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HONG KONG

UNIVERSITY OF WISCONSIN

MEMORANDUM FOR CLAIMANT

PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

On Behalf Of:	**Against:**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City, Mediterraneo	Oceanside, Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL FOR CLAIMANT

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	Kluwer Law International Vol. 27 (2010).	
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[*Beisteiner*]	Beisteiner, Lisa, "*The (Perceived) Power of the Arbitrator to Revise the Contract,*" in Klausegger et al., Austrian Yearbook on International Arbitration (2014).	38, 47
[*Black's Law Dictionary*]	Black's Law Dictionary, 5th Ed. (1979).	38
[Born]	BORN Gary, International Commercial Arbitration Vol. I-III, Second Edition, Kluwer Law International Rijn, ed. (2014).	16, 19, 20, 113
[*Coetzee*]	Coetzee, Juana. "*The Interplay Between Incoterms® and the CISG*" Journal of Law and Commerce 32, no. 1 (2013): 1-22. Accessed October 30, 2018. doi:10.5195/jlc.2013.39.	69
[*Dicey/Morris*]	DICEY Albert Venn, MORRIS John Humphrey Carlile, *The Conflict of Laws*, Twelfth Edition (1993).	15
[*Farnsworth*]	Farnsworth, Allan, in Bianca-Bonell *Commentary on the International Sales Law*, Giuffrè: Milan (1987).	8
[*Ferrari*]	Ferrari, Franco, *International Sales Law--CISG in a Nutshell*, West Academic Publishing (2014).	*2, 4, 8, 10*
[*Ferrario*]	*The Adaptation of Long-Term Gas Sale Agreements by Arbitrators* (2017).	36, 38, 46
[*Graffi*]	GRAFFI Leonardo, *Law applicable to the validity of the arbitration agreement: A practitioner's view* in: Conflicts of Laws in International Arbitration	19, 20

	(Ferrari/Kroll, eds. 2010).	
[*Gutterman*]	*Guterrman, Alan*, Corporate Counsel Guide to Tech Management & Transactions	69
[*Hausmaninger*]	Hausmaninger, Christian, Kommentar zu den Zilverprozessgesetzen, Fasching & Konecny eds., 2nd ed. (2005)	29
[*Incoterms, 2010*]	Incoterms (2010)	105
[*Jolles*]	Jolles, Alexander, Sonja Stark-Traber, and Maria Canals De Cediel. "*Confidentiality*." Chap. 7 in International Arbitration in Switzerland: A Handbook for Practitioners. 2nd ed. Kluwer Law International, 2013: 138.	125
[*Kee*]	Kee, Christopher, *Global Sales and Contract Law*, Oxford University Press: Oxford 2012.	8
[*Kroll*]	DM Julian, Mistelis, A. Loukas, Kroll Stefan Michael, *Comparative International Arbitration*, (Schulthess ed. 2003)	19
[*Lew*]	LEW D. M. Julian, *The law applicable to the form and substance of the arbitration clause* in: ICCA Congress Series Vol. 9 (2009)	2, 13, 15
[*Lookofsky*]	Lookofsky, David, The 1980 United Nations Convention on Contracts for the International Sale of Goods (2000)	26, 57
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[*Merkin*]	Merkin Robert, Flannery Louis,	15

	Arbitration Act, Fourth Edition (2005)	
[*Morales/Timm*]	Morales, Isabela Popolizio; Timm, Luciano, "*Competence-competence doctrine: an absolute principle*?" (2017) at https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Brazil/Carvalho-Machado-e-Timm-Advogados/Competence-competence-doctrine-an-absolute-principle	46
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[*Poudret/Besson*]	Poudret Jean-François, Besson Sébastien, *Comparative law of international arbitration*, Street & Maxweel (2007).	13
[*Redfern/Hunter*]	Blackaby Nigel, Partasides QC Constantine, Redfern Alan, Hunter Martin, *Redfern and Hunter on International Arbitration*, 6th Edition, Oxford University Press (2015)	14, 19, 22
[*Rimke*]	Rimke Joern, *Force majeure and hardship:Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* Kluwer International (1999)	60
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[*Schmidt-Kessel*]	Schmidt-Kessel, Martin, Commentary on Art. 8 in: Ingeborg	6
[*Tung & Lin*]	Tung, Sherlin, and Brian Lin. "Chapter II: The Arbitrator and the	114, 122

	Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have or Not to Have?" Austrian Yearbook on International Arbitration, (2018) 77-94.	
[*Ullman*]	Ullman, Harold, "Enforcement of Harship Clauses in the French and American Legal System"(1988)at https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?Art.=1467&context=cwilj	35
[*Waincymer*]	*Waincymer*, Jeffrey, *Procedure and Evidence in International Arbitration*. Kluwer Law International, (2012). 825-884.	106, 110, 11
[*Yoon & Richardson*]	Yoon, Byung Chol & Richardson, Joel , *Discovery in Investment Arbitration Involving Republic of Korea*, 4 ASIAN INT'L ARB. J. 139 (2008): 139.	110

CASES

Cited as	Citation	Paragraphs(s)
[*AEGIS v. European*]	*Assoc. Electric & Gas Ins. Servs. Ltd. v. Euro. Reinsurance Co*. of Zurich (2003) 1 W.L.R. 1041.	*120*
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INDEX OF ABBREIVIATIONS

Abbreviation	Term
¶/¶¶	Paragraph/paragraphs
Art./ Artt.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLAIMANT	Phar Lap Allevamento
DDP	Delivery Duty Paid
Ex. C	CLAIMANT'S Exhibit
Ex. R	RESPONDENT's Exhibit
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules
IBA	International Bar Association
Ibid	Ibidem (in the same place)
ICC	International Chamber of Commerce
Proc. Order	Procedural Order
RESPONDENT	Black Beauty Equestrian

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

STATEMENT OF FACTS

1. **Phar Lap Allevamento ("CLAIMANT")** is a company registered and located in Capital City, Mediterraneo. It operates Meditarraeneo's oldest and most renowned stud farm, covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot, and additionally offers frozen semen of its champion stallions for artificial insemination. Lastly, CLAIMANT is particularly known for its breeding success regarding racehorses. The star among CLAIMANT'S stallions is Nijinsky III, the most sought-after stallion for breeding.

2. **Black Beauty Equestrian ("RESPONDENT")** based in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. **21 March 2017** RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III for its newly started breeding program. CLAIMANT was told at the time that RESPONDENT's investors were keen to see its racehorse breeding program to commence as soon as possible taking advantage of the temporary lift of the ban on artificial insemination.

4. **24 March 2017** Over email, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards. RESPONDENT only objected to the choice of law and the forum selection clause and insisted on a delivery DDP. The parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause.

5. **6 May 2017**. The Parties signed the final contract, agreeing not only on the hardship clause but also an acceptable choice of law and arbitration clause.

6. **20 May 2017:** RESPONDENT sent the first shipment of 25 doses. The second shipment was due on **3 October 2017**.

7. Two months before the last shipment of 50 doses was due, Mediterraneo's newly elected President, Ian Bouckaert, announced 25% tariffs on agricultural products from Equatoriana. Frozen semen was included on the list of products that fell under the new tariff.

8. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen.

9. **23 January 2018** CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses before an agreement on the new price had been reached.

10. RESPONDENT, in breach of its contractual requirements, resold the semen at a price which is 20% above the price charged by CLAIMANT.

SUMMARY OF THE ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION AND POWERS TO ADAPT THE CONTRACT DUE TO HARDSHIP

With regard to the procedural issues in this case, the Arbitral Tribunal has jurisdiction and powers to adapt the contract due to hardship. Specifically, the law of Mediterraneo should be applied to the interpretation of the arbitration clause because the parties subjectively intended that to be the case; a reasonable third person would believe that to be the case; and an express choice of law governing the substantive portions of a contract should reach the arbitration agreement in the absence of intent indicating the contrary.

RESPONDENT's assertion that the Tribunal does not have the authority to adapt the contract for hardship is incorrect. The arbitration agreement is broad enough for the issue of hardship adaptation to be submitted to the Tribunal. Further, the Parties intended for Clause 12 to function as a hardship provision, where adaptation is a necessary remedy. As the Parties chose the law of Mediterraneo to govern arbitration as well as the contract, the Tribunal will have the power to adapt the contract for hardship under the principle of synchronized competence as the law of Mediterraneo allows its courts to adapt contracts for hardship. Lastly, the Parties intended to derogate away from CISG Art. 79 by including Clause 12 in the contract.

ISSUE 2: CLAIMANT IS ENTITLED TO PAYMENT RESULTING FROM AN ADAPTATION OF THE CONTRACT PRICE

CLAIMANT is entitled to an adaption of the contract price due to the hardship exemption applying under both UNIDROIT 6.2.2 and Clause 12. Clause 12 is a hardship provision. Furthermore, CLAIMANT faces financial ruin if forced to bear the entire cost of the tariffs, which has resulted in the increased cost of performance becoming excessively onerous. The newly imposed tariffs were enacted after the conclusion of the contract, and, therefore, CLAIMANT could not have reasonably foreseen that that government of Equatoriana would impose these regulations. Furthermore, Clause 12 precludes CLAIMANT from incurring all of the risks associated with a delivery DDP.

ISSUE 3: THE TRIBUNAL SHOULD ALLOW CLAIMANT TO SUBMIT EVIDENCE FROM A PREVIOUS ARBITRATION PROCEEDING

The Arbitral Tribunal additionally should allow CLAIMANT to submit evidence from a previous arbitration proceeding to ensure a fair and equal arbitration as well as avoid undue expense and delay. The evidence presented is relevant and does not breach the duty of good faith or raise confidentiality concerns.

ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION AND POWERS TO ADAPT THE CONTRACT DUE TO HARDSHIP

A. The Arbitration Agreement and its interpretation are governed by the law of Mediterraneo

1. Under the CISG, the law of Mediterraneo applies

1 The CISG governs the dispute because it is undisputed that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG, which satisfies the prerequisites of Art. 1(1) CISG [*PO 1*, ¶III.4]. It is consistent jurisprudence in Mediterraneo that the CISG applies to the conclusion and interpretation of the arbitration clause in a sales contract as long as the contract is governed by the CISG [*ibid.*].

2 When an issue arises concerning ambiguity in an arbitration agreement, the tribunal must interpret the parties' intentions [*Lew*, pp. 129–164]. Art. 8 of the CISG provides for a three-step analysis to determine the Parties' intent. [*Ferrari*, *p. 157*]. First, conduct or statements of a party should be interpreted according to that party's subjective intent when the other party knew or could not have been unaware of that intent (Art. 8(1)). [*Ferrari*, p. 156]. Second, when the prerequisites for applying subjective intent are not present, a factfinder should determine a party's intent based on a reasonable person's understanding of the statements or conduct of that party (Art. 8(2)). [*Ferrari, p. 157*]. Third, a factfinder should look at the circumstances surrounding the contract, (e.g., negotiations, established practices, usages, and any subsequent conduct of the Parties), to help interpret the Parties' intent. [*Ferrari, pp. 159–160*].

3 Using Art. 8 to interpret the arbitration agreement, it is evident that RESPONDENT knew or could not have been unaware of CLAIMANT's intent to have Mediterranean law govern the arbitration agreement. Further, CLAIMANT's subjective intent notwithstanding, a reasonable

person in RESPONDENT's circumstances would have understood that CLAIMANT intended for Mediterranean law to govern the arbitration agreement.

a. RESPONDENT knew or could not have been unaware of CLAIMANT's intent to have Mediterranean law govern the arbitration agreement

4 For subjective intent of a party to be relevant, it must have been manifested; thus, secret intent is irrelevant [*Ferrari, p. 157*]. If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party. [*UNIDROIT 4.1(1)*; *CISG 8(1)*]. This means that where an addressee of a statement does not recognize the intent of the party making the statement, and the declaring party's intent is easily recognizable, the declaring party's subjective intent will be binding [*Ferrari, p. 177*].

5 In the present case, CLAIMANT manifested its intent several times throughout the negotiation period. First, CLAIMANT did so in Exhibit C 3. Here, RESPONDENT expressed a reluctance to allow Mediterraneo courts to exercise jurisdiction, since Mediterraneo law would also govern the contract. [*Ex. C 3*]. Moreover, RESPONDENT expressed its consent to have Mediterraneo law govern the contract, and only emphasized the need for a neutral jurisdiction for arbitration. [*Ex. C 3*]. Second, RESPONDENT's Exhibit R 2 further clarifies CLAIMANT's intent. Here, RESPONDENT acknowledged that Danubia was the agreed upon neutral venue for arbitration, but also acknowledged the neutral venue agreement is naturally contingent on the Law of Mediterraneo still governing the contract. [*Ex. R 2*].

6 Additionally, RESPONDENT could not have been unaware of CLAIMANT's intentions. The standard for constructive knowledge according to Art. 8(1) is gross negligence. [*Schmidt-Kessel, ¶ 17*]. Here, Mr. Julian Krone, RESPONDENT's head of the legal department, declared that he was aware of CLAIMANT's intention RESPONDENT'S Exhibit R 3. He acknowledged therein that the draft of the contract had a provision in favor of a choice-of-law clause in favor of the Law of Mediterraneo. RESPONDENT's lack of knowledge was therefore not a result of CLAIMANT's failure to communicate its intention in clear terms. Rather, the lack of knowledge can be attributed to RESPONDENT's failure to communicate internally. Thus, RESPONDENT cannot claim that they lacked constructive knowledge, since CLAIMANT had clearly manifested its intent.

7 In view of CLAIMANT's absolute insistence that the Law of Mediterraneo govern the contract and RESPONDENT failing to communicate any disagreement, RESPONDENT could not have been unaware of CLAIMANT's intentions. Therefore, the arbitration agreement should be interpreted in the way intended by CLAIMANT.

b. CLAIMANT's subjective intent notwithstanding, a reasonable person in the RESPONDENT's circumstances would have understood that CLAIMANT intended for Mediterranean law to govern the arbitration agreement

8 When a subjective interpretation is not possible, the factfinder resorts to an objective interpretation under Art. 8(2) of the CISG. [*Ferrari, pp. 157–158*]. According to Art. 8(2), a party's statements and other conduct are to be interpreted according to the understanding of a reasonable third person in the same circumstances as the other party. [*Farnsworth, § 2.4*; *UNCITRAL Commentary, § 8*]. As a categorical rule, special weight is given to the language employed in the arbitration agreement. [*Kee, § 26.16*].

9 Here, both Parties agreed to put the choice of law clause directly preceding the arbitration clause and state that "[T]his Sales Agreement shall be governed by the law of, Mediterraneo…" [*Ex. C 5, ¶14*]. A reasonable person would interpret the word "Sales Agreement" as the entire contract, including the arbitration clause, because the arbitration clause is a part of the contract [*ibid. at ¶15*]. This is especially true in the absence of an express choice of law concerning the arbitration clause; a reasonable understanding of the contract suggests that the express choice of law governing the "Sales Agreement" would govern all the clauses in the contract, including the arbitration clause contained within.

10 Secondly, RESPONDENT did not express that the contract included a separate choice-of-law clause in favor of the Law of Danubia. It is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfill the intentions of the Parties. [*Ferrari, p. 155*]. CLAIMANT expressed intent in multiple emails, while RESPONDENT only expressed that it wanted arbitration to take place in a neutral venue. A reasonable person in RESPONDENT's position, having prior experience with arbitration, would have known that when Parties to a contract express a single choice-of-law provision, but fail to express a separate choice-of-law clause for the arbitration agreement, a reasonable person in CLAIMANT's position would not interpret the contract to have multiple choice-of-law provisions. If RESPONDENT wished to apply the different law to the arbitration clause, they should not have signed the contract or

should have added the provision expressly. The fact that RESPONDENT described the country of Danubia as a neutral jurisdiction, and not as providing the governing law for the arbitration agreement, would make a reasonable person in CLAIMANT's position believe RESPONDENT never intended for Danubian law to govern the arbitration agreement.

11 Accordingly, application of the law of the contract to the arbitration clause is a proper interpretation under Art. 8(2).

2. *In any event, the Arbitral Tribunal should use its discretion to apply the law of Mediterraneo*

12 In the absence of clearly discernible party intent, principles of conflict of laws dictate that the law of Mediterraneo should apply. Under HKIAC principles, the Arbitral Tribunal "shall apply the rules of law which it determines to be appropriate." [*HKIAC, Art. 36*]. Here, the Arbitral Tribunal should determine that the law of Meditarreaneo is appropriate.

13 That the law applicable to the arbitration clause *may* be different from the law governing the Sales Agreement is beyond serious dispute. [*Poudret/Besson, p. 258; Lew et al., p. 106*]. Even so, the doctrine of separability does not dictate that those laws *must* be different. In fact, as discussed above, many commentators and cases have pointed out that we should start with a presumption to the contrary.

14 This case presents the Arbitral Tribunal with two principle choices of law. Jurisdictions vary on whether they apply the law the Parties chose to govern the substantive portions of their agreement or the law of the jurisdiction the parties agreed upon for the seat of arbitration. [*Redfern/Hunter, ¶¶ 3.07-3.33*; *Bantekas, p. 3*].

a. The law the parties chose to govern the substantive portions of their contract is appropriate in this case

15 Beginning with the former approach, the law the Parties chose to govern the substantive portions of their agreement is the appropriate law to apply in this case. When the parties have expressly chosen a law to apply to their substantive contract, "there is a strong tendency to regard the choice of the law as equally applicable to the arbitration agreement, unless there is agreement to the contrary." [*Lew*; *Lew et al, ¶¶ 6-24; Russell, ¶2.094*; *Merkin, p. 180*; *Dicey/Morris, p. 577*; *ICC Case No. 2626 of 1977*]. Many ICC cases demonstrate that the same law may govern both the arbitration and the underlying agreement. [*ICC Case No. 6850*; *ICC Case No. 6752*; *ICC Case No. 6379*]. This is because it is more logical that the Parties

chose a single law to apply to their entire dispute and if the parties have a contrary intention they are free to declare so. [*Bantekas, p. 2*].

16 In this case, the validity and enforceability of the arbitration agreement is a central principle underlying the disposition of international commercial arbitrations. Uncertainty becomes pervasive if the law of the underlying agreement is not also applied to the arbitration agreement. This is due to courts, arbitral tribunals, and commentators adopting a wide range of choice-of-law approaches. As explained by Scholar Gary Born, "This multiplicity of choice-of-law rules potentially applicable to the arbitration agreement does not advance the purposes of the international arbitral process. The existence of multiple choice-of-law rules creates unfortunate uncertainties about the substantive law applicable to arbitration agreements, as well as the risk of inconsistent results in different forums . . . **Notwithstanding the uncertain state of their choice-of-law analyses, most national courts and international arbitral tribunals have arrived at sensible results in resolving disputes over the existence and validity of international arbitration agreements.**" [*Born*, *p. 488*] (emphasis added). In this case, as discussed above, the existence and validity of the arbitration agreement is best protected if the law governing the underlying agreements also governs the arbitration agreement.

17 The fact that the Parties expressly negotiated for the law of Mediterraneo suggests that the arbitration clause here is not totally independent from the Sales Agreement in this dispute. The acceptance of the Sales Agreement, without more, entailed acceptance of the arbitration clause. Additionally, the arbitration clause appears in Clause 15, while the choice of Mediterraneo law appears in Clause 14, indicating that the clauses are not completely distinct here.

18 Finally, if governed by the law of Mediterraneo, the arbitration clause would permit the Tribunal to decide on the substantive issue present in this matter because the laws of Mediterraneo permit tribunals to adapt agreements as is necessary in this matter. The law of Danubia, however, would not allow for such adaptation due to Danubia's "four corners rule" [*PO 1*]. As RESPONDENT admits, the application of the law of Danubia to the arbitration agreement serves to strip jurisdiction from the Tribunal on the hardship issue in this case because the law of Danubia narrowly construes arbitration agreements.

b. The law of the seat is inappropriate in this case.

19 Even in some jurisdictions taking the latter approach, when parties have expressly chosen a law to govern the substantive portions of the contract, that law should apply to the arbitration agreement unless it would render the arbitration agreement invalid, illegal, or incapable of being performed. [*Graffi, p. 35*; *Born, p. 425*; *Kroll p. 323*; *Redfern/Hunter* ¶¶ 3.07-3.33; *Brazil Insurance Case*; *Bulbank Case*]. This is referred to as a "rebuttable presumption" in favor of the law chosen for the substantive agreement [*ibid.*].

20 If the Arbitral Tribunal applies the "rebuttable presumption" method, RESPONDENT is unable to show that applying Mediterraneo law would render the arbitration agreement invalid, illegal, or incapable of being performed. [*Graffi, p. 35*; *Born, p. 425*]. RESPONDENT has not suggested that a result of that nature would occur. On the contrary, applying the law of Mediterraneo still gives RESPONDENT a neutral forum and a neutral *lex arbitri*—Danubia. The only adverse effect on RESPONDENT is that the substantive questions in this dispute proceed to consideration by the Arbitral Tribunal.

21 Even if the Arbitral Tribunal does not apply the rebuttable presumption, however, the law of the seat is still inappropriate. In jurisdictions that do not allow a "rebuttable presumption," face numerous problems with the latter approach. A primary problem with the latter approach is that it leads to conflicting results in jurisdictions applying the same law. [*Brazil Insurance Case; FirstLink Case*]. Additionally, the latter approach may leave parties with no remedy. If the parties wish to have recourse in a jurisdiction other than that before the courts of the seat, they must make an express reference to that in their arbitration clause. In that respect, the arbitration clause assumes a law that is not the same as the *lex arbitri*. It would be inappropriate to find that the only recourse CLAIMANT has in this case is before the courts of Danubia.

22 Additionally, the policy concerns that lead courts to apply the law of the seat are not present here. Courts may be concerned that applying the law governing the substantive portions of the agreement may lead in effect to two separate *lex arbitris*—one party invoking the *lex arbitri* of the seat and the other invoking a *lex arbitri* that may arise from the law governing the arbitration agreement. [*Bantekas, pp. 4-5*; *Redfern/Hunter*; *Bermuda Agreement Case; FirstLink Case*]. However, that concern is not relevant here, because the CLAIMANT has

submitted to the *lex arbitri* of Danubia, and does not suggest the law of Mediterraneo should govern the procedure of the arbitration, just the interpretation of the arbitration clause itself.

23 Moreover, the doctrine of separability cannot control the outcome of this case. Separability functions to protect otherwise enforceable arbitration agreements from invalid or unenforceable container agreements, when one party wishes to avoid arbitration. However, that does not indicate that the arbitration clause is a distinct agreement from the outset of the agreement. [*Interim Award in ICC Case No. 4131*; *Bantekas, p. 6*; *BCY*]. Neither Party in this dispute has suggested that the arbitration agreement itself is invalid. [*PO 1*]. This indicates that the underlying principles supporting the latter approach are inapplicable in this context.

24 It is also noteworthy that some of the courts that have initially sided with the former approach are now shifting towards using the latter. [*FirstLink Case; BCY*]. This is because the latter approach is supported by the weight of authority and it is preferable as a matter of principle [*ibid*].

25 Ultimately, the former approach is the most appropriate approach to apply in this case. This is the approach that allows this case to proceed past the jurisdictional questions and gives the Arbitral Tribunal the authority to rule on the adaptation issue. Because the parties have agreed to submit their disputes to arbitration, the Arbitral Tribunal should not force the CLAIMANT to seek a remedy in the courts of Danubia.

c. Danubia's parol evidence rule is precluded by Art. 8 of the CISG

26 Even if the arbitration clause contained a choice-of-law provision designating Danubian law as applicable to the clause, Danubia's "four corners" (parol evidence) rule is superseded by Art. 8 of the CISG [*Lookofsky, p. 55*]. In fact, most courts hold that "Art. 8 is incompatible with—and precludes the application of—the (domestic) parol evidence rule in cases otherwise governed by the CISG." [*ibid*].

B. The Tribunal has the authority to adapt the contract

27 The tribunal's authority to adapt a contract is derived from the intent of the Parties. CLAIMANT will establish that **(A)** the arbitration agreement is sufficiently broad enough to allow the contract to be adapted for hardship; **(B)** the Parties intended Clause 12 of the contract to function as a hardship provision and to allow for the contract to be adapted; and **(C)** the Parties chose the law of Mediterraneo to determine whether hardship applies.

1. The arbitration agreement is broad enough to allow the contract to be adapted for hardship

28 The contract's arbitration clause allows for the adaptation of the contract. Clause 15 of the contract states that "[a]ny dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration." [*Ex. C 5, Clause 15*]. As stated above, the law of Mediterraneo governs interpretation of the arbitration clause, which interprets the clause broadly.

29 The issue of whether the Tribunal may adapt the contract for hardship would likely be considered a "dispute" over the interpretation of Clause 12, and would therefore be covered under Clause 15. Furthermore, jurisdictions that interpret arbitration clauses also believe that, in the interest of the parties, "it is beneficial to have all disputes decided by the same arbitration tribunal as this will avoid the risk of split proceedings." [*Hausmaninger*, § 581 ⁋ 227]. As Clause 15 itself covers several situations in which the Parties can use arbitration to resolve their disputes, it would therefore be beneficial to have all disputes regarding the contract be decided by the same arbitral tribunal, including its adaptation for hardship.

30 Furthermore, contract adaptation is not prohibited under the HKIAC Rules. Clause 15 of the contract states that the proceeding shall be administered under the Hong Kong International Arbitration Center (*HKIAC*) Administered Arbitration Rules. Neither the HKIAC rules nor the UNCITRAL Model Law prohibit an arbitral tribunal from adapting a contract; they are entirely silent on the matter of contractual remedies. Therefore, the tribunal's authority to adapt the contract is not restricted by the rules governing the proceedings.

2. The parties intended for Clause 12 of the Contract to function as a hardship provision and to allow for the contract to be adapted

a. The parties intended for Clause 12 to be a hardship provision

31 The correspondence between the Parties shows that RESPONDENT would have been aware that CLAIMANT intended for Clause 12 to act as a hardship provision under the circumstances. Art. 8(1) of the CISG states that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." Subjective, actual intent is a primary principle of the CISG and the true

measure of what a party intended with contractual provisions. Further, UNIDRIOT Art. 4.1, which would apply under the law of the agreement, requires that "[a] contract shall be interpreted according to the common intention of the Parties." [*UNIDRIOT Art. 4.1*].

32 When analyzing a party's subjective intent, several factors should be taken into consideration. The exact wording chosen by the Parties along with the "systematic context" and Parties' actions are of particular importance. [*Fruit and vegetables case*]. In addition, the purpose of the contract and the Parties' interests should be analyzed under the circumstances.

33 CLAIMANT had made it sufficiently clear to RESPONDENT through its correspondence that Clause 12 was to act as hardship clause. CLAIMANT stated in its 31 March 2017 letter to RESPONDENT that it was "not willing to take over any further risks" associated with a DDP delivery. [*Ex. C 4*]. Furthermore, CLAIMANT's minimum request was to specifically include a hardship provision to account for any custom regulation or import restrictions that might occur which, in CLAIMANT's words, may "destroy the commercial basis of the deal." [*Ex. C 4*].

34 RESPONDENT also acknowledged that, at a minimum, "hardship wording" was added to the force majeure clause in addition to "regulat[ing] a number of possible risks directly." [*Answer to Notice of Arb. ¶ 4; Ex. R 3*]. Further, the addition of a hardship clause was discussed and referenced in the negotiations between CLAIMANT and RESPONDENT, and in the 11 April 2017 email where CLAIMANT suggested reliance on the International Chamber of Commerce's hardship clause [*Ex. C 8; Ex. R 2*]. Although narrowly worded, RESPONDENT did acknowledge that negotiations led to the adoption of a hardship clause and referred to it as such in its Answer to the Notice of Arbitration [*Answer to Notice of Arb. ¶¶ 9, 18*]. Given the explicit references to the hardship provision in the negotiations and correspondence, it is clear that Clause 12 was intended to be a hardship provision and that RESPONDENT would have been aware of that fact.

b. Adjustment is a necessary remedy for hardship

35 Clause 12 of the agreement states: "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third-party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Ex. C 5, ¶ 12*]. As stated above, both Parties intended for Clause 12 to function as a hardship clause. It is recognized that "[a] typical hardship clause has two aspects: (1) a definition of hardship and (2) a method to adapt the contract to accommodate the changed circumstances."

[*Ullman*, *p. 81*]. Scholar Oppetit offers a similar definition, defining a hardship clause as "a clause by which Parties will be able to request a rearrangement of the contract that binds them if an intervening change in the initial basis on which they obligated themselves modifies the equilibrium of the contract to the point that one of the Parties sustains a hardship." [*Oppetit*, *p. 797*].

36 In practice, courts will often use adaptation as a contractual remedy in long-term contracts where it is impossible for Parties to foresee future events that "may occur during the contract's life and affect the relevant equilibrium." [*Ferrario*, *p. 72*]. The Parties will insert an "adaptation or adjustment clause" into the contract in order for the court to "restore [the contract's] balance upon the occurrence of unforeseen events altering it" and to "provide the Parties with a remedy different from termination or specific performance of the original contract." [*Ferrario, p. 72*].

37 Because the contract between CLAIMANT and RESPONDENT was a long-term contract where CLAIMANT had expressed concerns over "unforeseeable additional health and safety requirements," the Parties inserted Clause 12 to alleviate these concerns. [*Ex. C 4*]. It therefore follows that by inserting Clause 12, the Parties intended for the tribunal to be able to use adaptation as a possible remedy.

c. Denying adaptation would violate the *pacta sunt servanda* principle

38 If a contract includes an adaptation, "it would not duly reflect the Parties' interests to assume that they did not want to confer upon the arbitrator the procedural power to adapt the contract — and hence to enforce their substantive agreement (i.e. the adaptation clause)." [*Beisteiner*, *p. 110*]. Scholar Beisteiner even goes so far to say that when a contract contains some kind of "revision clause," such as a price adaptation clause, force majeure clause, or hardship clause, "[c]ontract adaptation will then not merely be an exception to the sanctity of contracts, it will be an expression of the *pacta sunt servanda* principle," [*Beisteiner*, *p. 81*], which means that agreements of the parties to a contract must be observed [*Black's Law Dictionary*, *p. 999*]. In other words, if the contract contains a revision clause, it would go against both the intent of the Parties and the plain language of the contract for an Arbitral Tribunal to not enforce the revision clause by adapting the contract. This is bolstered by the fact that the "prevailing position in international commercial arbitration is [for the tribunal] to strictly apply the principle of *pacta sunt servanda*. [*Ferrario*, *p. 138*].

39 Additionally, if a contract includes an arbitration clause and a choice-of-law clause in an arbitration-friendly jurisdiction, "there will generally be no reason for the arbitrator not to enforce the rules of that [jurisdiction]" including "those rules which provide a basis for the adaptation of contracts." [*Beiseteiner*, *p. 110–111*].

40 Applying these two principles, the Tribunal should be allowed to adapt the contract. The contract between CLAIMANT and RESPONDENT contains a hardship clause and an arbitration clause. [*Sales Agreement Clause 12; 15*]. Through the inclusion of the hardship clause and the arbitration clause, it would not reflect the *pacta sunt servanda* principle for the tribunal to not be able to adapt the contract.

41 In addition, the contract also contains a choice-of-law clause that states that: "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)." [*Ex. C 5, Clause 14*]. As will be discussed further below, the law of Mediterraneo allows for the adaptation of contracts in situations of hardship. Therefore, there would be no reason for the Tribunal to not enforce the rules that allow for the contract to be adapted.

d. The intent of the Parties shows that adaptation was not excluded as a possible remedy

42 The narrow wording of Clause 12 does not preclude adaptation as a remedy. The intent of CLAIMANT and RESPONDENT both before and after the contract was negotiated shows that they did not intend for Clause 12 to preclude adaptation as a remedy. In her witness statement, CLAIMANT's lawyer, Julie Napravkin, stated that it was "important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment." [*Ex. C 8 ¶ 5*]. Ms. Napravnik states that RESPONDENT's lawyer, Chris Antley, agreed with Ms. Napravnik and "replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [*Ex. C 8 ¶ 5*]. Though the final contract ultimately did not reflect this discussion, Ms. Napravnik's statement shows that that the Parties clearly did not intend for the contract to exclude adaptation as a potential remedy.

43 Further, the statements made by RESPONDENT's employee David Shoemaker indicate that RESPONDENT did not view the contract as precluding adaptation. Though Mr. Shoemaker stated that he "never committed to any adaptation of the price and would also not have had the authority to do so," Mr. Shoemaker also conceded that "if the contract provides for an

increased price in the case of such a high additional tariff, we will certainly find an agreement on the price."

44 Mr. Shoemaker's statements directly contradict RESPONDENT's assertion that adaptation was precluded as a remedy. While Mr. Shoemaker does not explicitly state that the contract allows for its adaptation, Mr. Shoemaker did not explicitly state that the contract *excluded* adaptation as a potential remedy. If Mr. Shoemaker had believed that the true intent of the Parties was that the contract excluded adaptation he would have stated as much and would not have used language that kept the possibility of such a remedy open.

45 Even further, in no place does Clause 12 preclude adaptation as a remedy for hardship as RESPONDENT claims. The plain language of Clause 12 merely describes the situations in which CLAIMANT shall be relieved of their responsibilities under the contract. In no place does the clause discuss the potential remedies available for those situations. It follows that the Parties did not intend to exclude adaptation as a possible remedy through the narrow wording of Clause 12.

3. CLAIMANT and RESPONDENT chose the law of Mediterraneo to determine whether hardship applies

a. The principle of synchronized competence allows the Tribunal to adapt the contract under the Law of Mediterraneo

46 As stated above, the Parties chose the law of Mediterraneo to be the law applied by the Arbitral Tribunal. Under the principle of synchronized competence "if courts are entitled to exercise a specific power. . . arbitrators should [also] be deemed to have the same authority." [*Ferrario*, *pp. 75–76*]. This principle "is universally recognised in all developed national legal systems, international arbitration conventions, legal scholars' writings and judicial decisions." [*Morales/Timm*]. Therefore, it follows that if the applicable system allows for the adaptation of contracts, the Tribunal will be able to exercise that power under the principle of synchronized competence.

47 The law of Mediterraneo specifically allows for the adaptation of contracts through its adoption of UNIDROIT Artt. 6.2.2 and 6.2.3 as its codified law. Art. 6.2.3 (4)(b) provides that if a tribunal. finds hardship it may, if reasonable, "adapt [a] contract with a view to restoring its equilibrium." [*UNIDROIT, Art. 6.2.3*]. Further, depending on the nature of the

hardship, the tribunal may have the authority to adapt the price of the contract. [*UNIDROIT, Art. 6.2.3, Comment 7*].

48 In addition to Artt. 6.2.2 and 6.2.3, Art. 3.2.7 vests a tribunal with the power to adapt the contract or an individual term in cases where there is "gross disparity between the obligations of the Parties which, which gives one party an unjustifiably excessive advantage." [*UNIDROIT, Art. 3.2.7, Comment 1*].

49 Because the courts in Mediterraneo would have the power and authority to adapt a contract in the event of hardship under Artt. 6.2.2 and 6.2.3 and because the Parties expressly chose the law of Mediterraneo to govern the contract, the Arbitral Tribunal in the present dispute would have the power to adapt the contract as well as the potential authority to adapt its price through synchronized competence.

b. CISG Art. 79 does not govern hardship provisions

50 The CISG does not contain a hardship clause, and the prevailing opinion is that Art. 79 covers Force Majeure exclusively, and not hardship [*Carlsen*]. Because the CISG is silent on the issue of hardship, the Tribunal must apply the domestic law of Mediterraneo to govern, as stipulated in the contract [*Ex. C 5, Clause 14*]. The general contract law of Mediterrano is a verbatim adoption of the UNIDROIT Principles, thus hardship clause Art. 6.2.2 applies [*PO 1, § 3(4)*].

CONCLUSION ON ISSUE 1

51 The Tribunal may rule on its own jurisdciton, including any objections with respect to the existence, validity, or scope of the arbitration agreement. The law of Mediterraneo should apply to the interpretation of the arbitration agreement. The tribunal has the authority to adapt the contract because the Parties intended for Clause 12 of the contract to function as a hardship provision and allow for contractual adaptation. Furthermore, the Parties chose the law of Mediterraneo to determine whether hardship applies.

ISSUE 2: RESPONDENT ACCEPTED CLAIMANT'S OFFER TO ADAPT THE CONTRACT

52 On 23 January 2018, CLAIMANT complied with its delivery obligations and shipped the last 50 doses of product after RESPONDENT created the impression of accepting a price adaption. [*Ex. C 8*]. RESPONDENT's actions reasonably led CLAIMANT to assume that its offer to change

the DDP transportation agreement was accepted. Furthermore, Clause 12 of the contract is a valid hardship provision which creates a duty to renegotiate the delivery price. [*Ex. C 5, Clause 12*]. However, even if the Arbitral Tribunal finds the hardship clause to be invalid, the price must still be adapted under Mediterraneo law, UNIDROIT Art. 6.2.2.

A. RESPONDENT Agreed to a Price Adaption

53 RESPONDENT demonstrated through its conduct that it accepted the offer of a price adaption. When CLAIMANT was preparing the last shipment, news broke of the newly imposed tariffs. [*Ex. C 7*]. The tariffs made the shipment 30% more expensive than anticipated, which effectively eliminated CLAIMANT's profit margin and resulted in considerable hardship. [*Ex. C 8*]. CLAIMANT's representative, Julie Naparavnik, contacted RESPONDENT's representative, Mr. Shoemaker, and shared the news of the tariffs and the issues they posed to the last shipment [*ibid*]. Ms. Naparavnik stated that the shipments costs were now unacceptable and would need to be adapted in order for her to place the shipment [*Ex. C 7*]. Following the email, she reaffirmed the need for a price adaption in her phone conversation with Mr. Shoemaker [*Ex. C8*]. However, after CLAIMANT shipped the final doses, CLAIMANT discovered that the RESPONDENT refused to pay any additional amount for the tariffs [*ibid*].

54 Furthermore, the last two years have been quite difficult for the CLAIMANT. CLAIMANT has been able to stay in business due to extensive restructuring measures and a considerable cut of their workforce, but covering the costs of the increased tariffs would be impossible. [*Ex. C 8*]. CLAIMANT was not in the position to take on these excessive and unforeseen tariff costs, which they made known to RESPONDENT during contracting. [*Ex. C4*]. CLAIMANT even went as far as predicating their acceptance of the DDP delivery term on the inclusion of a hardship clause. [*ibid*].

B. Clause 12 is a hardship provision

55 Both RESPONDENT and CLAIMANT concede that Clause 12 is a hardship clause. [*Notice of Arb., ¶¶ 7, 8, 19; Answer to Notice of Arb., ¶¶ 9, 19*]. Clause 12 states:

56 Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of god neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous. [*Ex. C 5, Clause 12*].

57 Art. 8(1) of the CISG provides that courts interpret the "statements. . . and other conduct of a party. . . according to his intent" as long as the other party "knew or could not have been unaware what that intent was." Art. 8 should be interpreted in accordance with "the statements and conduct of the parties, inter alia, the kind of statements made by the offeror and offeree during the contract formation process." [*Lookofsky, p. 55*]. CISG Art. 8 expressly requires that "due consideration" be given to all relevant circumstance, including negotiations. [*ibid*]. Thus, the Arbitral Tribunal should consider the negotiations that came before the contract was signed, as well as statements made by both CLAIMANT and RESPONDENT.

58 In CLAIMANT'S first communication with the RESPONDENT, they offered the for the product to be picked up at their premises. [*Ex. C 2*]. In response, RESPONDENT asked to change the delivery term in light of "the urgency of the delivery" and CLAIMANT's "much greater experience in the shipment of frozen semen including the necessary export and import documentation." [*Ex. C 3*]. In light of such experience, RESPONDENT asked for the contract "on a delivery on the basis of DDP." [*ibid*]. However, CLAIMANT was uncomfortable signing a contract with a DDP delivery term. [*Ex. C 4*]. CLAIMANT's discomfort is noted in the following email response, where Ms. Napravnik states that "unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the costs up to 40% and thereby destroy the commercial basis of the deal." [*ibid*]. Ms. Napravnik then insisted that a hardship clause should be included into the contract to address such possibilities. [*ibid*]. Subsequent to the emails and on the day of the accident, Ms. Napravnik conveyed the importance of having a hardship clause to Mr. Antley. [*Ex. C 8*]. RESPONDENT's representative Mr. Antley agreed, stating that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [*Ex. C 8*]. Mr. Antley promised that he would come back with a proposal the next morning, but due to the accident he never managed to do so. [*ibid*].

59 Clause 12 of the contract was intended to protect the CLAIMANT from unforeseen delivery cost that would "destroy the commercial basis of the deal." [*Ex. C 4*]. Both Parties agreed that there needed to be a mechanism in place that would ensure an adaption of the contract in the event that the parties could not agree. [*Ex. C 8*]. Although the final hardship clause has no express reference to price adaption, it does state that sellers are not "responsible for hardship caused by . . . unforeseen events making the contract more onerous." [*Ex. C 5, Clause 12*]. The tariffs

are an unforeseen event that makes the contract extremely onerous for CLAIMANT. RESPONDENT was well aware that the CLAIMANT did not intend to take on any of the additional risk associated with delivery. [*Ex. C 8*]. Lastly, the Parties intended to put a mechanism in place that would give the Arbitral Tribunal express authority to adapt the price in the case that parties could not come to an agreement on their own [*ibid*]. In light of the above statements, the Arbitral Tribunal should apply Art. 8(1) of the CISG and interpret the contract in light of the party's statements, conduct, and intent.

C. The unforeseen tariffs constitute hardship under Art. 6.2.2 of the UNIDROIT principles

60 If the Tribunal decides that the contract price cannot be adapted under clause 12, CLAIMANT is still entitled to a price adaption under Mediterraneo's law of hardship. CLAIMANT is exempt from paying the increased delivery costs under Art. 6.2.2 of the UNIDROIT Principles because the agricultural products tariffs qualify as hardship. For the hardship exemption to apply to a case, the underlying circumstances of the contract must change in a way that the Parties did not foresee at the time when concluding the contract, and the change of the underlying circumstances is due to economic influences. [*Rimke, p. 199*]. CLAIMANT submits that it is exonerated from liability since the agricultural tariffs were unforeseen economic influence that caused them a loss of 30%. [*Notice of Arb., p. 4*].

61 Under UNIDROIT Art. 6.2.2, hardship occurs when an event "fundamentally alters the equilibrium of the contract . . . because the cost of a party's performance has increased." For an event to constitute hardship under Art. 6.2.2 the CLAIMANT must prove that (1) the event fundamentally altered the equilibrium of the contract, (2) the events occur or become known to the disadvantaged party after the conclusion of the contract; (3) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (4) the events are beyond the control of the disadvantaged party; (5) the risk of the events was not assumed by the disadvantaged party. [*UNIDROIT, Art. 6.2.2*].

1. A fundamental alteration of the contract has occurred because CLAIMANT would face financial ruin if forced to incur the delivery costs

62 There is no doubt that requiring CLAIMANT to pay the additional 30% tariff would result in Phar Lap's financial ruin. CLAIMANT specifically admitted that the last two years have been financially difficult for the business. [*Ex. C 8*]. The newly imposed tariff not only destroyed

CLAIMANT's profit margin of 5%, but also resulted in "considerable hardship." [*ibid*]. CLAIMANT is not arguing that the absence of a profit margin alone in the case warrants the invocation of the hardship clause; however, this reason, combined with CLAIMANT's already precarious financial situation, creates a dire predicament for Phar Lap. CLAIMANT directly stated that "it was impossible for us to shoulder this additional 30% tariff[.]" [*ibid*].

2. The tariffs implemented on agricultural products became known to CLAIMANT after the conclusion of the contract

63 The Parties signed the contract on May 6, 2017. [*Ex. C 5*]. Two months prior to the last shipment of 50 doses of semen, President Ian Bouckaert of Mediterraneo announced a 25% tariff on agricultural products. [*Ex. C 6*]. In response to the new tariffs, the Equatorianian government, which has always been an ardent supporter of free trade, imposed retaliatory tariffs of 30% on select Mediterraneo products including animal semen [*ibid*]. The events that placed CLAIMANT into such an arduous position became known after the contract was already negotiated and completed. [*Ex. C 7*].

3. CLAIMANT could not have reasonably taken into account the tariffs at the time they concluded contracting with RESPONDENT

64 Both Equatoriana's retaliatory tariffs of 30% and the initial tariffs from Mediterraneo came as a surprise to everyone, even those in informed government circles. [*Ex. C 6*]. Equatoriana has always been a big supporter of free trade, responding to restrictions imposed by other countries amicably or with dispute resolution mechanisms. [*ibid*]. Although the newly elected President Bouckaert of Mediterraneo announced in 2017 that he had a preference for a more protectionist approach to trade, the tariffs he set came as a shock to even experts [*ibid*]. President Bouckaert rationalized the large tariffs by saying the country's reliance on agricultural products posed an alleged threat to national security, which many saw as a façade to justify the controversial move. [*ibid*]. Thus, President Bouckaert's unsatisfactory justification for the tariffs may have triggered Equatoriana's retaliatory actions. [*ibid*]. In any event, CLAIMANT could not have reasonably anticipated such a sequence of occurrences.

4. The tariffs were beyond the control of CLAIMANT

65 The newly imposed tariffs were enacted by the government of Equatoriana, and their creation was completely outside the sphere of CLAIMANT's control. The first tariff was imposed by Mediterraneo's newly elected President, the retaliatory tariff was imposed by the government

of Equatoriana, and the inclusion of horse semen was decided by the Ministry of Agriculture. [*Ex. C 6, p. 15*]. Therefore, CLAIMANT could not have done anything differently to avoid the 30% increased tariff imposed.

5. CLAIMANT did not assume the risk of the tariffs

66 As stated throughout negotiations with RESPONDENT, CLAIMANT was never willing to take on such unforeseen risk. [*Ex. C 4*]. CLAIMANT expressed their desire to be relieved from shipping related risks during the negotiation process. [*ibid*]. The only reason that CLAIMANT agreed to take on delivery was due to their experience in shipping frozen semen. [*Ex. C 8*]. In light of the written communication, oral conversations, and Clause 12 of the contract, CLAIMANT made it very clear to RESPONDENT that they would not assume any unforeseeable risk associated with delivery.

67 The tariffs were an unforeseen event that fundamentally altered the equilibrium of the contract, or at the very least made the contract more onerous. The tariffs constitute hardship under UNIDROIT Principles Art. 6.2.2 and the Sales Agreement, and the Arbitral Tribunal should therefore adapt the price of the contract to restore balance and fairness.

D. The hardship clause mitigates any effect of DDP, and the use of the Incoterm DDP does not preclude CLAIMANT from asserting hardship in relation to surprise tariffs

68 CLAIMANT agreed to DDP Incoterm 2010 but critically insisted on and was successful in obtaining a hardship clause that mitigates the risks that DDP would have otherwise created.

69 Parties may "make modifications to a particular Incoterms 2010 term" in their contract. [*Gutterman, § 22:10*]. CLAIMANT acted in good faith aligned with approaches of commentators that Incoterms do not preclude application of the CISG:

> Incoterms do not replace the CISG's provisions on delivery and the passing of risk *in toto*, but merely supersede them in so far as they are mutually exclusive . . . [T]hey function *in tandem*. Aspects which are not governed by the Incoterms rules, or inadequately regulated, can be supplemented by the Convention, and *vice versa*. Collaboration between the two instruments strengthens the unified legal framework for international sales transactions with the view to facilitating international trade. [*Coetzee, p. 74*].

70 RESPONDENT wanted CLAIMANT to take on a burden of administering the costs associated with "shipment of frozen semen including the necessary *export and import documentation*" via

DDP, noting that CLAIMANT was already in the position to provide its "much greater experience" in such shipment administration. [*Ex. C 3 (emphasis added)*]. Acknowledging such administrative expertise, CLAIMANT agreed that "[g]iven the additional *cost*," CLAIMANT would agree to DDP, but noted that CLAIMANT was "not willing to take over any further *risks* associated with [accepting DDP], in particular not those associated with changes in *customs regulation* or *import restrictions*." [*Ex. C 4 (emphasis added*)].

71 Thus, concerned that RESPONDENT's insistence on DDP would result in unforeseen hardship that could result in the detriment of their anticipated 5% profit margin, CLAIMANT insisted on, and was successful in, including a hardship clause to mitigate CLAIMANT's DDP risk. CLAIMANT agreed to take on known costs of "shipment of frozen semen including the necessary export and import *documentation*" but CLAIMANT did not consent to any "further *risk* associated." [*ibid.*] CLAIMANT noted its desire to avoid its past experience regarding unforeseeable *risks* in the form additional health and safety requirements which could result in an increase of price of up to 40%, and suggested the need for a hardship clause to buffer any such unforeseen circumstances. [*Ex. C 4; Notice of Arb. ¶ 7*].

72 Again, neither party foresaw tariffs, but the hardship clause, constructed and signed by both parties, provided CLAIMANT protections from such hardships, by noting that CLAIMANT "shall not be responsible for . . . hardship, caused by additional healthy and safety requirements or comparable unforeseen events making the contract more onerous." [*Ex. C 5, Clause 12*].

E. CLAIMANT acted in good faith in initiating renegotiations for price adaptation and in performing its delivery obligation

1. CLAIMANT appropriately requested renegotiations, and in good faith conformed to its delivery obligations

73 When hardship occurs, "the disadvantaged party is entitled to request negotiations", but such a request does not "entitle the disadvantaged party to withhold performance." [*UNIDROIT, 6.2.3(1)-(2)*]. Additionally, the conduct of both parties during such renegotiation process is "subject to the general principle of good faith and fair dealing." [*UNIDROIT, 6.2.3 Comment 5*]. Once CLAIMANT requested negotiations, both CLAIMANT and RESPONDENT are expected to "conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information." [*UNIDROIT, 6.2.3 Comment 5*].

74 The imposition of a 30% tariff resulted in an unforeseen event making the contract more onerous and thus created hardship. [*Ex. C 8*]. On January 21–22, 2018, CLAIMANT attempted in good faith to request renegotiations for a contract price adaptation given the Sales Agreement's hardship clause, which provides that CLAIMANT is not responsible for hardship due to "unforeseen events making the contract more onerous." [*Ex. C 5, ¶ 12*]. Applying the shared Mediterraneo and Equatoriana law regarding hardships (UNIDROIT 6.2.2 and 6.2.3), CLAIMANT sought renegotiations. [*Notice of Arb., ¶ 12*].

75 On the morning of January 20, 2018, CLAIMANT (through agent Napravnik) emailed RESPONDENT to indicate that such hardship had occurred. [*Ex. C 7*]. CLAIMANT then requested renegotiations regarding a price adjustment for the last shipment of frozen semen, noting "we will have to find a solution [regarding the radically-increased price of product] before we can start the shipment, which was supposed to go out [2 days later]." [*Ex. C 7*]. RESPONDENT did not email back, but called CLAIMANT the next day. [*Ex. C 8*].

76 On the phone call, CLAIMANT again told RESPONDENT that the increased tariffs would result in "considerable hardship" to CLAIMANT: the shipment would be 30% more expensive than anticipated, destroying CLAIMANT's expected profit margin, as well as resulting in considerable additional cost to CLAIMANT. [*Ex. C 8, ¶ 6*]. RESPONDENT (through its agent Shoemaker) replied that it was "certain that a solution would be found through negotiation" given both parties' interest in continuing a long and fruitful business relationship. [*Ex. C 8*]. RESPONDENT then "urged" CLAIMANT to allow the shipment to proceed as planned, [*Ex. C 8*], noting "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*." [*Ex. R 4 (emphasis added)*]. RESPONDENT urged prompt shipment and delivery of the third installment, and appeared to generally accept the need for a price increase.

77 The next day, CLAIMANT fulfilled its obligation under Hardship Law 6.2.3, and performed the contracted shipment fully anticipating continued hardship renegotiations regarding a price adaptation. [*Notice of Arb., ¶ 13*].

2. Negotiations failed, and it is therefore appropriate for the Tribunal to adapt the price

78 Though CLAIMANT appropriately requested contract renegotiations, received assurances that the contract price would be renegotiated, and fulfilled its duty to perform the delivery, RESPONDENT in bad faith failed any continued renegotiations process.

79 If the Parties fail to reach agreement regarding hardship renegotiations, an arbitral tribunal may find hardship and "adapt the contract with a view to restoring its equilibrium." [*UNIDROIT, 6.2.3(4)(b); PO2, ¶ 39*].

3. The Parties intended the Tribunal to adapt the sales agreement in the event the Parties could not agree

80 Both CLAIMANT and RESPONDENT intended for an arbitral tribunal to be responsible for resolution of a price adaptation if the Parties couldn't reach a solution themselves.

81 Both Parties consented and bound themselves to the terms of the contract Sales Agreement, which by Clause 14 binds the contract to be governed by the law of Mediterraneo. Regardless of the law that ultimately applies to this arbitration, each contracting state, and the state of the seat of arbitration, are parties to the CISG. [*PO1, ¶ 4*].

82 In considering relief, the CISG directs arbitrators to give weight to parties' intent. [*CISG Art. 8(1)*]. In interpreting parties' intent, a factfinder should provide consideration to all relevant circumstances, including: (1) negotiations; (2) practices established between the parties; (3) usages; and (4) any subsequent conduct of the parties. [*CISG Art. 8(3)*].

83 On April 12, 2017, during the course of contract negotiations, CLAIMANT urged RESPONDENT that "it was important to have a mechanism in place which would ensure adaptation of the contract for the unlikely event that the Parties could not agree on an amendment." [*Ex. C 8*]. RESPONDENT responded that "in his view it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [*Ex. C 8*]. CLAIMANT also refers to the Sales Agreement contract, which stipulated that "[a]ny dispute arising out of this contract…shall be…finally resolved by arbitration." [*Ex. C 5, Clause 15*]. Both parties intended that the Tribunal should adapt the Agreement in the case of disagreement.

84 Additionally, both parties intended to renegotiate after the hardship occurred, with CLAIMANT requesting price renegotiations, and RESPONDENT providing that "we will certainly find an agreement on the price." [*Ex. R 4*].

85 Given the parties' intention during the negotiation of the Sales Agreement, the Tribunal should adapt the Sales Agreement.

4. The Tribunal should adapt the Sales Agreement in CLAIMANT's favor given the CISG's purpose in providing uniformity and good faith in international contracts

86 Tribunal should adapt the Sales Agreement in CLAIMANT's favor aligned with the purpose of the CISG: that international contracts be conducted in uniformity and good faith.

87 The purpose of the CISG is to promote uniformity and good faith in international trade. [*CISG Art. 7(1)*]. If the CISG does not provide enumerated principles upon which parties may settle disagreement, the matter is "to be settled in conformity with the general principles" of the CISG. [*CISG Art. 7(2)*].

88 RESPONDENT did not conduct international trade in the spirit of good faith, but instead resorted to silence and constructed misdirection in order to ensure that RESPONDENT, and it alone, would prevail at the detriment of CLAIMANT's good faith.

5. RESPONDENT is duplicitous in disputing its actions as nonbinding

89 RESPONDENT argues that it never bound itself to renegotiate the contract, because it did not agree to any negotiations nor adaptation because its agent "had no authority to agree on the adaptation." [*Answer to Notice of Arb., ¶ 10*]. CLAIMANT challenges RESPONDENT's premise that RESPONDENT's agent Shoemaker did not have authority to negotiate: Mr. Shoemaker was the person in charge of responding to CLAIMANT; Mr. Shoemaker conducted investigations to determine whether tariffs affected animal semen; Mr. Shoemaker took it upon himself to "ensure that the remaining 50 doses were actually shipped." [*Ex. R 4*.] Mr. Shoemaker had been introduced to Ms. Napravnik "as the person responsible . . . for all questions concerning the Frozen Semen Sales Agreement." [*PO2, ¶ 32*].

90 If Mr. Shoemaker were "the person responsible for all questions" concerning the Sales Agreement, he would have authority to act and bind RESPONDENT. With Mr. Shoemaker acting on behalf of RESPONDENT, RESPONDENT thus admits to telling CLAIMANT, "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." [*Ex. R 4*].

91 RESPONDENT relied on the conspiring of a lone agent (Mr. Shoemaker) and his attorney spouse to ensure that the delivery was made, but now hopes to escape liability that occurred on the basis of hardship. RESPONDENT admits to knowing that if he did not promise CLAIMANT the

chance to renegotiate on the January 21 phone call, it would result in RESPONDENT not getting the doses it needed to ensure its business objectives. [*Ex. R 4*]. In order to craft a response that would ensure CLAIMANT's timely shipment, Mr. Shoemaker did not consult RESPONDENT's CEO, but instead consulted with his attorney spouse in anticipation of such a delicate imminent conversation.

92 As a result of RESPONDENT's scheming to ensure that CLAIMANT performed, RESPONDENT read off to CLAIMANT a carefully crafted response, that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price," knowing that CLAIMANT "would not deliver if I were to reject their request outright." [*Ex. R 4*].

93 The above facts confirm that Mr. Shoemaker, agent of RESPONDENT, bound it to renegotiations; that RESPONDENT now wishes to dispute its agent's actions as nonbinding is duplicitous, and not in the spirit of good faith in international trade. It would result in undue hardship if RESPONDENT were able to shed the legal responsibility that attaches to its agent's actions.

6. RESPONDENT did not act in good faith during attempted renegotiations

94 In February 2018, both parties' chief executive officers, as well as parties' respective agents Ms. Napravnik and Mr. Shoemaker attended a meeting. [*PO2, ¶ 35*]. The meeting was called upon CLAIMANT's good faith initiative to resolve the issue of price adaptation. [*PO2, ¶ 35*]. At this meeting, CLAIMANT also confronted RESPONDENT regarding news that RESPONDENT had been reselling the semen to third parties. [*Ex. C 8*]. So confronted, RESPONDENT'S CEO became angry, aggressive, and "stopped the negotiations and refused to pay any additional amounts for the tariffs." [*Ex. C 8*]. CLAIMANT and RESPONDENT have thereafter been unable to reach agreement regarding continued renegotiations regarding price adaptation.

95 Though CLAIMANT at all times conducted itself in international trade in good faith, RESPONDENT acted in bad faith with duplicitous agent actions, and temper tantrums at the highest level.

96 Because renegotiations have failed, CLAIMANT now looks to the arbitral tribunal, to "adapt the contact with a view to restoring its equilibrium." [*UNIDROIT, 6.2.3(4)(b)*].

97 CLAIMANT seeks a $1,250,000 contract price adaptation based off of shared UNIDROIT hardship laws and the application of the CISG.

CONCLUSION ON ISSUE 2

98 For the foregoing reasons, CLAIMANT requests that the Tribunal order an adaptation of the contract with respect to price.

ISSUE 3: THE TRIBUNAL SHOULD ALLOW CLAIMANT TO SUBMIT EVIDENCE FROM A PREVIOUS ARBITRATION PROCEEDING

99 In any arbitration proceeding, each side should be given an equal and fair opportunity to present valid and material evidence. CLAIMANT's submission of relevant evidence from a previous arbitration proceeding should be no exception. CLAIMANT will demonstrate that (A) the Tribunal has authority to admit the evidence, (B) the evidence must be admitted under principles of international arbitration law, (C) the evidence does not raise confidentiality concerns, and (D) the evidence was available in the public domain.

A. The Tribunal has the authority to admit the evidence

100 Under the HKIAC Rules, IBA Rules on Taking of Evidence, and the UNCITRAL Model Rules, the Tribunal has the authority to admit the evidence. The applicable rules to this procedure give absolute authority to the Tribunal to determine the admissibility, relevance, materiality, and weight of the evidence offered by CLAIMANT, notwithstanding if it is considered confidential or illegal. Concretely, the authority conferred upon the Tribunal includes the power to determine the admissibility of "any evidence", such as the Partial Interim Award or other briefs offered by CLAIMANT [*UNCITRAL, Art. 19(1)*].

101 The arbitration process between CLAIMANT and RESPONDENT is procedurally governed by the Hong Kong International Arbitration Centre (HKIAC). Art. 22.2 of HKIAC gives the arbitral tribunal full authority over all evidentiary rulings, including admissibility during any point of arbitration. Art. 22.2 of HKIAC states that "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence." [*HKIAC, Art. 22.2*] Under such authority, the tribunal has the "power to admit . . . any documents, exhibits, or other evidence." [*HKIAC, Art. 22.3*]

102 The International Bar Association (IBA) Rules on Taking of Evidence provide further guidance. The IBA rules provide guidelines to the Tribunal's discretion on analyzing the material or relevant nature of the evidence. These include (i) any possible waiver of privilege by virtue of consent, earlier disclosure, affirmative use of the document, oral communication

or advice contained therein and (ii) the need to maintain fairness and equality as between the Parties. [*IBA Rules of Evidence, Art. 9]*.

103 UNCITRAL Art. 18 demands that Parties be "treated with equality" and "given a full opportunity of presenting his case." UNCITRAL Art. 19(1) grants the Parties the power to choose the procedure governing the proceedings, and UNCITRAL Art. 19(2) specifies that, absent agreement, the tribunal may "conduct the arbitration in such manner as it considers appropriate." [*UNCITRAL, Art. 19(2)*]. Further, UNCITRAL Art. 19(2) echoes HKIAC Art. 22.2, both provisions providing the tribunal the power to determine "admissibility, relevance, materiality, and weight of any evidence." [*HKIAC, Art. 22.2; UNCITRAL, Art. 19(2)*].

104 The foregoing authority clearly permits the tribunal to determine evidentiary questions such as admissibility, relevance, materiality, and weight. [*HKIAC, Art. 22.2; UNCITRAL, Art. 19(2)*].

B. The Tribunal must admit the evidence under principles of international arbitration law

105 The Tribunal must find that the evidence here is both relevant and material to the arbitration. The dispute underlying the other arbitration was almost identical to this dispute. In the other proceeding, a partial interim award was rendered in favor of RESPONDENT. The RESPONDENT received a renegotiation of price under the ICC Hardship Clause 2003 and Art. 6.2.3. of the Mediterranean Contract Law. The tribunal "confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT." [*PO 2*]. Much like this arbitration, the other arbitration was conducted under HKIAC Arbitration Rules, the contract provided for DDP (Incoterms 2010), contained an ICC Hardship Clause 2003, and a substantive choice-of-law clause selecting the law of Mediterraneo. [*ibid*]. Further, the source of the hardship was the same: suddenly implemented tariffs.

1. *The principle of procedural fairness favors admitting evidence relevant to the proceeding*

106 Procedural fairness, a vital element of international arbitration, favors admitting evidence relevant to the proceeding. Not only does it insure fairness in the balance of information presented, but ensures the tribunal has all the information needed to make a just award. The primary objective of an arbitral tribunal is to analyze evidence submitted by both Parties to discern the truth. Scholar Waincymer, a professor of law at Monash University in Melborne,

Australia, describes the pursuit of truth as "an element of fairness implies that a correct outcome is the most just . . . this approach would see few, if any limitation on the amounts of evidence" submitted to the tribunal. [*Waincymer, ch. 10*]. Because fairness means the goal of the tribunal is the pursuit of the objective truth, "any relevant document ought to be available for the adjudicator's benefit." [*Waincymer, ch. 11*].

107 The guidelines concerning evidence specifically state that the tribunal shall make all evidentiary rulings as long as it treats both Parties fairly [*HKIAC, Art. 22.2*]. The UNCITRAL Model Law, the law of Denubia, orders the tribunal to act within procedural fairness, stating "the Parties must be treated with equality and, at an appropriate stage in the proceedings, each party must be given a reasonable opportunity of presenting a case." The UNCITRAL Model Law language is mandatory, using "must" several times to emphasize the importance of fairness in the proceedings.

108 Because by the law of Denubia the tribunal must give each party a reasonable opportunity of presenting a case, the tribunal must admit CLAIMANT's evidence. The evidence from RESPONDENT's previous arbitration is essential for CLAIMANT to be able to fairly present its entire argument to the tribunal. RESPONDENT itself argued that an adaption of contract price is required in an unforeseeable change of circumstances. Under fairness and equity principles the evidence should be declared admissible. The Arbitral Tribunal should repudiate the fact that a party adopts inconsistent positions on parallel procedures to obtain inadequate and unjust advantages. In this regard, some treaties have said that courts may apply the collateral estoppel doctrine which "will preclude a party from asserting inconsistent positions on arguments or obligations that a party has asserted in pleading elsewhere." [*Baptista, pp. 135–136*].

109 The evidence is essential to this proceeding because the previous arbitration almost exactly mirrors the present dispute, including a tariff hike that would unfairly burden one of the Parties while unjustly enriching the other. The evidence establishes that RESPONDENT is completely in agreement with CLAIMANT that the contract price must be adapted to the circumstances of the tariff hike; otherwise, RESPONDENT, like the opposing party in the previous proceeding, will be unjustly enriched. RESPONDENT's current argument is inconsistent with its past stand, and this serves not only to undermine RESPONDENT's credibility, but to show that RESPONDENT agrees with CLAIMANT's current argument.

110 The evidence must also be admitted for the benefit of the tribunal. Because the evidence is essential for CLAIMANT's case, without access to the evidence the tribunal will be unable to make a fair and just decision. According to the HKIAC Guidelines, the tribunal must act within the confines of decision finality; "at any time during the arbitration the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome." [*HKIAC, Art. 22.3*]. Evidence is material when it has "a tendency to influence the tribunal's determination of issues in dispute" [*Waincymer, ch.11; Yoon & Richardson, p. 139*].

111 In addition to benefiting the tribunal, admitting the evidence is consistent with the international principle of due process. "Mandatory due process norms" include the opportunity to present one's case, "the right to equal treatment and ....good faith disclosure obligations." [*Waincymer, ch.10: UNCITRAL, Art. 18*]. Excluding evidence of the prior arbitration is a denial of CLAIMANT's reasonable opportunity to be heard. The evidence supports the heart of CLAIMANT's case. Further, a basic sense of fairness supports using all available information in order to render more correct results. Due process can warrant reversal, so the tribunal should be mindful that HKIAC Art. 13.1 requires the arbitral tribunal to "make every reasonable effort to ensure that an award is valid." [*Waincymer, ch.10*].

112 The admission of evidence is integral to upholding the principle of procedural fairness and upholding due process norms.

2. *The principle of transparency counsels admission of evidence*

113 The Tribunal should follow the current trend of transparency in the greater arbitration realm. Both the IBA and UNCITRAL have been moving towards greater transparency in terms of disclosing information. The ICC, for example, has adopted steps "designed to increase the transparency of its institutional decision making" such as communicating reasoning behind decisions made on the challenge of an arbitrator. Other institutions are increasingly publishing awards in complete or redacted form, press reports have published pending international disputes, and more information is being published by institutions about arbitrators, making the international arbitration community and process more accessible. [*Born, p.487*]. Although the UNCITRAL Rules on Transparency are unique to the Treaty-Based Investor State field, the general move towards transparency in the arbitration field lends to applying these rules to this present case.

114 The Rules of Transparency provide for the Tribunal to exercise discretion by taking into account the public interest and the disputing Parties interest in a fair and efficient resolution of their dispute [*UNCITRAL, Art. 4 (4)*]. An absence of transparency creates "information asymmetries between parties in arbitration" [*Malintoppi & Limbasan, p. 35*], and decreases the legitimacy of the process. Lack of access to relevant information essential to the proceeding at hand creates not only uncertainty in the proceeding but renders the outcome unjust and open to appeal. The interest in transparency in this proceeding is important to ensure that relevant evidence is being presented to the arbitrators. Transparency eliminates "inconsistencies in the interpretation of same-face disputes or even cases of similar facts and legal issues." [*Tung & Lin, p. 86*]. Consistency in how laws are applied in international arbitration not only leads to fair awards but eliminates mistrust of the arbitral system because Parties are more knowledgeable on the likely outcome of their case.

115 The prior proceeding is factually similar to the current proceeding; RESPONDENT argued for a price adjustment to the agreed upon contract because of an unforeseen tariff hike. [*PO2, ¶ 39*]. Because the two proceedings have the same fact pattern, it is important for the current tribunal to have access to the evidence so that it may view how the previous tribunal handled the issue. Furthermore, the evidence must be admitted because CLAIMANT is a relevant stakeholder to the prior proceeding. Arbitral proceedings do not act in a vacuum; actions by multinational companies have effects on communities. Transparency provides accountability to "individuals or groups who may be impacted and to other relevant stakeholders." [*Malintoppi & Limbasan, p. 37*]. Though CLAIMANT was not a party to the proceeding, the evidence and outcome of that proceeding is relevant to CLAIMANT because of the identical fact pattern and RESPONDENT's prior argument in support of CLAIMANT's position. The evidence is essential to the outcome of the case, and as such, makes CLAIMANT a relevant stakeholder in the previous proceeding. Therefore, the interest in transparency in this proceeding is integral to conducting a fair and efficient arbitration proceeding.

C. CLAIMANT is not bound by a duty of confidentiality

1. *CLAIMANT is not subject to a confidentiality agreement in relation to the evidence*

116 The Tribunal must admit the evidence from the previous arbitration because CLAIMANT is not subject to a confidentiality agreement in relation to the evidence. Danubia has adopted the UNCITRAL Model Law and is subject to its provisions. According to Art. 17 of the

UNCITRAL Model Law, the implied power of the tribunal is "limited to order directed to the Parties, not to third Parties." Therefore, the decisions of the Tribunal in RESPONDENT's previous arbitration, and consequently the confidentiality provision, do not apply to CLAIMANT. In relation to RESPONDENT's previous arbitration, CLAIMANT was not considered a party.

117 RESPONDENT claims that if the Tribunal allows the evidence into the proceeding, the tribunal would breach Art. 42 of the HKIAC 2013 Guidelines. Art. 42.1 states "unless otherwise agreed to by the Parties, no party may publish, disclose or communicate any information relating to (a) the arbitration under the arbitration agreements; or (b) an award made in the arbitration." [*HKIAC 2013, Art. 42*] However, like the UNCITRAL Model Law, Art. 42.1 does not apply to CLAIMANT because CLAIMANT is not a "Party" in the context of the previous award. Only "Parties" are bound by the duty of confidentiality because the tribunal's power does not extend to third Parties without joinder. CLAIMANT itself was not party to any duty of confidentiality; the duty exists between RESPONDENT and the other Parties involved in the previous arbitration. By submitting evidence to the tribunal from previous arbitration of which CLAIMANT was not part of, CLAIMANT is not breaching a duty of confidentiality.

2. *The Tribunal has the authority to waive confidentiality when the evidence is relevant*

118 HKIAC 2018 Rules have modernized the approach of confidentiality in arbitration procedures, giving more authority to arbitrators to obtain confidential documents than in the HKIAC 2013 Rules. Under Art. 45.3(d) and Artt. 27 through 30 of the HKIAC 2018 Rules, disclosure of confidential documents is allowed before any authority for the purpose of an eventual joinder or consolidation, even if there is only a legal question in common. [*HKIAC, Artt. 45.3(d), 27-30*]. RESPONDENT is a common litigant in both parallel arbitration procedures and both Tribunals must answer the same legal question. Therefore, under the rules applicable to this procedure, the Tribunal has the authority not only to declare the admissibility of the evidence offered, but also to require such documents from the parallel arbitration.

119 Under the IBA Rules of Evidence, confidentiality does not imply a prohibition on obtaining the information by an arbitral tribunal. Instead, the Rules recommend, where appropriate, making necessary arrangements to permit the evidence to be presented. Thus, Art. 9, No. 4 of the IBA Rules of Evidence demonstrates that the Tribunal may make the necessary

arrangements to permit evidence to be presented or to be considered subject to suitable confidentiality protections. [*IBA Rules of Evidence, Art. 9(4)*]

120 In the past, international arbitral tribunals at parallel arbitrations under ICSID and ICC rules have declared the admissibility of confidential evidence. In *AEGIS v. European Re*, there were parallel ICSID and ICC arbitrations, in which the RESPONDENT in both cases was the same, but the CLAIMANTS differed. In the mentioned case "the two tribunals were different and there was no common member. [*AEGIS v. European Re*]. The tribunal in the ICSID case ordered the RESPONDENT to produce all the documentation in the ICC case. [ibid]. The ICC tribunal issued a corresponding order requiring the RESPONDENT to produce all the documentation in the ICSID case" [*Waincymer, ch.7*].

121 One aspect of arbitration that is attractive to Parties is the implied environment of privacy; that is, that the proceedings and the resulting award will remain between those who participate in the proceedings (Parties, tribunal, experts, staff). Although an environment of privacy is an important aspect of international arbitration, it is only one aspect of arbitration. Sometimes privacy and fairness come into conflict. In the event of a conflict, the principle of fairness, as the most important aspect to the pursuit of truth and a just award, must prevail over privacy. When breaching the principle of privacy is essential to the pursuit of truth, arbitral tribunals must choose truth over privacy. Because the tribunal has authority over evidentiary issues, the tribunal also has the power to waive the principle of privacy in favor of admitting evidence under the principle of fairness.

122 Because the evidence is coming post award of the previous proceeding, its admittance for the use of the tribunal in the current proceeding does not harm RESPONDENT'S outcome or stance in the previous proceeding. Therefore, there is no risk of harm to RESPONDENT by admitting the evidence. Keeping the evidence private when its exposure would not harm RESPONDENT is unnecessary: "unnecessary privacy is a real problem" [*Tung & Lin, p. 87*] in arbitral proceedings.

123 In a recent arbitration case, the Tribunal weighed the balancing of confidentiality and privacy with relevant and material evidence. In *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, the Tribunal was faced was the question of evidence in the form of leaked documents that were now publicly available due to a Wikileaks Page. [*Caratube Case*] Because the documents were both material and relevant and now in the public domain, the

Tribunal found that the balance tipped in favor of admitting the documents [*ibid*]. Additionally, the documents were precluded from being considered privileged information now that they were available to the public. [*ibid*]. This test is crucial to balancing the interests of confidentiality with the admission of relevant and credible evidence.

124 In the CLAIMANT'S case, this balance weighs in favor of admitting the evidence. While confidentiality is important to ensure a just arbitration system, precluding information from the Tribunal that is integral to an efficient proceeding is an equally, if not more, important consideration.

3. *The information is in the public domain*

125 As a general rule relating to the environment of privacy, "arbitrators are obliged to keep confidential all facts and circumstances relating to the Parties, the third Parties (such as witnesses and experts) and to disputes that are not in the public domain and which become known to them in the course of the proceedings. [*Jolles, p. 138*]. However, once the information is in the public domain, it loses its confidential status.

126 RESPONDENT argues that CLAIMANT acquired the evidence one of two ways-either from RESPONDENT's previous employees or from the worldwide web. [*Fasttrack Email, 3 Oct, 2018*]. In the first scenario, the evidence should be admitted because RESPONDENT's former employees released the information to a member of the public; therefore, the information is no longer protected and exists in the public domain. CLAIMANT is not party to any illegal acts on the part of RESPONDENT's former employees; RESPONDENT's former employees breached a duty of confidentiality by releasing the information into the public domain, but CLAIMANT is not bound by any duty of confidentiality. CLAIMANT has no obligation to keep confidential information released into the public domain by RESPONDENT's former employees, and it would be contrary to public policy to require CLAIMANT to keep secret information that has become public.

127 RESPONDENT also argues the evidence should not be admitted because Plaintiff acquired the information from the internet via a breach of RESPONDENT's computer system. CLAIMANT had no part in hacking into RESPONDENT's computer system. Therefore, CLAIMANT has not committed an illegal act. Once information is available via the internet, it is fully accessible to the public and can no longer be classified as confidential, no matter if the information was

put up illegally or not. For this very information it is called an "information leak" because confidential information has been "leaked" to the public and is no longer secret.

128 It is contrary to public policy to require CLAIMANT to close its eyes to publicly known information relevant to current proceedings. In similar circumstances, U.S. attorneys are allowed to use information that was previously protected under the attorney-client privilege if the information, through means other than the attorney, has become public knowledge. [*Mod. Rules Prof. Cond., 1.9*]. In the current case, RESPONDENT's previously classified information has become public knowledge through means other than CLAIMANT's actions; therefore, the Tribunal must accept CLAIMANT's evidence. As a member of the general public, CLAIMANT has no duty to keep information in the public domain confidential.

CONCLUSION ON ISSUE 3

129 The Tribunal should allow CLAIMANT to submit the evidence from the previous arbitration proceeding. CLAIMANT recognizes the delicate balance between the submission of evidence and confidentiality concerns. However, in the present case, the scale shifts towards allowing the CLAIMANT to submit evidence that is both relevant and material to the outcome of the arbitration proceeding at hand. The submission of evidence, already in the public domain, would additionally uphold principles of procedural fairness and transparency.

PRAYER FOR RELIEF

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

(1) declare that the entire contractual relationship between CLAIMANT and RESPONDENT is governed by the law of Mediterraneo;

(2) order RESPONDENT to pay to CLAIMANT an additional amount of $1,250,000 USD which is 25% of the price for the third delivery of semen;

(3) order RESPONDENT to bear the costs of the arbitration.

4 December, 2018

Respectfully Submitted,

Maria Bucci and Hannah Clayshulte