id.*; *Cl. Ex.* 5].

9 Despite the unfortunate disruption to the Parties' negotiations, the Parties agreed in their final contract that: (a) Respondent bore the risk posed by delays in delivery not within the control of Claimant (clause 12); (b) the Sales Agreement would be governed by the law of Mediterraneo; and (c) any dispute would be resolved by arbitration administered by HKIAC under HKIAC Rules in Danubia [*Cl. Ex.* 5].

III. Respondent Failed to Perform and Assume Risks as Stipulated in the Contract

10 In December 2015, Claimant had shipped two out of three agreed-upon shipments when the Equatorianian Government imposed a 30 percent tariff on all goods from Mediterraneo, including animal semen [*Cl. Ex*. 6]. In January 2018, Ms. Napravnik, then recovered from the accident, and Respondent's Mr. Greg Shoemaker discussed the need for an agreement on a price adjustment considering the tariff's impact on the final shipment [*Cl. Ex. 7-8*]. Nevertheless, to accommodate Respondent, Ms. Napravnik, under the impression a price adjustment would be negotiated, authorized the final shipment [*Cl. Ex. 8*].

11 In February 2018, Claimant discovered Respondent breached the Sales Agreement by reselling doses to third parties [*Cl. Ex.* 8]. Respondent's Ms. Kayla Espinoza, when confronted with this discovery, ceased negotiations for a price adjustment [*Id.*].

IV. After Commencement of the Parties' Arbitral Proceedings, Claimant Discovered Respondent is Alleging Contradictory Claims in Another Arbitral Proceeding

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

13 Upon commencement of the proceedings, Claimant discovered Respondent, despite denying any warrant for a price adaptation in the present Parties' dispute, is insisting upon a price adaptation in another dispute with a Mediterranean party due to a recently imposed 25 percent Mediterranean tariff [*2 October 2018 Letter, p.* 49].

SUMMARY OF ARGUMENT

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

Respondent and Claimant disagree over how the Tribunal should resolve a conflict of laws regarding the arbitration agreement. Resolution of the conflict will determine whether the Tribunal, in the present arbitral proceedings, may adapt the contract to settle the appropriate price for the final shipment. The Tribunal should find that the Law of Mediterraneo governs the arbitration agreement, as it is most in line with the Parties' reasonable expectations, is impliedly the law governing the arbitration agreement, and bears the closest connection to the arbitration agreement. Pursuant to the Law of Mediterraneo, the Tribunal, in the present arbitral proceedings, may adapt the sales contract without an express conferral of power to do so in the contract [*NoA, p.* 7].

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRAL PROCEEDINGS

Claimant did not breach any confidentiality obligation by introducing the evidence from the other arbitration because there is no confidentiality obligation binding Claimant as a third party to the other arbitral proceedings. Even if there is some sort of duty of confidentiality, it is overcome by the interest of justice exception, because transparency is vital to a fair process. The evidence should not be blocked even it had been obtained through an illegal hack of Respondent's computer system. Claimant did not by itself involve in the hack, the copy of the award is open to the public for sale by a company, and the interest of justice does not favor rejecting the evidence. Admissibility of evidence is at the complete discretion of the Tribunal. International arbitration tribunals may admit unlawfully obtained evidence even when it is relevant and material. Therefore, Claimant is entitled to submit the evidence from the other arbitral proceedings.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF $1,250,000 RESULTING FROM A PRICE ADAPTATION UNDER EITHER CLAUSE 12 OF THE CONTRACT OR UNDER ARTICLE 79 OF THE CISG.

Respondent is obligated to bear the cost of hardship under clause 12 of the Sales Agreement and under the CISG, which governs the agreement. The proper interpretation of clause 12 requires Respondent to pay the additional costs resulting from a price adaptation. Furthermore, the inclusion of clause 12 does not preclude the application of CISG Article 79. Even if clause 12 is found to not cover the imposition of tariffs, Respondent is obligated to bear the cost under the CISG. Article 79 of the CISG exempts Claimant from

responsibility for the increased cost imposed by the agricultural tariff under the principle of economic hardship. Respondent must pay the increased contract price of US$ 1,250,000 under the CISG.

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1 The Parties to these proceedings entered a binding arbitration clause providing for dispute resolution administered by HKIAC under the HKIAC Rules [*Cl. Ex.* 5].

2 Respondent and Claimant disagree over how the Tribunal should resolve a conflict of laws. Resolution of the conflict will determine what law governs their arbitration agreement and, in turn, whether the Tribunal may adapt the contract. HKIAC Rules "do not specifically address the question of the law applicable to the parties' arbitration agreement" [*See Born* 579]. Additionally, the Hague Principles–the general conflict of laws rules for contracts in Danubia, Mediterraneo, and Equatoriana–"do not address the law governing . . . arbitration agreements" [*Proc. Ord. 2, p.* 61*; Hague Principles Art. I(3)(b)*].

3 Claimant acknowledges that the arbitration clause lacks an explicit choice-of-law term governing the arbitration agreement [*Cl. Ex*. 5]. However, the overall contract provides that the Parties' Sales Agreement shall be governed by the law of Mediterraneo [*Id.*]. Respondent erroneously contends that the Tribunal should interpret the arbitration agreement under the law of the seat of arbitration, Danubia [*Ans. to NoA, p.* 31].

4 Claimant submits that: **(I)** the doctrine of separability does not control the choice-of-law analysis**; (II)** this Tribunal should apply the law most in line with the Parties' expectations; and **(III)** even if this Tribunal does not look at extraneous evidence of the Parties' expectations, this Tribunal may apply the closest connection test to resolve the conflict. Accordingly, this Tribunal should interpret the arbitration agreement broadly in accordance with the Law of Mediterraneo, under which this Tribunal has the jurisdiction and power to adapt the contract [*NoA, p.* 7].

I. The Doctrine of Separability Does Not Necessitate Applying a Body of Law Different from the Law of the Contract

5 Pursuant to the doctrine of separability, or the "separability presumption," an arbitration clause is an autonomous and legally independent agreement [*Born* 350]. The invalidity of the overarching sales contract does not nullify the validity of the arbitration agreement [*Id.*]. Even if a sales contract itself is void, the arbitration clause of that contract still binds parties to dispute resolution by arbitral proceedings.

6 Respondent contends that the doctrine of separability in Article 16 of Danubian and Mediterranean Arbitration Law necessitates rejecting the law of the Sales Agreement as the law governing the arbitration agreement [*Ans. to NoA, p.* 31].

7 However, the separability presumption is relevant "*only in the context* of a challenge to [an arbitration agreement's] validity and not for other purposes, including that of choice of law" [*Kaplan/Moser* 137]. Indeed, contrary to Respondent's claims, Article 16(1) "carefully limits the doctrine to disputes about validity" [*Id.*]. Article 16(1) notes that "for [the] purpose" of "objections . . . to the . . . validity of the arbitration agreement[,]" tribunals may treat arbitration clauses as "independent" agreements [*UNCITRAL Model Law Art. 16(1)*].

8 Additionally, though the justification for the doctrine is that parties intend to arbitrate all disputes, "this has no bearing on governing law . . . " [*Kaplan/Moser* 138]. Intent for an arbitration agreement to be binding "says nothing" about the Parties' intended choice of law [*Id.*]. Parties who agree to arbitrate under Law *X* may intend to do so even if every other obligation in the contract containing the arbitration clause is governed by Law *Y* [*Id. at* 141]. "But this is not because the arbitration agreement is a separable agreement: rather, it is part of the same contract but governed by a different law to the rest of the contract because this is what the parties intended" [*Id.*].

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

9 The ultimate choice of law should "not defeat reasonable expectations of the parties as expressed in their agreement" [*Lew et al.* 424]. Choice-of-law rules aside, the Tribunal should consider "the intent of the parties without resort to national law . . . . based on the wording and circumstances" [*Waincymer* 135].

10 Rather than a choice between the law of the seat or of the contract, the Tribunal may look to "the proper law of the arbitration agreement to the extent it has been chosen by the parties or can be established under the circumstances" [*Id. at* 137]. For example, the French conflicts methodology focuses on parties; "common intention" rather than reference to national law [*Redfern/Hunter* 164]. Advocating for "analysis of the real intention and objectives of the parties through the widest analysis of all surrounding circumstances[,]" Marc Blessing argues that the Tribunal may even look to "the law of the place where the arbitration agreement has been concluded" or "the law of the country whose courts would have jurisdiction but for the arbitration agreement" [*Waincymer* 137]. Here, in light of all circumstances, at the time of the contract, the Parties would have reasonably expected application of the Law of Mediterraneo to the arbitration agreement.

11 First, while the text of the arbitration clause serves as "proof of waiver of litigation rights[,]" extraneous evidence "may be the best way to understand the parameters of such a choice" [*Id. at* 143]. Art. 7(2) of UNCITRAL Model Law, which precludes consideration of extraneous evidence, "should not be the preferred view" [*Id.*]. Here, because negotiations of an express choice-of-law term for the arbitration agreement were never completed, evaluating the circumstances is even more important [*Cl. Ex.* 8]. The Parties intended to establish a "mechanism" for adaptation and agreed "that it should probably be the task of the arbitrators[,]" which would only be possible under the Law of Mediterraneo [*Id.*].

12 Second, the Parties concluded the Sales Agreement, including the arbitration agreement, in Mediterraneo [*Proc. Order 2, p.* 56].

13 Third, Mediterraneo's courts would have jurisdiction but for the arbitration agreement. The Parties designated Danubia as the seat of arbitration "to accommodate [Respondent's] wish not to be submitted to the jurisdiction of the courts in Mediterraneo" [*Resp. Ex.* 2]. That the arbitration offer is contingent on maintaining the Law of Mediterraneo as the law of the Sales Agreement supports this conclusion [*Id.*]. In the Parties' correspondence, both Respondent and Claimant emphasized the condition that the Sales Agreement should be governed by the law of Mediterraneo [*Resp. Ex.* 1; *Resp. Ex*. 2].

14 Contrary to Respondent's allegations, absent express terms governing the issue, "there is usually no reason or commercial purpose for subjecting different parts of a single contract to different laws . . . " [*Kaplan/Moser* 140]. In the interest of certainty and a holistic contract, the Tribunal should apply the same law to the sales contract and to the arbitration agreement. Applying the law of the sales contract is consistent with the HKIAC notion that "[t]he arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration" [*HKIAC Art. 13*].

III. Even If the Tribunal Does Not Look at Extraneous Evidence of the Parties' Expectations, The Tribunal Should Apply the Closest Connection Test to Resolve the Conflict

A. The Closest Connection Test Avoids Mechanical Resolution of Law

15 Respondent argues that this Tribunal should apply the law of the seat of arbitration, Danubia [*Ans. to NoA, p.* 31]. However, "mechanical" application of the law of the seat "frustrate[s] the parties' objectives in agreeing to arbitrate" [*Born* 604]. Here, the law of the seat would "disregard[] the intimate connection (both textual and functional) between the arbitration agreement and underlying contract" [*Id. at* 517]. Indeed, there is a notable "trend against necessarily applying the law of the [s]eat" to the arbitration agreement because doing so fails to account for parties' reasonable expectations in negotiating the underlying contract [*Fouchard et al.*

643]. The law of seat as choice of law is "widely criticized" and "has few advocates" [*van den Berg* 454]. "Prevailing orthodoxy according to which the law of the seat (the lex arbitri) determines the law of the arbitration clause must no longer be viewed as engraved in stone" [*Bantekas* 8].

16 Instead, for the Tribunal to resolve the conflict of laws, the Tribunal should adopt the prevalent "closest connection test" [*Waincymer* 136]. The closest connection test avoids the "shortcomings" of exclusively focusing on the law of the seat or the law of the contract as a default choice in lieu of considering the parties' intent [*Born* 517-18]. In contrast with Respondent's default rule favoring the law of the seat, the closest connection test best effectuates the Parties' intent and the purpose of the arbitration agreement as is evident from the text of the contract. As such, "over the past several decades," authorities increasingly turn to considering the law with the "most significant relationship" and "closest connection" to the arbitration agreement [*Id. at* 518].

17 The closest connection test first asks whether there is an express choice-of-law for the arbitration agreement [*Redfern/Hunter* 160]. Here, the Parties have not agreed to an explicit choice-of-law term governing the arbitration agreement [*Cl. Ex.* 5].

18 Where there is no express choice-of-law term in the arbitration agreement, the closest connection test then offers two means for determining the law governing the arbitration agreement [*Redfern/Hunter* 160]. This Tribunal should consider: (a) whether the parties had made an implied choice of law; or (b) in the absence of an implied choice of law, "what would be the law with the 'closest and most real connection' with the arbitration agreement" [*Id.*].

B. The Parties' Express Choice of Law for the Substantive Contract Demonstrates an Implied Choice of Law for the Arbitration Agreement

19 From the express term that the Law of Mediterraneo governs the overarching sales contract and the lack of a choice-of-law term in the arbitration agreement, the Tribunal should conclude that the Parties impliedly chose the Law of Mediterraneo as the law governing the arbitration agreement.

20 First, express choice-of-law terms in arbitration agreements are "very unusual" and "[p]arties generally do not expressly specify" which law governs the arbitration agreement [*Born* 491]. That there is no express choice-of-law term in the arbitration clause does not negate the Parties' implied choice of law. Indeed, several authorities have "held that the parties' choice-of-law clause extended . . . impliedly . . . to the separable arbitration agreement" [*Id. at* 515].

21 Second, in the *Sulamérica Case*–the modern seminal case for the closest connection test–the Tribunal acknowledged it was "natural" to infer that the parties intended the law of the contract to govern the arbitration agreement [*Sulamérica Case* in *Redfern/Hunter* 160]. Here, the Tribunal should infer that the only law mentioned in the overall contract should govern the arbitration clause. Unlike the *Sulamérica Case*–which ultimately rejected the law of the contract due to policy concerns that are inapplicable here–there is no "serious risk" that a choice of the Law of Mediterraneo "would significantly undermine" the arbitration agreement [*Id. at* 135].

22 For example, in the *Peterson Farms Case*, the tribunal found that an "arbitration clause requiring arbitration in London, contained in [a] contract governed by Arkansas law, was governed by Arkansas law[,]" despite the lack of an express choice-of-law term in the arbitration clause itself [*Peterson Farms Case* in *Born* 515]. Similarly, the arbitration clause here, despite requiring arbitration in Danubia, is part of a broader contract governed by the Law of Mediterraneo and should be governed by the Law of Mediterraneo.

C. The Law of Mediterraneo Bears Closest Connection to the Arbitration Agreement

23 Even if the Tribunal finds the Parties made no implied choice of law, the Law of Mediterraneo is the law with the closest connection to the arbitration agreement.

24 It is presumed that the law that a contract is most closely connected to is the law of the country "that is the place of business or residence of the party that is to effect the performance characteristic of the contract" [*Redfern/Hunter* 220]. For example, this can be the country where "the work necessary to render services under the contract was predominantly performed" [*Building Project Case* in *van den Berg* 454].

25 Here, the bulk of performance necessitated procuring 100 doses of frozen semen from stallion Nijinsky III in Claimant's stud farm in Mediterraneo [*Cl. Ex.* 5*; NoA, p.* 4]. Thus, the country with the "centre of gravity" for performance is Mediterraneo, and its laws bear the closest connection to the arbitration agreement [*Building Project Case* in *van den Berg* 454].

26 Some have deemed the law of the seat to be the law with the closest connection to the arbitration agreement [*see, e.g., Sulamérica Case* in *Redfern/Hunter* 161]. But the law of the seat is "merely another general connecting factor" [*Compagnie d'Armement Maritime Case* in *van den Berg* 453]. And, where there is an implied choice of law, the express choice of a seat of arbitration alone is not enough to "displace" the implied choice of law [*Kaplan/Moser* 136]. Here, performance is primarily in Mediterraneo, and an implied choice of law exists.

27 **Conclusion to Issue 1:** Here, the Tribunal should find the Law of Mediterraneo is most appropriate, as it is most in line with the Parties' reasonable expectations, is impliedly the law governing the arbitration

agreement, and bears the closest connection to the arbitration agreement. Pursuant to the Law of Mediterraneo, the Tribunal may adapt the sales contract without an express conferral of power [*NoA, p. 7*].

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRAL PROCEEDINGS

28 Respondent challenged Claimant's submission of evidence from the other arbitration proceedings ("Prior Arbitration") between Respondent and one of its other customers ("Buyer") on the basis of breach of a duty of confidentiality and illegal obtainment evidence [*Letter Fasttrack, 3 Oct* 50]. However, **(I)** Claimant did not breach any duty of confidentiality and **(II)** evidence obtained through an illegal hack of Respondent's computer system does not prevent its admissibility.

I. Claimant Did Not Breach Any Duty of Confidentiality

29 **(A)** While it is not clear whether there even exists a confidentiality agreement between Respondent and Buyer in the Prior Arbitration, confidentiality does not bind Claimant as a non-party to the Prior Arbitration. **(B)** Even if there is duty of confidentiality, the obligation is overcome by interest of justice exception.

A. Confidentiality Does Not Bind Claimant as a Non-Party to the Prior Arbitration

30 As a non-party to the Prior Arbitration, Claimant is not bound by any explicit duty of confidentiality. The lex arbitri is completely silent on the subject of confidentiality in the international arbitration proceedings. The drafters reasoned: "It may be doubted whether the Model Law should deal with the question whether an award may be published . . . [But this] decision may be left to the parties or the arbitration rules chosen by them" [*Report of the Secretary-General* 90].

31 Neither the 2013 HKIAC Rules to which the Prior Arbitration were subject nor the HKIAC 2018 Rules applicable to these proceedings impose confidentiality obligations on non-parties. 2013 HKIAC Art. 42 states, "unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration" [*Article 42 HKIAC 2013 Rules* ¶ 1]. HKIAC 2018 Rules adds that the confidential obligation also applies to **the** arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC [*Article 45 HKIAC 2013 Rules* ¶ 2]. Nothing in these rules spell out a duty of confidentiality on non-parties.

32 The duty of confidentiality does not extend to those who are not parties to the arbitration. Non-parties are generally free to disclose materials from arbitral proceedings that were provided to them without separate confidentiality restrictions [*Born 2014* 2789]. In the current case, any duty of confidentiality would bind only

Respondent and its Buyer in the Prior Arbitration. Claimant as a non-party to that Prior Arbitration is under no confidentiality obligation.

33 Moreover, there is no implied or inherent duty of confidentiality, and instead Tribunals almost uniformly recognize the parties' autonomy with regard to the confidentiality of international arbitral proceedings [*Born 2016* 203]. Here, it remains unclear whether there were any confidentiality provisions in the arbitration agreement between Respondent and Buyer in the Prior Arbitration. In many instances, like the instant arbitration, parties do not include confidentiality provisions in their arbitration agreement. When they do not, courts have rejected the notion of an implied obligation of confidentiality.

34 The Australian High Court held that the obligation of confidentiality in arbitration existed only through an express agreement by the parties. In the absence of an explicit call for confidentiality, the court saw no obstacle in making arbitral awards public. The court reasoned that, "[i]f the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement" [*Esso Case* 151].

35 The silence with regard to confidentiality is also true of the FAA, the Swiss Law on Private International Law, the English Arbitration Act, the Japanese Arbitration Law and most other contemporary legislation. [*Born 2016* 202].

B. The Interests of Justice Exception Overcomes the Duty of Confidentiality

36 The interest in confidentiality in arbitration is not absolute. Transparency is vital to a fair and efficient arbitral process. The "interests of justice" exception is primarily concerned with ensuring that the judicial decision in a particular case is based on accurate evidence [*Ali Shipping Case*]. In the Prior Arbitration, Respondent asked for a price adaption, invoking an unforeseeable change of circumstances due to imposition of a 25% tariff [*Letter Langweiler, 2 Oct* 49]. But here, However, Respondent vigorously denied Claimant's justification for adapting the contract due to a change of circumstances with an even more unforeseeable retaliatory tariff of 30% [*Id.*]. If there can be a more thorough and accurate adjudication of this case through disclosure of confidential information from the Prior Arbitration, then the principle of confidentiality should not be an impediment [*Ali Shipping Case*].

37 Disclosure in the interest of justice enables a fair determination of the case, the prevention of contradictory evidence, and the protection of arbitrating parties' legitimate interests [*Smeureanu* 122]. British courts were the first to acknowledge that the discourse of confidential documents was occasionally necessary for the fair disposal of the matters in controversy [*Id.*].

38 The English Court of Appeals found that a party's case was materially inconsistent with that advanced in two other proceedings and that the party was presenting those courts with a misleading or inaccurate picture [*Emmott Case*]. The court said disclosure was in the interests of justice and reasonably necessary to enable the protection of legitimate rights, and caused no prejudice to misleading party [*Id.*]. The court also noted that other courts would not be misled in hearing the same or similar allegations [*Id.*]. Thus, confidentiality of documents generated in arbitration can be lifted in certain circumstances.

39 Another instructive case involved an application for a subpoena to obtain certain expert witness proofs used in previous arbitrations [*London & Leeds Case*]. The witness proofs were sought to demonstrate the prior inconsistent views expressed by the expert in previous arbitrations [*Id.*]. On the question of whether the subpoena should be upheld, the English High Court opined that if it could be shown that a witness had expressed himself in a materially different way on a prior occasion, then this should be disclosed, as it goes to the interests of the individual litigants and the public interest [*Id.*]. The court upheld the subpoena for the production of the expert witness proofs and determined that the interest of justice in exposing such inconsistencies outweighed the parties' rights to confidentiality [*Id.*].

40 In proceedings before the English Commercial Court, Teekay made reference to prior arbitration awards involving its opponent STX [*Teekay Tankers Case*]. Though STX objected, citing breach of confidentiality, the court held that the disclosure fell within the "interests of justice" exception [*Id.*]. It reasoned that the disclosures made by Teekay were put forward in good faith so that what transpired in the arbitrations could be relied upon for the purpose of Teekay's assertions in the English proceedings [*Id.*].

II. The Fact that Evidence Was Obtained Through an Illegal Hack of Respondent's Computer System Does Not Prevent Its Admissibility

41 The evidence Claimant would submit is provided by a company introduced to Claimant by a former employee of the Buyer in the Prior Arbitration [*Proc. Ord. 2 Nos.* 40, 41]. **(A)** Tribunals have complete discretion as to whether admit evidence. **(B)** Because the evidence from the Prior Arbitration is relevant and material to current proceedings and **(C)** substantial injustice would result if Claimant were barred from submitting the evidence, its admissibility should not be prevented.

A. Tribunals Have Complete Discretion to Admit Evidence

42 **(i)** The determination to admit evidence is vested in Tribunals under HKIAC Rules and Model Law. **(ii)** Moreover, Courts and Tribunals routinely admit documents that were unlawfully obtained.

i. Both the HKIAC Rules and Model Law Give Tribunals the Power to Decide Whether to Admit Evidence

43 Arbitral tribunals have wide discretion to admit any evidence they deem relevant or material [*Pilkov* 147]. Parties are generally free to submit any evidence they wish in order to prove the facts necessary to establish their respective cases [*Id.*].

44 Art. 22 of HKIAC 2018 Rules, "the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence" and "at any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome" [*Article 22 HKIAC 2018 Rules* ¶ 2, 3]. Particularly, "the arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence" [*Article 22 HKIAC 2018 Rules* ¶ 3].

45 Model Law Art.27 also demonstrates that "each party shall have the burden of proving the facts relied on to support its claim or defense," and "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered" [*Article 27 UNCITRAL Model Law* ¶ 1, 4].

ii. Courts and Tribunals Routinely Admit Unlawfully Obtained Documents

46 In *Corfu Channel Case*, hear by the International arbitral tribunals, was an instance where the tribunal dealt with illegally obtained evidence [*Corfu Channel Case*]. The United Kingdom in violation of Albania's sovereignty conducted a mine sweeping operation in Albania waters to find evidence in support of its case [*Id.*]. While the court found that the United Kingdom's actions were unlawful, it did not exclude the evidence [*Id.*].

47 In the well-known Yukos award, the tribunal relied extensively on confidential diplomatic cables from the United States Department of State that had been published on WikiLeaks [*Yukos Case*]. WikiLeaks obtained the cables from Bradley Manning, who was convicted of violating the US law and sentenced to 35 years of confinement [*Id.*]. The tribunal specifically referenced the views expressed by officials in the U.S. Embassy's cables published by WikiLeaks in support of its decision stating that the cables revealed an important issue in the case [*Id.*].

B. The Evidence from the Prior Arbitration is Relevant and Material

48 The facts as well as the outcome of the Prior Arbitration are relevant to this arbitration because the facts in the Prior Arbitration are substantially similar to those between Claimant and Respondent. In the Prior Arbitration, Respondent asked for an adaption of the price invoking an unforeseeable change of circumstances

due to imposition of the 25% tariff [*Letter Langweiler, 2 Oct* 49]. However, in this arbitration, Respondent vigorously denies Claimant's justification to adapt the contract to account for a tariff of 30% [*Id.*]. The only difference is that in the Prior Arbitration, Respondent was negatively affected by the tariffs [*Proc. Ord. 2 No.* 39].

49 The adaption of the contract is material issue to be addressed in the arbitration between Claimant and Respondent. Model Law requires the parties to be "treated with equality" and "given a reasonable opportunity of presenting its case" [*Article 17 UNCITRAL Model Law* ¶1]. The evidence from the Prior Arbitration will reveal Respondent's assertion that an unpredictable tariff calls for a price adaption for the affected party [*Proc. Ord. 2 No.* 39]. This Tribunal should seek to deter such bad faith conduct.

C. Substantial Injustice Would Result If Claimant Were Barred From Submitting the Evidence

50 Blair and Gojkovic, in their comprehensive article analyzing the existing jurisprudence of unlawfully obtained evidence, explain that the elements which have been have been taken into account when deciding admissibility of such evidence include: (1) Whether the evidence has been obtained unlawfully by a party who seeks to benefit from it (2) Whether the interest of justice favors the admission of evidence and (3) Whether the public interest favors rejecting the evidence [*Blair/Gojković*].

51 In this case, Claimant obtained the evidence from the Prior Arbitration through a third party and not from an illegal hack of Respondent's computer system. Claimant learned about the other arbitral proceedings at the annual breeder conference, where Mr. Kieron Velazquez, who had been working for Respondent's Buyer in the Prior Arbitration, revealed the information to Claimant's CEO [*Proc. Ord. 2 No.* 40]. Mr. Velazquez also gave Claimant the address of the company that promised to sell a copy of the award in Prior Arbitration for 1000 USD [*Proc. Ord. 2 No.* 41]. The clean hands doctrine and public domain argument, along with interest of justice, justify Claimant's right to submit the evidence.

52 Tribunals have tended to adopt the clean hands doctrine, which states that if a party seeking to introduce the evidence participated in the unlawful activity that led to its disclosure, the evidence is inadmissible on the basis that a party should not be permitted to profit from its own misconduct [*O'Sullivan*]. But if their hands are clean, the evidence should be disclosed for arbitral proceedings [*Id.*].

53 It is still uncertain whether the person who had provided the award to the company was the hacker [*Proc. Ord. 2 No.* 40]. Even if there was a hack of Respondent's computer system, Claimant played no part in that hack, and did not itself commit or condone any unlawful activity. Rather, it was simply the recipient of this

information. As the evidence is highly probative evidence and Claimant did not act unlawfully to obtain it, Claimant's hands are clean and Claimant should be entitled to submit the evidence.

54 An ICSID tribunal allowed the admittance of and reliance on certain evidence that was hacked from Kazakhstan's government computer systems and published on a public website [*Caratube Case*]. The Tribunal found that the documents were material and relevant to the dispute, and found that the balance of interests tipped in favor of admitting the documents, placing special emphasis on the fact that they were "lawfully available to the public" [*Id.*]. The fact precluded them from being considered privileged or confidential information because the documents are within public domain [*Id.*].

55 The public domain argument also applies here. The informant company was selling a copy of the Prior Arbitration award to Claimant [*Proc. Ord. 2 No.* 41]. Regardless of how the company obtained the documents of the Prior Arbitration, a copy of the award is lawfully available to the public for purchase.

56 The disclosure of the award from the Prior Arbitration will avoid contradictory judgements. In the Prior Arbitration, Respondent sought to adapt the contract under the hardship clause due to the 25% tariff that negatively affected Respondent [*Proc. Ord. 2 No.* 39]. Here, where a less predictable 30% tariff imposed on Claimant to Respondent's benefit, Respondent argues that the unforeseeable change of circumstance did not justify an adaption [*Letter Langweiler, 2 Oct* 49]. Disclosure of the evidence will demonstrate that Respondent is acting in bad faith by making only arguments that are only convenient to them in this case. Again, this Tribunal should seek to deter that type of conduct.

57 It is assumed that an earlier award enjoys a res judicata effect in subsequent arbitrations [*Smit, 577*]. If this Tribunal rejects the evidence from the other arbitral proceedings, it could result in different outcomes from same type of fact, which contradicts the public interest.

58 **Conclusion to Issue 2:** In conclusion, Claimant did not breach any confidentiality obligation by introducing the evidence from the Prior Arbitration because there is no confidentiality obligation binding Claimant as a non-party to the Prior Arbitration because transparency is vital to a fair arbitration. Even if there is some form of a duty of confidentiality, it is overcome by the interest of justice exception, because transparency is vital to a fair process. The evidence should not be blocked even it had been obtained through an illegal hack of Respondent's computer system. Claimant did not participate in the hack and a copy of the award is lawfully open to the public for sale by an intelligence company. Admitting the evidence is at the complete discretion of the Tribunal and this Tribunal may admit unlawfully obtained evidence when it is relevant and material. Because of its high probative value, Claimant should be able to submit the evidence from the Prior Arbitration.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF $1,250,000 RESULTING FROM A PRICE ADAPTATION UNDER EITHER CLAUSE 12 OF THE CONTRACT OR UNDER ARTICLE 79 OF THE CISG

59 This Tribunal should find that Claimant is entitled to a price adaptation of the contract under clause 12. **(I)** The language of clause 12 is sufficient to show that Claimant was not liable for the unforeseeable and unpredictable increase in tariffs. **(II)** Even if the CISG guidelines of interpretation are necessary, requiring a price adaptation is the proper interpretation of clause 12. **(III)** Respondent is also bound by party-specific practices under CISG Article 9. **(IV)** The inclusion of clause 12 does not preclude the application of CISG Article 79. **(V)** Even if clause 12 is found not to cover the imposition of tariffs, this Tribunal should require Respondent to pay US$ 1,250,000 resulting from the adaptation of the contract price under Article 79 of the CISG. **(V)** Article 79 of the CISG exempts Claimant from responsibility for the increased cost imposed by the agricultural tariff under the principle of economic hardship. **(VI)** Respondent must pay the increased contract price of US$ 1,250,000 pursuant to the CISG.

I. The Language of Clause 12 Is Sufficient to Show That Claimant's Risk Is Limited in the Case of an Unforeseen Price Increase from Tariffs

60 Under clause 12, Claimant is entitled to additional payment from Respondent resulting from an adaptation of price. The parties expressly included this clause to limit Claimant's liability from unforeseeable changing circumstances. Clause 12 states in relevant part: *"Seller shall not be responsible for . . . delays in delivery not within the control of the Seller . . . for hardship caused by . . . comparable unforeseen events making the contract more onerous"* [*Cl. Ex.* 5]. "Hardship," though left undefined in the contract, can be understood with reference to UNIDROIT Article 6.2.2, which defines hardship as the occurrence of an event that fundamentally alters the equilibrium of the contract. Here, the imposed tariffs fall under this definition of hardship because they drastically increased the cost of performance for Claimant. This fundamentally altered the equilibrium of the contract and put Claimant at a severe disadvantage. Claimant should not be held responsible for the hardship that occurred and is therefore entitled to a price increase [*UNIDROIT Art.* 6.2.3].

61 The tariff clearly constitutes a hardship in light of past health issues in the horse breeding industry. During negotiations, Claimant acknowledged that both parties had experienced past unforeseeable additional health and safety requirements that increased costs by up to 40%, destroying the commercial basis of the deal [*Cl. Ex.* 4]. Here, the high tariffs on frozen semen increased Claimant's cost by 30%, which equally destroys the commercial basis of this deal [*Cl. Ex.* 7]. Claimant would lose not only their entire profit from the deal but

also experience a large financial loss [*Id.*]. The equilibrium of the deal was destroyed by this increased cost to Claimant. This imposition of tariffs was a hardship caused by a comparable unforeseen event that made the contract much more onerous for Claimant.

62 While this particular hardship was not specifically enumerated in the clause, the hardship was caused by a "*comparable unforeseen event*." The tariffs came as a surprise to everyone in the industry, including the Parties [*Cl. Ex.* 6]. Both the size of the tariffs and the inclusion of frozen racehorse semen in the list of affected products were entirely unforeseeable by both parties [*Proc. Order* 2 *No.* 23]. Racehorse breeding is not typically listed in Agricultural products and a retaliatory tariff of this size was impossible to predict [*Cl. Ex.* 6]. Thus, Claimant is entitled to additional payment from Respondent.

63 Lastly, although Claimant did not ultimately delay delivery, Claimant should not lose access to clause 12 under the covenant of good faith and fair dealing, which is implied in every contract. Under this covenant, when there are fundamental and unforeseeable circumstances, a party is precluded from invoking the binding effect of that contract [*Islamic Republic of Iran v. Cubic Defense Systems, Inc.*]. Good faith in the context of a hardship clause is also explained by UNIDROIT principle 6.2.3 which states that the advantaged party is obligated to negotiate in good faith to adapt the contract to alleviate the burden. Here, the advantaged party is Respondent, who has a legal obligation to renegotiate in good faith [*Speidel*].

64 Claimant began price renegotiations with Respondent in a good faith attempt to adjust the delivery price. In fact, Claimant made it clear that delivery would not occur on time without an increase in price [*Cl. Ex.* 7]. Claimant only went ahead with delivery in a good faith reliance on Respondent's desire to agree on the price and to have a long-lasting relationship with Claimant [*Resp. Ex.* 4]. Allowing Respondent to escape liability would create perverse incentives for all sellers to delay delivery whenever there appeared to be a chance of unfavorable circumstances in order to retain their right to redress the future problem. Claimant should not sacrifice access to recovery under clause 12 just because they acted in good faith.

II. Under CISG Article 8, Both the Subjective and Objective Intent of the Parties Was Not for Claimant to Assume the Risk of Tariffs

65 As the CISG governs the sales agreement [*Cl. Ex.* 5], clause 12 should be interpreted consistent with Article 8 of the CISG [*Art.* 8 *CISG*]. Article 8(1) lays out a subjective test that determines the meaning of a contractual clause from the actual intentions of a party [*Farnsworth* 97]. However, if Article 8(1) is not applicable because one party is not aware of the other's intentions, then Article 8(2) applies [*Farnsworth* 98]. Under Article 8(2), a party's conduct will be interpreted according to an objective reasonable person standard [*Farnsworth* 98].

When determining the parties' intent under either standard, Article 8(3) requires that consideration be given to all relevant circumstances, including the negotiations, established practices, usages and any subsequent conduct [*Art.* 8(3) *CISG*].

66 Respondent could not have been unaware that Claimant intended to limit liability for risks associated with delivery, specifically for risks associated with changing customs requirements. **(A)** Furthermore, Respondent consented to the inclusion of clause 12, which was intended by both parties to limit Claimant's risks. **(B)** Therefore, clause 12 should be interpreted to reflect that intent. Even if Respondent was not aware of this intent, a reasonable person in Respondent's position would have been.

A. Clause 12 Must be Interpreted as Requiring a Price Adaptation Because Claimant Made the Intent to Limit Additional Risks Clear During Negotiations

67 Under Article 8(1) of CISG, a contract shall be interpreted according to the subjective intent of the parties [*Art.* 8(1) *CISG*]. If the intent of only one party is determinable, it is enough that the other party could not have been unaware of that intent [*Schlechtriem/Schwenzer* 154]. Due consideration must be given to all relevant circumstances, including not only the text of the contract but also the negotiations, practices and subsequent conduct of the parties [*Art.* 8(3) *CISG*]. Furthermore, the joint intent of the parties is conclusive, regardless of any deviating objective meanings of declarations [*Memory Module Case*]. Here, the parties manifested their common intent during negotiations that Claimant not bear additional risks.

68 The negotiations between the Parties show that the reason for including DDP in the contract was not to burden Claimant with additional risk but was included because of Claimant's experience with this product. Respondent's email requested DDP because of the urgency of the delivery and Claimant's much greater experience in the shipment of frozen semen [*Cl. Ex. 3*].

69 Although a traditional delivery DDP would place all risk of tariffs on Claimant as the seller [*Brunner 679*], the intent of the parties was to adapt the default standard. Due to the request for DDP, Claimant insisted on including clause 12 to limit its risk [*Cl. Ex. 4*]. Claimant asked at a minimum to be protected against the risk of changing health and security requirements by a hardship clause [*Cl. Ex.* 4]. Thus, the intent of both parties was to include a delivery DDP in light of Claimant's experience but also to limit Claimant's risk against changing circumstances.

70 Where a common intent of the parties is discerned, that common intent is decisive even if the objective meaning attributable to the statements of the parties differs [*Memory Module Case*]. While a delivery DDP objectively requires the seller to be responsible for tariffs, Claimant did not accept this term and instead

negotiated around the default [*Cl. Ex.* 4]. Respondent accepted this change and was willing to include the desired hardship clause to limit Claimant's risk [*Cl. Ex.* 8]. Therefore, both parties intended to stray from the default language of a delivery DDP.

71 Even if Respondent argues that their intent was not to limit Claimant's risk, Respondent could not have been unaware of Claimant's intent. The "unequivocal intent" of one party is equal to a finding of common intent [*Schlechtriem/Schwenzer 155*]. Unequivocal intent exists if "the actual will of one party was so easily recognizable by the other party that it could not have been unaware of it" [*Chemical Products Case*]. Claimant unequivocally expressed this intent in the 31 March 2017 email that states, "*we are not willing to take over any further risks. . . at a minimum, a hardship clause should be included into the contract to address such subsequent changes*" [*Cl. Ex. 4*]. This intent is easily recognizable as an unwillingness to burden Claimant with all the risks associated with a DDP delivery. Because Respondent could not have been unaware of Claimant's intent to limit its liability, clause 12 must be interpreted as requiring Respondent to bear the cost of the tariffs.

B. A Reasonable Person Would Have Understood Clause 12 as Requiring a Price Adaptation

72 In the event that subjective intent is not discernable, the analysis under Article 8(2) interprets the parties conduct according to the understanding that a reasonable third person in the position of the other party would have had in the same circumstances [*Art.* 8(2) *CISG; Farnsworth* 98]. Accordingly, "the intention which courts will attribute to a person is always that which that person's conduct and words amount to when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind" [*Chan* 73]. In determining the hypothetical understanding of a reasonable person, consideration must again be given to all relevant circumstances [*Art.* 8(3) *CISG*; *Schlechtriem/Schwenzer* 153]. The interpretation under Article 8(2) covers not only contractual terms, but also all statements and conduct [*Chan* 77]. **(i)** Here, the party's statements during negotiations, as well as the finalized price, could only be understood by a reasonable person in Respondent's position as limiting Claimant's risk. **(ii)** Furthermore, a reasonable person in Respondent's position would understand Respondent's subsequent conduct as acceptance of a price adaptation.

i. A Reasonable Person in Respondent's Position Would Have Understood Claimant's Intent to Limit Its Risk During Negotiations

73 A reasonable person would understand that Claimant's intent was to limit its risk due to Claimant's concerns raised during negotiations. Ms. Napravnik and Mr. Antley discussed that Claimant should not bear all the

risks associated with a delivery DDP because the true purpose of the DDP agreement was to benefit from Claimant's experience in shipping frozen semen, thereby ensuring swift delivery [*Cl. Ex.* 8]. Ms. Napravnik specifically stated, "we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions" [*Cl. Ex.* 4]. A reasonable person could only understand this statement as placing the additional risk of price increases due to tariffs on Respondent. Considering these statements, a reasonable person would understand that the addition of clause 12 into the contract was to allocate additional risk caused by certain hardships to Respondent.

74 Furthermore, the negotiated price agreed upon does not include the cost of additional risks. When negotiating an increased price for the goods, Claimant originally requested an additional 1,000 USD for the DDP delivery term [*Proc. Order* 2 *No.* 8]. Respondent was not willing to accept this price, and instead the Parties negotiated to limit Claimant's risk and include a hardship clause instead [*Cl. Ex.* 4]. The cost was lowered to only an additional 200 USD, which reflects the removal of certain risks normally associated with DDP delivery [*Proc. Order* 2 *No.* 8]. A reasonable person in Respondent's position would know that Claimant would not accept a considerably lower price without the inclusion of clause 12. As such, a reasonable person would also recognize that Claimant was not responsible for the unforeseen tariffs and as such is entitled to a price adaptation.

ii. A Reasonable Person in Respondent's Position Would Understand the Subsequent Conduct of the Parties as Acceptance of a Price Adaptation

75 The conduct and statements of the parties after the conclusion of the contract reasonably established that an agreement to adapt the price had been reached. In a French case, the buyer took a delivery of goods without contesting the price specified by the seller [*Alain Veyron v. Ambrosio*]. The court, applying Article 8(2), interpreted this conduct as acceptance of the seller's price [*Id.*]. In the present case, Respondent accepted delivery and did not contest to a price adaptation [*Cl. Ex.* 4]. Respondent was aware of Claimant's need for additional payment and urged Claimant to deliver the goods regardless [*Cl. Ex.* 8]. A reasonable person would assume that Claimant would not authorize delivery without a price adaptation as doing so would result in a large financial loss. Here, Claimant acknowledges that without a price adaptation in this contract, it would suffer a steep financial loss [*Proc. Order* 2 *No.* 29]. No reasonable person would accept a

contract which would bankrupt the company. Respondent's conduct of urging delivery should be interpreted as accepting Claimant's request for additional payment.

III. Under CISG Article 9, the Parties Are Bound to the Practice Which They Established Between Themselves

76 Under CISG Article 9(1), parties are bound by any practices which they have established between themselves [*Art.* 9(1) *CISG*]. Furthermore, these practices are specific to the parties and are established by a course of dealing between the parties that creates an expectation that this conduct will continue in the future [*Bonell* 105; *Chan* 83]. The Austrian Supreme Court said that it is "generally possible that intentions of one party, which are expressed in preliminary business conversations only and which are not expressly agreed upon by the parties, can become practices in the sense of Art. 9 CISG" [*Propane Case*]. This requires that the "business partner realizes from these circumstances that the other party is only willing to enter into a contract under certain conditions or in a certain form" [*Id.*].

77 Claimant made it clear that it was not willing to bear all risks associated with DDP delivery throughout the preliminary business negotiations [*Cl. Ex.* 7]. Both Parties agreed on this and that a mechanism would be in place for an adaptation of the contract. While this mechanism was not expressly referenced in clause 12, it can still be understood as a party-specific practice due to the clear intentions of Claimant. In the Parties' unique arrangement, the use of a delivery DDP was solely to ensure better transportation terms and swifter deliveries because of Claimant's superior experience [*Cl. Ex.* 3]. Both Parties acknowledged this [*Cl. Ex.* 3]. Respondent also knew that Claimant was only willing to accept DDP delivery if it was not responsible for the additional risks [*Cl. Ex.* 4]. As such, Respondent is bound by this practice and cannot escape liability.

IV. The Inclusion of Clause 12 in the Contract Does Not Preclude the Application of CISG Article 79

78 Even if Claimant is not entitled to a price adaptation under clause 12 of the contract, Claimant is entitled to payment resulting from an adaptation of the price under CISG Article 79. Article 79(1) of the CISG exempts a party from liability for its breach of contract if it proves "that the failure was due to an impediment beyond [its] control" [*Art.* 79(1) *CISG*]. Courts have construed article 79 in conjunction with *force majeure* clauses, which suggests that parties do not preempt article 79 by including contractual *force majeure* clauses [*Iron Molybdenum Case*]. The same applies to hardship clauses. The prevailing view "accepts that the *force majeure* excuse as reflected in Article 79 CISG not only applies in cases of impossibility, but also in hardship situations"

[*Brunner* 397]. Indeed, hardship may be seen as a "particular case of the force majeure excuse contained in Article 79 CISG" [*Id.*].

79 The Parties included a hardship clause to limit Claimant's liability in the case of changing circumstances [*Cl. Ex.* 4]. However, this clause is not exhaustive and instead impliedly leaves gaps that are filled and informed by Article 79. In this case, clause 12 and Article 79 can be read together to show the full picture of hardship. If this Tribunal finds that clause 12 does not cover the imposition of tariffs, this Tribunal should find that Article 79 does. Consequently, the price of the goods should be increased under CISG Article 79.

V. Article 79 of the CISG Exempts Claimant from Responsibility for the Increased Cost Imposed by the Agricultural Tariff Under the Principle of Economic Hardship

80 Should the Tribunal should find that **(A)** Article 79 of the CISG governs, but does not settle, economic hardship, then **(B)** an unforeseen agricultural tariff, as applied to the importation of frozen horse semen, constitutes economic hardship under Article 79 of the CISG.

A. Article 79 of the CISG Governs, but Does Not Settle, Economic Hardship

81 The parties stipulated in Section 14 of the Sales Agreement that the UN Convention on the International Sale of Goods (1980) (CISG) shall govern the Sales Agreement [*Art. 14 Agreement*].

82 Issues that are governed, but not settled by the CISG may be informed by the general principles on which the CISG is based [*Art.* 7(2) *CISG*]. This is unlike issues that are both governed and settled by the CISG [*Ferrari et al.*]. When an issue is governed and settled by the CISG, that issue must be decided under the CISG alone; no extraneous principles or laws may be used to inform the issue's settlement [*Id.*].

83 General principles of the CISG include reliance, good faith, and impossibility [*Jacobs* 425; *Bonell*, *Article 7* 2.4.1.; *Southerington* 2.2]. In cases where the CSIG "does not contain any express rule on the matter involved," these principles may be used to inform courts or tribunals on how the CISG should address a specific issue that it governs [*Art.* 7(2) *CISG*; *Hellner* 1; *Ferrari et al.*].

84 The UNIDROIT Principles and the Principles of European Contract Law (PECL) may be used as gap-filling measures [*Bonell*, *UNIDROIT Principles* 33; *Flambouras* 2]. The only requirement is that the relevant UNIDROIT and PECL principles must be "the expression of a general principle underlying CISG" [*Bonell*, *UNIDROIT Principles* 34].

85 Economic hardship is governed, but not settled by the CISG. Article 79 of the CISG does not expressly provide for economic hardship [*Art.* 79 *CISG*]. Nevertheless, the CISG Advisory Council Opinion No. 7 states that economic hardship qualifies as an impediment under Article 79(1) [*CISG Advisory Op. No. 7,* ¶3.1].

Moreover, several scholars state that Article 79 includes situations of extreme economic hardship within the meaning of impediment [*Tallon* 1.2; *Schlechtriem*, *Uniform Sales Law* 101]. Article 79(1) states:

> A party is not liable for a failure to perform any of [its] obligations if he proves that the failure was due to an impediment beyond [its] control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

86 An impediment under Article 79 may consist of "[a] change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship")" [*CISG Advisory Op. No. 7,* ¶3.1]. The majority view accepts that the force majeure exemption reflected in Article 79 applies in both cases of impossibility and hardship [*Brunner*, *Force Majeure and Hardship under General Contract Principles* 2028]. "Indeed, the hardship exemption may be considered as a particular case of the force majeure excuse contained in Article 79 CISG" [*Id. at* 2029]. Moreover, an impediment of hardship does not require that performance becomes absolutely impossible, but merely extremely difficult [*CISG Advisory Op. No. 7,* ¶3.1; *Ferrari et al.*]. Under narrow circumstances, an impediment under Article 79 includes unaffordability [*Schlechtriem*, *Uniform Sales Law* 101].

87 In the *Steel Tubes Case*, the Belgian Supreme Court read Article 79 to include economic hardship and looked to the UNIDROIT principles to fill in the gaps of the provision [*Steel Tubes Case*]. The court interpreted an event that was not reasonably foreseeable at the conclusion of the contract, and which disproportionally increased one party's burden of performance, as being governed by the CISG [*Ferrari et al.*]. Because the court looked to UNIDROIT to fill in the gaps of the CISG, scholars have determined that this opinion implies that the CISG governs, but does not settle, economic hardship [*Id.*]. In the *Steel Tubes Case*, after the contract was finalized, but before the steel tubes were delivered, the price for steel unexpectedly rose by approximately 70% [*Id.*]. The steel seller attempted to renegotiate a higher contract price with the steel buyer, but, the buyer refused to renegotiate and insisted that the goods be delivered at the agreed upon price [*Id.*]. The Belgian Supreme Court found for the seller, holding that "unforeseen increases in the price gave rise to a serious imbalance which rendered the further performance of the contracts under unchanged conditions exceptionally detrimental" to the steel seller [*Id.*]. Moreover, under the UNIDROIT principles, "the party who invokes changed circumstances that fundamentally disturb the contractual balance . . . is also entitled to claim the renegotiation of the contract" [*Id.*]. Thus, the court ordered the parties to renegotiate the contract price [*Id.*].

88 In the *Chinese Goods Case*, the seller's manufacturer experienced financial difficulties and could not deliver ordered goods to the seller [*Chinese Goods Case*]. As a result, the Chinese seller could not deliver goods to the German buyer [*Id.*]. The tribunal stated that this case was different from instances of "force majeure, economic impossibility or excessive onerousness" because the manufacturer's financial difficulties were a manageable risk [*Id.*]. This indicates that there are multiple cases where economic hardship provides an exemption under Article 79 [*Ferrari et al.*].

89 Because Article 79 governs, but does not contain an explicit rule about how to treat economic hardship, the general principles of the CISG may be used to settle the issue [*Art.* 7(2) *CISG*; *Hellner* 1]. Therefore, when analyzing Article 79's elements, the general principles of the CISG may be used to settle whether a specific event constitutes economic hardship under Article 79 [*Art.* 7(2) *CISG*; *Ferrari et al.*].

B. An Unforeseen Agricultural Tariff Constitutes Economic Hardship Under Article 79 of the CISG

90 Once it has been established that Article 79 governs, but does not settle, instances of economic hardship, Article 79(1) requires that the provision be broken down into multiple elements [*Enderlein-Maskow*; *Tallon* 2.6]. Those elements are **(i)** a failure to perform **(ii)** due to an impediment that was beyond the control of the breaching party **(iii)** and could not have been reasonably foreseen by the breaching party **(iv)** at the conclusion of the contract or avoided its consequences [*Enderlein-Maskow*; *Tallon* 2.6]. Each element must be met for an event to constitute economic hardship under Article 79, thus exempting the breaching party from liability [*Ferrari et al.*].

i. Claimant Failed to Perform Under the Contract

91 Claimant failed to perform under the contract when Claimant refused to make the final shipment on 20 January 2018 [*Cl. Ex.* 7]. A party is exempt from a failure to perform under a contract if the failure was caused "by an impediment beyond [its] control" and the impediment could not have been reasonably accounted for when the contract was finalized [*Art.* 79(1) *CISG*].

92 The term "failure to perform" is given the broadest meaning that is conceivable under the term [*Enderlein-Maskow* 2]. Specifically, the term "failure to perform" is not limited to late performance or non-performance, but also includes non-conforming performance [*Id.*; *CISG Advisory Op. No. 7,* Comment 10]. Therefore, a "failure to perform" under Article 79 may constitute total, partial, delayed, or defective performance [*Tallon* 2.4.1]. "Any failure to perform produces a certain exempting effect" [*Id.*].

93 Under Article 79, a failure to perform occurred in cases where the seller of a product was subjected to an unexpected price increase [*Steel Tubes Case*]. The seller could have delivered the steel tubes at a much higher cost, but instead, brought their case to court after the buyer refused to amend the contract [*Id.*]. Ultimately, the court ordered the parties to renegotiate the contract in light of the unexpected price increase [*Id.*].

94 Similarly, Claimant refused to deliver the final shipment of horse semen in its email to Respondent on 20 January 2018 [*Cl. Ex.* 7]. This constitutes constructive failure to perform under Article 79(1) [*Tallon* 2.4.1]. Citing the unexpected, significant economic hardship the new tariff would impose, Claimant made it clear to Respondent that it would not ship the final 50 doses of frozen horse semen unless the Parties found a solution [*Cl. Ex.* 7; *Cl. Ex.* 8]. Claimant put the shipment on hold, pending a resolution of which Party would bear the increased cost [*Cl. Ex.* 7; *Cl. Ex.* 8]. At this point, like the seller in the *Steel Tubes Case*, Claimant failed to perform under the contract because it had no intent to deliver the goods without resolution of the tariff issue.

95 Claimant only authorized the shipment on hold to proceed after reasonably relying on Respondent's promise of increased payment [*Cl. Ex.* 8]. Delivery would have otherwise been exceedingly detrimental to Claimant and it would not have performed [*Id.*]. Typically, reliance is used as a tool to prevent one party from revoking an offer after the other party has relied on that offer [*Art.* 16(2)(b) *CISG*]. However, Professor Schlechtriem has expanded the principle of reliance to other articles of the CISG [*Jacobs* 425]. Professor Schlechtriem stated that "induced reliance should be protected" [*Id. at* 426]. Here, Claimant was induced to rely on Respondent's promise to come to a solution when it made the final shipment of goods [*Cl. Ex.* 8]. Mr. Shoemaker was introduced to Claimant as Respondent's contact person, who was responsible for all questions concerning the Sales Agreement [*Proc. Order 2 No.* 32]. As such, it was reasonable for Claimant to rely on Mr. Shoemaker's promise to find a solution to the tariff issue. Moreover, Respondent knew that the agricultural tariffs would impose a significant economic hardship on Claimant [*Proc. Order 2 No.* 28]. Therefore, Respondent should be held responsible for inducing Claimant to rely on its promise. Claimant's ultimate delivery does not constitute full performance under the contract because it was induced by Respondent's promise–a promise that never came to fruition.

96 Moreover, delivery of the goods with the imposed agricultural tariff was impossible without Respondent's promise to adapt the contract price. There are several classifications of types of impossibility, which go beyond a physical impossibility [*Southerington* 2.2]. Commercial impossibility "occurs when the value of what is to be received in return for performance diminishes fundamentally" [*Id.*]. Had Respondent initially refused to adapt the contract price, Claimant would have never proceeded with the unduly expensive shipment of

goods because it was commercially impossible for Claimant to do so [*Cl. Ex.* 7]. This would have constituted a failure to perform under the contract [*Steel Tubes Case*]. Claimant's ultimate delivery does not constitute full performance under the contract because it was commercially impossible for Claimant to deliver without Respondent's promise to adapt the contract price.

97 Claimant made a good faith attempt to overcome the agricultural tariff as quickly as possible, relying on Respondent's promise of increased payment [*Cl. Ex.* 8]. The good faith principle applies to the CISG through Article 7 [*Art.* 7(1) *CISG*]. The good faith principle under CSIG applies to the contractual relationship between the parties [*Bonell*, *Article* 7 2.4.1.]. As such, the parties have an obligation of good faith if "in the course of the performance of the contract a question arises" [*Id.*].

98 Claimant undertook a good faith effort to deliver the final shipment of goods to Respondent, after Respondent promised to find a solution to the increased cost imposed by the tariff [*Cl. Ex.* 8]. After the customs authorities alerted Claimant that the tariff would be applied to its goods, Claimant immediately notified Respondent of the issue [*Cl. Ex.* 7]. Because Respondent cited an urgent need for the final shipment, and had emphasized its interest in pursuing a long-term business relationship, Claimant authorized the final shipment [*Cl. Ex.* 8; *Resp. Ex.* 4]. Claimant did so even though the agricultural tariff made the shipment unaffordable for Claimant [*Cl. Ex.* 8]. Claimant understood Respondent to have taken responsibility for the increased cost imposed by the agricultural tariff during the parties' telephone conversation [*Cl. Ex.* 8]. Claimant's ultimate delivery does not constitute full performance under the contract because delivery was merely authorized in good faith reliance on Respondent's promise of increased payment.

ii. The Agricultural Tariff Was an Impediment Beyond the Control of Claimant

99 The agricultural tariff was an impediment beyond Claimant's control. In considering whether an impediment was beyond the control of the seller, a person roughly determines the seller's assumption of risk [*Ferrari et al.*; *Enderlein-Maskow* 4.1]. The term impediment under Article 79 is a risk allocation provision that fills in the gaps from enumerated risk allocation provisions in the parties' sales contract [*Ferrari et al.*].

100 Unmanageable risks and exceptional events constitute impediments under Article 79 [*Chinese Goods Case*]. Moreover, events that make performance under the contract unaffordable have been narrowly interpreted as impediments [*Schlechtriem*, *Uniform Sales Law* 101]. Although most market fluctuations are not considered impediments, "wild and totally unexpected market fluctuations in goods" have constituted impediments under Article 79 [*CISG Advisory Op. No. 7,* Comment 39]. For example, an unexpected market fluctuation

that increased the price of a good by 70% was found to be an impediment [*Steel Tubes Case*]. Price increases that are wildly detrimental to the seller are impediments under Article 79 [*Id.*].

101 The agricultural tariff was an impediment, as it made the shipment of frozen horse semen unaffordable for Claimant [*Cl. Ex.* 8]. The agricultural tariff was also a wild and unexpected market fluctuation [*Cl. Ex.* 6]. Rather than a typical market event that could have been managed through contract provisions, the retaliatory nature and size of the tariffs was unexpected by everyone [*Id.*]. Unlike a 13% increase in cost, a 30% price increase caused by tariff is not within the normal realm of market activity [*Steel Bars Case*]. Moreover, the tariff imposed a considerable hardship on Claimant to perform under the contract by burdening Claimant with a 25% loss [*Cl. Ex.* 8]. In fact, the purpose behind the tariff was to create significant hardship on sellers from Mediterraneo [*Cl. Ex.* 6]. Even Respondent has argued in a separate arbitration that the agricultural tariff constitutes an unforeseeable change in circumstances that requires an adaptation of the contract price [*Langweiler Letter* 50]. Thus, the agricultural tariff is an impediment within the meaning of Article 79.

102 The agricultural tariff was an impediment especially because the frozen horse semen was not a generic good. Generally, generic goods are not susceptible to economic hardship because other goods may replace them [*Tallon* 2.6.5.]. Nijinsky III's semen is a unique product because it came from a world class racehorse [*Cl. Ex.* 1]. Nijinsky III was cited as one of Respondent's first choices for breeding specific mares [*Id.*]. Respondent specifically requested a first-rate product, for the use with specific mares, in enormous quantity, that cannot be replicated by any racehorse [*Id.; Cl. Ex.* 2]. Not only was Nijinsky III's semen a unique product, but both Parties also identified the quantity of doses as being unique and Claimant's fulfillment as an extraordinary accommodation [*Cl. Ex.* 2; *Cl. Ex.* 3].

103 Moreover, factors considered within the control of the seller include those which are connected to a seller's manufacturing or procurement process [*Enderlein-Maskow* 4.1]. Factors that are not considered to be within the control of the seller include acts of authority, such as governmental prohibitions like quotas, licensing, importation restrictions [*Ferrari et al.*; *Australia Cotton Case*; *Butter Case*].

104 The agricultural tariff was beyond the control of Claimant, as it was imposed by a governmental authority [*Cl. Ex.* 6*; Cl. Ex.* 7]. The agricultural tariff was imposed as a retaliatory measure by Respondent's government [*Cl. Ex.* 6]. Unlike an existing condition, the agricultural tariff was imposed after the parties concluded the contract, making the tariff both unforeseen and unexpected [*Coal Case*]. A tariff of such size and scope was unexpected, even by informed circles within Equatoriana [*Cl. Ex.* 6], and Claimant could not have assumed the risk for acts of a foreign government under these extraneous circumstances [*Ferrari et al.*].

iii. Claimant Could Not Have Reasonably Foreseen the Imposition of the Agricultural Tariff

105 Claimant could not have reasonably foreseen the imposition of the agricultural tariff. Article 79 requires that the impediment be unforeseeable at the conclusion of the contract [*Enderlein-Maskow* 5.1]. This element is not satisfied if the breaching party could have reasonably taken the impediment into account before the contract was finalized [*Id.*]. Foreseeability is known from the *force majeure* clauses [*Enderlein-Maskow* 5.1]. However, unlike *force majeure*, events that are not expected to materialize before the end of a contract are not foreseeable [*Id. at* 5.3]. Moreover, events that may be expected to materialize, but are not expected to have an effect on the contract, are not foreseeable under Article 79 [*Id.*].

106 The tariff was not within Claimant's assumption of risk because it was unexpected that an agricultural tariff would be imposed [*Cl. Ex.* 6*; Cl. Ex.* 8]. The original tariff imposed by Mediterraneo was completely unexpected and was "extraordinary in several regards," including "the amount and speed with which it had been imposed" [*Proc. Order 2 No.* 23]. Additionally, Equatoriana's imposition of a retaliatory tariff was a complete surprise to both Parties [*Cl. Ex.* 6]. Equatoriana had always been a huge proponent of free trade and had rarely responded to import restrictions with retaliatory measures [*Id.*]. Rather than respond to trade aggression with tariffs, Equatoriana often resolved to settle disputes amicably or under WTO dispute resolution mechanisms instead [*Cl. Ex.* 6]. Furthermore, until 2018, there were no tariffs on any agricultural goods or horse semen in either Equatoriana or Mediterraneo, making this the first tariff of its kind [*Proc. Order 2 No.* 25]. Therefore, Claimant could not have reasonably foreseen the imposition of a tariff that would wildly impact the cost of its Sales Agreement.

107 Finally, the tariff was not within Claimant's assumption of risk because it was unexpected that an agricultural tariff would be imposed on products for racehorse breeding [*Cl. Ex.* 7*; Cl. Ex.* 8]. Both Parties were shocked that the tariff even applied to frozen horse semen [*Cl. Ex.* 8*; Cl. Ex.* 4]. Not even the ministers and custom authorities in Equatoriana were sure about the scope of the tariff and in fact, it took considerable time for Respondent to confirm that the tariff covered animal products, including frozen horse semen [*Resp. Ex.* 4]. If government employees were unaware about the implications of the unexpected tariff, it was unreasonable to expect a foreign seller to have foreseen such an impediment. Thus, Claimant could not have reasonably foreseen the imposition of a tariff that would wildly impact the cost of its Sales Agreement.

iv. The Agricultural Tariff Occurred After the Conclusion of the Contract and Could Not Be Avoided

108 The agricultural tariff occurred after the conclusion of the contract and could not be avoided. To qualify for an exemption, the impediment must occur after the conclusion of a contract, preventing the breaching party from avoiding its consequences [*Tallon* 2.4.3, 2.4.6.] An impediment that exists before a contract is concluded will not qualify as an exemption under Article 79 [*Coal Case*]. All parties have an obligation to counteract impediments to the performance of contracts [*Enderlein-Maskow* 6.1]. Thus, future foreseeable impediments must be avoided [*Id.*]. If the impediment has come into effect, it should be overcome as quickly as possible [*Id.*]. This agricultural tariff occurred after the conclusion of the contract and its consequences could not have been avoided.

109 The agricultural tariff occurred after the contract was finalized and, therefore, the tariff occurred at the conclusion of the contract within the meaning of Article 79 [*Cl. Ex.* 7]. Claimant was not exempted from the tariff and could not obtain a reduction in the cost of the tariff [*Proc. Order 2 No.* 27]. There was also no indication that Equatoriana's tariff was temporary and it was unclear whether a trade war would escalate [*Cl. Ex.* 6]. It was possible that the tariff could have become even more detrimental to Claimant, as other governments pondered imposing similar retaliatory measures [*Cl. Ex.* 6]. This level of unprecedented economic uncertainty could not have been overcome or avoided by Claimant.

110 It was impossible to overcome the agricultural tariff because Respondent urgently needed the final shipment [*Resp. Ex.* 4; *Proc. Order 2 No.* 33]. Claimant could not have delayed delivery to see if the agricultural tariff would be removed because Respondent urgently needed the final shipment for the start of breeding season [*Resp. Ex.* 4; *Proc. Order 2 No.* 33]. In fact, Mr. Shoemaker's primary concern was to make sure that the shipment was executed as scheduled [*Resp. Ex.* 4]. Thus, Claimant could not avoid or overcome the impediment.

VI. Respondent Must Pay the Increased Contract Price of US$ 1,250,000

111 This Tribunal should find that **(A)** the adaptation of the contract price does not constitute damages within the meaning of Article 79(5) of the CISG and that **(B)** an adaptation of the contract price is a permissible remedy under the CISG.

A. The Adaptation of the Contract Price Does Not Constitute Damages

112 Article 79(5) of the CISG, the only provision that addresses a remedy under Article 79, prohibits the recovery of damages [*Ferrari et al.*]. Article 79(5) states that "[n]othing in this article prevents either party from

exercising any right other than to claim damages under this Convention" [*Art.* 79(5) *CISG*]. Thus, either party exempt under Article 79 is not liable for damages for a failure to perform [*Id.*]. Here, Claimant's request for an adjustment of the contract price is permissible.

B. An Adaptation of the Contract Price Is Permitted as a Remedy

113 Upon a determination of economic hardship under Article 79, an adaptation of the contract price is permitted as a remedy [*Judo Case*]. The CISG governs the possible remedies that are available following a finding of economic hardship, but does not settle the issue [*Garro* IV.6]. Article 7(2) of the CISG permits these gaps to be filled by the general principles of the CISG [*Art.* 7(2) *CISG*]. Under Article 6:111 of the PECL, a contract may be adapted "to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances" [*Art.* 6:111 *PECL*]. The CISG endorses such an approach. An unforeseeable impediment that makes the contractual obligation extremely burdensome to one party calls for "'adaptation' of the contract or one of its clauses" [*CISG Advisory Op. No. 7,* Comment 26].

114 Courts have imposed a reduction of contract price as an acceptable remedy following a finding of economic hardship under Article 79 [*Judo Case*]. According to Professor Schlechtriem, a price reduction is a contract adjustment that "reflect[s] a disturbed balance between performance on one side and obligation on the other side" [*Schlechtriem*, *Transcript of a Workshop on the Sales Convention* 237]. Here, Claimant was unduly burdened by the imposition of the agricultural tariff [*Cl. Ex.* 8]. The increased cost threatens Claimant's line of credit and worsens Claimant's already bleak financial situation [*Proc. Order 2 No.* 29]. Respondent will not suffer by being forced to pay the increased price and has expressed its interest in fostering a business relationship with Claimant [*Proc. Order 2 No.* 30]. Therefore, Respondent should bear the burden of the agricultural tariff.

115 The duty of good faith requires Respondent to bear the burden of the agricultural tariff. Claimant authorized the final shipment solely in reliance on Respondent's promise to find a solution to the agricultural tariff [*Cl. Ex.* 8]. Claimant would not have made such a shipment unless Claimant understood that Respondent was going to pay the increased cost [*Cl. Ex.* 7; *Cl. Ex.* 8]. Claimant undertook a good faith effort to make the final shipment on time because Respondent had an urgent need for the doses for breeding season [*Resp. Ex.* 4]. For these reasons, Claimant should not be unreasonably burdened by the unexpected cost of the agricultural tariff.

116 **Conclusion to Issue 3:** In conclusion, Claimant is entitled to a price adaptation under either clause 12 or Article 79 of the CISG. Clause 12 limits Claimant's risk in the case of hardship, which includes the tariff. Respondent could not have been unaware that Claimant's intent was to limit their risk. Regardless, a reasonable person in Respondent's position would have understood the negotiations and party-specific

practices as limiting Claimant's risk. Even if clause 12 does not cover the tariff, it constituted an economic hardship under Article 79 of the CISG. As such, Claimant is exempt from payment for the increased contract price and Respondent must pay US$ 1,250,000 resulting from the adaptation of the contract price.

PRAYER FOR RELIEF

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

1 Find that the Tribunal has jurisdiction and power under the arbitration agreement to adapt the contract;

2 Allow Claimant to submit evidence from Respondent's other arbitration proceeding; and

3 Order Respondent to pay USD $1,250,000 as an adaptation of the contract price.

Claimant also requests that the Tribunal order Respondent to bear all costs of this arbitration.

(signed)

Lena Bruce

Alexis Gannaway

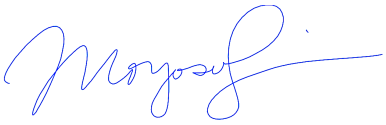
Kristine Itliong

Aryian Kohandel-Shirazi

Tom Robinson

Rebecca Rubin

Emma Sanzotta



Moyosola Soyemi

Michelle Van Sleet

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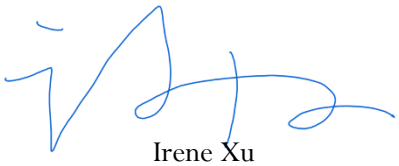

Irene Xu