SIXTEENTH ANNUAL WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

LOYOLA LAW SCHOOL, LOS ANGELES

MEMORANDUM FOR RESPONDENT

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

COUNSEL FOR RESPONDENT:

Alexandra Bernstein | Vanessa Nahigian | Rachael Weatherly

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INDEX OF AUTHORITIES

Cited As	Full Citation	Paragraphs
Beisteiner	Lisa Beisteiner "The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective In: Austrian Yearbook on International Arbitration, Volume 2014 Manz'sche Verlags- und Universitätsbuchhandlung (2014) pp. 77-122	21, 32, 33
Berger	Klaus Peter Berger Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion? In: Albert Jan van den Berg, International Arbitration 2006: Back to Basics? ICCA Congress Series, Volume 13 pp. 301 – 334	6
Black's Law Dictionary	Black's Law Dictionary 10th Edition Thomson Reuters St. Paul, Minnesota (2014)	10, 22
Born	Gary B. Born International Commercial Arbitration 2nd Edition Kluwer Law International (2014)	10, 11, 16, 18, 19

Born II	Gary B. Born, International Arbitration: Law and Practice 2nd Edition Kluwer Law International (2015)	16
Brunner	Christopher Brunner Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration International Arbitration Law Library, Volume 18 Kluwer Law International 2008 pp. 479-512	29
Carmody	Matthew Carmody Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration In: 19 Int'l Trade & Bus. Law Rev. 96 (2016)	130
CISG AC Opinion No. 7	CISG-AC Opinion No. 7 Exemption of Liability for Damages under Article 79 of the CISG Rapporteur: Professor Alejandro M. Garro Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007	88, 91, 92, 93, 97

UNCITRAL Digest	UNCITRAL UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods	41
CISG Secretariat Commentary on Art. 7	Guide to CISG Article 7 Secretariat Commentary Available at: https://cisgw3.law.pace.edu/cisg/text/secomm/secomm-07.html	51
Collins English Dictionary	Collins English Dictionary 13th Edition November 2018	69
Commentary on the Principles	Commentary on the Principles Principles on the Choice of Law in International Commercial Contracts The Hague Conference on Private International Law The Hague, Netherlands (2015)	7
Craig/Park/Paulson	International Chamber of Commerce Arbitration Oceana Publications New York (1984)	127
De Saint Marc	Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations In: Journal of International Arbitration Volume 20 Issue 2 (2003)	128

Eiselen	Siegfried Eiselen Editorial remarks on Scafom International BV v. Lorraine Tubes S.A.S. Available at: http://cisgw3.law.pace.edu/cases/090619b1.html	97
Enderlein	Fritz Enderlien & Dietrich Maskow Article 79 In: International Sales Law United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods Oceana Publications (1992) Available at: http://cisgw3.law.pace.edu/cisg/biblio/enderlein-art79.html.	41, 51
Feltham	J.D. Feltham The United Nations Convention on Contracts for the International Sale of Goods In: Journal of Business Law 1981 pp. 346-361	61
Flannery	Louis Flannery The Law Applicable to the Arbitration Agreement Paper for International Arbitration Conference Dublin (2016)	6, 15

Fouchard/Gaillard/ Goldman	Philippe Fouchard, Emmanuel Gaillard & Berthold Goldman On International Commercial Arbitration The Hague (1999)	13, 17
Glick/Ventatesan	Ian Glick & Niranjan Venkatesan Choosing the Law Governing the Arbitration Agreement In: Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles Kluwer Law International (2018) pp. 131 – 150	10, 18
Honnold 3rd ed.	John O. Honnold Uniform Law for International Sales under the 1980 United Nations Convention 3rd Edition Kluwer Law International (1999) pp. 77-87	86, 95
Honnold 1982	John O. Honnold Uniform Law and Uniform Trade Terms—Two Approaches to a Common Goal In: The Transnational Law of International Commercial Transactions: Studies in Transnational Economic Law Vol. 2 Kluwer Deventer (1982) pp. 161-171	44

Honnold 2009	John O. Honnold & Harry M. Flechtner (ed.) Uniform Law for International Sales under the 1980 United Nation Convention 4th Edition Kluwer Law International Alphen aan den Rijin (2009)	41
Lew/Mistelis/Kröll	Julian D. M. Lew, Loukas A. Mistelis & Stefan Michael Kröll Comparative International Commercial Arbitration Kluwer Law International (2003)	10, 30, 31
Malatesta	Alberto Malatesta Confidentiality in International Commercial Arbitration, The Rise of Transparency in International Arbitration, The Case for Anonymous Publication of Arbitral Awards eds. Alberto Malatesta & Rinaldo Sali Juris (2013)	128
Miles/Goh	Wendy Miles & Nelson Goh A Principled Approach Towards the Law Governing Arbitration Agreements In: Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles Kluwer Law International (2018)	11
Model Law Digest	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration	22, 25

O'Malley	Nathan D. O'Malley, Rules of Evidence in International Arbitration: An Annotated Guide Informa Law from Routledge (2014)	113, 114, 120
Perillo	Joseph M. Perillo Hardship and its Impact on Contractual Obligations: A Comparative Analysis Saggi, Conferenze e Seminari 20 Centro di studi e richeche di diritto comparator e straniero, diretto da M.J. Bonell Rome, Italy (April 1996) Available at: http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html	97
Pilkov	Konstantin Pilkov, Evidence in International Arbitration: Criteria for Admission for Evaluation, In: 80 Arbitration 2 Charter Institute of Arbitrators (2014)	113
Redfern/Hunter	Nigel Blackaby, Martin Hunter & Alan Redfern Redfern and Hunted on International Arbitration 6th Edition Oxford University Press Oxford (2015)	6, 10

Rijavec	V. Rijavec & T Keresteš Restrictions on the Admissibility of Evidence, Evidence in Contemporary Civil Procedure: Fundamental Issues in Comparative Perspective eds. C.H. van Rhee & A. Uzelac, Intersentia Ltd. (2015) pp. 87-103	121
Rubino-Sammartano	Mauro Rubino-Sammartano International Arbitration Law and Practice – Third Edition JurisNet (2014) pp. 207-320	10, 16
Schlechtriem	Peter Schlechtriem Uniform Sales Law – The UN- Convention on Contracts for the International Sale of Goods Manz, Vienna (1986) Available at: https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-06.html#b98	86, 87
Schwenzer	Peter & Schlechtriem & Ingeborg H. Schwenzer (ed.) Schlechtriem & Schwenzer. Commentary on the UN Convention on the International Sale of Goods (CISG) 4th Edition Oxford University Press Oxford (2016)	76, 78, 89, 96, 101

Smeureanu	Ilena M. Smeureanu Confidentiality in International Commercial Arbitration International Arbitration Law Library, Vol. 22 Kluwer Law International (2011)	122
Suez Canal case	Robert L. Birmingham A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory In: The Hastings Law Journal, Vol. 20 (1969)	63
Secretariat Commentary	Guide to CISG Article 8 Secretariat Commentary Available at: https://www.cisg.law.pace.edu/cisg/text/secomm/secomm-08.html	30
Secretariat Commentary Art. 79	Guide to CISG Article 79 Secretariat Commentary Available at: http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html	78, 101
Waincymer	Jeffrey Waincymer Procedure and Evidence in International Arbitration Kluwer Law International (2012)	33

Welser/Molitoris	Irene Welser & Susanne Molitoris The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract . . ." In: Austrian Yearbook on International Arbitration Volume 2012 Manz'sche Verlags- und Universitätsbuchhandlung (2012) pp. 17 – 30	11

INDEX OF CASES

Cited As	Full Citation	Paragraphs
	Austria	
Auto case	Oberster Gerichtshof Auto case 4 July 2007 Available at: http://cisgw3.law.pace.edu/cases/070704a3.html	86, 87
	Australia	
Bunning v. Cross	High Court of Australia Bunning v. Cross 14 June 1978 141 CLR 54	125
	Belgium	
Steel tubes case	Hof van Cassatie [Court of Cassation] Scafom International BV v. Lorraine Tubes S.A.S. 19 June 2009 Case no. C.07.0289.N Available at: http://cisgw3.law.pace.edu/cases/090619b1.html	95

England & Wales

C v. D	English Court of Appeal 12 May 2017 *C v. D* Case no. [2007] EWCA Civ 1282	16
Countess of Rutland's Case	Countess of Rutlands Case [1604] 77 Eng. Rep. 89	26
Habas Sinai	Queen's Bench Division Commercial Court 19 December 2013 Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v. VSC Steel Company LTD Case no. [2013] EWHC 4071 (Comm)	16
Sulamérica CIA de Seguros v. Enesa Engenharia SA	English Court of Appeal 16 May 2012 *Sulamérica CIA Nacional de Seguros S.A. and others v. Enesa Engenharia S.A. and others* Case no. [2012] EWCA Civ 638	16

Germany

CLOUT case 1234	Bundesgerichtshof 27 November 2007 CLOUT case 1234 Available at: http://www.uncitral.org/clout/clout/data/deu/clout_case_1234_leg-2615.html.	102, 104

Marzipan case	Bundesgerichtshof 11 December 1996 Marzipan case Available at: http://cisgw3.law.pace.edu/cases/961211g1.html	58

Japan

Judgment of 30 May 1994	Japan Educational Corporation v. Kenneth J. Feld High Court, Toyko 30 May 1994 Yearbook Commercial Arbitration 1995, Volume XX Kluwer Law International (1995) pp. 745 – 749	16

Netherlands

Amran v. Tesa	Hof Amsterdam [District Appeal Court] 5 January 1978 Amran v. Tesa Available at: http://cisgw3.law.pace.edu/cases/780105n1.html	61

Spain

Frozen chicken leg case	Audiencia Provincial [Appellate Court] de Granada 2 March 2000 Frozen chicken legs case Available at: http://cisgw3.law.pace.edu/cases/000302s4.html	53

Switzerland

Chemical products case	Bundesgericht 5 April 2005 Chemical products case Available at: http://cisgw3.law.pace.edu/cases/050405s1.html#cd	48
Judgment of 26 May 1994	Bezirksgericht [Court of First Instance] Affoltern am Albis 26 May 1994 In: Yearbook Commercial Arbitration 1998 - Volume XXIII Kluwer Law International (1998) pp. 754 – 763	16
Matches Case	Canton Court of Vaud. at Lausanne (deposited) December 1954 Alsing Trading Co. and Swedish Match Co. v. Greece (unpublished)	93

United States

Ajax Tool Works	United States District Court, Northern District of Illinois, Eastern Division 29 January 2003 Docket no. 01 C 5938 Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd. Available at: http://cisgw3.law.pace.edu/cases/030129u1.html	41

BP International Ltd.	United States Court of Appeals, 5th Circuit 11 June 2003 BP International, Ltd. v. Empresa Estatal Petroleos de Ecuador Available at: http://cisgw3.law.pace.edu/cases/030611u1.html	55
Cedar Petrochemicals, Inc.	United States District Court. Southern District of New York 18 January 2011 Hanwha Corporation v. Cedar Petrochemicals, Inc. Docket no. 09 Civ. 10559 (AKH) Available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=1583&step=FullText	86
Filanto v. Chilewich	United States District Court, Southern District of New York 14 April 1992 Filanto S.p.A. v. Chilewich International Corp. Docket no. 92 Civ. 3253 (CLB)	30, 48
Geneva Pharmaceuticals	United States District Court, Southern District of New York 21 August 2002 Geneva Pharmaceuticals Technology Corp v. Barr Laboratories Inc (2002) Docket no. 98 CIV 961 RWS, 99 CIV 3607 RWS Available at: http://cisgw3.law.pace.edu/cases/020821u1.html	45

Roser Technologies v. Carl Shreiber GmbH	United States District Court, Western District of Pennsylvania 10 September 2013 Roser Technologies v. Carl Shreiber GmbH Available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/130910u1.html	61
St. Paul Guardian Insurance Co.	St. Paul Guardian Insurance Co. United States District Court, Southern District of New York 26 March 2002 St. Paul Guardian Insurance Company and Travelers Insurance Company v. Neuromed Medical Systems & Support, GmbH Docket no. 00 Civ. 934 (SHS)	55, 56

INDEX OF ARBITRAL AWARDS

Cited As	Full Citation	Paragraphs
	American Arbitration Association	
Macromex Srl.	American Arbitration Association Macromex Srl. v. Globex International Inc. 23 October 2007 Available at: http://cisgw3.law.pace.edu/cases/071023a5.html	100
	Arbitral Tribunal – Vienna	
Rolled metal sheets case	Rolled Metal Sheets Case 15 June 1994 Vienna Arbitration proceeding SCH-4318 Available at: http://cisgw3.law.pace.edu/cases/940615a4.html	44
	Bulgarian Chamber of Commerce and Industry Arbitration Court	
Steel Ropes case	Steel Rope Case 12 February 1998 Arbitration Case 11/1996 Bulgaria Available at: http://cisgw3.law.pace.edu/cases/980212bu.html	104

China International Economic & Trade Arbitration Commission (CIETAC)

Ferroalloy case	Ferro-molybdenum alloy case 30 July 1996 Available at: http://cisgw3.law.pace.edu/cases/960730c2.html	86

International Chamber of Commerce (ICC)

CLOUT case 102	Award in ICC Case No. 6281 26 August 1989 France Available at: http://www.uncitral.org/clout/clout/data/oth/clout_case_102_leg-1305.html	94, 95, 102
ICC Case 8938	Final Award in ICC Case No. 8938 Exclusive Agent v Manufacturer 1996 In: Yearbook Commercial Arbitration 1999 - Volume XXIV Kluwer Law International (1999) pp. 174 – 181	10
ICC Case 16314	Award in ICC Case No. 16314 New York, USA Available at: http://www.unilex.info/case.cfm?id=2116	22, 26
ICC Case 9117	Award in ICC Case No. 9117 March 1998 Zurich, Switzerland Available at: http://www.unilex.info/case.cfm?id=661	22

International Centre for Settlement of Investment Disputes (ICSID)

EDF	EDF (Services) Limited v. Romania ICSID Case No. ARB/05/13 Procedural Order No. 3 Available at: https://www.italaw.com/cases/375	120
Methanex	Methanex Corporation v. USA Final Award of 2005, Part II, Chapter, 1, 26, §§54, 59 Available at: https://www.italaw.com/cases/683	120, 122

INDEX OF LEGAL TEXTS

Cited As	Full Citation	Paragraphs
2013 HKIAC Rules	2013 HKIAC Administered Arbitration Rules	111
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HKIAC Rules	2018 HKIAC Administered Arbitration Rules	10, 113, 117, 128
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ICC clause	ICC Force Majeure Clause 2003 / ICC Hardship Clause 2003 by the International Chamber of Commerce ICC Publishing S.A. France (2003)	47, 56, 89, 90
INCOTERMS	ICC Rules for the Use of Domestic and International Trade Terms: Incoterms 2010 by the International Chamber of Commerce (ICC) ICC Berlin (2011)	55, 56, 58, 59, 78
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Vienna (2008)	10, 21, 25, 117

Model Clause	2018 HKIAC Administered Arbitration Rules, Model Clause	27, 30, 116
Rules of Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (1 April 2014)	126, 130
PICC	UNIDROIT Principles of International Commercial Contracts (2010)	22, 26, 28, 90, 92, 98, 106, 107, 108

LIST OF ABBREVIATIONS

&	And
$	U.S. Dollar
%	Percentage
§	Paragraph
HKIAC Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
Apr.	April
Art(s).	Articles
Arb.	Arbitration
Aug.	August
cl.	Clause
CISG	United Nations Convention on Contracts for the International Sale of Goods
C	Claimant
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DDP Delivery	Duty Paid
Dec.	December
ed.	Edition
eds.	Editors
et al.	Et alii (and others)
et seq.	Et sequens (and that which follows)
Ex. C	Claimant Exhibit
Ex. R	Respondent Exhibit
Feb.	February
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration

ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICC clause	ICC-Hardship Clause
ICISD	International Centre for Settlement of Investment Disputes
i.e.	Id est (that is)
INCOTERMS	ICC International Commercial Terms Limited
infra	Below
Int'l	International
Jan.	January
Ltr.	Letter
Ltd.	Limited Partnership
Mar.	March
Model Clause	Hong Kong International Arbitration Centre Model Clause
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
No(s).	Number(s)
NoA	Notice of Arbitration
Other Proceeding	Respondent's Proceeding with Third Party
Oct.	October
p(p).	Page(s)
PIA	Partial Interim Award
PO1	Procedural Order 1
PO2	Procedural Order 2
RNoA	Response to Notice of Arbitration
Rules of Transparency	UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration
supra	Above
Tribunal	Arbitral Tribunal

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
v.	versus

STATEMENT OF FACTS

Black Beauty Equestrian ("RESPONDENT"), famous for its broodmare lines, started a racehorse breeding unit. Phar Lap Allevamento ("CLAIMANT") is a Mediterranean equestrian stud farm.

21 Mar. 2017	RESPONDENT requests an offer from CLAIMANT for 100 doses of frozen semen from Nijinsky III for artificial insemination of its mares.
24 Mar. 2017	CLAIMANT's main negotiator, Napravnik, responds favorably to RESPONDENT's request and negotiations begin.
28 Mar. 2017	RESPONDENT notifies CLAIMANT it would like to have a long-term relationship but notifies that it requires delivery DDP.
31 Mar. 2017	CLAIMANT agrees to delivery DDP, for an additional price and asks for a hardship clause. Further, CLAIMANT suggests arbitration in Mediterraneo, as Equatorianan court jurisdiction is not acceptable.
10 Apr. 2017	RESPONDENT provides a narrowly worded version of the HKIAC Model Clause **("Model Clause")** to streamline the broad wording, which included the seat of arbitration and the law of the arbitration clause to be Equatoriana.
11 Apr. 2017	CLAIMANT responds to RESPONDENT's offer stating that it would be possible to arbitrate in a neutral country and suggests Danubia as the seat of arbitration.
12 Apr. 2017	Antley and Napravnik get into a car accident. Before the accident, Antley stated he would bring a proposal to grant the Tribunal adaptation powers.
6 May 2017	RESPONDENT's head of the legal department, Julian Krone, and CLAIMANT's CEO, John Ferguson concludes Contract.
19 Dec. 2017	Equatoriana imposes 30% on all agricultural goods from Mediterraneo in retaliation for Mediterraneo imposing 25% tariff on Equatoriana agricultural goods.
20 Jan. 2018	CLAIMANT notifies RESPONDENT that CLAIMANT will not send final third shipment as it is subject to the tariffs.
21 Jan. 2018	Shoemaker, RESPONDENT's breeding unit head, tells CLAIMANT he is unauthorized to adapt price, but stresses the value of a future relationship.
23 Jan. 2018	CLAIMANT delivers the third doses.
31 July 2018	CLAIMANT files Notice of Arbitration.
3 Oct. 2018	RESPONDENT responds to CLAIMANT's request to include evidence of another arbitral proceeding that is not related to the proceedings at hand.

SUMMARY OF ARGUMENT

1. **ISSUE ONE:** The Tribunal does not have the jurisdiction or the power to adapt the Contract. CLAIMANT is not simply asking the Tribunal to order RESPONDENT to pay an outstanding payment amount, rather CLAIMANT is asking the Tribunal to change the agreed upon terms by the Parties in the Contract. The doctrine of separability and conflict of laws analysis indicates that Danubian law governs the arbitration agreement and its interpretation. Further, through narrow interpretation required under Danubian law, the Parties did not provide the express conferral of power necessary for the Tribunal to adapt the Contract in either the arbitration clause or the hardship clause.
2. **ISSUE TWO:** CLAIMANT is not entitled to price adaptation under clause 12 of the Contract because CLAIMANT waived the possibility of additional payment by agreeing on one remedy in cases of changed circumstances and RESPONDENT relied on that waiver. Furthermore, the Parties never intended price adaptation to be a remedy under the Contract. Even if it were an available remedy, clause 12 does not apply because a reasonable person in CLAIMANT's position would have foreseen the tariff on horse semen, the tariffs were not a comparable event under clause 12, and the tariffs did not make delivery more onerous. Alternatively, CLAIMANT is precluded from invoking hardship for tariffs because it agreed to DDP and because it delivered the remaining doses without additional payment. Additionally, CLAIMANT is not entitled to price adaptation under the CISG. The Parties contracted out of CISG Art. 79 with clause 12. Even if the Parties had not excluded CISG Art. 79, its prerequisites were not met because the tariffs were not an impediment beyond CLAIMANT's control, the tariffs were considered at the time the Contract was concluded, and CLAIMANT could have avoided their imposition. Additionally, CLAIMANT failed to give RESPONDENT adequate notice of any existing hardship. Ultimately, price adaptation in this case would be unreasonable.
3. **ISSUE THREE:** The Tribunal should not admit the evidence of RESPONDENT's other arbitral proceeding (**"Other Proceeding"**). The Tribunal has broad discretion to determine the admissibility of evidence and may bar admission of irrelevant evidence. Here, the evidence of the Other Proceeding is irrelevant because the dispute in the Other Proceeding is substantially different, and the evidence is not necessary to prove CLAIMANT's allegations. Furthermore, the Tribunal should not admit the evidence in the interest of procedural fairness because the evidence was obtained illegally. Finally, the interests of the Parties do not weigh in favor of admitting the evidence, and thus CLAIMANT is not entitled to submit the evidence of the Other Proceeding.

ISSUE ONE: THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADAPT THE CONTRACT

4. CLAIMANT's request for the Tribunal to adapt the Contract disregards the Parties' concluded arbitration agreement, as the arbitration agreement does not provide the Tribunal with the power to adapt the Contract. RESPONDENT challenges the jurisdiction of the Tribunal to adapt the Contract as the law of the seat of arbitration, Danubia, governs the interpretation of the arbitration agreement and requires an express conferral of power to the Tribunal by the Parties to adapt the Contract. [*RNoA, p. 31-32, §§12-17*]. The Tribunal does not have jurisdiction to adapt the Contract because Danubian law governs the arbitration agreement and its interpretation **(I)** and the Parties did not expressly provide for the Contract to be adapted by the Tribunal **(II)**.

I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

5. RESPONDENT only objects to the Tribunal's jurisdiction to adapt the price of the Contract, and not to the Tribunal's general jurisdiction [*PO2, §48, p. 61*]. CLAIMANT is incorrect in arguing that the law of Mediterraneo governs the arbitration agreement and the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") governs its interpretation because the conflict of laws analysis, highlighting the importance of separability, indicates Danubian law governs the governs the arbitration agreement **(A)** and the CISG is not applicable to the arbitration agreement under Danubian law **(B)** [*CM, pp. 3-9, §§2-21*].

A. The Conflict of Laws Analysis Indicates Danubian Law Governs the Arbitration Agreement

6. RESPONDENT kindly requests that the Tribunal utilize the conflict of laws three-stage inquiry, which entails looking at the express and implied choice of the parties, and in the absence of an express or implied choice, the closest and most real connection to the parties' arbitration agreement [*Berger, p. 318; Redfern/Hunter, §3.19; Flannery, p. 10; CM, p. 3, §§3-4; PO2, p. 61, §44*].
7. Even if CLAIMANT argued that Danubian, Mediterranean, and Equatorianan general conflict of laws rules should be applied, the Tribunal should not utilize them because all three of the countries' conflict of laws rules are a verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts ("**Hague Principles**") [*PO2, p. 61, § 43*]. The Hague Principles do not address the law governing arbitration agreements and thus should not be utilized in resolving which law governs the arbitration agreement [*Hague Principles, §1.3(b); Commentary on the Principles, p. 34, §1.26*].
8. The Tribunal should find that Danubian law governs the arbitration agreement, including its interpretation, because though the Parties did not make an express choice of law, the Parties made an

implied choice of law in Danubia governing the arbitration agreement **(1)** and even if the Tribunal were to find there was no implied choice of law made, the closest connection analysis indicates that Danubian Contract Law ("**DCL**") governs the interpretation of the arbitration agreement **(2)**.

1. The Parties impliedly chose Danubian Law to govern the arbitration agreement

9. CLAIMANT mistakenly argues the Parties made an implied choice of law resulting in Equatorianan law governing the arbitration agreement as Equatoriana does not appear at all within the concluded Contract [*Ex. C 5, p. 13-14*]. CLAIMANT concedes the Parties did not make an express choice of law for the arbitration agreement [*CM, p. 3, §4*]. However, contrary to CLAIMANT's argument, the Parties made an implied choice of Danubian law governing the arbitration agreement [*CM, p. 4, §§7-8*].

10. Though the Tribunal should look at the general circumstances of the Contract and Parties' conduct to determine whether the Parties impliedly chose a law governing the arbitration agreement, as CLAIMANT correctly noted, there is a clear presumption of separability of the underlying contract and the arbitration agreement by arbitral tribunals, which results in the treatment of the arbitration agreement as a separate agreement from that of the Contract [*CM, p. 4, §7, p. 8, §18; Black's Law Dictionary, p. 888; Rubino-Sammartano, p. 266; Born, p. 350; Redfern/Hunter, p. 388; Lew/Mistelis/Kröll, p. 102; ICC Case 8938*]. Separability is a cornerstone of international arbitration indicated in both the institutional rules and the *lex arbitri,* 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules ("**HKIAC**") Rules Art. 19(2) and Danubian Arbitration Law ("**DAL**") 16(1), which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), respectively [*Glick/Ventatesan, p.132; Born, p. 349; Model Law Art. 16(1); HKIAC Rules Art. 19(2); PO2*]. Institutional rules, like HKIAC Rules Art. 19(2) highlight that businesses fully expect contracts to be separable [*Born, p. 479*]. Thus, CLAIMANT cannot argue that the Parties did not expect the Contract to be separable or that the Parties impliedly chose the law of Mediterraneo, as the law of the underlying Contract, to serve as the law governing the arbitration agreement as it is a separate agreement [*CM, p. 8, § 17*].

11. Further, scholars acknowledge that it is presumed that the implied choice by parties will either be the law governing the underlying contract or that of the law of the arbitral seat [*Miles/Goh, p. 388*]. Scholars contend that arbitration agreements are negotiated at the last minute and parties would not intend the underlying contract to apply to the arbitration agreement [*Born p. 583; Welser/Molitoris, p. 17*]. Here, the Parties placed limited importance on the arbitration agreement and the arbitration agreement lacks a choice of law provision for the law governing the arbitration agreement indicating that the Parties impliedly chose Danubian law to govern the arbitration agreement and interpretation [*PO2, p. 55, §7*].

12. Additionally, CLAIMANT misconstrues the facts when determining whether the Parties impliedly chose a law governing the arbitration agreement [*CM, p. 4, ∫7*]. In response to RESPONDENT's offer to have Equatorianan law govern the arbitration agreement, CLAIMANT acknowledged in the 11 April 2017 email that "consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committees" [*Ex. R 2, p. 34; Ex. R 1, p. 33*]. Thus, CLAIMANT did not accept the condition that the law of the arbitration agreement would be Equatorianan law [*Ex. R. 1, p. 3; PO2, p. 37, ∫14; CM, p. 4, ∫8*]. Further, Napravnik stated prior to this exchange of emails on 31 March 2017, that jurisdiction of the courts in Equatoriana was unacceptable when suggesting arbitration in Mediterraneo [*Ex. C 4, p. 12*]. Napravnik never intended or accepted Antley's offer to have the law of the arbitration agreement to be that of Equatoriana and the Parties did not impliedly choose the law of Equatoriana to govern the arbitration agreement. Instead, Antley indicated a desire for the law of the arbitral seat to govern the arbitration agreement by providing the offer CLAIMANT bases its argument on. Thus, the Tribunal should find that the Parties made an implied choice that the law of Danubia governed the arbitration agreement.

2. Even if there was no implied choice of law, the closest connection analysis indicates that Danubian Law governs the arbitration agreement

13. Even if the Tribunal finds that the Parties did not make an implied choice of law, CLAIMANT incorrectly argues that Mediterranean law governs the arbitration agreement because the closest connection analysis indicates that Danubian law governs the arbitration agreement [*CM, pp. 7-9, ∫∫16-20*]. The closest connection analysis looks to connecting factors to the arbitration agreement which indicates which law has the closest and most real connection to the arbitration agreement, and thus should be utilized [*Fouchard/Gaillard/Goldman, pp. 224-228, ∫∫426-432*].

14. The closest connection analysis highlights that DAL governs the arbitration agreement, with DCL specifically governing its interpretation, because the seat of arbitration has a stronger presumption over the underlying law of the contract as a connecting factor **(i)**, the place of conclusion of contract is a weak connecting factor **(ii)**, the validation principle does not disfavor utilizing Danubian law **(iii)**.

i. The law of the seat of arbitration is a stronger connecting factor than the underlying law of the Contract

15. The law of the seat of arbitration is a stronger connecting factor than the underlying law of the Contract. This indicates that the law of Danubia should govern the arbitration agreement which is consistent with the separability doctrine, discussed in *supra ∫∫10-11*. The closest connection analysis often is similar to that of the implied choice analysis [*Flannery, p. 5, fn. 18*]. CLAIMANT cannot argue

that the Parties intended for the law of the underlying Contract, Mediterranean, to serve as the law governing the arbitration agreement [*CM, p. 8, ∫17*].

16. Contrary to CLAIMANT's argument that it is "common practice" to apply the law governing the underlying contract to the arbitration agreement [*ibid.*], there is a stronger presumption that in the absence of a choice of law provision, the law of the seat of arbitration governs the arbitration agreement [*Born, p. 509; Rubino-Sammartano, p. 324; Judgment of 26 May 1994, p. 757; Judgment of 30 May 1994, p. 747; C v. D, ∫∫22, 26, 28*]. Scholars and tribunals alike increasingly tend to show that the substantive law of the arbitral seat governs interpretation issues as the law of the seat of arbitration "will normally have a closer and more real connection" than the law of the underlying contract [*C v. D, ∫∫22, 26, 28; Habas Sinai, ∫101; Born, p. 510; Born II, ∫33*]. In fact, the case cited by CLAIMANT for the principle that the law governing the underlying contract governs the arbitration agreement, found that the law of the arbitral seat had the closest connection [*Sulamérica CIA de Seguros v. Enesa Engenharia SA, ∫32*]. Further, the law of the seat of the arbitration should be decisive as it is very uncommon for there to be a choice of law clause that specifically relates to the arbitration agreement [*Born, p. 491*]. Thus, the law of the seat of arbitration indicates Danubian law governs the arbitration agreement and DCL governs the interpretation of the arbitration agreement.

ii. The place of the conclusion of the Contract is a weak connecting factor

17. CLAIMANT cannot argue that a strong connecting factor is the place of the conclusion of the contract [*CM, p. 8, ∫19; PO2, p. 56, ∫13*] because the importance of the place where the contract was concluded is "extremely minor" [*Fouchard/Gaillard/Goldman, p. 427, ∫224*]. Thus, the Tribunal should place little to no weight on the fact the Contract was concluded in Mediterraneo.

iii. The validation principle does not disfavor the utilization of Danubian Law

18. Though CLAIMANT argues that the validation principle should not apply Danubian law as it would invalidate the Contract; the validation approach does not keep Danubian law from governing the arbitration agreement [*CM, p. 9, ∫20*]. The validation principle allows arbitral tribunals to select the law which validates the arbitration agreement, rather than selecting the law which invalidates the arbitration agreement [*Born, pp. 544-545*]. However, the validation principle should not force the arbitral tribunal to only select a law because it validates the agreement [*Glick/Venkatesan, p. 148*]. The validation principle should only be applied if the parties knew at the time of construction that the arbitration agreement would be invalidated by the use of Danubian law and there was not a specific reason why the seat of arbitration was selected [*ibid., pp. 132-133*]. Danubia was chosen as the seat of arbitration because CLAIMANT suggested it as it was a neutral country with a functional judicial

system [*PO2, p. 57, ∫14*]. Further, the Parties did not deeply contemplate the choice of law and its effects at the time of the construction of the arbitration agreement as they placed limited importance on the arbitration agreement resulting in no efforts taken by either party to contact the original negotiators to clarify the arbitration clause [*PO2, p. 55, ∫7; Ex. C 8, p. 17, ∫4*]. Thus, Danubian law as the law of the seat of arbitration has the closest connection to the arbitration agreement and the Tribunal is kindly requested to find that it governs the arbitration agreement, and specifically DCL governs the interpretation of the arbitration agreement.

B. Alternatively, the CISG is not applicable to the arbitration agreement under Danubian Law

19. If the Tribunal finds that the law governing the arbitration is the law of Danubia, CLAIMANT cannot argue the CISG supplants DCL in interpreting the arbitration agreement [*CM, p. 5, ∫10*]. Tribunals may utilize national contract law for interpretation of arbitration agreements, which here indicates that DCL should be utilized in interpreting the arbitration agreement [*Born, p. 1320*]. Further, there is consistent jurisprudence in Danubia that due to the doctrine of separability, the CISG does not apply to an arbitration agreement as it is considered a procedural contract, and not a sales agreement [*PO2, p. 60, ∫36*]. This is consistent with authorities which state that the CISG does not apply to arbitration agreements at all due to separability [*Born, p. 505*]. Thus, the Tribunal should use DCL to interpret the arbitration agreement to promote uniformity and predictability in international arbitration.

II. THE PARTIES DID NOT GIVE THE TRIBUNAL POWER TO ADAPT THE CONTRACT

20. Any reasonable interpretation of the arbitration agreement shows the Parties did not intend for the Tribunal to have power to adapt the Contract. RESPONDENT agrees that clause 12 constitutes a hardship clause, but CLAIMANT incorrectly argues that the hardship clause provides the Tribunal power to adapt the Contract [*CM, p. 10-12, ∫∫22-32*]. RESPONDENT respectfully requests the Tribunal find that it does not have power to adapt the Contract as the arbitration agreement does not provide for an express conferral of authority to do so under Danubian law **(A)**, even if Mediterranean law applies, the Tribunal does not have power to adapt the Contract **(B)** and clause 12 does not provide the Tribunal the power to adapt the Contract **(C)**.

A. The Tribunal Does Not Have Power to Adapt the Contract Under Danubian Law

21. Even if CLAIMANT were to argue that the Tribunal had the power through the arbitration agreement to adapt the Contract under DCL interpretation the Tribunal should find that it does not have power to adapt the Contract because the Parties never expressly conferred it such power. As DAL Art. 28(3) is a verbatim adoption of Model Law Art. 28(3), the power to adapt must be clarified in the arbitration

agreement and the arbitration agreement "must specifically empower the arbitral tribunal" [*Model Law Digest, p. 121, §2; Beisteiner, p. 108*; *PO2, p. 60, §36; CM, p. 3, §3*]. Both Parties agreed in the 4 Oct. 2018 call that if DCL were to be applied there is a "high likelihood that the arbitration would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal" [*PO1, p. 52, II*].

22. DCL is largely a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts ("**PICC**"), with a few exceptions, which provide for a narrow interpretation of arbitration agreements [*PO2, p. 51, §45*]. In DCL, PICC Art. 4.3 is replaced by the four corners rule and there is an addition to PICC Art. 6.2.3(4)(b) which states that the arbitral tribunal only has the power to adapt the contact "if authorized" [*ibid.*]. The four corners rule indicates that the Tribunal should look to the face of the written contract [*Black's Law Dictionary*]. The Danubian four corners rule excludes all extraneous evidence in interpreting contracts and interprets arbitration agreements narrowly [*PO1, p. 52*]. The Danubian four corners rule has an effect similar to PICC Art. 2.1.17 [*PO2, p. 61, §45*], where prior agreements and statements cannot contradict or supplement the written contract but can be used to interpret if the common intention of the parties cannot be determined by the plain wording of the arbitration agreement [*PICC Art. 2.1.17; ICC Case 16314; ICC Case 9117*].

23. However, the plain wording of the arbitration agreement indicates that the Tribunal does not have the power to adapt the Contract **(1)**. Even if the Tribunal finds the plain wording of the arbitration agreement does not fully reveal the intention of the parties, a narrow interpretation of the arbitration agreement also indicates that the Parties did not confer the express power to adapt the Contract to the Tribunal **(2)**.

1. The plain wording of the arbitration agreement shows the Tribunal does not have the power to adapt the Contract

24. The plain wording of the arbitration agreement indicates that the Parties did not intend to provide for an express conferral of powers to the Tribunal to adapt the Contract within the written Contract. Within the finalized arbitration agreement, the pertinent language includes: "any dispute arising out of this contract, including the *existence, validity, interpretation, performance, breach or termination* . . . shall be finally resolved by arbitration" [*Ex. C 5, p. 14, cl. §15*]. Here, the language of the arbitration agreement shows an intent by the Parties to not have an express conferral of power to adapt, as the power of the arbitral tribunal to decide on issues of existence, validity, interpretation, performance, breach or termination are highlighted, but adaptation is not highlighted within the arbitration agreement.

25. Though CLAIMANT may argue the use of "including" within the arbitration agreement indicates that the Parties meant for more power to be given to the Tribunal than what was highlighted within the

clause, it cannot meet the standard of showing it was "specifically empowered" to adapt the contract [*Model Law Digest, p. 121, ∫* 2]. Thus, the express conferral of power necessary is not present within the plain wording of the arbitration agreement and the Tribunal should not adapt the Contract.

2. Even if the Tribunal finds that the arbitration agreement's plain wording is unclear, the Tribunal does not have the power to adapt the Contract

26. Even if the Tribunal finds that the plain wording of the arbitration agreement does not sufficiently show the intention of the parties, the Tribunal should still find that it does not have the power to adapt the Contract through the narrow interpretation principles of DCL. The Danubian four corners rule provides that prior agreements and statements cannot contradict or supplement the written contract but can be used to interpret if the common intention of the parties cannot be determined by the plain wording of the arbitration agreement [*PICC Art. 2.1.17; ICC Case 16314*]. The narrow interpretation of the arbitration agreement is important to ensure that the Parties' intentions are followed, as memories of the negotiations can be faulty [*Countess of Rutland's Case*].

27. The previous negotiations clearly indicate RESPONDENT's intent to narrow the scope of the arbitration agreement because Antley narrowed the "fairly broad wording" of the Model Clause. Even if CLAIMANT argues that Antley's statement that the arbitral tribunal "should probably" be able to adapt the Contract, can be reasonably interpreted that the Parties meant for the Tribunal to have the power to adapt the Contract [*NoA, p. 7, ∫16; Ex. C 8, p. 17*], it was not a final agreement and he simply promised to bring back a proposal the following day [*Ex. C 8, p. 17*]. Further, the negotiators who stepped in were not aware of the statement [*Ex. R 3, p. 35*]. Napravnik's memory of the statement is the only recollection of the conversation and does not indicate the Parties intended to provide an express conferral of power to the Tribunal.

28. Further, Krone, who stepped in as negotiator after Antley's and Napravnik's unfortunate accident, and RESPONDENT's head of its legal department, acknowledged that if he had known that Antley had considered adding an express conferral of power to adapt the Contract to the Tribunal, he would have objected to the addition of the language to the arbitration agreement [*Ex. R. 3, p. 35*]. As he conducted the final negotiations, this statement of intent shows that he did not agree to an express conferral of power to adapt the Contract [*ibid.*]. Thus, RESPONDENT respectfully requests the Tribunal to find that it does not have power to adapt the Contract through the arbitration agreement under Danubian law.

B. Alternatively, the Tribunal Does Not Have Power to Adapt the Contract Under the Law of Mediterraneo

29. Even if the Tribunal were to find that the law of Mediterraneo applied to the arbitration agreement, the Tribunal does not have power to adapt the Contract. CLAIMANT is correct to argue that if Mediterranean law is chosen, the CISG governs the interpretation and conclusion of the arbitration agreement [*CM, p. 5, §10; p. 9, §21; P01, p. 53, §4*]. However, as there is not an express provision stating the arbitral tribunal's jurisdiction, it must be assessed under the *lex arbitri* and meet the express conferral of power standard of DAL Art. 28(3) [*Brunner, p. 493*]. Even under a broad interpretation, the Tribunal does not have the power to adapt the Contract because the narrowing of the arbitration agreement by RESPONDENT can only be understood as an intent to narrow the scope of the arbitration and does not provide the express conferral of powers to the Tribunal to adapt the Contract.

30. CISG Arts. 8(2)-(3) are applicable under Mediterranean law, which provide for an objective interpretive analysis of the understanding of a reasonable person of the same kind as the other party would have had in the same circumstances, while looking at negotiations and subsequent conduct of the parties [*Secretariat Commentary Art. 8, §§4, 6; Filanto v. Chilewich*]. CLAIMANT cannot argue RESPONDENT's narrowing of the arbitration agreement from the broad language of the Model Clause is simply an intent to make the clause more concise without amending it [*CM, p. 6, §12, p. 7, §14*]. A reasonable person of the same kind as CLAIMANT would understand through the communications between Antley and Napravnik that RESPONDENT intended to narrow the wording from "any dispute, controversy, different or claim arising out of or relating to this contract" to "any dispute arising out of this contract . . ." because it was overly broad for the intended scope of the arbitration agreement [*HKIAC Model Clause*; *Ex. R 1, p. 33; RNOA, p. 31, §13*]. Further, though some scholars have acknowledged that the term "arising out of" should be interpreted broadly, it is considered to be less broad than "relating to" [*Lew/Mistress/Kröll, p. 169*]. A reasonable person as CLAIMANT would understand the purposeful deletion of the words "relating to this contract," to indicate that the scope of "arising out of" was not to be construed broadly, and rather was a limit on the scope of the arbitration clause. Thus, a reasonable person would understand RESPONDENT's intent to not merely streamline the Model Clause, but also limit the scope of the arbitration agreement.

31. CLAIMANT's argument that the imposition of the tariffs is covered by the arbitration agreement is misplaced [*CM, pp. 6-7, §13*]. The relevant question is whether adaptation of the contract constitutes a dispute. CLAIMANT wrongfully argues that seeking a contract adaptation for an increased remuneration is a simple "yes" or "no" answer [*CM, p. 6, §12*]. A contract adaptation is a creative task,

which cannot be boiled down to a "yes" or "no" answer and parties should indicate in "clear and express wording" that the Tribunal has the power to adapt the Contract [*Lew/Mistress/Kröll, p. 170; Fouchard/Gaillard/Goldman, p. 27*]. Thus, without clear and express language by the Parties, a reasonable person of a like kind would not understand the Parties intended a contract adaptation to be a dispute arising out of the Contract. RESPONDENT kindly requests the Tribunal to find the Parties did not provide it power to adapt the Contract in the arbitration clause under both Danubian and Mediterranean law.

C. Clause 12 Does Not Provide the Tribunal the Ability to Adapt the Contract

32. Further, CLAIMANT incorrectly argues clause 12 provides the Tribunal power to adapt the Contract [*CM, p. 10-11, §§23-26*]. RESPONDENT agrees that clause 12 is a hardship clause, but the inclusion of clause 12 by the Parties, in of itself, is not sufficient to show the Parties expressly conferred power to adapt the contract under Danubian or Mediterranean law [*Beisteiner, p. 109*].

33. The Parties must expressly authorize the Tribunal power to adapt the Tribunal [*PO1, p. 53; PO2, p. 60, §36*]. A common sentiment by arbitral tribunals is that adapting a contract without express consent by the parties is not preferable and goes against the concept of consent [*Waincymer, p. 1056; Beisteiner, p. 109*]. As clause 12 lacks any reference to the Tribunal's power to adapt the Contract or arbitration, it is not sufficient to show that the Parties intended to provide an express conferral of power to the Tribunal to adapt the Contract [*Ex. C 5, p. 13, cl. 12*].

34. Even if the Tribunal utilized CISG Art. 8, the requirement of the Tribunal to look at the hardship clause needs to meet the level of having an express conferral of power, which it does not. Though CLAIMANT argues that under CISG Art. 8(1), CLAIMANT was able to fully understand that RESPONDENT intended to convey the power to adapt the Contract to the Tribunal, that is not clear. [*CM, p. 11, §27*]. Antley's remark that it would probably be the task of the arbitrators to adapt the Contract, combined with the promise of creating a proposal, does not indicate that RESPONDENT had fully decided on the language of clause 12 at the time of making the statement [*Ex. C 8, p. 17*]. Thus, under CISG Art. 8(1) interpretation CLAIMANT's argument that the Tribunal has the power to conduct a contract arbitration through clause 12 fails.

35. Contrary to CLAIMANT's argument that interpretation under CISG Art. 8(2) shows that a reasonable person of a like kind would construe that the addition of clause 12 indicated an express conferral of power to the Tribunal, it does not. As indicated *supra* §32, the addition of clause 12 by itself, with no express language indicating arbitration, does not allow a reasonable person of a like kind to see that RESPONDENT intended for clause 12 to allow for the Tribunal's power to adapt the Contract. Thus,

the Tribunal is kindly requested to find that clause 12 does not provide an express conferral of powers upon the Tribunal to adapt the Contract under both Danubian and Mediterranean law.

CONCLUSION ON ISSUE ONE

36. In light of the above arguments, RESPONDENT kindly requests the Tribunal find that it does not have jurisdiction to adapt the Contract under the arbitration agreement. Danubian law governs the arbitration agreement as it has the closest connection to the arbitration agreement. Further, the Parties did not provide for an express conferral of power in the arbitration agreement or clause 12 that is necessary for the Tribunal to adapt the Contract. Even if the Tribunal finds that the law of Mediterraneo applies, a reasonable person of the same kind as CLAIMANT would not be able to see that RESPONDENT intended for the Tribunal to have the power to adapt the Contract. Thus, RESPONDENT requests that the Tribunal find that it does not have power to adapt the Contract.

ISSUE TWO: CLAIMANT IS NOT ENTITLED TO PAYMENT UNDER CLAUSE 12 OF THE CONTRACT OR UNDER THE CISG

37. CLAIMANT wants to hold RESPONDENT responsible for CLAIMANT's contractual obligations and business shortcomings. CLAIMANT is not entitled to additional payment of $1,250,000 from RESPONDENT because clause 12 does not apply **(I)** nor is CLAIMANT entitled to payment under the CISG **(II)**. RESPONDENT kindly requests the Tribunal to uphold the agreement between the Parties and preserve the uniformity of the CISG.

I. CLAIMANT IS NOT ENTITLED TO $1,250,000 FROM AN ADAPTATION UNDER CLAUSE 12

38. CLAIMANT is not entitled to payment under clause 12 because price adaptation is not an available remedy **(A)**. Even if it was, CLAIMANT is not entitled to additional payment because the prerequisites of clause 12 were not met **(B)**. Even if the price could be adapted and clause 12 was met, RESPONDENT should not be required to pay an additional $1,250,000 **(C)**.

A. Adaptation is Not a Remedy under Clause 12

39. RESPONDENT is sympathetic to CLAIMANT's financial situation, but CLAIMANT cannot get more than RESPONDENT was contractually obligated to pay since adaptation was not a clause 12 remedy because RESPONDENT relied on CLAIMANT's waiver of a clause 12 remedy by delivering the shipment **(1)** and the Parties never intended to increase final agreed upon price **(2)**.

1. RESPONDENT relied on CLAIMANT's waiver of its contractual remedies after CLAIMANT delivered the shipment

40. Clause 12 states CLAIMANT "*shall not be responsible for*…hardship, caused by…health and safety requirements or comparable unforeseen events…" [*Ex. C 5, p. 14, cl. 12*]. When "not responsible for"

an act made more onerous by hardship, the party does not "have a duty to deal with" the relevant act [*Oxford Dictionary*]. Thus, CLAIMANT would not be required to perform any existing contractual obligation that became more onerous due to hardships defined by clause 12.

41. CLAIMANT took it on itself to deliver the remaining 50 doses despite the alleged hardship. The clause does not state that CLAIMANT would be compensated for any hardships it assumed responsibility for voluntarily. The waiver of a contractual remedy is consistent with the CISG [*Honnold 2009, pp. 373, 422 (waiver of objection for notice requirement; cannot use remedy after inviting late performance)*; *Ajax Tool Works*; *UNITRAL Digest Art. 39 §8*]. A waiver is "intentional or voluntary relinquishment of a known right, or conduct warranting an inference of the relinquishment of such right ...." [*Ajax Tool Works*; *Enderlein, p. 164 (waivers may be implied)*].
42. CLAIMANT cannot argue it did not voluntarily assume responsibility since it said "we have to find a solution [for the tariff] before shipment" nor that it relied on Shoemaker's belief a solution could be "found through negotiation given the Parties' good relationship…" [*Ex. C 7, p. 16, §2*; *Ex. C 8, p. 18, §2*]. First, CLAIMANT could not have been unaware it was excused from performing if it experienced a clause 12 hardship because the clause explicitly stated CLAIMANT would "not be responsible for" performance made more onerous by hardship [*Ex. C 5, p. 14, cl. 12*].
43. Shoemaker never demanded CLAIMANT authorize shipment nor accused CLAIMANT of breaching the Contract if it did not deliver. In CLAIMANT's words, Shoemaker only "urged" CLAIMANT to authorize the shipment, "emphasizing" RESPONDENT's interest in a long-term relationship [*Ex. C 8, p. 18, §2*]. Shoemaker told CLAIMANT he could not authorize additional payment and only expressed his opinion that a solution could be reached through negotiation [*ibid.*]. Thus, CLAIMANT could not reasonably believe RESPONDENT was making a binding promise to make additional payments and further waived its right to a remedy by delivering [*CISG Art. 8(2)*].
44. CLAIMANT is estopped from demanding a new remedy because RESPONDENT relied on CLAIMANT's remedy waiver. While not expressly settled by the CISG, estoppel, or venire contra factum proprium, is regarded as an underlying general principle [*Honnold 1982, p. 308*; *Rolled metal sheets case (seller estopped from using late notice defense when its conduct supported reasonable belief that the seller would not later invoke the defense)*]. CLAIMANT's delivery conduct despite the absence of a promise by RESPONDENT to increase the price allowed RESPONDENT to reasonably believe RESPONDENT had satisfied its obligations under the Contract. Furthermore, delivery would not occur until "*all* fees were paid" by RESPONDENT [*Ex. C 5, p. 14, cl. 5*].

45. CLAIMANT cannot argue estoppel does not apply since RESPONDENT's reliance on a waiver was not to its detriment. Estoppel under the CISG has not required detriment [*Geneva Pharmaceuticals*]. RESPONDENT agreed to renegotiate as a curtsey to CLAIMANT in support of a future business relationship [*Ex. C 8, p. 18, §2*]. CLAIMANT cannot allege that RESPONDENT failed a duty to renegotiate when RESPONDENT was never had such a duty [*Ex. C 8, p. 18, §4*]. CLAIMANT cannot seek an alternative adaptation remedy, which was not even in the contract, just because it did not exercise its rights as indicated by the plain language of the contract.

2. The Parties never intended to allow price adaptation under clause 12

46. Even if the Tribunal finds RESPONDENT did not rely on CLAIMANT's waiver, the Parties never intended price adaptation to be an available remedy. CISG Art. 8 states that the parties' conduct may be used to determine the parties' intent [*CISG Art. 8(1)*]. After an offer of $99,500 per dose without delivery, RESPONDENT replied that due to the "size of the order, [RESPONDENT]…expected a better price…as [it was] largely on top of what fees could be earned with Nijinsky III through natural coverage" [*Ex. C 3, p. 11, §3*]. In later price negotiations, RESPONDENT rejected $100,500 per dose with DDP delivery [*PO2, p. 56, §8*]. RESPONDENT only agreed to $100,000 per dose after adding DDP delivery terms [*Ex. C 5, p. 13*].

47. CLAIMANT could not be unaware of RESPONDENT's unwillingness to pay more than $100,000 per dose because the Parties persistently disagreed on price [*CISG Art. 8(2)*]. RESPONDENT rejected the ICC-Hardship Clause ("**ICC clause**") as "too broad for the [Contract's] purposes and objectives" [*Ex. R 3, p. 35, §3*; *PO2, p. 56, §12*]. The ICC clause *requires* performance if it would only be rendered "*more* onerous", but the parties would be obligated to renegotiate to remedy the disadvantaged party [*ICC Clause, pp. 15, 17, cls. 1, 9]*. Performance would only be excused if made "*excessively* onerous" [*ICC Clause, p. 15, cl. 2*]. In contrast, clause 12 only requires performance "*more* onerous" to excuse performance [*Ex. C 5, p. 14, cl. 12*]. The intent behind allowing a more lenient standard than that of the rejected clause is that the Parties would exclude other parts of the ICC clause.

48. The Parties were dealing at arm's length and CLAIMANT had more bargaining power. CLAIMANT was aware Nijinsky III was "one of [RESPONDENT's] first choices" for breeding and, because there was no other Nijinsky III semen on the market and the stallion was booked for natural coverage for the season, CLAIMANT was the only source for Nijinsky III semen [*Ex. C 1, p. 9, §2*; *PO2, p. 56, §11*]. CISG Art. 8(3) considers the parties' subsequent conduct [*Filanto v. Chilewich (clause incorporated by reference into a subcontract under Art. 8(3) because prior and subsequent conduct supported incorporation)*; *Chemical products case*]. CLAIMANT's delivery of the doses suggests "all fees [were] paid" [*Ex. C 5, p. 14, cl. 5*].

RESPONDENT's legal team leader later stated he would have "objected [to allowing] the Tribunal to increase price..." [*Ex. R 3, p. 35, ∫4*]. Granting more money contradicts the Parties' subsequent conduct. By agreeing that "seller *shall not be responsible for*…hardship" and not subsequent payment, the Parties' demonstrate intent for CLAIMANT to have one remedy in cases of hardship [*ibid.*]. This interpretation is consistent with the Parties' statements, giving RESPONDENT price stabilization while excusing CLAIMANT from the risks it feared.

B. The Prerequisites of Clause 12 Have Not Been Met

49. Even if the Contract allowed price adaptation, CLAIMANT has not alleged a hardship under clause 12 because the tariff was a foreseen event **(1)**, it was not comparable to health and safety requirements alluded to in clause 12 **(2)**, and because it did not make performance more onerous **(3)**. Alternatively, CLAIMANT is precluded from invoking hardship for tariffs **(4)**.

1. CLAIMANT cannot argue there was an unforeseen event

50. Clause 12 is not met because a reasonable person in CLAIMANT's position would have understood the risks it was assuming under the Contract **(i)**, would have foreseen the imposition of tariffs **(ii)**, and the semen's classification as an agricultural product **(iii)**.

i. A reasonable person in CLAIMANT's position would have understood the risks it was assuming under the Contract

51. CLAIMANT confuses CISG Art. 79 foreseeability with the language of clause 12. Under CISG Art. 79(1), the foreseeability prong is met if a party "could not have reasonably been expected [to consider] an impediment *at the time of the conclusion of the contract*" [*Enderlein, ∫5.3*]. Unlike CISG Art. 79(1), clause 12 does not contain a fixed time reference for an event's foreseeability [*Ex. C 5, p. 14, ∫12*]. Clause 12 exempts "unforeseen events". The Parties' did not define "unforeseen", so CISG Art. 8(2) applies a reasonable person's understanding of unforeseen. Interpretation under CISG Art. 8 should promote uniformity CISG application [*CISG Secretariat Commentary on Art. 7*; *CISG Art. 7(1)*].

52. The CISG uses "foreseen" in two provisions; Arts. 25 and 74. Under CISG Art. 25, a party's breach is fundamental if it "substantially deprives another of what it is entitled to…unless the breaching party did not *foresee*, or a reasonable person…could not have *foreseen*, such a result". Under CISG Art. 74, damages cannot exceed the amount that ought to have been foreseen *at the time the contract concluded*". Unlike CISG Art. 74, Art. 25 does not specify a time from which to determine whether an event was foreseeable [*ibid.*]. The Parties excluded that an event just had to be foreseen *at the time the contract was concluded*, indicating an understanding that events after the Contract concluded may be foreseen [*CISG*

Art. 8(1)]. To promote CISG uniformity, foreseen in clause 12 should not automatically mean only what could be predicted at the time the Contract concluded.

53. Like CISG Art. 25, clause 12 excuses obligations amounting to fundamental breaches, such as excuse from performing when health and safety requirements cause hardship [*Frozen chicken leg case (not a fundamental breach when chicken legs complied with contractual health regulations)*]. Because clause 12 and CISG Art. 25 are similar in language and content, foreseen in clause 12 should be informed by CISG Art. 25 to promote uniform application of "foreseen" under the CISG [*CISG Art. 7(1)*]. Under CISG Art. 25, a breach is fundamental if a reasonable person in the same circumstances would have foreseen the detriment resulting from the breach. Application of the standard is consistent with the Parties' choice to exclude "at the time the contract was concluded."
54. The Parties intended CLAIMANT to be responsible for knowledge of matters concerning the importation and exportation of the frozen semen [*Ex. C 3, p. 11, §3*]. RESPONDENT requested DDP due to CLAIMANT's "much greater experience in shipping frozen semen *including* the necessary export and import documentation…" [*ibid.*]. CLAIMANT accepted RESPONDENT's request for DDP on condition that price increase by $1,000 per dose, and, at minimum, a hardship clause be included to address its concerns regarding DDP [*Ex. C 4, p. 12, §§3, 4*]. Shipping would only cost CLAIMANT a $200 per dose, but CLAIMANT was concerned with being responsible for changes in customs regulation or import restrictions, clarifying that an experience with unforeseeable additional and highly expensive health and safety tests increasing the cost up to 40% [*ibid.*].
55. RESPONDENT rejected $100,500 per dose, but agreed to DDP, modified by clause 12, for $100,000 per dose [*PO2, p. 56, §8*]. The Parties agreed "seller would ship installments DDP of Nijinsky III's frozen semen" [*Ex. C 5, p. 14, cl. 8*]. The Parties are considered to have impliedly made applicable to their contract or a usage of which the Parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the trade concerned [*CISG Art. 9(2)*]. INCOTERMS 2010 are considered widely known trade terms in international trade [*St. Paul Guardian Insurance Co.*; *BP International Ltd.*].
56. CLAIMANT cannot argue the Parties did not understand the term "DDP" as defined by INCOTERMS 2010. Parties do not have to expressly reference INCOTERMS for its definitions to take effect [*St. Paul Guardian Insurance Co. (parties intended to apply INCOTERMS definition although not stated)*]. CLAIMANT referenced another ICC guideline by requesting the ICC clause and alluded to "further risks associated" with DDP [*Ex. R 2, p. 34, §6*; *Ex. C 4, p. 12, §4*]. Additionally, DDP was

part of RESPONDENT's "main strategy" [*Ex. R 3, p. 35, ∫1*]. RESPONDENT reasonably assumed the widely known INCOTERM definition applied unless CLAIMANT requested an alternative.

57. CLAIMANT cannot argue it is not liable for the tariff just because it denied risks associated with a change in delivery terms [*Ex. C 4, p. 12, ∫4*]. Later in the email, CLAIMANT stated specific concerns regarding a 40% increase in costs due to health and safety tests and stated it would be satisfied with a hardship clause [*ibid.*]. A hardship clause was added to address CLAIMANT's concerns and RESPONDENT paid more for DDP. The reasonable interpretation of the Parties' intent is that CLAIMANT's risk disclaimer was negotiated between the Parties until agreeing on clause 12.
58. Although CLAIMANT correctly states that a party's common understanding of standardized delivery terms can alter a term's meaning, an interpretation of the parties' intent under CISG Art. 8 indicates an understanding that the INCOTERMS definition of DDP would apply, subject to minor modifications made by the Parties [*Marzipan case (parties did not intend "free clause" to mean INCOTERMS DDU*]. The only reasonable interpretation CLAIMANT could have of RESPONDENT's conduct is that CLAIMANT added value to its offer [*CISG Art. 8(2)*]. RESPONDENT expressed that CLAIMANT's "much greater experience in shipment of frozen semen, including the necessary export and import documentation," was of great value to it [*Ex. C 3, p. 11, ∫3*].
59. The Contract's language is consistent with an intent regarding the accepted DDP definition. DDP is defined by INCOTERMS 2010 as the maximum obligation on seller, satisfying duties when goods are placed at buyer's disposal, cleared for import by seller and ready to unload [*INCOTERMS 2010*]. Under DDP, risk does not pass from CLAIMANT to RESPONDENT until the semen reaches a specified location [*ibid.*]. Here, RESPONDENT's only obligation regarding delivery fees is responsibility for "tank rental and handling fees for delivery from the storage facility…", indicating CLAIMANT is responsible until the semen reaches the storage facility [*Ex. C 5, p. 14, cl. 10*].
60. Furthermore, the Parties agreed to modify CLAIMANT's maximum DDP obligations by including clause 12. First, clause 12 exempts CLAIMANT from "lost shipments or delays…out of CLAIMANT's control [and] hardships caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C 5, p. 14, cl. 12*]. The Parties agreed on what exempt CLAIMANT from its otherwise binding DDP obligations. Unless a tariff satisfied the standard of clause 12, CLAIMANT would be responsible for paying the duty based on its agreed DDP obligations.
61. A reasonable person's interpretation can be "determined by what is accepted in the relevant trade" [*Feltham, p. 349*; *Amran v. Tesa*; *Roser Technologies v. Carl Schreiber GmbH (a reasonable businessman would read*

request for a guarantee as requiring guarantee)]. CLAIMANT could not be unaware RESPONDENT intended CLAIMANT handle customs. RESPONDENT requested DDP for CLAIMANT's experience with shipping semen, but specifically with import and export documentation [*Ex. C 3, p. 11, §3*]. RESPONDENT kindly requests the Tribunal to find that a reasonable person with CLAIMANT's experience that agreed to DDP, would have understood it possessed all DDP obligations except those exempt by clause 12, and thus, the parties intended CLAIMANT to be responsible for clearing the goods through customs.

ii. The import tariffs were not unforeseen

62. CLAIMANT alleges that the tariffs "came as a big surprise even to informed circles" [*Ex. C 6, p. 15*]. However, CLAIMANT cites to a world business news Art. published 20 December 2017, three weeks and five days before the tariffs would go into effect [*Ex. C 6, p. 15*; *PO2, p. 58, §25*]. Additionally, Equatoriana previously prohibited the artificial insemination of race horses and only temporarily lifted the ban due to the foot and mouth disease [*Ex. C 1, p. 9, §1*]. While RESPONDENT seemed confident the ban would be permanently lifted eventually, RESPONDENT admitted to not have nearly as much import and export experience as CLAIMANT, thus, a reasonable person agreeing to delivery duty paid would at least monitor the custom situation in Equatoriana [*Ex. C 3, p. 11, §3*]. With shipments spanning over the course of nine months, it was unreasonable for CLAIMANT to assume nothing would change, especially given the high tariff imposed on Equatoriana by Mediterraneo in November 2017 [*PO2, p. 58, §23*]. The fact that Equatoriana had once imposed retaliatory measures against another country for import restrictions coupled with the surprisingly high nature of the 25% tariff imposed against Equatoriana supports that a reasonable person in CLAIMANT's position would have been monitoring customs requirements more than just three days before shipment was due [*Ex. C 6, p. 15*; *Ex. C 7, p. 16*].

63. After discovering the tariff, CLAIMANT could have reasonably arranged to ship the last 50 doses on 14 January 2018, only 9 days earlier before the tariff went into effect. Courts have found that a party generally must perform its contractual obligations, even if changed circumstances required the party to take a course of action than different than initially planned [*Suez Canal case, pp. 1411-1412*]. In the *Suez Canal case*, a party was required to deliver after the Suez Canal closed due to war although the alternative route was "substantially more expensive" [*ibid.*]. Unless CLAIMANT proves shipping 9 days earlier would have been more expensive than the $280,000,000 lost by the party in the *Suez Canal case*, the tariffs were an event CLAIMANT should have foreseen, within its control [*ibid.*].

iii. Classifying semen as an agricultural product was foreseen

64. A person in CLAIMANT's position as a DDP shipper would have monitored customs requirements and would have reasonably foreseen the frozen semen classifying as an agricultural product. In the 20 December 2017 article, the Mediterranean government claimed its 25% tariffs were based on agricultural product's reliance on a national security threat [*Ex. C 6, p. 15*]. CLAIMANT knew of Equatoriana's foot and mouth disease crisis before contracting with RESPONDENT. Thus, CLAIMANT could not have been unaware of the possibility Equatoriana would respond to a national security threat in a similar manner [*Ex. C 1, p. 9, ∫1*; *Ex. C 6, p. 15*].

65. Furthermore, Mediterraneo's tariff was imposed on 15 November 2017 and explicitly included "living animals" [*PO2, pg. 58, ∫∫23, 24*]. CLAIMANT failed to act reasonably by assuming horse semen was not an agricultural good [*PO2, pg. 58, ∫26*]. Because the semen came from another living animal, had the potential to become a living animal, and had the purpose of becoming a living animal, a reasonable person in CLAIMANT's position would have clarified its assumption with customs. CLAIMANT asked for customs clearance and was informed less than 24 hours later the tariff applied [*ibid.*]. RESPONDENT should not be responsible because CLAIMANT waited four days before shipment was due to ask, especially since RESPONDENT relied on CLAIMANT's customs expertise when agreeing to pay more for DDP.

2. The tariffs are not comparable events in terms of clause 12

66. Pursuant to CISG Art. 8, the Parties' conduct indicating the requirements to satisfy clause 12 would exclude the tariffs from its protection. During negotiations, CLAIMANT stressed the importance of avoiding events like "additional health and safety regulation requirements" increasing costs up to 40% [*Ex. C 4, p. 12, ∫4*]. The referenced event was an $8,000,000 DDP contract for three mares to Danubian farms [*PO2, p. 58, ∫21*]. After the foot and mouth disease, Danubia imposed health and safety regulations requiring tests and quarantine, increasing the price of the contract by 40% [*ibid.*].

67. Here, the tariff was on 50 out of 100 doses, unlike CLAIMANT's previous experience where the contract's entire cost increased by 40% [*Ex. C 4, p. 12, ∫4*; *PO2, p. 58, ∫21*]. The tariff on 50 doses increased CLAIMANT's expenses from $9,500,000 to $11,000,000 and and the total sale price by only $1,500,000, or approximately 16%, far below 40% [*PO2, p. 56, ∫8*; *NoA, p. 8*; *NoA, p. 7, ∫18*].

68. RESPONDENT was only aware of CLAIMANT's past concerning the additional health and safety tests and quarantine issues. Quarantine costs would not be an issue here because semen would not require stables like mares and tariffs are not health or safety regulations. Because CLAIMANT emphasized its concerns of an increase in the total price of the contract, RESPONDENT could not be aware of any hidden intent CLAIMANT harbored during not to assume risk for *any* increase in

price. The tariffs do not qualify as a "comparable event" intended to be exempt by clause 12 because it does not come close to the 40% standard established by CLAIMANT for clause 12.

3. The tariffs did not make CLAIMANT's performance more onerous

69. CLAIMANT mistakenly asserts that the legal obligation of paying the tariff would exceed the benefits of the contract [*Collins English Dictionary*]. However, CLAIMANT misleads the Tribunal by focusing on 50 doses. The Contract was for 100 doses, half delivered tariff-free. Also, CLAIMANT's fixed and variable costs are suspiciously vague. Although CLAIMANT has experience selling frozen semen in other areas of equestrian sport and had information regarding costs associated with frozen semen, it decided to use the fixed costs applied for natural coverage, at $80,000 per session [*PO2, p. 59, ∫31*]. CLAIMANT decided to apply the variable costs associated with sale of frozen semen [*ibid.*].

70. Natural coverage and the sale of a frozen semen dose have fundamentally different associated costs. Natural coverage requires timing, space for coverage to occur, handlers, and results in full ejaculation with billions of sperm. One dose of semen under the Contract is only required to have 800,000,000 sperm [*Ex. C 5, p. 13, cl. 1*]. Also, Nijinsky III was booked for natural coverage through 2017 [*PO2, p. 56, ∫11*]. The 25 doses CLAIMANT delivered before the 2017 breeding season ended had the effect of doing the reproductive work of two horses, while only having the fixed costs for CLAIMANT of one horse [*ibid.*].

71. CLAIMANT made no attempt to explain the use of two different types of transactions to make the combined total cost for the sale of racehorse semen. Because the price of a natural coverage session with Nijinsky III is $110,000, with a $16,500 profit, and fixed costs for a natural coverage session are $80,000, it can be determined that a natural coverage session with Nijinsky III has a variable cost of $13,500, $1,500 less than the variable costs CLAIMANT applied to the contract or $150,000 more for the 100 doses [*PO2, p. 57, ∫19; PO2, p. 56, ∫8*].

72. Furthermore, nothing is known about CLAIMANT's fixed costs for typical frozen semen sales. Because CLAIMANT applied the higher variable costs out of its available transactions, it would be reasonable to assume CLAIMANT applied the fixed cost for natural coverage to the contract because it was higher than its usual fixed cost for frozen semen sales. Without more information, it is impossible to tell just how big the difference is and how much extra CLAIMANT was making per dose. Even if CLAIMANT's fixed and variable cost calculations are correct, CLAIMANT failed to account for the value of a long-term relationship with RESPONDENT derived as a benefit from the contract.

73. CLAIMANT's conduct regarding use of different transactions for costs strongly suggests CLAIMANT may have profits outside its stated 5% profit margin. In that case, CLAIMANT would have wrongfully assessed the benefit derived from the contract, and the imposition of a tariff on half the contract would not outweigh the benefits it received and was thus not onerous.

4. CLAIMANT is precluded from arguing the tariffs caused hardship within the meaning of clause 12

74. CLAIMANT is precluded from arguing the tariffs were a hardship under clause 12 because the threat of CLAIMANT's insolvency was not caused by the tariffs **(i)**, the Parties negotiated for and agreed to delivery DDP **(ii)**, and CLAIMANT subsequently performed despite the alleged hardship **(iii)**.

i. The tariffs were not the cause of CLAIMANT's financial hardship

75. CLAIMANT improperly defines the performances agreed upon by the Parties and how those performances changed after the tariffs were imposed. CLAIMANT concedes that its financial difficulties began years before entering into the contract with RESPONDENT, with its racehorse section expected to make a profit because of the contract with RESPONDENT for the first time since 2014 [*PO2, p. 57, ∫15*]. In its previous contract to sell mares to Danubia in 2014, CLAIMANT was almost rendered insolvent from the 40% increase in a contract for $8,000,000 [*PO2, p. 57, ∫22*]. In that contract, CLAIMANT paid an additional $3,200,000 and did not claim hardship or become insolvent [*ibid.*]. Even before that contract, CLAIMANT was suffering financially due to investing in new stables and taking out high interest loans [*PO2, p. 57, ∫22*; *PO2, p. 59, ∫29*].

76. Because the contract does not specifically state whether RESPONDENT is to be held liable for CLAIMANT's capacity to enter into contracts, the CISG indicates that financial capacity to perform specific contracts is typically within the seller's sphere of risk [*Schwenzer 2010, p. 1072*]. CLAIMANT was aware of its financial situation when it decided to enter into a DDP contract with RESPONDENT while RESPONDENT was only aware of vague rumors regarding CLAIMANT's financial situation [*PO2, p.58, ∫22*]. It would contradict the general principle of fairness to hold RESPONDENT accountable for the tariffs on the basis that CLAIMANT has made a pattern of poor business decisions over the years and entered into a contract accepting more money for more risk RESPONDENT was unaware CLAIMANT could not afford. Ultimately, CLAIMANT's own decisions have led to its financial difficulties and thus it should be precluded from claiming it is suffering a hardship from a 15% increase in price.

ii. The parties precluded the assumption of hardship caused by tariffs by agreeing on DDP

77. Although no price was specifically allocated to payment for DDP delivery, RESPONDENT indicated it was at least willing to increase the price by $500 per dose more [*PO2, p. 56, §8*]. At a minimum, RESPONDENT allocated $50,000 just for DDP delivery [*ibid.*]. Because shipping would only directly cost CLAIMANT $200 per dose, or $20,000 for the entire contract, it can be assumed CLAIMANT accepted more money in return for a greater assumption of risk [*ibid.*].

78. Because, as argued above, the tariffs were not a clause 12 hardship, paying the tariffs remained a contractual obligation within CLAIMANT's sphere of risk [*Schwenzer, p. 1072*; *Secretariat Commentary Art. 79*]. CLAIMANT was aware of its own financial capacity at the time the contract was concluded and could have chosen a less demanding delivery term that would have still allowed CLAIMANT to handle import and export documentation [*INCOTERMS 2010*]. However, CLAIMANT accepted payment for DDP delivery. Only now is CLAIMANT arguing it did not intend to assume the responsibility RESPONDENT paid for and that RESPONDENT owes CLAIMANT more money. Because CLAIMANT agreed on the most obligatory delivery term for a seller, that negotiated agreement should be honored and CLAIMANT should be precluded from arguing execution of his duty creates a hardship.

iii. CLAIMANT subsequently delivered the doses and paid the tariff without additional payment from RESPONDENT

79. As argued above **(I.A.1)**, CLAIMANT should be precluded from arguing that the tariffs were a hardship because CLAIMANT voluntarily delivered the doses, even though it now claims it was under no obligation to do so. Shoemaker informed CLAIMANT that he was not authorized to promise any additional payments, but CLAIMANT delivered the doses regardless [*Ex. C 8, p. 18*]. If CLAIMANT truly believed it suffered a hardship exempt under clause 12, it would know it was under no duty to perform [*Ex. C 6, p. 14, cl. 12*].

80. Much less than CLAIMANT's previous contract with Danubia where it paid an additional $3,200,000 but still performed, CLAIMANT only paid an additional $1,300,000 and still managed to perform. CLAIMANT is not insolvent or teetering on the brink of bankruptcy/financial ruin/collapse, etc. Instead, we kindly suggest that it is only panicking because it needs to negotiate a new credit line [*PO2, p. 59, §29*], and that the Tribunal should not hold the RESPONDENT responsible for helping CLAIMANT out of its sustained poor business decisions.

C. RESPONDENT is not Required to Pay $1,250,000

81. Requiring RESPONDENT to pay the entire amount would hold RESPONDENT entirely responsible for the tariff CLAIMANT assumed contractual responsibility for while allowing CLAIMANT to benefit from its 5% profit margin for the other 50 doses. Discrepancies in CLAIMANT's cost calculations threaten to overcompensate CLAIMANT and punish RESPONDENT for CLAIMANT's failure to monitor customs, for which RESPONDENT relied on CLAIMANT [*Ex. C 3, p. 11, §3*].

82. While CLAIMANT could argue that RESPONDENT is more financially capable of paying the tariff, this would undermine the importance of freedom to contract which is central to a free market. If businesses had to worry about less wealthy companies going back on their promises just because it became more expensive than it expected, those companies will be less willing to engage in international contracts with the at-risk companies. This will greatly chill the number of companies that benefit from the expanded market of international trade.

83. If the Tribunal were to adapt the contract price in cases such as this, it would discourage commercial parties from transacting with companies struggling financially, which could have a chilling effect on international trade. Ultimately, to uphold the certainty of a negotiated promise, the Tribunal should find CLAIMANT was responsible for paying tariffs under the Contract and that the 15% increase in contract price did not constitute a hardship under the meaning of clause 12.

II. CLAIMANT IS NOT ENTITLED TO A PRICE ADAPTATION UNDER THE CISG

84. RESPONDENT is not asking the Tribunal to determine whether the CISG would ever allow for price adaptation following changed circumstances. RESPONDENT only requests the Tribunal to determine that a 30% tariff on only half the number of doses delivered under the contract is not the type of economic hardship intended to qualify as an exception to contractual obligations. CLAIMANT may not adapt the price of the contract under the CISG because the Parties waived the possibility of price adaptation **(A)**. Alternatively, if price adaptation was an available remedy in this situation, CLAIMANT failed to meet its burden of proof regarding the requirements of Art. 79 **(B)**. Even supposing CLAIMANT could prove all CISG Art. 79 requirements, adaptation of the contract would not be reasonable **(C)**.

A. The Parties Waived Price Adaptation under the CISG by Opting out of Art. 79

85. The Parties expressly excluded the possibility of price adaptation by contracting out of it [*CISG Art. 6*]. Pursuant to CISG Art. 6, clause 12 states CLAIMANT "shall not be responsible for lost shipments or delays not within the control of the seller…[nor] hardships" [*Ex. C 5, p. 14, cl. 12*]. CLAIMANT

assumed responsibility by making the delivery despite the tariffs. The Parties contracted for CLAIMANT's remedy to be relief from obligation, not compensation. Furthermore, clause 12 also includes a force majeure component, referred to by the Parties as a force majeure clause, stating that CLAIMANT "shall not be responsible for lost shipments or delays not within the control of the seller…such as acts of God…" [*PO2, p. 56, §12*; *Ex. R 3, p. 35, §4*; *Ex. C 5, p. 14, cl. 12*]. CLAIMANT effectively displaced CISG Art. 79 by defining its own definition of impediment and by including a hardship clause.

86. Even if the Parties have not expressly opted-out of the CISG, courts have recognized implied exclusion of the CISG when the parties reference a particular law [*Auto case*; *Schlechtriem; Honnold 3rd ed., at 76*]. If all parties demonstrate an intent to derogate from the CISG, an expressed agreement to do so is not required [*Ferroalloy case*; *Cedar Petrochemicals, Inc.*]. The Parties impliedly excluded the CISG pursuant to Art. 9(2) when they both indicated an intent to apply a version of the ICC hardship clause. An implied exclusion may be determined based on facts pointing to real agreement between the parties [*Honnold 3rd ed., p. 76*].

87. CLAIMANT cites the *Auto case* in support of its claim that derogation only occurs if it is impossible to misunderstand the parties' intention. However, the case was determined with a different line of reasoning. The Supreme Court of Austria overturned the decision of the Court of Appeals that the parties had not opted-out of the CISG [*Auto case*]. The Court of Appeals applied warranties under the CISG even though the seller's standard granted consumers under the Consumer Protection Act warranties under the relevant statutory provisions and the Austrian Commercial Code would apply to businessmen [*ibid.*]. The Supreme Court found that exclusion of the CISG can occur by incorporating standard terms of business into the contract, such as when mentioning the Consumer Protection Act hinted at Austrian law [*Auto case*; *Schlechtriem*]. Thus, the lower court's decision was overturned because the parties merely referenced the law of a contracting state [*ibid.*].

88. CLAIMANT requested [?] a hardship clause, which is not expressly governed by the CISG. Hardships may become an impediment, and thus CISG Art. 79 would apply, however, until that point, hardships are not governed by the CISG [*CISG AC Opinion No. 7*]. The Advisory Council cites to the PICC to determine when a hardship becomes an impediment [*ibid.*]. When CLAIMANT requested a hardship clause and the resulting clause contained both situations regarded as impediments and hardship, CLAIMANT displayed a clear intent to derogate away from the CISG and apply what can be interpreted as a reference to PICC, which both Parties are from contracting members.

89. Furthermore, CLAIMANT based the clause off the ICC clause, which, unlike the CISG, has both a force majeure and a hardship component. Parties may derogate from the CISG by citing to the ICC-force majeure clause [*Schwenzer, p. 1085, footnote 160*]. When CLAIMANT suggested the ICC clause, CLAIMANT displayed an intent to opt-out of CISG Art. 79 by expressly providing for hardship [*CISG Art. 8(1)*]. CLAIMANT could not reasonably believe RESPONDENT did not intend to exclude CISG Art. 79 because RESPONDENT rejected the ICC clause, which is more inclusive than CISG Art. 79, as being "too broad" [*CISG Art. 8(2)*; *Ex. R 3, p. 35, §3*].
90. Only after further negotiations did RESPONDENT and CLAIMANT come to an agreement on a modified ICC clause that would allow for an exemption of events more inclusive than the CISG, but for limited remedies [*PO2, p. 56, §12*]. Therefore, the Parties' intent to exclude CISG Art. 79 from the Contract was established by agreement on an over inclusive clause based on the ICC clause and closely resembling PICC Art. 6.2.3.

B. The Requirements of Art. 79 are not Met

91. Even if the Tribunal determines CISG Art. 79 was not excluded, CLAIMANT is not entitled to remedy under the CISG. CLAIMANT has the "*extremely high* burden" of proving each requirement under CISG Art. 79 [*CISG AC Opinion No. 7, §11*]. CLAIMANT cannot meet its burden because the tariff was not an impediment **(1)**, its consequences were not beyond CLAIMANT's control **(2)**, CLAIMANT reasonably should have accounted for the tariffs at the time the Contract was concluded **(3)**, and CLAIMANT could have avoided or overcome the consequences of the tariff **(4)**. Furthermore, CLAIMANT did not give adequate notice of its refusal to perform **(5)**.

1. There was not a hardship amounting to an impediment under Art. 79

92. CLAIMANT argues adaptation is possible under the CISG pursuant to the general principle of good faith [*CISG Art. 7(1)*]. RESPONDENT stipulates that price adaptation may be possible under Art. 79, but only when there was an "unforeseeable and *extraordinary chang*e in circumstances rendering an obligation *extremely burdensome*" [*CISG AC Opinion no. 7, §26*]. RESPONDENT also stipulates that the PICC can be a gap-filler for hardship under the CISG. RESPONDENT argues CLAIMANT fails to meet the PICC requirements for hardship, and thus cannot prove an impediment existed.
93. CLAIMANT argues that when the one invoking hardship is threatened by insolvency, the threshold for hardship is lowered and the Parties must renegotiate price to restore equilibrium to the Contract [*CISG AC Opinion no. 7, §40*; *Matches case*]. In CLAIMANT cited case, the party invoking hardship was a country forced to continue a supply contract until it could pay a $2,000,000 loan [*ibid.*]. The court

found that changed circumstances could only be considered if enforcing the contract would cause the debtor's ruin, as was the case with a prolonged monopoly on matches [*ibid.*].

94. CLAIMANT's "ruin" is not caused by the tariffs. A 13% market price increase resulting in the seller's insolvency was not enough to be the cause of ruin [*CLOUT case 102*]. CLAIMANT attempts to mischaracterize the imposition of the tariffs as a 30% increase in Contract price. Tariffs only applied to half the Contract's doses. Therefore, CLAIMANT mistakenly calculated that the tariff increased the price of each dose by $30,000. When considering CLAIMANT's initial cost-benefit calculation, the increase in price was $15,000 per dose.

95. The 15% increase cannot be described as "unreasonable" or "disproportionate" [*Steel tubes case*]. At least twice, CLAIMANT has proven it could perform under such conditions, once by delivering the remaining 50 doses without additional payment and previously by withstanding a 40% increase in contract price when it solely bore the burden of $3,200,000 in additional costs [*PO2, p. 58, §21*]. A 15% increase in price is much more like the 13% increase in market price that was not enough to cause ruin, not the type of "economic impossibility" rendering performance practically impossible intended to fall under CISG Art. 79 [*CLOUT Case 102*; *Honnold 3rd ed., p. 628*].

96. Furthermore, CLAIMANT's position that hardship always constitutes an impediment when the economic existence of the debtor is threatened conflicts with established interpretations of CISG Art. 79. It is well established that a party's financial capacity to contract is generally within the seller's sphere of risk [*Schwenzer, p. 1072*]. Even before the 2014 Danubian deal, CLAIMANT struggled financially due to several events. Under CISG Art. 79, "the promisor is liable for performance if failure to perform results from a combination of events, at least one of which promisor could have foreseen or avoided" [*Schwenzer, pp. 1069-70*]. In 2013, CLAIMANT took out high interest loans to heavily invest in stables to the point it had to rely on revenues from one sale [*PO2, p. 59, §29*]. Due to loan interest payments, CLAIMANT has been operating at a loss since 2014 [*ibid.*].

97. National laws have inconsistent hardship thresholds. Italian law suggests a 14% increase is enough while others would not call a 100% increase a hardship [*Perillo, p. ll*]. However, courts are cautioned against using national principles for changed circumstances cases and advised that hardship should only fall under the CISG if deemed to be "*exceptionally* hard" [*CISG AC Opinion no. 7, §32*]. Only one case has recognized economic hardship under the CISG [*Steel tubes case (price increase of 70% was a hardship)*]. Notably, the case has been criticized for threatening the international character of the CISG by applying Art. 79 to economic hardship within the seller's sphere of control [*Eiselen*]. Permitting price adaptation after total costs for CLAIMANT increased, at most, by 15%, would undermine

uniformity of the CISG and threaten the legitimacy of international contracts, leaving many courts and tribunals with the task of determining at what point a hardship exists.

98. An official comment to the PICC suggests that a 50% increase or more of the value is likely to be a "fundamental" alteration justifying the invocation of hardship [*PICC, Art. 6.2.2, comment 2*]. Even if the PICC applied pursuant to CISG Art. 9(2), a 15% increase in the total price, or even the 30% increase in just the last shipment, does not amount to a PICC Art. 6.2.3 hardship, as alleged by CLAIMANT. To promote the uniform application of the CISG and avoid the arbitrary and unpredictable application of national law, this Tribunal should apply the understanding of the PICC and determine that a 15% increase in price does not amount to a hardship.

99. While RESPONDENT sympathizes with CLAIMANT's economic difficulties, it should not be responsible for saving CLAIMANT when CLAIMANT's persistent business decisions over the years caused CLAIMANT's financial incapacity. Because CLAIMANT's alleged hardship did not cause CLAIMANT's financial difficulties and does not meet the high burden envisioned to justify price adaptation under the CISG, the first requirement of Art. 79(1) is not met.

3. The tariffs were not beyond CLAIMANT's control

100. Even if the Tribunal believes the tariffs caused hardship, the requirements of CISG Art. 79 cannot be met because any hardship caused by the tariffs was not beyond CLAIMANT's control. CLAIMANT contends tariffs are automatically beyond its control since they were imposed by a government [*Macromex Srl.*]. However, CLAIMANT's cited case held that a governmental act was beyond control because the Romanian government banned all chicken imports with virtually no notice [*ibid.*]. CLAIMANT had notice of the tariffs in time to control their application. The tariffs were announced 19 December 2017 and allowed about a month of tariff-free trade before taking effect 15 January 2018 [*PO2, p. 58, ∫26*]. Because the Equatorianan government gave one-month notice, the Tribunal should not assume the tariffs were automatically uncontrollable. CLAIMANT controlled the delivery date and thus whether the shipment would be subject to the governmental act.

3. CLAIMANT reasonably should have taken the possibility of tariffs into account at the time the Contract was formed

101. Even if the Tribunal determines the tariffs caused uncontrollable hardship, CLAIMANT still lacks a remedy because it considered DDP risks. Whether a party could have reasonably considered an impediment at the time the contract concluded is determined on a case-by-case basis [S*ecretariat Commentary Art. 79*]. Here, not only was it reasonable for CLAIMANT to consider the possibility of tariffs, but CLAIMANT actually did so. During negotiations, CLAIMANT recognized "other risks

associating with a change in delivery terms" and suggested a hardship clause be included at a minimum [*Ex. C 4, p. 12, §4*]. Not only did the Parties agree on a hardship clause, but they also agreed on a force majeure clause in clause 12 [*Ex. C 5, p. 14, cl. 12*]. By accepting DDP, subject to clause 12, for more money, CLAIMANT accepted remaining DDP risks without reservation. CLAIMANT cannot allege that it did not consider DDP risks just because they materialized. If an impediment was foreseen at the contract's conclusion and the promisor made no reservations, he should be understood to have assumed the associated risk [*Schwenzer, p. 1068*].

102. Furthermore, the tariffs could have been anticipated during negotiations. Mediterraneo's new president was elected in March 2017 and announced in January 2017 the need for a more protectionist trade approach [*Ex. C 6, p. 15*]. On 5 May 2017, the new president appointed Frankel, one of the most active critics of free trade, as the "superminister" for agriculture, trade and economics [*PO2, p. 58, §23*]. Contract negotiations began in April 2017, finishing on 6 May 2017, after announcement of the new "superminister" [*Ex. C 5, p. 13*]. As a citizen, CLAIMANT could not have been unaware of its new president and, as a business dealing in international trade, of the possibility of tariffs in shipping. The foreseeability of a new government bringing about new trade regulations is like the foreseeability of fluctuations in market price in that it is an expected part of international trade; an event a reasonable seller would account for at the time the contract was concluded [*CLOUT Case 102*; *CLOUT Case 1234*].

4. CLAIMANT could have avoided or overcome the tariff's consequences

103. Even if the Tribunal finds a financial hardship, beyond CLAIMANT's control, and that they were unforeseeable at the Contract's conclusion, CLAIMANT still does not meet CISG Art. 79 requirements because it could have avoided the tariffs. The tariff was announced about a month before taking effect. It took a business article one day to report the tariffs [*Ex. C 6, p. 15*]. CLAIMANT is in the business of importing and exporting and should have been aware of the article. CLAIMANT had time to arrange early transportation for the remaining doses to avoid imposition of the tariff altogether.
104. Due to its promise to RESPONDENT to handle customs and its contractual relationship dependent on delivery to Equatoriana, CLAIMANT could not have been unaware of the tariff nor of the possibility that it could apply to horse semen. Even if a party makes a reasonable mistake, it is not grounds for an impediment under CISG Art. 79 [*Steel ropes case*]. RESPONDENT may agree it was reasonable to assume semen used for racehorse breeding would not classify as a living animal. However, CLAIMANT took responsibility for customs. CLAIMANT's mistaken assumption being

reasonable does not make it an impediment [*Ex. C 3, p.11, §3*; *CLOUT Case 1234 (seller not entitled to fees due to its own miscalculation)*].

5. CLAIMANT did not give adequate notice of its refusal to perform

105. Furthermore, CLAIMANT failed to give adequate notice under CISG Art. 79(4). Under CISG Art. 79(4), the party invoking hardship must notify the other party of the hardship's effect on his ability to perform at the time the party "ought to have known of the impediment" [*CISG Art. 79(4)*]. CLAIMANT asked for customs clearance and was told on 19 January 2018 that the tariffs would apply, even though it waited until the next morning to read its email [*ibid.*]. CLAIMANT did not attempt to further contact RESPONDENT after Shoemaker informed CLAIMANT he was not authorized to make price adjustments [*Ex. C 8, p. 18, §2*].

106. CLAIMANT did not describe the alleged hardship's impact on its ability to perform [*CISG Art. 79(4)*; *PICC Art. 6.2.3, comment 3*]. CLAIMANT only said a tariff applied and "we have to find a solution before shipment can be made" [*Ex. C 7, p. 16, §2*]. CLAIMANT did not explain who "we" included, nor that RESPONDENT must contribute to the solution. RESPONDENT only knew of vague rumors of CLAIMANT's situation; thus, CLAIMANT could not argue its financial situation was so obvious, that there was no need to "spell it out" in its email [*PICC Art. 6.2.3, comment 3*; *PO2, p. 58, §22*]. Because CLAIMANT did not notify RESPONDENT at the time the tariffs were imposed and did not express that RESPONDENT was obligated to find a solution, RESPONDENT should not be liable for damages from inadequate notice, including CLAIMANT's payment of the tariffs.

C. Adaptation of the Contract would be Unreasonable

107. CLAIMANT alleges that the Tribunal should adapt the contract because the Parties were not able to reach an agreement within a reasonable time. However, explained *supra* **(II.B.5)**, CLAIMANT did not request renegotiations "as quickly as possible" after the hardship occurred [*PICC Art. 6.2.3, comment 2*]. Also, CLAIMANT was not entitled to threaten nonperformance [*PICC Art. 6.2.3, comment 4*]. CLAIMANT acted in bad faith and in contravention of the PICC's purpose for renegotiation by threatening not to deliver on the agreed date unless a solution was reached [*Ex. C 7, p. 16, §2*]. The PICC allows renegotiation after hardship, but not non-performance to prevent abuse [*PICC Art. 6.2.3, comment 4]*. Upholding CLAIMANT's renegotiation demand undermines the purpose of PICC Art. 6.2.3 by rewarding CLAIMANT for threatening not to perform until Shoemaker said he thought renegotiation was possible. CLAIMANT's failed to discover the tariff despite its DDP customs obligations and superior experience and failed to renegotiate in good faith.

108. CLAIMANT alleges adaptation is needed to restore equilibrium to the Contract. But, with CLAIMANT's mischaracterization of the tariff's costs, CLAIMANT's solution that RESPONDENT pay $1,250,000 and CLAIMANT forgo $250,000 in profit disproportionately benefits CLAIMANT. CLAIMANT would have $250,000 in profit from the first 50 doses. Plus, RESPONDENT did not fail to renegotiate in good faith. CLAIMANT surprised RESPONDENT with blame for reselling doses [*Ex. C 8, p. 18, ∫4*]. Both parties must act in good faith during renegotiation [*PICC Art. 6.2.3, comment 5*]. CLAIMANT acted contrary to the principle of good faith, abusing renegotiation to allege contract breach for the first time, preventing RESPONDENT from preparing a defense or examining evidence against it [*PICC Art. 7.1, comment 2*]. RESPONDENT did not act unreasonably or in bad faith by believing the allegations had no basis and by leaving negotiations [*Ex. C 8, p. 18, ∫4*].

CONCLUSION TO ISSUE TWO

109. RESPONDENT kindly requests the Tribunal to uphold the Parties' intentions and acknowledge the value of enforcing negotiated terms, despite materialized risks. RESPONDENT was never intended to pay more than an already high price and a clause 12 remedy did not apply.

110. Alternatively, the Tribunal should not adapt the price under the CISG. By incorporating into clause 12 a force majeure and hardship clause, the Parties intended to allow more events excusing CLAIMANT from performance in exchange for less remedies. Furthermore, CLAIMANT has not met its burden to prove CISG even applies to the tariffs. Lastly, because CLAIMANT did not appropriately request renegotiations and acted in bad faith by surprising RESPONDENT with an unrelated accusation, the Tribunal should find that price adaptation would be unreasonable.

ISSUE THREE: THE TRIBUNAL SHOULD NOT ADMIT EVIDENCE OF RESPONDENT'S OTHER ARBITRAL PROCEEDING

111. CLAIMANT asserts that the tribunal should admit evidence of RESPONDENT's position in RESPONDENT's Other Proceeding. The Other Proceeding, which concerned the sale of a mare, was conducted under the 2013 HKIAC Rules, and the arbitral tribunal awarded a Partial Interim Award (**"PIA"**) in favor of RESPONDENT [*PO2, p. 61, ∫39*]. CLAIMANT argues that the evidence is admissible because it is relevant to CLAIMANT's case, and because a weighing of interests favors admissibility [*CM, p. 31, ∫105*].

112. Contrary to CLAIMANT's allegations, RESPONDENT respectfully requests that the tribunal preclude the admission of the evidence of the Other Proceeding. CLAIMANT is not entitled to submit the evidence from RESPONDENT's other arbitral proceeding because the evidence is not relevant

to the current proceeding (**I**), the evidence was obtained illegally and in bad faith **(II)**, and a weighing of the Parties' interests does not favor admission of the evidence **(III)**.

I. THE EVIDENCE OF THE OTHER PROCEEDING IS NOT RELEVANT TO THE CURRENT PROCEEDING

113. Arbitral tribunals enjoy broad discretion in determining the admissibility of evidence and are not bound by strict rules of evidence [*HKIAC Rules Art. 22; O'Malley,* §9.09; *Pilkov, p. 148*]. The Tribunal may exercise this evidentiary discretion by declaring evidence inadmissible due to lack of relevance [*O'Malley, §9.06*]. CLAIMANT argues that the PIA from the Other Proceeding is admissible as relevant to the pending case because the proceedings are similar [*CM, p. 31, §106*]. In the Other Proceeding, RESPONDENT was the seller of the mare and refused delivery of it after being negatively affected by an 25% increase in tariffs and took the position that the arbitral tribunal had the power to adapt its contract with the buyer [*PO2, p. 61, §39;* 2 *Oct. 2018 Ltr., p. 50*]. However, the proceedings are dissimilar enough such that the evidence is not relevant to prove the elements of CLAIMANT's case **(A)**. CLAIMANT also argues that the evidence is relevant as contradictory behavior, which is recognized as a general principle under CISG Art. 7(2), however; the CISG is not applicable to the question of evidentiary admissibility **(B)**.

A. The Proceedings are Dissimilar Enough Such that the Evidence is Not Relevant

114. Evidence is relevant if it is likely to be necessary to prove or disprove an allegation [*O'Malley, §9.09*]. Here, the evidence of the Other Proceeding is not necessary to prove any element of the current case. The Other Proceeding concerns a wholly distinct contract with significant differences, which CLAIMANT is not a party to, and thus it has no bearing on the contract in dispute in the instant proceeding.

115. CLAIMANT is attempting to introduce the evidence from the Other Proceeding to prove RESPONDENT's contradictory behavior, however; the proceedings are substantially different such that RESPONDENT's position in the Other Proceeding is irrelevant to prove this allegation. CLAIMANT argues that the proceedings are alike because the issue giving rise to both disputes was the imposition of import tariffs [*NoA, p. 7, §18*; *PO2, p. 60, §39*] and both underlying sales contracts contain hardship clauses and are governed by Mediterranean law, including the CISG [*Ex. C 5, p. 14; PO2, p. 60, §39*].

116. Contrary to CLAIMANT's allegations, the contract in the Other Proceeding is substantially different to the current contract. The prior contract provided for a delivery DDP Mediterraneo and contained an ICC Hardship Clause 2003, which is different from that in the current proceeding [*Ex. C 5, p. 14,*;

PO2, p. 60, §39]. Significantly, the contract in the Other Proceeding contains the Model Clause with all additions [*PO2, p. 60, §39*]. Thus, the arbitration clause had an express choice of law provision and was much broader than the arbitration clause in the current proceeding [*Model Clause*]. The scope of the arbitration clause at issue in the current proceeding is much narrower, thus rendering RESPONDENT's inconsistent position with regard to the Tribunal's power to adapt the contract irrelevant here [*Ex C 5, p. 14*]. Because RESPONDENT's position in the Other Proceeding does not tend to prove any element of the current case, the Tribunal should bar its admission as it is irrelevant.

B. The Principle of *Venire Contra Factum Proprium* is not Applicable

117. CLAIMANT further argues that the evidence of the Other Proceeding is relevant as giving testament of contradictory behavior, or *venire contra factum proprium*, which is "recognized as a general principle pursuant to Art. 7(2) CISG" [*CM, p. 65, §106*]. However, CLAIMANT misuses this principle because the CISG is not applicable in determining the admissibility of evidence. CISG Art. 7(2) is specifically limited to "matters governed by this Convention" [*CISG Art. 7(2)*]. The admissibility of evidence is governed here by the HKIAC Rules, as the institutional rules governing the arbitration, and the Model Law, which serves as the *lex arbitri*. Thus, because the CISG does not apply, the principle of *venire contra factum proprium* does not render the evidence admissible.
118. Ultimately, the Tribunal is respectfully requested to find that the evidence of RESPONDENT's position in the Other Proceeding is irrelevant, and thus inadmissible.

II. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE IN THE INTEREST OF FAIRNESS BECAUSE THE EVIDENCE WAS OBTAINED ILLEGALLY

119. The Tribunal should, in its discretion, preclude the evidence of the Other Proceeding in the interest of fairness because the evidence was obtained illegally, and CLAIMANT does not have "clean hands."
120. CLAIMANT is attempting to introduce evidence that was disclosed either by a hack of RESPONDENT's computer system or an unauthorized disclosure by RESPONDENT's employees [*3 Oct. 2018 Ltr., p. 51; PO2, pp. 61-62, §41*]. While Tribunals enjoy broad discretion in determining the admissibility of evidence, it is widely accepted and confirmed by precedent that evidence gathered through illegal means will be excluded from an arbitral proceeding [*O'Malley, §9.119, Methanex, EDF*]. This rule, which finds confirmation in the IBA Rules of Evidence (**"IBA Rules"**) Art. 9.2(g), is an application of the principle of procedural fairness, which is a cornerstone of international arbitration [*IBA Rules Art. 9.2(g)*; *O'Malley §9.119*]. Disputing parties owe a general legal duty to conduct themselves in good faith and respect the procedural fairness of the arbitration, and many tribunals have recognized that it would be therefore be wrong to admit unlawfully obtained evidence.

Consequently, because the evidence of the Other Proceeding was obtained illegally, the Tribunal should find such evidence inadmissible in the interest of fairness.

121. Additionally, the illegally obtained evidence should be excluded so as not to create an incentive to break the law. While parties may be sanctioned for unlawfully obtaining evidence, an underlying assumption exist that such a sanction is not sufficient to prevent parties from acting illegally to obtain evidence, and thus illegally obtained evidence should be excluded from arbitral proceedings [*Rijavec, p. 199*]. Accordingly, the tribunal here should exclude the evidence in order to disincentive law breaking in order to obtain evidence.

122. Furthermore, CLAIMANT may argue at oral hearing that a third party, and not CLAIMANT, acted illegally to obtain the evidence. However, this does not render the evidence admissible. The arbitral tribunal in *Methanex* found illegally obtained evidence inadmissible when the party had not intended to violate the law but acted with reckless disregard for it. Here, it is clear that CLAIMANT was aware that the information was obtained unlawfully [*PO2, pp. 61-62, §41*]. Moreover, CLAIMANT took further steps to acquire information, when it became clear they could not find a copy of the award, by offering to pay a disreputable company for the information. [*ibid.*]. Thus, CLAIMANT acted with reckless disregard for the law in its attempt to acquire the information. Because CLAIMANT acted intentionally in furtherance of the unlawful disclosure of the information, CLAIMANT cannot argue that it has "clean hands," such that the evidence should be admitted because it was obtained by a third party [*Smeureanu*, *pp. 111-112*; *PO2, p. 61, §41*].

123. Consequently, the Tribunal is respectfully requested to find that, due to the procurement history of the evidence and CLAIMANT's own actions, the evidence should not be admitted.

III. A WEIGHING OF THE PARTIES' INTERESTS PRECLUDES THE ADMISSION OF THE EVIDENCE

124. CLAIMANT argues that the Tribunal is free to weigh the Parties' interests to determine the admissibility of evidence, and that CLAIMANT's interests in favor of admitting the evidence prevail, such that the Tribunal should admit the evidence. Contrary to CLAIMANT's position, RESPONDENT respectfully requests that the Tribunal find, in exercising its broad discretion, that a weighing of interests does not favor admitting the evidence.

125. As CLAIMANT notes, the Tribunal may exercise its broad discretion by weighing the interests of the parties to determine admissibility [*CM, p. 67, §108*; *Bunning v. Cross; Peiris, p. 344*; *Wernerp. 997*]. CLAIMANT argues that its interests in admitting evidence of the Other Proceeding prevail; however, RESPONDENT will demonstrate that CLAIMANT's arguments are without merit

126. CLAIMANT argues that the Parties' interests weigh in favor of admitting the evidence; however, CLAIMANT's arguments are without merit, as the evidence will not increase the efficiency of the arbitration, was obtained by a breach of confidentiality, was not divulged as a result of RESPONDENT's negligence, and the UNCITRAL Rules of Transparency (**"Rules of Transparency"**) are not applicable.
127. CLAIMANT argues that admission of the evidence will ensure the speed and effectiveness of the proceeding [*CM, p. 67, ∫110*]. While CLAIMANT is correct in noting that conducting arbitral proceedings in a time efficient manner is a cornerstone of arbitration, this evidence will not increase the efficiency of the proceeding [*Craig/Park/Paulsson, ∫1.07*]. As previously discussed, the other arbitral proceeding concerned a contract with significant differences, rendering the evidence of RESPONDENT's behavior dissimilar enough such that the evidence would not effectively speed up the arbitration. Instead, the Tribunal would be forced to examine the differences between the contracts and the corresponding differences in RESPONDENT's behavior, effectively requiring more time and effort. Thus, admission would *not* ensure the speed and effectiveness of the proceeding.
128. CLAIMANT also alleges that the principle of confidentiality does not "hinder" admission of the PIA. CLAIMANT acknowledges the fact that confidentiality is a cornerstone of international arbitration [*De Saint Marc, p. 211*; *Fouchard/Gaillard/Goldman, p. 773 ∫1412*]. The duty of confidentiality covers the award and all decisions taken throughout the proceeding, thus, disclosure of such information is not allowed without the consent of the parties [*Malatesta, p. 49*]. The evidence of the prior arbitration was obtained through a breach of confidentiality, because CLAIMANT was not a party to the prior arbitration, and RESPONDENT did not consent to the disclosure of the information [*HKIAC Rules Art. 45*; *3 Oct. 2018 Ltr., p. 51*]. Allowing further use of the information would violate the principle of confidentiality, and thus the Tribunal is respectfully requested to hold that this weighs in favor of precluding admission of the evidence.
129. CLAIMANT further argues that RESPONDENT is less worthy of protection because of its negligence in not taking steps to prevent the disclosure of the PIA [*CM, p. 69, ∫114*]. The information regarding the Other Proceeding was disclosed either by a hack of the RESPONDENT's computer system, or by disclosure of two employees [*3 Oct. 2018 Ltr., p. 51*]. These means of disclosure cannot be attributed to RESPONDENT's negligence. First, the employees in question were under contractual obligation to keep all information regarding the Other Proceeding confidential, thus showing that RESPONDENT took measures to prevent disclosure [*PO2 p. 61, ∫41*]. Consequently, any such disclosure should be attributed to unauthorized actions by the employees, and not the

RESPONDENT's negligence. Second, RESPONDENT maintained a firewall to protect its computer system in another measure to ensure confidentiality [*PO2 p. 61, §42*]. Any subsequent hack of that computer system can only be attributed to the criminal actions of parties unrelated to the RESPONDENT. Therefore, RESPONDENT is *not*, as CLAIMANT argues, less worthy of protection, and this does not favor admission of the evidence.

130. CLAIMANT may argue at oral hearing that transparency principals or the Rules of Transparency favor admission of the evidence; however, the rules of transparency are not applicable here. The Rules of Transparency are applicable only to treaty-based investor state arbitration [*Rules of Transparency Art. 1(1)*; *Carmody p. 98*]. As this dispute concerns a private commercial transaction, the Rules of Transparency do not favor admission of the evidence.

131. The Tribunal is respectfully requested to hold that, contrary to CLAIMANT's arguments, CLAIMANT's interests do not weigh in favor of admitting evidence of the Other Proceeding.

CONCLUSION ON ISSUE THREE

132. The Tribunal has wide discretion to admit the evidence of the Other Proceeding, however; the Tribunal should preclude admission of the evidence because it is not relevant to the current proceeding, because the evidence was obtained illegally, and because CLAIMANT's interests do not weigh in favor of admission.

REQUEST FOR RELIEF

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

I. The Tribunal does not have the power to adapt the Contract;

II. CLAIMANT is not entitled to additional payment under the Contract or CISG;

III. CLAIMANT is not entitled to submit evidence of RESPONDENT's Other Proceeding.

Alexandra Bernstein Vanessa Nahigian Rachael Weatherly

Certificate and Choice of Forum

To be attached to each Memorandum

I Hiro Aragaki, on behalf of the Team for (name of School) Loyola Law School, Los Angeles hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☑ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☐ Our School is competing in both Vis East Moot and Vienna Vis Moot.

- ☐ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

- ☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)
  - ☐ Vis East Moot in Hong Kong, or
  - ☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Loyola Law School, Los Angeles

Name Hiro Aragaki

Signature Hiro Aragaki