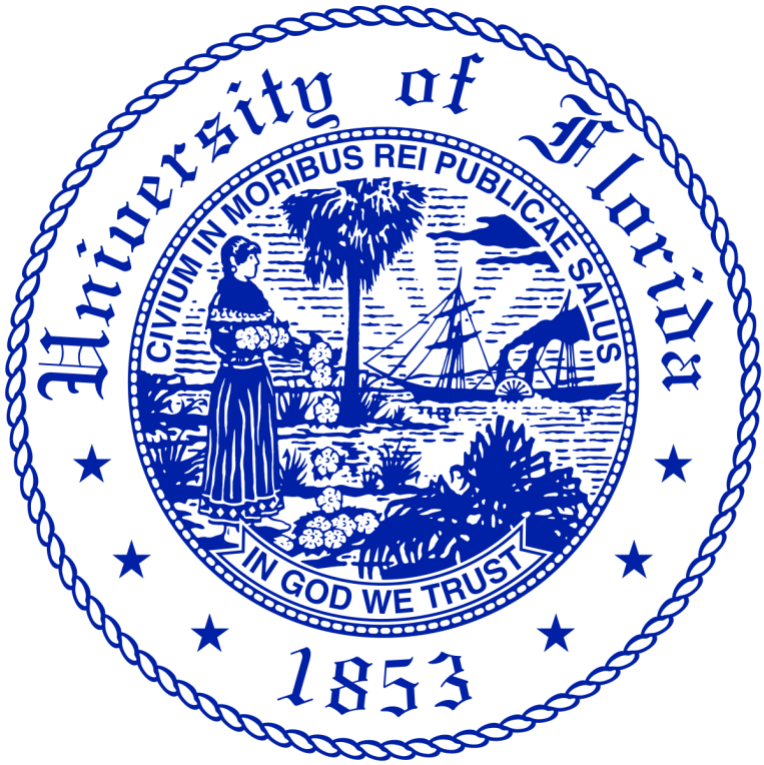
SIXTEENTH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT



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

UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW

KIERSTEN CASH • PORFÍRIO GUEIROS • ELLIOT HANEY • RYAN SCHWAMM

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AAA Rules	American Arbitration Association International Arbitration Rules (2010)	¶ 30
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980	PART 1, 3, 4
HKIAC Rules	Administered Arbitration Rules, Hong Kong International Arbitration Centre (2018)	PART 1, 2
IBA Evidence Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)	¶ 30, 32, 41, 43, 46, 47
ICC Hardship Clause	INTERNATIONAL CHAMBER OF COMMERCE, ICC FORCE MAJEURE CLAUSE 2003/ICC HARDSHIP CLAUSE 2003 (2003)	¶ 34, 38, 61, 66
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UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts Rome, 2010	13,18, PART 4(I), 103, 125-128

COMMENTARY

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Nuova Fuciniati	Tribunale Civile di Monze *Nuova Fuciniati v. Fondmentall Int'l* 14 January 1994 CLOUT case no. 54 Available at: http://cisgw3.law.pace.edu/cases/930114i3.html	¶ 86

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Egson Construcciones	Court of Appeal *Egson Construcciones S.A. (Ecosta) v. Canteras y Construcciones S.A.* 25 January 2008	¶ 27

Switzerland

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Firestone	United States District Court for the District of South Carolina *Buchanan Home & Auto Supply v. Firestone Tire & Rubber* 7 July 1981 Available at: 227 Cal. App. 3d 675	¶ 41
Frigaliment Importing Co.	United States District Court for the Southern District of New York *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.* 27 December 1960 Available at: 190 F. Supp. 116	¶ 55

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TABLE OF ABBREVIATIONS

&	and
¶	paragraph
§	section
amiable compositeur	an unbiased third party acting as mediator in a dispute between subjects of international law
Art./Artt.	Article/Articles
consensus ad idem	agreement to the same thing
CISG	United Nations Convention on Contracts for the International Sale of Goods
Convention	United Nations Convention on Contracts for the International Sale of Goods
e.g.	for example
ex aequo et bono	in the interests of fundamental fairness and equity
ex ante	before the event
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
Id.	the same
Incoterms	International Commercial Terms
inter alia	among other things
Letter Fasttrack	Letter by Fasttrack (3 October 2018)
Letter Langweiler	Letter by Langweiler (2 October 2018)
lex mercatoria	merchant law
Mr.	Mister
Ms.	Miss
No.	number/numbers
NoA	CLAIMANT's Notice of Arbitration

NY Convention	New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
p./pp.	page/pages
pacta sunt servanda	agreements must be kept
Partial Interim Award	Separate arbitration between RESPONDENT and a Mediterranean buyer
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
RNoA	Respondent's Response to Notice of Arbitration of 24 August 2018
supra	above
travaux préparatoires	preparatory work(s)
Tribunal	Arbitral Tribunal
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
US$	United States Dollars
v.	*versus* (against)
venire contra factum proprium	actions contrary to prior conduct

STATEMENT OF FACTS

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

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

21 March 2017 RESPONDENT emailed CLAIMANT to inquire about the availability of Nijinsky III—one of CLAIMANT's most successful racehorses—for its new racehorse breeding program. Due to a health crisis in Equatoriana, the Equatorianian government temporarily lifted the ban on racehorse artificial insemination. Because of this, RESPONDENT was particularly interested in acquiring frozen semen.

24 March 2017 In response to RESPONDENT's inquiry, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen at a price of US$ 99,500 per dose. CLAIMANT's offer was expressly conditioned on RESPONDENT's agreement not to re-sell CLAIMANT's product to third parties without CLAIMANT's express written consent, and on RESPONDENT's agreement to inform CLAIMANT about the use of each dose.

28-31 March 2017 RESPONDENT—finding most of CLAIMANT's proposed terms of sale acceptable—insisted that the contract be on the basis of "delivery DDP." CLAIMANT, however, was only willing to accept delivery DDP against a US$ 1,000 price increase, the transfer of certain financial customs and import risks to RESPONDENT, and the inclusion of a hardship clause to limit the additional risks borne by a traditional "delivery DDP" contract. To resolve this and other outstanding issues, the parties discussed plans for additional in-person negotiations to occur on 12 April 2017.

10-12 April 2017 In the course of further negotiations, CLAIMANT suggested use of the ICC Hardship Clause and urged the importance of having a contractual mechanism

in place for adaptation of price. In reply, RESPONDENT stated that it believed adaptation should be the job of the arbitrator. In agreement with RESPONDENT's position, CLAIMANT suggested—for the sake of clarification—that express language providing for adaptation be included in the contract.

12 April 2017 Following the in-person meeting discussing outstanding topics of negotiation, the primary negotiators for CLAIMANT and RESPONDENT were involved in a car accident that left both negotiators incapacitated. The accident precluded RESPONDENT from incorporating some of the parties' mutual understandings into the next draft of the agreement.

20 May 2017 Eventually, an agreement (**"Sales Agreement"**) was concluded between the parties for 100 doses of Nijinsky III's frozen semen at a price of US$ 100,000 per dose. The Sales Agreement called for shipment in three installments, contained a hardship clause, contained language that provided for "delivery DDP," and contained a choice of law provision in favor of Mediterranean law. The parties also concluded a standard arbitration provision ("**Arbitration Clause"**) that designated the seat as Danubia and subjected the proceedings to administration under the Hong Kong International Arbitration Centre Rules.

20 December 2017 Prior to shipment of the third installment, in a wholly unexpected turn of events, the government of Equatoriana announced a radical 30% tariff on Mediterranean imports of agricultural products, including frozen horse semen. This tariff went into effect on 15 January 2018.

20 January 2018 Three days before the scheduled delivery date, CLAIMANT was informed by Equatorianian customs officials that the new tariff applied to its upcoming shipment to RESPONDENT. Immediately upon hearing this, CLAIMANT attempted to contact RESPONDENT to work out a solution regarding the significant financial hardship that the tariff imposed on CLAIMANT.

21 January 2018 CLAIMANT and RESPONDENT held a telephone conversation regarding CLAIMANT's request that the parties reach a solution regarding the tariff. Speaking on RESPONDENT's behalf, Mr. Shoemaker informed CLAIMANT that although he personally could not authorize an adaptation of price, he was sure

that the parties could reach a solution. Specifically, Mr. Shoemaker read a prepared statement to Claimant, stating "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." Furthermore, Mr. Shoemaker fervently urged CLAIMANT to immediately authorize the shipment notwithstanding the pending nature of these renegotiations. Based on Mr. Shoemaker's comments and CLAIMANT's understanding of the parties' agreement as a whole, CLAIMANT timely shipped the third installment, expecting to temporarily bear the increased cost associated with the tariff.

12 February 2018 Before the parties could reach an agreement on an adaptation of price, RESPONDENT informed CLAIMANT that it would no longer cooperate with CLAIMANT, stopped renegotiations for an adaptation of price, and refused to pay any additional costs associated with an adaptation of price.

31 July 2018 CLAIMANT filed its Notice of Arbitration requesting payment of US$ 1,250,000, which is 25% of the price for the third semen delivery, and that RESPONDENT bear the costs of the arbitration.

2 October 2018 CLAIMANT notified this arbitral tribunal (**"Tribunal"**) that CLAIMANT had come upon credible information that RESPONDENT recently received a "Partial Interim Award" in a different arbitral proceeding. This other proceeding arose from a similar 25% tariff that increased the price of RESPONDENT's performance under a contract for the shipment of a mare to Mediterraneo. Under Mediterranean governing law and pursuant to an ICC Hardship Clause, RESPONDENT requested and was ultimately awarded an adaptation of price.

3 October 2018 RESPONDENT objected to CLAIMANT's attempt to submit evidence from the other arbitral proceeding, raising concerns that such information had been obtained by CLAIMANT either from former employees of RESPONDENT or from a hack of RESPONDENT's computer network. RESPONDENT did not disclose the perpetrator of the purported hack.

SUMMARY OF ARGUMENT

1 RESPONDENT may not promise to adapt the price due to a hardship and then disingenuously renege when that hardship materializes.

2 When parties conduct cross-border business transactions, they do so based on tacit understandings about the world in which they contract. While the international sales market is subject to a great deal of calculable fluctuation, some changes so radically disrupt the status quo that they undermine the very commercial basis upon which deals are formed.

3 For this reason, CLAIMANT and RESPONDENT agreed to include a clause in their Sales Agreement to shift the financial risk from CLAIMANT to RESPONDENT in the event of an unforeseen hardship. Furthermore, the parties intended that this clause operate in tandem with the Arbitration Clause, which the parties agreed was governed by a body of law that granted the arbitral tribunal the power and jurisdiction to adapt the contract: the law of Mediterraneo.

4 **THIS TRIBUNAL HAS THE POWER AND JURISDICTION TO ADAPT THE PRICE OF THE CONTRACT BECAUSE THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION CLAUSE (PART 1)**. The law of Mediterraneo, Equatoriana, and Danubia all allow this Tribunal to consider extrinsic evidence of party negotiations to determine what law the parties agreed should govern the Arbitration Clause. Such evidence reflects that CLAIMANT and RESPONDENT agreed that the law governing the Arbitration Clause must allow for adaptation of price. Since Mediterraneo is the only jurisdiction that gives this Tribunal this power, the parties intended that this jurisdiction govern the Arbitration Clause. Alternatively, Danubian law grants this Tribunal the power to adapt if such power has been expressly conferred upon it. This express conferral can be found at clause 12 of the Sales Agreement.

5 **PURSUANT TO ART. 34 UNCITRAL MODEL LAW, CLAIMANT MUST BE PERMITTED TO FULLY AND FAIRLY PRESENT ITS CASE (PART 2)**. Evidence that RESPONDENT received an arbitral award in a separate proceeding by arguing the very position that it now contests is both relevant to this Tribunal's determination on the merits in this case and material to the outcome. This evidence shows that, under the circumstances presented in this case, RESPONDENT intended that the Sales Agreement allow for adaptation of price due to hardship, and that RESPONDENT understood that an arbitral tribunal would have the power and jurisdiction to adapt the contract pursuant to the parties' agreement. RESPONDENT's objections to the submission of this evidence lack merit, as CLAIMANT did not engage in any illegal conduct, CLAIMANT did not breach any agreement or law obliging it to

keep the other proceeding confidential, and because RESPONDENT maintains a cause of action against those who did.

6 **PURSUANT TO CLAUSE 12 OF THE SALES AGREEMENT, CLAIMANT IS ENTITLED TO AN ADAPTATION OF PRICE (PART 3)**. Under the CISG, which governs the interpretation of the Sales Agreement, this Tribunal should interpret the contractual language in accordance with the "true intent" of the parties. The negotiation history shows that CLAIMANT and RESPONDENT shared an understanding that CLAIMANT would take on all administrative responsibilities associated with "delivery DDP" on the condition that clause 12 of the Sales Agreement temper the financial risks associated with events that rendered performance more onerous. Because a 30% tariff radically increased CLAIMANT's cost to perform, CLAIMANT is entitled to a price adaptation under clause 12 to restore the commercial equilibrium of the deal.

7 **PURSUANT TO THE UNIDROIT PRINCIPLES, OR THE CISG WHEN INTERPRETED IN ACCORDANCE WITH ITS GENERAL PRINCIPLES, CLAIMANT IS ENTITLED TO AN ADAPTATION OF PRICE (PART 4)**. The CISG contains an external gap concerning adaptation of price due to hardship. Therefore, this Tribunal should apply the appropriate domestic law to fill this gap. The UNIDROIT Principles—the domestic contract law of both the buyer and the seller—provide an adaptation of price under the circumstances presented in this case. In any event, if this Tribunal finds that the provisions of the CISG reach but do not expressly settle the circumstances of this case, CLAIMANT is still entitled to an adaptation of price pursuant to the general principles on which the CISG is based.

PART 1: THIS TRIBUNAL HAS THE POWER AND JURISDICTION TO ADAPT THE PRICE OF THE CONTRACT BECAUSE THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION CLAUSE

8 It was the parties' agreement that the law of Mediteranneo should govern the Arbitration Clause. The parties intended for the clause to allow for adaptation, and only under Mediterranean law is this possible. Because of this, the parties agreed—without including language in the Sales Agreement—that Mediterranean law governs the Arbtration Clause **(I)**. Still, even though this Tribunal believes it highly unlikely that the Arbitration Clause allows for an adaptation under the Danubian "four corner rule," this Tribunal has the power and jurisdiction to adapt the contract pursuant to an express authorization from the parties **(II)**. Therefore, under either governing law, this Tribunal has the power and jurisdiction to adapt the price.

I. This Tribunal has the power to adapt the contract because the parties agreed that the law of Mediterraneo governs the Arbitration Clause

9 The parties have agreed to conduct this arbitration on the basis of the HKIAC Rules [*PO1*]. According to Art. 36.1 HKIAC Rules, this Tribunal shall decide the substance of the dispute in accordance with the law agreed to by the Parties. Despite the parties' express designation of the seat as Danubia, the parties shared an implicit, yet prevailing, meeting of the minds that the Arbitration Clause is governed by the law of Mediterraneo [*see Exh. C5*].

10 Regardless of the procedural law this Tribunal applies to discern what law governs the Arbitration Clause, this Tribunal may consider extrinsic evidence to discern party intent. All three relevant jurisdictions have adopted the UNCITRAL Model Law [*PO1*; *PO2*]. Therefore, the UNCITRAL Model Law governs this Tribunal's inquiry as to what law governs the Arbitration Clause [*see PO1*; *PO2*]. Art. 19(2) UNCITRAL Model Law allows a tribunal to assess evidence as it sees appropriate. In accordance with this provision, extrinsic evidence is admissible where it is integral to understanding the true meaning of a contract [*Zurich Insurance*; *BQP v. BQQ*; *Icepearl Case*; *Wagners Case*].

11 In light of these principles, the Arbitration Clause is subject to the law of Mediterraneo, not the law of Danubia, because the negotiations reflect a shared intention that a domestic law that allows for adaptation should govern **(A)** and because such a finding comports with the NY Convention's principles on enforceability and interpretation of arbitration clauses **(B)**.

A. The law of Mediterraneo governs the Arbitration Clause because the parties shared the intention that a domestic law that allows for adaptation should govern the Arbitration Clause

12 In order to determine which law should govern the Arbitration Clause, this Tribunal should look past the parties' express designation of the seat as Danubia, and look to the parties' *consensus ad idem* that the governing law is that of Mediterraneo. Where there is abundant evidence that the parties' externally manifested intent constitutes a "meeting of the minds," a contract is formed on the basis of that tacit intent, rather than the contractual language [*Holmes p. 457*; *Cleanall Case*; *Manufacturer Case*].

13 Mediterranean contract law is a verbatim adoption of the UNIDROIT Principles, which allows an arbitral tribunal to adapt a contract when hardship has rendered performance more onerous [*see PO2, Artt. 6.2.1-6.2.3 UNIDROIT Principles supra PART 4(I)(C)*]. The parties agreed for the contract to be subject to adaptation, and thus could only have agreed that the law of Mediterraneo govern the Arbitration Clause. This can be discerned from the parties' negotiations of both the Sales Agreement and the Arbitration Clause itself.

14 The parties purposely incorporated a hardship clause into the Sales Agreement that provided for adaptation of the contract should a hardship render CLAIMANT's performance more onerous [*Exh. C5*]. Specifically, clause 12 of the Sales Agreement reflects the agreement between CLAIMANT and RESPONDENT that the financial risks associated with a hardship would be borne by RESPONDENT [*see Exh. C4, C5*]. This clause in the Sales Agreement is pointless unless the Arbitration Clause is governed by a law that provides a mechanism that allows the tribunal to adapt the contract. Therefore, Mediterranean law is the only logical choice and was indeed the choice made by the parties.

15 The hardship clause was a financial risk-shifting clause [*see Exh. C5*]. CLAIMANT did not intend to bear the financial risks associated with "delivery DDP," therefore the parties agreed on a hardship clause to shift those risks to RESPONDENT [*Exh. C4, C5*]. The function of the hardship clause was—as CLAIMANT put it—to "address such subsequent changes" including "changes in customs regulation or import restrictions," "additional health and safety requirements," or "comparable unforeseen events making the contract more onerous" [*Id.*]. Such an increase in CLAIMANT's costs could only be borne by RESPONDENT through an increase in the purchase price. This drafting history indicates that the parties selected Mediterranean law to govern the Arbitration Clause because it would operate in tandem with clause 12's provision for adaptation.

16 Furthermore, Ms. Napravnik (CLAIMANT's negotiator) told Mr. Antley (RESPONDENT's negotiator) that "it was important to have a mechanism in place which would ensure adaptation of the contract . . ." [*Exh. C8*]. Mr. Antley replied in agreement that "it should probably be the task of the arbitrators

to adapt the contract . . .” [*Id.*]. This exchange further reflects the meeting of the minds between CLAIMANT and RESPONDENT that the arbitral tribunal should have the power and jurisdiction to adapt the contract.

17 Following this conversation, Mr. Antley even made a handwritten note stating that a subsequent draft of the contract needed to “[c]onnect [the] hardship clause with [the] arbitration clause” [*Exh. R3*]. The only connection these two clauses could logically share is that the hardship clause provides for the remedy of adaptation and the Arbitration Clause grants the arbitral tribunal the authority to award such a remedy. This agreed-upon grant of authority required the law of Mediterraneo to govern the Arbitration Clause, and such requirement was understood and intended by both CLAIMANT and RESPONDENT.

18 Additionally, in discussions pertaining specifically to the Arbitration Clause, RESPONDENT was amicable to the governing law being the law of Mediterraneo because of the parties’ shared interest in a long-term mutually beneficial business relationship. In fact, RESPONDENT stated that “given the desirability of a long-term relationship for the mutual benefit of both parties . . . [RESPONDENT] could accept the application of the Law of Mediterraneo . . .” [*Exh. C3*]. RESPONDENT made this proposal because the law of Mediterraneo would advance its interest in a mutually beneficial relationship precisely because of its allowance for adaptation [*see Artt. 6.2.1-6.2.3 UNIDROIT Principles*]. Adaptation affords parties to a transaction the flexibility to implement the contract in the face of hardship and maintain the commercial basis of the deal, and continued implementation of the contract furthers the parties’ interest in profiting from the deal [*Maskow p. 664*]. Therefore, the parties agreed that the law of a jurisdiction that allows for adaptation must govern the Arbitration Clause.

B. Pursuant to the NY Convention’s principles on interpretation and enforceability of arbitration clauses, this Tribunal should find that the law of Mediterraneo governs the Arbitration Clause

19 Art. II NY Convention encourages this Tribunal to give effect to the parties’ intentions. Furthermore, the importance of recognizing the parties’ meeting of the minds is emphasized in the *travaux préparatoires* of the NY Convention and is echoed by commentators on the subject [*Travaux Préparatoires*; *Wolff p. 128-32*]. Therefore, a finding that the Arbitration Clause is governed by the law of Mediterraneo rather than Danubia would comport with these aims, specifically since the finding confirms the enforceability of the clause [*see Born p. 1318-19*].

20 If this Tribunal finds that the law of Danubia governs the Arbitration Clause and that the Arbitration Clause does not grant the Tribunal the power and jurisdiction to adapt the contract, the parties cannot

arbitrate the substantive issue of whether the contract can be adapted under either clause 12 or the CISG. Such a finding would run contrary to the pro-arbitration aims of the NY Convention.

21 It was the parties' agreement that the Sales Agreement provide for adaptation, and accordingly that the Tribunal has the jurisdiction to award that remedy should it be warranted by the facts of the case. The hardship provision in the Sales Agreement only properly functions if effectuated by a grant of authority to this Tribunal through the Arbitration Clause. A finding that this Tribunal has the power and jurisdiction to adapt the contract under Mediterranean law would resolve any doubt concerning the scope of arbitral issues because it would reflect an interpretation of the Arbitration Clause in favor of arbitration [*Born p. 1318-19*; *Mitsubishi Motors*].

22 Furthermore, if the law of the seat invalidates of the parties' arbitration clause, a choice must be made against such law [*see Born p. 1318-19*]. It would be nonsensical to choose a law of the seat that would lead to an inability of the Tribunal to grant the parties' contemplated remedy and accordingly to arbitrate the applicability of such remedy, and it would contravene the parties' manifested intent in this case. Therefore, the parties' intent that the law of Mediterraneo apply to the Arbitration Clause must prevail.

II. Even pursuant to the law of Danubia, this Tribunal has the power and jurisdiction to adapt the contract because the parties expressly authorized this Tribunal to do so

23 Danubian Arbitration Law has adopted verbatim Art. 28(3) UNCITRAL Model Law [*PO2*]. This provision allows the Tribunal to decide the rules applicable to the substance of the dispute "*ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so" [*Art. 28(3) UNCITRAL Model Law*]. Therefore, despite a narrow "four corner rule" approach to the interpretation of the Arbitration Clause, this Tribunal can still adapt the contract notwithstanding Danubian contract law if it has received an express conferral of power to do so [*PO2*; *see id.*].

24 Art. 28(3) UNCITRAL Model Law requires that the parties specifically empower the arbitral tribunal to award the extraordinary remedy of adaptation [*PO2*]. Even if such an express conferral cannot be located in the Arbitration Clause, where the dispute relates to a contract, "the tribunal must decide in accordance with the terms of the contract . . ." [*UNCITRAL Digest*]. Therefore, this Tribunal must look to the terms of the Sales Agreement for an express conferral of the authority to adapt the contract [*Food Services*].

25 An express conferral of the power to adapt the contract can be found at clause 12 of the Sales Agreement, which begins with the language "[s]eller shall not be responsible . . ." [*Exh. C5*]. Clause 12 exempts CLAIMANT from responsibility for "hardship, caused by additional health and safety

requirements or comparable unforeseen events making the contract more onerous" [*Id.*]. This exemption of CLAIMANT from the obligation to pay the increased cost of performance arising from hardship, in turn, requires the other party to the contract, RESPONDENT, to pay any costs that fall under the enumerated definition of hardship [*see Exh. C5*]. Therefore, clause 12 confers upon this Tribunal, even under Danubian law, the power to increase the price paid by RESPONDENT by way of an adaptation of price.

CONCLUSION ON PART 1

26 A finding that CLAIMANT and RESPONDENT agreed on the law of Mediterraneo to govern the Arbitration Clause is a finding based in sound logic deeply supported by the record. CLAIMANT and RESPONDENT carefully and deliberately included a hardship clause in the Sales Agreement that reflects their shared understanding that an adaptation of price be the remedy awarded if a contemplated hardship arose. Since it is Mediterranean law—and not Danubian law—that provides the mechanism for adaptation, the hardship provision in the Sales Agreement translates into a meeting of the minds that Mediterranean law should govern the Arbitration Clause. In any event, this "mechanism" serves as the express conferral of power to adapt the contract under Danubian law. Therefore, CLAIMANT respectfully requests that this Tribunal find that Mediterranean law governs the Arbitration Clause, or that the Tribunal has the power and jurisdiction to adapt the contract regardless of what law applies to the Arbitration Clause.

PART 2: PURSUANT TO ART. 34 UNCITRAL MODEL LAW, CLAIMANT MUST BE PERMITTED TO FULLY AND FAIRLY PRESENT ITS CASE

27 CLAIMANT submits that it must be permitted to introduce evidence from a separate arbitral proceeding in which RESPONDENT has taken the position that adaptation is allowed under the same governing contract law, the same rules of arbitration, and a similar hardship clause to this case [*see PO2, Letter Langweiler*]. Under Art. 34 UNCITRAL Model Law, an arbitral award must be set aside where a party is denied the right to use relevant means of evidence for its case [*UNCITRAL Digest*; *CLOUT Case no. 371*; *Egson Construcciones*]. CLAIMANT should not be denied the right to use evidence from the other arbitration proceeding for its case because its probative value outweighs considerations of confidentiality, illegality, and fundamental fairness.

28 Under the HKIAC Rules, this Tribunal is afforded a high degree of flexibility to deal with evidentiary matters [*Moser & Bao p. 190*; *Art. 22 HKIAC Rules*]. Under this evidentiary framework, CLAIMANT

respectfully requests that this Tribunal allow it to submit evidence from the other arbitral proceeding on the basis that it is both "relevant" and "material" to making a determination on the merits of this case **(I)** and because its admission would not run afoul of standards concerning confidentiality, illegality, and fundamental fairness **(II)**.

I. Evidence from the other arbitration is "relevant" to CLAIMANT's contention that the parties agreed that this Tribunal has the power and jurisdiction to adapt the contract, and is "material to the outcome" of this issue

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

30 As a general rule, all relevant evidence that is material to the outcome of the arbitration is admissible [*Art. 22.3 HKIAC Rules*; *Moser & Bao p. 193*]. The requirements of "relevance" and "materiality" transcend international rules of arbitral procedure, as they are featured in the UNCITRAL Model Law, IBA Evidence Rules, and domestic evidentiary codes [*see, e.g. Art. 19(2) UNCITRAL Model Law, Art. 9(1) IBA Evidence Rules, Art. 20(6) AAA Rules*]. Therefore, uniform arbitration rules such as the UNICTRAL Model Law and IBA Evidence Rules should be referred to for more specific guidance and commentary on the evidentiary provisions contained at Art. 22 HKIAC Rules [*Moser & Bao p. 191*; *Intel Capital*].

31 Under this evidentiary framework, CLAIMANT respectfully requests that this Tribunal admit evidence from the other arbitration because it is relevant to establish CLAIMANT's submission that the parties agreed that this Tribunal could adapt the contract in this case **(A)** and because evidence of RESPONDENT's position in the other arbitration is material to the outcome of this case, as it would afford this Tribunal a more complete consideration of whether RESPONDENT intended for an adaptation in this case **(B)**.

A. Evidence from the other arbitration is relevant to establish that the parties agreed that this Tribunal has the power to adapt the contract in this case

32 The IBA Evidence Rules are commonly adopted or referred to in HKIAC arbitration [*see Moser & Bao p. 191*, *Intel Capital supra* ¶ *4*]. The IBA's concept of "relevance" suggests that the requested evidence must be useful in establishing the truth of CLAIMANT's factual allegations on which its legal conclusions are based [*Raeschke-Kessler p. 22*]. Also, arbitrators should be reluctant to limit the

admissibility of evidence on relevance grounds—since even evidence of questionable relevance plays a role in the proof of a party's theory [*Von Mehren & Salomon p. 290*].

33 Evidence of RESPONDENT's position in the other arbitral proceeding is a relevant fact that proves CLAIMANT's theory that the parties intended for the contract to allow for adaptation in this case. It is CLAIMANT's submission the parties agreed for this transaction to contemplate an adaptation of price if changed circumstances rendered CLAIMANT's performance more onerous [*see infra PART 2-3*]. The fact that—when performance became more onerous in an analogous transaction—RESPONDENT expected an adaptation of price is proof of RESPONDENT's understanding that the same remedy is available in this case [*PO2*].

34 RESPONDENT not only sought the same remedy in the other arbitration, but RESPONDENT interpreted the same governing law and a similar hardship clause to provide for that remedy [*PO2*]. Both the other arbitration and the Sales Agreement in this case are governed by Mediterranean contract law [*Compare Exh. C5 with PO2*]. Furthermore, the contract in the other transaction contained a "delivery DDP" term and an ICC Hardship Clause [*PO2*]. Similarly, the Sales Agreement in this case contains a "delivery DDP" term and a modified ICC Hardship Clause [*Exh. C5*].

35 Evidence indicating that RESPONDENT interpreted a strikingly similar contract and Mediterranean contract law as entitling it to an adaptation in the face of hardship is relevant because it proves that RESPONDENT agreed with CLAIMANT that the Sales Agreement and the Arbitration Clause in this case allow for an adaptation. Therefore, this Tribunal should allow CLAIMANT to submit it for this Tribunal's consideration of the merits of the case.

B. Evidence of RESPONDENT's position in the other arbitration is material to this Tribunal's opportunity to fully and fairly consider whether the parties agreed that this Tribunal could adapt the contract

36 To satisfy the "materiality" requirement, this Tribunal must find that its consideration of the evidence from the other arbitration is necessary to determine whether a factual allegation is true [*Raeschke-Kessler p. 22*]. This requirement empowers the Tribunal to consider only evidence that is necessary "to substantiate a contention" [*O'Malley p. 57*]. To be "necessary" in this respect does not mean that the case cannot be won without the particular item of evidence, but rather that the case cannot be "optimally presented" without it, or that the evidence would have a tendency to influence this Tribunal's determination [*Waincymer p. 859*; *UNCITRAL Draft Guidelines*]. Similar to relevance, since the threshold for "materiality" can be easily met, this Tribunal should err on the side of inclusion [*Waincymer pp. 859-60*].

37 In the other arbitration, RESPONDENT knew and contended that adaptation is allowed under similar circumstances and identical governing law to this case [*PO2*; *Letter Langweiler*]. Evidence from the other proceeding is material to the critical determination of whether RESPONDENT had the same understanding in this case. Such a determination hinges on CLAIMANT's submission that RESPONDENT shared CLAIMANT's intent that the Sales Agreement provided for adaptation, and on whether CLAIMANT and RESPONDENT tacitly agreed that Mediterranean law govern the Arbitration Clause.

38 The details of the Partial Interim Award reflect that RESPONDENT shares with CLAIMANT the same interpretation of Mediterranean contract law and the same interpretation of the Sales Agreement and Arbitration Clause itself [*PO2*; *Letter Langweiler*]. Specifically, RESPONDENT's contentions in that arbitration are material to the resolution of both the procedural and substantive issues presented in this case [*see PO1*]. In the other proceeding, RESPONDENT argued that the ICC Hardship Clause—read in cooperation with the "delivery DDP" term—provided for an adaptation of price and that under the law of Mediterraneo, the tribunal had the power and jurisdiction to adapt the price [*PO2*].

39 If admitted, this evidence would afford this Tribunal the most comprehensive understanding of RESPONDENT's state of mind when it negotiated and assented to the contract at issue. Therefore, this evidence is "material to the outcome" of this case. Without consideration of such evidence, this Tribunal would lack the ability to conduct a comprehensive inquiry into RESPONDENT's state of mind. Such a deficiency would render this Tribunal unable to reach a justifiable and valid decision on the merits of the case.

II. This Tribunal must permit CLAIMANT to admit evidence from the other arbitration proceeding because its probative value outweighs concerns of confidentiality and illegality

40 RESPONDENT's objection that this evidence has been obtained by illegal means is inconsequential to this Tribunal's analysis of its admissibility [*see Letter Fasttrack*]. This Tribunal should allow CLAIMANT to submit the evidence from the other arbitration because CLAIMANT did not participate in the unlawful activity that led to its disclosure **(A)** and because this evidence is not precluded from admission by the doctrines of privilege or confidentiality, or by fundamental notions of procedural fairness **(B)**.

A. This evidence is admissible because CLAIMANT did not participate in the unlawful activity that led to its disclosure

41 The "clean hands" doctrine is an international equitable principle rooted in Roman law [*Encyclopedia of Public Int'l Law*]. This doctrine has empowered courts to preclude parties from prevailing by way of

their own wrongdoing [*Inceysa Vallisoletana*; *Firestone*]. This doctrine is reflected in the "good faith" requirement contained in the IBA Evidence Rules, and if applied to this case, should not preclude CLAIMANT from introducing evidence from the other arbitration, because CLAIMANT has "clean hands" with respect to the obtaining of this evidence.

42 CLAIMANT learned of the other arbitration from a former employee (Mr. Velazquez) of RESPONDENT's adversary in the other proceeding [*PO2*]. The text of the Partial Interim Award has been arranged to be shared with CLAIMANT by a third party company [*Id.*]. However, CLAIMANT has not been availed of the means by which that third party obtained the award [*Id.*]. Therefore, rumors of that company's malfeasance in obtaining the Partial Interim Award have no bearing on this evidentiary issue [*see PO2*]. Furthermore, CLAIMANT is not a party to any of the confidentiality provisions that bind the parties to the other arbitration.

43 The IBA Evidence Rules set forth specific guidelines within the bounds of the broad discretion afforded to this Tribunal in deciding evidentiary matters. Specifically, Art. 9(7) IBA Evidence Rules requires that the parties "conduct [themselves] in good faith in the taking of evidence . . ." In this case, CLAIMANT has not run afoul of this mandate because the party that breached confidentiality or hacked RESPONDENT's computer network was not CLAIMANT, rather it was either Mr. Velazquez or a former employee of RESPONDENT's [*PO2*]. Neither of those individuals nor the third party company that agreed to provide the evidence to CLAIMANT is affiliated with CLAIMANT in any way [*Id.*].

44 Where the source of documents is legally questionable, but the party that possesses them was not the wrongdoer with respect to their procurement, tribunals have admitted the challenged evidence [*Caratube International*; *see ConocoPhillips*]. Since CLAIMANT has not participated in any unlawful act to obtain this evidence, nor has it acted in bad faith to RESPONDENT's detriment, it has "clean hands" and should not be precluded from submitting evidence from the other arbitral proceeding.

B. This Tribunal must not preclude CLAIMANT from submitting this evidence on the basis of privilege, confidentiality, or other notions of fundamental fairness

45 Art. 45 HKIAC Rules calls for the confidentiality of any information relating to an arbitral proceeding. It specifically bars disclosure by a "party or party representative" to the proceeding [*Art. 45.1 HKIAC Rules*]. While it is clear that either Mr. Velazquez or the former employee of RESPONDENT that may have leaked the evidence has violated an express duty to maintain confidentiality, CLAIMANT is a mere recipient of the wrongfully obtained information, and no HKIAC rule or other provision bars CLAIMANT's submission of this evidence.

46 The inquiry does not end there. The IBA Evidence Rules do not impose a rule of evidentiary exclusion on the details of the other arbitration. Art. 9(b) IBA Evidence Rules requires exclusion only if the evidence is subject to "legal impediment or privilege . . ." The concept of "privilege" in international arbitration generally refers to issues of professional secrecy between an attorney and client, or within settlement discussions, and imposes a duty of confidentiality only on the parties to these communications or subject matter [*Born p. 2375-78*; *IBA Commentary p. 35*]. Although evidence from the other arbitration is subject to the HKIAC's confidentiality provisions, it is not subject to any privilege contemplated by the IBA Evidence Rules.

47 While the IBA Evidence Rules do not define the term "legal impediment," Art. 9.3 directs the tribunal to consider "fairness and equality" in determining whether such an impediment exists [*Ashford p.160*; *Waincymer p. 814*]. An analysis of the "fairness and equality" factor weighs in favor of the admission of evidence from the other arbitration. Admission here—which would support CLAIMANT's contention that RESPONDENT intended for an adaptation of the contract under the circumstances of this case—would not improperly harm RESPONDENT in any way. The irreparable harm that stems from disclosure of confidential arbitration material occurred when a non-party to this proceeding improperly acquired the information [*PO2*]. That conduct should be considered separate and distinct from CLAIMANT's submission of the evidence into this proceeding.

48 While international arbitral policy strongly disfavors obtaining evidence by unlawful means, the salient inquiry is whether RESPONDENT would be denied "fairness and equality" in this arbitration as a result of CLAIMANT's submission of evidence regarding RESPONDENT's position in the other proceeding. While RESPONDENT may have been irreparably harmed by a non-party acquiring confidential arbitration information, that non-party's conduct is discouraged by the availability of a separate civil or criminal action against that party.

49 No applicable provision on confidentiality, privilege, legal impediment, or otherwise applies to CLAIMANT's submission of evidence from the other arbitral proceeding. Furthermore, the use of this evidence in this proceeding is not fundamentally unfair or prejudicial to RESPONDENT. Therefore, this Tribunal should allow CLAIMANT to submit the evidence in this proceeding.

CONCLUSION ON PART 2

50 In order for this Tribunal to conduct a full and fair analysis of precisely what CLAIMANT and RESPONDENT truly agreed to, this Tribunal must admit evidence from the other arbitral proceeding. To the extent that RESPONDENT may argue it was obtained by illegal means, this Tribunal must bifurcate the illicit acts of Mr. Velazquez, a former employee of RESPONDENT, or the company that

may have hacked RESPONDENT's computer network from the innocent conduct of CLAIMANT, a mere recipient of the information. In doing so, CLAIMANT respectfully requests a finding that evidence from the other arbitration is both "relevant" and "material to the outcome" of this case, and therefore admissible under the HKIAC Rules.

PART 3: PURSUANT TO CLAUSE 12 OF THE SALES AGREEMENT, CLAIMANT IS ENTITLED TO AN ADAPTATION OF PRICE

51 The parties selected the law of Mediterraneo, including the CISG, to govern the Sales Agreement [*Exh. C5*]. Since a dominant theme of the CISG is the role of the contract made by the parties, the inquiry into whether price can be adapted due to an unforeseen radical tariff should begin with an analysis of the contract itself [*Honnold p. 2*].

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

53 Clause 12 provides for adaptation because RESPONDENT "knew or could not have been unaware" of CLAIMANT's intent that it provide for adaptation [*Art. 8(1) CISG*] **(I)**, because "a reasonable person of the same kind" as RESPONDENT would have interpreted clause 12 to provide for adaptation [*Art. 8(2) CISG*] **(II)**, and because the language of clause 12, standing alone, provides for adaptation [*see Art. 8(3) CISG*] **(III)**.

I. RESPONDENT "knew or could not have been unaware" of CLAIMANT's intent that clause 12 provides for adaptation

54 The salient function of Art. 8(1) CISG is that if the parties share a common understanding of the meaning of contractual language, that understanding prevails [*Farnsworth pp. 96-99*; *UN Commission*; *MCC Marble*]. Here, the prevailing shared understanding was that clause 12 provided for an adaptation if a hardship ensues.

55 Art. 8(1) CISG instructs the Tribunal to apply a subjective test to discern the parties' intended interpretation of the contractual language, and Art. 8(3) CISG requires consideration of "all relevant circumstances of the case . . ." [*Farnsworth pp. 95-102*; *Frigaliment Importing Co.*]. Therefore, the shared intent that clause 12 provides for an adaptation can be discerned from the parties' negotiations of the term "delivery DDP" **(A)** and from the parties' negotiations of clause 12 **(B)**.

A. The parties used the Incoterm "delivery DDP" to shift only administrative responsibilities to CLAIMANT, and tempered the financial risks through a hardship clause

56 Under Art. 6 CISG, a mutually agreed upon derogation from any of the provisions governed by the CISG will be honored in accordance with the true intent of the parties [*Coetzlee pp. 6-11*; *Lookofsky p. 436*]. Since a delivery term may serve as a derogation from the CISG's provisions, the delivery term "DDP" is a provision that may be modified to reflect the parties' true intent [*Lookofsky p. 436*].

57 In an email to CLAIMANT on March 28, 2017, RESPONDENT proposed that the transaction be "on the basis of delivery DDP" [*Exh. C3*]. "Delivery DDP" is a reference to the Incoterm "Delivered Duty Paid," which traditionally means that "the seller bears the costs and risks involved in the delivery of the goods, including tariffs" [*Incoterms Rules*]. However, this was not the meaning of "delivery DDP" ultimately incorporated into the Sales Agreement. Rather, the parties' intended only to shift the administrative responsibilities associated with "delivery DDP" to CLAIMANT ***(i)***, while RESPONDENT bore the financial risks that fell under the hardship clause ***(ii)***.

i. The parties agreed that "delivery DDP" would shift administrative responsibilities, but not financial responsibilities, to CLAIMANT

58 The parties intended for CLAIMANT to handle all administrative responsibilities concerning shipment because of CLAIMANT's expertise in the transportation of its product [*see, e.g. NoA, Exh. C1, C3, C8*]. CLAIMANT was assigned all shipping responsibilities because there was a lower risk of damage to the product, CLAIMANT was more familiar with import formalities, and shifting administrative responsibilities to CLAIMANT allowed the parties to transact on "commercially much more favorable terms" [*NoA*; *Exh. C8*].

59 RESPONDENT not only understood the benefits of assigning CLAIMANT these administrative responsibilities but in fact RESPONDENT was the party that initially suggested doing so [*Exh. C1*]. RESPONDENT's reason for initially soliciting an offer from CLAIMANT—rather than another breeder—was CLAIMANT's "considerable experience with the use of artificial insemination . . ." [*Id.*]. Moreover, the very reason RESPONDENT suggested "delivery DDP" was "[CLAIMANT's] much greater experience in the shipment of frozen semen *including the necessary export and import documentation* . . ."—a specific reference to an administrative task, rather than a financial burden [*Exh. C3*] (emphasis added).

ii. The financial risks normally associated with "delivery DDP" were allocated to RESPONDENT through the hardship clause

60 In an email to RESPONDENT on March 31, 2017, CLAIMANT indicated that it was not willing to take on "further risks" imposed by a "delivery DDP" term in the Sales Agreement [*Exh. C4*]. These

"further risks" were defined in the very next sentence of CLAIMANT's email: "in particular not those associated with changes in customs regulation or import restrictions" [*Id.*]. CLAIMANT then provided an example of a previous incident where a change in customs regulations—specifically, a health and safety requirement—resulted in a radical increase in CLAIMANT's cost of performance [*Id.*]. To account for these financial risks, CLAIMANT suggested the inclusion of a hardship clause [*Id.*].

61 RESPONDENT understood CLAIMANT's intention that the hardship clause reallocate the financial risks associated with "delivery DDP." In response to CLAIMANT's suggestion of the ICC Hardship Clause, RESPONDENT made a note regarding the ICC clause's breadth, and through continued negotiations arrived at the hardship language contained in clause 12 [*see Exh. R2, R3, C5*]. Notably, the parties integrated language nearly identical to CLAIMANT's email into clause 12: "Seller shall not be responsible for . . . hardship, caused by *additional health and safety requirements* . . ." [*Exh. C5*] (emphasis added). This indicates that RESPONDENT understood that it bore these financial risks by way of the hardship clause.

62 Because CLAIMANT suggested a hardship clause to temper the risks associated with a "delivery DDP" term, RESPONDENT "knew or could not have been unaware" that clause 12 functioned to limit the scope of "delivery DDP," rather than conflict with it [*Exh. C4*; *see Art. 8(1) CISG, Exh. C5*]. RESPONDENT could not possibly read "delivery DDP" to possess any other meaning than that intended by CLAIMANT because such a contrary reading would render clause 12 useless.

B. CLAIMANT is entitled to an adaptation because it was the parties' shared intent that clause 12 provides for an adaptation of price in the face of a radical unforeseen tariff

63 The shifting of financial risk associated with a traditional "delivery DDP" Incoterm was done so through the hardship language in clause 12 of the Sales Agreement [*see Exh. C5*]. The parties shared the understanding and intent that clause 12 encompassed unforeseen radical changes in customs regulations and import restrictions ***(i)*** and that if such circumstances arose, CLAIMANT was entitled to an adaptation of price ***(ii)***.

i. CLAIMANT expressed to RESPONDENT that the hardship clause encompasses customs regulations and import restrictions

64 The 30% Equatorianian tariff falls under clause 12's definition of "hardship." When discussing "additional health and safety requirements" with RESPONDENT, CLAIMANT referenced a prior instance when, after contracting to ship mares to Danubia for natural coverage, a foot and mouth disease crisis caused the Danubian government to impose a quarantine and testing requirements that increased CLAIMANT's costs by 40% [*PO2*; *Exh. C4*]. RESPONDENT was aware of these prior events because they were widely reported in the press [*PO2*].

65 Since the prior Danubian contract was for natural coverage rather than artificial insemination, RESPONDENT "knew or could not have been unaware" that "health and safety requirements" mentioned by CLAIMANT did not exclusively refer to a quarantine or testing requirements for natural coverage, but rather that it served as an example representing a broader range of financial import restrictions that could be imposed on frozen semen [*see PO2*; *Exh. C4, C5*]. The 30% tariff on agricultural imports including frozen horse semen falls into this category, as it is an import restriction imposed in response to a health and safety regulation levied by the Mediterranean government [*Exh. C6*].

66 Additionally, the fact that CLAIMANT and RESPONDENT ultimately agreed to a "narrower" hardship clause than the ICC Hardship Clause is not dispositive that clause 12 fails to reach the circumstances of this case [*Exh. R3*]. Rather, after negotiations between the parties, clause 12 still expressly encompassed events making performance "more onerous," namely, changes in customs regulations that radically increase the price of performance [*Exh. C5*].

ii. CLAIMANT expressed to RESPONDENT that the hardship clause allows for adaptation

67 "A hardship clause without a sanction is hardly worth the paper on which it is written" [*Schmitthoff II p. 230*]. In an email to RESPONDENT on March 31, 2017, CLAIMANT expressed its intent that the hardship clause be included for the very purpose of a price adaptation [*Exh. C4*]. Specifically, CLAIMANT explained that because unforeseen events could "destroy the commercial basis of the deal . . . a hardship clause should be included in the contract to address such subsequent changes" [*Id.*]. What was meant by "address such subsequent changes" can only be that the price be increased after the conclusion of the contract to account for an increased burden imposed by a hardship.

68 Furthermore, Ms. Napravnik (CLAIMANT's negotiator) told Mr. Antley (RESPONDENT's negotiator) that it was important to CLAIMANT that the contract have a mechanism for adaptation [*Exh. C8*]. Mr. Antley believed, irrespective of the language in the contract, that adaptation was an appropriate remedy in this transaction [*see id.*]. Thus, the parties possessed a shared understanding, or RESPONDENT "could not have been unaware," that CLAIMANT intended for clause 12 to provide for an adaptation of price [*Art. 8(1) CISG*].

69 Coupled with the fact that CLAIMANT expressed interest in a long-term relationship that would be "mutually beneficial," it is further evident that clause 12 was intended to preclude a scenario in which unforeseen events caused avoidance of the contract [*see, e.g. Exh. C2, C3, C4, C8*]. RESPONDENT not only understood that this was CLAIMANT's intention, but in reply RESPONDENT confirmed the

"desirability of a long-term relationship for the mutual benefit of both parties" [*Exh. C3*]. The inclusion of a hardship clause directly furthers this interest.

70 These communications show that CLAIMANT intended to profit from its sale of Nijinsky III's frozen semen and that RESPONDENT intended to profit either from the offspring produced or from the resale of the doses [*Exh. C8*]. Because the parties shared an intent to profit from this transaction, they included a clause that would prevent either party from incurring a financial loss due to unexpected hardship [*see Exh. C5*]. They did so by providing for an adaptation of price that could restore the commercial basis of the deal [*see id.*].

II. Even if RESPONDENT did not understand CLAIMANT's intent, a "reasonable person of the same kind" as RESPONDENT would have understood that clause 12 provides for an adaptation under the circumstances presented in this case

71 Where subjective intent cannot be discerned, Art. 8(2) CISG contains a completely objective standard. Therefore, should the Tribunal find that the parties had different understandings of clause 12, the language should be interpreted according to Art. 8(2) CISG [*Used Rotary Case*]. Under Art. 8(2) CISG, the focus shifts from the party making the statement to the listener. Statements and conduct of a party should be interpreted the way "a reasonable person of the same kind as the other party" would have interpreted them [*Art. 8(2) CISG*]. Like Art. 8(1) CISG, Art. 8(2) CISG may be used to interpret contractual language [*see CISG-AC 3*, *Honnold p. 153*, *UN Conference supra ¶ 45*; *Heaters Case*].

72 RESPONDENT initially contacted CLAIMANT seeking a sale of frozen racehorse semen rather than natural coverage because of a health crisis in Equatoriana that resulted in a temporary lift on the ban on racehorse artificial insemination [*Exh. C1, C6*]. On several occasions, RESPONDENT referenced the Equatorianian political climate when communicating with CLAIMANT [*Exh. C1, C3*]. Even more strikingly, CLAIMANT mentioned to RESPONDENT a particular instance during a different transaction that resulted in heightened import restrictions rendering performance more burdensome [*Exh. C4*]. RESPONDENT was aware that this incident placed CLAIMANT in financial distress [PO2].

73 Given the difficulty associated with the shipment of goods across state lines, RESPONDENT lauded CLAIMANT's expertise and efficiency as the reason for suggesting that CLAIMANT bear all risks associated with delivery [*Exh. C1, C3*]. However, CLAIMANT objected, and the parties ultimately negotiated a hardship clause to temper the financial risks associated with such responsibility [*Exh. C4*; *see Exh. C5*].

74 Furthermore, both parties expressed the intention that their relationship be "long-term" and "mutually beneficial" [*Exh. C2, C3*]. Not only did the transaction at issue involves three shipments over six

months, but RESPONDENT expressed interest in transactions "go[ing] beyond this single purchase" [*Exh. C3, C5*].

75 Art. 8(2) CISG directs the Tribunal to discern the perspective of an objective "reasonable person of the same kind" as RESPONDENT. Such a person would have been aware of the Equatorianian political climate, its potential to destroy the commercial basis of the deal, and CLAIMANT's overt intention that the Sales Agreement account for such a possibility. Such a person would have been aware of CLAIMANT's objection to "delivery DDP," and of CLAIMANT's request that the hardship clause "address such subsequent circumstances" [*Exh. C4*]. CLAIMANT even asked Mr. Antley (RESPONDENT's negotiator) to include explicit adaptation language in the Sales Agreement [*Exh. C8*]. Finally, such a person would have both understood and possessed RESPONDENT's intention to maintain a long-term, mutually profitable relationship. It is implied in contracts governed by the CISG that parties are motivated by mutual benefit and economic gain [*Kastely p. 591*]. Therefore, such a person could not have expected CLAIMANT to enter into a contract from which it would not profit.

76 In summary, a "reasonable person of the same kind" as RESPONDENT—in light of CLAIMANT's overtly manifested intent, the surrounding circumstances, and possessing the requisite motivations—would have interpreted clause 12 to provide for an adaptation of price due to an unforeseen radical tariff.

III. The meaning of the plain language of clause 12 encompasses as a "hardship" an unforeseeable radical tariff and provides for an adaptation of price

77 Under Art. 8 CISG, the scope of a contractual responsibility is examined according to the parties' intent, and regard must be given to both the text of the contract and the surrounding circumstances [*Art. 8(3) CISG*; *Peterkova pp. 153-54*]. Art. 8(3) CISG requires that consideration be given to the typical meaning of the words used by the parties and within standard language [*Schlechtriem & Schwenzer §§41-42*; *Bugg p. 49*; *Coke Case*; *Mattress Case*].

78 When analyzing clause 12 objectively, the "catch-all" phrase at the end of the clause which reads, "Seller shall not be responsible for . . . hardship, caused by additional health and safety requirements *or comparable unforeseen events making the contract onerous*," frees CLAIMANT from liability caused by an unforeseen radical tariff that drastically increases the cost of performance [*Exh. C5*] (emphasis added). Furthermore, the use of the word "onerous" was purposeful to not only limit CLAIMANT's liability when performance is impossible, but also when it becomes unduly burdensome [*see id.*].

79 Additionally, the concept of "hardship," a word deliberately included in clause 12, is typically directed at adaption of the contract [*Rimke p. 197*]. The word "hardship" generally includes deterrents whether personal, financial, or otherwise [*Schmitthoff I p. 199*]. This concept is intended to solve the problem

of fundamentally altered circumstances through adaptation to the new situation [*Rimke p. 199*]. Therefore, a reasonable third person would conclude that by mutually agreeing to use the term "hardship" in clause 12, the parties agreed that the clause contemplate price adaptation [*see Exh. C5, id.*].

CONCLUSION ON PART 3

80 Despite RESPONDENT's contention that clause 12 is "narrowly worded," RESPONDENT "knew or could not have been unaware" of CLAIMANT's intent that it encompass as a "hardship" the unforeseen radical tariff imposed by the Equatorianian government. Furthermore, RESPONDENT "knew or could not have been unaware" that clause 12 allows for an adaptation of price. In any event, a reasonable, objective interpretation of clause 12 in light of CLAIMANT's manifested intent would lead a "person of the same kind" as RESPONDENT to understand that clause 12 affords CLAIMANT an adaptation. Finally, the plain language of clause 12, standing alone, provides for an adaptation of price under the circumstances of this case. For these reasons, CLAIMANT respectfully requests that this Tribunal find that CLAIMANT is entitled to payment of US$ 1,250,000 or some other amount as a result of an adaptation of price.

PART 4: PURSUANT TO THE UNIDROIT PRINCIPLES, OR THE CISG WHEN INTERPRETED IN ACCORDANCE WITH ITS GENERAL PRINCIPLES, CLAIMANT IS ENTITLED TO AN ADAPTATION OF PRICE

81 The Sales Agreement is governed by the CISG [*see Exh. C5 supra ¶ 44*]. The CISG contains an external gap on the subject of hardship adaptation. Therefore, CLAIMANT is entitled to an adaptation of price under the applicable domestic law, the UNIDROIT Principles **(I)**. Alternatively, the CISG contains an internal gap on the issue of hardship adaptation, and interpreted in accordance with the Convention's general principles, the CISG allows for price adaptation due to hardship **(II)**. Regardless of what methodology this Tribunal chooses to employ, international public policy favors performance, rather than avoidance of contractual obligations, and a failure by this Tribunal to grant CLAIMANT an adaptation would run contrary such policy **(III)**.

I. CLAIMANT is entitled to an adaptation of price because Artt. 6.2.1 through 6.2.3 UNIDROIT Principles afford CLAIMANT the remedy of an adaptation under the facts of this case

82 An external gap is a matter neither governed nor settled by the CISG [*Schwenzer p. 115*; *Schlechtriem & Schwenzer p. 96*]. The standard treatment is that such a gap can be settled by domestic law [*Ferrari p.*

471]. Since the CISG contains an external gap on the subject of hardship **(A)**, this Tribunal should resort to applicable domestic law, here, the UNIDROIT Principles **(B)**. As a result, Artt. 6.2.1 through 6.2.3 UNIDROIT Principles afford CLAIMANT an adaptation of price **(C)**.

A. This Tribunal must apply the UNIDROIT Principles because the CISG contains an external gap concerning adaptation of price due to hardship

83 An external gap in the CISG is one regarded as "neither governed nor settled by the CISG" [*see Schwenzer p. 115, Schlechtriem & Schwenzer p. 96 supra* ¶ *75*] or is an issue expressly excluded under Art. 4 CISG. This tribunal should consider the concept of hardship an external gap under the CISG because it is "neither governed nor settled by" Art. 79's regulation of "impediment" ***(i)*** or in any event, because adaptation in the face of hardship is an issue of contractual validity expressly excluded by Art. 4 CISG ***(ii)***.

i. The CISG neither governs nor settles the issue of hardship

84 The inquiry into whether hardship is an external gap in the CISG begins with the question of whether the subject is "governed by" the Convention [*McMahon p. 1002*; *see Art. 7(2) CISG*]. The situation of "hardship" which increases the cost of performance is not a matter governed by the CISG. While Art. 79 CISG discusses "impediment" to performance, this provision fails to reach invocation of changed circumstances and excuses liability only "for failure to perform" [*Art. 79 CISG*]. The Art. 79 CISG concept of "impediment" should not be interpreted broadly because if the drafters intended to regulate all matters that could possibly arise in a sales transaction, there would be no need for gap-filling mechanisms [*Schlechtriem & Schwenzer p. 103*].

85 In fact, the drafters sought to exclude the very doctrine of hardship from the CISG. Recourse to the *travaux préparatoires* to interpret the CISG accords with the Art. 31 Vienna Convention's general treaty interpretation principles [*Schlechtriem & Schwenzer p. 102*]. The very term "impediment" was substituted for the word "circumstances" in order to preclude Art. 79 CISG from providing a remedy where performance merely became more burdensome [*Honnold p. 483*]. Furthermore, as a reason not to adopt a proposed modification of Art. 79 CISG, the drafters specifically stated their intent not to introduce the doctrine of *l'imprevision*—the French equivalent of hardship—into what would ultimately become Art. 79 [*UN Conference*]. Additionally, the drafters rejected a separate proposed provision for hardship [*UNCITRAL Yearbook*]. Therefore, the drafters intended that the concepts of "impediment" and "hardship" be separate and distinct.

86 In summary, the term "impediment" in Art. 79 CISG does not encompass hardship. Courts have opted to apply domestic law rather than the CISG in cases where hardship is claimed [*Société Romay*;

see Nuova Fucinati]. Therefore, this Tribunal should find that there is an external gap in the CISG regarding a promisor's invocation of radically changed circumstances making performance more onerous.

ii. Art. 4 CISG expressly excludes the issue of adaptation in the face of hardship from the CISG's scope because it is an issue of contractual validity

87 In any event, the term "hardship" is an issue of contractual validity, which is expressly excluded from the CISG's application [*Art. 4 CISG*]. In fact, the CISG Advisory Council took note of the fact that adaptation of a contract due to hardship is regarded by some domestic legal systems as a validity issue, rendering hardship—especially where the disadvantaged party still performs—a validity issue excluded from the CISG's coverage [*CISG-AC 7*].

88 Moreover, although the CISG found outright categorization of hardship as an external issue of a validity "not convincing or persuasive," consideration of the particular circumstances of this case weigh in favor of characterizing adaptation in the face of hardship as an external gap [*see CISG-AC 7*]. While it is arguable that, standing alone, an event rendering performance more onerous has some overlap with CISG's the concept of "impediment," such overlap with Art. 79 CISG dissolves when CLAIMANT performs and then seeks an adaptation, rather than seeking excusal for non-performance—the remedy contemplated by Art. 79 [*Exh. C7*].

89 At the point in time when CLAIMANT requests an adaptation of price pursuant the clause 12 of the Sales Agreement, the parties are no longer bound by a valid contract [*see Exh. C7*]. Rather, CLAIMANT has initiated renegotiations of the price term—a term that is re-validated at the moment of agreement between the parties, or in this case, the moment in time when this Tribunal upholds the validity of the adaptation provisions of the contract and finds that CLAIMANT is entitled to an adaptation of price.

B. This Tribunal must apply the UNIDROIT Principles because they are the domestic law applicable to fill this external gap

90 Matters categorized as an external gap in the CISG are settled by the applicable domestic law. Since the contract law of both Mediterraneo and Equatoriana has adopted verbatim the UNIDROIT Principles, Artt. 6.2.1 through 6.2.3 UNIDROIT Principles are the applicable domestic provisions this Tribunal must employ to resolve this issue [*see PO1*].

C. CLAIMANT is entitled to an adaptation of price under Artt. 6.2.1 through 6.2.3 UNIDROIT Principles

91 This case falls under the "hardship" provisions of the UNIDROIT Principles. When hardship arises, Art. 6.2.1 UNIDROIT Principles binds the disadvantaged party to perform subject to Artt. 6.2.2 and

6.2.3 UNIDROIT Principles. Despite the imposition of the tariff, CLAIMANT still authorized shipment [*Exh. C8*]. Therefore, if the tariff satisfies the Art. 6.2.2 UNIDROIT Principles' definition of "hardship," CLAIMANT is entitled to request renegotiations. Should renegotiations fail, CLAIMANT may seek adaptation from this Tribunal [*Art. 6.2.3 UNIDROIT Principles*].

i. CLAIMANT encountered a "hardship" under Art. 6.2.2 UNIDROIT Principles

92 Art. 6.2.2 UNIDROIT Principles defines "hardship" as "a situation where the occurrence of events fundamentally alters the equilibrium of the contract," provided that those events meet the requirements contained in subparagraphs (a) to (d) [*Comment 1 to Art. 6.2.2 UNIDROIT Principles*]. Whether an alteration is "fundamental" depends on the circumstances present on a case-by-case basis [*Rimke p. 238*].

93 The 30% tariff "fundamentally alter[ed] the equilibrium of the contract" [*Art. 6.2.2 UNIDROIT Principles*]. The equilibrium of a contract may be altered through "a substantial increase in the cost for one party of performing its obligation" [*Comment 2(a) to Art. 6.2.2 UNIDROIT Principles*]. A substantial increase in the cost of performance has prompted tribunals to adapt a contract pursuant to the UNIDROIT Principles [*Raw Materials Case*; *Steel Tubes Case*].

94 The 30% tariff satisfies the requirements of subparagraphs (a) through (d) of Art. 6.2.2 UNIDROIT Principles. First, the tariff occurred after the conclusion of the contract [*Exh. C6*; *Art. 6.2.2(a) UNIDROIT Principles*]. Second, the tariff was not taken into account by CLAIMANT at the time of conclusion of the contract [*see Art. 6.2.2(b) UNIDROIT Principles*]. The size of the tariff was in direct contrast with Equatoriana's general disposition towards free trade, and the tariff—which was an unexpected retaliation against Mediterranean trade measures—was a stark departure from Equatoriana's historical treatment of comparable foreign action [*Exh. C6*]. Therefore, CLAIMANT had no reason to expect these events at the time of conclusion of the contract. Third, the tariff was beyond CLAIMANT's control because it was instituted by the president of RESPONDENT's home country [*Exh. C6*; *Art. 6.2.2(c) UNIDROIT Principles*]. CLAIMANT could neither have influenced nor prevented this decision by the Equatorianian administration [*Id.*]. Finally, the risk was not assumed by CLAIMANT [*see supra PART 3*].

ii. Under Art. 6.2.3 UNIDROIT Principles, CLAIMANT was entitled to request renegotiation of the price

95 When the provisions of Art. 6.2.2 UNIDROIT Principles are satisfied, Art. 6.2.3 entitles CLAIMANT to request renegotiations. As a prerequisite, the request "shall be made without undue delay and shall indicate the grounds on which it is based" [*Art. 6.2.3(1) UNIDROIT Principles*]. CLAIMANT made the

request for renegotiations in an email on January 20, 2018, just five days after the tariff took effect [*Exh. C7*; *PO2*]. The request was timely, as CLAIMANT had just been informed that the tariff applied to the shipment [*Id.*]. Additionally, CLAIMANT stated its grounds for renegotiation by explaining that it could not shoulder the 30% tariff and that renegotiation was authorized by the Sales Agreement [*Id., Exh. C8*].

96 Furthermore, once a party enters into renegotiations, it must act in good faith [*Art. 2.15 UNIDROIT Principles*]. In this case, RESPONDENT entered into renegotiations for a short period, induced CLAIMANT to authorize the final shipment, then backed out of such renegotiations, neither acting in good faith nor in accordance with its duty to renegotiate [*Exh. C8, R4*; *Art. 6.2.3 UNIDROIT Principles*].

iii. In the event that renegotiations failed, CLAIMANT was entitled to an adaptation of the price

97 When renegotiations fail, either party may resort to the court [*Art. 6.2.3(3) UNIDROIT Principles*]. If the court finds hardship, it may "adapt the contract with a view to restoring its equilibrium" [*Art. 6.2.3(4)(b) UNIDROIT Principles*]. In fact, it is the consistent jurisprudence of Mediterranean courts, which employ verbatim the UNIDROIT Principles, that adaptation is appropriate where an unforeseen event results in hardship for the performing party [*PO2*].

98 Renegotiations failed when RESPONDENT's CEO stopped negotiations and refused to pay any additional amount [*Exh. C8*]. Therefore, CLAIMANT was entitled to seek adaptation from this Tribunal [*Art. 6.2.3(3) UNIDROIT Principles*]. Since there was a hardship in this case, this Tribunal should adapt the contract [*Art. 6.2.3(4)(b) UNIDROIT Principles*].

iv. CLAIMANT's requested remedy would restore the equilibrium of the contract

99 According to the UNIDROIT Principles, this Tribunal's goal in adaptation should be to "restore [the contract] to its equilibrium" [*Art. 6.2.3(4)(b) UNIDROIT Principles*]. Based on *lex mercatoria*, contracts for the sale of goods are founded on mutual profit, and the price necessary to restore such an equilibrium is established at the time the agreement was reached [*Zaccaria p. 161*]. Therefore, the profits reasonably expected by the parties at the time of conclusion of the contract should be considered in this Tribunal's designation of a fair adaptation price [*Fucci p. 35*; *ICC Case 2508*].

100 In this case, at the time the Agreement was reached, CLAIMANT expected to receive a 5% profit on the deal [*PO2*]. However, due to the unforeseen tariff, CLAIMANT incurred a 25% loss on the third shipment and approximately a 13% loss on the entire deal [*PO2*].

101 While Art. 6.2.3(4)(b) UNIDROIT Principles entitles a disadvantaged party to seek an award that restores, at least in part, its profit margin, CLAIMANT's requested adaptation of US$ 1,250,000 would

ensure merely that CLAIMANT does not lose money on this deal [*PO2*]. Furthermore, even if directed to pay an increased price to CLAIMANT, RESPONDENT would still profit from this deal as a result of its resale of the doses to third parties [*PO2*].

102 Therefore, CLAIMANT's request undoubtedly falls within the bounds established by the remedy provision in Art. 6.2.3(4)(b) UNIDROIT Principles. In fact, US$ 1,250,000 would merely compensate CLAIMANT to the extent that performance becomes bearable; it does not even reach the true point of "equilibrium" contemplated by the UNIDROIT Principles. Therefore, an adaptation of price is the most equitable and reasonable remedy available in this case, and this Tribunal should award it to restore the contract's equilibrium.

II. In any event, CLAIMANT is entitled to an adaptation of price in accordance with the general principles on which the Convention is based

103 When confronted with an apparent gap in the CISG's express provisions, the Tribunal should look to the general principles on which the CISG is based [*Art. 7(2) CISG*; *Honnold p. 104*]. Should this Tribunal find that hardship is a question governed by the CISG but not expressly settled in it, the CISG affords CLAIMANT an adaptation of price when interpreted in accordance with its general principles of detrimental reliance **(A)**, adaptation of price **(B)**, and because the spirit of Art. 79 CISG supports this interpretation **(C)**. In any event, the UNIDROIT Principles can be used to interpret an internal gap **(D)**.

104 If this Tribunal finds that the scope of the CISG does indeed reach the concept of hardship, CLAIMANT submits that the issue is "governed by" the CISG, but not expressly settled in it, resulting in an internal gap [*see Art. 7(2) CISG*]. The CISG contains an express rule on the interpretation of internal gaps at Art. 7(2), which directs the Tribunal to settle the issue "in conformity with the general principles on which [the Convention] is based . . ." Additionally, Art. 7(1) CISG directs the Tribunal to interpret the Convention with regard to, *inter alia*, "the observance of good faith in international trade."

105 The CISG speaks only to remedies available to parties that fail to perform due to "impediments" beyond the party's control [*see Art. 79 CISG*]. The term "impediment" does not exclusively encompass impossibility, thus the underlying principles are "best served" by considering those circumstances rendering performance unduly burdensome, *i.e.* hardship, as an internal gap in the Convention [*Schlechtriem p. 101*; *DiMatteo II p. 280*]. Since the CISG governs but fails to expressly settle both the issue of invocation of hardship and the remedy of adaptation, an internal gap exists on the matter, and

the Convention should be interpreted in accordance with the general principles upon which it is based in deciding this issue [*Art. 7(2) CISG*].

A. CLAIMANT is entitled to an adaptation of price based on the general principle of protection of a party that detrimentally relies on the conduct of another party

106 There is a close connection between the good faith principle and the principle that a party who has created a situation of reliance, upon which the other party had acted, has to bear the consequences of such situation [*Magnus & Hamburg § 5(b)(4)*]. Artt. 16(2)(b), 29(2), 35(2)(b), and 42(2)(b) CISG show that the Convention is based on that maxim [*Id.*]. Therefore, if a party has created the impression that it is willing to adapt a contractual term, the CISG protects the other party if it acted in justifiable reliance on this representation [*Id.*].

107 That was the case here, where RESPONDENT created the impression that it would be willing to adapt the price, then subsequently acted *venire contra factum proprium* [*Exh. C8*]. In addition to inducing performance, RESPONDENT urged CLAIMANT not to hesitate in its authorization of the third shipment [*Exh. C8*].

108 A party can only demand reliance protection if it actually relied on specific actions by the other party [*Magnus & Hamburg § 5(b)*(4)]. CLAIMANT "actually relied" by authorizing the third shipment and by fronting the additional costs imposed by the tariff [*Exh. C8*]. Mr. Shoemaker—one of RESPONDENT's employees—urged CLAIMANT to authorize shipment, emphasized RESPONDENT's interest in a long-term business relationship (including mention of concrete plans to purchase more doses), and stated that "if the contract provides for an increased price . . . we will certainly find an agreement on the price" [*Exh. C8, R4*]. But for Mr. Shoemaker's conduct, CLAIMANT would have withheld shipment until the parties agreed on an increased price—a non-performance for which Art. 79 CISG would have explicitly excused liability.

B. CLAIMANT is entitled to an adaptation of price because the CISG contains a general principle of adaptation to restore the equilibrium of the contract

109 The provision in Art. 50 CISG concerning price reduction reflects the general principle allowing for adaptation [*Fletchner p. 252-53*]. Like the remedy of adaptation sought here, the remedy of a price adjustment under Art. 50 CISG is available when the equilibrium or balance of performance has been disturbed [*Id.*]. In Art. 50 CISG's case, that disturbance is caused by a nonconformity. In this case, the disturbance was caused by hardship. This principle of adjustment, merely an analogue of adaptation, underlies circumstances governed by the CISG where the equilibrium or balance of the deal is fundamentally disrupted [*Id.*].

110 The tariff in this case disrupted the equilibrium of performance. It increased the cost of CLAIMANT's performance by 30% when CLAIMANT only had an expected profit margin of 5%, thereby destroying the commercial basis of the deal [*Exh. C8*]. Therefore, the CISG's general principle of price adjustment—here, adaptation—should be utilized by this Tribunal to restore such equilibrium.

111 In any event, the principle of adaptation is an extension of the good faith principle. The principle of good faith and fair dealing—a general principle upon which the CISG is based—presumes that both parties try to adapt the contract to unpredictable and unforeseen circumstances [*DiMatteo I p. 84-85*]. Accordingly, Art. 79(5) CISG has been interpreted to allow for "the possibility for a court or arbitral tribunal to determine what is owed to each other, thus 'adapting' the terms of the contract to changed circumstances" [*CISG-AC 7*].

C. The spirit of Art. 79 CISG supports a finding that the CISG's general principles afford CLAIMANT an adaptation

112 An internal gap in the CISG is further supported by the fact that had CLAIMANT failed to perform, Art. 79 CISG would have afforded CLAIMANT the relief sought. Therefore, the circumstances of this case must fall under the Convention's general principles regarding "hardship," and the remedy of adaptation of price can be awarded by way of Art. 79(5) CISG's direction to seek out other remedies available under the Convention.

113 Before analyzing CLAIMANT's argument in accordance with the "spirit" of Art. 79 CISG, CLAIMANT first submits that the parties did not derogate from this provision. Under Art. 6 CISG, parties may derogate from the Convention's provisions, and RESPONDENT contends that this is was occurred [*RNoA*]. Even though the CISG is otherwise applicable to the Sales Agreement [*see Exh. C5*], this Tribunal must nevertheless determine whether the parties derogated from its provisions with respect to adaptation for hardship [*Film Case*; *Bonaldo v. A.F.*]. Parties derogate from a provision of the CISG where a contractual term constitutes a deviation from, or is so incompatible with, the CISG [*UNCITRAL Digest*; *Tree Case*; *Machine Case*].

114 The provision for changed circumstances in the contract was not incompatible with Art. 79 CISG [*see Exh. C5*]. The precise treatment of changed circumstances under Art. 79 CISG is not "incompatible" with its treatment under clause 12. Similarly, the inclusion of a force majeure clause has been found not to be a derogation from Art. 79 CISG [*Iron Case*; *Equipment Case*].

i. An economic hardship constitutes an "impediment" under Art. 79 CISG

115 Art. 79(1) CISG exempts a party from liability for failure to perform a contractual obligation where "he proves that that failure was due to an impediment beyond his control and that he could not

reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." The legislative history of Art. 79 CISG is not conclusive on the question of whether "hardship" can fit within the concept of "impediment" [*CISG-AC* 7]. Some commentators even suggest that changes in circumstances that make performance more difficult or unprofitable should be seen as impediments [*Honnold pp. 482-85*; *Enderlein & Maskow p. 320*].

116 Art. 79 CISG indicates that the general principles of the CISG regulate the circumstances of this case because the unforeseen radical tariff that imposed an economic hardship on CLAIMANT could be considered an "impediment" under the Convention. An impediment to performance may result from general economic difficulties where they constitute a barrier to performance comparable to other types of exempting causes [*Honnold pp. 482-85*; *Enderlein & Maskow p. 320*]. Because Art. 79 CISG does not define "impediment" as an event that renders performance absolutely impossible, but an impediment may be represented by "a totally unexpected event that makes performance excessively difficult," the Convention contains a clear aim towards generally resolving this issue through an internal gap [*CISG-AC 7*; *Lando p. 396*].

117 The 30% tariff imposed in this case was an "impediment" under the CISG's general principles. Art. 79 CISG requires that the impediment be "beyond [CLAIMANT's] control." The tariff was imposed by Government of Equatoriana, and CLAIMANT had no control nor any influence on the Equatorianian government or its Prime Minister, and thus could not have brought about its own hardship [*Exh. C6*].

118 Art. 79 CISG requires that CLAIMANT not reasonably have been expected to have taken the impediment into account at the time of conclusion of the contract. While the parties did discuss responsibility for certain import and customs costs, CLAIMANT could not reasonably have been expected to account for a 30% tariff. Fluctuations in tariffs are not *per se* unforeseeable, but a tariff of this nature could not reasonably have been taken into account at the time of conclusion of the contract. The size of the tariff was in direct contrast with Equatoriana's general disposition towards free trade [*Exh. C6*], and the abrupt nature of the tariff—especially that it was an unexpected retaliation against Mediterranean trade measures—demonstrates CLAIMANT's lack of the *ex ante* ability to have taken it into account at the time of conclusion of the contract [*Id.*].

119 Finally, Art. 79 CISG requires that CLAIMANT have been unable to avoid or overcome the impediment. The tariff made the third installment 30% more expensive than anticipated [*Exh. C8*]. Since CLAIMANT had an expected profit margin of 5%, overcoming this impediment would have been an

incredible financial burden—especially given the fact that the two years preceding this contract had been financially difficult on CLAIMANT due to restructuring and workforce issues [*Id.*].

ii. Art. 79 CISG directs this Tribunal to seek out the Convention's general principle of adaptation, which can be discerned from Art. 50 CISG

120 Art. 79(1) CISG expressly exempts a disadvantaged party from liability for failure to perform its contractual obligations. Should the Tribunal grant CLAIMANT an adaptation of price, such relief would amount to a retroactive excusal of CLAIMANT from non-performance of its alleged obligation of bearing the increased tariff price. In any event, Art. 79(5) CISG still affords adaptation despite CLAIMANT's performance in this case.

121 Art. 79(5) CISG exempts an obligor from payment of damages but preserves the possibility of resort to any other remedy available under the CISG [*Atamer p. 1061*]. This provision does not dissolve or avoid the contract because an obligation cannot be performed due to an impediment, rather, it provides for resort to the remedy of adaptation [*Id.*]. This is because the term "failure to perform" must be considered in the broadest sense of the word [*Enderlein & Maskow p. 319*; *Tallon p. 575*].

122 Therefore, under Art. 79(5) CISG, CLAIMANT may resort to the remedy of adaptation, a remedy generally available under the Convention in Art. 50 CISG, which affords adjustment of price. Therefore, adaptation is a "right other than to claim damages" under the Convention available to CLAIMANT.

iii. CLAIMANT provided RESPONDENT the required notice under Art. 79(4) CISG

123 Art. 79(4) CISG requires the party that encounters an impediment to give notice to the other party. Such notice must be provided "within a reasonable time after the party who fails to perform knew or ought to have known of the impediment" [*Art. 79(4) CISG*]. This provision reflects the CISG's general disposition in favor of good faith and open communications between the parties.

124 In an email on January 20, 2018, CLAIMANT provided the required notice to RESPONDENT [*Exh. C7*]. It was within a reasonable time after CLAIMANT knew of the impediment because Ms. Napravnik stated she "was just informed" of the tariff, which took effect just five days prior to her email [*Id.*; *PO2*]. Although the tariff was announced approximately one month prior to CLAIMANT's email, it went into effect just eight days prior to the third installment's shipping date [*PO2, Exh. C5*]. Therefore, the period within which CLAIMANT ought to have known had not tolled yet, as CLAIMANT became aware of the tariff upon preparing the third shipment [*Exh. C6, C7*; *PO2*].

D. In any event, this Tribunal must use the UNIDROIT Principles to interpret an internal gap in the CISG

125 The CISG does not contain any enumeration of the "general principles" referred to in Art. 7(2). The UNIDROIT Principles, therefore, provide the court with an express formulation of such general principles and can thereby facilitate a court's efforts to determine these elusive principles [*Bonell p. 348*]. Alternatively, if this Tribunal finds that the general principles discussed above fail to settle the issue of adaptation in the face of hardship, Art. 7(2) CISG directs this Tribunal to resort to applicable domestic law, here the UNIDROIT Principles.

126 The aim of UNIDROIT was to elaborate a general regulatory system which could apply universally and restate the general principles of contract law, thus reflecting all the major legal systems of the world [*Bonell p. 618*]. This stated purpose comports with Art. 7(1) CISG's requirement that the CISG be interpreted with regard to both "its international character" and "the need to promote uniformity in its application." Therefore, the UNIDROIT Principles may be used as a means of interpreting and supplementing existing international instruments, such as the CISG [*Preamble to the UNIDROIT Principles*].

127 Courts have considered the UNIDROIT Principles as the general principles on which the CISG is based [*Food Products Case*; *Chemical Fertilizer Case*; *Holzimpex Inc.*]. Namely, a Belgian court found that by incorporating the UNIDROIT Principles to interpret Art. 79 CISG according to the aims put forth in Art. 7 CISG, "the party who invokes changed circumstances that fundamentally disturb the contractual balance is [] entitled to claim the renegotiation of the contract" [*Steel Tubes Case*].

III. Regardless of what interpretive methodology this Tribunal employs, international public policy favors performance, rather than avoidance of contractual obligations

128 A founding principle of international sales contracts is the principle of *pacta sunt servanda*, which emphasizes that contractual duties should normally be performed, rather than avoided [*Perillo p. 111*]. The sanctity of the contract is universal and can be found in all legal systems throughout legal history, including universal codes such as Art. 1.3 UNIDROIT Principles [*Gormley p. 373*]. Furthermore, the principle has been recognized by tribunals and domestic courts alike as one that protects the parties from breach [*Metal Bars Case*; *Fujitsu Ltd.*].

129 In this case, CLAIMANT acted in accordance with this fundamental principle. As soon as CLAIMANT became aware of the hardship, it contacted RESPONDENT with an aim towards performing the contract subject to an adaptation [*Exh. C7*]. More importantly, in an effort to address RESPONDENT's

concerns regarding promptness of the shipment, CLAIMANT honored its original obligation to ship on January 21st, 2018, notwithstanding pending renegotiations of the price [*Exh. C8*].

130 To deny CLAIMANT entitlement to an adaptation of price would run contrary to this international policy favoring performance. If—where the parties have contracted for an adaptation of price through a hardship clause—such an adaptation is not recognized by courts and arbitral tribunals, parties that face a hardship will be incentivized not to perform and to resort to contentious litigation, rather than to honor their bona fide duty of *pacta sunt servanda*.

CONCLUSION ON PART 4

131 CLAIMANT respectfully requests that this Tribunal find that it is entitled to payment of US$ 1,250,000 or some other amount under the CISG. Because the CISG fails to reach circumstances in which a party invokes the remedy of a price adaptation due to changed circumstances making performance more onerous, an external gap exists. Therefore, the domestic law of either Mediterraneo or Equatoriana afford CLAIMANT a hardship adaptation. Still, if this Tribunal finds that the CISG does reach the circumstances of this case, the general principles of good faith, detrimental reliance, and price adaptation all favor an interpretation of the Convention that affords CLAIMANT its requested remedy.

PRAYER FOR RELIEF

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

1) this Tribunal has the jurisdiction and the power under the Arbitration Clause to adapt the contract;

2) CLAIMANT is entitled to submit evidence from the other arbitration proceedings;

3) CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of price

i) under clause 12 of the contract; or

ii) under the CISG.

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