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AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

MEMORANDUM FOR RESPONDENT

On Behalf of:	Against:
BLACK BEAUTY EQUESTRIAN Oceanside, Equatoriana	**PHAR LAP ALLEVAMENTO** Capital City, Mediterraneo
RESPONDENT	**CLAIMANT**

TIMOTHY CUMMINGS • MATT HAGLER • QURATULAIN MEHMOOD • ANTHONY NARDI
ALEXANDRA NOLAN • NAZANEEN PAHLEVANI • SYDNEY SHUFELT • STEPHANIE WALD

WASHINGTON, DISTRICT OF COLUMBIA, UNITED STATES OF AMERICA

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ABBREVIATIONS

&	And
¶(¶)	Paragraph(s)
%	Percent
§	Section
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Claimant	Phar Lap Allevamento
Cl. Ex. [#]	Claimant's Exhibit [Number]
Co.	Company
Comm.	Commentary
HKIAC	Hong Kong International Arbitration Centre
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
Inc.	Incorporated
No(s).	Number(s)
Not. Arb.	Claimant's Notice of Arbitration
p. [#]	Page(s)
PO [#]	Procedural Order No [#]
R.	Record
Respondent	Black Beauty Equestrian
Resp. Ex. [#]	Respondent's Exhibit Number
Ans. Not. Arb.	Respondent's Answer to Claimant's Notice of Arbitration
Resp. Not. Challenge Arb.	Respondent's Notice of Challenge of Arbitrator
U.S.	United States
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
v.	Versus
Vol.	Volume

TABLE OF AUTHORITIES

Brunner	Christoph Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration* (2009). Cited in: ¶¶ 54, 55, 65, 68
Bout	Patrick X. Bout. "Trade Usages: Article 9 of the CISG." 1998. Cited in: ¶ 79
Boykin & Havalic	James H. Boykin & Malik Havalic, *Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration* (2015). Cited in: ¶¶ 38, 40, 41
Bühring-Uhle	Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (1996). Cited in: ¶ 47
C v. D	C v. D [2007] EWCA Civ 1282 (05 December 2007). Cited in: ¶ 15

CISG	United Nations Convention on Contracts for the International Sale of Goods Cited in: ¶¶ 4, 18, 55, 63, 69, 75, 76, 77, 79, 80, 81
CMS Gas	CMS Gas v. Argentine Republic. International Centre for Settlement of Investment Disputes. Case No. ARB/01/8. 2005. Cited in: ¶ 83
Commerica Bank	*Commerica Bank v. Whitehall Specialties, Inc.,* U.S. District Court, Central District California, Eastern Division, dated 28 October 2004 Cited in: ¶ 71
Devaud	Pascal Devaud, *The Arbitration Agreement Signed by the Representative Without Powers* (2005). Cited in: ¶ 61
FirstLink	FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others [2014] SGHCR 12. Cited in: ¶ 15

Fouchard Gaillard Goldman	*Fouchard Gaillard Goldman on International Commercial Arbitration* 1st Edition. Cited in: ¶ 8
Girsberger/Zapolskis	Daniel Girsberger & Paulius Zapolskis, *Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption*, 19 JURISPRUDENCE 121, 123 (2012). Cited in: ¶ 65
Harms	Wolfgang Harms, *Zur Anwendung von Revisionsklauseln in langfristigen Energielieferungs vertdgen*, 1983 DER BETRIEB 322, 325. Cited in: ¶ 68
Hassneh Insurance v. Mew	Hassneh Insurance v. Mew, 2 Lloyd's Rep. 243 (1993). Cited in: ¶ 34
Himpurna v. PT	Himpurna California Energy Ltd. v. PT. UNCITRAL Ad-Hoc Award of 4 May 1999. Cited in: ¶ 83

Honnold	John O. Honnold, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 3d ed. (1999). Cited in: ¶ 77
Indonesia Case	Final award of 4 May 1999, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara. Yearbook Commercial Arbitration*. 2000, XXV: 13−108. Cited in: ¶ 65
Ishida	Yasutoshi Ishida. "CISG Article 79, Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something," Pace International Law Review, April 2018. Cited in: ¶ 76
John Forster Emmott v. Michael Wilson & Partners	John Forster Emmott v. Michael Wilson & Partners, EWCA Civ 184 (2008). Cited in: ¶ 34

Libananco Holdings v. Turkey	Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8 (2011). Cited in: ¶ 41
Methanex	Methanex Corporation v. United States of America NAFTA Ch. 11 Arb. Trib. (2005). Cited in: ¶ 41
O'Sullivan	Nikki O'Sullivan, *Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?*, Practical Law Arbitration Blog (Aug. 31, 2017). Cited in: ¶ 41
Raw Materials Case	Raw Materials Inc. v. Manfred Forberich GmbH & Co. Federal District Court (Illinois) July 6, 2004 Case No. 03 C 1154 Cited in: ¶ 69

Redfern/Hunter	Alan Redfern & Martin Hunter with Nigel Blackaby & Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Sixth Edition 2015). Cited in: ¶ 34
Reisman & Freedman	W. Michael Reisman & Eric E. Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 American Journal of International Law 739 (1982). Cited in: ¶ 41
Ryan/Dharmananda	David Ryan & Kanaga Dharmananda, *Summary Disposal in Arbitration: still Fair or Agreed to be Fair*, 35 Journal of International Arbitration (2018). Cited in: ¶ 28
Schlechtriem/Schwenzer	Schlechtriem Peter & Schwenzer Ingeborg, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), Third Edition, Oxford University Press (2010). Cited in: ¶ 69

Schwenzer, Fountoulakis, Dimsey	Ingeborg Schwenzer et al., *International Sales Law: A Guide to the CISG* (2012). Cited in: ¶ 55
Smeureanu	Ileana M. Smeureanu, CONFIDENTIALITY in International Commercial Arbitration (Kluwer Law International, 2011). Cited in: ¶ 46
Steel Tubes	Scafom International BV v. Lorraine Tubes SAS. Belgium Court of Cassation. 2009. Cited in: ¶ 80
Sugar Australia Pty. Ltd. v. Mackay Sugar Ltd	Sugar Australia Pty. Ltd. v. Mackay Sugar Ltd., QSC 38 (2012). Cited in: ¶ 28
Sulamérica	Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ 638. Cited in: ¶¶ 8, 12, 13, 14

Triulzi	Triulzi Cesare SRL v. Xinyi Group, S.G.H.C. 220 (2014). Cited in: ¶ 28
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration Cited in: ¶ 10, 20, 27
UNIDROIT	International Institute for the Unification of Private Law Cited in: ¶¶ 55, 60, 75, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89
Waincymer	Jeffery Waincymer, *Procedure and Evidence in International Arbitration* (2012). Cited in: ¶ 41
Yukos v. Russia	PCA Case No. AA227 Yukos Universal Ltd. v. Russian Federation 18 July 2014 Cited in: ¶¶ 38, 39

2013 HKIAC Rules	2013 HKIAC Administered Arbitration Rules Cited in: ¶¶ 30, 31, 35, 45, 46
2018 HKIAC Rules	2018 HKIAC Administered Arbitration Rules Cited in: ¶¶ 2, 26, 30, 31, 35, 45

STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**").

CLAIMANT is a stud farm in Mediterraneo covering all areas of equestrian sport.

RESPONDENT is an established racehorse stable in Equatoriana famous for its broodmare lines.

21 March 2017	RESPONDENT contacted CLAIMANT to inquire about the availability of frozen semen from CLAIMANT'S Nijinsky III for its newly established breeding program.
24 March 2017	CLAIMANT agreed to sell 100 doses of Nijinsky III's semen to RESPONDENT and provided RESPONDENT terms of the agreement.
28 March 2017	RESPONDENT accepted the majority of CLAIMANT'S terms, with the exception of the price, choice-of-law, and dispute resolution terms. RESPONDENT also requested delivery DDP.
31 March 2017	CLAIMANT counteroffered, asserting it would only accept DDP at a price increase. Additionally, CLAIMANT suggested that the PARTIES opt for arbitration in Mediterraneo.
April 2017	The newly-elected President of Mediterraneo delivered on his campaign promises and announced a 25% tariff on agricultural products from Equatoriana.
10 April 2017	RESPONDENT sent CLAIMANT the first draft of a dispute resolution clause which was derived from the HKIAC model clause but excluded any reference which could be interpreted as empowering a tribunal to adapt the contract.
11 April 2017	CLAIMANT requested to change the seat of the Arbitration to Danubia, while fully accepting the remainder of RESPONDENT'S dispute resolution clause. RESPONDENT, in an effort to compromise with CLAIMANT, accepted the neutral location as the seat of arbitration.
12 April 2017	The two main negotiators for the PARTIES were injured in a car crash toward the end of their negotiations. They had to be replaced for the

	finalization of the contract. RESPONDENT's principal negotiator remained in a coma until after the contract was signed.
6 May 2017	CLAIMANT and RESPONDENT signed the contract, agreeing on three shipments of frozen semen, for which RESPONDENT was to pay in advance.
20 May 2017	CLAIMANT delivered the first shipment of 25 doses DDP.
3 October 2017	CLAIMANT delivered the second shipment of 25 doses DDP.
19 December 2017	Equatoriana's long-time free-trade supporting government imposed a retaliatory 30% tariff on all agricultural goods from Mediterraneo.
20 January 2018	CLAIMANT emailed RESPONDENT and demanded a price adaptation outside of the scope of the contract due to the newly imposed tariffs.
21 January 2018	The PARTIES, represented on CLAIMANT's side by an attorney and on RESPONDENT's side by a veterinarian, discussed the tariff and CLAIMANT's increased costs therefrom over the phone. RESPONDENT's representative made clear that his understanding of the contract was that CLAIMANT had to bear the costs of the tariff. He also pointed out that he had no authority to agree on a contract adaptation.
23 January 2018	CLAIMANT delivered the third shipment of 50 doses DDP.
12 February 2018	CLAIMANT confronted RESPONDENT'S CEO over the resale of some doses of Nijinsky III's frozen semen. Considering there was nothing in the contract prohibiting resale of the semen, RESPONDENT'S CEO then decided it was no longer in the best interest of RESPONDENT to continue business with CLAIMANT.
31 July 2018	CLAIMANT submitted its Notice of Arbitration and appointed Ms. Wantha Davis as its arbitrator. The HKIAC acknowledged CLAIMANT'S Notice of Arbitration.
24 August 2018	RESPONDENT filed its Answer to the Notice of Arbitration.
2 October 2018	CLAIMANT made an allegation about RESPONDENT's conduct in a separate arbitration to the TRIBUNAL based on confidential information

	CLAIMANT received illegally, and subsequently attempted to file evidence before the TRIBUNAL in support of its allegations.
3 October 2018	RESPONDENT objected to the introduction of the proposed evidence because CLAIMANT was in violation of both its contractual and statutory obligations of confidentiality.

SUMMARY OF THE ARGUMENT

1. **ISSUE 1**. This TRIBUNAL does not have the jurisdiction or the power under the arbitration agreement to adapt the contract. The arbitration agreement is severed from the contract by the doctrine of separability; therefore, it must be looked at separately and distinctly from the substance of the agreement. In the absence of an express choice of law provision within the arbitration agreement, the *lex arbitri*, in this case the law of Danubia, applies. Danubia follows the "four corners rule" of contract interpretation, which requires recourse only to the express wording of the contract to derive its meaning. The PARTIES did not agree to any such express language, nor can any other term in the contract be read in its plainest meaning to give that power to the TRIBUNAL. Absent that agreement, the TRIBUNAL does not have the jurisdiction to adapt the contract, or the power under the contract to do so.
2. **ISSUE 2**. CLAIMANT is not entitled to enter into evidence any and all evidence that it so chooses. Article 45 of the 2018 HKIAC Rules protects RESPONDENT's right to confidentiality and any documents from a separate arbitration should be excluded as admitting them would violate this right to confidentiality. Regardless of how the documents were obtained, whether through an illegal hack or through a contractual breach, the TRIBUNAL has the absolute authority to determine evidentiary procedures, and the TRIBUNAL should find in RESPONDENT's favor and not admit the evidence from RESPONDENT's separate arbitral proceeding.
3. **ISSUE 3**. CLAIMANT is not entitled to any additional payment under the contract. Even if the TRIBUNAL finds that clause 12 of the agreement allows for adaptation, that clause only covers CLAIMANT in the event of lost shipments or delays in shipment, not for the imposition of tariffs. In fact, clause 12 makes no reference to additional tariffs, nor could RESPONDENT have known about CLAIMANT's intent to include a such a provision in the clause. Moreover, the tariffs neither constitute an unforeseen event nor make the contract more onerous. Furthermore, a new contract was not formed, either by RESPONDENT's resale of some of the doses from CLAIMANT or by RESPONDENT's representative's conduct on the 21 January 2018 phone call. The TRIBUNAL should therefore honor the contract as it is written.
4. **ISSUE 4**. CLAIMANT is also not entitled to any additional payment under the CISG. CLAIMANT attempts to invoke CISG Article 79 to support its claim that it is entitled to renegotiation and price adaptation, but CLAIMANT fails to meet the applicability requirements of CISG Article 79.

CLAIMANT further attempts to apply Mediterranean contract law but fails again to meet its threshold hardship requirements. Because CLAIMANT is unable to show how any legal regime allowing for contract adaptation applies to it in this case, it is not entitled to any additional payments under the contract.

ARGUMENT

ISSUE 1: THIS TRIBUNAL HAS NEITHER THE JURISDICTION NOR THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

5. Because the arbitration agreement is separable from the substance of the contract and is therefore subject to Danubian law **[A]**, the TRIBUNAL lacks both the jurisdiction and the power to adapt the contract **[B]**.

A. Danubian Arbitration Law governs the arbitration agreement and its interpretation.

6. The arbitration agreement is separable from the substance of the contract. **[1]**. Therefore, the contract is governed by the Danubian Arbitration Law as established by the absence of an express choice of law in the arbitration clause **[2]**.

1. The arbitration agreement is separable from the body of the contract.

7. The PARTIES' agreement contains a choice of law provision that reads as follows: *"This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)." [Cl. Ex. 5, p. 14, ¶14]*.

8. Arbitration clauses are generally considered "separable" from the main contract concluded by the parties, [*Born, p. 50; Fouchard Gaillard Goldman, p. 389*]. Although this doctrine is normally implicated by a challenge to or termination of the substantive contract, courts have applied to the question of which law governs an arbitration agreement [*Sulamérica*]. Therefore, the arbitration agreement outlined in Clause 15 of the contract must be considered separate and distinct from the rest of the contract. [*Cl. Ex. 5*].

9. It is undisputed that Mediterranean law applies to the *substantive* provisions of the contract, but CLAIMANT's assertion that it applies also to the arbitration agreement is incorrect and unsubstantiated [*Cl. Br ¶¶10, 12*]. The choice of law provision in the contract is limited by its terms to the "sales agreement," not the arbitration agreement. The arbitration agreement does not fall under the substantive provisions of the contract, so it is not governed by this choice of

law. Additionally, while it could be considered ambiguous what is intended by "Sales Agreement," because this language comes from CLAIMANT's standard form, the *contra proferentum* principle dictates that any ambiguity should be construed against the CLAIMANT and, therefore, the choice of law provision applies only to the substantive part of the agreement and not the arbitration clause.

10. This need for independent interpretation of the arbitration agreement follows also from the UNCITRAL Model Law, which has been adopted as the arbitration law of Danubia, Mediterraneo, and Equatoriana [*PO 2, p. 56-57, ¶14*]. Article 16(1) of the Model Law provides that the "Arbitration clause which forms part of a contract shall be treated as an agreement *independent* of the other terms of the contract." [*UNCITRAL ML Art. 16(1)*]. Therefore, the arbitration agreement must be looked at independently from the "main" sales agreement.

2. The law of the seat of arbitration applies in the absence of an express choice of law within the arbitration agreement.

11. Because the choice of law clause does not apply to the arbitration agreement, and the arbitration agreement contains no express choice of law clause, the TRIBUNAL must look to the law most closely related to the arbitration provision to interpret it. In this case, the closest law is the law of the seat of the arbitration, Danubia.

12. The English Court of Appeals devised a three-tiered hierarchy of laws that could apply to determine the law applicable to the arbitration agreement in *Sulamérica*: [1] the law expressly chosen by the parties; [2] or in the absence of an express choice, the law impliedly chosen by the parties as determined from the parties' intentions at the time of contracting; or [3] in the absence of an express or implied choice, that with which the arbitration agreement has the closest and most real connection. [*Sulamérica*].

13. Applying the *Sulamérica* test in this case, the first tier is not available as there is no express choice of law provided within the arbitration agreement itself. [*Cl. Ex. 5, p. 14, ¶15*]. Turning then to the second-best source of the choice of law, which looks to the parties' intent at the time of contracting, it is clear that RESPONDENT's proposal required that the arbitration agreement be governed by the law of the seat of the arbitration and not by the law of the contract. [*Resp. Ex. 1, p. 33*]. The choice of law clause for the arbitration agreement was incorporated in Mr. Antley's final draft before his unfortunate accident [*Resp. Ex. 1, p. 33*].

CLAIMANT only wished to change the suggested place of arbitration but had no objections to having the seat of arbitration govern the arbitration agreement [*Resp. Ex. 2, p. 34*]. RESPONDENT, in an effort to compromise with CLAIMANT, accepted CLAIMANT'S suggestion for a neutral place of arbitration, Danubia. The PARTIES understood that the choice of law provision would be changed to mirror the new seat. Mr. Antley intended to update the provision for the final contract's final draft, which is evidenced by his final notes prior to his accident agreement [*Resp. Ex. 3, p. at 35*]. Therefore, if we look to the PARTIES' intent at the time of drafting, it is clear that the PARTIES chose Danubian Arbitration Law to govern the arbitration agreement.

14. The third best source of the choice of law set out in *Sulamérica* looks to which law has the closest and most real connection to the arbitration agreement. The court in *Sulamérica* determined that the arbitration agreement has the closest and most real connection with the law of the seat of arbitration because it would "exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective." [*Sulamérica*]. Accordingly, since the PARTIES chose the seat of arbitration as Danubia, the arbitration law of Danubia would have the closest and most real connection to the arbitration agreement, especially in ensuring that the arbitration is effective.

15. Additionally, in *FirstLink,* the Singapore High Court took the view that absent the counterparties' express choice to the contrary, the applicable law of an arbitration agreement was the law of the seat of the arbitration. [*FirstLink*]. The court stated that "in the province of international arbitration, the arbitral seat is the juridical center of gravity which gives life and effect to an arbitration agreement, without which the seed of an agreement would not grow into a full-fledged arbitration resulting in the fruit of an enforceable award." [*FirstLink*]. As further emphasized by the English Commercial Court of Appeal, it would be "rare" for the proper law to be different from the law of the seat, because an arbitration agreement has a closer and more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract. [*C v. D*]. This is especially true where the parties have deliberately chosen to arbitrate in one place disputes arising out of a contract governed by the law of another place. [*C v. D*].

16. Under the doctrine of separability, the arbitration agreement should be looked at as separate and distinct from the body of the contract. Where the arbitration agreement does not specify a choice of law, the most widely accepted method used to determine the law of the arbitration agreement is to look to the seat of arbitration as determined by the PARTIES. The seat of arbitration agreed upon by the parties is Vindobona, Danubia [*Cl. Ex. 5, p. 14, ¶ 15.*]. Therefore, Danubian law governs the arbitration agreement.

B. This TRIBUNAL does not have the jurisdiction or the power to adapt the contract.

17. This TRIBUNAL does not have the jurisdiction to adapt the contract the contract does expressly not grant it that power **[1]**, and even by recourse to the drafting history, it is clear that the PARTIES did not intend to allow such adaptation **[2]**.

1. Because Danubia follows the four corners rule and the contract does not expressly authorize contract adaptation, the TRIBUNAL lacks the power to adapt the contract.

18. It is consistent jurisprudence in Danubia that due to the doctrine of separability, the CISG does not apply to the arbitration agreement because the arbitration agreement is considered to be a procedural contract, and the CISG is only to apply to contracts. [*PO 2, p. 60*]. CLAIMANT's submission that the CISG applies to the arbitration agreement is, therefore, unfounded.

19. According to Danubian Arbitration Law, which follows the "four corners rule," the arbitration agreement should be interpreted narrowly based only on its express language. [*PO 1, p. 52*; *Ans. Not. Arb., p. 32, ¶ 16*]. Looking to the four corners of the contract, the arbitrators only have the power to interpret "disputes arising out of" the contract, including disputes related to its "existence, validity, interpretation, performance, breach of termination." [*Cl. Ex. 5, p. 14, ¶ 15*].

20. The originally agreed contractual remuneration has undisputedly been paid by RESPONDENT. CLAIMANT is now seeking a remuneration which goes beyond the scope of what was contemplated by the contract. While Danubian law authorizes arbitral tribunals to adapt contracts, an express conferral of powers is required for such authorization. [*UNCITRAL ML Art. 28. (3)*]. Because the contract lacks any explicit language empowering the Arbitral Tribunal to adapt the contract, this TRIBUNAL lacks the jurisdiction and the power to adapt the contract beyond the scope of remuneration outlined in the original agreement. [*Cl. Ex. 5*].

2. Even looking beyond the four corners of the contract, the drafting history of the contract does not indicate the PARTIES intended to allow for adaptation.

21. Typically, recourse to the drafting history of a contract should be had only where its terms are unclear or otherwise open to interpretation. There is no such ambiguity in the contract at issue, but even if the TRIBUNAL chooses to look to its drafting history for clarification, it is clear that the PARTIES never intended to allow for contract adaptation.

22. RESPONDENT, when suggesting the arbitration clause to CLAIMANT, explicitly reduced the broad wording of the HKIAC Model Clause by deleting any reference which could be interpreted as empowerment for contract adaptation. [*Resp. Ex. 1, p. 33*]. CLAIMANT had no objections to RESPONDENT's narrowly worded version of the clause, as evidenced when CLAIMANT mirrored the exact language provided by RESPONDENT and stated its broad acceptance of the proposal. [*Resp. Ex. 2. p. 34*]. Therefore, even when looking to the drafting history and preceding communications of the PARTIES, it is clear that the PARTIES never intended for the Arbitral Tribunal to have the power to adapt the contract.

Conclusion on Issue 1

23. Accordingly, the separability of the arbitration agreement from the remainder of the contract and the absence of an express choice of law clause within the arbitration agreement supports the conclusion that Danubian law governs its interpretation. Moreover, applying Danubian law, the arbitration agreement should be interpreted narrowly to prevent the TRIBUNAL from going beyond the scope of its powers as outlined by the PARTIES in the contract.

ISSUE 2: ARTICLE 45 OF THE 2018 HKIAC RULES CLEARLY PROTECTS RESPONDENT'S RIGHT TO CONFIDENTIALITY AND THE DOCUMENTS FROM THE SEPARATE ARBITRATION SHOULD NOT BE ADMITTED AS THEY VIOLATE THAT RIGHT.

24. RESPONDENT has been the victim of either a revenge-motivated contractual breach or an illegal computer hack. [*R. at p. 51*]. CLAIMANT has obtained documents and the Partial Interim Award from RESPONDENT's separate and distinct arbitral proceeding as the fruit of a third party's illegal actions.

25. RESPONDENT has an absolute right to confidentiality under the HKIAC Rules **[A]**. The manner in which RESPONDENT's confidential information was obtained is irrelevant when determining whether it can be admitted; the information was obtained from either an illegal computer hack

or a contractual breach and should not be admitted into this arbitration as it violates RESPONDENT's right of confidentiality **[B]**.

A. The TRIBUNAL should not admit evidence from the separate arbitration that violates RESPONDENT's contractually obligated confidentiality right under the 2018 HKIAC Rules.

26. This TRIBUNAL should not allow CLAIMANT to admit the Partial Interim Award from RESPONDENT's separate and distinct arbitral proceeding as neither the 2013 and 2018 HKIAC Rules give CLAIMANT the procedural right to admit any, or all, evidence that it wants **[1]**. Further, due to the confidential and non-precedent setting nature of commercial arbitration this TRIBUNAL can issue an award in this arbitration without consulting the Partial Interim Award from the separate arbitration **[2]**.

1. Article 18 of the 2018 HKIAC Rules does not give CLAIMANT the unlimited right to admit any evidence it desires.

27. CLAIMANT does not have an absolute procedural right to have any evidence admitted into the arbitration, and in this instance, the balance of equities weighs in favor of not admitting the partial interim award and protecting RESPONDENT's confidentiality. CLAIMANT argues that excluding one piece of evidence from RESPONDENT's separate proceeding would violate CLAIMANT's procedural rights entirely. [*CL Br. ¶ 49, 50, 52, 70, 71, 74*]. CLAIMANT identifies Article 18 of the Danubian Law as the source of this procedural right. [*UNCITRAL ML Art. 18*]. Article 18 provides, "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." [*UNCITRAL ML Art. 18*]. CLAIMANT is exaggerating the scope of its rights.

28. As Gary Born notes, this principle of full presentation is no more difficult to apply than domestic due process. [*Born, ¶ 32*]. Each party is entitled to an equal, adequate opportunity to present its case, to an impartial tribunal, which applies rational procedures. [*Born, ¶ 32*]. As Born also points out, however, the procedural standards that are applicable to international arbitration are different from, and less rigorous than, those applied in a domestic context. [*Born, p. 3507*]. In the international context, parties merely have to be afforded a "reasonable opportunity" to present their cases. [*ADG v. ADI; Sugar Australia Pty. Ltd. v. Mackay Sugar Ltd; Triulzi 2014 S.G.H.C. 220; Ryan/Dharmananda, p. 43*].

29. While Article 18 of the Danubian Arbitration Law confers the right to present one's case, it does not render admissible all evidence a party proffers. This TRIBUNAL has the authority to exercise its discretion and determine admissibility. If, after deliberation, the TRIBUNAL determines that the evidence is inadmissible, CLAIMANT's Article 18 rights will have been in no way impinged. In this arbitration, the TRIBUNAL would be well within its rights to deny the admission of the illegally obtained evidence based on whatever rational evidentiary procedures the TRIBUNAL determines apply. While CLAIMANT may not agree with the TRIBUNAL's decision, CLAIMANT's procedural rights would still be protected.
30. As mentioned above, the TRIBUNAL should balance the competing interests when determining the admissibility of the Partial Interim Award. The fact that the documents were leaked from a former employee, as opposed to a current employee is irrelevant, as it makes the act no less illegal. Especially when both former employees had been witnesses in the separate arbitration and had been under a contractual obligation to keep the information confidential. [*PO2 ¶ 41; 2013 HKIAC Art. 42; 2018 HKIAC Art. 45*].
31. CLAIMANT also alleges that RESPONDENT does not have a legitimate interest in confidentiality, as a number of people who would learn the confidential information is too small. [*CL Br. ¶ 73*]. However, this is an arbitrary assertion by CLAIMANT, as there is no mention in the HKIAC Rules about the number of people information must be exposed too before a confidentiality interest can be invoked. [*2013 HKIAC Art. 42; 2018 HKIAC Art. 45*]. Whether one person or one hundred people, the result is a breach of confidentiality.
32. Regardless, the Partial Interim Award should not be admitted, and as CLAIMANT itself states, the "TRIBUNAL retains a broad discretion with respect to determining the admissibility of evidence" and is well within its right to prohibit the use of this evidence. [*CL Br. ¶ 60*].

2. An Award predicated only on evidence from the present arbitration would not be based on 'false pretenses,' as CLAIMANT alleges.

33. CLAIMANT is incorrect to state that an award that is issued in the present arbitration without the admission of the documents would be based on false pretenses. [*CL Br. ¶ 53*]. Tribunals have the authority to determine admissibility and do not need to admit irrelevant documents that do not factually pertain to the present arbitration.

34. Historically, the confidential nature of an arbitral proceeding has been one of the most important advantages of arbitration and was recognized as an implied duty. [*Hassneh Insurance v. Mew; Ali Shipping v. Shipyard Trogir; John Forster Emmott v. Michael Wilson & Partners; Redfern/Hunter, p. 124*].
35. The 2013 HKIAC Administered Arbitration Rules, which applied to RESPONDENT's separate arbitral proceeding, explicitly provide for the confidentiality of the parties' information, documents, and awards, unless agreed upon by all parties to the arbitration. [*2013 HKIAC Rules Art. 42.1*]. Further, the 2018 HKIAC Rules, which govern this arbitration, remain committed to confidentiality in arbitration, and explicitly include party representatives within the scope of the confidentiality provisions. [*2018 HKIAC Rules Art. 45*]. The HKIAC Rules are renowned for favoring confidentiality over disclosure.
36. Rather, the documents from the separate arbitration are not relevant to the current dispute, as they are based on a different contract, with different facts, and a different hardship clause. [*Cl. Br. ¶ 51, 55, 57; PO2 ¶ 39*]. In particular, and most significantly, the contract at issue in the other arbitration included the ICC hardship clause, which is quite a bit broader than the clause included in this contract. [cite] Any argument that RESPONDENT made regarding hardship arising out of that contract, therefore, is necessarily broader than any argument that CLAIMANT could make here in the same posture. To allow admission of the partial interim award from RESPONDENT's separate arbitration in this case would do little more than show that a party could make a different argument under a different clause, at the huge expense of RESPONDENT's confidentiality.

B. The TRIBUNAL should be reticent to allow CLAIMANT to introduce documents that were obtained illegally.

37. The TRIBUNAL should not allow CLAIMANT to admit evidence obtained through an illegal computer hack **[1]** or obtained through an illegal contractual breach from one of RESPONDENT's former employees **[2]**.

1. Documents obtained through a third party that illegally hacked RESPONDENT's system should not be admitted.

38. Documents obtained through an illegal hack of a computer system should not be admissible in an arbitration wherein the victim is a party. [*Boykin/Havalic, p. 35*]. CLAIMANT alleges that if a

party itself does not partake in obtaining the evidence through illegal means, then the evidence is admissible, citing the *Yukos Majority Shareholder* arbitration. [*CL. Br. ¶ 77, 78*]. There are, however, clear factual differences between the *Yukos* arbitration and the present arbitration.

39. In the *Yukos* arbitration, WikiLeaks, a third party, released information that had been illegally hacked from United States diplomatic cables. [*Yukos v. Russia*]. The parties to the arbitration were the *Yukos Majority Shareholders* and the *Russian Federation*, not the United States. [*Yukos v. Russia*]. When the tribunal decided to admit the WikiLeaks documents, they balanced the utility and necessity of the information for the proceeding against the illegal nature of how the information was obtained but did not have to grapple with a confidentiality interest of one of the parties. [*Yukos v. Russia*].

40. In the present arbitration, the documents have been illegally stolen from RESPONDENT. [*R. at p. 51*]. As such, the TRIBUNAL is required to account for not only the utility of the documents for CLAIMANT, but also the privacy and confidentiality interests that are RESPONDENT's right. Boykin and Havalic have proposed a test to balance these interests. [*Boykin/Havalic, p. 35*]. The three-step test first looks at whether the party introducing the evidence participated in the illegal acts that obtained the evidence. Second, whether the evidence is material to an issue in the case, and finally, if the evidence was unlawfully obtained from the files of a party to the arbitration. [*Boykin/Havalic, p. 35*].

41. The first two prongs are easily dealt with as CLAIMANT did not take part in the illegal activity, and the documents are relevant to the current arbitration. However, the third prong asks, "Was the evidence unlawfully obtained from the files of a party to the arbitration, although at no fault of the party seeking to introduce the evidence?" [*Boykin/Havalic, p. 35*]. Here, the answer is yes, as the information was taken directly from RESPONDENT's computer system. [*R. at p. 51*]. Boykin and Havalic note that if the question is answered in the affirmative, then the evidence should be presumptively inadmissible. [*Boykin/Havalic, p. 35; Methanex v. USA; Libananco Holdings v. Turkey; O'Sullivan; Waincymer, p. 797; Reisman & Freedman, pp. 741*]. This analysis acknowledges that even if the illegally obtained information has been obtained through no fault of the admitting party, the evidence should still not be admitted if it was unlawfully obtained from the files of a party to the arbitration.

42. Further, while CLAIMANT did not hack RESPONDENT's computer system itself, CLAIMANT has not acted entirely innocently. CLAIMANT arranged to buy a copy of the Partial Interim Award from a company that has a reputation for providing "intelligence" on the horseracing industry. [*PO2 ¶ 41*]. The company has a "dubious reputation" and has refused to disclose its source for the Partial Interim Award, and it is possible that the person who provided the Award to the company was the hacker or former employee. [*PO2 ¶ 41*].
43. Therefore, the TRIBUNAL should not admit the evidence if it was illegally obtained from RESPONDENT's computer files.

2. Documents obtained from a former employee acting as RESPONDENT's agent should not be admitted.

44. The documents obtained from RESPONDENT's separate arbitral proceeding should not be admitted into the present arbitration. While there is no explicit institutional rule barring the admission of illegally obtained materials, the TRIBUNAL can, and should, use its discretionary authority to bar the documents admission. In addition, the contractually obligated confidentiality between RESPONDENT and the ex-employees removes the possibility that the documents are admissible as the product of a third party, and that the ex-employees acted as agents of RESPONDENT.
45. As mentioned above, the TRIBUNAL should balance the competing interests when determining the admissibility of the Partial Interim Award. The fact that the documents were leaked from a former employee, as opposed to a current employee is irrelevant, as it makes the act no less illegal. Especially when both former employees had been witnesses in the separate arbitration and had been under a contractual obligation to keep the information confidential. [*PO2 ¶ 41; 2013 HKIAC Art. 42; 2018 HKIAC Art. 45*].
46. CLAIMANT argues that under the 2013 HKIAC Rules, "no party may publish, disclose or communicate any information relating to: (a) the arbitration . . . or (b) an award" and implies that the two former employees were no longer parties to the arbitration. [*2013 HKIAC Art. 42.1; CL Br. ¶ 64, 65*]. However, CLAIMANT fails to acknowledge HKIAC Article 42.2, which provides that "the provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, witness, secretary of the arbitral tribunal and HKIAC" (emphasis added). [*2013 HKIAC Art. 42.2; Smeureanu, p. 162*]. As stated

in Procedural Order 2, "[b]oth employees had been witnesses in the other arbitration before they were fired," and further both employees were under a "contractual obligation to keep all information about the other arbitral proceedings confidential." [*PO2 ¶ 41*].

47. Further, CLAIMANT is incorrect that RESPONDENT is ultimately the PARTY that disclosed the Award and therefore should not be allowed to estop the use of the documents. [*CL Br. ¶ 66*]. There is an internal inconsistency in CLAIMANT's argument: if the ex-employees are not parties governed by the confidentiality provisions, then they cannot also be so closely related with RESPONDENT for RESPONDENT to be the party who disclosed the information. As RESPONDENT was not the party who breached confidentiality, and is, in fact, the party trying to maintain confidentiality, RESPONDENT is not trying to preclude CLAIMANT from using documents that RESPONDENT had originally disclosed. [*Bühring-Uhle, p. 136; CL Br. ¶ 66*]. While CLAIMANT asserts that RESPONDENT is gaining some advantage by exploiting the confidentiality provisions, the opponent in RESPONDENT's separate arbitral proceeding noted that "the allegation by Claimant do not reflect reality and are taken out of context." [*R. at 54*].
48. Finally, a contractual breach between the ex-employees and RESPONDENT should impact CLAIMANT's ability to admit the documents. [*CL Br. ¶ 68*]. CLAIMANT assumes that the documents have been obtained from the ex-employees; however, the illegal manner in which the documents were obtained remains unknown. As CLAIMANT knows, the same "dubious" company that provided the Partial Interim Award could have obtained the documents. [*PO2 ¶ 41*]. As previously mentioned, the TRIBUNAL should weigh the illegal nature of the documents and find that they are inadmissible in this arbitration.

Conclusion on Issue 2

49. The TRIBUNAL should not admit the evidence from RESPONDENT's other arbitral proceeding. The evidence should not be used as its admission would violate the confidentiality provisions of the HKIAC Rules and because the balance between CLAIMANT's ability to present its case and RESPONDENT's confidentiality weighs in RESPONDENT's favor.

ISSUE 3: NOTHING IN THE CONTRACT ENTITLES CLAIMANT TO ADDITIONAL MONEY.

50. RESPONDENT is not required by the contract to pay CLAIMANT either USD 1.250.000 for the cost of the retaliatory tariffs or any other amount in additional payments. The PARTIES specifically agreed CLAIMANT would incur all of the costs associated with delivery of the goods

by contracting for delivery DDP. Even were this TRIBUNAL to consider clause 12 of the contract as providing remedies for performance already rendered, the conditions enumerated in the clause were not met, and therefore, no contract adaptation is possible **[A]**. Likewise, the PARTIES did not adapt the sales agreement already or agree to do so. **[B]**.

A. Even if this TRIBUNAL finds that clause 12 can be construed as providing for contract adaptation, it contains preconditions for contract modification that were not met in this case.

51. Clause 12 has limited applicability. It restricts changes to the contract to circumstances arising under health and safety requirements. [*Cl. Ex. 5, p. 14*]. RESPONDENT could not have known CLAIMANT intended to include tariffs in the hardship clause **[1]**, nor do tariffs constitute an unforeseen event **[2]**. No reasonable interpretation of clause 12 shows that tariffs are included **[3]**. The PARTIES already agreed CLAIMANT would take on all costs associated with delivery, including tariffs **[4]**. Furthermore, the tariffs were not more onerous for CLAIMANT than existing contract obligations **[5]**.

1. RESPONDENT could not have known CLAIMANT intended the hardship clause to cover tariffs.

52. CLAIMANT had ample opportunity to explicitly include tariffs in the contract. Although Ms. Napravnik was temporarily unavailable, her name is on the contract as CLAIMANT's representative. [*Cl. Exh. 5, p. 13*]. RESPONDENT relied on CLAIMANT's expertise in the field of horse breeding, including its expertise in the shipment of related goods, and could not have known what costs were involved in the shipment of horse semen. The PARTIES thus agreed CLAIMANT would bear all costs associated with delivery by including a DDP term in the contract. [*Cl. Exh. 5, p. 13, cl. 8*]. Had CLAIMANT intended to avoid paying all tariffs associated with the delivery, or make arrangements to offset any potential tariffs, it could have discussed that possibility during contract negotiations. In fact, the first round of retaliatory tariffs was implemented on 5 May 2017, a day before the PARTIES signed the contract. [*PO 2, p. 58, ¶ 23*]. Knowing that the political climate was changing, CLAIMANT had every opportunity to address the risks. RESPONDENT cannot bear the costs of poor business choices made by CLAIMANT.

53. Furthermore, RESPONDENT did not and could not have known CLAIMANT's expected profit margin from the contract. During the discussion of the contracted price, CLAIMANT never

discussed the total cost of DDP or CLAIMANT's expected price margin. [*PO 2, p. 56, ¶8*]. The PARTIES reached an agreement on the final price of the contract without discussing the actual cost of delivery. [*PO 2, p. 56, ¶8*].

2. The imposition of tariffs does not constitute a comparable "unforeseen event" sufficient to fall under the *force majeure* clause.

54. Clause 12 merely provides an excuse for nonperformance and does not allow for price adaptation. Clause 12 reads: "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events in making the contract more onerous*." [*Cl. Ex. 5 ¶ 12, p. 14*]. A *force majeure* clause is a way for a party to be excused for nonperformance. [*Brunner, p. 1*]. CLAIMANT was able to complete its performance and cannot therefore invoke the *force majeure* clause to adapt the contract price. [*Cl. Exh. 8, p. 18*].

55. Where the terms of a *force majeure* clause are not specifically defined, a tribunal must consider the terms to have been defined according to general standards. [*Brunner, p. 387*]. One way of interpreting the general definition of a term is from the surrounding circumstances in the contract. [*CISG Art. 8.3*]. To that end, the TRIBUNAL must interpret the statement of a party "subjectively" by examining the scope of the entire contract. [*Schwenzer, Fountoulakis, Dimsey, p. 60; UNIDROIT Art. 4.3*].

56. Looking at the text of clause 12 of the agreement, it is clear that the language referring to "health and safety" is intended only as an example, borne from CLAIMANT's prior experience with health and safety requirements. Tariffs are neither a health nor a safety risk. Tariffs are not specifically listed. The addition of "comparable unforeseen events" in the clause also does not include a tariff that does not cause lost shipments or delays in delivery. [*Cl. Exh. 5, p. 14, cl. 12*].

57. Finally, Mediterraneo implemented the tariffs in retaliation for comparably tariffs levied by Equatoriana. CLAIMANT's own exhibit C6 includes the history of the tariffs in each country, beginning with the Prime Minister of Equatoriana taking a protectionist stance for its country. [*Not. Arb., p. 7, ¶ 19;* C6]. While surprising, the tariffs were not unforeseen.

58. CLAIMANT in fact accounted for the increased risk of DDP delivery by increasing its offering price. [*Cl. Exh. 4, p. 12*]. When the PARTIES agreed to DDP delivery, Ms. Napravnik indicated

that she had personal experience with the potential increase in costs related to shipping across international borders as explanation for raising the price.

59. CLAIMANT also had the opportunity to offset its risks in other ways. During initial negotiations, CLAIMANT proposed including the ICC hardship clause, which RESPONDENT indicated was too broad. [*Resp. Ex. 3, p. 35*]. After Mr. Antley was unable to complete the contract negotiation, Mr. Crone took over final discussions and incorporated Mr. Antley's proposal for narrowing the hardship clause. [*Resp. Ex. 3, p. 35*]. The narrower hardship clause did not encompass tariffs in its provisions.

3. No interpretation of clause 12 could leave one to believe that additional tariffs were included as hardship.

60. Under UNIDROIT Article 4.1, tribunals interpret contracts according to the behavior of the parties. Specifically, the behavior of the party to the contract is interpreted under a principle of intent. Under Article 4.1 of the contract law of Mediterraneo, where intent is difficult to determine, a tribunal should undertake an objective interpretation by considering the circumstances of a reasonable person. [*UNIDROIT Art. 4.1*].

61. The principle of good faith is universally applied. [*Devaud, p. 17*]. RESPONDENT's intent in drafting the contract was clear. When CLAIMANT attempted to introduce an expansive hardship clause, RESPONDENT disagreed. CLAIMANT's current attempt to read tariffs into the coverage of clause 12 of the contract, meanwhile, is in bad faith.

62. Under either an intent-based, an objective, or a good faith interpretation, it is clear that tariffs do not fall under the category of health or safety measures so as to fall within the scope of clause 12 of the contract.

4. Under Article 8 of the CISG, the drafting history demonstrates that CLAIMANT and RESPONDENT agreed that CLAIMANT would be responsible for hardships outside of the agreed upon DDP terms.

63. Under CISG Article 8(1), a tribunal should first interpret a contract according to the parties' subjective intent where the other party could not have been unaware of what this intent was. [*CISG Art. 8.1*]. Due regard must be given not only to the text of the contract but also to surrounding circumstances. [*CISG Art. 8.3*].

64. In his 12 April 2017 note [*Resp. Ex. 3, p.35*], Mr. Antley indicated that CLAIMANT's proposed hardship clause was too broad. When he took over negotiating on RESPONDENT's behalf, Mr. Crone thus understood the need for narrow hardship protections. The final contract included language for hardship related to health and safety issues in the *force majeure* clause and additional protections throughout the contract. Ms. Napravnik made RESPONDENT aware that CLAIMANT had previously had issues with diseases during horse transport. The costs associated included "highly expensive tests" [*Cl. Ex. 4, p. 12*] and quarantine of mares [*PO 2, p. 58*]. Health costs do not include tariffs. A tariff is a simple tax unrelated to health or safety issues. Because the tariffs are not covered under clause 12's language, CLAIMANT is responsible for the change in cost.

5. The tariffs did not make the contract more onerous for CLAIMANT than their existing obligations under the contract.

65. In order to constitute a hardship, performance of a contract must be made *excessively* more onerous. [*Girsberger/Zapolskis, p. 123*]. Various tribunals have found that a cost increase of thirteen percent, thirty percent, and forty-four percent were not excessively onerous. [*Brunner, p. 427*]. In Indonesia, for example, the economy contracted approximately fifteen percent, creating a loss of five million jobs. Inflation ran rampant at seventy-five percent. The tribunal found that the economic situation did not amount to a hardship sufficient to excuse parties from their duties or for the tribunal to adapt the contract. [*Indonesia Case*].

B. Contrary to CLAIMANT'S argument the PARTIES did not adapt the sales agreement.

66. Nothing in the conduct of the PARTIES amounted to an adaptation of the Sales Agreement **[1]**, nor can a veterinarian's tacit agreement bind his employer to any statements he made on a phone call with an opposing party **[2]**.

1. The PARTIES did not agree orally that RESPONDENT would bear the cost of the tariffs.

67. On the 21 January 2018 phone call between Ms. Napravnik and Mr. Shoemaker, lead veterinarian in RESPONDENT's breeding program, the PARTIES did not adapt the sales agreement. CLAIMANT discussed the tariffs to which RESPONDENT indicated that the issue of the tariffs would require a further discussion. Mr. Shoemaker explicitly stated, "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." [*Resp. Exh. 4, p. 36*]. Mr. Shoemaker stated in his Witness Statement

that he "had no authority to consent to additional payments outside the contract." [*Resp. Exh. 4, p. 36*].

68. A party cannot overcome the obligations of a contract unless the contract contains a renegotiation clause and the parties have agreed on a triggering event. [*Berger, p. 1354; Harms, p. 325; Baur, Festschrift Steindorff p. 512*]. At the occurrence of such an event, the parties must then, in good-faith, renegotiate the contract. [*Brunner, p. 33*]. If the parties did not state or agree upon a triggering event, tribunals will only require parties to adapt or renegotiate the contract if circumstances have changed profoundly. [*Berger, p. 1350*]. Absent both a clause providing for renegotiation and a triggering event, the TRIBUNAL should not buy into CLAIMANT'S half-hearted attempts to reinterpret the provisions of the contract after its signing.

69. Under CISG Article 29(1), the parties may modify a contract only by mutual agreement [*Raw Materials Case*]. An agreement is formed only when parties reach a consensus and the minimum contractual content is present. [*Schlechtriem/Schwenzer, p. 240*].

    To determine whether the parties reached an agreement, a tribunal must consider all the circumstances surrounding the contract and the conduct of the parties involved.

70. On the 21 January 2018 phone call, Mr. Shoemaker indicated merely that he would relay CLAIMANT's position on the payment of the tariffs to his superiors. It was clear from Mr. Shoemaker's conversation with Ms. Napravnik that further communications about the tariff and about whether the contract even provided for adaptation would be needed. Therefore, the phone conversation did not lead to an adaption of the contract.

71. In *Commerica Bank v. Whitehall Specialties, Inc.*, the court rejected the idea that the buyer accepted a party's offer by performing its obligations under a supposed oral contract. The court held that a party may not unilaterally attempt to materially alter the terms of an agreement. The two PARTIES is this case have not reached an agreement of a price, nor have they had a meeting of the minds. CLAIMANT may not unilaterally demand RESPONDENT to pay a new price for the goods. Here, RESPONDENT did not agree to CLAIMANT's request for a price change merely because it accepted delivery of the goods, which were already paid for. RESPONDENT wanted to ensure both PARTIES followed the dictation of duties as outlined by the contract.

2. Mr. Shoemaker was explicit regarding his lack of authority to adapt the contract, and, RESPONDENT is not bound by any of his actions.

72. Mr. Shoemaker was not a legal representative of RESPONDENT with regard to negotiating subsequent agreements with CLAIMANT, either by his training—he is a veterinarian—or by his role. At least one tribunal refused to uphold alterations to a contract because they were finalized by an unauthorized person [*Dow AgroSciences Vertribs GmbH v. Production Commercial Firm "SB."*] [What happened in this case? Can you expand here?]

73. Here, Mr. Shoemaker was explicit on the phone that he did not have the authority to adapt the sales agreement. Mr. Shoemaker informed CLAIMANT that he would make the legal team aware of the changes facing the CLAIMANT, though he simultaneously made clear that his view was that CLAIMANT would cover all of the costs by virtue of the DDP delivery. He told Ms. Napravnik that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." [*Resp. Exh. 4, p. 36*].

Conclusion on Issue 3

74. The contract does not allow for the TRIBUNAL to adapt the sales agreement. Under clause 8 of the contract, the PARTIES agreed that CLAIMANT would bear the costs of any tariffs associated with delivery DDP, and clause 12 of the contract is not sufficiently expansive to grant authority to adapt that provision. Additionally, no subsequent conduct by RESPONDENT either did or could reasonably be interpreted to have accepted CLAIMANT's request to adapt the payment terms of the contract absent additional conversation with someone authorized to represent RESPONDENT on that point.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO PRICE ADAPTATION UNDER THE CISG.

75. The CISG does not allow for price adaptation for an impediment or hardship in CLAIMANT's situation. CLAIMANT fails to meet the requirements of CISG Article 79 and the threshold hardship requirements of UNIDROIT, and therefore, CLAIMANT is not entitled to adaptation under CISG Article 79.

A. CLAIMANT neither explicitly nor implicitly satisfies the requirements of CISG Article 79.

76. In order to invoke CISG Article 79, there must be an impediment beyond a party's control that forces non-performance. [*Ishida, p.* 334]. CISG Article 79(1) states, "A party is not liable for a

failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control . . . . " The plain text of CISG Article 79 states explicitly that it excuses a failure to perform on the contract. The structure of the CISG further demonstrates that CISG Article 79 only serves as an exemption from performance and not as a means to adapt the contract and recover economic losses post-performance. To this end, CISG Article 79 is included in "Section IV: Exemptions" of the Convention, and the only other article listed along with it in this section, CISG Article 80, also deals exclusively with parties' failure to perform. There is no reference anywhere in the text of CISG Article 79 or Article 80 providing for adaptation of the contract after performance. CLAIMANT cannot rely on CISG Article 79 in demanding price adaptation because it fails to satisfy the article's applicability requirements under the CISG.

77. The plain text of CISG Article 79(1) refers only to excusing liability "for a failure to perform." If that is not clear enough, CISG Article 79(4) reaffirms through its language that the purpose of the article is to excuse failure to perform: "The party who fails to perform must give notice to the other party of the impediment." CISG Article 79 applies only to parties facing impediments that prevent performance. [*Honnold*, *p. 477*].

78. Claimant contends that if CISG Article 79 does not cover adaptation of the contract, this threatens uniformity in application of the Convention under CISG Article 7(1). [Cl. Br., p. 27 ¶ 116]. There is no threat to uniform application of the CISG, because the CISG simply does not apply to Claimant's circumstance. Claimant rendered performance, and CISG Article 79 covers only circumstances where performance is not possible.

79. Additionally, Claimant attempts to invoke UNIDROIT through CISG Article 9(2), suggesting that UNIDROIT has become a trade usage within the meaning of that article. [Cl. Br. p. 28, ¶ 122-23]. This is a mischaracterization of trade usages. Although the CISG does not define trade usages, it is generally accepted that usages are specific terms that are commonly used and hold a particular meaning under certain circumstances within a particular trade. [Bout, p.10]. UNIDROIT does not constitute a "trade usage" because it is not a term that is particular to any trade, and therefore cannot apply under CISG Article 9(2) as Claimant suggests. [Cl. Br. p. 28, ¶ 122-23].

80. Claimant also suggests that UNIDROIT should apply here as a gap-filler for CISG Article 79 through CISG Article 7(2), based on the Steel Tubes case. [Cl Br. p. 28, ¶ 119]. In the Steel Tubes case, after the conclusion of the parties' contract, the price of steel rose by seventy percent and the seller refused to deliver before renegotiation of the price. [Steel Tubes]. The court applied UNIDROIT in that case to develop what recourse is allowed to a party that falls under the CISG Article 79 exemption for impossible performance, nothing that CISG Article 79 does not specify the recourse available to the party it exempts from performance. Because the applicability of pre-performance remedies under CISG Article 79 was never in question in the Steel Tubes case, that case is inapposite to the case at hand, where performance has already occurred and is therefore a fortiori not impossible.

B. Even if the Tribunal finds that UNIDROIT applies, CLAIMANT is not entitled to renegotiation or contract adaptation under UNIDROIT.

81. UNIDROIT Article 6.2.2 defines "hardship," which is the closest analogy to the "impediment" found in CISG Article 79; UNIDROIT Article 6.2.2 may therefore be used as a gap-filler for further expanding upon what constitutes an "impediment" under CISG Article 79. UNIDROIT Article 6.2.3 then allows renegotiation or contract adaptation when a party fails to perform due to a hardship under UNIDROIT Article 6.2.2. Because Claimant was able to perform and rendered performance, it is therefore not entitled to renegotiation or adaptation under UNIDROIT.

1. CLAIMANT does not meet the requirements for "hardship" under UNIDROIT 6.2.2.

82. Under UNIDROIT Article 6.2.2, "There is hardship where 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 receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party." Additionally, hardship may only be invoked for performance not yet rendered. [*UNIDROIT Art. 6.2.2 Official Commentary, Comment 4*]. For an event to constitute

hardship under UNIDROIT 6.2.2, it must meet all of these requirements. Failure to meet any of the requirements precludes a party from recourse under UNIDROIT 6.2.3, which provides for remedies when a party has suffered hardship under UNIDROIT 6.2.2.

83. Cases that have been settled under UNIDROIT have repeatedly held that changing economic conditions of a country, including tariffs, do not constitute hardship under UNIDROIT because they are by nature an expected factor in international trade, and therefore, are a foreseeable risk all parties assume in international trade. [*CMS Gas v. Argentina; Himpurna v. PT*]. In *CMS Gas*, CMS claimed hardship on the basis that its domestic tariff revenue had dropped by seventy-five percent after the conclusion of the contract, but the tribunal held that the parties had assumed such an economic risk generally tied to the operation of a government, and it was not unforeseeable under UNIDROIT, and therefore, did not constitute hardship under UNIDROIT. Even giving CLAIMANT the most leeway here, tribunals have found that this does not constitute a hardship. CLAIMANT only suffered a thirty percent loss, while in CMS Gas, the tribunal found that a seventy-five percent loss based on tariffs was insufficient to constitute hardship. [*CMS Gas*]. Here, CLAIMANT contends that the tariffs and the inclusion of frozen semen in the tariffs was surprising, and therefore unforeseeable, but the reality of international trade is that governments may choose to impose tariffs on any good at any time, and parties that conduct themselves in international commercial transactions know about this possibility and cannot claim that the imposition of tariffs was unforeseeable. [*Cl. Br. p. 29, ¶ 126-127*].
84. CLAIMANT therefore fails to satisfy factor (b) under UNIDROIT, because tariffs can be reasonably taken into account by parties that transact internationally.
85. Parties also cannot claim hardship if they assumed the risk of the event they attempt to characterize as a hardship. Here, CLAIMANT agreed to delivery DDP in exchange for a higher price, and RESPONDENT paid that higher price. [*Cl. Ex. 4*]. Delivery DDP includes payment of tariffs by the seller, and so CLAIMANT assumed the risk of the tariffs and does not satisfy factor (d) under UNIDROIT for hardship.
86. Additionally, the Official Commentary for UNIDROIT states that a party may invoke hardship only when it has not yet performed. Even if this TRIBUNAL finds that the tariffs were unforeseeable, CLAIMANT still fails to meet all the requirements for hardship, because it already performed on the contract.

2. Because CLAIMANT failed to satisfy the requirements for hardship under UNIDROIT Article 6.2.2, CLAIMANT is not entitled to negotiation for price adaptation under UNIDROIT Article 6.2.3.

87. Under UNIDROIT Article 6.2.3(1), "In case of hardship the disadvantaged party is entitled to request renegotiations." CLAIMANT has no grounds for requesting renegotiation for price adaptation under UNIDROIT Article 6.2.3. because CLAIMANT did not suffer hardship under UNIDROIT Article 6.2.2.

C. Because CLAIMANT is not entitled to any remedies under CISG Article 79 or UNIDROIT 6.2.2, RESPONDENT is not obliged to pay an additional USD 1,250,000 to CLAIMANT.

88. CLAIMANT has no recourse for its circumstances under the CISG or UNIDROIT, yet CLAIMANT contends that it is still entitled to adaptation under the principle of good faith. [*Cl. Br. p. 27, ¶ 116*]. CLAIMANT laments that it deserves price adaptation because the unfortunate circumstance of this one sales transaction alone would effectively sink its business entirely and result in bankruptcy. [*Cl. Br. p. 29, ¶ 129; 132*]. However, in drafting the contract, CLAIMANT made an informed choice of its own with regard to its desired profit margin. CLAIMANT asked for an additional $1000 for delivery DDP, which RESPONDENT agreed to pay. [*Cl. Ex. 4*]. RESPONDENT cannot be held accountable for CLAIMANT's decisions with regard to the methods CLAIMANT used to achieve its desired profits.

89. CLAIMANT is not entitled to adaptation under the CISG and UNIDROIT, and it would be unfair to impose an obligation on RESPONDENT based purely on CLAIMANT's financial circumstances, which it failed to disclose to RESPONDENT, and then claim bad faith because the RESPONDENT refuses to negotiate based on circumstances of which it was unaware.

Conclusion on Issue 4

90. CLAIMANT's present circumstances fail to conform to the requirements of the CISG and UNIDROIT for entitlement to price adaptation.

PRAYER FOR RELIEF

In light of the above, RESPONDENT respectfully requests the TRIBUNAL find that:

1) The TRIBUNAL need not adapt the contract;
2) The Partial Interim Award is inadmissible in this proceeding;
3) CLAIMANT is not entitled to a payment of USD 1.250.000 under both;
    a) Clause 12 of the contract, and
    b) Art. 79(1) of the CISG.

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

Certificate and Choice of Forum

To be attached to each Memorandum

I Nazaneen Pahlevani, on behalf of the Team for (name of 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) American University Washington College of Law

Name Nazaneen Pahlevani

Signature Nazaneen Pahlevani