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MEMORANDUM FOR RESPONDENT

GEORGETOWN UNIVERSITY

GEORGETOWN UNIVERSITY LAW CENTER

On behalf of:	**Against**:
RESPONDENT	CLAIMANT
Black Beauty Equestrian	**Phar Lap Allevamento**
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TABLE OF ABBREVIATIONS

Abbreviation	**Original Phrase/Explanation**
A fortiori	With stronger reason
Amicable compositeur	Unbiased third party
Art./Arts.	Article/Articles
CISG	United Nations Conventions on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid (Incoterm)
€	Euro
ed./eds.	Editor/Editors
ex aequo et bono	What is just and fair
HKIAC	Hong Kong International Arbitration Centre
i.e.	*id est* (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
in casu	In the case at hand
infra	Below
Inter alia	Among other things

Mr.	Mister
No.	Number
p./pp.	Page/Pages
Sales Agreement	Claimant's Exhibit C 5 (Sales Agreement 6 May 2017)
Supra	Above
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollars
v.	Versus
&	And
§/§§	Paragraph/Paragraphs

TABLE OF AUTHORITIES

Author(s):	**Citation:**
Blackaby, Nigel **Partasides**, Constantine **Redfern**, Alan **Hunter**, Martin	Redfern and Hunter on International Arbitration 6th Edition Oxford University Press (2015) Cited as: *Blackaby/Partasides/Redfern/Hunter* Cited in: §§ 17, 18, 21, 43
Born, Gary B.	International Arbitration: Cases and Materials Kluwer Law International (2011) Cited as: *Born 2011* Cited in: § 51
Born, Gary B.	International Commercial Arbitration 2nd Edition Kluwer Law International (2014) Cited as: *Born 2014* Cited in: § 54
Born, Gary B.	International Arbitration Law and Practice 3rd Edition Kluwer Law International (2016)

	Cited as: *Born 2016* Cited in: §§13, 16, 18
Brunner, Christoph	Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration Kluwer Law International (2009) Cited as: *Brunner* Cited in: § 24
Cachard, Oliver	Maritime Arbitration under the ICC Rules of Arbitration ICC International Court of Arbitration Bulletin, Vol. 22, No. 1 Cited as: *Cachard* Cited in: § 86
International Law Association	Resolution: No. 1/2006, Recommendations on Lis Pendens and Res Judicata and Arbitration Cited as: *ILA Resolution* Cited in: § 43
Lew, Julian D. M.	Comparative International Commercial Arbitration Kluwer Law International (2010) Cited as: *Lew* Cited in: § 18
Moser,	A Guide to the HKIAC Arbitration Rules

Michael J. **Bao**, Chiann	Oxford University Press (2017) Cited as: *HKIAC Guide* Cited in: §§ 41, 47, 54
Moses, Margaret L.	The Principles and Practice of International Commercial Arbitration Cambridge University Press (2008) Cited as: *Moses* Cited in: § 51, 54
Schwenzer, Ingeborg	Force Majeure and Hardship in International Sales Contracts *39* Victoria U. Wellington L. Rev. 709 (2008) Available at: https://core.ac.uk/download/pdf/18243147.pdf Cited as: *Schwenzer* Cited in: § 24
Sherwin, Peter **Aldous**, Kenneth	Proskauer on International Litigation and Arbitration Proskauer Rose LLP (2007) Cited as: *Sherwin* Cited in: § 61
Sicard-Mirabal, Josefa **Derains**, Yves	Introduction to Investor-State Arbitration Kluwer Law International (2018) Cited as: *Sicard-Mirabal/Derains* Cited in: § 49

Turner, Peter **Mohtashami**, Reza	A Guide to the LCIA Arbitration Rules Oxford University Press (2009) Cited as: *Turner/Mohtashami* Cited in: § 54
UNIDROIT	UNIDROIT Principles of International Commercial Contracts Official Commentary (2010) Cited as: *UNIDROIT Principles Official Commentary 2010* Cited in: § 89
Van Alstine, Michael	Dynamic Treaty Interpretation University of Pennsylvania Law Review (1998) Cited as: *Dynamic Treaty Interpretation* Cited in: § 87
Webster, Thomas H. **Buhler**, Dr. Michael	Handbook of ICC Arbitration: Commentary, Precedents, Materials Sweet & Maxwell (2014) Cited as: *Webster/Buhler* Cited in: § 54

TABLE OF ARBITRAL AWARDS

Institution: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

Date: 24 November 1998

Case: Name Unavailable

Case No.: 96/1998

Available at: CISG-online 1525

Cited as: *Russian Export License Case*

Cited in: §§

Institution: United Nations Commission on International Trade Law

Date: 4 May 1999

Case: Himpurna California Energy Ltd. v, PT. (Persero) Perusahaan Listruik Negara

Available at: XXV Y.B. Int'l Comm. Arb. 13 (2000)

Cited as: *Himpurna Award*

Cited in: §

Institution: *Ad hoc*

Date: 14 March 2003, Final Award

Case: CME Czech Republic B.V. v. The Czech Republic

Cited as: *Czech Republic UNCITRAL Case*

Cited in: § 54

Institution: International Chamber of Commerce

Date: 1976

Case: Name Unavailable

Case No.: 2708

Cited as: *ICC Case 2708*

Cited in: § 89

Institution: International Chamber of Commerce

Date: 1 September 1988

Case: Name Unavailable

Case No.: 5953

Cited as: *ICC Case 5953*

Cited in: § 89

Institution: International Chamber of Commerce

Date: 1990

Case: Name Unavailable

Case No.: 6219

Cited as: *ICC Case 6219*

Cited in: § 89

Institution: International Chamber of Commerce

Date: 1997

Case: Name Unavailable

Case No.: 5961

Cited as: *ICC Case 5961*

Cited in: § 74

Institution: International Chamber of Commerce

Date: 2001

Case: Name Unavailable

Case No.: 9994

Cited as: *ICC Case 9994*

Cited in: § 89

Institution: International Chamber of Commerce

Date: 12 May 2003, Procedural Order

Case: Name Unavailable

Case No.: 12169

Cited as: *ICC Case 12169*

Cited in: § 54

Institution: International Chamber of Commerce

Date: 13 February 2004, Procedural Order

Case: Name Unavailable

Case No.: 12206

Cited as: *ICC Case 12206*

Cited in: § 54

Institution: International Chamber of Commerce

Date: 21 June 2004, Procedural Order

Case: Name Unavailable

Case No.: 12296

Cited as: *ICC Case 12296*

Cited in: § 54

Institution: International Chamber of Commerce

Date: 8 October 2004, Procedural Order

Case: Name Unavailable

Case No.: 13225

Cited as: *ICC Case 13225*

Cited in: § 54

Institution: International Chamber of Commerce

Date: May 2006, *Procedural Order*

Case: Name Unavailable

Case No.: 13176

Cited as: *ICC Case 13176*

Cited in: § 54

Institution: International Chamber of Commerce

Date: 2010

Case: Name Unavailable

Case No.: 13674

Cited as: *ICC Case 13674*

Cited in: § 75

Institution: International Chamber of Commerce

Date: 2010

Case: Name Unavailable

Case No.: 7903

Cited as: *ICC Case 7903*

Cited in: §§ 75, 76

Institution: International Chamber of Commerce

Date: 2014

Case NA

Case No: 14793

Cited as: *ICC Case 14793*

Cited in: § 74

Institution: International Chamber of Commerce

Date: 2014

Case No.: 15610

Cited as: *ICC Case 15610*

Cited in: § 74

Institution: International Centre for the Settlement of Investment Disputes

Date: 12 May 2005, *Award*

Case: CMS Gas Transmission Co. v. The Argentine Republic

Case No.: ARB/01/8

Cited as: *CMS Award*

Cited in: § 72

Institution: *Ad Hoc*

Date: 3 August 2005, Final Award, Part II

Case: Methanex Corporation v. United States of America (UNCITRAL)

Cited as: *Methanex Case*

Cited in: § 49

Institution: International Center for the Settlement of Investment Disputes

Date: 23 June 2008, Decision on Preliminary Issues

Case: Libananco Holdings Co. v. Turkey

Case No.: ARB/06/8

Cited as: *Libananco Holdings*

Cited in: § 49

Institution: Court of Arbitration for Sport

Date: 16 March 2010, Award

Case: Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano

Case No.: CAS 2009/A/1879

Cited as: *Valverde Award*

Cited in: § 49

Institution: Court of Arbitration for Sport

Date: 24 February 2012, Award

Case: Amos Adamu v. FIFA

Case No.: CAS 2011/A/2426

Cited as: *Adamu Award*

Cited in: § 49

Institution: *Ad hoc*

Date: 30 March 2012, Award

Case: Dr. Carl A. Sax v. The City of St. Petersburg

Cited as: *St. Petersburg UNCITRAL Case*

Cited in: § 54

Institution: International Chamber of Commerce

Date: 2016, Final Award

Case: Name Unavailable

No.: 17272

Cited as: *ICC Case 17272*

Cited in: § 54

Institution: International Center for the Settlement of Investment Disputes

Date: 1999

Case: Mondev Int'l Ltd. v. USA

Case No.: ARB(AF)/99/2

Cited as: *Mondev Int'l Ltd.*

Cited in:§ 62

Institution: International Center for the Settlement of Investment Disputes

Date: 4 October 1999

Case: World Duty Free Co. Ltd. v. Republic of Kenya

Case No.: ARB/00/7

Cited as: *World Duty Free*

Cited in:§ 62

TABLE OF COURT DECISIONS

Australia

Date: 07 April 1995

Case: Esso Australia Resources Ltd. v. Plowman

Court: High Court of Australia

Case No: 183 CLR

Cited as: Esso

Cited in: §§ 57, 58, 59

Belgium

Date: 2 May 1995

Case: Vital Berry Marketing NV v. Dira-Frost NV

Court: Rechtbank van Koophandel Hasselt

Case No.: A.R. 1849/94, 4205/94

Available at: http://cisgw3.law.pace.edu/cases/950502b1.html

Cited as: Vital Berry Marketing NV

Cited in: § 84

Spain

Date: 27 December 2007

Case: Case involving machine for repair of bricks

Court: Audiencia Provincial de Navarra, sección 3ª

Case No.: Unavailable

Cited as: *Case involving machine for repair of bricks*

Cited in: § 74

United Kingdom

Date: May 16, 2012

Case: Sulamérica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A.

Court: English Court of Appeals

Case No.: [2012] Ewca Civ 638

Cited as: *Sulamérica*

Cited in: §§ 18, 19

OTHER SOURCES

CISG	1980 United Nations Convention on Contracts for the International Sale of Goods Cited in: §§ 47, 66, 73, 80, 81, 82, 83, 84, 85, 86, 87, 88, 95
DAL	Danubian Arbitration Law (being a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration, with the 2006 amendments) Cited in: § 35
HKIAC Rules	Hong Kong International Arbitration Centre Arbitration Rules (2018) Cited in: §§ 1, 5, 11, 16, 39, 40, 41, 47, 48, 50, 51, 54, 55, 65
HKIAC Rules 2013	Hong Kong International Arbitration Centre Arbitration Rules (2013) Cited in: § 41
IBA Rules	International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (2010) Cited in: §§ 5, 40, 53, 54, 55, 65
International Arbitration Act of 1974	International Arbitration Act (1974) Available at: https://www.legislation.gov.au/Details/C2016C00083 Cited as: *International Arbitration Act* Cited in: § 57
New York Convention	1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Cited in: § 51

Uniform Law on the International Sale of Goods	Convention Relating to a Uniform Law on the International Sale of Goods (1964) Cited as: Uniform Law on the International Sale of Goods Cited in: §§ 83, 86
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts Cited in: §§ 66, 78, 80, 81, 82, 86, 87, 88, 89, 92, 93, 94, 95

STATEMENT OF FACTS

1 Phar Lap Allevamento (CLAIMANT) is a renowned Mediterraneo stud farm, located in Capital City, Mediterraneo. In 2016 Black Beauty acquired ten mares with an excellent racehorse pedigree and has been doing financially well ever since starting up the company. On 21 March 2017, RESPONDENT contacted CLAIMANT with an offer to buy frozen semen from CLAIMANT's star racehorse Nijinsky III. After extensive negotiations, RESPONDENT and CLAIMANT (the Parties) entered into the Sales Agreement of 6 May 2017 that included an arbitration clause and a hardship clause. On 6 May 2017, the Parties agreed on the final text of the Sales Agreement, which provides for the sale of 100 doses of frozen horse semen, delivered in three installments over the course of nine months. The Sales Agreement is governed by Mediterraneo law and contains a hardship clause. The hardship clause agreed by the Parties was very narrowly worded. The agreed upon language was then included in the *force majeure* clause and did not provide for any adaptation by the arbitral tribunal. The Sales Agreement also provides for arbitration under the HKIAC Rules in force when the Notice of Arbitration is submitted, seated in Vindobona, Danubia; but does not stipulate the law governing the arbitration clause. In its email of 10 April 2017, RESPONDENT made clear his sincere wish that the arbitration agreement would be governed by the law of the place of arbitration and not by the law of the contract. CLAIMANT had made no objections to this wish until the start of the arbitration proceedings. In November 2017, after the second shipment, but before the final shipment of frozen semen, the newly elected government of Mediterraneo suddenly imposed a 25% tariff on all Equatorianian agricultural products, as necessary to protect Mediterraneo national security.

2 In December 2017, the Equatorianian government saw no other choice but to respond to these changes with a 30% tariff on agricultural products imported from Mediterraneo. These tariffs came as a surprise to both CLAIMANT and RESPONDENT. On 20 January 2018, as CLAIMANT was preparing to deliver the final shipment, he discovered that the tariff applied to frozen horse semen, making the shipment 30% more expensive than anticipated. RESPONDENT's employee informed CLAIMANT that he could not authorize any additional payment but was certain a solution would be found through negotiations. After that CLAIMANT delivered the remaining 50 doses on 23 January 2018 without any agreement on a new price or a price adaptation prior to this last delivery. CLAIMANT contended that RESPONDENT should bear the risk of the unexpected increase in price and seeks an increased remuneration in front of this Tribunal. On 31 July 2018, CLAIMANT initiated arbitration proceedings, seeking reimbursement for at least

25%. RESPONDENT objects to the jurisdiction of the Tribunal because the Tribunal does not have jurisdiction to hear a dispute related to the adaptation of the price.

SUMMARY OF ARGUMENTS

3 International business transactions can sometimes turn into a runaway horse. *In casu*, CLAIMANT is attempting to hold RESPONDENT accountable for unforeseen tariffs on a shipment of racehorse semen which render the transaction 30% more expensive. CLAIMANT agreed to take responsibility for tariffs in their Sales Agreement. RESPONDENT is now forced to argue this dispute, despite it being outside the scope of the arbitration agreement and its interpretation.

4 With regard to the procedural issues, this dispute is outside the scope of the arbitration agreement. The request for increased remuneration is not covered under the narrow wording of the arbitration agreement. The Arbitral Tribunal should therefore rule it has no jurisdiction to rule on this dispute. This is even more so because the law governing the arbitration agreement is the law of Danubia, where the seat of arbitration is. Danubian law limits the interpretation of the arbitration agreement to its strict wording and no external evidence may be relied upon. The behavior of both parties demonstrates that RESPONDENT gave no indication of an intention to pay for the increased tariffs: for example, RESPONDENT's outright rejection of adaption during negotiations and clear lack of consent to additional payments when the subject arose on the phone. Finally, the arbitration clause does not cover the sale of frozen racehorse semen: this aspect of the transaction clearly falls outside the scope of "performance disputes" as they are expressed in the arbitration clause **(PART 1)**.

5 CLAIMANT is not entitled to submit into evidence the Partial Interim Award from RESPONDENT's other arbitration because it does not meet the requirements of the binding HKIAC Rules to be relevant to the dispute and material to its outcome. Even if these requirements are met, this Tribunal should not reward CLAIMANT'S opportunistic behavior and disrespect of general obligations of good faith. CLAIMANT is also not entitled to submit the Partial Interim Award under the IBA Rules on the Taking of Evidence, further reaffirming the need to refuse admission of the evidence **(PART 2)**.

6 With regard to substantive issues, CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaption of the price under Clause 12 of the Sales Agreement, because it agreed to assume that risk. The Equatorianian tariff change does not fall within the scope of hardship under Clause 12 of the Sales Agreement because the potential for a tariff change is not only foreseeable, but has also been foreseen by CLAIMANT. CLAIMANT is also not entitled to an adaption of the price because the conditions for negotiations, future performance and Tribunal's power are not met **(PART 3)**.

ARGUMENT

PART 1: THIS TRIBUNAL DOES NOT HAVE JURISDICTION BECAUSE THIS DISPUTE IS OUTSIDE OF THE SCOPE OF THE NARROWLY WORDED ARBITRATION AGREEMENT.

7 The Arbitral Tribunal lacks jurisdiction and the necessary powers to decide upon the claim raised by CLAIMANT. The Arbitration Agreement does not extend to a claim for an increased remuneration.

8 Because of the narrow wording of the arbitration clause, the dispute does not fall within the scope of the arbitration agreement **(I)**. The law governing the arbitration agreement should be the law of Danubia, which also provides that arbitration agreements should be interpreted narrowly **(II)**.

9 Finally, the behavior of both parties throughout the course of negotiations and signing of the Sales Agreement demonstrates that contract adaption was never mutually agreed upon **(III)**.

I. THIS DISPUTE IS NOT WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

10 The language in "any dispute arising out of this contract" from the arbitration clause is narrow in scope. The arbitration clause does not cover the claim raised by CLAIMANT for an increased remuneration.

11 The Tribunal must first decide whether an arbitration clause is broad or narrow to determine if this dispute falls within the scope of a contractual arbitration provision. The Tribunal has the power to do this according to article 19 HKIAC. The HKIAC rules state that "[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or *scope* of the arbitration agreement." [*HKIAC Rules, Art. 19.1*]. This is an application of the *Kompetenz-Kompetenz* doctrine under which the arbitral Tribunal possesses jurisdiction to consider and decide on its own jurisdiction [*Born, p. 52, §2.05*].

12 The arbitration clause in the Sales Agreement of 6 May 2017 is carefully drafted such that it only permits a narrow scope of application. The parties opted for the narrow wording of 'arising out of' during the drafting of the contract. The arbitration clause solely covers 'disputes arising out of this contract' [*CLAIMANT's Exhibit C 5, Clause 15*]. This dispute does not arise out of the contract but is the result of legislative changes over which neither party had control. Undoubtedly, an arbitration clause is designed primarily to cover claims for breach of contract [*Lonrho Ltd v. Shell Petroleum Co. Ltd*]; and, therefore, should be interpreted narrowly.

13 The arbitration clause does not use broader language that is more prevalent, such as 'arising out of or in connection with/relating to the contract.' Many arbitration agreements use phrases like "relating to" (as in "disputes relating to this contract") or "in connection with". [*Born 2016, pp.91-94, §4.01*]. Courts in most jurisdictions have held that these terms extend an arbitration clause to a *broad* range of disputes. For example, U.S. courts have repeatedly concluded that the "relating to" formula encompasses non-contractual, as well as contractual, claims and that it reaches any disputes that "touch" or have a factual relationship to the parties' contract. Courts in other jurisdictions have also interpreted the phrase "relating to" broadly. Similar conclusions have been reached with respect to the phrase "in connection with." [*Born 2016, pp.91-94, §4.01*] On the contrary, when an arbitration clause does not contain these terms, the assumption that the arbitration clause covers a broad range of disputes should not be made.

14 In conclusion, because of the narrow scope of this arbitration clause, the Arbitral Tribunal should decide that it has no jurisdiction to rule on this matter because the dispute is outside of the scope of this arbitration agreement.

II. IN ANY EVENT, THE LAW GOVERNING THE ARBITRATION AGREEMENT IS THE LAW OF DANUBIA AND THEREFORE THE INTERPRETATION OF THE ARBITRATION AGREEMENT IS LIMITED TO ITS WORDING.

15 The law of Danubia should be applicable to the arbitration agreement because Danubia is also the seat of the arbitration.

16 CLAIMANT's argument that the law of Mediterraneo should be applicable to the arbitration agreement, solely because this is the law of the underlying contract, completely neglects the universally accepted doctrine of separability of the arbitration agreement *[Born 2016, p. 55; Lew, p. 109, §§6-9]*. This doctrine treats the parties' underlying contract as distinct from the arbitration clause. The separability doctrine is adopted in Art. 19.2 HKIAC Rules. This rule provides that 'an arbitration agreement which forms part of a contract, shall be treated as an agreement independent of the other terms of a contract' *[HKIAC Rules, Art. 19.2]*. There cannot be drawn any assumption that the law governing the underlying contract should be the same as the law governing the arbitration agreement. In particular where, as here, there is nothing that links the law of Mediterraneo to the arbitration clause.

17 This conclusion was also reached in the Swedish case *Bullbank* and the Belgian case *Matermaco v PPM Cranes*. In the *Bullbank* case, the Swedish Supreme Court ignored the parties' choice of law to govern the underlying contract, considering that the arbitration clause ought to be treated as a separate agreement subject to a separate law *[Blackaby/Partasides/Redfern/Hunter, p. 162]*.

The court held that when "No particular provision concerning the applicable law for the arbitration agreement itself was indicated by the parties … the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place" *[Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc.]*. In *Matermaco v PPM Cranes*, the law of the place of arbitration was applied, despite the fact that the State of Wisconsin had been chosen by the parties to apply to the underlying contract. The Brussels *Tribunal de Commerce* held that "A consistent interpretation of the Convention require that that the arbitrable nature of the dispute be determined, under the Articles II and V, under the same law, that is, the lex fori…" *[Matermaco SA v PPM Cranes Inc.]*.

18 To decide upon the law governing the arbitration agreement, the Arbitral Tribunal should apply the widely followed *Sulamérica test [Blackaby/Partasides/Redfern/Hunter, p. 160, Born 2016, § 9.01 p. 135 -136]*. In the *Sulamérica*-case, the English Court of Appeal established a three-step test to determine which law governs an arbitration agreement. *[Blackaby/Partasides/Redfern/Hunter, p. 160]*.

19 This test takes a three-pronged approach. Firstly, the Tribunal should consider whether the parties agreed upon an express choice of law in the arbitration agreement. Second, if there was no express choice of law, the Tribunal should then consider the existence of an implied choice of law through the parties' intentions and conduct at the time of contract formation. Third, if neither an express or implied choice of law is evident, the Tribunal should consider the system of law with which the arbitration agreement has the closest and most real connection *[Sulamérica §§17-26]*.

20 Application of this case here will lead to the conclusion that the law of the seat of the arbitration should also be the law governing the arbitration agreement. To start, there is no express choice of law made in the arbitration agreement. Rather, the parties have implicitly agreed to the law of Danubia as the law governing the arbitration agreement. Mr. Antley's latest draft of 10 April 2017 of the arbitration agreement shows that RESPONDENT made very clear that it was its sincere wish that the arbitration agreement was to be governed by the law of the place of arbitration and not by the law of the contract [*RESPONDENT's Exhibit R 1, p. 33]*. In its reply of 11 April 2017, CLAIMANT had changed the suggested place of arbitration but did not make any objections to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement [*RESPONDENT's Exhibit R 2, p. 34]*. This communication proves that the parties have implicitly agreed that the law of the seat of arbitration will be the law governing the arbitration agreement.

21 In any event, the law of Danubia is the law that has the closest connection to this dispute since this is the place where the arbitration proceedings are seated. The parties have carefully chosen Danubia as the place where the arbitration should take place. The arbitration agreement has its closest and most real connection with the law of the place where the arbitration is held because this place exercises the supporting and supervisory jurisdiction necessary to ensure the effectiveness of the arbitral procedure *[Blackaby/Partasides/Redfern/Hunter, p. 161]*. The application of the *Sulamérica*-test therefore brings us to the conclusion that the law of Danubia is the applicable law to this agreement.

22 Accordingly, the law of Danubia should be recognized as the law governing the arbitration agreement because it is the implicitly chosen law and, as the seat of arbitration, it is the law with the closest connection to the dispute.

III. THE BEHAVIOR OF BOTH PARTIES DEMONSTRATES THAT THERE WAS NEVER AGREEMENT REGARDING A CLAIM FOR CONTRACT ADAPTION.

23 Even if this Tribunal does not consider this wording narrow in scope, when CLAIMANT inquired about adaption during negotiations, RESPONDENT rejected such a change outright **(A)**. When CLAIMANT suddenly request contract adaption prior to the final delivery, Mr. Shoemaker on behalf of RESPONDENT gave no indication that RESPONDENT agreed to additional payments or contract adaption, nor did he have any authority to agree **(B).** This dispute regarding the sale of frozen racehorse semen is not covered by the wording of this arbitration clause **(C)**.

A. RESPONDENT rejected adaption outright when it was requested by CLAIMANT during negotiations.

24 RESPONDENT and CLAIMANT discussed the possibility of allowing the Tribunal to adapt the contract during their negotiations [*CLAIMANT'S Exhibit C 8*]. It is in the best interest of the tribunal to respect the meeting of the minds between parties as is reflected in the four corners of the contract, or the lack thereof [*Brunner, p. 496*]. To decide otherwise may constitute overreaching by the Tribunal as it would cause the contract to be changed in a way that does not reflect the wishes of the parties. While several civil law jurisdictions rely on courts to adapt contracts in changed circumstances [*Schwenzer, p. 723*], the Tribunal should also consider adaption in the context of what the parties intended throughout their negotiations and what was actually written in the contract.

25 Turning to the drafting history of the arbitration clause as CLAIMANT suggests, (although not endorsed under Danubian law due to the "four corners rule"), the Parties discussed an express choice of law provision in the arbitration clause for Equatoriana [*CLAIMANT'S Exhibit C 8*].

However, there was never a choice of law wording in favor of the law of Mediterraneo to govern the contract: "RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft of 10 April 2017." [*RESPONDENT'S Exhibit 1; Answer to Notice of Arbitration §5*].

26 RESPONDENT clearly had no intention to include a claim for adaption within the *force majeure*-hardship clause either during negotiations or the signing of the final contract, and never would have agreed to have the arbitration agreement governed by the law of the contract.

B. When CLAIMANT unexpectedly broached the subject prior to the final delivery of the semen, RESPONDENT also gave no indication that the contract could be adapted or that RESPONDENT would consent to additional payments.

27 CLAIMANT's argument that RESPONDENT agreed upon the power of the Tribunal to adapt the Sales Agreement is without merit, as Mr. Shoemaker (on behalf of RESPONDENT) explicitly stated that his understanding was that CLAIMANT had to bear costs.

28 Even without this clear indication that RESPONDENT did not intend for the contract to be adapted, Mr. Shoemaker was also put into a difficult position due to CLAIMANT's threats not to complete the third and final delivery, as RESPONDENT had already paid the agreed sum for the product and the remaining doses were urgently needed for the start of "breeding season." [*RESPONDENT'S Exhibit R 4*]. Mr. Shoemaker was in no position to be rejecting the CLAIMANT's requests outright; instead he carefully explained that he "would try to clarify the legal situation with [RESPONDENT'S] legal department or the drafters of the Sales Agreement." [*RESPONDENT'S Exhibit R 4*].

29 In fact, Mr. Shoemaker's mere statement that "if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price" was not a concession and evokes no guarantee or responsibility on RESPONDENT's part [*RESPONDENT'S Exhibit R 4*]. This should have been particularly obvious to CLAIMANT given that this statement was only made after Mr. Shoemaker had repeatedly stated that he had to confirm with his superiors whether there was an obligation by CLAIMANT to deliver at the conditions agreed upon or not [*RESPONDENT'S Exhibit R 4*].

30 Furthermore, Mr. Shoemaker had no authority to agree to contract adaption in the first place. He had only recently become responsible for the development of the racehorse breeding program; he was never involved in the negotiations of the contract; he is not a lawyer; and when he spoke

to CLAIMANT's representative regarding the tariffs he was merely fulfilling the errand for his superiors of confirming that CLAIMANT had sent the final shipment [*RESPONDENT'S Exhibit R 4*].

31 CLAIMANT's argument that RESPONDENT admitted that the Tribunal had the power to adapt the Sales Agreement in stating that the arbitrators should be able to "adapt the contract if the parties could not agree*"* is also exaggerated; as CLAIMANT was clearly referring to adaption [*CLAIMANT'S Exhibit C 8*].

C. Even if this Tribunal does not find this wording to be narrow in scope, this dispute concerning the sale of frozen racehorse semen is not covered by the wording of this arbitration clause.

32 The rights that CLAIMANT is seeking to enforce are not rights which are covered by the language of the arbitration clause.

33 Contrary to CLAIMANT's argument, the claim for contract adaption by reimbursement of unforeseen extra tariffs does not fall within the scope of "performance disputes" because the stipulations of performance, including the product, amount, and price, had already been agreed upon by both parties. CLAIMANT is simply arguing that it should be able to renege on this agreed-upon price despite RESPONDENT having faithfully adhered to its side of the Sales Agreement and despite the circumstances, while unusual, being covered by the language of the contract.

34 The issue in dispute is even further from the purview of the clause due to the Sales Agreement's DDP wording that all risks had to be borne by Phar Lap and their acceptance of the delivery DDP on the condition that the price would be increased by 1000 USD per dose [*CLAIMANT'S Exhibit C 8*; *CLAIMANT'S Exhibit C 4*].

35 Furthermore, according to Danubian courts, Article 28(3) DAL requires the Parties' express conferral of the exceptional power to adapt the contract [*Procedural Order 2, p. 58, para. 36*]. Article 28(3) DAL is a verbatim adoption of Article 28(3) UNCITRAL MAL. The same regards the power of an arbitral tribunal to decide the dispute ex aequo et bono or as amiable compositeur only if the Parties have expressly authorized to do so *[Guadalajara Claimant's memo, para. 28].* The power to grant contract adaption is "exceptional" and related to the power to decide the dispute *ex aequo et bono* as the Danubian courts consider [*Danubian interpretation of Article 28(3)*].

36 As explained above, *in casu*, the parties have expressly authorized the arbitral tribunal to adapt the contract.

37 Therefore, the claim for adaption due to a change in tariffs is not closely connected to the contract which contains the arbitration clause.

CONCLUSION OF PART 1

38 In light of the above arguments and evidence, RESPONDENT respectfully requests the Arbitral Tribunal to find that the scope of its powers under the arbitration agreement should be interpreted narrowly.

PART 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

39 RESPONDENT does not dispute CLAIMANT's right to present its case [*Cl. Memo. G § 30-31*], but this right does not equal an entitlement to submit evidence which is otherwise inadmissible. Under the binding 2018 HKIAC Rules This Tribunal has the power to determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence, without imposing any limitations [*HKIAC Rules, Art. 22.2*]. Any evidence has to be relevant and material to the outcome of the dispute in order to be admitted [*HKIAC Rules, Art. 22.3*].

40 The Partial Interim Award which CLAIMANT wants to submit is not admissible under the HKIAC Rules because it is neither relevant to the current dispute **(I)** nor material to its outcome **(II)**. Even if the Partial Interim Award meets the requirements of the HKIAC Rules, this Tribunal should not allow CLAIMANT to submit evidence obtained through improper means **(III)**. Admitting the Partial Interim Award is contrary to the best practices of the IBA Rules (**IV**).

I. THE PARTIAL INTERIM AWARD IS NOT RELEVANT TO THE CURRENT DISPUTE BECAUSE IT DOES NOT ESTABLISH FACTS RELEVANT TO THIS ARBITRATION.

41 As established by the guide to the HKIAC Rules 2013, evidence is relevant when it is useful to establish the truth of the submitting party's factual allegations, on which its legal conclusions are based [*HKIAC Guide, §9.161*]. There is no newer official commentary on the 2018 HKIAC Rules and the provisions on admissibility have remained the same since the HKIAC Rules were established in 2013. The Partial Interim Award will show this Tribunal RESPONDENT's position on the dispute with the Mediterranean buyer. However, that position is not part of the factual allegations, upon which CLAIMANT's legal conclusions are based in this arbitration.

42 First, the relationship between RESPONDENT and the buyer from Mediterraneo is not subject to these proceedings and therefore the facts related to it have no connection to CLAIMANT's assertions. CLAIMANT is not arguing that the Partial Interim Award has *res judicata* or that RESPONDENT is estopped by the position expressed in the other arbitration.

43 In any case, even if CLAIMANT had argued that the Partial Interim Award has a *res judicata* effect, the argument would be untenable. The preclusion would apply only between the same parties [***Blackaby/Partasides/Redfern/Hunter**, p. 559*] and CLAIMANT is not a party to the other dispute. What is more, only final and binding awards can create such preclusions [***Blackaby/Partasides/Redfern/Hunter**, p. 561; **ILA Resolution**, p. 4*] and the evidence in the case at hand is merely an interim award which does not have such an effect [*Procedural Order 2, p. 50, para. 39*]. Consequently, the Partial Interim Award has no effect on RESPONDENT's position on the issues before this Tribunal.

44 Second, even if CLAIMANT alleged that RESPONDENT's position in the previous arbitration and the resulting Partial Interim Award result in some preclusion, the facts in the other dispute cannot be equated with those of the current dispute. In the other arbitration, the contract contained an ICC Hardship Clause 2003, and explicitly declared the law of Mediterraneo applicable to both the arbitration agreement and as substantive law [*Procedural Order 2, p. 60, §39*]. On the other hand, the contract between CLAIMANT and RESPONDENT does not contain an ICC Hardship Clause 2003, but a modified and more limited provision and does not specify the law applicable to the arbitration agreement. Therefore, regardless of RESPONDENT's position on the application of those rules to the tariffs, the rules in this dispute are different and therefore may not warrant the same result.

45 Finally, it must be noted that in the other dispute, RESPONDENT was injured by the Mediterranean tariff, which was imposed first [*CLAIMANT's Exhibit C 6, p. 15*]. That tariff was largely unexpected, since there was no indication from the government or any event which would lead a reasonable person to expect it. On the other hand, CLAIMANT was injured by the retaliatory tariff, which was more predictable. This is another key difference between the circumstances on the other dispute and the one at hand which demonstrates that RESPONDENT's position in the first proceedings is irrelevant to CLAIMANT's allegations in these proceedings. Consequently, even if RESPONDENT had a different position on the dispute with the other party from Mediterraneo it is not acting in bad faith by claiming that in the current case the tariffs should be borne by CLAIMANT.

46 The Partial Interim Award will not help CLAIMANT establish any facts related to its legal position, therefore the Partial Interim Award is relevant.

II. THE PARTIAL INTERIM AWARD IS NOT MATERIAL TO THE OUTCOME OF THE DISPUTE.

47 For the purposes of the HKIAC Rules the evidence is material to the outcome of the dispute when the arbitral tribunal considers the document is needed as an element to allow complete consideration as to whether a factual allegation is true [*HKIAC Guide, §9.161*]. The factual allegations in the dispute at hand are about the interpretation of the Sales Agreement between CLAIMANT and RESPONDENT. That interpretation depends on the statements and conduct of CLAIMANT and RESPONDENT regarding it, their negotiations, any practices which they have established between themselves, usages and any subsequent conduct of the parties to the agreement [*Article 8 CISG*]. RESPONDENT's conduct in its relations with another party has no relationship to the interpretation of the Sales Agreement. Therefore, the Partial Interim Award cannot prove or disprove any factual allegation in this dispute. Consequently, the Partial Interim Award is not material to the outcome of the dispute.

48 The Partial Interim Award should not be admitted because it does not meet the requirements of the binding HKIAC Rules for being relevant to the case and material to its outcome because it will not help CLAIMANT establish any of the facts related to its position and it will not prove or disprove any facts in this dispute.

III. EVEN IF THE PARTIAL INTERIM AWARD MEETS THE REQUIREMENTS UNDER THE HKIAC RULES, THIS TRIBUNAL SHOULD NOT ALLOW CLAIMANT TO SUBMIT THE AWARD BECAUSE IT WAS OBTAINED THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM AS A MATTER OF PRINCIPLE.

49 Arbitral tribunals have consistently upheld that all parties owe a general duty to the others and to the tribunal to conduct themselves in good faith during the arbitration proceedings and that it is not acceptable for a party to an arbitration to gather evidence in violation of the other party's privacy and confidentiality [*Valverde Award, para. 69; Adamu Award, p. 37; Methanex Case, Part II, Chapter I, p. 26, para. 54; Libananco Holdings*]. It is impermissible to allow a party to misuse assets to gain access to confidential information and introduce into evidence the resulting materials [*Methanex Case, Part II, Chapter I, p. 26, para. 54*]. CLAIMANT'S submission of the Partial Interim Award, knowing that it was obtained improperly violates the duty to conduct the arbitration in good faith [*Sicard-Mirabal/Derains, p. 185*].

50 In the case at hand, CLAIMANT should be aware that under the HKIAC Rules the Partial Interim Award is confidential and that RESPONDENT's employees who testified in that arbitration are

under a similar duty of confidentiality. If CLAIMANT hired a company which is known to have a doubtful reputation to acquire what it knew was confidential information it was intentionally abused its resources in bad faith [*Procedural Order 2, p. 61, para. 41*]. Even if CLAIMANT obtained the evidence off the Internet pursuant to an illegal hack, it was still aware that the information is obtained through illegal activities and submitting it into evidence is not consistent with the notion of good faith.

51 If this Tribunal allows CLAIMANT to submit the Partial Interim Award which is inadmissible under the binding HKIAC Rules, this Tribunal will commit an error of law which may be appealed against or the award can be set aside [*Born 2011, p. 724*]. What is more, the resulting award will be likely unenforceable. If this Tribunal admits inadmissible evidence, the arbitral procedure will not be in accordance with the agreement of the parties to apply the HKIAC Rules [*Article V (1) (d) New York Convention*]. The award will also be vacated and unenforceable on an additional ground. Under Art. 34, para. 2(b), UNCITRAL Model Law and Art. V(2)(b), New York Convention RESPONDENT can bring an action to set aside the Tribunal's award if it contradicts with fundamental notions of justice, honesty, and fairness [*Moses, pp. 206, 220*].Thus, corruption, fraud, or lack of integrity in the process could be considered a violation of public policy, requiring the award to be annulled [*Moses, p. 206*].

52 Finally, if this Tribunal allows the admission of evidence obtained through improper means it will encourage future parties to resort to improper and illegal means to obtain such information. This Tribunal must not allow CLAIMANT to benefit from its opportunistic actions and therefore should not admit the evidence.

IV. THE ADMISSION OF THE PRIOR INTERIM DECISION IS PROHIBITED UNDER THE IBA.

53 Admission of the Partial Interim Award is prohibited under the IBA Rules because it has no relevance to this dispute (**A**), it will violate the confidentiality of the other proceedings (**B**) and would be contrary to public policy (**C**). Additionally, the principles of transparency have no application to this dispute (**D**).

(A) CLAIMANT's arguments related to admission of final Awards for the use of their final decisions are invalid.

54 Since the arbitration agreement, the HKIAC Rules, and the *lex arbitri* do not deal in detail with issues of evidence, this Tribunal can also look for guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The IBA Rules represent the best practices on the taking of evidence [*HKIAC Guide, para. 9.155*] and are commonly adopted in HKIAC arbitrations [*HKIAC Guide, para. 9.155*] and by other tribunals when deciding on issues of

evidence, even when they are not binding by virtue of the arbitration agreement [ICC Case 17272, §276; ICC Case 13225, §3; ICC Case 12206, §8; ICC Case 12296, §1; ICC Case 12169, §13; St. Petersburg UNCITRAL Case, p. 66; Czech Republic UNICTRAL Case, §43; Born 2014, p. 2334; Turner/Mohtashami, §6.31;Webster/Buhler, p. viii; Moses, p. 45].

55 Under IBA Rules Article 3 (11) every piece of evidence must meet the same standard as the one in the HKIAC Rules - relevance to the case and materiality to its outcome. This further reaffirms the standard of the HKIAC Rules and demonstrates that according to the gold standard of the IBA Rules, this Tribunal should not admit nonconforming evidence according to the IBA Rules.

56 CLAIMANT is not trying to enter the Partial Interim Award for the value granted by the arbitral tribunal, but rather to show that the initial claim brought by RESPONDENT in the other arbitration shows a difference of understanding between the two arbitrations. Therefore, their references to articles and cases regarding the admission of awards are not pertinent to today's arbitration.

(B) Reference to the Esso case would not help CLAIMANT's argument.

57 No reliance upon the Esso decsions would lead to the conclusion that the evidence CLAIMANT wants to use is not confidential. The International Arbiration Act provides that "pleadings, submissions, information supplied to the tribunal by a party, documentary and other evidence, transcripts of hearings and rulings and awards of the arbitral tribunal" are confidential information [International Arbitration Act 1974, Sec. 15(1)]. The amendments to the 1974 Act gave specific situations where disclosures of confidential information are allowed, and specifies that disclosure for the purposes of necessity is appropriate only when being invoked by a party to the original arbitration [International Arbitration Act of 1974, Sec. 23D(5)]. None of the exceptions outlined by the Australian legislature would fit CLAIMANT'S current position. As *Esso* was pre-empted by the legislature of the country where the decision was rendered, it would be inappropriate to use it to guide the current Arbitration.

58 RESPONDENT does not seek to apply Australian law to the current arbitration, it uses the 1974 Act to underline *Esso*'s limited use in understanding confidentiality in regard to international arbitration and to the current dispute.

59 Therefore, using *Esso* as the basis for admission of this evidence as non-confidential information is inappropriate and should be ignored by the Tribunal.

(C) The admission of the Partial Interim Award is contrary to public policy and is therefore inadmissible under the IBA Rules.

(a) The admission of the Partial Interim Award would limit party's disclosures during future arbitrations.

60 Interim decisions need not be final decisions, and the information outlined within them may be subject to change given the process of the arbitration. By allowing these decisions to be made public the Tribunal would dis-incentivize parties from being entirely forthcoming during the arbitration process, limiting the efficiency of arbitrations.

(b) The admission of the Partial Interim Award would eliminate the effectiveness as interim decisions as a valuable tool for the Arbitral Tribunal.

61 Interim awards are generally intended to assist the arbitral process towards a final goal [*Sherwin Ch. 20 Sec. D*]. Since these decisions are more of a tool than a final pronouncement there are no limitations on their form or content [*id.*]. By allowing the Partial Interim Award to be entered in to the current arbitration, CLAIMANT seeks to turn deliberations and arguments that may never be published into a final award. This would essentially nullify the value of interim decisions as a tool to achieving a final arbitral result.

D. CLAIMANT's argument that the Partial Interim Award must be admitted to ensure transparency is entirely invalid and misleading.

C. CLAIMANT's argument that transparency is a real need is entirely invalid and misleading.

62 CLAIMANT's argument that transparency is a real need deliberately obfuscates the argument of their sources. Interim decisions are not treated the same as final decisions in international arbitrations, they are treated as "the outcome of a hearing not open to the public" which would bring them under the privacy of arbitral hearings which extend to orders, decisions, and other records of the hearing [*Mondev Int'l Ltd. v. Canada*, UNCITRAL Procedural Order No. 16, 13 May 2000; *World Duty Free Co. Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Oct. 2006].

63 Further, interim decisions are not meant to be scrutinized by future tribunals. The Working Party of the ICC notes that interim decisions are not intended to be final or irreversible, nor are such decisions generally "accompanied by detailed reasons" which might shed light on their inclusion in the decision [ICC International Court of Arbitration Bulletin Vol. 1 No. 2, Dec. 1990]. Scrutinizing these decisions, they note, would not lend any "meaningful contribution" to later arbitrations [*id.*].

64 CLAIMANT blurs the line between a legitimate release of a final decision and the illegitimate leak of an interim decision and therefore provides misleading reasoning as to why the decision should be admitted.

CONCLUSION OF PART 2

65 CLAIMANT is not entitled to submit the Partial Interim Award into evidence, because it does not meet the test in the binding HKIAC Rules as it is neither relevant to the dispute or material to its outcome. Even if the Partial Interim Award met the HKIAC requirements, this Tribunal

should not admit it and reward CLAIMANT for using information it knew was obtained illegally or through a breach of confidentiality. Finally, allowing CLAIMANT to submit the Partial Interim Award is also inconsistent with the IBA Rules on the Taking of Evidence which reflect best practices on evidence.

PART 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT OR UNDER THE CISG.

66 CLAIMANT is not owed any payment for the cost of the tariffs on the basis of the Sales Agreement **(I)**. CLAIMANT is also not owed any payment under the CISG because it does not govern hardship and the gap cannot be supplemented with the UNIDROIT Principles **(II)**.

I. CLAIMANT IS NOT OWED ANY PAYMENT UNDER THE SALES AGREEMENT.

67 CLAIMANT is not entitled to any payment under Clause 12 of the Sales Agreement, because the Parties did not intend for it to include such events **(A)**. In any case, CLAIMANT is not owed any payment under Clause 12, because it is obligated to bear the tariffs under the DDP clause in Clause 8 of the Sales Agreement as a cost of importing the frozen semen samples **(B)**.

A. The parties did not intend for Clause 12 to include the imposition of tariffs.

68 The tariff change does not fall within the scope of Clause 12, because the Parties drafted it in a way which limits the type of hardship.

69 First, the hardship clause contained in Article 12 of the agreement does not specifically refer to tariff changes as a cause of the hardship because the tariff changes are not "additional health or safety requirements [*CLAIMANT's Exhibit C 5, p. 14, Clause 12*]." Instead, the tariff changes are the result of a political dispute between the states to which CLAIMANT and RESPONDENT are nationals [*CLAIMANT's Exhibit C 6, p. 13*].

70 Second, the hardship clause does not include the tariff change in the category of "comparable unforeseen events making the contract more onerous [*CLAIMANT's Exhibit C 5, p. 14, Clause 12*]." Furthermore, the hardship imposed by the tariffs is not only foreseeable but has been foreseen. CLAIMANT argues that the tariff was so unexpected that the subsequent resulting hardship could not be foreseen by the parties prior to the event itself. However, it was clear from the President of Mediteranneo's election materials that he was interested in altering external trade relations; and this is not the first time that Equatoriana has imposed direct retaliatory measures [*CLAIMANT's Exhibit C 6, p. 15*].

71 Even if the exact intentions of either state's leaders were not foreseeable, parties in international business transactions cannot claim unawareness of the risks of macro-economic adversities affecting their agreements [*Himpurna Award, ¶ 203, 207*]. Especially given that CLAIMANT was only able to artificially inseminate his horse as a result of governmental decisions [*Notice of Arbitration, p. 5, §5*], CLAIMANT should not be permitted to assert ignorance toward potential changes to the system of international trade as it was on the day the agreement was signed.

72 Furthermore, even if the events resulting in the tariffs under these circumstances may not have themselves been foreseeable, "changes in customs regulation or import restrictions" were a concern specifically raised by CLAIMANT in the negotiation of the agreement [*CLAIMANT's Exhibit C 5, p. 14, Clause 12*]. The contract does not specifically concern the risk of tariffs; therefore, certain guarantees may have been put in place to offset such risk. Therefore, by arguing that the hardship clause contains the risk of tariffs expressed during the negotiation of the contract, CLAIMANT admits that this risk is both foreseeable and indeed, has been foreseen [*CMS Award,* ¶ 225].

B. The tariffs must be borne by CLAIMANT pursuant to the DDP term the parties included in clause 8.

73 The Parties chose to subject the Sales Agreement to the law of Mediterraneo, including the CISG [*Sales Agreement, p. 14, Clause 14*]. Therefore, the Sales Agreement must be interpreted pursuant to Article 8 CISG. Where a contract lacks an indication of a party's specific intent, the agreement must be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

74 The starting point of interpretation of contractual terms and thus, the content of the Parties' obligations is the ordinary or literal sense of the words [*ICC Case 5961; ICC Case 14793, para. 146; ICC case 15610, para. 162*]. if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail [*Case involving machine for repair of bricks*]. Clause 8 of the Sales Agreement explicitly stipulates that CLAIMANT will ship all 3 instalments of Nijinsky III's 100 doses of frozen semen DDP [*Sales Agreement, p. 14*].

75 Under the INCOTERMS rule DDP - Delivery Duty Paid the seller, here CLAIMANT, has to bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared for importation [*ICC Case 13674, para. 104*]. DDP represents the maximum obligation for the seller [*ICC Case 7903, para. 8.2.3.]*.

76 Pursuant to the Parties' agreement for a DDP delivery CLAIMANT must bear all risks and costs of importing the goods. The seller's obligations can be limited by including phrases such as "delivered duty paid, but excluding taxes and import duties (CDST)" [*ICC Case 7903*]. However, in the case at hand the Parties did not include any limitations to CLAIMANT'S duties under the DDP clause to clear the goods for importation. The customs authorities required the payment of the tariff by CLAIMANT before CLAIMANT could ship the frozen semen samples to RESPONDENT and thus, clear the shipment for import [CLAIMANT'S *Exhibit C 7, p. 16*]. Consequently, CLAIMANT is obligated to bear the tariff under the DDP clause.

77 It must be noted that the Parties included the term DDP four times in the agreement for delivery of the frozen sperm, further proving their firm intern to have CLAIMANT assume the DDP obligations for every delivery. More importantly, CLAIMANT took the time to conduct long internal discussions about the DDP clause and required an increase in the price in return. Therefore, CLAIMANT'S agreement to deliver the frozen semen DDP was not a mere formality, but a conscious and carefully thought out business decision to accept a certain risk in return for a higher price. Thus, this Tribunal should hold CLAIMANT to the obligations he has undertaken.

78 Finally, CLAIMANT'S insistence that Clause 12 covers the risk of tariffs cannot be supported, because it would mean that the DDP delivery provision in Clause 8 would not cover the costs it is meant to cover - the payment of import obligations such as tariffs. Thus, CLAIMANT'S interpretation would fail to give effect to all terms, within the Sales Agreement, contrary to the basic principles of contract interpretation [*Article 4.5 UNIDROIT Principles*].

79 In conclusion, the tariff must be borne by CLAIMANT because by agreeing to a DDP delivery CLAIMANT undertook the unqualified obligation to bear all costs and risks associated with the delivery, including the tariff.

II. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000 OR ANY OTHER AMOUNT UNDER THE CISG BECAUSE THE CISG DOES NOT REGULATE HARDSHIP.

80 Article 79 CISG does not cover hardship **(A)**, and the gap cannot be filled with the UNIDROIT Principles on Hardship because it would be counter to the principles of the CISG **(B).**

81 As the CISG does not address Hardship, and Art. 79, which deals with "impediments," does not apply to the economic hardship. The Tribunal cannot supplant this gap with the UNIDROIT Principles, as the legislative history of the CISG indicates the drafters did not believe them to comport with the spirit of the Convention, and doing so would give a scholarly recommendation the same weight as enacted legislation.

A. The CISG does not recognize hardship under Article 79.

82 As the CISG does not address Hardship, and Art. 79, which deals with "impediments," does not apply to the economic hardship. The Tribunal cannot supplant this gap with the UNIDROIT Principles, as the legislative history of the CISG indicates the drafters did not believe them to comport with the spirit of the Convention, and doing so would give a scholarly recommendation the same weight as enacted legislation.

83 The UNCITRAL debates indicate that the drafters of the CISG were opposed to having an economic or commercial hardship as an excuse for non-performance of a contract, and thus used the term "impediment" as opposed to other suggested terms [*Uniform Law on the International Sale of Goods*]. While the committee did contemplate economic sanctions as being an example of an impediment, there was a clear desire to limit the expansiveness of the term. With their inclusions of wars and political instability as other impediments, that this was more comparable to a total embargo on goods rather than just tariffs [*Uniform Law on the International Sale of Goods*].

84 This understanding was further accepted by the Belgian tribunal in the case of Vital Berry Marketing, where the arbitral tribunal concluded that "a significant drop in the market price of goods after contract formation does not constitute an impediment" under the CISG, a ruling that supports the understanding that an "impediment" applies to an event that causes the inability to carry out the terms of the contract rather than making it unprofitable to do so [*Vital Berry Marketing NV*].

85 It is clear then that Art. 79 does not apply to, nor was intended to apply to, economic hardship. Since it is not mentioned in any other portion in the CISG, economic hardship is not contemplated as a reason for non-performance of a contract.

B. The Legislative History of the CISG does not Support the use of the UNDROIT Principles to Gap-Fill the Hardship Provision.

86 Though the Working Group considered a proposal to include an Article addressing "excessive difficulties" as a basis to "claim an adequate amendment of the contract or its termination;" the Group explicitly rejected it as counter to the spirit of the CISG [*Uniform Law on the International Sale of Goods*]. Given that this proposed Article would bring the UNCITRAL Principle's approach to hardship into the CISG formally, it is clear that, when drafting the rules, the Working Group specifically rejected the definition of hardship under UNIDROIT Principles in gap-filling for hardship. This express denial by the Group to use the UNIDROIT Principles

for hardship indicates that they were not intended to supplement the CISG on the issue of hardship.

87 Further, the UNIDROIT Principles are not enacted law but the understandings of several experts in international trade, using them to fill a gap in the CISG would essentially be supplanting a formal source of law, reviewed and voted upon by the UN Committee, for a recommendation that has not been formally discussed by the governing body nor enacted [*Dynamic Treaty Interpretation*, 687, 784-785]. By allowing the UNIDROIT Principles to supplant the CISG, the Tribunal would treat formal legislation by an international body with the same weight as speculation by a group of experts. The Principles, while helpful in interpreting the CISG, cannot fully replace it. As such it would be inappropriate to Gap-fill the CISG with the UNIDROIT Principles.

C. Even if there was a gap in the CISG to be filled by Article 6.2.3. UNIDROIT Principles, Claimant is not entitled to invoke adaptation.

88 Assuming but not conceding the CISG contains a gap which must be filled by Article 6.2.3 of the UNIDROIT Principles, Claimant is not entitled to adaptation of the Sales Agreement because it has not attempted to negotiate an adaptation (1). In any case the tariff changes do not fall within the scope of hardship in the sense of Article 6.2.3 of the UNIDROIT Principles because Claimant already assumed that risk and already performed its duties (2).

(1) Claimant cannot request adaptation of the Sales Agreement, because the Parties have not negotiated the issue as envisioned by Article 6.2.3. (1) of the UNIDROIT Principles.

89 Pursuant to Article 6.2.3 (1) UNIDROIT Claimant could request Respondent to enter into renegotiation of the contract in order to adapt it to the changed circumstances [*UNIDROIT Principles Official Commentary 2010, p. 218*]. This is a condition for Claimant to invoke adaptation of the Sales Agreement contract as the parties have a good faith obligation to renegotiate the contract in case of changed circumstances [*ICC Case 2708; ICC Case 5953; ICC Case 6219; ICC Case 8365, cited in Cachard*] and to seek out adaptation of the agreement, taking into account the new circumstances [*ICC Case 9994*].

90 Despite the exchange between the Parties' employees, there have been no actual negotiations prior to the initiation of the arbitral proceedings. Mr. Shoemaker is not a lawyer [*Respondent's Exhibit R 4, p. 36*]; and it is not in his capacity to decide whether the Sales Agreement can be adapted or not. The Sales Agreement was concluded by Mr. Krone on behalf of RESPONDENT and the chief negotiator on RESPONDENT's side was Mr. Antley [*Respondent's Exhibit R 3, p.*

35]. Therefore, CLAIMANT had no reason to believe that Mr. Shoemaker could have represented RESPONDENT in any negotiations or undertakings of any financial obligations. Thus, CLAIMANT could not reasonably believe that Mr. Antley's statements were a representation of any binding decision to adapt the Sales Agreement.

91 When the Parties met on the 12 February 2018 CLAIMANT only accused RESPONDENT for the alleged breach of the resale prohibition but provided no offer or solution to the issue with the tariffs [*Claimant's Exhibit C 8, p. 18*]. Consequently, the Parties have not did not undergone renegotiations for adaptation of the Sales Agreement and until they do, there can be no unilateral action by CLAIMANT.

(2) The tariff changes do not fall under Article 6.2.3 UNIDROIT Principles because Claimant assumed the risk for them.

92 The definition of hardship for the purposes Article 6.2.3. UNIDROIT is contained in Article 6.2.3. UNIDROIT Principles. Article 6.2.3. UNIDROIT Principles provides a test for determining whether a certain change in circumstances constitutes hardship. One of the requirements for hardship is that the risk of the events was not assumed by the disadvantaged party, here, CLAIMANT [*Article 6.2.3. (d) UNIDROIT Principles*]. In the case at hand, by virtue of the carefully negotiated and drafted Clauses 8 and 12 of the Sales Agreement, the Parties already allocated all risks, with narrow exceptions, to CLAIMANT [*Claimant's Exhibit C 5, p. 14*]. Therefore, CLAIMANT has already assumed the risk of the tariffs and can no longer claim adaptation of the Sales Agreement under Article 6.2.3. UNIDROIT Principles.

93 In any case, under Article 6.2.3 UNIDROIT Principles hardship is only relevant for performance yet to be rendered [*UNIDROIT Commentary, p. 221*]. In the case at hand, CLAIMANT has already delivered the shipment subject to the tariffs, therefore it cannot claim adaptation to that past performance, even if the circumstances meet all other criteria.

(3) Even if all other conditions are met, the Sales Agreement cannot be adapted under Danubian Contract Law because this Tribunal lacks the authority.

94 Even if this Tribunal finds that the circumstances constitute hardship under Article 6.2.3 UNIDROIT Principles, it still cannot adapt the contract under Danubian Contract Law. Danubian Contract Law is largely a verbatim adoption of the UNIDROIT Principles [*Procedural Order 2, p. 61, para. 45*]. However, there is a key difference between the provisions on hardship, because section b is worded differently, granting the power "to adapt the contract" to the court only "if authorized" [*Procedural Order 2, p. 61, para. 45*]. Therefore, the adaptation of the Sales

Agreement depends on this Tribunal's power, which lacks in the case at hand since the parties did not specifically give the authorization to the the Arbitral Tribunal to do so.

CONCLUSION OF PART 3

95 CLAIMANT is obliged to bear the tariffs as part of its obligations under Clause 12 and Clause 8 of the Sales Agreement. CLAIMANT is not entitled to an adaptation under the CISG, because Article 79 CISG does not permit recovery for hardship. This does not leave a gap in the CISG; but even if it did, it should not be filled by the UNIDROIT Principles. Even if there is a gap and it is filled by the UNIDROIT Principles, the requirements of Article 6.2.3 UNIDROIT Principles are not met. In any case, CLAIMANT is not entitled to an adaptation of the price and must bear the tariffs.

REQUEST FOR RELIEF

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

1) Declare that it has no jurisdiction to hear CLAIMANT'S case.
2) Declare that Danubian Contract Law is the law governing the arbitration agreement in clause 15 of the Sales Agreement.
3) CLAIMANT is not entitled to submit the Partial Interim Award into evidence.
4) CLAIMANT is not entitled to the payment of US$ 1,250, 000 or any other amount.

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

CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Washington, D.C., 24 January 2019.

Rory CAHILL-O'BRIEN Lia HARIZANOVA Kara MCDONOUGH

Laurie MORGAN Justin PRINDLE Heleen VAN CAUWENBERGE