16th Annual Willem C. Vis East International Commercial Arbitration Moot

Hong Kong • 31 March – 7 April 2019

Loyola University Chicago School of Law

MEMORANDUM FOR RESPONDENT

On Behalf of:
Black Beauty Equestrian
(RESPONDENT)
2 Seabiscuit Drive
Oceanside, Equatoriana
(0) 214 669804

Against:
Phar Lap Allevamento
(CLAIMANT)
Rue Frankel 1
Capital City, Mediterraneo
(0) 146 9346359

AMANDA BURNS / CHRISTINA CONNELLY / SHELBY KOST

JESSICA SOTO / LUCAS TERNA / LOAN TRAN / PARIZ YABUKU

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Art	Article
Aug	August
CISG	United Nations Convention on Contracts for the International Sale of Goods
CEO	Chief Executive Officer
Co	Company
DCFR	Draft Common Frame of Reference
Dec	December
Ex. C	CLAIMANT'S Exhibit
Ex. R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Hong Kong International Arbitration Rules
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)
Ibid or Id	Ibidem (the same)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR Rules	International Centre for Dispute Resolution, International Dispute Resolution Procedures (1 June 2014)
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Incoterm	International Commercial Term, Published by ICC

Jan	January
LCIA Rules	London Court of International Arbitration Rules (2014)
Mar	March
Model Law	UNCITRAL Model Law
Mr.	Mister
Ms.	Miss or Mrs.
n/a	Not Applicable
No.	Number
Nov	November
p.	Page
para.	Paragraph
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts
R.	Record
Sept	September
Swiss Civil Procedure Code	Swiss Civil Procedure Code of 19 December 2008
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)
UNIDROIT Principles	International Institute for Unification of Private Law, Principles of International Commercial Contracts (2016)
USD	United States Dollars

v.	Versus
Vol	Volume
WIPO Rules	World Intellectual Property Organization Arbitration Rules (1 Oct 2002)

INDEX OF AUTHORITIES

CITED AS	REFERENCE	CITED IN
Ashford	Peters Ashford, THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (Cambridge 2013)	*para. 35*
Beisteiner	Lisa Beisteiner, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION (2014)	*paras.* 4, 5
Born	Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014)	*paras.* 13, 14, 15, 19, 36, 39, 44
Brown	Alexis Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969 (2001)	*para.* 42
Brunner	Christoph Brunner, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION (2008)	*paras.* 19, 70, 71, 72, 73, 88,
De Ly	Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning,* NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS (1991)	*para.* 17
Fucci	Frederick R. Fucci, HARDSHIP AND CHANGED CIRCUMSTANCES AS GROUNDS FOR ADJUSTMENT OR NON-PERFORMANCE OF CONTRACTS CONFERENCE: PRACTICAL CONSIDERATIONS IN INTERNATIONAL INFRASTRUCTURE INVESTMENT AND FINANCE (2006)	*paras.* 24, 91
Gaillard	Emmanuel Gaillard, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (2008)	*para.* 1
Girsberger /Voser	Daniel Girsberger & Nathalie Voser, INTERNATIONAL ARBITRATION - COMPARATIVE AND SWISS PERSPECTIVES (2016)	*para.* 35

Glick	Ian Glick & Niranjan Venkatesan, *Chapter 9: Choosing the Law Governing the Arbitration Agreement,* in JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES (2018)	*paras.* 11, 12, 16, 19
Holtzmann	Howard Holtzmann & Joseph Neuhaus, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989)	*para.* 19
Hornyold-Strickland	Francis Hornyold-Strickland, *What Law Governs the Separability of an Arbitration Agreement?*, KLUWER ARBITRATION BLOG (25 December 2016)	*para.* 14
Kröll	Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application*, JOURNAL OF LAW AND COMMERCE (2005-06)	*para.* 15
Lamm	Carolyn Lamm, Hansel Pham, et al, *Fraud and Corruption in International Arbitration*, in Fernandez-Ballester, Miguel Angel & Arias, David (eds), LIBER AMICORUM BERNARDO CREMADES (2010)	*para.* 59
Maniruzzaman	Abdul F. Munir Maniruzzaman, *Choice of Law in International Contracts: Some Fundamental Conflict of Laws Issues,* JOURNAL OF INTERNATIONAL ARBITRATION (1999)	*para.* 16
Moser	Michael Moser & Chiann Bao, A GUIDE TO THE HKIAC ARBITRATION RULES (2017)	*paras.* 28, 35, 42
Moses	Margaret Moses, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2017)	*paras.* 11, 12
Nakamura	Tatsuya Nakamura, *Confidentiality in Arbitration; SVEA Court of Appeal Decision- is it Good News Stockholm?*, 14 MEALEY'S INT'L ARB. REP. 24 (1999).	*para.* 42
Petsche	Markus Petsche, *Hardship Under the UN Convention on the International Sale of Goods (CISG),* VINDABONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW & ARBITRATION (2010)	*paras.* 6, 12, 17, 83, 84, 85
Redfern/ Hunter	Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 6th edition (Oxford 2015)	*para. 35*

Rosengren	Jonas Rosengren, *Contract Interpretation in International Arbitration*, JOURNAL OF INTERNATIONAL ARBITRATION, Volume 30, Issue 1 (2013)	*para.* 20
Ruiz	Pedro Silva-Ruiz, *Some Remarks about the 1980 Vienna Convention on Contracts for the International Sale of Goods – Emphasis on Puerto Rico*, 6 ARIZONA JOURNAL OF INTERNATIONAL COMPARATIVE LAW (1987)	*para.* 87
Saidov	Djakhongir Saidov, *Chapter 5: Foreseeability of Damages*, THE LAW OF DAMAGES IN INTERNATIONAL SALES: THE CISG AND OTHER INTERNATIONAL INSTRUMENTS	*para.* 70
Samuel	Mayank Samuel, *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?,* in KLUWER ARBITRATION BLOG (21 FEBRUARY 2017). *Available at:* http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/	*para.* 42
Schlechtreim	Peter Schlechtreim & Petra Butler, UN LAW ON INTERNATIONAL SALES: THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2009)	*paras.* 78, 85, 86
Schlechtreim Article 6	Peter Schlechtriem, UNIFORM SALES LAW – THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1986)	*para.* 81
Schmidt-Ahrendts	Dr. Nils Schmidt-Ahrendts, *CISG and Arbitration*, BELGRADE LAW REVIEW (2011)	*para.* 19
Schramm	Dorothee Schramm, Elliott Geisinger, et al., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (2010)	*paras.* 10, 11
Schwenzer	Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts,* 29 VICTORIA U. WELLINGTON L. REV. 709 (2009)	*paras.* 71, 76

Segesser	Georg von Segesser, *Admitting Illegally Obtained Evidence in CAS Proceedings- Swiss Federal Supreme Court Shows Match-Fixing the Red Card,* KLUWER ARBITRATION BLOG (17 October 2014). *Available at:* http://arbitrationblog.kluwerarbitration.com/2014/10/17/admitting-illegally-obtained-evidence-in-cas-proceedings-swiss-federal-supreme-court-shows-match-fixing-the-red-card/	*para.* 56
Smeureanu	Ileana M. Smeureanu, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION, INTERNATIONAL ARBITRATION LAW LIBRARY, VOLUME 22 (2011)	*para.* 47
Sussman	Edna Sussman, *Cyber Intrusion as the Guerrilla Tactic: An Appraisal of Historical Challenges in an Age of Technology and Big Data,* FORTHCOMING in EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION, ICCA CONGRESS SERIES No. 20 (2019)	*para.* 51
Uribe	Rodrigo Momberg Uribe, *Change of Circumstances in International Instruments of Contract Law: The Approach of the CISG, PICC, PECL, and DCFR,* VINDABONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION (2001)	*paras.* 83, 88
Valcke	Brecht Valcke, *ICCA Sydney: Hot Topics,* KLUWER ARBITRATION BLOG (18 April 2018). *Available at:* http://arbitrationblog.kluwerarbitration.com/2018/04/18/icca-sydney-hot-topics-new-voices/	*para.* 57
Waincymer	Jeffrey Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (2012)	*paras.* 28, 35, 51
WiseLSM	Kun Hee Cho & Kay-Jannes Wegner, *WiseLSM Co., Ltd. v. Draeger Korea Co., Ltd. – A Contribution by the ITA Board of Reports*, KLUWER LAW INTERNATIONAL (2017)	*para.* 21
Winship	Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in Galston & Smith, ed., INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1984)	*para.* 81

INDEX OF LEGAL SOURCES

CITED AS	REFERENCE	CITED IN
CISG	The United Nations Convention on Contracts for the International Sale of Goods *Available at*: http://iicl.law.pace.edu/cisg/cisg	*paras.* 23, 70, 78, 81, 82
HKIAC 100 Questions	HKIAC, 100 Questions *Available at*: http://www.hkiac.org/arbitration/why-hong-kong/hong-kong-arbitration-faqs	*para. 36*
HKIAC 2013	Hong Kong International Arbitration Centre Administered Arbitration Rules (2013)	*paras.* 44, 48
HKIAC 2018	Hong Kong International Arbitration Centre Administered Arbitration Rules (2018)	*paras.* 28, 38, 42, 44, 48
Swiss Civil Procedure Code	Swiss Civil Procedure Code (19 December 2008)	*para.* 56
UNIDROIT Principles	UNIDROIT Principles (2016) *Available at:* http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016	*paras.* 89, 90, 94

INDEX OF AWARDS

Caratube International	*Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* Decision Rendered 27 September 2017	*para.* 54
Inceysa	*Inceysa Vallisoletana S.L. v. Republic of El Salbador* ICSID Case No. ARB/03/26 (2006).	*para.* 59
World Duty	*World Duty Free v. Kenya* ICSID Case No. ARB/00/7 (2006)	*para.* 59

PCA

Hulley Enterprises	*Hulley Enterprises Ltd. v. Russian Federation* Final Award, PCA Case No. AA 226 (2014)	*para.* 58

UNCITRAL

Lauder	*CME v. Czech Republic* UNCITRAL 2018	*para.* 36

INDEX OF CASES

Netherlands

Agristo	*Agristo N.V. v. Macces Agri B.V.* Rb Masstricht (District Court) 9 July 2008	*para.* 91

Philippines

Air Terminals	*Republic of Philippines v. Philippines International Air Terminals Co. Inc.* Republic of the Philippines, Supreme Court G.R. No. 181892 19 April 2016	*para.* 12

Singapore

FirstLink	*FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd. and Others* SGHCR 12 2014	*para.* 12

Spain

Building Plots Case	*Building Plots Case* Tribunal Supremo (64/2015) 24 February 2015	*para.* 91

Switzerland

Swiss Case 4A_362	*Case No: 4A_362/2013; Complaint Against the Arbitral Award of the Tribunal- Arbitral du Sport of 2 August 2013* Swiss Federal Supreme Court 27 March 2014	*para.* 56
Swiss Case 4A_448	*Case No: 4A_448/2013; Complaint Against the Arbitral Award of the Tribunal- Arbitral du Sport of 2 August 2013* Swiss Federal Supreme Court	*para.* 56

United Kingdom

Ali Shipping	*Ali Shipping Corp. v. Shipyard Trogir* Court of Appeal (Civil Division) 19 December 1997	*para.* 47

Dolling Baker	*Dolling Baker v. Merrett*, UK Court of Appeal, 21 March 1990 [1990] 1 W.L.R. 1205. Available at: http://www.uniset.ca/lloydata/css/19901WLR1205.html	*para.* 47
Sulamerica	*Sulamerica CIA Nacional De Seguros S.A. v. Enesa Engenharia S.A.* England and Wales Court of Appeals (Civil Division) 16 May 2012	*para.* 8

INDEX OF OTHER SOURCES

CITED AS	REFERENCE	CITED IN
CLAIMANT's Memorandum	Humboldt-Universität zu Berlin, CLAIMANT Memorandum, Willem C. Vis International Commercial Arbitration Moot (East) (6 December 2018)	*paras.* 6, 9, 13, 19, 21, 24, 27, 30, 35, 37, 39, 40, 45, 49, 60, 66, 68, 69, 70, 76, 77, 78, 84, 85, 86, 87, 94
Commentary on the UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency *Available at:* https://www.iisd.org/pdf/2013/uncitral_rules_on_transparency_commentary.pdf	*para.* 61
ICC Force Majeure 2003	International Chamber of Commerce, " ICC Force Majeure Clause 2003/ICC Hardship Clause 2003" *Available at*: https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/	*para.* 31
Kluwer	Kluwer Arbitration. Database research tool *Available at:* http://www.kluwerarbitration.com/	n/a
Lexis	Lexis Nexis. Database research tool *Available at:* http://www.lexisnexis.com/en-us/gateway.page.	n/a
Merriam – Webster	Merriam–Webster. Dictionary research Tool *Available at:* https://www.merriam-webster.com	*para.* 50
Pace CISG Database	Database research tool *Available at:* http://iicl.law.pace.edu/cisg/cisg	n/a

UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) *Available at:* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html	*para.* 60
West Law	West Law Database Research Tool *Available at:* https://1.next.westlaw.com/Search/Home.html?transitionType=DefaultandcontextData=(sc.Default)	n/a
WEX	Wex Law Dictionary *Available at*: https://www.law.cornell.edu/wex/clean-hands_doctrine	*para.* 58

STATEMENT OF FACTS

Phar Lap Allevamento ("**CLAIMANT**") is a stud and equestrian sport farm located in Mediterraneo. CLAIMANT additionally offers frozen horse semen for artificial insemination. Black Beauty Equestrian ("**RESPONDENT**") is an established equestrian center known for its world champion jumper and dressage horses and is located in Equatoriana. Due to the Equatorianan Government's temporary lift on the ban on artificial insemination and RESPONDENT's newly established racehorse stable, RESPONDENT took an interest in CLAIMANT's frozen horse semen for artificial insemination.

21–24 Mar 2017 — RESPONDENT and CLAIMANT ("**Parties**") exchanged emails about the purchase of CLAIMANT's horse semen. RESPONDENT requested 100 doses of horse semen.

28 Mar 2017 — RESPONDENT requested a lower price, DDP delivery term, and agreed that the law of Mediterraneo be the law of the contract.

31 Mar 2017 — CLAIMANT agreed to DDP and in exchange increased the price by 1.000 USD per dose. CLAIMANT expressed concerns about taking on obligations related to additional health and safety requirements and import costs.

10 Apr 2017 — RESPONDENT sent a draft of the arbitration clause with Equatoriana as both the seat and choice of law for the arbitration.

11 Apr 2017 — CLAIMANT accepted RESPONDENT's draft but changed the seat of arbitration to Danubia. CLAIMANT did not specify a choice of law.

06 May 2017 — The Parties signed the Sales Agreement ("**Sales Agreement**"), which included the underlying contract ("**Main Contract**") and an arbitration clause ("**Arbitration Agreement**"). The Sales Agreement included a limited hardship provision in clause 12 ("**Hardship Clause**"). The Hardship Clause explicitly mentioned health and safety requirements as a ground for hardship, but not import costs or tariffs. Additionally, the Sales Agreement provided that Mediterraneo Law governed the Main Contract and that the seat of arbitration was Danubia. The Sales Agreement did not include a choice of law provision for the Arbitration Agreement.

18 May 2017 — RESPONDENT fully satisfied its contractual obligation and paid the first installment of 5.000.000 USD to CLAIMANT.

20 May 2017 — CLAIMANT shipped the first installment of horse semen.

03 Oct 2017	CLAIMANT shipped the second installment of horse semen.
Nov 2017	Mediterraneo imposed 25% tariffs on agricultural goods from Equatoriana.
19 Dec 2017	Equatoriana imposed retaliatory 30% tariffs ("**Tariffs**") on selected products from Mediterraneo, including animal semen.
20 Jan 2018	CLAIMANT and an employee of RESPONDENT communicated and failed to agree on how to address the cost increase caused by the Tariffs. CLAIMANT contends the delay in contacting RESPONDENT was due in part to confusion about the scope of the Tariffs.
21 Jan 2018	RESPONDENT satisfied its final contractual obligation and paid the second installment of 5.000.000 USD to CLAIMANT.
22 Jan 2018	The final installment was expected to be shipped on this date.
23 Jan 2018	Even without a formal agreement regarding the tariffs, CLAIMANT shipped the final installment of horse semen ("**Final Shipment**").
31 July 2018	CLAIMANT submitted the Notice of Arbitration to initiate arbitration ("**Proceeding**"), seeking price adaptation on the basis of paying the Retaliatory Tariff.
24 Aug 2018	RESPONDENT submitted its Answer to the Notice of Arbitration.
2–3 Oct 2018	CLAIMANT informed the Tribunal that it wanted to submit material, which was obtained through either a breach of confidentiality or illegal hacking, from RESPONDENT's previous and confidential arbitration. A day later, RESPONDENT objected to the admission of this material in this arbitration due to its illegality and confidentiality.

INTRODUCTION

1. In the glamorous and competitive world of horse racing, RESPONDENT and CLAIMANT contracted for the purchase and sale of prized frozen horse semen. Between the second and third shipments from CLAIMANT to RESPONDENT, Tariffs were imposed upon this prized horse semen. The Tariffs, however, did not change either Party's responsibilities under the Sales Agreement. RESPONDENT completely satisfied its contractual obligations by paying the entire contract price in full.

2. CLAIMANT now seeks to revise the terms of the Sales Agreement by asking this Tribunal to adapt the price. Not every change in circumstance, however, properly leads to a revision of contractual terms of an executed contract.

3. The Sales Agreement may not be adapted because the Tribunal is not empowered to do so (**Part I**). CLAIMANT has arranged the purchase of documents from a past arbitration involving RESPONDENT that were obtained either through an illegal computer hack or a breach of confidentiality. The material from RESPONDENT's past arbitration should be barred because it is neither material nor relevant to this case and because regardless of the manner in which they were collected, their confidentiality should be respected (**Part II**). The Parties agreed to complete the deliveries of frozen horse semen DDP ("Delivery Duty Paid") after extensive negotiations, thus placing the risk of import costs on CLAIMANT. The Parties are not able to adapt the price through the United Nations Convention on the International Sale of Goods ("CISG") or rules of private international law, rendering RESPONDENT's obligation complete. This assumption of risk bars CLAIMANT from claiming hardship (**Part III**).

ARGUMENT

I. The Arbitral Tribunal Does Not Have the Jurisdiction or Power to Adapt the Sales Agreement

4. RESPONDENT respectfully asks the Tribunal to find that it does not have the jurisdiction or power under the Arbitration Agreement to adapt the Sales Agreement. The Tribunal's power to adapt is derived from either an express authorization from both Parties or from the Arbitration Agreement *(Beisteiner, 107–108, 110)*. Here, no express authorization is found in the Sales Agreement *(R. 13–14 – Sales Agreement)*. Thus, the Tribunal must look to the Arbitration Agreement.

5. The power to adapt a contract is a matter of contract interpretation, specifically the interpretation of the scope of the arbitration agreement *(Beisteiner, 108)*. In the instant case, the Parties did not explicitly provide for a choice of law to govern the Arbitration Agreement and its interpretation *(R. 14, para. 15 – Sales Agreement)*. RESPONDENT submits that the proper law to govern the Arbitration Agreement is Danubian law (**A.1.**). Under Danubian law, the Arbitration Agreement does not permit the Tribunal to adapt the Sales Agreement (**A.2.**). Even if Mediterraneo law is selected to govern the Arbitration Agreement, the Tribunal is still not empowered to adapt (**B**).

A. Danubian law precludes the Tribunal's power to adapt the Sales Agreement

6. Because neither Party selected a choice of law to govern the Arbitration Agreement, this Tribunal has broad discretion to select the proper law *(See Petsche, 21; AES, 99)*. CLAIMANT argues that the applicable law to the Arbitration Agreement is the law of Mediterraneo *(CLAIMANT's Memorandum, para. 7)*. Danubian law, however, is the proper law to interpret the Arbitration Agreement. Under Danubian law, adaptation of a contract is not allowed because the Parties did not give the Tribunal express empowerment to adapt. Thus, Danubian law precludes the Tribunal's power to adapt the Sales Agreement.

1. Danubian law is the proper law to govern the Arbitration Agreement

7. Danubian law is the proper law to govern the Arbitration Agreement because Danubia has the closest and most real connection to the arbitration. Furthermore, selecting Danubian law

would uphold the principle of neutrality. Mediterraneo law should not govern the Arbitration Agreement, as evidenced by the doctrines of separability and dépeçage.

a. Danubian law has the closest and most real connection to the arbitration

8. In the absence of a choice of law provision, courts have looked to the place with the closest and most real connection to the arbitration agreement to govern the arbitration agreement *(See, e.g., Sulamerica, 218)*. The *Sulamerica* case concerned an insurance policy for the construction of a hydro-electric plant in Brazil. The policy provided that the policy be governed by Brazilian law and the seat of arbitration be London. The English Court of Appeals decided the pivotal question of which law governed the arbitration agreement. The court engaged in a three-stage inquiry: (1) express choice, (2) implied choice, and (3) law having the closest and most real connection to the arbitration agreement. The court found no express or implied choice of law because the existence of a chosen seat of arbitration negates the argument that a law governing an underlying contract impliedly governs an arbitration agreement. The court thus turned to the law with the closest and most real connection to the arbitration agreement.

9. Likewise, in this case, there was no express or implied choice of law. CLAIMANT argues that because the law of Mediterraneo governs the Sales Agreement, this choice constitutes an implied choice of law to govern the Arbitration Agreement *(CLAIMANT's Memorandum, para. 12)*. CLAIMANT, however, fails to acknowledge that the Parties also explicitly selected Danubia as the seat of arbitration. If the Parties had not selected a seat, then Mediterraneo law may be the implied choice of law. The Parties here, however, mutually selected a seat and thus Mediterraneo law is not the implied choice of law. This Tribunal should turn to the law having the closest connection. Danubia has the closest and most real connection because Danubian law governs the arbitration proceeding as the chosen seat of arbitration, and Danubia is where the arbitration will physically take place.

10. Some commentators have concluded that the law of the country where an award will be made governs the arbitration agreement *(See, e.g., Schramm, 55)*. Because Danubia is where this award will be rendered, Danubia has the closest and most real connection to the arbitration agreement and its proceedings.

11. Under the widely-accepted territorial approach to arbitration, an arbitration is viewed as attached to a national legal system, typically the seat of the arbitration *(Schramm, 44)*. As commentators have noted, in choosing the seat of arbitration, the parties must be understood to have placed the arbitration under the exclusive jurisdiction of the law of the seat *(Glick, 145; Gaillard, 943)*. For example, these arbitral proceedings may require the aid of the court *(See Moses, 65)*. Parties desire the reassurance that a national court is available to assist in the arbitral process, especially a national court that is in the same place as the arbitration *(Id)*. Because the Parties agreed to Danubia as the seat of arbitration, it is logical that the Parties also understood that Danubian courts should apply their domestic laws to aid in the arbitration if needed. Since Danubia's national court is the proper court to aid in the arbitration proceedings, this fact further supports that Danubia has the closest and most real connection to the arbitration.

b. Selecting Danubian law would uphold the principle of neutrality

12. Danubian law should govern the interpretation of the Arbitration Agreement instead of the laws of either Party's home country—Mediterraneo or Equatoriana. Neutrality is a critical underlying principle of international arbitrations *(FirstLink)*. Case law confirms that considerations of neutrality play a significant role in choice of law decisions of arbitral tribunals *(Petsche, 35; ICC No. 13012; ICC No. 7110; ICC No. 3460)*. In ICC Case No. 3460, an arbitral tribunal was called upon to clarify an arbitration agreement between two companies from different countries. The tribunal used the concept of neutrality as the driving force in determining the proper arbitral institution and location, further illustrating the importance of neutrality within arbitration (*ICC No. 3460*). The purpose of choosing a neutral seat of arbitration is generally to insulate the dispute resolution system from the national law of either party *(Glick, 145)*. This insulation will ensure that no discriminatory law of one party will apply, which might possibly render an award invalid *(Born, 476; Air Terminals)*. The common practice of choosing a location with no particular relationship to either party as the seat of arbitration reflects the importance of neutrality *(Moses, 80)*. Thus, Danubian law should govern the Arbitration Agreement because it is unconnected to either Party's domestic laws.

c. Mediterraneo law should not govern the Arbitration Agreement

13. CLAIMANT argued that Mediterraneo law governs the Arbitration Agreement because the Parties intended the same law to govern both the Sales Agreement and Arbitration Agreement (*CLAIMANT's Memorandum, para. 9).* Selecting Danubian law to govern the Arbitration Agreement is not undermined by the fact that Mediterraneo law governs the Sales Agreement *(CLAIMANT's Memorandum, para. 8).* This argument starts with the doctrine of separability. The Parties chose Mediterraneo law to govern the Sales Agreement *(R. 14, para. 14 – Sales Agreement)*, but because an international arbitration agreement is presumptively separable from its underlying contract, Mediterraneo law does not govern the Arbitration Agreement *(Born, 473).*

14. It is common that an arbitration agreement is governed by a different law than the one governing the main contract *(Born, 473).* Both Danubia, as the seat of the arbitration, and Mediterraneo, as the home country of CLAIMANT, expressly embrace the separability doctrine under Article 16 of Danubian and Mediterraneo law *(R. 31, para. 14 – Notice).* The separability doctrine is important in order to prevent an arbitration agreement from being ineffective if the underlying contract is found invalid (*Hornyold-Strickland).* Thus, this Tribunal should uphold the doctrine of separability.

15. Arbitral tribunals have consistently chosen not to apply the law of the underlying contract to the arbitration agreement because it is fundamentally "at odds" with the separability doctrine *(Born, 493).* For example, in a 1999 ICC arbitral hearing in Zurich, the tribunal found that the law of the underlying contract could not govern the arbitration agreement due to the doctrine of separability (*ICC No. 6248*). The tribunal instead chose the law of the seat of arbitration to govern the agreement (*ICC No. 6248*; *Born, 486*). Similarly, in situations in which the main contract contains an explicit choice of law and the arbitration agreement does not, courts have often not extended the law of the main contract to the arbitration agreement (*Kröll, 45*). There is a strong view that the main factor in deciding the law applicable to the governing the arbitration agreement is the place of the arbitration, which in this case is Danubia (*Id*).

16. The concept of dépeçage also allows the Arbitration Agreement to be governed by Danubian law rather than Mediterraneo law. The concept of dépeçage provides that different parts of a

single contract may be governed by different systems of laws *(Glick, 132, 139–40)*. Many common law, civil law, and international conventions recognize dépeçage *(Maniruzzaman, 142, 155)*. Thus, the correct inquiry is not what law governs a contract, but rather what law governs the particular question raised in the instant proceedings *(Maniruzzaman, 155)*. Here, the critical question is what law governs the interpretation of the Arbitration Agreement. Because the question focuses specifically on the Arbitration Agreement rather than the underlying contract, the concept of dépeçage should be applied to allow different governing laws.

17. Not only can the Arbitration Agreement be governed by a law other than that of Mediterraneo, it should be because of neutrality. The principle of neutrality requires that the parties be placed on an equal footing with regards to familiarity with the applicable law, access to relevant legal authorities, and the ability to understand legislation and case law *(Petsche, 34)*. Applying the law of Mediterraneo to the Arbitration Agreement may result in competitive disadvantages, because CLAIMANT has a superior knowledge and resources regarding Mediterraneo law (*De Ly, 52*). An application of Mediterraneo Law to the Arbitration Agreement would thus contravene the principle of neutrality. This principle should only be circumvented if the Parties expressly authorized one Party's domestic law to govern, which the Parties did not *(R. 14, para. 14 – Sales Agreement)*.

2. Under Danubian law, the interpretation of the arbitration agreement does not allow for adaptation

18. Under Danubian law, the interpretation of the arbitration agreement does not allow for adaptation. Danubian contract law only empowers the Tribunal to adapt the Sales Agreement if the Arbitration Agreement expressly provides for adaptation *(R. 60, para. 36 – Procedural Order 2)*. The Arbitration Agreement in the instant matter does not expressly give the Tribunal authority to adapt the Sales Agreement, thus no authority exists *(R. 14, para. 15 – Sales Agreement)*.

19. CLAIMANT argues that the power to adapt is an exceptional power *(CLAIMANT's Memorandum, para. 32)*. Adaptation is the concept of altering contractual terms as circumstances change during the length of the contract. Adaptation is an exceptional power because the Parties have not mutually consented to the revised terms. This unilateral change offends the principle of *pacta sunt servanda*, or sanctity of the contract. In fact, many national courts do not allow judges

to adapt contracts because of this reasoning. For similar reasons, the Secretariat of the UNCITRAL Model Law noted that the strongest argument against giving arbitral tribunals the power to adapt is because many legal systems do not allow their courts to do so. The area of adaptation is unique because it is subject to substantial controversy and confusion, as noted by many renowned international scholars such as Gary Born, Ian Glick, and Nils Schmidt-Ahrendts (*Glick, 472; Schmidt-Ahrendts, 215).* Specifically, adaptation concerns itself with questions of both substantive and procedural law *(Brunner, 493).* Many model laws and international conventions have excluded this topic in their texts because of the different approaches to adaptation established under the laws of various states (*Holtzmann, 1117).* Accordingly, adaptation has more significant ramifications and is authorized much less frequently than ordinary damages. Given its uniqueness as a remedy, the power to adapt is an exceptional power and cannot be taken for granted or understood to have been implicitly authorized.

20. Danubian law interprets contracts and arbitration agreements using the four corners rule, which narrowly interprets contracts and arbitration agreements, and does not allow external evidence to be relied upon *(R. 32, para. 16 – Answer to Notice).* Under the four corners rule, evidence of previous negotiations and conduct are not allowed to be considered when interpreting an arbitration agreement *(Rosengren, 6).* Here, looking to the four corners of both the Sales Agreement and Arbitration Agreement, there is no provision allowing the Tribunal to adapt, thus the Tribunal is not empowered to adapt. Indeed, both Parties have agreed that under Danubian law, there is a high likelihood that the Arbitration Agreement will not be interpreted to allow the Tribunal to adapt *(R. 51, para. II – Procedural Order 1).*

21. CLAIMANT argues that because there is an ambiguity in the Sales Agreement regarding the choice of law for the Arbitration Agreement, this ambiguity should be interpreted against the drafter, which it takes to be the RESPONDENT *(CLAIMANT's Memorandum, paras. 26–27).* This *contra proferentem* doctrine of interpretation, however, is most often used in cases of standardized contracts and with parties of unequal bargaining power. Neither of these situations apply in the instant case. First, the Sales Agreement, which includes the Arbitration Agreement, is not a standardized contract. In *WiseLSM Co. v. Draeger Korea Co.*, for example, two corporations entered into a contract for medical equipment *(WiseLSM).* A dispute arose

between the parties and the plaintiff requested mediation, arguing that the dispute resolution clause in the contract was a standardized contract, thus subjecting it to certain obligations. The High Court of Korea disagreed and held that the dispute resolution clause did not meet the criteria of a standardized contract because it was modified four times, was negotiated by both parties, and was neither inconspicuous nor incomprehensible. Similarly, the Sales Agreement in the present case was modified by both Parties through at least five emails *(R. 9–12, 33–34)*. These negotiations established or modified the DDP term, seat of arbitration, and price. Second, neither Party possessed more bargaining power than the other. Both Parties had equal opportunity to amend the Sales Agreement, as evidenced by the multiple emails, and nothing in the Record suggests that CLAIMANT or RESPONDENT possessed more bargaining power than the other. Because the Sales Agreement is not a standardized contract and there is no evidence of unequal bargaining power, the CLAIMANT may not argue that the Sales Agreement must be interpreted *contra proferentem.*

B. Even if Mediterraneo law applies, the Tribunal has no power to adapt the Sales Agreement

22. Even if this Tribunal selects Mediterraneo law to govern the Arbitration Agreement, the Tribunal is still not empowered to adapt the Sales Agreement. Mediterraneo has adopted the CISG and PICC. The CISG, however, does not address the interpretation of arbitration agreements (**B.1.**) and the PICC permit adaptation only apply in limited circumstances not applicable here (**B.2.**).

1. The CISG does not provide the Tribunal with the remedy of adaptation

23. There is jurisprudence in Mediterraneo that if a sales contract is governed by the CISG, then the interpretation of the arbitration agreement is also governed by the CISG *(R. 52, para. 4 – Procedural Order 1)*. Even if the CISG is found to govern the Arbitration Agreement, that fact does not provide this Tribunal with the jurisdiction or power to adapt the contract. The CISG does not address adaption as a remedy, much less provide courts or arbitral tribunals the power to adapt. The CISG does, however, make reference to Article 7(2) of the CISG, which allows the Tribunal to look to private international law to interpret the Arbitration Agreement *(See CISG, Art 7(2))*. Article 7(2) provides that questions concerning matters governed by the CISG which are not expressly settled within it are to be settled in conformity with general

principles of the CISG or private international law *(Id)*. Here, the Tribunal shall look to private international law because neither the CISG provisions nor general principles underlying the CISG address the question of adaptation. Looking to private international law, Danubian law is the proper law to govern the Arbitration Agreement, and under Danubian law adaptation is not permitted in the instant case.

2. No hardship exists to empower the Tribunal to adapt under the PICC

24. It is true, as noted by CLAIMANT (*CLAIMANT's Memorandum, para. 20),* that Mediterraneo law adopts the PICC, which in turn allow for adaptation if hardship is found. The PICC, however, do not expressly give any court or arbitral tribunal the independent authority to adapt a contract. Nor can that authority be applied in this case because the PICC prerequisites for adaptation in the face of hardship have not been met. To establish that there is a hardship warranting adaptation, a tribunal must find that circumstances are so excessively onerous that it justifies a change in terms of the contract (*Fucci, 22*). As discussed in detail in **Part III** of this Memorandum, no such hardship exists, and thus no authority to provide adaptation can be implied in favor of this Tribunal.

C. Conclusion

25. RESPONDENT respectfully urges the Tribunal to find that it does not have the jurisdiction or power under the Arbitration Agreement to adapt the Sales Agreement because Danubian law interprets the Arbitration Agreement and does not allow for adaptation without express empowerment. Even if Mediterraneo law interprets the Arbitration Agreement, neither the CISG nor PICC empower this Tribunal to adapt the Sales Agreement.

II. CLAIMANT Should Not Be Entitled To Submit Evidence From The Other Arbitration Proceedings

26. On 2 October 2018 CLAIMANT informed the Tribunal it wished to submit a copy of the Partial Interim Award ("**Award**") from a separate arbitration proceeding involving RESPONDENT *(R. 49 – CLAIMANT Letter to Tribunal)*. RESPONDENT objects because the Award is confidential *(R. 50 – RESPONDENT's Objection Letter)*. The other proceeding was conducted under the Hong Kong International Arbitration Centre ("**HKIAC**") 2013 rules, which has an express obligation to keep the proceedings confidential *(R. 61, para. 41 – Procedural Order 2)*. The arbitration also included contractual obligations to keep all information about the arbitral proceedings confidential *(Id)*. After investigation, RESPONDENT discovered the Award could only have been obtained through a breach of confidentiality or through an illegal hack of the RESPONDENT's computer system *(R. 50 – RESPONDENT's Objection Letter)*.

27. CLAIMANT asserts that regardless of how the Award was obtained, the Tribunal should admit the document because it is material to the outcome of this case and RESPONDENT is acting duplicitous by taking the opposite position in the other proceeding (*CLAIMANT's Memorandum, para. 38*). RESPONDENT will demonstrate, first, despite the broad discretion of the Tribunal to admit evidence, it should not admit this document because it is neither material or relevant to the Proceeding (**A**). In the unlikely event the Tribunal may find the Award to be material or relevant, the Award is still confidential and should not be submitted (**B**). If the Award was illegally obtained, the Tribunal should not accept this Award into evidence (**C**). Finally, the prevailing principles of transparency do not provide sufficient warrant to admit the Award as evidence (**D**).

A. The Award should not be admitted because it is not material to this Proceeding

28. The Parties agreed that this Proceeding would be governed by the HKIAC and its rules *(R. 14 – Sales Agreement)*. Under Article 22.2 of the 2018 HKIAC Rules, the Tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" *(HKIAC 2018, Art 22.2)*. This rule provides the Tribunal flexibility to determine the evidence in a manner that suits the specific nature of the proceedings *(see Moser, 190)*. The wording of the rule suggests that the factors the Tribunal should take into consideration are factors like relevance, materiality, and weight of the evidence. The Tribunal's

discretion should also be exercised within the parameters of due process, fairness, and the reasonable expectation of the Parties *(see Waincymer, 752*). Under these principles, this prior Award should not be admitted.

29. While the proceedings may appear similar at first glance, there are numerous factual and legal differences that render the Award immaterial to the outcome of this case (**1**). Further, RESPONDENT arguing a different position in a separate and completely different case is immaterial to CLAIMANT's case (**2**).

1. There are numerous factual and legal differences between the proceedings

30. If narrowed down to the most basic facts, the two proceedings appear similar. Both proceedings involve a cross-border equestrian sale between a buyer and seller, with a contract that involved the seller delivering under DDP terms, an arbitration clause with the HKIAC governing, and a hardship clause *(R. 49 – CLAIMANT Letter to Tribunal; R. 60, para. 39 – Procedural Order 2)*. In the other proceeding, RESPONDENT, as the seller, requested price adaptation because it was affected by the imposition of tariffs, and the other party in that case objected to their tribunal's power to adapt *(Id)*. The Award was rendered on whether the tribunal had the power to adapt, with the question of whether the tariff is considered a hardship to be decided later *(R. 60, para. 39 – Procedural Order 2)*. CLAIMANT argues that these are similarities which make the Award material to this Proceeding *(CLAIMANT's Memorandum, para. 43)*.

31. What CLAIMANT fails to mention are the many significant differences between the situations involved, differences that render the prior Award immaterial to the present Proceeding. The contract in the other proceeding was negotiated to contain an ICC Hardship Clause 2003 ("**ICC Hardship Clause**"). The ICC Hardship Clause requires renegotiation whenever a contractual duty becomes excessively onerous, beyond the invoking party's reasonable control, and the party could not have reasonably overcome the event *(ICC Force Majeure Clause 2003, emphasis added)*. In this Proceeding, RESPONDENT objected to CLAIMANT's request for the inclusion of the ICC Hardship Clause because RESPONDENT found the clause too broad *(R. 56, para 12 – Procedural Order 2)*. CLAIMANT did not negotiate on this point any further, instead accepting RESPONDENT's choice to narrow the hardship provision *(Id)*. In the earlier

proceeding the broadness of the ICC Hardship Clause could have been a significant factor in the other tribunal's decision. Here, the Parties agreed that the Hardship Clause is limited only to hardships caused by health and safety requirements, or comparable unforeseen events *(R. 14, para. 12 – Sales Agreement)*, which RESPONDENT will argue the clause does not include the imposition of additional tariffs. RESPONDENT's arguments in the other proceeding would therefore be immaterial to CLAIMANT's hardship arguments.

32. The arbitration clause in the other proceeding was also significantly different then the clause at issue in this Proceeding. In the other contract, the parties used the exact Model HKIAC Arbitration Clause, with all additions. In this case, the CLAIMANT altered the Arbitration Agreement by deleting a reference to a choice of law governing the Arbitration Agreement and agreed to the seat being Danubia *(R. 34 – 11 April 2017 Email)*. In the other proceeding, there was no question that Mediterraneo governed the arbitration clause. In this case, no such designation has been made, and as RESPONDENT has argued, the appropriate law governing the Arbitration Agreement is the law of Danubia *(R. 60, para. 39 – Procedural Order 2)*. As discussed above, the law governing the arbitration clause has a significant impact on whether the Tribunal will find it has the jurisdiction and power to adapt. The fact that the other proceeding did not have an issue with governing law makes it immaterial to CLAIMANT's arguments regarding both the Tribunal's jurisdiction and power to adapt and what law governs the arbitration clause.

33. Most importantly, in the other proceeding, the seat of arbitration was Mediterraneo *(R. 60, para. 39 – Procedural Order 2)*. This fact is unlike the current Proceeding, where the seat of the arbitration is Danubia. Also, unlike this Proceeding, in the other case there was no dispute that the general contract and the arbitration clause should be governed by different laws. There is no guidance the Award can give this Tribunal in regard to its power to adapt, because the tribunal in the other proceeding had found the basis for its power to adapt from a different set of law.

34. Also, the earlier Award only addresses whether or not the tribunal in the other proceeding has the power to adapt *(R. 60, para. 39 – Procedural Order 2)*. This means it would provide no guidance regarding whether or not the tariffs constitute a hardship. In the other proceeding, RESPONDENT is arguing about whether the tariffs constituted a hardship under the ICC

Hardship Clause and therefore deserves price adaptation *(Id)*. Here CLAIMANT argues that the tariff is a hardship under a considerably narrower hardship clause. The difference in hardship clause is what could account for the difference in legal conclusions between the two tribunals. In addition, the contract in the other case was for a sale of a live mare, which RESPONDENT declined to deliver without renegotiations and/or price adaptation (*Id*). Here the Parties fully completed their obligations, which means CLAIMANT has not fulfilled the criteria to request renegotiations or price adaptation *(See Section C)*. Withholding of performance under the ICC Hardship Clause, as opposed to a request for adaptation after performance has been completed, leads to very different arguments in the two proceedings. RESPONDENT's legal position concerning whether or not tariffs constitute a hardship is based on entirely different facts and laws than CLAIMANT's arguments in this Proceeding.

35. The Award is only material if the evidence helps the Tribunal in determining disputed issues of fact *(see Girsberger/Voser, 237, para. 977; Redfern/Hunter, para. 6.75)*. Decisions by tribunals, and the outcome of proceedings depend to a great extent on factual determinations *(Waincymer, 743)*. Since the Award cannot provide guidance on any factual allegation CLAIMANT has made to the Tribunal, it should not accept the Award as evidence. CLAIMANT fails to establish how the Award from the other proceeding, involving different circumstances, is either sufficiently connected to a factual allegation or helps to establish the truth of any of facts upon which its legal conclusions are based *(CLAIMANT's Memorandum, paras. 41–42; see also Moser, 193; Ashford, paras. 3–37)*.

36. Finally, the Award is immaterial to this Tribunal's decision because even if the facts were much more parallel to this Proceeding, the Tribunal is under no obligation to follow another tribunal's decision *(see HKIAC 100 Questions, 14; AES, 99; Born, 3807; Lauder (where a tribunal refused the opportunity to hear another pending action with an almost identical claim, making a ruling based on its own understanding))*. With the factual differences and lack of precedential value, there would be little guidance gleaned from the Award.

37. CLAIMANT argues that any award rendered by this Tribunal will not be enforceable because it could not present the most relevant evidence *(CLAIMANT's Memorandum, para. 45)*. As emphasized, however, there is nothing about RESPONDENT's other proceeding that would prove any factual allegation CLAIMANT is making in this Proceeding.

2. RESPONDENT's arguments in an earlier proceeding are not material to this Proceeding

38. RESPONDENT runs a famous equestrian business, which involves itself in many different business deals *(R. 9 – 21 March 2017 Email; see also R. 60, para. 39 – Procedural Order 2*). As both a buyer of studs and seller of mares, it is not unusual for the RESPONDENT to find itself on different sides of an issue in different proceedings. Just as CLAIMANT is entitled to make its best legal arguments to support its claims in this Proceeding, RESPONDENT should also be able to make its best argument as a party in this and the other proceeding, even if those arguments appear superficially in conflict *(HKIAC 2018, Art 16.2)*.

39. CLAIMANT argues that since RESPONDENT is arguing for price adaptation in the other proceeding, it is being contradictory by arguing against price adaptation in this situation *(CLAIMANT's Memorandum, para. 44)*. Taking CLAIMANT's argument to the extreme, no party then should ever argue anything contradictory to any of their previous arbitral disputes, regardless of the differences in details. A party's entire history then would be held against them in subsequent arbitral proceedings, because "the Tribunal should not tolerate" any inconsistencies *(Id)*. Not only is would this be impractical, but it would go against the reason why arbitration is preferred by businesses, as a flexible, fair, neutral and efficient way to resolve transnational commercial disputes *(Born, 1)*.

40. RESPONDENT is hardly "riding two horses at once" as CLAIMANT suggests. *(CLAIMANT's Memorandum, para. 44)*. RESPONDENT is arguing its best case as the claimant in another proceeding. CLAIMANT provides no reason why RESPONDENT should not be able to make its best argument in another proceeding that is completely unrelated to the current Proceeding.

41. RESPONDENT is not being inconsistent because the circumstances and facts in the other proceeding are completely different from those in this proceeding. How RESPONDENT argues in the earlier proceeding is irrelevant to this Proceeding. A party making its best arguments in every dispute that it is involved in is not intolerable behavior as CLAIMANT would contend.

B. Admission of the Award would breach the RESPONDENT's right to confidentiality

42. The Award in the other proceeding was specifically rendered under the HKIAC 2013 rules, Art. 42 of which expressly requires the proceedings to be kept confidential. Confidentiality is viewed as one of the benefits of choosing to arbitrate disputes *(see Moser, 281; Brown, 972;*

Samuel; Aita v. A. Ojjeh). While the concept of confidentiality does not guarantee infinite protection to parties who choose to arbitrate, a standard of protection is assumed that prohibits the disclosure of information relating to a confidential arbitration proceeding *(see HKIAC 2018, Art 45.1; see also Brown, 974; Nakamura, 24)*. According to RESPONDENT's investigation, the Award could have only been made available through a leak of documents or an illegal hack of its computer system *(R. 50 – RESPONDENT's Objection Letter)*.

43. Under the assumption this Award was leaked due to a breach of confidentiality, RESPONDENT argues that CLAIMANT's insistence on submitting the Award, despite knowing it is confidential, will further worsen the breach. RESPONDENT has a strong interest in stemming this breach, because the Award possibly contains important confidential information pertaining to both the RESPONDENT's and the other party's businesses (**1**). Further, there is no reason the Award should be considered any less confidential because the Tribunal and the CLAIMANT to this Proceeding may know some facts which occurred in the other proceeding (**2**).

1. RESPONDENT has an interest in the confidentiality of the Award

44. By operating under the HKIAC rules, either the 2013 or 2018 versions, both the Parties in this Proceeding and the other proceeding have an expectation of confidentiality in those proceedings *(see HKIAC 2018, Art 45.1; HKIAC 2013, Art 42)*. Arbitration proceedings, and the awards that are given, may involve commercially-sensitive information, which could cause damage by its disclosure to competitors, customers and others *(see Born, 2780)*.

45. Not only does RESPONDENT has a strong interest in ensuring that none of its commercially-sensitive information is revealed, but the other party in the other proceeding has the same interest and concern. While CLAIMANT alleges there will not be any further circulation of the Award if it is heard in this Proceeding, and therefore will not disadvantage RESPONDENT or its opposing party *(CLAIMANT's Memorandum, para. 63)*, that does not mean RESPONDENT'S and its opposing party in the other arbitration's right to confidentiality should be waived. CLAIMANT is still a third-party who neither the RESPONDENT nor its opposing party has agreed to be privy to their confidential proceeding.

46. CLAIMANT should be forbidden to submit this Award because CLAIMANT is supporting the circulation of confidential material. If the Tribunal denies the admission of the Award, it will

stop CLAIMANT from perpetuating the circulation of confidential material. CLAIMANT is encouraging third-parties to seek out confidential material to sell to the highest bidder. If the Tribunal allows the proffered material to be admitted, it is allowing CLAIMANT to skirt the rules of confidentiality.

47. In a seminal British case, *Dolling Baker v. Merret*, the court addressed a similar issue: whether a party can introduce another party's documents as they relate to a separate arbitration, including the Award. The British court found that an implied duty of confidentiality arises from the implicitly private nature of arbitration which "extend[s] over virtually over [sic] all documents prepared, submitted and used in the framework of an arbitration" *(Dolling Baker; see Smeureanu, 33–34; Hwang, 611, 614)*. Other courts have agreed *(see Ali Shipping)*. The Award is confidential and its submission should be forbidden because CLAIMANT is not party to the other arbitration.

2. The Award remains confidential and should remain this way

48. Both the HKIAC 2013 and 2018 Rules allow for certain circumstances where the disclosure of communication or information is not prevented by confidentiality *(see HKIAC 2013, Art 52.3; HKIAC 2018, Art 45.3)*. The only relevant exception to confidentiality is when the submission is needed "to protect or pursue a legal right or interest of the party" *(HKIAC 2018, Art 45.3)*. In this case, the CLAIMANT may argue that the earlier Award should be admitted to prove its legal right to price adaptation in the face of hardship. The admission of the earlier Award, however, will do nothing "to protect or pursue" this legal right. The confidential Award is about a completely different contract. The decision of the tribunal in the other proceeding is irrelevant to CLAIMANT's arguments here because the earlier Award concerns a completely different set of facts. Under the HKIAC Rules, there is no relevant exception to maintaining the confidentiality of the earlier Award.

49. CLAIMANT also argues that because the knowledge of the other proceeding was circulated orally at the annual breeder's conference, the Award is public information and ceases to be confidential *(CLAIMANT's Memorandum, para. 62*). CLAIMANT provides no support, however, for the proposition that anyone at the annual breeder's conference possesses the Award or knows the details of the Award, or that the Award is publicly available for all to see.

50. "Public" is generally understood to mean "exposed to general view" *(Merriam-Webster)*. The fact that people know about an ongoing proceeding and that a partial interim award was rendered, does not mean that the Award or its details have been exposed in such a matter that it is public. There is no proof that the Award is generally accessible. In fact, the only way CLAIMANT can access the Award is through paying a private company *(R. 60–61, para. 41)*. The Award remains non-public and therefore protected.

C. CLAIMANT should not be entitled to submit the Award because it is illegally obtained

51. If the Award is not available because of a leak, RESPONDENT's investigation has found that it could only be available by an illegal hack of its computer system *(R. 50* – RESPONDENT's *Objection Letter)*. In the recent age of technology, arbitral tribunals have been confronted with the question of whether to admit evidence that was obtained through a technological breach or hack *(see Sussman, 2*). The admission of illegally hacked information in international arbitration is a discretionary matter left in the hands of the Tribunal *(see Waincymer, 797)*.

52. Unlike other cases where illegally obtained evidence was accepted by tribunals, the circumstances in this case point to the exclusion of the illegally obtained evidence (**1**). In addition, CLAIMANT is acting with "unclean hands," because if it knowingly buys an Award that was either leaked or obtained through a hack, it will be encouraging illegal behavior (**2**).

1. There is no interest which outweighs the violation of RESPONDENT's rights

53. RESPONDENT has not waived its interest in confidentiality. Its interest in keeping its other proceeding confidential outweighs any possible exposition of truth the Award may bring.

54. CLAIMANT invokes two decisions by the International Court of Justice ("**ICJ**") to argue that tribunals allow the admittance of illegally obtained evidence. Both *Caratube International v. Republic of Kazakhstan* and the *Corfu Channel Case*, were investor-state arbitrations that allowed the admittance of illegally obtained evidence. They did so to expose the truth on an international level as well as to provide information to the public. The tribunal and court in those cases paid close attention to the issues of corruption and the need to provide information to the public (*Id)*. Here, there is no corruption or a need to provide information to the public. This Proceeding involves private parties contracting for the sale of goods. This contract involves no public policy issue and has little to no public interest.

55. The two cases cited by the *CLAIMANT* also show that the Tribunal should balance the need to expose a truth to the public and RESPONDENT's interest in confidentiality. Since this is not an investor-state arbitration which could have large effects on the public, the scale tips in favor of keeping the matter confidential and excluding the illegally obtained evidence.

56. In a similar vein, other courts and tribunals have established a balancing test, where they consider "the interest in pursuing the truth against the violation of rights that the procurement of evidence has caused," with emphasis that illegal evidence is to be considered only in the event there is an overriding interest in uncovering the truth *(Segesser; see also Swiss Civil Procedure Code, Art 152; Swiss case 4A_362; Swiss case 4A_448; Corfu Channel)*. Here, not only has RESPONDENT experienced a violation of its right to confidentiality, but the procurement of the documents from the past arbitration may have violated its property rights and its right of privacy through an illegal hack of its computer system *(R. 50 – RESPONDENT's Objection Letter)*. The admittance of the Award from the other proceeding could potentially reveal both the RESPONDENT's and its opposing party's trade secrets and commercially-sensitive information.

57. At a recent conference of the International Council for Commercial Arbitration in Sydney, a panel discussed the issue of allowing illegally obtained evidence in arbitration, stating that in these situations, a tribunal should weigh the interest in finding the truth against the risk of allowing potentially damaging evidence in when a party has objected to its use *(Valcke)*. Here, RESPONDENT and its opposing party in the other arbitration may be damaged by the admission of the prior Award. The Parties are in the competitive equestrian business and do not want their private information leaked to third-parties in the industry, such as CLAIMANT. CLAIMANT has failed to prove what kind of "truth" the admission of the Award would help to uncover. The other proceeding is simply about a private contract with its own circumstances. There is no interest in the truth which would outweigh the RESPONDENT's interest in confidentiality.

2. CLAIMANT is not acting with "clean hands"

58. RESPONDENT has made clear its objections to the admittance of the Award *(see R. 50 – RESPONDENT's Objection Letter)*. Despite these objections, CLAIMANT still seeks to introduce these documents into evidence by purchasing the Award from a company with a "doubtful reputation" *(R. 60–61, para. 41 – Procedural Order 2)*. These actions demonstrate that CLAIMANT

is acting with "unclean hands" in obtaining these documents. The unclean-hands doctrine is a general principle of international law which provides that a party that violates equitable norms cannot then benefit from that violation *(see Wex; Hulley Enterprise, 431)*.

59. This principle applies not only to parties that commit illegal acts *(see Inceysa)* but also to parties who knowingly benefit from such actions *(Military Activities, 392*). Although there is no evidence that CLAIMANT had anything to do with the illegal procurement of the Award, it knows from RESPONDENT that the Award could only be available through an illegal leak or an illegal hack *(R. 50 – RESPONDENT's Objection Letter*). International courts and tribunals have found that paying for access to unlawfully obtained information breaches the unclean-hands doctrine and violates international public policy *(see World Duty; ICC No. 3916; Lamm, 730)*. CLAIMANT is willing to pay 1.000 USD to introduce this Award into evidence, despite knowing that the Award's availability can only be explained by the illegal actions of others. In such circumstances, *CLAIMANT*'s unclean hands should bar the submission of this information to this Tribunal.

D. CLAIMANT is not entitled to submit the Award on the grounds of transparency

60. CLAIMANT alleges that its strong interest in transparency mandates the admission of the Award, and that the prevailing principles of the UNCITRAL Transparency Rules should guide the Tribunal in this decision *(CLAIMANT's Memorandum, para. 59)*. Under the UNCITRAL Transparency Rules, the purpose of transparency is to disclose information to third parties who are affected by, but not part of, an arbitration proceeding *(UNCITRAL Transparency Rules)*. *CLAIMANT* argues that RESPONDENT's "contradictory and inconsistent behaviour" affects its case, because in this Proceeding RESPONDENT opposes the adaptation of the Sales Agreement *(CLAIMANT's Memorandum, para. 59)*.

61. The UNCITRAL Transparency Rules were created in relation to investor-state arbitrations, in order to bring more transparency, because of the concern that confidentiality would hide issues relating to public policy and business corruption *(Commentary on UNCITRAL Transparency Rules)*. By their own terms, moreover, the UNCITRAL Transparency Rules do not apply to this type of proceeding. Disputes between private parties rarely affect anyone else

besides the parties involved. This is unlike an investor-state arbitration proceeding which involves information that could affect an entire nation.

62. Even if the Tribunal were to consider applying the principles this Proceeding, the application would also fail. CLAIMANT's argument using these principles is quite similar to its materiality argument, and it fails for the same reason. The factual and legal circumstances are different in the other proceeding *(see R. 60, para. 39 – Procedural Order 2)*, and will not prove any of CLAIMANT's factual allegations in this Proceeding.

E. Conclusion

63. Even though the Tribunal is given a broad discretion to both admit and exclude evidence, there are many reasons for the Tribunal to exclude this material. The Award is both irrelevant and immaterial to the outcome of this Proceeding. The confidentiality of the Award should be upheld, and in the case the Award was illegally obtained, RESPONDENT's interest in keeping these documents out of the proceedings outweighs CLAIMANT's interest in admitting them. RESPONDENT therefore requests that the Tribunal decline CLAIMANT's request to admit the proffered evidence.

III. The Tribunal Should Not Adapt the Price

64. Even if the Tribunal finds it has the jurisdiction and power to adapt the price in the Sales Agreement, it should not do so. There is no justification to adapt the price under the Hardship Clause of the Sales Agreement (**A**), nor under any provision of the CISG (**B**).

A. The Tribunal should not adapt the price pursuant to the Hardship Clause

65. The Hardship Clause does not allow the tribunal to adapt the price. Adapting the price is impermissible because the Hardship Clause is narrow and applies only to specific circumstances (**1**) the Parties did not modify the Hardship Clause through their conduct or otherwise implicitly agree to adapt the price (**2**).

1. The Hardship Clause, as written, is narrow and only applies to specific circumstances

66. The Hardship Clause is the final product of extended negotiations between the Parties. The language of the clause was specifically chosen by the Parties to account only for the risks the Parties agreed to allocate. The Parties tailored the Hardship Clause to these narrowly defined risks, instead of using a broader clause such as the ICC 2003 Hardship Clause initially suggested by CLAIMANT. These risks include force majeure, and selected hardship circumstances. The Tariffs are not within the scope of any of these circumstances. CLAIMANT's reading of the clause, eliminating the force majeure portion of the clause and concluding that the Tariffs fall within the hardship portion *(CLAIMANT's Memorandum, para. 70)*, improperly truncates the clause. CLAIMANT's reading omits key sections that demonstrate the Hardship Clause's true meaning. The full reading of the Hardship Clause leads to the conclusion the price cannot be adapted, because the Tariffs do not fall within any circumstance enumerated in the Hardship Clause.

a. The Tariffs are not "health and safety regulations"

67. The Hardship Clause excuses CLAIMANT's liability for circumstances arising out of health and safety regulations. Neither tariffs generally, nor the Tariffs in this case, are health and safety regulations because of their political and economic nature. These Tariffs were motivated by political and economic decisions, specifically, as a response to the tariffs imposed by the President of Mediterraneo. The aim of the Tariffs was to have an economic and political effect

on the economy of Mediterraneo, not to regulate health or safety. The newly elected President of Mediterraneo was "known to have a certain preference for a more protectionist approach to international trade" *(R. 15, Ex. C6- Article)* when he imposed the original 25% tariffs. This action demonstrates a political motivation. Similarly, the Prime Minister of Equatoriana imposed the retaliatory tariffs because of political motivations. Business commentators claimed "hardliners" within the Prime Minister's circle convinced him to react strongly to the new President's actions *(R. 15, Ex. C6 – Article)*. The Tariffs therefore cannot be properly understood as "health and safety regulations."

b. The Tariffs are not "comparable unforeseen events"

i. The Tariffs are not "comparable" to health and safety regulations

68. The Sales Agreement excuses CLAIMANT's liability for "comparable unforeseen events" making the contract more onerous. CLAIMANT's arguments that the Tariffs are like health and safety regulations because they are both imposed by national governments is too broad a comparison to be meaningful. CLAIMANT's interpretation of the clause would excuse them for any government action, a reading of the clause that the Parties could not have intended *(CLAIMANT's Memorandum, para. 71)*. If the Parties wished to include all government action as excused under the Hardship Clause, they could have written "government action" instead of "health and safety regulations," but they did not.

69. CLAIMANT assumes the statutory health and safety requirements are unforeseeable changes of circumstances and compares the Tariffs to these measures to assert the Tariffs are comparable *(CLAIMANT's Memorandum, para. 71)*. CLAIMANT's arguments fail because tariffs are taxes on imported goods, and do not regulate health or safety like the statutory requirements. Tariffs, when directed at a specific country, affect that country's economy and its politics. Tariffs do not regulate health or safety. They do not change health or safety standards or impose health and safety requirements. It is true that national governments act with regard to the health and safety of their citizens, but these issues are handled in the form of health and safety regulations, not economic tariffs. CLAIMANT conflates the two circumstances *(CLAIMANT's Memorandum, para. 71)*, but the statutory health and safety requirements previously banning the artificial insemination of horses were entirely separate from the Tariffs. These two sets of measures

were the result of different political leaders, and had different concerns motivating their implementation. The ban on artificial insemination was implemented to prevent the spread of disease, whereas the Tariffs were a political and economic retaliation to the actions of the government of Mediterraneo.

ii. The Tariffs are not "unforeseen" events

70. The Tariffs were foreseeable to sophisticated business entities like CLAIMANT and RESPONDENT, the same way changes in market price, or changes in the law are foreseeable. CLAIMANT argues the Tariffs were not foreseeable because they came as a surprise to both parties and some others within the international community *(CLAIMANT's Memorandum, paras. 71–73; R. 6, paras. 9–10 – Notice; R. 15, Ex. C6 – Article)*. "Surprise," however, is not the measure of hardship or foreseeability. Foreseeable events include not just those that a party actually foresaw, but also those which it ought to have foreseen, or could reasonably have foreseen *(Saidov, 100)*. For a party to be liable for a loss, it is not necessary to prove this party actually foresaw the loss in question as long as it was in the position to reasonably foresee that loss *(Saidov, 100)*. The foreseeability of a potential hardship, such as an increase in costs caused by the Tariffs here, may be analyzed under Dr. Professor Christoph Brunner's three-step approach: Was the extent of the event and the time of the event both generally and specifically foreseeable? (**I**) Was the foreseeable degree of likelihood sufficiently important so it could be assumed the party seeking to invoke hardship assumed the risk? (**II**) Was there an alternative allocation of risk agreed to by the parties that would permit hardship to be invoked? (**III**) (*Brunner, 158–60)* Additionally, if there is doubt amongst disputing parties, clauses allocating a particular risk in a different way than the force majeure or hardship exemption should be construed narrowly *(Brunner, 122)*. When assessing foreseeability under this standard, an objective approach applies *(CISG, Art 8(2); Brunner, 160)*.

(I) The extent and time of the event was generally and specifically foreseeable

71. The first part of the *Brunner* test is to determine if the extent and time of the Tariffs were generally and specifically foreseeable. For an event to be both generally and specifically foreseeable, it must be foreseeable in an objective sense, and also in the specific circumstances of the case *(Brunner, 160)*. The Tariffs, like tariffs in general, affected the final price of the

goods for CLAIMANT in a manner analogous to market price fluctuations, which, depending on the magnitude and timing of the fluctuation, are considered generally foreseeable *(Schwenzer, 714–715; Borregaard)*.

72. If the price had increased by 70% from the tariffs, the extent of that price change would have been considered unforeseeable to some courts (*Scaform*) but more courts have held as little as a 30% price fluctuation is inadequate *(Frozen Bacon Case; Vital Berry Marketing)*. In this case, CLAIMANT experienced a price increase of 30% on *one of three shipments*, meaning the total cost to CLAIMANT to fulfill its obligations under the Sales Agreement only rose by 15%. In this case, an increase in the price of 15% is not enough to render the time or extent of the Tariffs unforeseeable. While it is true the parties were surprised by the Tariffs, surprise is not the test for determining foreseeability *(Brunner, 168–70)*. Foreseeability is measured by *what is possible and reasonable* for a party to anticipate, not what a party actually anticipated *(Saidov, 101)*.

73. The Tariffs may also be characterized as a change in the law, which is similarly foreseeable in both the general and specific sense. Laws change under many sets of circumstances, and a contract between two objectively reasonable sophisticated business entities such as CLAIMANT and RESPONDENT should know that changes in the law are always possible. Some commentators have argued that as a default, changes in the law are generally foreseeable, although there may be exceptions depending on a party's specific circumstances that prevented performance *(Brunner, 165)*. In this case specific case, there are no circumstances arising out of the Tariffs as a change in the law that prevented CLAIMANT from performing the Sales Agreement, and the delivery was made on time.

(II) The foreseeable degree of likelihood that the Tariffs would occur was sufficiently important, so it could be assumed CLAIMANT assumed the risk

74. The second part of the *Brunner* test is to determine if the foreseeable degree of likelihood the Tariffs would occur was sufficiently important, so it could be assumed CLAIMANT assumed the risk. The DDP Term in Clause 8 of the Sales Agreement imposes all import and export costs on CLAIMANT, and the Hardship Clause does not release CLAIMANT from this obligation *(R. 14, para. 8 – Sales Agreement)*. Under a DDP term ("Delivery Duty Paid"), the seller is responsible for all costs of carriage and delivery up until the goods are cleared for import and all taxes and duties are paid *(Incoterm 2010, "DDP")*. The Parties agreed each shipment of

frozen horse semen should be delivered DDP, *(R. 14, para. 8 – Sales Agreement; Incoterms 2010, "DDP")*. CLAIMANT raised the price of the shipments by 1.000 USD per dose in exchange for agreeing to the DDP term *(R. 12, Ex. C4)*, demonstrating the Parties both understood the burdens imposed on CLAIMANT by this term. RESPONDENT would not have agreed to pay an additional 1.000 USD per dose unless it was receiving at least some benefit in return, which, in this case, was that the risk of the import costs and duties would be borne by CLAIMANT *(R. 32, para. 4 – Response to Notice)*.

75. Other provisions of the Sales Agreement mitigate some of the strict obligations of the DDP term and shift some obligations to RESPONDENT, but none explicitly release CLAIMANT from its import and duty obligations. Clause 9, for example, provides that RESPONDENT is responsible for registry of the shipments and any fees regarding foals *(R. 14, para. 9 – Sales Agreement)*. Clause 10 provides that RESPONDENT is responsible for the proper equipment for storing the semen, and for delivering it from the storage facility *(R.14, para. 10 – Sales Agreement)*. Clause 11 states RESPONDENT is responsible for inspecting the goods within twenty-four hours of delivery *(R. 14, para. 11 – Sales Agreement)*. None of the clauses in the Sales Agreement expressly or impliedly release CLAIMANT from the obligation to pay tariffs, as imposed by the DDP term.

(III) There was no alternative allocation of risk agreed to by the Parties that would permit hardship to be invoked by CLAIMANT

76. The third part of the *Brunner* test asks if there was any alternative risk allocation that might permit the hardship to be seen as foreseeable, and invokable by CLAIMANT. The inclusion of these provisions in the Sales Agreement, as noted above, demonstrates the depth of the Parties' negotiations, and the care they took to allocate risks precisely and explicitly. In this case, there was no explicit exclusion of the import and duty obligations imposed on CLAIMANT under the DDP term. An objectively reasonable third party would be assumed to have sought a specific provision dealing with a particular risk if it was important to that party *(Schwenzer, 719)*, and here, CLAIMANT did not. CLAIMANT's argument that a DDP term was only agreed to in principle is unfounded (*CLAIMANT's Email; CLAIMANT's Memorandum, para. 71*). There is no evidence that a different allocation of risk was agreed to by the parties.

2. The Parties did not modify the original Hardship Clause through their conduct or otherwise agree to adapt the price

a. RESPONDENT never impliedly accepted CLAIMANT's request to be released from liability concerning import restrictions

77. CLAIMANT's assertions that the parties impliedly agreed to allow for price adaptation, are unfounded *(CLAIMANT's Memorandum, para. 76)*. CLAIMANT agreed to deliver the goods DDP and therefore assumed the risk of the Tariffs *(R. 14, para. 8 – Sales Agreement)*. CLAIMANT argues RESPONDENT's lack of specific written response to CLAIMANT's request to be free from liability arising out of import restrictions and a general reference to "risk assumption in the Hardship Clause," but fails to point to specific affirmative conduct by RESPONDENT that would constitute assent to its request (*CLAIMANT's Memorandum, para. 76)*. The conduct of the parties does not allow room to link price adaptation to the Hardship Clause. The other clauses in the Sales Agreement show it was possible for the Parties to make the DDP term less harsh, but the Parties did not mitigate the import restrictions in other clauses of the Sales Agreement. RESPONDENT agreed to pay extra per dose in exchange for the DDP term, it did not do this to receive nothing in exchange.

78. CLAIMANT's assertions that under Article 18, silence coupled with conduct is assent, is misguided *(CLAIMANT's Memorandum, para. 76)*. Article 18(1) provides that "a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance" *(CISG, Art 18)*. Whether conduct should be interpreted as acceptance of a contract or provision, however, requires an inquiry into the intent of the parties *(Schlechtreim, 45)*. The conduct of both Parties demonstrates the final intent not to excuse CLAIMANT from import liability. CLAIMANT asserts RESPONDENT did not further negotiate about the DDP Term after CLAIMANT asked to be released from import obligations *(CLAIMANT's Memorandum, para. 76)*, but the negotiations concerning the DDP term were negotiations about import restrictions by definition - DDP regulates which party bears the risks of import restrictions. RESPONDENT never accepted CLAIMANT's request to shift those duties implicitly or explicitly. No other part of the Sales Agreement limits CLAIMANT's liability in this area, and CLAIMANT's general reference to assumption of risk in

the Hardship Clause *(CLAIMANT's Memorandum, para. 76)* is unsupported by authority or contract language.

b. CLAIMANT's actions demonstrated it was willing to take on the risk of import restrictions

79. CLAIMANT shipped the goods before an agreement about additional payment could be reached. The Sales Agreement provides that shipments will not be made until all payment has been *received (R. 10, para. 5)*. CLAIMANT authorized and completed the Final Shipment before receiving any additional payment because of the Tariffs, and without receiving confirmation from RESPONDENT that the price increase they requested was possible. When asked if a price increase would be given, CLAIMANT responded that **if** the contract provided for an increase in price, an alteration would be made, but the Sales Agreement did not provide for such an increase *(R. 36, Ex. R4 – Witness Statement)*. CLAIMANT agreed to ship the goods without knowing an adjustment in price was certain. CLAIMANT therefore demonstrated through its conduct that it was willing to ship the goods without adaptation of the price.

B. The Tribunal should not adapt the price under the CISG

80. CLAIMANT argues that adaptation of the price is possible under the CISG. The CISG does not provide for the remedies CLAIMANT seeks, because the Parties derogated from the CISG by including the Hardship Clause (**1**), Article 79 does not provide for adaptation (**2**), and gap-filling provisions applying the UNIDROIT Principles also fail to provide for adaptation (**3**).

1. The Parties derogated from the CISG by including the Hardship Clause, so no CISG provisions are applicable to any potential hardship in this matter

81. The Hardship Clause covers all circumstances agreed to by the parties where the CLAIMANT would be excused from responsibility. When the parties included the Hardship Clause, this was a derogation form the CISG, rendering inapplicable any similar provision regarding hardship in the CISG. Under Article 6 of the CISG, parties may derogate from any of its provisions *(CISG, Art 6)*, and here, any potentially applicable provisions of the CISG governing hardship are superseded by the Hardship Clause. The Parties went to great lengths to negotiate and finalize the Hardship Clause, in lieu of potentially applicable provisions in the CISG. Article 6 permits parties to a contract to derogate from any of its specific provisions in order to ensure party autonomy over substantive issues *(Schlechtreim Article 6, 54*). The debates

at the 1980 Convention itself support the literal interpretation of Article 6: parties may derogate from or vary the effect of all provision of the CISG *(Winship, 1–33)*. Any provision in the CISG dealing with hardship does not apply to CLAIMANT's circumstances, because the Parties derogated from any CISG article dealing with hardship by including the aptly named Hardship Clause.

2. The most applicable article under the CISG is Article 79, which does not permit adaptation of the price

82. Even if the Tribunal finds that the Hardship Clause was not a derogation, Article 79, the only article with potential application, does not allow for adaptation of the price. Article 79(1) provides: A party is not liable for a failure to perform any of his obligations if he proves that the 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 *(CISG, Art 79(1))*. Article 79 does not apply here because it only excuses non-performance, which is not at issue in this arbitration, and the Tariffs do not constitute an impediment, which Article 79 requires.

a. Article 79 only excuses non-performance and it does not provide for adaptation

83. Article 79 excuses non-performance in situations of impossibility (*Petsche,* 147). In this case, the imposition of the Tariffs did not render performance impossible, evidenced by the very fact CLAIMANT was able to deliver the final shipment on schedule and perform its obligations *(R. 6, para. 13 – Notice)*. There is no "non-performance" for CLAIMANT to be excused from. The language of the article only provides for an excuse for non-performance, not an adaptation in price due to a change in the equilibrium of the circumstances surrounding the contract *(Uribe, 237; Mohs, 65)*. Since performance was rendered, Article 79 is inappropriate.

b. CLAIMANT's circumstances do not constitute an "impediment" required to invoke Article 79

84. Article 79 only excuses non-performance due to an "impediment." Through an analysis of the plain meaning of the term "impediment," meaning to pose as an obstacle that would prevent a person from performing an act, it is reasonable to conclude that an "impediment" is only something that prevents performance *(See Petsche, 157)*. CLAIMANT asserts that the Tariffs are

an impediment *(CLAIMANT's Memorandum, paras. 103–04)*. The Tariffs do not constitute an impediment because they did not prevent CLAIMANT from performing.

85. Some courts and commentators have held that Article 79 only allows for exemptions in cases involving force majeure or absolute impossibility *(See Petsche, 147; Schlechtriem 201; Frozen Bacon Case)*. In this case, CLAIMANT's experienced a price increase of 30% on *one of three shipments*, meaning the total cost to CLAIMANT to fulfill its obligations under the Sales Agreement only rose by 15%. A 15% increase in price is not of the order of magnitude necessary to constitute force majeure, absolute impossibility, or even to render performance "excessively onerous." Scholarship that argues Article 79 might apply to general hardship, as CLAIMANT argues *(CLAIMANT's Memorandum, paras. 99–102)* are speculative.

86. The Tariffs also did not make that performance "excessively onerous" as CLAIMANT argues *(CLAIMANT's Memorandum, paras. 103–04)*. CLAIMANT argues the Tribunal should consider its financial situation at the time of the completion of the Sales Agreement when determining if performance was "excessively onerous" *(Id)* CLAIMANT's financial situation at the time the Parties entered into the Sales Agreement, however, is irrelevant to how "onerous" performance may have been made by the Tariffs. Any risks arising out of a party's financial situation at the time of the conclusion of the contract are assumed by that party *(Schlechtreim, 202)*. Parties entering into international sales contracts are free to structure their terms as the parties see fit, including terms that might disadvantage one party over another. In this case, CLAIMANT assumed the risks brought on by its own financial situation, independently of how "onerous" the Tariffs made its performance.

3. The Parties are not able to adapt the price via gap-filling pursuant to the CISG's Interpretive Articles such as Article 7(2)

87. CLAIMANT argues the general principles of the CISG, including good faith, do not require the Tribunal to adapt the price *(CLAIMANT's Memorandum, paras. 111–15)*. RESPONDENT does not dispute that good faith is a widely recognized and important general principle promoted by the CISG, as CLAIMANT asserts. Good faith, however, does not require that CLAIMANT be compensated for the 15% increase in costs the Tariffs caused in this case. CLAIMANT asserts that the principle of good faith may impose additional duties on the parties, but the authority CLAIMANT cited to support this argument only states that a party's "failure to act in good faith

results in pre-contractual liability" *(Ruiz, 141)*. CLAIMANT has not asserted any claims of pre-contractual liability. The Parties acted in good faith throughout the negotiations and execution of the Sales Agreement. Therefore, good faith does not require the Tribunal to adapt.

88. Because neither Article 79 nor any other article of the CISG provides for an adaptation of the price, CLAIMANT turns to its final, multi-step argument that a gap-filling provision of applicable law may be used *(Brunner, 169; Uribe, 240)*. In this case, the applicable laws that fill the gaps left by the CISG in the area of hardship are the UNIDROIT Principles, which allow a party to request renegotiation of a contract if hardship is found.

a. The UNIDROIT Principles (PICC) do not require the Tribunal to adapt the price

89. Under the UNIDROIT Principles, hardship and force majeure are dealt with separately *(UNIDROIT Principles, Art 6.2.1 v. Art 7.1)*. To invoke hardship, the aggrieved party must first demonstrate there was a fundamental alteration of the equilibrium of the contract, provided also that four elements are met: (a) the events occur or become known to the disadvantaged part after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party *(UNIDROIT Principles, Art 6.2.2, Comment 1)*. In this case there was no fundamental alteration in the equilibrium of the contract. Even if there was, CLAIMANT still could have anticipated the tariffs and in fact did assume the risk of the tariffs.

b. There was no fundamental alteration of the equilibrium of the Sales Agreement

90. CLAIMANT claims a 15% increase in the cost of the goods due to the Tariffs entitles it to an adaptation of the price. This increase is not great enough to constitute an alteration in the equilibrium of the contract. There are two primary means of fundamentally altering the equilibrium of a contract (1) an increase in the cost of performance (2) a decrease in the value of the performance by one party. The present dispute falls short of the former category *(UNIDROIT Principles, Art 6.2.2, Comment 2(a))*.

91. The Commentary to the PICC provides that a situation falling under this principle must be "substantial" or "dramatic" *(Id)* A 15% increase in price is neither *(Id)*. Situations where hardship has been successfully invoked and resulted in an adaptation of the price indeed were

substantial and dramatic, include the Argentinian Economic Crisis of 2002 *(Ghezzi y Salvini; but see Building Plots Case – where the Spanish Economic Crisis of 2008 that resulted in a 50% devaluation was not considered a great enough hardship to adapt the price)* or the sudden insolvency of one party *(UAB)*. Some commentators have noted an increase in price of 50% or more is necessary to invoke hardship under the PICC *(Fucci, p. 22)*. Even circumstances involving increases in price of one to two times the original price after the conclusion of the contract have fallen short of remedial "hardship" *(See FeMo Alloy, Agristo, Société Romay)*. While it is unfortunate that CLAIMANT will lose its 5% profit margin but a 15% increase in price falls well short of a fundamental shift in the equilibrium of the contract required by the PICC.

c. The possibility of tariffs could reasonably have been taken into account by CLAIMANT at the time of the conclusion of the Contract

92. The "hardship" of the Tariffs is remedial only if the possibility of the Tariffs could not reasonably have been taken into account. CLAIMANT could reasonably have taken the Tariffs into account. The Parties spent significant time negotiating the wording of the Hardship Clause. RESPONDENT specifically rejected the use of the ICC Hardship Clause 2003 because it was too broad, and instead the parties settled on the Hardship Clause reflected in the final Sales Agreement. CLAIMANT specifically mentioned its hesitation at taking on import related risks *(R. 12, Ex. C4)* but then those risks were left out of the hardship clause *(R. 14, para. 12 – Sales Agreement)*. CLAIMANT therefore could have taken the risks of the Tariffs into account.

93. When CLAIMANT decided to ship the Final Shipment before reaching a definitive agreement on how to deal with the tariffs *(R. 6 — Notice)*, it further assumed the risk of bearing the additional costs. The Parties agreed each shipment of frozen horse semen should be delivered DDP, or "Delivery Duty Paid" *(R. 14, para. 8 – Sales Agreement; Incoterms 2010, "DDP")*. As discussed above, the Parties both understood the burdens imposed on CLAIMANT by this term given their substantial discussions of the term prior to the conclusion of the Sales Agreement *(R. 11–12, Ex. C4 – Email)*.

d. A request for renegotiations did not take place

94. Even if this Tribunal finds all elements of Article 6.2.2 were met, CLAIMANT still failed to conduct a proper re-negotiation, and is thus unable to adapt the price. The PICC requires that

a party must request renegotiation to take advantage of its hardship provision (*UNIDROIT Principles, Art 6.2.3)*. Contrary to CLAIMANT's assertions, the Parties' conduct does not demonstrate an intent to adapt the price *(CLAIMANT's Memorandum, paras. 88–89)*. CLAIMANT contacted Gregory Shoemaker, a veterinarian employed by RESPONDENT, three days before the third shipment was due *(R. 36, Ex. R4 – Witness Statement)*. Shoemaker was not authorized to renegotiate on RESPONDENT's behalf *(Id)*. Shoemaker told CLAIMANT explicitly he was not authorized to adapt the price *(Id)*. The only promise Shoemaker made was that **if** the contract provides for an increase in price, an alteration would be made, but the contract does not provide for such an increase *(R. 36, Ex. R4 – Witness Statement)*. The strongest language CLAIMANT can use to describe this conversation is that Napravnik had "gotten the impression" RESPONDENT should take on additional costs, not that it was firmly agreed upon or certain in any way. *(R. 18, Ex. C8 – Witness Statement)*. "Getting an impression" is not nearly enough to constitute a proper renegotiation.

95. The meeting of 12 February 2018 between RESPONDENT's CEO and CLAIMANT was also not a request for renegotiation or adaptation. The focus of that meeting was the unfounded allegations that RESPONDENT had resold doses of frozen horse semen to other parties, not the Tariffs *(R. 18, Ex. C8 – Witness Statement)*. CLAIMANT confronted RESPONDENT with these allegations for the first time at this meeting, which led to the abrupt conclusion of the meeting *(Id)*. While it is true RESPONDENT's CEO also refused to pay any additional costs associated with the tariffs at this meeting *(Id)*, this position is consistent with Shoemaker's position taken during the phone conversation with Napravnik, that no promises could be made about an adaptation in the price *(R. 36, Ex. R4 – Witness Statement)*. Nothing at this meeting could be understood as a proper request for renegotiation, as required by the PICC.

C. Conclusion

96. Therefore, CLAIMANT is not entitled to 1.250.000 USD due to an adaptation of the price. The Parties' Sales Agreement put the obligation to pay the Tariffs squarely on the CLAIMANT. Nothing in the Parties' conduct changed that allocation of risk. No relief is properly provided by any article of the CISG, or the gap-filling principles of the PICC. Therefore, CLAIMANT is not entitled to any amount of money due to an adaptation of the price.

REQUESTS FOR RELIEF

In light of the above RESPONDENT requests the Arbitral Tribunal:

1. To dismiss the claim as inadmissible for a lack of jurisdiction and power;
2. To reject the claim for additional remuneration in the amount of 1.250.000 USD raised by CLAIMANT;
3. To reject the evidence proffered by CLAIMANT pertaining to RESPONDENT's prior arbitration;
4. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

CHRISTINA CONNELLY

SHELBY KOST

LOAN TRAN

PARIZ YABUKU

22 January 2019