SIXTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

TULANE UNIVERSITY LAW SCHOOL

MEMORANDUM FOR CLAIMANT

On Behalf Of:
Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo

CLAIMANT

Against:
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana

RESPONDENT

Z. CARTER FIGUEROA • ELIZABETH GERSTNER • MARK HAMBLIN
NICHOLAS MITCHELL • ELIZABETH REED • BENJAMIN RUSSELL • MICHELLE SLOSS
JAMIE SPELLERBERG

TULANE UNIVERSITY LAW SCHOOL
NEW ORLEANS, LOUISIANA, UNITED STATES OF AMERICA

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&	and
Apr	April
Art./Artt.	Article/Articles
BGB	Bürgerliches Gesetzbuch
BV	Besloten vennootschap
BVBA	Besloten vennootschap met Beperkte Aansprakelijkheid
CE	CLAIMANT's Exhibit
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLAIMANT	Phar Lap Allevamento
Co.	Company
Corp.	Corporation
e.g.	*exempli gratia* (For example)

Ed.	Edition
Feb	February
HKIAC	Hong Kong International Arbitration Centre
i.e.	*id est* (That is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	Immediately preceding cited authority
Inc.	Incorporated
Jan	January
Jul	July
Jun	June
LLC	Limited liability company
LLP	Limited liability partnership
Ltd.	Limited

Mar	March
MBH	mit beschränkter Haftung
No.	Number
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PARTIES	CLAIMANT and RESPONDENT
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
R.	Record
RE	RESPONDENT's Exhibit
RESPONDENT	Black Beauty Equestrian
Sales Agreement	Frozen Semen Sales Agreement
S.A.	Société Anonyme
SAS	Société par actions simplifiée
Sec.	Section

See	Inferential step
Sep	September
S.p.A.	Società per azioni
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	United Nations International Institute for the Unification of Private Law
USD	United States Dollar(s)
v.	Against

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STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"; together the "**PARTIES**"). CLAIMANT is incorporated in Mediterraneo and is Mediterraneo's oldest and most renowned stud farm, particularly known for its breeding success regarding racehorses. RESPONDENT is famous for its broodmare lines and established its racehorse stable three years ago. RESPONDENT is incorporated in Equatoriana.

21 Mar 2017	RESPONDENT contacts CLAIMANT to inquire about the availability of Nijinksy III for its newly established breeding program. [*Notice of Arbitration*, p. 5; *CE 1*].
24 Mar 2017	CLAIMANT submits an offer to RESPONDENT for 100 doses of Nijinsky III's frozen semen. [*Notice of Arbitration*, p. 5; *CE 2*].
28 Mar 2017	RESPONDENT's Mr. Antley proposes changes in the price, delivery terms, applicable law, and the dispute resolution clause to CLAIMANT's Ms. Napravnik via email. [*CE 3*].
31 Mar 2017	Ms. Napravnik accepts changes to delivery terms, but also insists an increased price, the introduction of a hardship clause, and the possibility of arbitration. [*CE 4*].
10 Apr 2017	Mr. Antley emails Ms. Napravnik a draft of the arbitration clause. [*RE 1*].
11 Apr 2017	Ms. Napravnik modifies Mr. Antley's draft arbitration clause and suggests an ICC hardship clause. [*RE 2*].
12 Apr 2017	Ms. Napravnik and Mr. Antley are severely injured in a car accident, resulting in Mr. Antley's coma and subsequent retirement from RESPONDENT company. [*Notice of Arbitration*, p. 5]. CLAIMANT's Mr. Ferguson and RESPONDENT's Mr. Krone replace Ms. Napravnik and Mr. Antley in the negotiation process. [*RE 3*].
April 2017	Mediterraneo elects its new President. [*CE 6*].
6 May 2017	The contract between CLAIMANT and RESPONDENT is signed. [*CE 5*].
1 Nov 2017	RESPONDENT appoints Mr. Shoemaker as head of its racehorse breeding program. [*RE 4*].
23 Nov 2017	Mediterraneo's President announces twenty-five percent tariff on agricultural products from Equatoriana. [*CE 6*].
19 Dec 2017	Equatoriana's government imposes a thirty percent tariff on animal products, including frozen semen, from Mediterraneo. [*CE 6*].

20 Jan 2018	Ms. Napravnik emails Mr. Shoemaker discussing Equatoriana's new tariffs and requesting renegotiation of the contract price for the last shipment of semen, due to ship on 23 January 2018. [*CE 7*].
21 Jan 2018	Mr. Shoemaker calls Ms. Napravnik insisting on the shipment of the last doses, informs her of RESPONDENT's interest in purchasing semen from another stud, and advises her of his certainty that a solution could be found regarding renegotiating the price. [*CE 8*; *RE 4*].
23 Jan 2018	CLAIMANT delivers the last shipment of 50 doses of frozen semen. [*CE 8*].
12 Feb 2018	Ms. Napravnik meets with RESPONDENT's CEO, Ms. Espinoza, after discovering RESPONDENT's resale of Nijinksy III's frozen semen. [*CE 8*]. Ms. Espinoza ended renegotiation of the price of the final shipment. [*Id.*].
6 Jul 2018	RESPONDENT fires the employees that potentially notified CLAIMANT of RESPONDENT's other arbitration.
31 Jul 2018	CLAIMANT submits its Notice of Arbitration. [*Notice of Arbitration*, p. 1].
24 Aug 2018	RESPONDENT submits its Answer to the Notice of Arbitration. [*Answer to Notice of Arbitration*, p. 29].
2 Oct 2018	CLAIMANT notifies the Arbitral Tribunal of RESPONDENT's other arbitration in which RESPONDENT argues for adaptation of contract price that increased after Mediterraneo's twenty-five percent tariff on agricultural products from Equatoriana. [*Leisinger Letter*, p. 49].
3 Oct 2018	RESPONDENT responds to CLAIMANT's notification of the Arbitral Tribunal, objecting to the introduction of evidence from its other arbitration. [*Fasttrack Letter*, p. 50].

INTRODUCTION

2. In times of political and economic tension, private companies often feel the consequences of governmental retaliations. CLAIMANT, as the oldest and most renown stud farm in Mediterraneo, offers other equestrian companies the opportunity to breed their stock with its star racehorses. CLAIMANT was delighted to extend this opportunity to RESPONDENT and shared in RESPONDENT's hopes of creating a longstanding business relationship. Consequently, RESPONDENT's refusal to find a solution in order to maintain the business relationship between the two and RESPONDENT's

knowing violation of a provision of the contract requiring CLAIMANT's permission to resell semen shocked CLAIMANT.

3. Upon the introduction of unforeseeable, excessive, and financially detrimental tariffs by Equatoriana, CLAIMANT requested that RESPONDENT renegotiation of the contract price of the last delivery of frozen semen. As a company of humble means, CLAIMANT faces financial ruin if it is required to pay the resulting 1.25 million USD increase of the price to deliver the last installment of frozen semen doses. RESPONDENT has the financial capabilities of paying for the increased price of delivery, but instead refuses to do so while profiting from the resale of Nijinsky III's frozen semen in violation of the contract with CLAIMANT. Instead, when confronted about the resale of frozen semen, RESPONDENT ended price renegotiation for the last delivery and quashed all hopes of CLAIMANT receiving a fair price for the goods.
4. Regarding the procedural issues, this honorable Tribunal has the jurisdiction and powers to adapt the PARTIES' Sales Agreement per applicable Mediterranean law. (**Issue 1**). Additionally, CLAIMANT is entitled to submit to the Arbitral Tribunal evidence of another arbitration in which RESPONDENT is involved because its weight on this arbitration—as proof of RESPONDENT's change in position—is not overcome by any confidentiality concerns. (**Issue 2**).
5. With respect to the merits, RESPONDENT insists that the increased tariffs do not fall under Clause 12 of the contract. Both PARTIES, however, intended for the hardship clause of the contract to contemplate situations such as an unforeseen, excessive increase in tariffs and other regulations. Even if the hardship clause does not contemplate unforeseen customs duties, the CISG entitles CLAIMANT to the adaptation of the contract and payment of 1.25 million USD. (**Issue 3**).

ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL HAS BOTH THE JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

6. On 6 May 2017, after almost a month of negotiations, the PARTIES to this arbitration agreed to be bound by an Arbitration Agreement requiring them to submit to arbitration any dispute arising out of their Sales Agreement. [*CE 5*]. This agreement further provides that the seat of arbitration shall be Vindobona, Danubia. [*Id.*]. Further, the PARTIES agreed that their contract would be governed by the law of Mediterraneo, including the CISG. [*Id.*].

7. Every arbitral tribunal derives its jurisdiction and powers from the agreement of the parties. The Arbitration Agreement and its interpretation are governed by the law of Mediterraneo because the PARTIES intended as such when they explicitly chose Mediterranean law to govern the substantive contract. **(A)**. The Arbitral Tribunal has the power to adapt the contract according to the arbitration agreement, because the national contract law of Mediterraneo recognizes the power to adapt a contract in the presence of undue hardship which has undoubtedly occurred here. **(B)**.

A. The Arbitration Agreement and Its Interpretation Are Governed by the Law of Mediterraneo

8. Absent an explicit choice of law agreement to govern the Arbitration Agreement, the Arbitral Tribunal should apply the law chosen to govern the Sales Agreement. CLAIMANT submits that the PARTIES' communications and conduct demonstrate their intent for Mediterranean law to apply to the Arbitration Agreement. **(I)**. Furthermore, the prevalent Host Theory of international arbitration supports that the law governing a container contract should also govern the arbitration clause contained therein. **(II)**. Lastly, the law of Mediterraneo should apply to the arbitration clause because it is the law most closely connected to the contract. **(III)**.

I. The PARTIES Intended for the Law of Mediterraneo to Govern Their Arbitration Agreement

9. In interpreting an arbitration agreement enshrined in a sales contract subject to the CISG, an arbitral tribunal may apply the CISG principles of interpretation. [*Schlechtriem/Schwenzer*, pp. 14-24, para. 10; *Kröll*, at Art. 11, para. 13]. The sales contract between CLAIMANT and RESPONDENT is unquestionably governed by the CISG. [*CE 5*].

10. According to Article 8(1) CISG, “statements made by . . . a party are to be interpreted according to [its] intent where the other party knew or could not have been unaware what that intent was.” [*CISG Art. 8(1)*]. Therefore, the law applicable to the arbitration turns on whether RESPONDENT could not have been unaware that CLAIMANT intended for the law of Mediterraneo to apply.

11. In the case at hand, the PARTIES agreed for the sales agreement to “be governed by the law of Mediterraneo.” [*CE 5*]. Immediately following this choice of law, the PARTIES agreed to arbitrate any dispute arising out of the contract but did not explicitly choose a body of law to govern that arbitration clause. Therefore, RESPONDENT could not have been unaware that CLAIMANT intended for the law of Mediterraneo to govern both the Sales Agreement and the arbitration clause contained therein.

12. Contrary to RESPONDENT's allegation, CLAIMANT did not accept RESPONDENT's proposal that the law of the seat of arbitration, Danubia, should govern the arbitration agreement. [*Answer to the Notice of Arbitration*, p. 29].

13. CLAIMANT made clear that they have an “internal policy according to which consent to a contract submitted to foreign law or providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committee, a board in which all financing banks are included.” [*RE 2*]. CLAIMANT never acquired the special approval to consent to a contract submitted to foreign law. [*PO 2, para 14*]. Respondent was made aware of this internal policy. [*RE 2*]. Therefore, it is evident that CLAIMANT intended the arbitration agreement to be governed by Mediterranean law.

14. CLAIMANT's Creditors Committee declared, in regard to a different contract, that there was no need to seek approval for the consent to the arbitration clause as long as the seat of arbitration was a neutral country with a functional judicial system. [*PO 2, para. 14*]. While in the context of that contract Danubia was considered to be a neutral country that didn't require approval by CLAIMANT's Creditors Committee, this contract is different. [*Id*.]. In the context of the contract, CLAIMANT was agreeable to arbitration in a neutral country, but was still under the impression that they needed to seek approval to consent to foreign law. [*RE 2*]. The mere fact that CLAIMANT believed it still needed to seek approval after the Creditors Committee's declaration, and did not do so, shows that CLAIMANT was not submitting to foreign law for the arbitration agreement. [*RE* 2; *PO 2, para. 14*].

II. The Host Theory Compels the Arbitral Tribunal to Apply the Law of Mediterraneo to the Arbitration Agreement

15. By choosing Mediterranean law to govern the substantive contracts, the PARTIES also impliedly chose Mediterranean law as the law of the arbitration agreement. Absent a clear choice of law to govern the Arbitration Agreement, the Tribunal should apply the law to which the PARTIES did agree.

16. The Host Theory states that "where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract." [*Sonatrach Petroleum Corp. v. Ferrell International Ltd.*]. Here, the PARTIES chose Mediterranean law to govern the substantive contract and, under the Host Theory, the arbitration agreement as well. [*CE 5*].

17. The system of law chosen to govern the Sales Agreement governs the entire contract, and therefore also governs the arbitration agreement. [*Born,* p. 514*; Lew*]. A reference to a system of law governing a container contract shows that the parties intended for that law to also govern the arbitration clause. [*Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings*]. If contractual documents choose a choice of law to pertain to the sales agreement, an arbitrator should honor that choice and apply the chosen law to the dispute. [*Born*, p. 505]. When there is no express choice of law for the arbitration agreement, the law chosen to govern the parties' sales agreement also applies to the arbitration agreement. [*Id*.].

18. Contracts often include an express choice of law provision governing the substantive contract, but remain silent as to the choice of law governing the arbitration agreement. The choice of the seat of arbitration is not itself an implied choice by the PARTIES for the law of the host country to apply to the arbitration agreement. Although the PARTIES chose to conduct arbitration in Danubia, that alone does not displace the inference drawn from the express choice of Mediterranean law to govern the substantive contract. This choice is a "strong pointer" that the PARTIES intended Mediterranean law to apply to the Arbitration Agreement. [*Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenhari S.A.*].

III. Absent an Explicit Choice of Law, the Arbitral Tribunal Should Apply the Law of Mediterraneo as It is Most Closely Connected to the Arbitration Agreement

19. Where parties do not explicitly agree to the law applicable to their arbitration agreement, there is a three-stage test to determine the proper law: "(i) whether the parties expressly chose the law of the arbitration agreement; (ii) whether the parties made an implied choice of law for the arbitration agreement; and (iii) in the absence of express or implied choice, the system of law with which the arbitration agreement has the 'closest and most real connection.'" [*Sulamérica Cia Nacional De Seguros S.A v. Enesa Engenhari S.A.*]. While there is no express choice of law for the arbitration agreement, the PARTIES' intention is abundantly evidenced here, as they submitted the contract to the law of Mediterraneo after long discussions. [*CE 5*].

20. Absent of a choice of law by the parties, a tribunal should apply the closest connection standard in selecting the law governing the arbitration agreement. [*Born*, p. 505]. Under this standard, the law chosen to govern the parties' underlying contract is the most decisive connecting factor for the arbitration agreement. [*Id.*]. Here, Mediterranean law is the law chosen to govern the underlying contract. [*CE 5*].

21. Furthermore, the principle of contract consistency requires that the Tribunal apply the law of Mediterraneo. [*Channel Tunnel Group v. Balfour Beatty Construction*]. For the Sales Agreement to be consistent, the governing law of the substantive agreement and the arbitration clause should be the same, save exceptional cases. [*Id.*]. If Mediterranean law were to govern the substantive contract and not the Arbitration Agreement, the contract would be improperly inconsistent.

B. The Arbitral Tribunal Has the Power to Adapt the Contract According to the Arbitration Agreement

22. Because Mediterranean law governs the interpretation of the PARTIES' Arbitration Agreement, the Arbitral Tribunal has the power to adapt the contract. The PARTIES' communications and conduct show their intentions that an arbitral tribunal would have the power to adapt the contract for hardship. **(I)**. Mediterranean national law gives this Tribunal such power to adapt the contract. **(II)**. Principles of international law require that this Tribunal retain its procedural power to adapt the contract. **(III)**.

I. The PARTIES Agreed that an Arbitral Tribunal Deciding Their Disputes Would Have the Power to Adapt the Sales Agreement

23. The individuals initially in charge of drafting the contract, Mr. Antley and Ms. Napravnik, explicitly stated the need for a mechanism to ensure adaptation of the contract. [*CE 8*]. RESPONDENT's Mr. Antley had previously stated to CLAIMANT's Ms. Napravnik that the arbitrators should be tasked with adapting the contract if the PARTIES could not agree on an amendment. [*Id*.]. Due to Mr. Antley and Ms. Napravnik's replacement following the severe car accident, no express statement to that effect was either included in the adaptation clause or the Arbitration Agreement. [*Id*.]. However, it is clear that the PARTIES intended that the Arbitral Tribunal have adaptation power.

24. The Arbitral Tribunal has the power to fill gaps in the contract—including adapting the contract—even in the absence of an explicit power to do so in the arbitration agreement. [*Frick*]. "An express clause should not be necessary for the arbitrators' jurisdictional power to adapt a contract within reasonable limits." [*Frick*]. Therefore, while the PARTIES intended to, but did not, explicitly provide a mechanism for adaptation, the Arbitral Tribunal still has the power to adapt the contract. [*Id*.].

25. The arbitral tribunal derives all of its power from the agreement of the parties. [*Redfern*, p. 524]. Here, the PARTIES agreed to submit "all disputes. . ." to arbitration [*CE 5*]. "The Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, regardless of an allegedly narrow wording merely referring to 'dispute(s) arising out of this contract.'" [*Notice of Arbitration*, p. 7]. In international arbitration, the term "dispute" is understood to be interpreted broadly, "so as to include differences of opinion between the parties." [*Berger*, p. 17]. This understanding of the term "dispute" supports the power of the arbitral tribunal to adapt the contract. [*Id*.]. Consequently, the Arbitration Law of Mediterraneo provides the arbitral tribunal with the power to adapt the contract. [*Id*.].

II. The Law of Mediterraneo, as the Law Applicable to the Arbitration Agreement, Allows the Arbitral Tribunal to Adapt the Sales Agreement

26. Mediterraneo has adopted the UNIDROIT Principles verbatim as its general contract law. [*PO 1*]. Article 6.2.3 of the UNIDROIT Principles provides that hardship occurs when "the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has

diminished." [*UNIDROIT Principles 6.2.3*]. The thirty percent tariff was imposed while CLAIMANT was preparing the final shipment of fifty doses to RESPONDENT. [*CE 7*]. The imposed tariffs destroyed CLAIMANT's profit margin of five percent and caused them considerable hardship. [*CE 8*].

27. Pursuant to Article 6.2.3 of the UNIDROIT Principles, "in case of hardship, the aggrieved party must first request to enter in renegotiations with a view of adapting the contract or terminating it." [*UNIDROIT Principles 6.2.3*]. If the parties fail to reach an agreement within a reasonable amount of time, either party can go to the court in the situation finds hardship and the court can adapt the contract. [*Id.*].

28. The PARTIES began renegotiations to adapt the contract but were unable to come to an agreement. [*CE 8*]. CLAIMANT was under the impression that RESPONDENT was willing to adapt the contract to make up for the undue hardship. [*Id.*]. CLAIMANT made it clear that they never would have shipped the product, had it been made clear to them that RESPONDENT was unwilling to adapt the contract. [*Id.*]. Because of this discrepancy, it is evident that the PARTIES never came to an agreement regarding the adaptation of the contract.

29. Since the PARTIES agreed to arbitration, the principle of synchronized competences requires that arbitral tribunals should not be treated differently than state courts. [*Brunner*, p. 495]. "If state courts are empowered to fill contractual gaps under the applicable substantive law, arbitral tribunals should have the same powers." [*Id.*].

30. Mediterranean Courts agree that "a standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal the same powers as a court has under the provision." [*PO 2, para. 39*]. Therefore, since a court would have the power to adapt the contract, upon a finding of hardship under the UNIDROIT Principles, the Arbitral Tribunal should have the same powers to adapt the PARTIES' contract. [*Id.*].

III. Notions of Contractual Fairness Require that the Arbitral Tribunal Retain its Procedural Power to Adapt the Sales Agreement

31. Furthermore, if the hardship clause is considered valid in the contract between the parties under the substantive law of the contract, the procedural power of arbitral tribunals should also be generally accepted. [*Brunner*, p. 493]. "To exclude the procedural power of arbitral tribunals to adapt a contract would mean that they would only be entitled to conform to the terms of the contract as originally

agreed upon or terminate the contract." [*Id.*]. "However, the recognition of the hardship exemption is hardly compatible with such an all or nothing rule." [*Kramer*, Art. 18 CO para. 354].

32. RESPONDENT alleges that reliance on the hardship clause is not possible. [*Answer to the Notice of Arbitration*, p. 32]. However, if the Arbitral Tribunal cannot confirm the terms of the hardship clause or adapt the contract, the only other option it would maintain is to terminate the contract. [*Brunner*, p. 497]. Termination of the contract would interfere in the PARTIES' contractual relationship more than adapting the contract would. [*Kramer*, Art. 18 CO para. 354]. In addition, the right of the parties to request termination of the contract by an arbitral tribunal can be understood as a form of adapting the contract. [*Id.*]. In order to terminate an agreement, similar to adaption, both parties must agree or there must be a judgment. [*Brunner*, p. 509]. "The power to determine the date and terms of the termination also shows that termination should be understood as a particular form of contract adaptation." [*Id.*]. The very inclusion of the hardship clause shows the PARTIES' intent to arbitrate adaptation of the contract.

CONCLUSION OF ISSUE 1

33. The arbitration agreement is governed by Mediterranean law based on the PARTIES' intent and explicit choice of Mediterranean law. Therefore, the Arbitral Tribunal has the jurisdiction under the arbitration agreement to adapt the contract. Mediterraneo law allows for a broad interpretation of arbitration agreements and the UNIDROIT Principles recognize the power to adapt a contract in the presence of undue hardship, thus the Arbitral Tribunal has the power to adapt the contract here.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION PROCEEDINGS

34. RESPONDENT alleges that CLAIMANT is not entitled to adaptation of the Sales Agreement in light of the thirty percent tariff. [*Answer to Notice of Arbitration*, p. 29]. However, RESPONDENT itself recently asked for an adaptation of price due to strikingly similar unforeseen circumstances in another arbitration. [*Langweiler Letter*, p. 49]. This other arbitration is relevant to the current proceedings as it will shed light on RESPONDENT's contradictory behavior which may preclude RESPONDENT form maintaining its current position in this arbitration.

35. The Arbitral Tribunal should allow CLAIMANT to submit evidence of RESPONDENT's other arbitration because all applicable arbitration rules and international law compel admission of relevant evidence when that relevance is not outweighed by confidentiality concerns. The HKIAC 2018

Rules and other supporting international commercial arbitration rules entitle CLAIMANT to submit the evidence from RESPONDENT's other arbitration because the tribunal has broad discretion to admit evidence and is not bound by strict evidentiary rules. **(A)**. CLAIMANT is not a "party" to the other arbitration under Article 42 of the HKIAC 2013 Rules, and thus, evidence from the other arbitration can be submitted without a breach of confidentiality. **(B)**.

A. HKIAC 2018 Rules and Supporting Commercial Arbitration Rules Entitle CLAIMANT to Submit Evidence from the Other Arbitration

36. The main issue at hand is of whether or not CLAIMANT is entitled to *submit* evidence from the other arbitration proceedings; the answer is unquestionably "yes." It is clear from multiple sources of rules on international commercial arbitration that CLAIMANT must be entitled to, at the very least, submit evidence upon which it relies. [*HKIAC 2018 Rules Art. 22*; *UNCITRAL Model Law*; *IBA Rules*]. Once this evidence is submitted, the Arbitral Tribunal may decide whether that evidence shall be admitted into the proceedings. Regardless of the origin of the evidence, CLAIMANT is entitled to submit the evidence from RESPONDENT's other arbitration. Despite the unknown origin, the Arbitral Tribunal has the discretion to admit the evidence considering the nature of the evidence. **(I)**. Moreover, CLAIMANT's involvement in obtaining the evidence from the other arbitration is irrelevant because the pursuit of fairness and justice outweighs any objections to the procurement of the evidence. **(II)**.

I. CLAIMANT is Entitled to Submit Evidence from the Other Arbitration Proceeding Regardless of the Evidence's Origin

37. Article 22.2 of the HKIAC 2018 Rules states that the arbitral tribunal must determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. [*HKIAC 2018 Rules Art. 22.2*]. While most rules of evidence typically bar evidence that was obtained illegally, the HKIAC 2018 Rules provide in Article 13.5 that the arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration. [*See, e.g., Canadian Charter of Rights and Freedoms, Sec. 24; HKIAC 2018 Rules Art. 13.5*]. In the present case, the arbitral tribunal should weigh the evidence of RESPONDENT's other arbitration heavily because RESPONDENT requested the same remedy there that CLAIMANT seeks in this arbitration. The HKIAC 2018 Rules allow for the tribunal to determine the relevance and materiality

of this evidence. [*HKIAC 2018 Rules Art. 22.2*]. CLAIMANT is entitled to submit the evidence to the tribunal because it is material and relevant to this arbitration.

38. Moreover, Danubia, the seat of this arbitration, has adopted the UNCITRAL Model Law. [*PO 1*]. Article 18 of the UNCITRAL Model Law requires equal treatment and an adequate chance for a party to present its case. [*UNCITRAL Model Law Art. 18*]. Article 19(2) of the UNCITRAL Model Law provides that the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. [*UNCITRAL Model Law Art. 19(2)*].

39. In addition to the HKIAC 2018 Rules and the UNCITRAL Model Law, the IBA Rules on the Taking of Evidence serve as persuasive authority. Although the PARTIES to this arbitration have not specifically adopted the IBA Rules on the Taking of Evidence, Hunter and Redfern refer to these Rules as "almost universally recognized as the international standard for an effective, pragmatic, and relatively economical document production regime." [*Redfern*, p. 381]. Article 3(11) of the IBA Rules on the Taking of Evidence indicate that parties may submit to the arbitral tribunal and to the other parties any additional documents on which they intend to rely, or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised by the parties. [*IBA Rules on the Taking of Evidence Art. 3(11)*].

40. Case law and relevant legal scholarship further support the freedom of arbitrators to use their discretion in evidentiary matters. It has been held that "arbitrators are not bound by the rules of evidence" in relation to restrictions imposed by evidentiary rules. [*Int'l Chemical Workers Union v. Columbian Chemical Co.*]. Moreover, the UK Supreme Court similarly has held that "arbitrators have complete power over all procedural and evidential matters…[t]hey are the sole judges of the evidence, including the assessment of the probabilities and resolving issues of credibility." [*Jivraj v. Hashwani*]. Scholar Gary Born indicates that typically, international arbitration tribunals do not apply strict rules of evidence, and one of the hallmarks of arbitration is the freedom that it offers from technical disputes over admissibility of evidence and other procedural matters. [*Born*, p. 2310]. This Tribunal should err substantially on the side of permitting presentation of the facts that a party desires. [*Id.*].

41. Considering these sources of law together, there is a clear preference in international law for tribunals to admit evidence that would promote equality of the parties. RESPONDENT is involved in

another arbitration under the HKIAC 2013 Rules and is seeking the same result under similar facts as CLAIMANT seeks in this arbitration. CLAIMANT submits that the evidence of this contradictory behavior is relevant and material to the outcome of this case. [*R.* at 49]. Under both the 2013 and 2018 HKIAC Rules and supporting rules of international commercial arbitration, CLAIMANT is entitled to submit evidence that allows it to equally present its case where the evidence is particularly relevant, weighty, and material to the outcome of this case. [*HKIAC 2013 Rules*; *HKIAC 2018 Rules*; *Model Law Art. 19(2)*; *IBA Rules on the Taking of Evidence Art. 3(11)*].

42. In this case, CLAIMANT intends to present facts in order to fairly present its case to the Tribunal. The Tribunal has broad discretion and should not deviate from the hallmark of international arbitration, namely, the freedom of the Tribunal to not be bound by strict rules of evidence. [*Id.*]. Moreover, the Tribunal should, again, comply with traditional notions of international arbitration and err on the side of allowing parties to present the facts, especially when the facts of another arbitration are particularly material to the present arbitration. These considerations are consistent with the HKIAC 2018 Rules. [*HKIAC 2018 Rules Art. 22*].

43. Even if the evidence were illegally obtained, Article 22.3 of the HKIAC 2018 Rules permits the tribunal to allow or require a party to produce documents the tribunal believes to be relevant to a case and material to its outcome. [*HKIAC 2018 Rules Art. 22.3*]. This article shows that the HKIAC 2018 Rules leniently permit parties to provide evidence, regardless of their origin. [*Id.*]. In order for the present arbitration to be a full and fair hearing of both CLAIMANT and RESPONDENT's positions, the evidence of RESPONDENT's other arbitration should be admitted.

44. RESPONDENT alleges that CLAIMANT obtained the evidence from the other arbitration by illegal means. [*Fasttrack Letter*, p. 50]. While CLAIMANT disagrees, it has been noted that where international arbitration is concerned, the admittance of illegally obtained evidence is often a discretionary matter for arbitral tribunals and depends on circumstances such as who obtained it illegally. [*Waincymer*, p. 797]. This rationale is in line with the general principles delineated in Article 22 of the HKIAC 2018 Rules. [*HKIAC 2018 Rules Art. 22*]. The arbitral tribunal has broad discretion to admit and weigh evidence based on the circumstances surrounding the evidence. [*Id.*]. This Tribunal, considering the nature of the evidence of RESPONDENT's other arbitration, (namely, the contradictory conduct of the RESPONDENT), should find that it is relevant, weighty, and material to the outcome of this case—despite the alleged illegal means used to obtain such evidence.

45. The International Court of Justice has held that unlawfully gathered evidence may be *admissible*. [*Corfu Channel Case*]. Scholars interpreting the effect of the court's decision comment that certain unlawful procurements of evidence will be declared violations of international law, yet no sanction will be imposed on the gatherer, nor will the illegally obtained evidence be deemed *inadmissible*. [*Id*.]. Moreover, the Federal Supreme Court of Switzerland has held that excluding illegally obtained evidence is a recognized principle in Swiss procedural law but that there are situations that warrant an exception. [*Match-Fixing Case*]. Specifically, under Article 152(2) of the Swiss Code of Civil Procedure, arbitral tribunals and domestic courts may admit illegally obtained evidence if the interest of pursuing the truth overrides the legal interest that could be harmed by admitting the evidence. [*Id*.; *Swiss Code of Civil Procedure Art. 152(2)*].

46. In the present case, the evidence submitted by CLAIMANT is relied upon by CLAIMANT in pursuit of the truth behind whether RESPONDENT is involved in inconsistent conduct in its arbitrations, regardless of the origin of the evidence. Moreover, it is not clear how the evidence has been obtained.

47. Ultimately, it is within the discretion of the tribunal whether to *admit* the evidence, but CLAIMANT should not be barred from *submitting* the evidence from the other arbitration proceedings despite the origin of the evidence.

II. CLAIMANT is Entitled to Submit the Evidence Regardless of CLAIMANT's Involvement in Obtaining the Document

48. Whether evidence of this nature is admissible largely depends on who obtained the evidence. [*ICCA Sydney: Hot Topics*]. In this case, it is not clear who obtained the evidence. [*Langweiler Letter*, p. 50]. RESPONDENT alleges that CLAIMANT obtained the evidence illegally through a computer hack or via two terminated employees. [*Id*.]. RESPONDENT argues that the evidence should not be admitted by the Tribunal whether or not CLAIMANT had any involvement in obtaining the document or whether they have been made publicly available. [*Id*.].

49. As alleged by RESPONDENT, if there was a computer hack or if the document was released by the terminated employees to the company selling the award, it would be evident that CLAIMANT has not had a hand in initially obtaining the evidence. [*Id*.]. Thus, it would be clear that the evidence could not be considered inadmissible due to the CLAIMANT not having "clean hands." [*ICCA Sydney: Hot

Topics]. If the information, as RESPONDENT ponders, was publicly accessible online, that evidence may be admissible subject to certain considerations. [*Id.*]. Namely, whether the party against whom evidence is brought objects to the admission of the particular evidence. In this case, RESPONDENT objects [*Langweiler Letter*, p. 50]. In that situation, the tribunal may weigh the interest to find the truth against the risk of damage to the objecting party should the evidence be admitted. [*ICCA Sydney: Hot Topics*].

50. CLAIMANT submits that this Tribunal should allow CLAIMANT to submit this evidence in the pursuit of the truth, fairness, the particular weightiness of the evidence, and the materiality that the evidence has in the outcome of this case. The admission of this evidence will shed light as to whether or not RESPONDENT is dealing fairly or acting inconsistently and merely taking advantage of arbitration confidentiality principles to unfairly profit when they are advantaged in the same circumstances, and to seek redress when they are disadvantaged in the same circumstances.

B. CLAIMANT is Entitled to Submit Evidence from the Other Arbitration Proceeding Since It is Not a "Party" Under Article 42 of the HKIAC 2013 Rules and Even if It is Considered a "Party," the Evidence Sought is Subject to Confidentiality Exceptions

51. Article 42 of the HKIAC 2013 Rules does not prevent CLAIMANT from submitting evidence of RESPONDENT's other arbitration to the Arbitral Tribunal. [*HKIAC 2013 Rules Art. 42*]. Critically, CLAIMANT is not a "party" to that arbitration and therefore not subject to its confidentiality rules. **(I)**. Even if CLAIMANT were subject to such confidentiality, the evidence from the other arbitration can be submitted to the Arbitral Tribunal due to the exception in Article 42.3 of HKIAC 2013 Rules to any potential confidentiality if CLAIMANT has an interest in using the evidence to pursue a legal right. **(II)**. Moreover, even if the award was subject to confidentiality, the doctrine of issue preclusion provides for an exception to permit this evidence in the pursuit of justice. **(III)**.

I. CLAIMANT is not a "Party" to RESPONDENT's Other Arbitration and is Therefore Not bound by Its Confidentiality Rules

52. CLAIMANT learned at the annual breeder conference of RESPONDENT's involvement in another arbitration regarding Mediterraneo's twenty-five percent tariff. [*PO 2*, *para. 40*]. In that arbitration RESPONDENT argued for the adaptation of contract price because of an increase of costs resulting from the tariff. [*PO 2*, *para. 39*]. RESPONDENT is involved in another arbitration under the HKIAC

2013 Rules. [*Langweiler Letter*, p. 49; *Fasttrack Letter*, p. 50]. Thus, the other arbitration, its proceedings and award, are subject to the requirements and confidentiality provided for in the HKIAC 2013 Rules. [*HKIAC 2013 Rules Art. 1.1*].

53. Article 42.1 of the HKIAC 2013 Rules states that no *party* may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration. (Emphasis added) [*HKIAC 2013 Rules Art. 42.1*]. While it may be true that the other arbitration proceeding and its award are subject to confidentiality obligations by the parties to that proceeding (i.e. RESPONDENT and its customer), *CLAIMANT* was not a party to that arbitral proceeding. RESPONDENT argues that the award and proceedings from the other arbitration are subject to an express obligation of confidentiality [*Fasttrack Letter*, p. 50]. However, RESPONDENT misstates the applicability of HKIAC 2013 Rules Article 42 regarding confidentiality. [*Id.*; *HKIAC 2013 Rules Art. 42*].

54. CLAIMANT intends to procure a copy of the Partial Interim Award from a company that provides intelligence on the horseracing industry and submit the copy of the Partial Interim Award to the Tribunal once it has been received. [*Langweiler Letter*, p. 49; *PO 2*, *para 41*]. RESPONDENT alleges that this information could have only been obtained from either (1) two former employees of RESPONDENT, the contracts of which have been terminated on 6 July 2018, for cause and with immediate effect, or (2) a hack of RESPONDENT's computer system that occurred on 12 September 2018. [*Fasttrack Letter*, p. 50; *PO 2*, *paras. 40-41*]. If what RESPONDENT has alleged is true, then no *party* to the other arbitration has published, disclosed or communicated any information relating to the arbitration or the arbitration award.

55. Because the terminated employees are no longer a part of RESPONDENT's organization, they cannot be considered a "party" to the previous arbitration. Moreover, even if it were somehow determined that the former employees were a "party" to the other arbitration, it is still not clear who provided the information. Hackers are presumably also not a party to the arbitration. It is also clear that CLAIMANT was not a party to the other arbitration. Moreover, the company that provides intelligence on the racing industry was not a party to the arbitration either. Therefore, even assuming that RESPONDENT is correct in their allegations, the confidentiality provision in Article 42 does not apply, and CLAIMANT should be entitled to submit the award of the other arbitration once it has been received. [*HKIAC 2013 Rules Art. 42*].

56. Article 42.2 states that the provisions of Article 42.1 also apply to the arbitral tribunal, any emergency arbitrator, expert, witness, secretary of the arbitral tribunal and HKIAC. [*HKIAC 2013 Rules Artt. 42.1, 42.2*]. In this case, no one that has been allegedly involved in the procurement of the Partial Interim Award is subject to the obligations proscribed in Article 42.1 via Article 42.2. The new CEO of CLAIMANT's new customer, Mr. Kieron Velazquez, was not an expert or a witness to the arbitration; thus, his divulgence that another arbitration existed involving RESPONDENT is not in violation of Article 42 of the HKIAC 2013 Rules. [*HKIAC 2013 Rules Art. 42*]. Moreover, it is unclear whether Mr. Velazquez divulged the existence of another arbitration involving RESPONDENT in his official capacity as an employee of the Mediterranean buyer or in his capacity as CEO of CLAIMANT's customer. [*PO 2*, *para. 41*]. Thus, the argument that Mr. Velazquez was a "party" to the arbitration and that his divulgence of the existence and of the main issues in dispute cannot be a valid argument.

57. It is not clear whether the person who had provided the award to CLAIMANT was a hacker or one of the former employees of RESPONDENT. [*Id.*]. However, both employees, prior to being terminated on 6 July 2018, were witnesses in the other arbitration and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential. [*Id.*]. If it were in fact the two employees that were witnesses to the other arbitration, then they would be subject to confidentiality obligations under Article 42.2. [*HKIAC 2013 Rules Art. 42.2*]. Even so, CLAIMANT was never a party to the arbitration and therefore owes no confidentiality obligation to RESPONDENT. Further, it is still not clear who actually obtained the information and such speculative allegations by RESPONDENT should not outweigh the probative value of the evidence to *this* arbitration.

II. The Award from the Other Arbitration is Subject to the Exception in Article 42.3 and is Thus Able to be Submitted to the Tribunal

58. Article 42.3 states that the provisions in Article 42.1 do not prevent the publication, disclosure, or communication of information referred to in Article 42.1 by a party: (a) to protect or pursue a legal right or interest of the party. [*HKIAC 2013 Rules Artt. 42.1, 42.3*]. In this case, CLAIMANT's interest in submitting the evidence from the other arbitration is to protect and pursue its legal right against RESPONDENT. The arbitration award from the other arbitration is evidence that is important and vitally material to the outcome of this arbitration.

59. The disclosure of an award and its reasoning for the award is allowed as "reasonably necessary." [*Hassneh Insurance Co. of Israel v. Mew*]. Arbitration proceedings are subject to an implied duty of confidentiality, but there are exceptions to the confidentiality rule. [*Id.*]. One exception exists when it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights, regarding a third party, in order to constitute a defense, or as the foundation of a cause of action and disclosing the information, including its reasons, do not breach a duty of confidence. [*Id.*]. Therefore, even under the circumstance where CLAIMANT has been deemed to be a party in which the duty of confidentiality applies, this evidence is being submitted in order to "found a defence." [*Id.*].

60. In this case, CLAIMANT intends to produce evidence as a defense to RESPONDENT's argument that the Arbitral Tribunal may not adapt the contract price. [*PO 2*, *para. 41*]. If it is found in RESPONDENT's previous arbitration that RESPONDENT is allowed to adapt the contract price due to a change in circumstances, namely: the unexpected raise in tariffs, then CLAIMANT should be able to submit that evidence to the Arbitral Tribunal in order to defend its own claim. [*PO 2*, *para.* 39]. The defense CLAIMANT raises in this case is that RESPONDENT's inconsistency in its conduct and that conduct alone provides support to CLAIMANT's argument that they should be able to adapt the change in contract price due to the change in circumstances. Thus, the award and reasoning of the other arbitration are reasonably necessary to advance CLAIMANT's defense and the basis for its cause of action that CLAIMANT should be allowed to adapt the contract price.

61. CLAIMANT need not prove absolute necessity for disclosure of the award; the Arbitral Tribunal may take into account the totality of the circumstances surrounding the proceedings and the issues to which the evidence sought is being directed. [*Ali Shipping Corp v. Shipyard Trogir*]. In this case, even if disclosure of the other arbitration award is not absolutely necessary for CLAIMANT to raise a defense, it is reasonably necessary for CLAIMANT to pursue its legal rights. Therefore, the Arbitral Tribunal should find that the CLAIMANT entitled to submit the evidence due to the compelling similar nature and purposes of both of the arbitrations in question.

62. The disclosure of documents from a previous arbitration may be warranted in the interest of justice and the obligation of confidentiality should not stifle the ability to bring light to any wrongdoing. [*Westwood Shipping Lines Inc. v. Universal Schiffahrtsgesellschaft MBH*]. CLAIMANT does not submit that there is necessarily any "wrongdoing" in terms of criminality or unlawful conduct by RESPONDENT

but that RESPONDENT's inconsistent conduct indicates RESPONDENT is acting in bad faith by changing its position on a similar issue in a subsequent arbitration and taking advantage of CLAIMANT. Accordingly, CLAIMANT should be entitled to submit the requested evidence in order to pursue its legal rights in this arbitration.

III. The Partial Interim Award is not Subject to Confidentiality and Should be Submitted Pursuant to the Doctrine of Issue Preclusion

63. The seat of this arbitration is Danubia, a common law jurisdiction. [*PO 2*, *para. 44*]. Common law jurisdictions recognize two types of preclusion: claim preclusion and issue preclusion (collateral estoppel). [*Born*, p. 3734]. The Partial Interim Award in RESPONDENT's other arbitration is made in finality in furtherance of the process of achieving the final award and is therefore subject to the doctrine of issue preclusion. [*Aldous/Sherwin*]. Issue preclusion can be invoked by nonparties to the previous arbitration (i.e., CLAIMANT), against a party to the prior litigation (i.e., RESPONDENT). [*Born*, p. 3736; *see also Parklane Hosiery*; *Sea-Land*; *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*]. The doctrine of issue preclusion ensures that litigants are not allowed to "talk out of both sides of their mouth" in concurrent cases. A party should not be entitled to change its position on an issue of law simply because the new position is advantageous in the new arbitration. [*Id*.].

64. Disclosure of an award despite confidentiality is in the interest of justice if there is a bona fide belief that the disclosure was necessary to support a claim in a subsequent litigation. [*Teekay Tankers Ltd. v. STX Offshore & Shipbuilding*; *see also Aldous/Sherwin*]. The "abuse of process" doctrine is a form of issue preclusion that seeks out the interests of justice and fairness by precluding parties from raising, in a subsequent litigation, an issue or claim that could have been asserted in earlier litigation, but was (improperly or inequitably) not so asserted. [*Born*, p. 3736].

65. To be sure, litigants should only be allowed "one bite at the cherry." [*Danyluk v. Ainsworth Tech*]. RESPONDENT here abused the process of these arbitrations and seeks to invoke confidentiality of the award in their other arbitration to take "multiple bites of the cherry." Common law jurisdictions like Danubia give this Tribunal the authority to pursue the interests of fairness and justice by precluding RESPONDENT from unjustly seeking opposite result in this arbitration.

66. Ultimately, the law of Danubia takes into consideration the principles of fairness and transparency through the doctrine of issue preclusion. While CLAIMANT argues that the confidentiality provisions

of Article 42 of the HKIAC 2013 Rules are not applicable to the evidence intended to be procured, the doctrine of issue preclusion permits the tribunal to admit the award from the other arbitration in the interest of justice. [*HKIAC 2013 Rules Art. 42*]. CLAIMANT has a bona fide belief that the disclosure of the award from the other arbitration is necessary to support the claim in this subsequent arbitration.

CONCLUSION OF ISSUE 2

67. CLAIMANT respectfully requests that the Arbitral Tribunal allow the submission of evidence from the other arbitration that RESPONDENT is involved in since the Arbitral Tribunal has broad discretion to admit evidence and is not bound to strict evidentiary rules. Moreover, contrary to RESPONDENT's assertions, the other arbitration award is not subject to Article 42 of HKIAC 2013 Rules regarding confidentiality since no "party" to the other arbitration was involved in the procurement of the award. Even if the award were subject to confidentiality, the doctrine of issue preclusion precludes RESPONDENT from making the inequitable contradictory claim that it makes in this arbitration and thus, the Arbitral Tribunal, in the interest of justice and fairness should permit the submission of this evidence.

ISSUE 3: CLAIMANT IS ENTITLED TO RELIEF UNDER BOTH THE HARDSHIP PROVISION IN THE CONTRACT AND THE CISG

68. On 19 December 2017, Equatoriana's government imposed a thirty percent tariff on agricultural products shocking the international community. On 20 January 2018, Claimant learned that these tariffs applied to all animal products, including semen used for artificial insemination. CLAIMANT is entitled to the payment of 1.25 million USD because such relief is required in surprising circumstances such as the thirty percent tariff.

69. The tariff imposed by the Equatorianan government made the contract between the PARTIES more onerous and Clause 12 of the Sales Agreement contemplates such tariffs. **(A)**. Additionally, CLAIMANT is entitled to payment under CISG Articles 7 and 8 because the tariff constitutes an unforeseen circumstance, the Equatorianan tariff unjustly enriched RESPONDENT, and RESPONDENT's conduct resulted in CLAIMANT's belief that the price would be adapted. **(B)**.

A. CLAIMANT is Entitled to Relief Due to the Hardship Provision in the Contract

70. CLAIMANT is entitled to relief in the amount of 1.25 million USD because Clause 12 of the Sales Agreement contemplates the unforeseen increase in the cost of delivery due to customs regulation

and/or import restrictions. [*CE 5*]. The thirty percent import tariff on animal products was an unforeseen event that made the price of delivery excessively onerous for CLAIMANT. **(I)**. The DPP delivery terms did not shift the burden of paying customs duties onto CLAIMANT where the cost of delivery has increased severely and unexpectedly. **(II)**. When circumstances change to such a degree to create an imbalance in the contract and renegotiation in good faith has failed, the appropriate court or tribunal may adapt the contract. **(III)**.

I. The Tribunal May Adapt the Contract in Accordance with the Hardship Clause

71. Just as the Tribunal has the power to adapt the contract under the Arbitration Agreement, the Tribunal can adapt the contract under the hardship clause. The construction of the hardship clause, Clause 12, allows for adaptation or renegotiation in good faith as a remedy under the express circumstances. The mere inclusion of a hardship clause is naturally accompanied by a power to renegotiate or adapt the contract and is evidence of the PARTIES' intent to allow a remedy.

72. The Arbitral Tribunal has the power to adapt the price in proportion to the additional costs incurred by CLAIMANT as a result of the thirty percent tariff on agricultural products. Because the PARTIES agreed on the hardship clause, the Arbitral Tribunal should adapt the contract to compensate for hardship incurred by one party in accordance with the hardship clause. [*Droit Civil: Les obligations*; *Berger*, pp. 1351-52]. Even if the contract did not include a hardship clause, international jurisprudence dictates that good faith renegotiation is appropriate where the fundamental basis for contracting has been disturbed. [*Luna v. Granbanco S.A.*; *Klepac*]. If such renegotiation proves unsuccessful, then the courts or an appropriate tribunal may make a ruling to dissolve, maintain or adapt the contract between the PARTIES. [*Schwenzer*, *Force Majeure*; *Horn*, pp. 21-24].

73. Mediterranean law governs the substance of the Sales Agreement. [*CE 5*]. Mediterraneo adopted verbatim the UNIDROIT Principles as its contract law. [*PO 1*]. Mediterranean law allows for the courts to use prior statements and agreements between the PARTIES to interpret the contested contract. [*UNIDROIT Principles 2.1.17*]. Although the hardship clause does not explicitly state that the contract may be adapted, the logical result of the inclusion of such a clause is adaptation if there is a conflict. [*Zaccarria*]. Additionally, the prior statements made during negotiation and the agreements in other parts of the same contract support the PARTIES' assent to contractual adaptation based on Clause 12. [*CE 2, 4, 5*]. Furthermore, the question of whether CLAIMANT may be afforded a remedy at law is made simpler by the inclusion of the hardship clause which outlines circumstances

ripe for adaptation or renegotiation. [*CE 4*, *5*]. This tribunal does not have to rely on equity alone, where a decision on hardship might be more tentative, to provide a solution because the PARTIES agreed per the contract that hardship was a consideration. [*CE 4*; *Berger*, pp. 1351-52; *Horn*, pp. 21-24].

II. The Thirty Percent Tariff on Animal Products was not Reasonably Foreseeable at the Conclusion of the Contract

74. The PARTIES agreed that CLAIMANT would not be responsible for unforeseen changes. The thirty percent tariff was an unforeseen event comparable to health and safety requirements and was caused by RESPONDENT's home country. **(1)**. Clause 12 was included because of the potential for unanticipated hardship making the contract excessively onerous. **(2)**. Hardship can be remedied by contract law even absent a hardship clause. **(3)**.

1. The Thirty Percent Tariff was an Unforeseen Event Contemplated by the Contract and RESPONDENT's Home Country Caused the Thirty Percent Tariff on Animal Products into Its Country

75. Clause 12 stipulates that CLAIMANT is not responsible in the case of "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*CE 5*]. Import tariffs can be grounds for hardship when they could not be reasonably anticipated by the parties at the time of the conclusion of the contract. [*Schwenzer/Leisinger*, pp. 261-62; *Orion Metal BVBA*]. The thirty percent retaliatory tariff on animal products by RESPONDENT's home country was an unforeseen event comparable to additional health and safety requirements; the tariff was an economic event that was out of the control of the contracting PARTIES imposed by the government. [*Canned Oranges Case*]. "Comparable unforeseen events" should refer to other government actions that are not specifically health and safety requirements because health and safety requirements are already explicitly covered in Clause 12. [*CE 5*]. Although political and economic turmoil was a principal consideration in the formation of this contract, a retaliatory tariff of this degree was not foreseeable. [*Fucci*; *Scafom International BV v. Lorraine Tubes S.A.S.*].

76. The thirty percent tariff that made the contract more onerous was imposed by RESPONDENT's home country. [*CE 6*]. Although the tariff in question was retaliatory, the conflict between the PARTIES arose as a direct result of the Equatorianan tariff. [*See Schwenzer/Leisinger*, pp. 261-62]. The provoking

tariff by CLAIMANT's country did not affect the fundamental basis of the contract when it was implemented and, therefore, CLAIMANT cannot alone carry the burden of the tariff. The retaliatory tariff imposed by the Equatorianan government is the immediate cause of the conflict at issue. [*Id*.].

2. CLAIMANT Included Clause 12 with the Specific Intent to Protect Against Sudden Increases in Delivery Costs

77. Considering potential political and economic turmoil, the PARTIES included Clause 12 to disclaim liability related to increases in the cost of delivery due to such turmoil. [*CE 4*]. The non-occurrence of such a high tariff was a basic assumption of the contract and CLAIMANT would not have entered into the contract without protection from unforeseeable increases in delivery costs. [*Luna v. Granbanco S.A.*]. Delivery costs were 200 USD per dose in the normal course of business. However, due to the thirty percent tariff, delivery costs have increased by over 6,000% to 1.25 million USD. [*PO 2*, *para. 8*].

78. The PARTIES included Clause 12 with the explicit purpose of protecting CLAIMANT from governmental actions because CLAIMANT has a history with unforeseen costs due to health and safety requirements imposed by a government. [*PO 2*, *para. 21*]. As such, the hardship clause is applicable to the current conflict and should be used to assess costs of delivery due to such hardship to RESPONDENT as contemplated in the Agreement. [*Trump Majeure*]. Further, CLAIMANT on several occasions maintained its insistence on a hardship clause, which was included in the contract. [*CE 4*, *5*, *8*; *RE 2*]. CLAIMANT similarly insisted on an adaptation of the price after the unexpected tariffs imposed by Equatoriana. The PARTIES' contract expressly excluded CLAIMANT from liability should there be unforeseen events making the contract more onerous. [*CE 5*]. Therefore, because the PARTIES contractually directed liability toward the RESPONDENT if the contract were to become more onerous, RESPONDENT should bear the excess costs in the present case.

3. Even Absent a Hardship Clause, International Contract Doctrine Provides a Remedy Where Contractual Equilibrium is Disturbed

79. Unforeseen price fluctuations, political, and economic factors can greatly affect the contract's value to a party. [*Schwenzer, Force Majeure*, p. 709; *DiMatteo*, p. 293; *Puelinckx*, p. 56; *Suez Canal Cases*]. The Roman principle of *clausula rebus sic stantibus* serves as a protector of parties who face debilitating circumstances that could not have been foreseen when drafting the contract. [*Schwenzer, Force*

Majeure, p. 710; *Fucci*, p. 3]. In Roman law, *clausula rebus sic stantibus* meant that the contract contained an implied term that some circumstances must remain unchanged. [*Fucci*, p. 3; *Horn*, p. 18]. Modern commercial law in countries like Germany and France have used the Roman concept of *clausula rebus sic stantibus* to form their modern hardship doctrines. [*Živković*; *Fucci*, p. 4; *Horn*, p. 19]. Germany developed its own interpretation of the Roman principle in its doctrine of *Wegfall der Geschäftsgrundlage* [frustration of contract basis]. [*Rimke*, p. 207]. In German law, *Wegfall der Geschäftsgrundlage* provides a remedy when extreme circumstances arise in which the basic aim of the contract cannot be achieved under the abnormal economic and political circumstances that the tariff has given rise to. [*Id.*]. In this situation the contract should be adapted for hardship. [*Id.*]. Adjustment of the contract is also acceptable where an event was unforeseeable and external to the parties, exceeded reasonable expectations, and resulted in an extreme unbalancing of the contract. [*Fucci*, p. 4; *Gaz de Bordeaux Case*].

80. Here, the contractual equilibrium that was the foundation of the contract itself has been disturbed by the unforeseeable tariff on animal products into RESPONDENT's home country. The retaliatory tariff imposed by Equatoriana greatly affected the contract's value to CLAIMANT. Initially, CLAIMANT anticipated making a profit of five percent on the transaction, but the tariffs made the final contracted shipment thirty percent more expensive, eliminating all of CLAIMANt's expected profit and resulted in unforeseeable and financially debilitating loss. [*CE 7*]. Because the retaliatory tariff constitutes an unforeseeable, external act on the part of the Equatorianan government resulting in a major imbalance between the PARTIES, CLAIMANT is entitled to an adaptation of the price.

81. Although French Law has been traditionally less amenable to altering contacts based on changed circumstances, French courts have recognized and implemented the doctrine of Imprévisión, which provides a remedy for the contracting parties when unforeseen hardships disturb the basis of the contract. [*Fucci*, pp. 27-29; *Samuel*]. Furthermore, civil law countries such as Italy, the Netherlands and Brazil have codified remedies for a contract that has become excessively onerous for one party. [*Fucci*, pp. 9-10, 21-22, 26-27; *Lando*]. In the present case, the excessively onerous increase in costs have pushed the CLAIMANT to the verge of financial collapse. [*PO 2*, *para. 29*]. These circumstances are ripe for action by the Tribunal given the history of international jurisprudence in recognizing hardship or the disturbance of the foundation of the contractual equilibrium. [*Hinestrosa*; *Lando*].

III. The DDP Delivery Term Does Not Control Liability or Risk in this Extreme Case of Changed Circumstances

82. The PARTIES intended to modify the standard DDP (Delivery Duty Paid) delivery terms. CLAIMANT disclaimed liability related to additional customs duties through Clause 12. [*CE 5*]. DDP does not apply as a strictly standard term. The clauses following Clause 8, incorporating DDP into the contract is followed by modifications to those standard terms in subsequent clauses, including Clause 12.

83. The Arbitral Tribunal should interpret Clause 12 according to the intent of the PARTIES, taking into account all relevant circumstances, including negotiations and usages, into account. [*CISG Art. 8*]. The negotiation history indicates that CLAIMANT agreed to DDP delivery terms conditioned upon non-assumption of certain risks associated with DDP delivery, specifically risks related to unforeseen customs regulations or import restrictions. [*CE 4*; *Insurance Company Case*]. Furthermore, RESPONDENT insisted on DDP delivery because of CLAIMANT's expertise in the shipment and storage of the frozen horse semen, and not because RESPONDENT was concerned about bearing the burden of paying customs duties. [*CE 3*]. In fact, RESPONDENT accepted CLAIMANT's counteroffer for an increase in price to ensure DDP delivery of the frozen horse semen. [*CE 8*]. It would be inconsistent with the motive behind the inclusion of Clause 12 to hold it to be anything other than applicable to the circumstances giving rise to the present arbitration.

84. As the seller, CLAIMANT included an exculpatory clause to protect itself from liability due to political or economic turmoil. [*CE 4*; *Rapsomanikas*]. The intent of the PARTIES indicates that RESPONDENT assumed the risk of unforeseeable changes in customs regulations and import restrictions that could cause the contract to be more onerous. [*Orion Metal BVBA*]. Here, the retaliatory thirty percent tariff by RESPONDENT's home country has made the contract excessively onerous. [*Zaccarria*]. CLAIMANT does not typically contract for DDP delivery in its normal course of business and thus sought protection from unforeseen hardships arising from DDP delivery. [*PO 2*, *para. 8*; *Rapsomanikas*]. As a result, the PARTIES included Clause 12 in the contract to state explicitly that CLAIMANT is not liable under the circumstances provided. [*CMS Gas*].

85. CLAIMANT did not contractually assume the risk of an unforeseen increase in price due to an increase in customs duties (the retaliatory tariff) despite the inclusion of the Incoterm "DDP". CISG Article 9(1) states that parties are bound by any usage (DDP) common or widely known to

international trade to which they have agreed. [*CISG Art. 9(1)*]. Additionally, CISG Article 9(2) establishes that the parties are considered to have made such usage applicable to the contract unless otherwise agreed. [*CISG Art. 9(2)*; *Fiberglass Case*]. In the present case, the PARTIES validly incorporated DDP into the contract, but the PARTIES digressed from the standard terms of DDP delivery through the inclusion of Clause 12 ("the hardship clause") which created exceptions to strict conformity with standard DDP requirements. [*PO 2*, *para. 8*].

86. Further, CISG Article 6 allows for derogation or vary the effects of any of the provisions. [*CISG Art. 6*]. The inclusion of Clause 12 constitutes an Article 6 derogation from the standard terms of DDP delivery under usage common or widely known to international trade. [*Id.*]. Incoterms are included in a contract through CISG Article 6 and the principles of derogation provided for in the same are also applicable. [*Id.*; *Coetzee*, pp. 5-6]. If Clause 12 were not included in the contract, then CLAIMANT would be responsible for all duties per the DDP delivery terms; however, the risk of an extreme increase in delivery costs due to customs regulations was disclaimed in Clause 12 and resolves the CLAIMANT's liability to pay the retaliatory thirty percent tariff. [*CE 5*; *Orion Metal BVBA*].

B. CLAIMANT is Entitled to an Adaptation of the Price Under the CISG

87. The PARTIES entered into a contract hoping to secure a long-term business relationship in which CLAIMANT would deliver frozen semen from its top racehorses for RESPONDENT's newly-established breeding program. [*Notice of Arbitration*]. As a result of the retaliatory tariff, CLAIMANT requested an adaptation of the price, and it relied on RESPONDENT's apparent acquiescence to adapting the price when CLAIMANT sent the last shipment. [*CE 8*].

88. In addition to Clause 12 of the Sales Agreement, the CISG provides for relief and entitles CLAIMANT to the payment of 1.25 million USD. In the present case, CLAIMANT suffered hardship because the tariff could not have been foreseen and the resulting price increase will likely subject CLAIMANT to financial ruin. **(I)**. Because of its hardship on CLAIMANT, the unforeseen tariff resulted in RESPONDENT's unjust enrichment, contrary to the contracting principle of good faith. **(II)**. Furthermore, CLAIMANT reasonably relied on RESPONDENT's apparent acquiescence to adapt the price when completing the contract. **(III)**.

I. It was Reasonable for CLAIMANT to Believe That There Would be an Adaptation of the Price Upon Shipment Under CISG Article 8

89. CISG Article 8 states that statements made by and conduct of a party should be interpreted according to a party's intent where the other party knew or could not be unaware what the intent was. [*CISG Art. 8(1)*]. The meaning of conduct or statements made by a party should be interpreted based on the party's intent. [*Id.*; *Schlechtriem*, p. 603; *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*]. The parties' negotiations, dealings, practices and behavior are particularly persuasive for proving intent. [*CISG Art. 8(3)*; *Schlechtriem*, p. 70; *Filanto v. Chilewich*; *Memory Module Case*; *Chemical Products Case*]. If a party's intent is not readily understood, the meaning of the party's conduct and statements should be determined by what a reasonable person would believe in the situation. [*CISG Art. 8(2)*; *PECL Art. 2:102*; *Barley Case*].

90. Here, in Ms. Napravnik's discussion with Mr. Shoemaker, she relied on his promise that they would be able to work out an additional payment if she authorized the shipment to RESPONDENT. [*CE 8*]. Mr. Shoemaker claims he was not authorized to make additional payments or enter into any agreements without RESPONDENT's consent. [*RE 4*]. However, Mr. Shoemaker acknowledged that he had no legal authority to make concessions, yet led Ms. Napravnik to believe there had been a deal by assuring they would find an agreement on the price in order to expedite delivery. [*Id.*].

91. In business transactions, it does not matter whether or not a party understood the declaration of its intent – the party may still be bound by it. [*Schlechtriem*, p. 71; *BGB 133*]. "Any previous negotiations and subsequent conduct of the parties may indicate how they have actually understood their respective declarations of intent." [*Schlechtriem/Schwenzer*, p. 160; *Fruit and Vegetables Case*]. If intent cannot be ascertained, CISG Article 8 allows a presumption of intent. [*Fruit and Vegetables Case*; *CISG Art. 8*].

92. In the case at hand, Mr. Shoemaker insisted he could not make decisions on behalf of RESPONDENT. However, Ms. Napravnik relied on representations made by Mr. Shoemaker that purported to show that RESPONDENT would be open to renegotiating the contract because of the changed circumstances. Therefore, it is immaterial that Mr. Shoemaker did not intend to be bound by his statements if they caused CLAIMANT to believe RESPONDENT would consider adapting the price. If Mr. Shoemaker did not understand the consequences of his statement, it is not a defense. However, he admittedly understood the "great strategic importance" to having CLAIMANT send the

January shipment, so it is likely he did understand the effect his statement had on Ms. Napravnik. [*PO 2*, *para. 34*].

93. Mr. Shoemaker had been introduced to Ms. Napravnik as the go-to person for all inquiries of the breeding program and the Frozen Semen Sales Agreement. [*PO 2*, *para. 32*]. Mr. Shoemaker had been present at many key meetings, and it appeared that he was an integral person to the contract. Therefore, it is not unreasonable for Ms. Napravnik to rely on Mr. Shoemaker's statements that the PARTIES could adapt the price.

II. CLAIMANT Suffered a Hardship Under the UNIDROIT Principles Article 6.2.3 Because the Tariff was an Unforeseen Circumstance

94. The Arbitral Tribunal can turn to the UNIDROIT Principles because it is the contract law of Mediterraneo. [*PO 1*]. Additionally, the provisions of the CISG do not expressly define every issue in sales contracts. This omission leaves gaps for international law to define ambiguous terms. Pursuant to CISG Article 7(2), questions not settled under the Convention may be settled in conformity with the rules of private international law. [*CISG Art. 7(2)*; *Sica,* p. 2].

95. CISG Article 79 does not define what constitutes an impediment beyond a party's control that enables a party to avoid the consequences of the contract. [*CISG Art. 79*]. Clarification of this issue may be derived from the UNIDROIT Principles. The UNIDROIT Principles have been widely accepted as a gap-filler for the CISG due to their uniformity in interpretation of international law. [*Chandrasenan*, pp. 66, 77].

96. Parties to a sales contract are expected to perform unless faced with changed circumstances. [*UNIDROIT Principles 6.2.*1]. A party may request renegotiation of the contract if it has faced unforeseen hardship. [*UNIDROIT Principles 6.2.3*]. Hardship occurs when events fundamentally alter the equilibrium of a contract because of excessive costs or diminished value to a party. [*UNIDROIT Principles 6.2.2*].

97. Hardship requires that (i) the disadvantaged party discover the hardship after the contract has concluded, (ii) the events could not have been foreseen, (iii) the events were beyond the control of the disadvantaged party, and (iv) the disadvantaged party did not assume the risk. [*UNIDROIT Principles 6.2.2*; *PECL 6:111*; *Egyptian Cotton Case*; *Krell v. Henry*; *Jackson v. Union Marine Insurance Co. Ltd.*].

98. The CISG recognizes foreseeability by noting that damages awarded may not exceed the loss that the breaching party foresaw or ought to have foreseen. [*CISG Art. 74*]. Different jurisdictions have different interpretations of what a party must foresee to disqualify an award for damages. [*Saidov*, p. 112]. For example, common law jurisdictions, like England, require only the type of loss be foreseen, while civil law jurisdictions, like France, require both type of loss and extent of loss to be foreseen. [*Id*.]. The CISG does not favor one particular interpretation over the other. [*Id*.].

99. Article 6.2.3 of the UNIDROIT Principles does not require that performance be impossible or excessively difficult. [*UNIDROIT Principles 6.2.3*]. Rather, "good faith prevents [an] obligee from seeking performance under the original terms if the circumstances fundamentally differ from those in place when these terms were agreed upon." [*da Silveira,* p. 324; *Albert D. Gaor & Co v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*].

100. The party facing changed circumstances that "fundamentally disturb the contractual balance" may seek renegotiation of the contract based on CISG Article 7(2). [*CISG Art. 7(2)*; *Scafom International BV v. Lorraine Tubes S.A.S.*]. An unforeseen circumstance leading to an imbalance between the parties and rendering the contract extremely detrimental to one party will require good faith renegotiation of the contract. [*Scafom International BV v. Lorraine Tubes S.A.S.*; *CISG-AC Opinion No. 7, Art. 3.1*; *Spinning Mill Case*].

101. In the case at hand, Equatoriana's retaliatory tariffs constituted an unforeseen circumstance, which led to a contractual imbalance between the PARTIES. Peak Business News wrote an article immediately following the imposition of both tariffs, and it noted that these tariffs surprised most analysts, and that the tariffs detrimentally harmed the international trading system as a whole. [*CE 6*]. Before Equatoriana announced the tariffs on 19 December 2017, there had never been a tariff on agricultural goods or horse semen in either Equatoriana or Mediterraneo. [*PO 2*, *para. 23*]. Accordingly, CLAIMANT could not have reasonably anticipated a retaliatory tariff of this kind.

102. It is up to the parties to determine who bears the risks associated with the contract. [*Schwenzer, Force Majeure*, p. 715]. In cases where one party may be subject to financial ruin imminently, as with CLAIMANT, the hardship threshold may be lowered. [*PO 2*, *para. 29*; *Schwenzer, Force Majeure*, p. 716; *Brunner*, pp. 437-38].

103. Additionally, CLAIMANT has faced severe financial difficulty in the last two years because of extensive restructuring measures and a considerable cut in the work force. [*CE 8*]. In 2014, CLAIMANT promised its creditors it would be profitable from 2017 onwards, and the renewal of its credit lines depended on its profitability because the creditors had already lost money from a prior credit line to CLAIMANT. [*PO 2*, *para. 29*]. The PARTIES' contract would have given CLAIMANT a profit of 180,000 USD in 2017 and 300,000 in 2018. [*Id*.]. If CLAIMANT were forced to pay the 1.25 million USD, it is likely their creditors would only grant a new credit line if CLAIMANT agreed to sell its dressage department to its top competitor. [*Id*.]. CLAIMANT cannot shoulder this cost of the hardship because it is specifically contemplated by the UNIDROIT Principles. [*Schwenzer, Force Majeure*, p. 716; *Brunner*, pp. 437-38].

III. RESPONDENT was Unjustly Enriched by the Tariff Imposed by Equatoriana Under CISG Article 7

104. CISG Article 7(1) requires the observance of good faith requirement in international trade relations. [*CISG Art. 7(1)*]. CISG Article 7 leaves open the possibility that an unburdened party may invoke the good faith doctrine if they can establish their burden is unreasonable under the contract and contrary to good faith, ultimately permitting the PARTIES to renegotiate to contract and establish more equitable terms. [*Id*.; *Schlechtriem*, p. 618; *Tarquinio*, p. 9] While some scholars express skepticism regarding the applicability of the good faith doctrine to the contractual relationship directly, the UNIDROIT Principles Article 1.7 provides that each party must act in accordance with good faith and fair dealing in international trade. [*Schwenzer*, pp. 126-27; *UNIDROIT Principles 1.7*].

105. RESPONDENT planned from the beginning of negotiations to sell the frozen horse semen obtained from CLAIMANT to other buyers for a much higher price, in direct violation of CLAIMANT's "express written consent" provision. [*PO 2*, *paras. 16, 20*]. CLAIMANT received credible information from a breeder who had bought Nijinsky III semen from RESPONDENT for 120,000 USD, a higher than the contracted price paid by RESPONDENT. In reselling the semen, RESPONDENT contravened CLAIMANT's express contractual provision to the contrary, both breaching the contract negotiated by the PARTIES and acting in bad faith. [*CE 5*].

106. Similarly, RESPONDENT used its advantage over CLAIMANT by appearing to acquiesce to contract adaptations with no intention to do so. RESPONDENT urgently needed CLAIMANT to ship the frozen horse semen in January so they could resell it to other customers with delivery dates prior to 2

February. [*CE 8*; *RE* 4]. Because RESPONDENT's apparent acquiescence misled CLAIMANT into shipping the doses so that RESPONDENT could fulfill obligations contrary to the agreement, RESPONDENT's behavior should be considered contrary to good faith and an adaptation to the price should be allowed.

107. CISG Article 79(1) provides that a party is not liable due to an impediment beyond his control that could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. [*CISG Art. 79(1)*]. An impediment under CISG Article 79(1) may exist during the conclusion of the contract or it can occur subsequently. [*CISG Art. 79(1)*; *Schlechtriem*, p. 609]. The impediment must arise in an area outside the promisor's control, and "state intervention…such as the imposition of quotas, import, or export bans…or exchange control… are in general outside a party's control." [*Schlechtriem*, p. 610]. State intervention is classified as an exception when the intervention is based on political decisions unrelated to serving a particular business' interests. [*Schlechtriem*, p. 611].

108. An exemption might exist under CISG Article 79(1) when a governmental body has intervened by way of imposing exchange controls. [*CISG Art. 79(1)*; *Schlechtriem/Schwenzer*, p. 1071; *Caviar Case*]. If unforeseen government changes affect a contract and cause enrichment to one party at the expense of the other, it is within the principles of good faith and dealing to adapt the contract to reflect what both parties initially bargained for. [*Fombad*, pp. 124-25; *State Plan Case*].

109. CISG Article 9(2) requires the parties to a contract to apply international principles of contract law. [*CISG Art. 9(2)*; *Schwenzer*, pp. 127-28]. Unjust enrichment is a principle of law recognized and enforced by governments around the world such as Germany and Scotland. [*Fombad*, p. 120; *Lena Goldfields Arbitration*; *BGB, Art. 812; Fife Omnibuses Ltd*]. Because of its widespread use, unjust enrichment is considered a "general principle of law" under Article 38 of the Statute of the International Court of Justice. [*Fombad*, p. 123]. The party who receives unjust enrichment has "committed a fault" under the law, and must repay the difference in what was owed under the contract. [*Fombad*, p. 123; *Direction Generale des Ports et Voies de Communication par Eau v. A. Schwartz et Cie*]. An unjust enrichment claim generally requires: "an enrichment, an impoverishment, [or] a connection between the enrichment and the impoverishment, absence of a justification for the enrichment and the impoverishment, and absence of a remedy provide by law." [*Vohryzek-Griest*, p. 14; *Future Trading Inc.*; *Schlegel Corp.*].

110. In this case, CLAIMANT relied on RESPONDENT's apparent acquiescence to adapt the price because of the heavy burden on CLAIMANT's resources. RESPONDENT knew of CLAIMANT's perilous financial situation during the time of contracting, and RESPONDENT currently has enough capital to where if adaptation of the contract price occurred, its business would not be financially endangered. [*PO 2*, *paras. 22, 30*]. CLAIMANT had taken many losses because of a high interest loan to its creditors, and its credit line depended on CLAIMANT making a profit in this transaction. If CLAIMANT is forced to pay the tariff, its creditors may force CLAIMANT to sell part of its business to a competitor. [*PO 2*, *para. 29*]. Because RESPONDENT received unjust enrichment, it would be contrary to good faith to allow CLAIMANT's business to shutter rather than adapt the price.

CONCLUSION OF ISSUE 3

111. Because Clause 12 of the Agreement contemplates the tariffs in this case, the Arbitral Tribunal should adapt the contract price in the amount of 1.25 million USD in favor of CLAIMANT. The contract has been made more onerous, which has led CLAIMANT into a disadvantageous position under which circumstances CLAIMANT would never have entered into the contract. CLAIMANT rightfully relies on the hardship clause included in the original contract to provide a remedy for unforeseen customs regulations which have made delivery more onerous.

112. CLAIMANT is entitled to an adaptation of the price. According to the PARTIES' contract, the PARTIES included an express provision providing that RESPONDENT would be liable if the contract turned onerous. Because of the tariff, the contract became onerous, resulting in hardship for CLAIMANT. RESPONDENT suffered unjust enrichment because of the tariff, which made the contract contrary to good faith, allowing for an adaptation of the price. Additionally, the PARTIES' conduct and negotiations indicated RESPONDENT's intent to adjust the price.

PRAYER FOR RELIEF

In light of the foregoing submissions CLAIMANT respectfully requests the Arbitral Tribunal to find that:

- the Arbitral Tribunal has the jurisdiction and powers under the arbitration agreement to adapt the contract, and that Mediterrean law governs the arbitration agreement (**Issue 1**);
- CLAIMANT is entitled to submit evidence from the other arbitration proceedings (**Issue 2**);
- CLAIMANT is entitled to the payment of 1.25 million USD both under Clause 12 of the contract and under the CISG (**Issue 3**).

New Orleans, 6 December 2018

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Z. CARTER FIGUEROA

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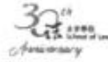

Certificate and Choice of Forum
To be attached to each Memorandum

I Elizabeth M. Reed, on behalf of the Team for (name of School)

Tulane University Law School hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Tulane University Law School

Name Elizabeth M. Reed

Signature EM Reed