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MEMORANDUM FOR CLAIMANT

UNIVERSITY OF WASHINGTON SCHOOL OF LAW

SEATTLE, WASHINGTON USA

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

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&	And
AC	Advisory council
Arb.	Arbitration
Ans.	Answer
Art./Arts.	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
Cl.	Claimant
Cmt.	Comment
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICAC	The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	Idem (the same)
i.e.	Id est (that is)
Inc.	Incorporated
Ltd.	Limited
Ltr.	Letter
Memo.	Memorandum
No.	Number
Ntc.	Notice
Op.	Opinion
Ord.	Order
¶/¶¶	Paragraph(s)
Proc.	Procedural
R.	Respondent
U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts Investor-State Arbitration
v.	Versus (against)

STATEMENT OF FACTS

1. RESPONDENT, Black Beauty Equestrian, is a world-renowned horse stable incorporated in Equatoriana. CLAIMANT, Phar Lap Allevamento, is an established horse-breeding operation in Mediterraneo.
2. As the popularity of horse racing grew in Equatoriana, RESPONDENT looked to expand its racehorse breeding program [*Ntc. Arb.* ¶4]. When the Equatorianian government announced a temporary lift of its ban on the artificial insemination of racehorses, RESPONDENT, on **21 March 2017**, inquired with CLAIMANT over the availability of frozen semen from its top racehorse, Nijinsky III [*Cl. Ex. C1*].
3. Despite some initial reticence, CLAIMANT, by email on **24 March 2017**, agreed to sell RESPONDENT 100 doses of frozen Nijinsky III semen [*Cl. Ex. C2*]. CLAIMANT informed RESPONDENT that delivery of the semen must be made in several installments and that the purchase would be based on the "Standard Frozen Semen Sales Agreement taking into account the Mediterraneo Guidelines for Semen Production and Quality Standards" [*Id.*].
4. In response to CLAIMANT's request and the Parties' desire for a long-term business arrangement, RESPONDENT informed CLAIMANT that it would need CLAIMANT to agree to delivery DDP and that the Contract could not both be governed by Mediterranean law and justiciable solely in Mediterraneo [*Cl. Ex. C4*].
5. In a **31 March 2017** email, CLAIMANT told RESPONDENT it would accept delivery DDP if RESPONDENT accepted a price increase of $1000 USD per dose [*Id.*]. Additionally, CLAMAINT expressed concerns over unforeseen health and safety requirements that "can increase the costs up to 40%." [*Id.*] Accordingly, CLAIMANT expressed its need for a hardship clause to cover the applicable health and safety issues [*Id.*].
6. The Parties eventually agreed, in principle, on a narrow hardship clause, as well as acceptable forum selection and choice-of-law clauses. Tragically, prior to the completion of the negotiations, the main negotiators for each party were involved in a car accident. The deal was later completed by different negotiators on **6 May 2017** [*Cl. Ex. C5*].
7. The Parties agreed on three total shipments. The first shipment of 25 doses was delivered on **20 May 2017**. The second 25 dose shipment was delivered on **3 October 2017**. However, prior to the final 50 dose shipment, the Government of Equatoriana implemented a 30% tariff on agricultural goods that included frozen racehorse semen [*Cl. Ex. C7*]. This tariff was in retaliation to a similar 25% tariff enacted by the Government of Meditteraneo. Based on the party platform of the new elected Prime Minister of Mediterraneo, this tariff was not unexpected [*Cl. Ex. C6*].

8. In light of the 30% increase in costs of shipping the final shipment, CLAIMANT informed RESPONDENT that it may have to withhold performance [*Cl. Ex. 7–8*]. To facilitate a solution, the Parties held a telephonic meeting on **21 January 2018** involving Julie Napravnik, Corporate Counsel for CLAIMANT, and Greg Shoemaker, the head of racehorse breeding for RESPONDENT. During this phone call, Mr. Shoemaker never agreed to a price adaptation [*R. Ex. R4*]. Rather, Mr. Shoemaker told Ms. Napravnik "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*Id.*] In fact, Mr. Shoemaker is not an attorney, something he repeatedly conveyed to Ms. Napravnik, and did not have the authority to authorize any price adjustment [*Id.*]. Without any agreement for a price adjustment, CLAIMANT made the final delivery of the frozen semen [*Cl. Ex. C7*].
9. On **12 February 2018**, the Parties met to discuss whether the Contract allowed for a price increase [*Id.*]. However, before the Parties could discuss the details of the Contract, CLAIMANT baselessly accused RESPONDENT of reselling Nijinsky III semen [*Ans. Ntc. Arb.* ¶11]. After the discussions failed, CLAIMANT initiated this proceeding on **31 July 2018** [*Ntc. Arb.*].
10. Prior to this proceeding's Case-Management-Conference, CLAIMANT sought the admission of an arbitral award from a prior arbitration involving RESPONDENT [*Ltr. Langweiler* 49]. CLAIMANT speculates this arbitral award will show that RESPONDENT argued that the 25% Mediterranean tariff constituted an economic hardship and justified a price adaptation [*Id.*]
11. RESPONDENT objected to the admission arguing that all information from that arbitration is protected by a confidentiality agreement and that CLAIMANT could only have obtained the award through illegal means [*Id.*]. RESPONDENT also noted the award lacks probative value as it was a completely different context and contract [*Id.*].
12. Peculiarly, CLAIMANT sought admission of the award without actually possessing a copy [*Proc. Ord. #2* ¶43]. Rather, CLAIMANT has an agreement to buy a copy for $1000 USD from a company known to sell insider information from the horseracing industry [*Id.*]. This unnamed company also refuses to disclose the source of its copy of the arbitral award.

SUMMARY OF ARGUMENT

13. The Tribunal should not allow CLAIMANT to saddle RESPONDENT with obligations and proceedings to which it did not agree. Rather, the Tribunal should rein in CLAIMANT's attempt to manipulate the negotiation history between the Parties. Requiring RESPONDENT to pony up additional funds is outside the scope of the Contract and beyond the Tribunal's authority.

14. CLAIMANT's first attempt to impose obligations and proceedings beyond those provided in the Contract is its unfair request to admit a partial interim award from RESPONDENT's previous arbitration [**Issue I**]. The evidence is irrelevant and therefore the Tribunal should not allow the admission. Further, CLAIMANT is attempting to obtain this evidence in an underhanded way. It is negotiating with a third party—with a questionable reputation—to purchase the award. The Tribunal should not reward this behavior. Similarly, the other party from the previous arbitration should not be joined to this proceeding. This Tribunal does not have the power to join a separate party and doing so would not be in the interest of fairness and efficiency. The partial interim award is the result of a completed, confidential, separate arbitration, and admission would contravene longstanding arbitral values.
15. Next, CLAIMANT attempts to manipulate the Contract to grant the Tribunal authority that it does not possess. Contrary to CLAIMANT's assertion, the Tribunal lacks the jurisdiction to adapt the Contract [**Issue II**]. Danubian law governs the Arbitration Agreement and its interpretation because there is no presumption in favor of applying the law of the substantive Contract. In the absence of such a presumption, the law of the seat should apply because it has the closest and most real connection to the Arbitration Agreement. Under Danubian law, the text of the Agreement does not allow for adaptation. And, even applying Mediterranean law and taking into account external evidence, the Tribunal still cannot adapt the Contract. Furthermore, the international presumption against *ex aequo et bono* decision-making precludes the Tribunal from adapting the contract.
16. Further, CLAIMANT is not entitled to a price adaptation under Clause 12 of the Contract [**Issue III**]. The Parties specifically negotiated an agreement that allocated all import restriction risks onto CLAIMANT. RESPONDENT paid CLAIMANT fairly for this allocation. The Parties' preliminary negotiations, as well as the text and purpose of the Contract, demonstrate that the Equatorianian tariff falls outside the scope of Clause 12. Moreover, Clause 12 provides only one remedy: avoidance. CLAIMANT is not entitled to that remedy and CLAIMANT's decision to forego the possibility of that remedy does not now entitle it to ask for adaptation.
17. Finally, CLAIMANT is not entitled to a price adaptation under the CISG [**Issue IV**]. The Parties, by drafting Clause 12, derogated from the effects of Art. 79 CISG. Further, economic hardship is not a qualifying impediment under the CISG, nor is adaptation an authorized remedy.

I. THE TRIBUNAL SHOULD NOT ADMIT THE PARTIAL INTERIM AWARD FROM RESPONDENT'S PREVIOUS ARBITRATION.

18. CLAIMANT unfairly seeks to admit evidence related to a completed arbitration in which RESPONDENT was involved. Pursuant to its jurisdiction over questions of relevancy, the Tribunal should decline to admit this evidence because it is irrelevant to the current dispute [**A**]. Even if the Tribunal determines that the evidence is in fact relevant or material, it should still refuse to admit the evidence based on CLAIMANT's unethical behavior in illicitly procuring the evidence and the overriding importance of confidentiality [**B**].

A. Using its Inherent Jurisdiction over Issues of Relevancy, the Tribunal Should Not Admit the Evidence.

19. The Tribunal has the jurisdiction to resolve questions of relevancy of evidence [*BORN* 1852]. Parties in international arbitration do not have "an automatic right to demand documents to be disclosed by their counter-parties" [*BORN* 1897]. CLAIMANT incorrectly asserts that the Award's potential relevance requires its admission. Rather, in determining relevancy, the Tribunal should focus on the value of confidentiality not CLAIMANT's baseless claim to the evidence.

20. Claimant's relevancy argument ignores the salient differences between the previous arbitration and this proceeding. The previous arbitration stemmed from the effects of a 25% tariff which could have posed a significant threat to RESPONDENT's business. CLAIMANT argues that the evidence is relevant because it suggests a lack of good faith, asserting that the difference between a 25% tariff and the 30% tariff in this dispute is insignificant [*Cl. Memo.* ¶88]. That conclusion ignores the facts of the situation. RESPONDENT only recently decided to establish a racehorse stable, whereas CLAIMANT is "Mediterraneo's oldest and most renown stud farm" [*Ntc. Arb.* ¶¶1, 4]. A 25% tariff places a larger burden upon a new business venture. Whereas a veteran corporation, such as CLAIMANT's, has experience in handling changing economic conditions and is therefore more equipped to carry the burden of the tariff. This evidence does not show a lack of good faith from RESPONDENT, but rather highlights CLAIMANT's failure to engage in sound business practices. Therefore, the Award is not relevant in proving the position which CLAIMANT seeks to advance.

21. Further, the Tribunal can properly rule on this case without the admission of the Award. The Parties have submitted timelines, communications, witness statements, and other evidence that provide a complete understanding of this dispute. CLAIMANT's assertion that the Tribunal needs this specific evidence to make an informed ruling is without merit [*Cl. Memo.* ¶71]. Admission of the evidence does not serve the purpose which CLAIMANT asserts it does, but rather provides a misleading picture of the

situation. The facts of this case, the contract, the Parties, and the law are separate and distinct from those in the previous dispute. CLAIMANT's argument that the Tribunal "would be shutting itself off … into a subjective make-believe world of its creation" [*Cl. Memo.* ¶95] is a gross mischaracterization of the reality of the situation. The Tribunal has all the facts of *this* case, which is all that is relevant for purposes of efficient and fair resolution.

B. Even if the Tribunal Finds the Award Relevant, It Should Employ the Established Two-Part Inquiry and Decline to Admit the Evidence.

22. Regarding admissibility, CLAIMANT asks the Tribunal to ignore RESPONDENT's interest in a decision that directly impacts it and the values of confidentiality, fairness, and efficiency [*Cl. Memo.* ¶81]. In determining admissibility, the Tribunal should follow the two-step approach applied by other tribunals: if the party submitting the evidence has "unclean" hands in the disclosure of the evidence, or the evidence in question is privileged, then tribunals should not admit the evidence [*Bergsten Lecture, Vienna, Austria, 2018*]. Applying this approach, the evidence is inadmissible for two reasons. First, CLAIMANT is currently involved in an underhanded attempt to obtain the documents it seeks to admit [1]. Second, the evidence is privileged under various rules and guidelines [2].

1. CLAIMANT has "unclean hands" and the Tribunal should not reward its behavior.

23. Tribunals from across jurisdictions have applied a "clean hands" standard when addressing situations involving illegally-obtained evidence [*Methanex Case*; *Libananco Holdings Case*]. This standard asks tribunals to look at a party's role in the acquisition of evidence. Further, it encourages admission if the party is free from fault, but discourages admission if the party has participated in the unlawful procurement—i.e., if it has "unclean hands" [*Methanex Case*; *Libananco Holdings Case*]. CLAIMANT spectacularly fails to meet this low standard.

24. CLAIMANT continues to attempt to procure the Award illicitly. While the Award was originally disclosed by a different entity, CLAIMANT is currently involved in a scheme to purchase the Award from a disreputable source. CLAIMANT has "arranged an opportunity to acquire the 'Partial Interim Award' against payment of 1,000 USD from a company which provides intelligence on the horseracing industry" [*Proc. Ord. #2* ¶41]. The company which CLAIMANT is engaging with has a "doubtful reputation" as to where it retrieves its intelligence [*Id.*]. The company refuses to disclose its sources for the Award [*Id.*]. This scheme shows CLAIMANT's disregard for confidentiality standards as well as its disregard for RESPONDENT's autonomy to engage in separate transactions. CLAIMANT's actions cannot be regarded as "clean handed." Therefore, the Tribunal should not reward CLAIMANT's

behavior, and it should instead uphold the integrity of international arbitration by declining to admit the unethically-obtained evidence.

25. While CLAIMANT argues that the third parties that originally unlawfully disclosed this information are the ones with the "unclean hands," that does not make CLAIMANT's hands "clean" [*Cl. Memo.* ¶¶110–13]. Although CLAIMANT was not the party who originally disclosed the information, it has "unclean hands" in the further dissemination of the award. Shifting the blame does not absolve CLAIMANT of its unethical behavior in attempting to purchase the Award from a disreputable company with suspicious sources. Under CLAIMANT's theory, the Tribunal would have to find that there is no ethical issue with knowingly purchasing stolen property.
26. CLAIMANT relies on conclusions set forth in cases involving the infamous Wikileaks scandal [*Cl. Memo.* ¶95]. CLAIMANT absurdly casts this evidentiary issue as a "travesty of justice," akin to the *ConocoPhillips Case* [*Id.*]. However, the *ConocoPhillips* Tribunal admitted the evidence primarily because it had already been widely disseminated [*ConocoPhillips Case*]. Comparing the facts of this dispute to the facts of a politically-charged case involving international espionage is a false equivalency. The information disclosed by the Wikileaks breach was widely available, whereas the evidence related to RESPONDENT's previous arbitration is not. The only way the Award could become widely available is through the continued unlawful dissemination by disreputable sources. This is exactly what CLAIMANT seeks to do through its attempted purchase. The Wikileaks cases are therefore irrelevant to the dispute before this Tribunal.
27. RESPONDENT agrees with CLAIMANT that "it is an internationally recognized legal principle that a right cannot stem from a wrong" [*Cl. Memo.* ¶101; *COMMENTARY*; *Tippets Case*; *CHENG* 149]. Under this mutually-shared belief, the Tribunal should not admit the illicitly purchased Award.

2. <u>The evidence is confidential under applicable law.</u>

28. Even if the Tribunal decides that the evidence is relevant, the determination of admissibility can still be mitigated if "a party can demonstrate that there are reasons for non-production" [*BORN* 1855]. RESPONDENT submits that the prevailing value of confidentiality bars admission of the Award. Any disclosure to a third party necessarily infringes upon a parties' right to confidentiality [*Esso Australia Case*; *BORN* 2281]. The New York Convention [*i*] and the 2013 HKIAC Rules [*ii*] provide overwhelming reasons to deny admission.

i. The underlying principles of the New York Convention support the inadmissibility of the Award.

29. Under the New York Convention, RESPONDENT's right to confidentiality renders the Award inadmissible. "[T]he proper analysis of confidentiality in the context of international commercial

arbitration is . . .to give effect to the parties' agreement with regard to the confidentiality" [*BORN* 2280]. This position is based on "application of principles of party autonomy (and Articles II and V(1)(d) of the New York Convention) and should be noncontroversial" [*Id.*].

30. The parties in the previous arbitration specifically contracted for a confidentiality clause with the intent to preserve the confidentiality of that arbitration [*Ltr. Fasttrack* 51]. This agreement should not be ignored at the request of CLAIMANT, as that would contravene the rights of RESPONDENT. CLAIMANT's purported "fundamental right to be heard," [*Cl. Memo.* ¶¶83–86], cannot outweigh RESPONDENT's right to confidentiality. The Tribunal has all the necessary information to decide this case—as CLAIMANT has provided its arguments to a degree that satisfies its right to be heard.

ii. The 2013 HKIAC Rules, the governing rules of the previous arbitration, require that confidentiality be preserved.

31. Because the parties in the previous arbitration contracted to apply the 2013 HKIAC Rules, those are the rules that govern the confidentiality of the evidence. The 2013 HKIAC Rules explicitly state that "unless otherwise agreed by the parties, no party may publish, disclose or communicate any information related to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration" [*2013 HKIAC Rules Art. 42.1*]. This provision sets out a clear expectation for the parties in how their dispute, evidence, and award will be treated. RESPONDENT and the other party, relying on the rules applicable to their arbitration, expected their evidence to be kept confidential during and beyond their arbitration. Therefore, the Tribunal should decline to admit the Award.
32. Further, the Rules only allow an award to be published "[when] no party objects to such publication" [*Id. Art. 42.5*]. The Award was originally disclosed via unlawful means, and CLAIMANT seeks to obtain the evidence through illicit behavior. CLAIMANT now seeks to "publish" the Award despite RESPONDENT's objection. Although this disclosure is not a technical publication, to uphold the spirit of the Rules, the Tribunal should honor RESPONDENT's objection.
33. Moreover, the high standard and expectation of confidentiality offered by the 2013 HKIAC Rules proscribes CLAIMANT's argument to apply the UNCITRAL Arbitration Rules. Arbitration affords parties the autonomy to craft detailed arbitration agreements that define the expectations of the parties regarding the applicable arbitral rules [*REDFERN/HUNTER* 6.20]. Neither the Parties in this dispute nor the other party in the previous arbitration contracted to apply the UNCITRAL Transparency Rules. Applying these UNCITRAL Rules to the question of admissibility is an application which the parties not only could not have foreseen, but that the parties expected not to be applied.

34. Finally, CLAIMANT argues that there is no violation of a contractual obligation of confidentiality between the Parties to this dispute [*Cl. Memo.* ¶104]. That is an irrelevant position, as the admission of the evidence would violate the confidentiality agreement between RESPONDENT and the other party in the previous arbitration.

C. The Tribunal Should Not Grant CLAIMANT's Request to Join the Other Party.

35. RESPONDENT does not consent to the joinder of the other party from the previous arbitration. Allowing the other party to participate in this arbitration would contravene RESPONDENT's rights to separate resolutions, and it would be adverse to both the Parties' and the Tribunal's interest in fairness and efficiency. Joining the other party from RESPONDENT's previous arbitration would not result in a sounder arbitral decision for two reasons. First, the Tribunal does not have the power to join the other party [1]. Second, even if the Tribunal did have such power, joining the other party would not result in more fairness or efficiency [2].

1. The Tribunal Does Not Have the Power under the Arbitration Agreement to Join the Party from the Previous Arbitration.

36. CLAIMANT's position that the Tribunal should join the party from RESPONDENT's previous arbitration is not grounded in reality. In this situation, as acknowledged by CLAIMANT [*Cl. Memo.* ¶114], various authorities indicate that the Tribunal does not have joinder authority in the absence of a clause in the Arbitration Agreement.
37. The New York Convention safeguards a party's "contractual right to arbitrate any non-consolidated proceeding" and their right to do so "without the presence of additional parties" [*BORN* 2074; *accord N.Y. Conv. Art. II(1), (3)*]. Here, the Parties in both proceedings have separately agreed to arbitrate their disputes. Consolidating or joining these proceedings would "go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes" [*REPORT ON THE ARBITRATION BILL*; *see also BORN* 2074]. Stepping outside of the express intent of the Parties is beyond the scope of the Tribunal.
38. While the Model Law is silent on this issue, its silence indicates a lack of jurisdiction [*BORN* 2077]. The Model Law states that arbitration agreements should be "recognized and enforced in accordance with the parties' intentions" [*Id.*]. In the context of authority to join another party, joinder can only be granted "where that is what the parties have agreed, but not otherwise" [*Id.*].
39. Joinder has "generally been possible only where the parties have unanimously agreed to such a result, typically in their original arbitration agreement" [*Id.* at 2073 (also noting national law "generally does not permit consolidation or joinder/intervention—either through orders of the arbitral tribunal or a

national court")]. The Arbitration Agreement is determinative in this situation: "parties agree to arbitrate with particular other parties, according to specified procedures—not to arbitrate with anybody, in any set of proceedings" [*Id.* at 2072]. The Parties did not agree to open themselves to this sort of inclusion, and the Tribunal should not read this power into the Agreement.

40. Further, granting CLAIMANT's frivolous request would contravene the Arbitration Agreement and traditional tribunal behavior. Tribunals are often "very unwilling to permit parties to engage in 'fishing expeditions'" [*BORN* 1908]. CLAIMANT's "fishing expedition" is particularly egregious in that it threatens the privacy of a company who is not a party to this dispute. Allowing CLAIMANT to bring another, uninvolved party into this dispute would be allowing CLAIMANT to stretch out the arbitration process in hopes of identifying further claims that did not arise out of its original challenge.

2. Even if the Tribunal Did Have the Power to Join the Other Party, Joinder Would Not be in the Interest of Fairness and Efficiency.

41. If the Tribunal decides it has the power to join the other party from RESPONDENT's previous arbitration, it should still decline to do so because joinder would result in an unfair and inefficient proceeding.

42. CLAIMANT is, in principle, allowed to request this joinder, but "there are important issues regarding the timeliness of such efforts" [*Unpublished Ad Hoc Award of 3 March 1999* (holding that joinder is "subject of course to the parties' right to due process of law"); *see also BORN* 2092]. The timing of CLAIMANT's request comes after the gathering of statements of claims, defenses, witness statements, and other evidence [*See Ntc. Arb.; Cl. Ex. C1–8; R. Ex. R1–4*]. In other words, after the relevant and material facts have been gathered in their entirety. Joining the other party would "unnecessarily or unreasonably [delay] the resolution," and would likely "[impose] unnecessary or unreasonable expense" on the parties [*BORN* 2092].

43. The other arbitration proceeding has concluded. An independent tribunal has heard arguments and rendered a Partial Interim Award. Allowing CLAIMANT to join the other party would result in re-arbitrating a separate matter. This is inefficient and unfair to all parties. The Tribunal should therefore decline to join the other party from RESPONDENT's previous arbitration.

44. Therefore, because the evidence is irrelevant and illicitly obtained and joinder is unauthorized and inefficient, the Tribunal should allow the Parties to arbitrate this dispute without reference to RESPONDENT's previous arbitration.

II. THE TRIBUNAL LACKS JURISDICTION TO ADAPT THE CONTRACT.

45. While the Tribunal has the right to determine its own jurisdiction under the doctrine of Kompetenz-Kompetenz [*REDFERN/HUNTER* 5.99; *BORN* 853], it lacks jurisdiction to adapt the Contract. The Tribunal lacks this jurisdiction because Danubian law, which governs the Arbitration Agreement [**A**], mandates a narrow interpretation of the Agreement and prevents the Tribunal from adapting the Contract in response to the tariff [**B**].

A. Danubian law applies to the Arbitration Agreement.

46. A general choice-of-law clause governs the substantive Contract; however, there is no express choice-of-law provision governing the Arbitration Agreement [*Cl. Ex. C5*]. When there is no express choice-of-law provision, the law of the seat of arbitration should apply [1]. Further, the law of the seat should apply because the Parties did not intend to apply Mediterranean law to the Arbitration Agreement [2]. Finally, the principle of *favor negotii* does not reflect the Parties' intent [3].

1. The law of the substantive Contract does not always apply to the Arbitration Agreement.

47. Contrary to CLAIMANT's argument, there is no presumption in favor of applying the law of the substantive Contract [*i*]. The doctrine of separability reinforces this position [*ii*]. As there is no presumption, the law of the seat should apply [*iii*].

i. There is no presumption that the law governing the substantive Contract applies to the Agreement.

48. CLAIMANT argues that the Parties implicitly intended to apply Mediterranean law to the Arbitration Agreement because RESPONDENT never rebutted the presumption during negotiations [*Cl. Memo.* ¶24–43]. However, CLAIMANT fabricates this "presumption." Such a presumption does not exist.

49. It "does not necessarily follow that law of the underlying contract applies to the arbitration agreement" [*BORN* 449]. In other words, the Parties' intent to be bound by a general choice-of-law clause cannot be construed as an intent for the Arbitration Agreement to be governed by that same general provision [*PHUA* 7]. Particularly when sophisticated commercial entities fail to specify what law will govern the arbitration agreement, it should not be assumed that the parties intended to automatically apply the law of the substantive contract to the arbitration agreement [*Id.*]. This is especially true when there is an option to select a different applicable law [*Id.*]. Therefore, no presumption in favor of applying the law of the substantive contract exists.

ii. Under the separability doctrine, the Contract and the Arbitration Agreement are distinct.

50. The separability doctrine is a well-established doctrine recognizing that an arbitration agreement is separable from the substantive contract with which it is associated. [*BORN* 311, 411; *Model Law Art. 16.1*; *2018 HKIAC Rules Art. 19.2*]. This doctrine permits the arbitration clause to "stand alone if

necessary" [*REDFERN/HUNTER* 3.13]. Accordingly, it allows arbitration agreements to be governed by a different law than that governing the substantive contract [*BORN* 411].

51. CLAIMANT argues that the separability doctrine is used only to empower the tribunal to render a decision when its jurisdiction is in question [*Cl. Memo.* ¶45]. CLAIMANT's narrow application of the doctrine ignores the doctrine's purpose. The separability doctrine exists to reconcile two sets of obligations. When parties enter into a contract containing an arbitration clause, it is *as if* they are entering into two physically-separate contracts—(1) the principal agreement with substantive obligations and, (2) the arbitration agreement [*LEE*, 423; *HUDA* 10]. If they are two separate agreements, it naturally follows that two different laws can apply to each agreement.
52. While the separability doctrine was created in conjunction with the doctrine of Kompetenz-Kompetenz, that does not mean it is contingent on the application of Kompetenz-Kompetenz. The UNCITRAL Secretariat's commentary on draft text of Art. 16.1 merely states "the [separability] doctrine complements the power of the arbitral tribunal to determine its own jurisdiction…" [*HOLTZMANN/NEUHAUS* 508]. However, this complementary nature of the separability doctrine to Kompetenz-Komepetenz does not limit the doctrine in any way.
53. Thus, the separability doctrine allows the Arbitration Agreement to be interpreted separately.

iii. Because no presumption in favor of applying the law governing the substantive Contract exists, the law of the seat should apply to the Arbitration Agreement.

54. CLAIMANT argues that the law of the substantive Contract should be presumed to apply to the Arbitration Agreement in the interest of legal "certainty and predictability" [*Cl. Memo.* ¶29]. However, these interests are better achieved by applying the law of the seat of arbitration, a legal system agreed upon in the Arbitration Agreement. Applying the law of the seat streamlines the applicable laws because "the seat typically supplies the *lex arbitri* and imposes mandatory rules" [*PHUA* 7] that would otherwise need to be reconciled. This proposition is illustrated by the *Daewoo Case*, where an HKIAC tribunal held that the law of the seat of arbitration should apply to avoid "jurisdictional complications and issues as to the relative roles of the local court and the chosen foreign court in relation to the arbitration" [*Daewoo Case*].
55. The law of the seat of arbitration is also preferable because it connects the arbitration agreement to the legal system [*STEINGRUBER* 91]. The seat of arbitration has the closest and most real connection to the Arbitration Agreement [*BORN* 480 citing *XL Insurance Case*; *REDFERN/HUNTER* 3.19] because it is "the place where the arbitration is held … [and] will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective" [*PHUA* 7 citing *Habas Sinai Case*].

Therefore, CLAIMANT's position is untenable and the law of the seat of arbitration should apply to the Arbitration Agreement.

2. The Parties did not intend to apply Mediterranean law to the Arbitration Agreement.

56. CLAIMANT inaccurately concludes that the Parties intended to apply Mediterranean law to the Arbitration Agreement. Relying on that conclusion, CLAIMANT cites Mediterranean jurisprudence to apply the CISG [*Cl. Memo.* ¶37–38]. However, Claimant fails to provide any justification for applying the CISG under Danubian law—the law actually governing the Arbitration Agreement. Additionally, the CISG's application to the substantive contract does not automatically mean that the arbitration clause contained in that contract is also subject to the CISG [*KROLL* 7]. Therefore, contrary to Claimant's assumption, Danubian law, which adopts the "four corners rule," should be used to interpret the Arbitration Agreement.

57. However, even if the CISG applied to the interpretation of the Arbitration Agreement, RESPONDENT did not intend to apply Mediterranean law. CLAIMANT misconstrues RESPONDENT's intent [*i*], and a reasonable person in RESPONDENT's position would have understood that the law of the seat of the arbitration applies to the Arbitration Agreement [*ii*].

i. Claimant misconstrues Respondent's implied intent to apply the law of the seat of arbitration as a concession that Mediterranean law applies.

58. CLAIMANT argues that it did not know, nor could have been aware, of RESPONDENT's intent to apply Danubian law because RESPONDENT did not rebut the presumption in favor of applying the law of the Contract to the Arbitration Agreement [Cl. Memo. ¶36–38]. CLAIMANT's argument is predicated on a presumption in favor of applying the law of the substantive Contract. However, as explained above, such a presumption does not exist. Because this presumption does not exist, RESPONDENT did not agree that the law of the substantive Contract governs the Agreement.

59. In fact, CLAIMANT knew or was aware of RESPONDENT's intent to not apply Mediterranean law. RESPONDENT explicitly stated it wanted Equatorianean law to apply to the Arbitration Agreement [*R. Ex.* 1]. Further, when CLAIMANT deleted the choice-of-law provision and, instead, included an arbitration clause which only referenced Danubia [*R. Ex.* 2], CLAIMANT demonstrated its awareness that RESPONDENT did not intend for Mediterranean law to apply to the Agreement.

ii. A reasonable person would not have expected that the law of the substantive Contract applied to the Agreement.

60. Even if the Tribunal finds that CLAIMANT was unaware of RESPONDENT's subjective intent, the Tribunal should find that a reasonable person would have understood that RESPONDENT intended Danubian law to apply [Art. 8(2) CISG].

61. Where, as here, there is no express choice-of-law for an arbitration agreement, the great *corpus* of international arbitral law renders a singular conclusion—the law of the seat governs the agreement. For instance, Article V(1)(a) of the New York Convention states that, in the absence of an agreement by the parties as to the law governing their arbitration, the law of the seat of arbitration applies [*N.Y. Conv. Art. V(1)(a)*]. Further, the IBA Guidelines state that absent a choice of procedural or arbitral law, the governing law defaults to the place of arbitration [*IBA Guidelines Art.* 44]. Also, in the *Daewoo Case*, the tribunal, under the HKIAC rules, applied the law of the seat of arbitration. Because the overwhelming weight of authorities apply the law of the seat when there is no express choice of law, a reasonable person engaged in international commerce would not have thought that the law of the substantive Contract applies to the Parties' Arbitration Agreement.

62. Furthermore, commercially reasonable parties value neutrality in dispute resolution. Because parties value neutrality, the "law governing the performance of substantive contractual obligations . . . takes a backseat" [*First Link Case*, *TZENG* 18]. The law of seat of arbitration is neutral by design. Parties often choose a specific seat of arbitration because they consider that jurisdiction to have fair courts and neutral laws [*TZENG* 10]. This is precisely why CLAIMANT chose Danubia as the seat of arbitration [*R. Ex. 2*; *Proc. Ord. #2* ¶14]. Therefore, it is reasonable for RESPONDENT to have expected Danubian law, the only body of neutral law applicable to the Parties, to apply.

3. <u>The principle of *favor negotii* is irrelevant to the Parties' dispute.</u>

63. CLAIMANT argues that the Tribunal should apply Mediterranean law pursuant to the principle of *favor negotii* [*Cl. Memo.* ¶51]. *Favor negotii* is a universally accepted method to construe contracts and their terms "in a way that works in favor of what has been negotiated by the parties" [*SHEWENZER/HACHEM/KEE* ¶26.57]. To achieve this, contracts and terms "should be interpreted in a way to achieve validity" so as to "render the clause useful" [*SCHEWENZER in Schlechtriem/Schwenzer* ¶¶26.58, 26.59]. In the context of arbitration agreements, this type of interpretation is commonly referred to as the validation principle [*BORN* 498; *BERGER, Power of Arbitrators* 313; *ICC Case No. 4145*; *RUBINO-SAMMARTANO* 336]. The validation principle allows arbitrators to choose a law that gives "full effect to the arbitration agreement" by effectuating the parties' intent to arbitrate [BORN 498].

64. The validation principle is irrelevant because Danubian law does not invalidate the Arbitration Agreement. CLAIMANT argues that Danubian law's narrow interpretation of arbitration clauses invalidates the Parties' intent to arbitrate [*Cl. Memo.* ¶54]. However, Danubian law does not foreclose the possibility of contractual adaptation. Rather, Danubian law simply requires "express authorization" [*Ans. Ntc. Arb.* ¶13]. The Parties can still arbitrate over whether such authorization exists under the Contract. The fact that no express authorization exists does not mean that the Arbitration Agreement is invalid. It simply means that the Tribunal should effectuate the Parties' intent to not adapt the Contract.

65. Finally, Danubian law does not foreclose the application of the CISG to the Contract. Therefore, the dispute over whether the CISG allows for adaptation is still within the Tribunal's jurisdiction—further showing that Danubian law does not preclude the Parties' underlying dispute.

B. Under the Arbitration Agreement, the Tribunal Does Not Have the Power to Adapt the Contract.

66. Contrary to CLAIMANT's assertion, the Tribunal lacks the legal authority to adapt the Contract. Under the Danubian four corners rule, the phrase "dispute arising out of" does not extend to this claim for adaptation [1]. Further, even applying the broad interpretive standard of Mediterranean law, the Tribunal does not have jurisdiction over CLAIMANT's request for contractual adaptation [2]. Finally, the widely accepted presumption against *ex aequo et bono* decision-making prevents the Tribunal from adapting the contract [3].

1. Under Danubian law, the Tribunal does not have the power to adapt the Contract.

67. Danubian law prohibits adaptation of this Contract. Although Danubian international contract law is essentially an adoption of the UNIDROIT Principles, it contains a few important exceptions [*Proc. Ord. #2* ¶45]. One exception is that adaptation is a remedy only where expressly authorized [*Id.*]. There is no such authorization in this Contract [*Cl. Ex. C5*].

68. Another key exception to the UNIDROIT Principles is Danubia's four corners rule. This rule excludes consideration of all "external evidence," like drafting history and negotiations, in interpreting an arbitration agreement [*Ans. Ntc. Arb.* ¶16; *Proc. Ord. #1* II]. Here, the text of the Arbitration Agreement does not contain any express verbiage about adaptation, such as an adaptation or renegotiation clause [*Cl. Ex. C5*]. The text of the hardship clause cannot be considered because the hardship clause is not within the four corners of the Arbitration Agreement [*i*]. While the Agreement states that "dispute[s] arising out of" the Contract are arbitrable, the meaning of that phrase does not extend to the Parties' current conflict over adaptation [*ii*].

i. The Tribunal cannot look to the hardship clause when interpreting the Agreement.

69. A hardship clause in the substantive contract is not connected to the arbitration agreement for legal purposes due to the doctrine of separability [*See supra* ¶¶47–50].

70. Given that the Parties' hardship clause is part of the substantive Contract and not part of the Arbitration Agreement, it is considered separate from the Arbitration Agreement. Therefore, it does not lie within the four corners of the Parties' Arbitration Agreement and, under Danubian law, is external evidence and not factored into the determination of the Tribunal's power to adapt the Contract [*Ans. Ntc. Arb.* ¶16].

ii. CLAIMANT's demand for contractual adaptation is not a "dispute" to which the Arbitration Agreement applies.

71. The phrase "dispute arising out of" in the Arbitration Agreement does not include a claim for contractual adaptation. The term "dispute" in international arbitration is a narrower, sub-category of "conflict" and is more than just a difference of opinion between parties [*BERGER* 1374; *BROWN/MARRIOT* 1-007].

72. During negotiations about the UNCITRAL Model Law, a definition of "dispute" was suggested that would have allowed a mere difference of opinion to suffice as an arbitrable issue. However, the UNCITRAL Working Group denied this suggestion as it was too broad [*BERGER* 1374 *citing UN Commission*, *P II.1-3 Art. 2*].

73. The Model Law requires the existence of a "dispute" in order to initiate arbitration [*BERGER* 1371–72]. In situations in which a party is asking a tribunal to adjust the contractual terms, it is doubtful that an arbitrable "dispute" exists [*BERGER* 1372]. "Because the possible negotiation outcome is so open, a difference of opinion between the parties as to the way to adjust the contract is not suited to classical arbitral adjudication…." [*BERGER* 1372–73]. A legal, arbitrable dispute usually does not involve the tribunal making a "creative legal decision," rather, it involves the tribunal deciding on the "rights and obligations of the parties" pursuant to their contract [*Id.*].

74. Given that the word "dispute" does not extend to all situations where there may be a disagreement, it does not include CLAIMANT's demand for increased remuneration. Rather, this demand is a mere "difference of opinion" between the Parties. Therefore, the Arbitration Agreement does not authorize the Tribunal to adapt the Contract in this case.

75. CLAIMANT incorrectly asserts that its demand for adaptation is a legal dispute when in fact, it is a non-arbitrable difference of opinion. CLAIMANT proffers three, unpersuasive arguments in which it seeks to demonstrate this.

76. First, CLAIMANT alleges that the term "dispute" as used in the Arbitration Agreement includes claims for contractual adaptation. It believes that such an interpretation aligns with the "creative character" of arbitration and the supposed tendency of tribunals to liberally construe arbitration agreements [*Cl. Memo.* ¶58 *citing* BERGER, *Applicable Law* 313]. However, CLAIMANT fails to note that Berger was narrowly discussing tribunals' broad power to decide which law to apply to an arbitration agreement specifically in order to maintain the validity of the contract [*BERGER*, *Applicable Law* 310–13]. That is, a tribunal cannot decide that a law applies to the arbitration agreement if that law would render the agreement invalid; rather, a tribunal has the broad authority to choose a law that maintains the validity of the agreement [*BERGER*, *Applicable Law 313*]. Thus, Berger is only referring to issues of contractual validation, which are an entirely different matter than adaptation.
77. CLAIMANT cites *J. Ryan Case* in an attempt to show that an arbitrable dispute exists. However, that case was about the enforceability and validity of a contract. The *J. Ryan Case* does not parallel the Parties' present situation and is therefore inapplicable to the case at hand. The claim in the *J. Ryan Case* was about conspiracy, coercion, and the forced breaking of a contract, and therefore was a "dispute" subject to the authority of the tribunal. The "dispute" involved enforceability/non-termination of a contract, whereas the Parties' present conflict is about adaptation of their Contract. Unlike the *J. Ryan Case*, the enforceability or validity of the Parties' Contract is not at issue.
78. Second, CLAIMANT argues that, in cases of ambiguity, "doubts about the intended scope of an agreement to arbitration are to be resolved in favor of arbitration," and cites the *Kaplan Case* from the U.S. Court of Appeals [*Cl. Memo.* ¶58]. However, the U.S. Supreme Court subsequently overruled the Court of Appeals on this point and held that the dispute was actually *not* within the scope of the arbitrators [*Kaplan Case II*]. The Court of Appeals holding in the *Kaplan Case* is therefore immaterial to this Tribunal's analysis.
79. Third, contrary to CLAIMANT's allegation, RESPONDENT does not allege that there is *always* a difference between an arbitral tribunal's "jurisdiction to order a relief based on an interpretation of the contract and the power to revise and adapt a contract" [*Cl. Memo.* ¶59]. Rather, RESPONDENT acknowledges that there are situations in which a tribunal can adapt a contract. For instance, when a contract actually contains a renegotiation clause [*REDFERN/HUNTER* 9.66, 9.71]. But the Parties' conflict presents no such situation here.
80. Thus, CLAIMANT's arguments are insufficient to demonstrate that contractual adaptation in response to Equatoriana's retaliatory tariff is a "dispute" within the meaning of the Arbitration Agreement's text. Accordingly, the Tribunal lacks the authority to adapt the Contract.

2. Even under Mediterranean law, the Tribunal still cannot adapt the Contract.

81. Even if the Tribunal applied Mediterranean law to the Arbitration Agreement, it nonetheless lacks the power to adapt the Contract. Under Mediterranean law, the Tribunal would evaluate both the text, as discussed above, and external evidence [*See Proc. Ord. #1* §III ¶4 (incorporating the interpretive rules of the CISG)]. External evidence can include the Parties' respective intent, drafting history, and preceding communications [*Art. 8(3) CISG*]. Even factoring in this external evidence, the Tribunal still does not have the authority to adapt the Contract.

82. CLAIMANT avers that Mediterranean law requires consideration of the Parties' intentions to define the scope of what is arbitrable. However, there is no evidence that the Parties' intended "one-stop" adjudication for all disputes. CLAIMANT, once again, fabricates a presumption, stating that the Parties' intended "one-stop" adjudication to resolve all conflicts [*Cl. Memo.* ¶¶62–66]. CLAIMANT also misconstrues the significance of the Parties' prior negotiations and attempts to say the negotiations suggest an all-encompassing jurisdiction of the Tribunal [*Id.*]. While CLAIMANT is correct that "one-stop" adjudication may enhance procedural efficiency [*Id.* at ¶61], CLAIMANT fails to acknowledge that efficiency alone cannot justify supplanting the Parties' actual agreement [*HODGES* 191].

83. CLAIMANT posits that construction of an arbitration agreement starts with the presumption that the Parties intended for all disputes to be decided by the same tribunal [*Cl. Memo.* ¶¶62–66]. CLAIMANT relies on the *Premium Nafta Case* to say that there is a presumption favoring "one stop" adjudication and that any agreement to exclude certain disputes "should be expressed in clear language" [*Cl. Memo.* ¶64]. The *Premium Nafta Case*, however, was about contractual validity *not* contractual adaptation [*Premium Nafta Case* ¶¶17, 35]. The legal question at the core of the *Premium Nafta Case* was whether a contract, potentially procured through bribery, was invalid [*Id.* at ¶4]. The court found that a rational businessperson would not intend for one tribunal to decide question of validity and for another to decide questions of performance [*Id.* ¶7]. Therefore, the *Premium Nafta Case*, at most, stands for the proposition that a presumption in favor of "one-stop" adjudication may exist in the context of a dispute over contract validity [*Id.* ¶27].

84. The presumption of a "one-stop" adjudicatory process proffered in the *Premium Nafta Case* has a narrow application and is not persuasive support for CLAIMANT's adaptation demand. The Parties' Contract was validly entered and concluded. Contractual adaptation, not validity, is the current issue, so the presumption from the *Premium Nafta Case* does not apply.

85. Furthermore, it was not RESPONDENT's intent for all claims to be subject to arbitration. Mr. Krone, RESPONDENT's final Contract negotiator, stated that he "would have objected to transfer powers to

the Arbitral Tribunal to increase the price upon its discretion" had he known that was CLAIMANT's intent [*R. Ex. R3*]. Therefore, it is plain that RESPONDENT was unaware of CLAIMANT's now conveniently asserted desire for "one-stop" arbitration.

86. CLAIMANT also argues that the negotiations surrounding the Arbitration Agreement suggest the Parties intended for the all-encompassing, "one-stop" jurisdiction of the Tribunal. To prove this assertion, CLAIMANT emphasizes that the Parties could not agree on either of their domestic courts as locales for adjudication over potential contractual disputes, so "[CLAIMANT] suggested arbitration in a neutral country" [*Cl. Memo.* ¶*65*]. There are two flaws in CLAIMANT's logic. First, if CLAIMANT suggested arbitration in a neutral country, then surely Mediterranean law would not apply. Rather, Danubian law would govern the Contract and party intent would thus be immaterial. Second, merely because the Parties could not agree on a domestic court does not *ipso facto* mean that *all* disputes and claims are governed by the Arbitration Agreement–particularly where said claims plainly fall outside of the scope of the Parties' written Agreement. Such an argument is an unreasonable extrapolation.
87. Finally, CLAIMANT erroneously states that RESPONDENT's position on contractual adaptation limits the Tribunal's jurisdiction solely to questions that can be resolved with "yes or no" answers [*Cl. Memo.* ¶58]. However, RESPONDENT's objection to jurisdiction is not about "yes or no" answers; rather, it is about the Tribunal's underlying jurisdiction to adapt the Contract. Further, CLAIMANT raises the spectre of resorting to domestic courts to obtain a remedy, but neither domestic courts nor a tribunal can provide CLAIMANT with a remedy that does not exist. Certainly the Tribunal can answer questions beyond a mere "yes or no" answer, however, it cannot answer questions over which it lacks jurisdiction.

3. <u>The presumption against *ex aqeuo et bono* decision-making cautions against arbitral adaptation of the Contract.</u>

88. As demonstrated above, under either Danubian or Mediterranean law the Tribunal does not have the authority to adapt the Contract. This contention is further supported by the presumption against *ex aqueo et bono* decision-making—a bedrock presumption in international arbitration. An arbitrator who reasons *ex aequo et bono* is "deciding according to that which is 'fair' and 'good,'" and thereby acting "outside of the law" [*TRAKMAN* 622]. Therefore, international law disputes may only be resolved *ex aequo et bono* in extraordinary circumstances, and "[a]ny resort to *ex aequo et bono* occurs only if the parties expressly choose it" [*Id.* at 624, 666]. Additionally, Article 36.2 of the 2018 HKIAC Rules states, "the arbitral tribunal shall decide . . . ex aequo et bono only if the parties have expressly agreed that the arbitral tribunal should do so." [*2018 HKIAC Rules Art. 36.2*].

89. When a tribunal adapts a contract without party acquiescence it is making an *ex aequo et bono* decision [*REDFERN/HUNTER 9.72*]. By adapting a contract originally negotiated and established by the parties, an arbitral tribunal is necessarily imposing its own views on the parties' contractual obligations [*Himpurna Case* 61–62]. Given that the HKIAC endorses a consent requirement before allowing *ex aequo et bono* decisions, the Tribunal should avoid engaging in such decision-making. Should the Tribunal attempt to adapt the Contract for the increased remuneration, the Tribunal would be violating this foundational presumption in international arbitration and the 2018 HKIAC rules.

90. Therefore, because neither Danubian nor Mediterranean law allow for adaptation and the underlying principles of international commercial arbitration counsel against such adaptation, the Tribunal should find that it lacks the jurisdiction to decide this dispute.

III. CLAUSE 12 DOES NOT CONTEMPLATE THE EQUATORIANIAN TARIFF, NOR DOES IT ALLOW FOR CLAIMANT'S REQUESTED RELIEF.

91. CLAIMANT dramatically overstates the scope of events covered and remedies offered by Clause 12 of the Contract. The language of the Contract and the circumstances surrounding its formation demonstrate that the Parties did not intend Clause 12 to cover the Equatorianian tariff nor allow for price adaptation. When Equatoriana temporarily lifted its artificial-insemination ban, RESPONDENT sought to import a large quantity of frozen horse semen from the best racehorses in the world to jump start its racehorse breeding program [*Cl. Ex. C1*]. RESPONDENT contacted CLAIMANT to see if CLAIMANT would be amenable to shipping high-caliber frozen semen on a tight time-table. Although CLAIMANT was initially hesitant, the Parties eventually agreed on mutually acceptable terms which leveraged CLAIMANT's shipping expertise [*Id.*; *Cl. Ex. C2*; *Cl. Ex. C5*]. Contrary to CLAIMANT's argument, the Parties explicitly allocated all shipping risks directly in the Contract, through the inclusion of a DDP clause, and the Parties intended the Contract to determine all of their potential liabilities. RESPONDENT, therefore, respectfully requests the Tribunal dismiss CLAIMANT's claim for additional remuneration. Contrary to CLAIMANT's assertions, the tariff does not trigger Clause 12 [**A**], and Clause 12 does not authorize price adaptation [**B**].

A. The Equatorianian Tariff Does Not Trigger Clause 12.

92. Claimant incorrectly asserts that the tariff triggers Clause 12 [*Cl. Memo.* ¶130]. In reaching this conclusion, Claimant fails to adequately consider all the circumstances surrounding Contract formation. A thorough examination reveals that the text of Clause 12, the Contract as a whole, the Parties' negotiations, and the surrounding circumstances all show that the Parties intended to allocate

the risk of import restrictions to CLAIMANT. Accordingly, the tariff is not a "comparable unforeseen event" [1] and, even if it were a qualifying event, it did not make performance sufficiently more onerous [2].

1. The tariff is not a "comparable unforeseen event."

93. CLAIMANT wrongly asserts the present tariff is "comparable" to the "health and safety requirements" referred to in Clause 12. It reaches this conclusion by reasoning that both are sovereign measures specific to animal and agricultural goods [*Cl. Memo.* ¶135]. However, CLAIMANT's reasoning fails to interpret the text of Clause 12 in light of the circumstances surrounding its adoption [*See Art. 8(3) CISG*; *SCHMIDT-KESSEL in Schlechtriem/Schwenzer Art. 8* ¶*33*]. Further, CLAIMANT'S assertion fails to consider the Contract as a whole [*STANIVUKOVIC* ¶5(j)]. Contrary to CLAIMANT's contentions, CLAIMANT knew, or could not have been unaware, that RESPONDENT did not intend for tariffs to be covered as "comparable unforeseen event[s]" [*i*]. Further, a reasonable person in CLAIMANT's position would have understood the "comparable unforeseen event" language does not extend to tariffs [*ii*].

i. CLAIMANT knew or could not have been unaware that RESPONDENT did not intend for tariffs to be covered.

94. Under Art. 8(1) CISG, CLAIMANT knew, or could not have been unaware, that RESPONDENT intended to cabin the scope of Clause 12 by expressly excluding tariffs. This awareness is evident from the Parties' negotiations. During preliminary negotiations, CLAIMANT, by its 31 March 2017 e-mail, suggested allocating traditional delivery DDP risks, specifically "changes in customs regulation or import restrictions" to RESPONDENT [*Cl. Ex. C4*]. CLAIMANT then elaborated it was reluctant to assume these risks due to its past experience with expensive tests required by unforeseen health and safety regulations [*Id.*]. CLAIMANT insisted that, "[a]t a minimum, a hardship clause should be included into the contract to address such subsequent changes" [*Id.*].

95. However, CLAIMANT's first suggestion was unacceptable to RESPONDENT as the Parties had already agreed to an increased price to compensate CLAIMANT for the risks associated with delivery DDP [*Cl. Ex. C4*]. RESPONDENT was "not willing to pay a much higher price for receiving basically nothing" [*Ans. Ntc. Arb.* ¶4]. In recognition of RESPONDENT'S express refusal to assume greater shipping risks after having already agreed to CLAIMANT's requested price increase, CLAIMANT proposed to incorporate the ICC-Hardship Clause into the Contract [*R. Ex. R2*]. However, both Parties later agreed this clause was broader than necessary to achieve the Contract's purpose [*Proc. Ord. #2* ¶12].

Instead, referencing the health and safety risks mentioned by CLAIMANT in its 31 March 2017 e-mail, RESPONDENT suggested the hardship wording ultimately incorporated into Clause 12 [*Id.*].

96. Therefore, rather than the broad protections now asserted by CLAIMANT, Clause 12 explicitly protects CLAIMANT from hardship only when it is caused by "additional health and safety requirements" and explicitly *not* import restrictions [*Cl. Ex. C5*]. The Parties pulled this "additional health and safety" language directly from CLAIMANT's 31 March 2017 e-mail [*Cl. Ex. C4*]. By referencing only select language from CLAIMANT's 31 March 2017 e-mail, RESPONDENT demonstrated its intent to omit the import restriction risks also mentioned by CLAIMANT. Further, CLAIMANT knew or could not have been unaware of this intent. Claimant's awareness of this intent is particularly evident as CLAIMANT originally proposed a course of action meant to account for RESPONDENT's refusal to assume risks from import restrictions by suggesting reliance on the ICC-Hardship Clause.

ii. A reasonable person in CLAIMANT's position would not consider a tariff to be a "comparable unforeseen event."

97. Even if the Tribunal cannot discern the Parties' subjective intent, a reasonable person in CLAIMANT's position would understand the present tariff is not a "comparable unforeseen event." To ascertain what a reasonable person in CLAIMANT's position would understand, due consideration must be given to all relevant circumstances [*Art. 8(3) CISG*]. Here, the text of Clause 12 [a] the Contract as a whole [b], and the Parties' negotiations [c] all indicate that a reasonable person in CLAIMANT's position would have understood the tariff not to be a "comparable unforeseen event."

a. A reasonable person would not understand the text of Clause 12 as equating tariffs with events comparable to health and safety requirements.

98. To determine reasonable intent under Art. 8(2) CISG, the Tribunal should look to the Contract itself as "the primary source of interpretation" [*Chemical Products Case*]. The Contract protects CLAIMANT from "hardship[] caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Cl. Ex. C5*]. CLAIMANT boldly asserts the term "comparable" is broad enough to encompass the Equatorianian tariff. However, when reading the term in context, "comparable" is modified by "health and safety requirements" [*Id.*]. Accordingly, the term "comparable" is meant to account for evolving requirements unique to shipping horse semen. Strict, but ambiguous, standards for the cryopreservation process, semen thawing, and other quality control measures that are ever-present in international horse semen shipping [*LOOMIS* 300].

Considering that these concerns, and not tariffs, are the underlying threat to those in the Parties' position, the "comparable" language was crafted to account for these risks.

b. When reading the Contract as a whole, a reasonable person would understand Clause 12 does not encompass the Equatorianian tariff.

99. CLAIMANT's argument requires the Tribunal to read Clause 12 in a vacuum. Such an approach is inconsistent with Art 8 CISG [*STANIVUKOVIC* ¶5(j)]. In fact, when one takes the correct approach and reads the Contract as a whole, it becomes clear that CLAIMANT'S interpretation fails to account for the inclusion of Delivery DPP within the Parties' Contract. Delivery DDP allocates all import costs to the buyer [*INCOTERMS Rules 2010*]. Accordingly, Clause 12, and its "comparable" language cannot encompass tariffs, as the costs from those risks are already explicitly allocated to CLAIMANT elsewhere in the Parties' Contract.

100. CLAIMANT contends that "the agreement on DDP delivery was included primarily to ensure transportation on commercially more favorable terms as well as swifter delivery, and not to burden CLAIMANT with all risks associated with DDP" [*Cl. Memo.* ¶147]. However, if this were true, then the Parties would have used a different shipping term. Unlike all the other INCOTERMS, delivery DDP specifically places the burden of clearing goods for export and import upon the seller [*GABRIEL* 71], and the seller bears the risk of both export and import restrictions [*RAMBERG*, *INCOTERMS* 172]. Conversely, delivery DAP, while allowing parties to capitalize on a seller's shipping expertise, allocates all import risks onto the buyer once the goods reach the country of destination [*INCOTERMS Rules 2010*]. Had the Parties intended for RESPONDENT to bear the risks of import restrictions, there was another term available. Instead, the Parties enshrined their actual intent with delivery DDP [*Cl. Ex. C5*].

101. This view is supported by the *St. Paul Guardian case*. There, the Federal District Court of the Southern District of New York, applying the CISG, held the INCOTERMS should be applied even though the contract did not contain an explicit reference to INCOTERMS. The Court held that the parties' choice to include the term "CIF," a term unique to INCOTERMS, within their contract plainly meant that they had intended to refer to the INCOTERMS definition.

102. Additionally, CLAIMANT already received its requested consideration for agreeing to delivery DDP. During negotiations, CLAIMANT agreed to delivery DDP term in exchange for a price increase [*Cl. Ex. C4*]. CLAIMANT cannot now claim that Clause 12 inherently includes implicit consideration for agreeing to delivery DDP when it already received a price increase of $1000 USD per dose [*Id.*].

103. The Parties' inclusion of delivery DDP in the Contract is unambiguous evidence of their intent to allocate import restriction risks to CLAIMANT. Accordingly, and contrary to CLAIMANT's contention, Clause 12 cannot have been crafted to cover tariffs. Further, CLAIMANT's argument requires an assumption that no other shipping terms could have encapsulated the Parties' intentions. However, this assumption ignores the litany of other INCOTERMS options like delivery DAP. Therefore, when interpreting the Contract as a whole, a reasonable person would not understand Clause 12 to protect CLAIMANT from import restriction risks.

c. The tariff was not "unforeseeable" because CLAIMANT knew of the possibility of additional import restrictions.

104. CLAIMANT knew that import restrictions were a possibility, but failed to clarify whether Clause 12 covered them before signing. Accordingly, the tariff was not "unforeseen" and therefore cannot be encompassed by Clause 12. An event is "unforeseen" if the defaulting party could not reasonably anticipate such an impediment at the contract's conclusion [*TALLON* 579]. If an event is not "unforeseeable," the defaulting party should be considered to have assumed the risk of its realization [*Id.*]. Further, "[b]ecause courts have a tendency to construe *force majeure* clauses narrowly, drafters should use very clear language when defining the events that will excuse performance" [*BUND* 410].

105. CLAIMANT specifically addressed the possibility of tariffs in preliminary negotiations [*Cl. Ex. C4*] and, thus, reasonably anticipated such an impediment. Additionally, CLAIMANT was aware of the impending breakdown in trade relations between Meditteraneo and Equatoriania [*Proc. Ord. #2* ¶26]. Therefore, CLAIMANT must have known import restrictions were a possibility, especially when the Meditteranean tariff was enacted prior to completion of the Contract [*Cl. Ex. C6*]. Despite this knowledge, CLAIMANT never demanded the "very clear language" necessary to ensure Clause 12 covered import restrictions [*See BUND* 410]. It is unreasonable to argue that "comparable unforeseen event" covers situations a party believes could come to pass. The Tribunal should not wade into this contradiction when CLAIMANT could have and, according to Scholars Tallon and Bund, should have required clear language accounting for the possibility of increased import costs.

2. Even if the Equatorianian tarrif is a qualifying event, it is not sufficiently onerous.

106. CLAIMANT fails to explain how burdensome an event must be to trigger Clause 12 [*Cl. Memo.* ¶149]. Instead, CLAIMANT asserts the 30% increase in costs is onerous without citing any portion of Parties' negotiations indicating that level of increase is sufficient. However, according to CLAIMANT's own communications, only a 40% increase or above would be sufficiently onerous to trigger Clause 12.

107. In its 31 March 2017 email, CLAIMANT requested hardship language to account for events "which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal." [*Cl. Ex. C4*]. By indicating that 40% is the level at which the commercial basis of the deal is destroyed, CLAIMANT establishes 40% as the floor of what it would consider sufficiently onerous. This is the sole communication between the Parties dealing with what constitutes "onerous," and therefore is the only evidence of the Parties' intention on this issue. As such, this communication, especially as it came from the party wishing to incorporate hardship language, is determinative of how much of a cost increase is necessary to trigger Clause 12. Therefore, because 30% is less than 40%, the tariff does not trigger Clause 12 because it is not sufficiently onerous.

108. CLAIMANT's argument implies any cost increase would trigger Clause 12. However, there is nothing in the Parties' negotiations, nor in the text of the Contract, to support such a contention. Considering the Parties' intent for their contractual language to have meaning [*STANIVUKOVIC* ¶5(j)], CLAIMANT's argument, which renders the "more onerous" language superfluous, is unreasonable.

B. Clause 12 Does Not Authorize for Adaptation.

109. Adaptation is not a remedy available under Clause 12. The Parties' negotiations show that avoidance was the only remedy available under the Contract [1]. Further, a reasonable person in the Parties' position would understand Clause 12 does not provide for price adaptation [2]. Finally, CLAIMANT chose to forego the only remedy provided by Clause 12 [3]. Thus, CLAIMANT should not now be permitted to seek compensation for the changed circumstances.

1. The Parties intended avoidance to be the sole remedy provided by Clause 12.

110. CLAIMANT incorrectly states that adaptation is the only appropriate remedy to uphold the commercial basis of the transaction [*Cl. Memo.* ¶151]. In actuality, adaptation would cost both Parties excessive time and money and frustrate the commercial purpose of the transaction. Therefore, avoidance is the only "just and fair [remedy] in consonance with commercial common sense" [*Cl. Memo.* ¶152; *BERGER*, *Power of Arbitrators*]. Moreover, the text of Clause 12 indicates avoidance is the only remedy available. Clause 12 is a *force majeure* clause with hardship wording [*Proc. Ord. #2* ¶12]. While "*force majeure* may relieve a party of the performance of a duty . . . it will not result in an adjustment of the contract terms" [*FUCCI*].

111. Respondent consistently communicated to CLAIMANT this was a time-sensitive transaction [*Cl. Ex. C1*; *Cl. Ex. C3*; *Cl. Ex. C8*; *R. Ex. R4*]. It was imperative RESPONDENT receive all shipments in time for breeding season and before the ban on artificial insemination was reinstated. While the Parties

initially discussed the inclusion of the ICC-Hardship Clause, which, if triggered, would have mandated renegotiation or adaptation, both Parties considered this clause too broad for the purpose of the Contract [*Proc. Ord. #2* ¶12]. The Parties instead "agreed on the inclusion of a narrow hardship reference into the *force majeure* clause" [*R. Ex. R3*]. This reference did not incorporate the remedy of renegotiation provided by the ICC-Hardship Clause [*Cl. Ex. C5*]. In fact, this reference did not include any alternative remedy in the case of hardship [*Id.*]. Therefore, the Parties' decision to include hardship language without adding additional recourse shows they intended avoidance to be the only remedy.

2. A reasonable person would not consider price adaptation to be an available remedy.

112. A reasonable person in either Party's position would understand Clause 12 does not permit adaptation. The exclusion of a hardship-specific remedy within the Clause supports this understanding. An effective hardship clause includes both a triggering event and a solution [*RIMKE* 227]. It is standard practice in international agreements to incorporate clear adjustment standards within a hardship clause [*FUCCI*]. Despite both Parties' extensive experience with international contracting, Clause 12 includes no such standards or enumerated effects of hardship, excepting the traditional *force majeure* remedy of non-liability. A reasonable person in the Parties' position would be aware of the importance of including specific remedial measures within a hardship clause. Therefore, in the absence of such a provision, a reasonable person would interpret the language of Clause 12 stipulating "[s]eller shall not be responsible" for unforeseen events to mean CLAIMANT was entitled to avoid the Contract in the face of *force majeure* or hardship as defined by Clause 12.
113. Because the only remedy provided by Clause 12 was exemption from performance, CLAIMANT should be denied additional remuneration. After clarifying RESPONDENT only consented to adaptation "if the contract provides for an increased price in the case of such a high additional tariff" [*R. Ex. R4*], CLAIMANT initiated the third delivery without discussing the implications of the tariff with RESPONDENT's legal department. CLAIMANT disregarded the remedy provided by Clause 12. Therefore, this is not, as CLAIMANT asserts, a situation where "one party bears the consequences of the unexpected change, while the other is permitted to act opportunistically, unjustly enriching himself by taking advantage of his partner's hardship" [*Cl. Memo.* ¶152]. Rather, this is a situation where CLAIMANT must bear the consequences of its waiver of its contractual right to avoid performance.
114. Despite CLAIMANT's waiver, in hopes of continuing a fruitful business relationship, RESPONDENT agreed to consider adapting the Contract [*Proc. Ord. #2* ¶35]. Instead of taking the opportunity to engage in meaningful renegotiations, CLAIMANT attacked RESPONDENT with baseless insinuations of

bad faith [*Ans. Ntc. Arb.* ¶11]. CLAIMANT should not now be permitted to seek additional payment through the Tribunal simply because its previous underhanded negotiation tactics failed. The Tribunal should decline to provide CLAIMANT with additional remuneration.

115. Thus, because Clause 12 does not permit the Tribunal to adjust the price of the Contract, and because Clause 12 is inapplicable to the present tariff, the Tribunal should not require RESPONDENT to pay CLAIMANT additional remuneration.

IV. CLAIMANT IS NOT ENTITLED TO RELIEF UNDER THE CISG.

116. As well as not being entitled to price adaptation under the Contract, CLAIMANT is also not entitled to price adaptation under the CISG. First, the Parties agreed to derogate from Art. 79 CISG [**A**]. Second, CLAIMANT's alleged economic hardship falls outside the scope of the CISG [**B**]. Third, the CISG does not provide for the remedy that CLAIMANT seeks [**C**]. And, finally, even if the tariff is an impediment under Art. 79 CISG, CLAIMANT has failed to demonstrate that it is entitled to relief [**D**].

A. The Parties Derogated from Art. 79 CISG.

117. Despite CLAIMANT's contention that Art. 79 CISG applies to the Contract, the Parties derogated from Art. 79 CISG by agreeing to an exhaustive list of force majeure and hardship events in Clause 12 of the Contract. Although CLAIMANT correctly states that derogation from an article of the CISG is governed by Art. 6 CISG and that derogation may be express or implied [*Cl. Memo.* ¶165], CLAIMANT fails to acknowledge that Clause 12 is exhaustive and precludes application of Art. 79 CISG.

118. CLAIMANT first argues that the Parties did not derogate from Art. 79 CISG because the Parties agreed in Clause 14 that the CISG governed the Contract [*Cl. Memo.* ¶166]. However, Art. 6 CISG expressly states that Parties may "derogate from or vary the effect of any of [the Convention's] provisions" regardless of whether the CISG governs the Contract [*Art. 6 CISG*]. Further, the Contract's other provisions demonstrate that the Parties agreed to exclude certain CISG articles. The Parties agreed to DDP shipping term in Clause 8, which replaces the default shipping terms laid out in Arts. 31 and 32 CISG [*Cl. Ex. C5*]. Yet, CLAIMANT is not now arguing that both the DDP term and the default shipping rules apply simply because the Parties referenced the CISG in Clause 14. Therefore, the Parties' acknowledgment that the CISG governs the Contract in no way implies that Clause 12 is not a derogation from Art. 79 CISG.

119. Second, CLAIMANT is incorrect that a reasonable person would find that the Parties did not impliedly exclude Art. 79 CISG by including Clause 12 [*Cl. Memo.* ¶167]. Parties that agree to an exhaustive list of force majeure events have impliedly derogated from Art. 79(1) CISG [*automatic diffractameter case*]. In

the *automatic diffractameter case*, the ICAC Tribunal found that a clause listing specific *force majeure* events prevented the seller from relying on Art. 79 CISG. The Tribunal found that the seller could rely only on the events included in the contract to claim *force majeure*. As in the *automatic diffractameter case*, the Parties intended Clause 12 to cover exhaustively the events which would relieve CLAIMANT from liability [*See supra III(A)*]. Therefore, Claimant cannot now rely on the CISG after having specifically negotiated hardship and *force majeure* protections directly in the Contract.

120. Third, all the *force majeure* events covered by Clause 12 are a subset of those typically covered by Art. 79(1) CISG [*BRUNNER* 107]. If the Parties did not intend a narrower list of exemptions, the inclusion of Clause 12 would be superfluous. Therefore, contrary to CLAIMANT's position, the Contract does in fact show an intention by the Parties to derogate from Art. 79 CISG.

121. Because the Parties specifically determined which events relieved CLAIMANT from liability directly in Clause 12, Clause 12 constitutes a derogation from Art. 79 CISG. CLAIMANT cannot now rely on Art. 79 CISG to force RESPONDENT to pay more than its contractual obligation.

B. Even if Art. 79 CISG Applies, CLAIMANT's Economic Hardship Does Not Entitle It to a Remedy.

122. If the Tribunal determines that the Parties did not intend to displace Art. 79 CISG, CLAIMANT is still not entitled to relief. Economic hardship is not an impediment under Art. 79(1) [1] and even if economic hardship could qualify as an impediment, CLAIMANT has failed to provide evidence of a sufficient economic impediment [2].

1. Economic hardship is not an impediment under Art. 79(1) CISG.

123. Despite CLAIMANT's contention that the wording of Art. 79(1) CISG is sufficiently broad to cover hardship, a textual analysis shows that Art. 79(1) CISG only provides exemption in typical *force majeure* situations [*i*]. Further, contrary to CLAIMANT's assertion that the drafting history of Art. 79(1) CISG does not support this interpretation [*Cl. Memo.* ¶173–75], the drafting history in fact provides context for why the restrictive reading of the Article is correct [*ii*]. Finally, the lack of a hardship remedy in Art. 79 CISG supports RESPONDENT's position that hardship claims are excluded from exemption under the CISG [*iii*]. Thus, CLAIMANT's alleged economic hardship does not qualify for an exemption.

i. The plain meaning of Art. 79 CISG excludes hardship as a qualifying impediment.

124. Economic hardship does not qualify as an impediment because the plain meaning of Art. 79 CISG requires actual impossibility. To be entitled to relief, a party's failure to perform must be "due to" the

claimed impediment [*Art. 79(1) CISG*]. "In other words, the impediment must have *caused* the failure to perform" [*PETSCHE* 157]. In fact, the "impediment must be the *exclusive cause* for the non-performance" [*Id.*]. However, in hardship situations, "where, by definition, performance is still possible, the non-performance is ultimately caused by a *decision* of the party concerned *not to perform*." [*Id.*]. Therefore, "[i]n hardship scenarios, a party's failure to perform is thus never *due* to the alleged impediment, but rather to a conscious *choice* not to perform." [*Id.*].

125. That Art. 79 CISG is limited to actual impossibility is supported by its requirement that a party show it "could not reasonably be expected to . . . have avoided or overcome [the impediment], or its consequences" [*Art. 79(1) CISG*]. This requirement excludes hardship because in "situations of hardship, the use of the verbs *avoid* and *overcome* is not appropriate" [*PETSCHE* 158]. When dealing with hardship "there is simply no need to avoid or overcome the event (or its consequences) because the party relying on the alleged impediment is still able to perform" [*Id.*]. As the plain text of Art. 79(1) CISG demonstrates that hardship is not a qualifying impediment, CLAIMANT cannot claim exemption.

ii. Art. 79 CISG's drafting history supports the exclusion of hardship from the CISG's possible exemptions.

126. Art. 79 CISG's drafting history supports RESPONDENT's position that hardship is not a valid impediment under the CISG. Many members of the UNCITRAL Working Group expressed concern that the use of the word "circumstances" rather than "impediment" would make the exemption too broad [*Id.* at 164]. This concern carried over to the final proposals regarding the Article [*FLAMBOURAS*]. Indeed, the debates show that the drafters "were opposed to allowing commercial or economic hardship as an excuse for non-performance and that this was the reason for adopting the requirement of an *impediment* as a precondition for relief" [*Id.*; *accord HONNOLD* 432.1]. While CLAIMANT is correct that some of the discussion centered on a proposal related to introducing a hardship rule in the context of long-term impediments [*Cl. Memo.* ¶174], even these discussions "indicate that the rejection . . . [was] based on a general hostility, or at least skepticism" towards hardship [*PETSCHE* 166].

127. Because the drafters decided to adopt the term "impediment" rather than "circumstances" and expressed "general hostility" towards even a narrow hardship exemption, the drafting history supports a narrow, restrictive interpretation of Art. 79 CISG [*Id.*; *FLECHTNER* 92–93]. Therefore, '[t]he express rejection of a hardship exception can only be construed as meaning that such an exemption is not available under the CISG" [*PETSCHE* 165]. As hardship is expressly excluded as a reason for exemption, CLAIMANT is not entitled to a remedy based on any hardship caused by the tariff.

iii. The lack of a hardship remedy in Art. 79 CISG supports the exclusion of hardship as an impediment.

128. Finally, as shown by CLAIMANT's attempts to import a UNIDROIT remedy into Art. 79 CISG [*Cl. Memo.* ¶199–202], the remedy available under the Article demonstrates that hardship cannot be an impediment. Art. 79(1) CISG provides that a party suffering the effects of a qualifying impediment is simply "not liable for a failure to perform" [*Art. 79(1) CISG*; *HONNOLD*; *FLAMBOURAS*]. Unlike the remedies for *force majeure* or impossibility, the remedies "typically available in cases of hardship significantly differ from the remedy provided for in Art. 79 CISG" [*PETSCHE* 160]. Because Art. 79 "addresses situations involving impossibility to perform . . . it is merely concerned with exempting the non-performing party from its liability" [*Id.*]. Thus, it is unlike hardship rules which aim to restore contractual equilibrium by "saving" the contract through renegotiation or adaptation. [*Id.*] These fundamental differences demonstrate that hardship is not an impediment under Art. 79 CISG [*Id.*].

129. Further, despite Claimant's desire to apply the UNIDROIT's hardship remedy, "[t]he fact that the CISG articles governing exemption do not authorize a tribunal to impose modified contract terms . . . does not create a 'gap' in the Convention" which can be supplemented by the UNIDROIT Principles [FLECHTNER 92–93; *accord RIMKE* 226]. Rather, "it merely reflects the Convention's rejection of the adaptation remedy, as reflected in the *travaux prepatoires*" [FLECHTNER 92–93; *accord RIMKE* 226].

130. As the plain meaning of the text, the drafting history, and the available remedies all demonstrate that economic hardship is not an exempting event under the CISG, the Tribunal should find that CLAIMANT is not entitled to relief under Art. 79 CISG.

2. <u>Even if economic hardship is an impediment, CLAIMANT has failed to show the 30% tariff qualifies.</u>

131. Even if the Tribunal finds that severe economic hardship may qualify as an impediment, CLAIMANT has failed to demonstrate that the tariff qualifies it for relief. Both case law [*i*] and scholars [*ii*] agree that the relevant threshold for a colorable claim of economic hardship is much higher than the 30% cost increase experienced here. As CLAIMANT has failed to demonstrate that the tariff meets the requirements of Art. 79(1) CISG, the Tribunal should find that CLAIMANT is not entitled to relief.

i. CLAIMANT has failed to provide any decision where a court or tribunal granted relief based on a 30% cost increase.

132. CLAIMANT has failed to provide any evidence of a court or tribunal granting relief in a situation similar to this one. CLAIMANT has likely failed to do so because the recorded CISG caselaw demonstrates that, because of the inherent risks in international trade, claims for economic hardship face such a high bar so as to be practically unachievable [*KUSTER/ANDERSEN* 6; *PETSCHE* 163]. Art. 7(1) CISG

directs a tribunal to consider "the need to promote uniformity" in the application of the CISG [*Art. 7(1) CISG*]. If the Tribunal intends to promote uniformity as required by Art. 7(1) CISG, "an examination of the CISG cases involving claims of hardship show that there is a functional uniformity present" [*KUSTER/ANDERSON* 6]. Indeed, "there has not been a single decision where the courts have exempted a party to a CISG contract from liability due to hardship under Article 79(1)" [*Id.* at 16]. In fact, "it is clear that the case law has spoken: Article 79 does not apply to hardship" [*Id.* at 18].

133. CLAIMANT relies on the Belgian Supreme Court's decision in the *Scafom case* as evidence that economic hardship may qualify as an impediment [*Cl. Memo.* ¶*186*]. However, the reasoning of the Belgian Supreme Court has been roundly derided [*See generally KUSTER/ANDERSEN*; *FLECHTNER*; *PETSCHE*; *DIMATTEO*]. Further, the decision in the *Scafom case* is against the great weight of caselaw holding either that hardship is not a valid excuse under the CISG or that the required level of hardship is practically unattainable [*See KUSTER/ANDERSEN* 16–18]. Finally, even if the Tribunal finds the reasoning in the *Scafom case* convincing, the relevant level of hardship at issue was a 70% increase—far greater than the 30% increase at issue here [*Scafom case*; *Ntc. Arb.* ¶18].

134. Art. 7(1) CISG directs the Tribunal to consider the need "to promote uniformity." Accordingly, the Tribunal should side with the great weight of the caselaw and find that the 30% cost increase is insufficient to qualify as an impediment.

ii. Scholars agree that a 30% price increase is insufficient for a valid hardship excuse.

135. Along with the CISG caselaw, most scholars agree that either hardship is not a valid CISG excuse or that a 30% cost increase is insufficient to meet the CISG's excuse requirements. This is because "the risk of hardship is virtually inevitable in the field of international trade, as the economic and political context is subject to continual and rapid change" [*ZACCARIA* 136]. Even scholars who believe hardship may qualify as an Art. 79(1) impediment set the relevant threshold significantly above the 30% price increase found here. For example, CLAIMANT cites Scholar Schwenzer for the proposition that "market changes qualify . . . if they cause the seller to incur unreasonably high costs in comparison to the price agreed upon in the contract" [*Cl. Memo.* ¶190]. But CLAIMANT fails to note that Scholar Schwenzer stated that in such cases a "150-200 per cent margin seems advisable" [SCHWENZER, *Force Majeure* 716-17 (setting this margin because of the inherent risks of international trade and a presumption that the parties assumed the risks)]. Therefore, while some scholars may believe that a hardship excuse is available in theory, the relevant threshold is nonetheless incredibly high [*See Id.*; *KUSTER/ANDERSEN* 4–7].

136. CLAIMANT's responsibility to pay for the tariff cannot reasonably be considered a hardship. CLAIMANT has declared hardship based upon a 25% loss [*Ntc. Arb.* ¶18]. This loss falls well below the level generally required by both courts and scholars to allow for an exemption in a domestic transaction, let alone an international transaction as exists here.

C. Price Adaptation Is Not a Remedy Under the CISG.

137. Even if CLAIMANT was entitled to an exemption under Art. 79 CISG, CLAIMANT's protection was non-liability for failure to perform the contract [*Art. 79(1) CISG*]. Claimant experienced no impediment and completed the Contract as written. As the Parties' Contract has concluded, CLAIMANT now attempts to insert a new remedy into the CISG's framework [*See Cl. Memo.* ¶¶200-02]. CLAIMANT admits that adaptation does not exist as a remedy under the CISG but argues that this is a gap in the CISG that can be filled by the UNIDROIT Principles rather than an intentional decision by the CISG's drafters to exclude adaptation as a remedy [*Id.*]. Contrary to CLAIMANT's contention, the CISG's provisions on exemption do not contain a gap regarding adaptation as a remedy.
138. CLAIMANT fails to realize that "[t]he fact that the CISG articles governing exemption do not authorize a tribunal to impose modified contract terms not agreed to by the parties does not create a 'gap' in the convention" [*FLECHTNER* 92–93]. Rather, "it merely reflects the Convention's rejection of the adaptation remedy" [*Id.* at 93]. The CISG contains an entire section on possible exemptions [*PETSCHE* 159]. As argued by Scholar Petsche, it is significant that the section is not titled "*Force majeure*," as such a heading might suggest the availability of other exemptions. Rather "it is reasonable to assume that Section IV *exhaustively* regulates the question of available exemptions" [*Id.*] Neither Art. 79 nor 80 contain any suggestion that the Articles are merely illustrative, and an interpretation to that effect "would be contrary to the basic requirement of legal certainty" [*Id.*].
139. Further, as discussed above, reading in a hardship remedy would go against the intent of the drafters. Rather than needing to read in a new remedy for a novel impediment, the "legal effect of post-contract developments that render a party's performance more difficult, including more expensive, is fully addressed in the Convention's exemption provision" [*Id.* at 92]. Failing to recognize the provision's preemptive scope could improperly contribute to a homeward trend, increasing reliance on domestic hardship doctrines and promoting disunity among courts and tribunals based on their common law or civil law backgrounds [*Id.* at 92–93]. As CLAIMANT admits that the CISG does not contain an adaptation remedy, and that the CISG exhaustively regulates remedies for exemptions, CLAIMANT is not entitled to contract adaptation.

D. Even Under a Hardship Analysis, CLAIMANT Fails to Show That It Is Entitled to Relief.

140. CLAIMANT contends that it is entitled to a price adaptation because it is entitled to an Art. 79 CISG exemption and a remedy picked from the UNIDROIT Principles [*Cl. Memo.* ¶185–218]. However, even if Art. 79 applies, CLAIMANT is not entitled to an exemption. CLAIMANT must show not only that an impediment exists but that the impediment was "beyond [its] control and that [CLAIMANT] 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" [*Art. 79(1) CISG*]. As stated earlier, dramatic changes in economic and political context of a transaction are "inevitable in the field of international trade" [*ZACCARIA* 136]. Even accepting, for the sake of argument, that a 30% cost increase could be an impediment, CLAIMANT has failed to show that the tariff was unforeseeable [1], that CLAIMANT would be unable to overcome the tariff's consequences [2], or that the tariff was outside the sphere of CLAIMANT's allocated risk [3].

1. The tariff was foreseeable.

141. First, CLAIMANT contends that the tariff and its effects were unforeseeable because "Equatoriana is a member of the WTO" and had previously been an "ardent supporter of fair trade" [*Cl. Memo.* ¶137–39]. However, even while arguing that a tariff was unforeseeable, CLAIMANT states: "[a]dmittedly, Equatoriana had imposed a retaliatory tariff against a third country once before," undercutting its own argument that Equatoriana had always been an ardent supporter of fair trade [*Cl. Memo.* ¶138]. Further Claimant should have been aware that the state of fair trade was in flux because the President of Mediterraneo had "announced a certain preference for a more protectionist approach to international trade" as early as January 2017, and, just a day prior to the signing of the Contract, the President of Mediterraneo appointed "one of the most ardent critics of free trade[] as his 'superminister' for agriculture, trade and economics" [*Cl. Ex. C5*; *Cl. Ex. C6*; *Proc. Ord. #2* ¶23]. Therefore, it is reasonable to assume that the Parties were aware at the time of contracting that a change in the free trade relationship between the Countries was foreseeable.

142. CLAIMANT's own argument belies its ability to rely on Art. 79 CISG. CLAIMANT first argues that the Parties foresaw the possibility of a tariff and expressly included such a risk in the Contract [*Cl. Memo.* ¶*148*]. However, now, CLAIMANT's argument hinges on the "unforeseeability" of the tariff. CLAIMANT fails to address this inherent tension. Instead, CLAIMANT states "[a]t the time the Parties concluded the FSSA, they could not have reasonably been expected to take the imposition of the tariff on frozen

horse semen into account" [*Id.* ¶*148*]. CLAIMANT is unable to demonstrate that it qualifies for its preferred remedy, let alone any remedy at all, under either the Contract or Art. 79 CISG.

2. CLAIMANT could reasonably be expected to overcome the tariff.

143. Second, CLAIMANT incorrectly contends that it could not have been expected to avoid or overcome the tariff or its consequences. CLAIMANT simply states that because it "could not have obtained a reduction in the tariff" it could not have avoided or overcome the tariff or its consequences [*Cl. Memo.* ¶197]. Even accepting that CLAIMANT could not "avoid" the tariff, CLAIMANT fails to provide any law or reasoning for why CLAIMANT should not be required to overcome it. When claiming exemption due to economic hardship, a party should at least show that the hardship will result in "financial ruin and possible bankruptcy" [*GIRSBERGER/ZAPOLSKIS* 131]. Further, the party should demonstrate that the alleged "financial ruin" is not due "to a lack of managerial skills or resources" [*Id.* at 131–32]. CLAIMANT has done neither.

144. CLAIMANT's financial position is due to its decision to take out a loan to finance new stables in 2013 [*Proc. Ord. #2* ¶29]: an event unrelated to the present transaction. CLAIMANT also fails to provide an explanation for why it is unreasonable for CLAIMANT to overcome the tariff, when it is only a possibility that CLAIMANT *might* have to sell off its dressage business as a result [*Id.*]. The fact that CLAIMANT has assets with which it can meet its obligations demonstrates that overcoming the tariff is not likely to result in CLAIMANT's "possible bankruptcy." RESPONDENT should not be required to bear the burden of CLAIMANT's previous poor business decisions. As CLAIMANT has failed to provide any evidence that it cannot overcome the tariff, the Tribunal should find that CLAIMANT has failed to meet the requirements of Art. 79 CISG and, therefore, is not entitled to relief.

3. The tariff falls within CLAIMANT's sphere of risk.

145. Third, for CLAIMANT's hardship claim to succeed, CLAIMANT must show that the tariff does not fall within its sphere of risk [*SCHWENZER* "*Force Majeure*" 715]. To determine the relevant sphere of risk "[t]he starting point has to be the contract itself. Primarily, it is up to the parties to define their respective spheres of risk in the contract. One party may have expressly or impliedly assumed the risk for a fundamental change of circumstances" [*Id.*] Here, the tariff falls directly within CLAIMANT's sphere of risk. The Parties agreed to delivery DDP and allocated certain risks associated with DDP away from CLAIMANT [*Cl. Ex. C5*]. However, those DDP risks not allocated differently in the Contract remain on CLAIMANT as the Parties expressly agreed to those shipping terms. Therefore, the tariff, as a cost associated with delivery DDP, falls within CLAIMANT's sphere of risk.

146. Because CLAIMANT has failed to demonstrate that the tariff was unforeseeable, that CLAIMANT could not reasonably overcome it, and that it fell outside CLAIMANT's sphere of risk, CLAIMANT is not entitled to an exemption under either the CISG or the UNIDROIT Principles and, thus, is not entitled to a price adaptation.

PRAYER FOR RELIEF

For the above reasons, RESPONDENT respectfully requests the Arbitral Tribunal, while dismissing all contrary requests and submissions by CLAIMANT,

TO ADJUDGE AND DECLARE that:

a. The evidence relating to RESPONDENT's previous arbitration is inadmissible;
b. The Tribunal does not have the authority to adapt the Contract; and
c. CLAIMANT is not entitled to a price adaptation.

And to **ORDER** CLAIMANT to:

1. Pay the costs of the arbitration, including CLAIMANT's expenses for legal representation.

Washington, United States, 21 January 2019

On behalf of Black Beauty Equestrian

Ben Moore

Kirsten Parris

Danika Duffy

Gabrielle Lindquist

Colin Patrick

Wonji Kerper