SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH TO 7 APRIL 2019

HONG KONG

MEMORANDUM FOR RESPONDENT

SMU

SINGAPORE MANAGEMENT UNIVERSITY

CLAIMANT		RESPONDENT
PHAR LAP ALLEVAMENTO		BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1	V	2 SEABISCUIT DRIVE
CAPITAL CITY		OCEANSIDE
MEDITERRANEO		EQUATORIANA

CLAIRE LIM • FAITH HWANG • GEROME GOH

JAYAKUMAR SURYANARAYANAN • MEGAN HO

NICOLE NG • WAYNE YEO

TABLE OF CONTENTS

List of Abbreviations IV

Table of Authorities VI

Statement of Facts 1

Introduction 2

Argument 3

I. The Arbitral Tribunal has neither the jurisdiction nor the power under the Arbitration Agreement to adapt the Contract 3

A. The law of Danubia governs the Arbitration Agreement and its interpretation 4

1. The Parties chose the law of Danubia to govern the Arbitration Agreement and its interpretation 4

i. The Parties did not expressly choose the law of Mediterraneo 4

ii. The Parties implicitly chose the law of Danubia 5

2. Alternatively, the law of Danubia, as the law of closest connection to the Arbitration Agreement, governs the Arbitration Agreement and its interpretation 7

B. The Tribunal does not have jurisdiction over the Claimant's request for adaptation 8

1. Adaptation is a task beyond the role of an arbitral tribunal 8

2. Alternatively, under the governing law of Danubia, a request for adaptation falls outside the scope of the Arbitration Agreement 9

3. Even if the law of Mediterraneo governs the Arbitration Agreement, a request for adaptation falls outside the scope of the Arbitration Agreement 9

C. In any event, the Tribunal does not have the power to adapt the Contract 11

1. The Tribunal has the power of adaptation only if Danubian Arbitration Law authorises it 11

2. Clause 12 of the Contract does not expressly confer the power of adaptation as required by the Danubian Arbitration Law 12

3. The Arbitration Agreement does not expressly confer the power of adaptation as required by the Danubian Arbitration Law 14

II. The Arbitral Tribunal should not admit evidence from the other arbitration proceedings 15

A. The principles of good faith and procedural fairness justify excluding the evidence 15

1. Submitting the illegally obtained Award would violate the Claimant's duties to arbitrate in good faith and to respect procedural fairness 16

2. To uphold the integrity of the arbitral process, the Award should not be admitted 17

B. Alternatively, confidentiality concerns justify excluding the evidence 18

1. The Award should be excluded on grounds of commercial confidentiality 18

2. The Award remains subject to confidentiality protections despite being leaked 19

3. Alternatively, the Tribunal should avoid being seen to condone a breach of the confidentiality duties that protect the Award under the HKIAC Rules 19

C. The evidence should be excluded for a lack of sufficient relevance and materiality 20

III. The Claimant is not entitled to additional payment of US$1,250,000 21

A. The Claimant is not entitled to payment arising from a modification of Clause 12 of the Contract 22

1. Mr Shoemaker was not authorised to modify the Contract on behalf of the Respondent 22

2. Even if Mr Shoemaker was authorised to modify the Contract, he did not agree to modify Clause 12 of the Contract 23

B. The Claimant is not entitled to an adaptation under Clause 12 of the Contract 24

1. The remedy of adaptation is not available under Clause 12 of the Contract, whether on a subjective or an objective interpretation of the Parties' intention 24

2. Alternatively, the Tariff does not fall within the scope of Clause 12 of the Contract 25

3. In any event, the effect of the Tariff is not sufficiently severe to constitute an event causing hardship within the meaning of Clause 12 of the Contract 26

C. The Claimant is not entitled to an adaptation under the CISG 28

1. Article 79 of the CISG does not provide the remedy of adaptation 28

2. Alternatively, Clause 12 of the Contract derogates from Article 79 of the CISG 29

3. *Even if Article 79 applies to the Contract, the imposition of the Tariff does not satisfy the criteria in Article 79*......29

i. *The Tariff is not an impediment within the meaning of Article 79 of the CISG*....30

ii. *Alternatively, the Claimant could reasonably have been expected to take the Tariff into account when the Contract was concluded*......30

D. The Claimant is not entitled to an adaptation under the UNIDROIT Principles......31

1. *The UNIDROIT Principles regarding hardship and adaptation may not be used to supplement the CISG*......32

2. *Alternatively, the Claimant is not entitled to an adaptation as the requirements for hardship under the UNIDROIT Principles have not been satisfied*......32

i. *The Claimant assumed the risk of the imposition of the Tariff*......33

ii. *The Claimant could have reasonably taken the Tariff into account when the Contract was concluded*......33

iii. *The Tariff did not fundamentally alter the equilibrium of the Contract*......34

E. Even if the Claimant is entitled to an adaptation of the Contract, the Claimant is only entitled to payment of US$500,000......34

Request for Relief......35

LIST OF ABBREVIATIONS

¶/¶¶	Paragraph/paragraphs
%	Per cent
§	Section
ANA	Answer to the Notice of Arbitration dated 24 August 2018
Art.	Article
Award	Partial Interim Award rendered on 29 June 2018 in the other arbitration between the Respondent and a buyer in Mediterraneo
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Phar Lap Allevamento
Cl. Memo	Claimant Memorandum
Contract	Frozen Semen Sales Agreement between Phar Lap Allevamento and Black Beauty Equestrian, concluded on 6 May 2017
DDP	Delivered duty paid
Exh. C	Claimant's Exhibit
Exh. R	Respondent's Exhibit
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules
IBA	International Bar Association
ICC	International Chamber of Commerce
INCOTERMS	International Commercial Terms
Letter by Langweiler	Mr Joseph Langweiler's letter to the Members of the Arbitral Tribunal dated 2 October 2018
Letter by Fasttrack	Ms Julia Clara Fasttrack's letter to the Members of the Arbitral Tribunal dated 3 October 2018
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NOA	Notice of Arbitration dated 31 July 2018
p./pp.	Page/pages

Parties	Phar Lap Allevamento and Black Beauty Equestrian
PO1	Procedural Order No 1 dated 5 October 2018
PO2	Procedural Order No 2 dated 2 November 2018
Respondent	Black Beauty Equestrian
Tariff	30 per cent tariff imposed by Equatoriana on products of Mediterraneo
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollars
v	Versus

TABLE OF AUTHORITIES

Texts, Commentaries and Opinions

Cited as	Reference
AC Opinion No. 7	GARRO M. Alejandro, CISG Advisory Council Opinion No. 7, *Exemption of Liability for Damages Under Article 79 of the CISG* (2007) Accessible at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (consulted on 23 January 2019) Cited in: ¶ 101
Anderson/Schroeter	ANDERSON B Camilla, SCHROETER G Ulrich, *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy Simmonds & Hill (2008) Cited in: ¶ 100
Berger, Power of Arbitrators	BERGER K Peter, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense* in: 17(1) Arbitration International Vol 17 No. 1 (2001) Cited in: ¶¶ 27, 30, 35, 36, 37
Berger, Evidentiary Privileges	BERGER Klaus Peter, *Evidentiary Privileges: Best Practice Standards versus/ and Arbitral Discretion* in: 22 Arbitration International (2006), pp. 501–520 Cited in: ¶ 13
Berger, Re-examining the Arbitration Agreement	BERGER Klaus Peter, *Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?* in: Albert Jan van den Berg, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series Volume 13, Kluwer Law International (2007) Cited in: ¶¶ 18, 19

Bernardini, Arbitration Clauses	BERNARDINI Piero, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause* in: Albert Jan van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards, 40 Years of Application of the New York Convention*, ICCA Congress Series no. 9 (1999) Cited in: ¶ 19
Bernardini, Stabilization and Adaptation	BERNARDINI Piero, *Stabilization and Adaptation in Oil and Gas Investments* in: Journal of World Energy Law & Business, 2008, Vol. 1, No. 1, pp. 98–112 Cited in: ¶ 35
Blair/Gojković	BLAIR Cherie and GOJKOVIĆ Ema Vidak, *WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence* in: ICSID Review, Vol. 33, No. 1 (2018), pp. 235–259 Cited in: ¶¶ 53, 58
Bianca/Bonell	BIANCA C Massimo, BONELL Joachim Michael, *Commentary on the International Sales Law: the 1980 Vienna Sales Convention,* Giuffrè: Milan (1987) Cited in: ¶¶ 90, 95
Born, International Commercial Arbitration	BORN B Gary, *International Commercial Arbitration*, 2nd Edition, Kluwer Law International (2014) Cited in: ¶¶ 19, 31, 32, 36, 48
Born, Law Governing International Arbitration Agreements	BORN B Gary, *The Law Governing International Arbitration Agreements* in: 26 Singapore Academy of Law Journal (2014), pp. 814–848 Cited in: ¶ 19

Boykin/Havalic	BOYKIN J H and HAVALIC M, *Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration* in: 12(5) Transnational Dispute Management (2015) Accessible at: www.transnational-dispute-management.com (consulted on 23 January 2019) Cited in: ¶ 54
Brandner	BRANDNER Gert, *Admissibility of Analogy in Gap-filling under the CISG* in: Pace Law School Institute of International Commercial Law (1999) Accessible at: http://www.cisg.law.pace.edu/cisg/biblio/brandner.html (consulted on 23 January 2019) Cited in: ¶ 100
Briggs, The Conflict of Laws	BRIGGS Adrian, *The Conflict of Laws*, 2nd Edition, Oxford University Press (2008) Cited in: ¶ 25
Briggs, Agreements on Jurisdiction and Choice of Law	BRIGGS Adrian, *Agreements on Jurisdiction and Choice of Law*, Oxford University Press (2008) Cited in: ¶ 24
Brown	BROWN Chester, *The Inherent Powers of International Courts and Tribunals* in: 76 British Yearbook of International Law (2006), pp. 195– 244 Cited in: ¶ 52
Brunner	BRUNNER Christoph, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration*, Kluwer Law International (2009) Cited in: ¶¶ 32, 35, 65, 84, 86, 95, 103, 106, 107

Bund	BUND M Jennifer, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner* in: 17 Journal of Law and Commerce (1998), pp. 381– 413 Cited in: ¶ 95
Brown/Miles	BROWN Chester, MILES Kate, *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press (2011) Cited in: ¶ 55
Chitty	BEALE G Hugh, *Chitty on Contracts, Vol. I*, 31st Edition, Sweet & Maxwell (2012) Cited in: ¶¶ 17, 42
Craig/Park/Paulsson	CRAIG L William, PARK William, PAULSSON Jan, *International Chamber of Commerce Arbitration*, 3rd Edition, Oceana (2000) Cited in: ¶ 30
Cremades/Cortes	CREMADES M Bernado, CORTES Rodrigo, *The Principle of Confidentiality in Arbitration: A Necessary Crisis* in: 23 Journal of Arbitration Studies (2013), pp. 25–38 Cited in: ¶ 55
CISG Official Records	United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, United Nations (1991) Cited in: ¶ 101
Dalhuisen	DALHUISEN H Jan, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law,* Volume 2, Hart (2010) Cited in: ¶ 85
Dawwas	DAWWAS Amin, *Alteration of the Contractual Equilibrium under the UNIDROIT Principles* in: Pace International Law Review Online Companion (2012), pp. 1–28 Cited in: ¶ 105

DiMatteo	DIMATTEO A Larry, *Contractual Excuse Under the CISG - Impediment, Hardship, and the Excuse Doctrines* in: 25 Pace International Law Review (2015), pp. 258–305 Cited in: ¶ 101
Doudko	DOUDKO G Alexei, *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia* in: 5 Uniform Law Review, pp. 483–509 Cited in: ¶¶ 42, 84, 105
Faruque	FARUQUE Al Abdullah, *Possible Role of Arbitration in the Adaptation of Petroleum Contracts by Third Parties* in: 2(2) Asian International Arbitration Journal (2006), pp. 151–162 Cited in: ¶ 27
Fasching	FASCHING Hans, *Zivilprozessrecht – Lehrbuch- und Handbuch* in: Klausegger Christian, Klein Peter, *Austrian Yearbook on International Arbitration 2014*, Manz'sche Verlags- und Universitätsbuchhandlung (2014) Cited in: ¶ 27
Ferrari	FERRARI Franco, *Remarks on the UNCITRAL Digest's Comments on Article 6 CISG* in: 25 Journal of Law and Commerce (2005-06), pp. 13–37 Cited in: ¶ 90
Ferrario	FERRARIO Pietro, *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators* in: International Arbitration Law Library, Vol 41, Kluwer Law International (2017) Cited in: ¶ 35

Flambouras	FLAMBOURAS Dionysios, *The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1989 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis* in: 13 Pace International Law Review (2001), pp. 261–293 Cited in: ¶¶ 65, 95
Fucci	FUCCI R Frederick, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts* in: American Bar Association Section of International Law (2006) Cited in: ¶ 84
Gabriel	GABRIEL Henry*, International Chamber of Commerce Incoterms 2000: A Guide to Their Terms and Usage* in: 5 Vindobona Journal of International Commercial Law & Arbitration (2001), pp. 41–73. Cited in: ¶ 80
Gaillard/Savage	GAILLARD Emmanuel, SAVAGE John, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International (1999) Cited in: ¶¶ 13, 18, 24, 26, 32, 48
Garro, CISG Comparison	GARRO M Alejandro, *Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)* in: Pace Law School Institute of International Commercial Law (2005) Accessible at: https://cisgw3.law.pace.edu/cisg/text/anno-art-79.html#uni (consulted on 23 January 2019) Cited in: ¶ 93

Garro, UNIDROIT Gap Filling Role	GARRO M Alejandro, *Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG* in: 69 Tulane Law Review (1994-1995), pp. 1149–1190 Cited in: ¶ 101
Girsberger/Zapolskis	GIRSBERGER Daniel, ZAPOLSKIS Paulius, *Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption*, in: Jurisprudence (2012), pp. 121–141 Cited in: ¶¶ 85, 86
Glick/Venkatesan	GLICK Ian and VENKATESAN Niranjan, *Choosing the Law Governing the Arbitration Agreement* in: Neil Kaplan and Michael J Moser, *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, Kluwer Law International (2018) Cited in: ¶ 20
Gorman	GORMAN Francis J, ALEXANDER Bruce E, SCHELLER Douglas M, *Exculpatory and Limitation of Liability Provisions in Terminal Operator Tariffs* in: 13 Journal of Maritime Law and Commerce (1982), pp. 407–454 Cited in: ¶ 42
Harisankar	HARISANKAR K S, *International Commercial Arbitration in Asia and the Choice of Law Determination* in: 30 Journal of International Arbitration (2013), pp. 621–636 Cited in: ¶ 13
Harrison	HARRISON L Jeffrey, *A Case for Loss Sharing* in: 56 Southern California Law Review (1983), pp. 573–601 Cited in: ¶ 107

Hilgard/Bruder	HILGARD Mark and BRUDER Ana, *Unauthorised Amiable Compositeur* in: Dispute Resolution International, Volume 8 No 1 (May 2014), pp. 51–62 Cited in: ¶ 37
Hillman	HILLMAN A Robert, *Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law* in: Duke Law Journal, Volume 1 (1987), pp. 1–33 Cited in: ¶ 107
Honnold	HONNOLD O John, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention with Introductions and Explanations*, Springer (1989) Cited in: ¶ 101
Honnold/Flechtner	HONNOLD O John, FLECHTNER M Harry, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th Edition, Kluwer Law International (2009) Cited in: ¶ 91
Ishida	ISHIDA Yasutoshi, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness – Full of Sound And Fury, but Signifying Something* in: 30 Pace International Law Review (2018), pp. 331–382 Cited in: ¶ 101
Kelley	KELLEY D Jay, *So What's Your Excuse - An Analysis of Force Majeure Claims* in: 2 Texas Journal of Oil Gas & Energy Law 91 (2007), pp. 91–124 Cited in: ¶ 42

Kankkunen	KANKKUNEN Juho, *Document Production under the IBA Rules on the Taking of Evidence in International Arbitration* Cited in: ¶ 61
Kessedjian	KESSEDJIAN Catherine, *Competing Approaches to Force Majeure and Hardship* in: 25 International Review of Law and Economics (2005), pp. 641-670 Cited in: ¶ 101
Kröll	KRÖLL Michael Stefan, *Contractual Gap Filling by Arbitration Tribunals* in: 1 International Arbitration Law Review (1999), pp. 9–16 Cited in: ¶ 26
Leciercq	LECIERCQ Herve, *Force Majeure in Chinese Commercial Law* in: 7 Journal of Energy & Natural Resources Law 238 (1989), pp. 238–241 Cited in: ¶ 42
Lew/ Mistelis/ Kröll	LEW Julian D M, MISTELIS A Loukas, and KRÖLL M Stefan, *Comparative International Commercial Arbitration*, Kluwer Law International (2003) Cited in: ¶ 25
Lewison	Sir LEWISON Kim, *The Interpretation of Contracts*, 5th Edition, Sweet & Maxwell (2011) Cited in: ¶ 31
Lindström	LINDSTRÖM Niklas, *Changed Circumstances and Hardship in the International Sale of Goods* in: 1 Nordic Journal of Commercial Law (2006), pp. 1–29 Cited in: ¶¶ 65, 95

Ma/Brock	MA Geoffrey and BROCK Denis, *Arbitration in Hong Kong: A Practical Guide*, 3rd Edition, Sweet & Maxwell (2014) Cited in: ¶ 47
Maskow	MASKOW Dietrich, *Hardship and Force Majeure* in: 40 American Journal of Comparative Law (1992), pp. 657–669 Cited in: ¶ 42
Monberg	MONBERG Christian, *The UNIDROIT Principles The Ugly Duckling of Gap-Filling Instruments under the CISG* in: Pace Law School Institute of International Commercial Law (2001) Accessible at: http://cisgw3.law.pace.edu/cisg/biblio/monberg.html (consulted on 23 January 2019) Cited in: ¶ 100
Motulsky	MOTULSKY Henri, *Ecrits-Vol. 2 - Etudes et Notes sur l'arbitrage*, Dalloz (1974) in: Emmanuel Gaillard, John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International (1999) Cited in: ¶ 26
Münch	MÜNCH Joachim, *Münchener Kommentar zur Zivilprozessordnung* in: Klausegger Christian, Klein Peter, *Austrian Yearbook on International Arbitration 2014*, Manz'sche Verlags- und Universitätsbuchhandlung (2014) Cited in: ¶ 27
Mustill/Boyd	Sir MUSTILL J Michael, BOYD C Steward, *Commercial Arbitration*, 2nd Edition, Butterworths (1989) Cited in: ¶ 26

Nicholas	NICHOLAS Barry, *Force Majeure and Frustration* in: 27 American Journal of Comparative Law (1979), pp. 231–245 Cited in: ¶ 42
O'Malley	O'MALLEY D Nathan, *Rules of Evidence in International Arbitration: An Annotated Guide*, Informa (2012) Cited in: ¶¶ 49, 50, 56, 62, 64
Perillo	PERILLO M Joseph, *Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts* in: 5 Tulane Journal of International & Comparative Law (1997), pp. 5–28 Cited in: ¶ 105
Raeschke-Kessler	RAESCHKE-KESSLER Hilmar, *The Production of Documents in International Arbitration: A Commentary on Article 3 of the New IBA Rules of Evidence* in: Arbitration International, Vol 18, Issue 4 (2002), p. 427 Cited in: ¶¶ 62, 64
Ramberg	RAMBERG Christina, *Problems Legal Practitioners Face in Finding the Law Relating to CISG – Hardship, Defective Goods and Standard Terms* in: 57 Scandinavian Studies in Law (2012), pp. 283–291 Cited in: ¶ 95
Redfern/Hunter, International Arbitration	BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *Redfern and Hunter on International Arbitration*, 6th Edition, Oxford University Press (2015) Cited in: ¶¶ 25, 26, 35, 60
Redfern/Hunter, Law and Practice	REDFERN Alan and HUNTER Martin, *Law and Practice of International Commercial Arbitration*, 4th Edition, Sweet & Maxwell (2004) Cited in: ¶ 20

Rimke	RIMKE Joern, *Force Majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* in: Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000) Cited in: ¶ 101
Ross	ROSS Alison, *Tribunal rules on admissibility of hacked Kazakh emails* in: Global Arbitration Review (22 Sep 2015) Cited in: ¶¶ 51, 58
Schlechtriem	SCHLECHTRIEM Peter, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz (1986) Cited in: ¶¶ 91, 93
Schlechtriem/Schwenzer	*Commentary on the UN Convention on the International Sale of Goods (CISG),* 4th Edition, Oxford University Press (2016) Cited in: ¶¶ 38, 40, 65, 95, 100
Schreiber	SCHREIBER Eric, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel – A Doctrine Precluding Inconsistent Positions* in: 30 Loyola of Los Angeles Law Review (1996), pp. 323–359 Cited in: ¶ 48
Schwenzer	SCHWENZER Ingeborg, *Force Majeure and Hardship in International Sales Contracts* in: 39 Victoria University of Wellington Law Review (2009), pp. 709–725 Cited in: ¶¶ 84, 106

Sim	SIM Disa, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* in: Pace Law School Institute of International Commercial Law (2001) Accessible at: https://www.cisg.law.pace.edu/cisg/biblio/sim1.html#* (consulted on 23 January 2019) Cited in: ¶ 100
Slater	SLATER D Scott, *Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG* in: 12 Florida Journal of International Law (1998), pp. 231–262 Cited in: ¶ 101
Smeureanu	SMEUREANU Ileana M, *Confidentiality in International Commercial Arbitration*, Kluwer Law International (2011) Cited in: ¶ 55
Sourgens/Duggal/Laird	SOURGENS Frédéric G., DUGGAL Kabir, LAIRD Ian A., *Evidence in International Investment Arbitration*, Oxford University Press (2018) Cited in: ¶ 56
Uribe	URIBE Rodrigo Momberg, *The Duty to Renegotiate an International Sales Contract in Case of Hardship – International Case Note* in: 1 European Review of Private Law (2011), pp. 119–135 Cited in: ¶ 85
UNCITRAL CISG DIGEST	United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations (2012) Cited in: ¶¶ 15, 41, 49, 75, 76

UNCITRAL YB 1974	United Nations Commission on International Trade Law, *Yearbook Volume V: 1974*, United Nations (1975) Cited in: ¶ 93
UNCITRAL YB 1977	United Nations Commission on International Trade Law, *Yearbook Volume VIII: 1977*, United Nations (1979) Cited in: ¶ 93
Van den Berg	VAN DEN BERG Jan Albert, *The New York Arbitration Convention of 1958 (1981): Towards a Uniform Judicial Interpretation,* Kluwer Law International (1981) Cited in: ¶ 36
Veneziano	VENEZIANO Anna, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court* in: Uniform law Review Vol. 15 Issue 1 (2010), pp. 137–149 Cited in: ¶ 101
Viscasillas	VISCASILLAS Pilar Perales, *Interpretation and gap-filling under the CISG: contrast and convergence with the UNIDROIT Principles* in: 22 Uniform law Review (2017), pp. 19–24 Cited in: ¶ 101
Vogenauer	VOGENAUER Stephan, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd Edition, Oxford University Press (2015) Cited in: ¶¶ 72, 84, 103
Wälde	WÄLDE W Thomas*, "Equality of Arms" in Investment Arbitration: Procedural Challenges* in: Arbitration Under International Investment Agreements: A Guide to the Key Issues, Oxford University Press (2010) Cited in: ¶ 52

Winship	WINSHIP Peter, *The Scope of the Vienna Convention on International Sales Contracts* in: Matthew Bender, International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Juris (1984) Cited in: ¶ 90
Wallach	WALLACH George, *Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability* in: 55 Notre Dame Law Review (1979), pp. 203–230 Cited in: ¶ 42
Zeiler	ZEILER Gerold, BEISTEINER Lisa, SCHIFFERL Markus, SIWY Alfred, *Austrian Arbitration Law*, NWV Verlag BmbH (2016) Cited in: ¶ 49
Zeller	ZELLER Bruno, *Good Faith – The Scarlet Pimpernel of the CISG* in: 6 International Trade & Business Law (2001), pp. 227-245 Cited in: ¶ 95

Arbitral Awards

Cited as	**Reference**
Ad-Hoc Tribunals	
ARAMCO Award	*Saudi Arabia v Arabian American Oil Company (ARAMCO)* 23 August 1958 Cited in: ¶ 17
Himpurna California	*Himpurna California Energy Ltd. (Bermuda) v PT (Persero) Perusahaan Listruik Negara* 4 May 1999 in: *Yearbook Commercial Arbitration (2000)* Cited in: ¶ 84
Methanex (2005)	*Methanex Corporation v United States of America* Final Award of the Tribunal on Jurisdiction and Merits 3 August 2005 Accessible at: https://www.italaw.com/cases/683 (consulted on 23 January 2019) Cited in: ¶¶ 48, 50, 53, 54
Câmara FGV de Conciliação e Arbitragem	
Delta Comercializadora	*Delta Comercializadora de Energia Ltda v AES Infoenergy Ltda* Case No. N 1/2008 9 February 2009 Accessible at: http://www.unilex.info/case.cfm?pid=1&do=case&id=1530&step=Abstract (consulted on 23 January 2019) Cited in: ¶ 107

Cairo Regional Centre of International Commercial Arbitration	
CRCICA Case No. 29 (1995)	CRCICA Case No. 29, Award No. 64/1995 24 September 1996 in: Mohie Eldin, I Alam Eldin, *Arbitral Awards of the Cairo Regional Centre of International Commercial Arbitration*, The Hague (2000) Cited in: ¶ 17
Court of Arbitration for Sport	
Fusimalohi	*Ahongalu Fusimalohi v Fédération Internationale de Football Association* Case No. CAS 2011/A/2425 8 March 2012 Accessible at: http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/97.pdf (consulted on 23 January 2019) Cited in: ¶ 53
Valverde	*Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano (CONI)* Case No. CAS 2009/A/1879 16 March 2010 Cited in: ¶ 53
International Centre for Settlement of Investment Disputes (ICSID)	
Autopista	*Autopista Concesionada de Venezula, CA v Bolivarian Republic of Venezula* ICSID Case No. ARB/00/5 27 September 2001 Accessible at: https://www.italaw.com/cases/3458 (consulted on 23 January 2019) Cited in: ¶ 95

Caratube	*Caratube International Oil Company and Mr Devincci Saleh Hourani v Kazakhstan* ICSID Case No. ARB/13/13 27 September 2017 (unpublished) Cited in: ¶ 58
CMS Gas	*CMS Gas Transmission Company v The Argentine Republic* ICSID Case No. ARB/01/8 12 May 2005 Accessible at: https://www.italaw.com/cases/288 (consulted on 23 January 2019) Cited in: ¶ 107
EDF (PO3, 2008)	*EDF (Services) Ltd v Romania* ICSID Case No. ARB/05/13 Procedural Order No 3 29 August 2008 Accessible at: https://www.italaw.com/cases/375 (consulted on 23 January 2019) Cited in: ¶¶ 48, 50, 53
Libananco (Preliminary Issues, 2008)	*Libananco Holdings Co Ltd v Turkey* ICSID Case No. ARB/06/8 Decision on Preliminary Issues 23 June 2008 Accessible at: https://www.italaw.com/cases/626 (consulted on 23 January 2019) Cited in: ¶ 52

Merrill & Ring Forestry	*Merrill & Ring Forestry LP v The Government of Canada* ICSID Case No. UNCT/07/1 Decision on Production of Documents 18 July 2008 Accessible at: https://www.italaw.com/cases/669 (consulted on 23 January 2019) Cited in: ¶ 56
International Chamber of Commerce	
ICC Case No. 1000 (2006)	ICC Case No. 1000 of 2006 in: Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, Informa (2012) (unpublished) Cited in: ¶ 56
ICC Case No. 1507	ICC Case No. 1507 in: Sigvard Jarvin, Yves Derains, *Collection of ICC Arbitral Awards 1974–1985*, Kluwer (1990) Cited in: ¶ 19
ICC Case No. 2508 (1976)	ICC Case No. 2508 (1976) in: Collection of ICC Awards I Cited in: ¶ 84
ICC Case No. 4237 (1984)	ICC Case No. 4237 (1984) 17 February 1984 in: *Yearbook Commercial Arbitration* (1985) Cited in: ¶ 13
ICC Case No. 5754 (1988)	ICC Case No. 5754 (1988) in: Peter K Berger, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense* 17(1) Arbitration International Vol 17 No. 1 (2001) Cited in: ¶ 30

ICC Case No. 8486 (1999)	ICC Case No. 8486 in: *Yearbook Commercial Arbitration* (1999) Cited in: ¶¶ 48, 107
ICC Case No. 11333 (2002)	*Machine case* ICC Case No. 11333 (2002) Accessible at: http://cisgw3.law.pace.edu/cases/021333i1.html (consulted on 23 January 2019) Cited in: ¶ 90
ICC Case No. 14581 (2012)	ICC Case No. 14581 (2012) in: *Yearbook Commercial Arbitration* (2012) Cited in: ¶¶ 13, 15
ICC Case No. 99994 (2001)	ICC Case No. 99994 (2001) December 2001 Accessible at: http://www.unilex.info/case.cfm?id=1062&step=Abstract (consulted on 23 January 2019) Cited in: ¶ 86
ICC Case (2003)	Unpublished award dated 10 March 2003 in: *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's L Rep 603 Cited in: ¶ 19
Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange	
Cargo Ship Case	*Contractor v Shipbuilder* 20 September 1975 in: *Yearbook Commercial Arbitration (1983)* Cited in: ¶ 84

Ukrainian Chamber of Commerce and Industry	
Corn Case	*Corn Case* Case No. 218y/2011 23 January 2012 Accessible at: http://cisgw3.law.pace.edu/cases/120123u5.html (consulted on 23 January 2019) Cited in: ¶ 90

National Court Cases

Cited as	Reference
Austria	
OGH, Ob 35/05a	Austrian Supreme Court Case No. 3 Ob 35/05a Cited in: ¶ 49
Pharmacy Lease Case	Austrian Supreme Court (Oberster Gerichtshof) *Pharmacy Lease Case* Case No. 1 Ob 504/85 Cited in: ¶ 27
Propane Case	Austrian Supreme Court (Oberster Gerichtshof) *Propane Case* Case No. 10 Ob 518/95 6 February 1996 Accessible at: http://cisgw3.law.pace.edu/cases/960206a3.html (consulted on 23 January 2019) Cited in: ¶ 76
Tantalum Powder Case	Austrian Supreme Court (Oberster Gerichtshof) *Tantalum Power Case* Case No. 7 Ob 175/05v 17 December 2003 Accessible at: http://cisgw3.law.pace.edu/cases/031217a3.html (consulted on 23 January 2019) Cited in: ¶ 76

Belgium	
Frozen Raspberries Case	Belgian District Court (Rechtbank van Koophandel, Hasselt) *Vital Berry Marketing NV v Dira-Frost NV* Case No. AR 1849/94 2 May 1995 Accessible at: http://cisgw3.law.pace.edu/cases/950502b1.html (consulted on 23 January 2019) Cited in: ¶¶ 91, 93
Scafom International Case	Belgian Supreme Court (Hof van Cassatie) *Scafom International BV v Lorraine Tubes S.A.S* Case No. C.07.0289.N 19 June 2009 Accessible at: http://cisgw3.law.pace.edu/cases/090619b1.html (consulted on 23 January 2019) Cited in: ¶ 85
European Union	
Dombo Beheer BV	European Court of Human Rights *Dombo Beheer BV v The Netherlands* Case No. 14448/88 27 October 1993 Cited in: ¶ 49
France	
Aita	Paries Court of Appeal (Paris Cour d'appel) *Aita v Ojjeh* 18 February 1986 Cited in: ¶ 60

Cámara Agraria	France Court of Appeal (Cour d'appel) *Société Cámara Agraria Provincial de Guipuzcoa v André Margaron* Case No. 93/2821 29 March 1995 Cited in: ¶ 75
Germany	
Machinery Case	Federal Supreme Court of Germany (Bundesgerichshof) *Machinery Case* Case No. VIII ZR 60/1 31 October 2001 Accessible at: http://cisgw3.law.pace.edu/cases/011031g1.html (consulted on 23 January 2019) Cited in: ¶ 15
Metalic Slabs Case	District Court Landshut *Metalic Slabs Case* 12 June 2008 Case No. 43 O 1748/07 Accessible at: http://cisgw3.law.pace.edu/cases/080612g2.html (consulted on 23 January 2019) Cited in: ¶ 70
Shop Furnishing Case	Appellate Court Schleswig *Shop Furnishing Case* 24 October 2008 Case No. 14 U 4/08 Accessible at: http://cisgw3.law.pace.edu/cases/081024g1.html (consulted on 23 January 2019) Cited in: ¶ 70

Italy	
Nuova Fucinati	Tribunale Civile di Monza *Nuova Fucinati S.p.A. v Fondmetal International A.B.* 14 January 1993 Accessible at: http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=Abstract (consulted on 23 January 2019) Cited in: ¶¶ 84, 93
Singapore	
Firstlink	High Court *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12 19 June 2014 Cited in: ¶ 20
Wee Shuo Woon	Court of Appeal *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 30 March 2017 Cited in: ¶¶ 50, 58
Tjong Very Sumito	Court of Appeal *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 26 August 2009 Cited in: ¶ 32

Switzerland	
Chemical Products Case	Supreme Court (Bundesgericht) *Chemical Products Case* Case No. 4C.474/2004 5 April 2005 Accessible at: http://cisgw3.law.pace.edu/cases/050405s1.html (consulted on 23 January 2019) Cited in: ¶ 38
Packaging Machine Case	Appellate Court (Basel-Stadt) *Packaging Machine Case* Case No. 16/2007/MEM/chi 26 September 2008 Accessible at: http://cisgw3.law.pace.edu/cases/080926s1.html (consulted on 23 January 2019) Cited in: ¶ 38
Roland Schmidt Case	Federal Supreme Court *Roland Schmidt GmbH v Textil-Werke Blumenegg AG* Case No. 4C.296/2000/rnd 22 December 2000 Accessible at: http://cisgw3.law.pace.edu/cases/001222s1.html (consulted on 23 January 2019) Cited in: ¶ 41

Welding Devices Case	Appellate Court Valais *Welding devices case* Case No. C1 04 33 27 May 2005 Accessible at: http://cisgw3.law.pace.edu/cases/050527s1.html (consulted on 23 January 2019) Cited in: ¶ 70
United Kingdom	
Arsanovia	High Court of Justice (Queen's Bench Division, Commercial Court) *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* Case No. 2012-1047 20 December 2012 Cited in: ¶ 13
Dolling-Baker	Court of Appeal *Dolling-Baker v Merrett* [1991] 2 All ER 890 21 March 1990 Cited in: ¶ 60
Mottram Consultants	House of Lords *Mottram Consultants Ltd v Sunley (Bernard) & Sons Ltd* [1975] 2 Lloyd's Rep 197 13 November 1974 Cited in: ¶ 31
Overseas Union	High Court of Justice (Queen's Bench Division, Commercial Court) *Overseas Union Insurance Ltd. v AA Mutual International Insurance Co. Ltd.* [1988] 2 Lloyd's Rep 63 21 January 1988 Cited in: ¶ 31

Bancoult Case	Court of Appeal (Civil Division) *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708 23 May 2014 Cited in: ¶ 58
Punjab National Bank	Court of Appeal (Civil Division) *Punjab National Bank v de Boinville* [1992] 1 WLR 1138 17 May 1991 Cited in: ¶ 31
Sulamérica	Court of Appeal (Civil Division) *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* Case No. A3/2012/0249 16 May 2012 Cited in: ¶¶ 20, 24
Westacre	High Court of Justice (Queen's Bench Division, Commercial Court) W*estacre Investments Inc. v Jugoimport-Spdr Holding Co Ltd* [1999] Q.B. 740 19 December 1997 Cited in: ¶ 19
X Ltd	High Court of Justice (Queen's Bench Division, Technology & Construction Court) *X Ltd v Y Ltd* [2005] EWHC 769 22 March 2005 Cited in: ¶ 32

United States of America	
Pennzoil	United States Court of Appeals, Fifth Circuit *Pennzoil Exploration & Prod Co v Ramco Energy Ltd* Case No. 139 F.3d 1061, 1068 (5th Cir. 1998) 13 May 1998 Cited in: ¶ 32
Seifert	Supreme Court of Florida *Patricia Seifert v U.S. Home Corporation* Case No. 750 So. 2d. 633, 636 (Fla. 1999) 18 November 1999 Cited in: ¶ 31

Others

Cited as	**Reference**
ICC Hardship Clause	International Chamber of Commerce 2003 Hardship clause Accessible at: https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/ (consulted on 23 January 2019) Cited in: ¶¶ 39, 78
INCOTERMS 2010	INCOTERMS 2010 Edition DDP Clause in: Jan Ramberg, *ICC Guide to Incoterms 2010 – Understanding and practical use*, International Chamber of Commerce (2011) (consulted on 23 January 2019) Cited in: ¶¶ 80, 109
UNCITRAL Model Law Explanatory Note	UNCITRAL Model Law Explanatory Note United Nations Commission on International Trade Law Accessible at: http://www.uncitral.org/pdf/english/texts/arbitration/mlarb/MLARB-explanatoryNote20-9-07.pdf (consulted on 23 January 2019) Cited in: ¶¶ 19, 37
UN Doc. A/CN.9/263	United Nations Commission on International Trade Law, Commission Documents, *Analytical compilation of comments by Governments and International Organizations on the draft text of a Model Law on International Commercial Arbitration* Accessible at: http://undocs.org/en/A/CN.9/263 (consulted on 23 January 2019) Cited in: ¶ 26

Rules, Statutes and Treaties

Cited as	Reference
Canada Criminal Code	Canada, *Canada Criminal Code* (1985)
CISG	United Nations Commission on International Trade Law, *United Nations Convention on Contracts for the International Sale of Goods* (1980)
Hague Principles	Hague Conference on Private International Law, *Hague Principles on Choice of Law in International Commercial Contracts* (2015)
HKIAC Rules 2013	Hong Kong International Arbitration Centre, *HKIAC Administered Arbitration Rules* (2013)
HKIAC Rules 2018	Hong Kong International Arbitration Centre, *HKIAC Administered Arbitration Rules* (2018)
IBA Rules	International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010)
United States Code	United States, *Title 18 United States Code* (1948)
UK Theft Act	United Kingdom, *Theft Act 1968* (1968)
UNCITRAL Model Law	United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (With amendments as adopted in 2006)* (1985)
UNIDROIT Principles	International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2016)
New York Convention	United Nations Commission on International Trade Law, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958)

STATEMENT OF FACTS

1 The parties to the arbitration are Phar Lap Allevamento ("**Claimant**") and Black Beauty Equestrian ("**Respondent**"; together the "**Parties**"). The Claimant operates a stud farm in Mediterraneo, and the Respondent breeds horses in Equatoriana. On 21 March 2017, the Respondent contacted the Claimant to purchase frozen horse semen for the Respondent's breeding programme. The Parties entered into negotiations for the Frozen Semen Sales Agreement ("**Contract**"), with Ms Napravnik representing the Claimant and Mr Antley representing the Respondent.

2 As neither party wished the courts in the other party's country to have jurisdiction over contractual disputes, Mr Antley proposed an arbitration clause. He communicated the Respondent's intention for the law of the arbitral seat to govern the arbitration agreement. Ms Napravnik accepted the proposal with an amendment changing the arbitral seat from Equatoriana to Danubia. Unfortunately, Ms Napravnik and Mr Antley had an accident and could not finalise the Contract. Mr Ferguson and Mr Krone finalised the Contract for the Claimant and the Respondent respectively. They did not discuss the arbitration agreement but merely copied parts of the drafts in Ms Napravnik's and Mr Antley's correspondence.

3 Before the accident, the Parties had agreed to contract on a DDP basis using the INCOTERMS 2010. Additionally, Ms Napravnik had stated that the Claimant wanted a hardship clause to protect itself from risks of changes in health and safety requirements. After the accident, Mr Krone told Mr Ferguson that the ICC Hardship clause suggested by Ms Napravnik was too broad. The Parties therefore added a narrow hardship reference to the existing *force majeure* clause in the Claimant's standard form template.

4 On 6 May 2017, the Parties concluded the Contract for the Claimant to deliver 100 doses of horse semen, in three instalments, to the Respondent for US$100,000 per dose. The first two instalments were delivered without difficulty. On 15 November 2017, Mediterraneo announced a 25% tariff on agricultural products from Equatoriana. In retaliation, Equatoriana imposed a 30% tariff ("**Tariff**") on animal products from Mediterraneo.

5 On 20 January 2018, Ms Napravnik learned that the Tariff affected the third instalment and contacted the Respondent. Mr Shoemaker, a veterinary in charge of the Respondent's breeding programme, told Ms Napravnik that he understood the DDP terms to mean that the Claimant would bear the Tariff. He emphasised that his authority was limited and read

to Ms Napravnik a carefully written note to avoid making promises to adapt the Contract.

6 After shipping the third instalment on 23 January 2018, the Claimant requested payment for the Tariff. Since filing the Notice of Arbitration on 31 July 2018, the Claimant has heard of a Partial Interim Award ("**Award**") rendered in an unrelated arbitration regarding the Respondent's sale of a mare. Ignoring the confidentiality obligations protecting the Award, the Claimant has arranged to buy an unlawfully obtained copy from an intelligence company of doubtful repute and seeks to submit it before the Tribunal.

INTRODUCTION

7 When commercial entities represented by lawyers agree on the allocation of risk in their contract, they expect that their agreement will not be lightly altered. When they enter into a one-off sales contract to be performed within a year, they do not expect that it will be treated like a long-term contract. When one party agrees to a contract price giving it a slim profit margin, the other party does not expect to be saddled with the consequences of that margin vanishing. Yet, contrary to the Parties' expectations, the Claimant seeks to have the Tribunal rescue it from a bad bargain, disregarding the Parties' contractual agreement.

8 Disregarding the integrity of the arbitral process, the Claimant also seeks to submit an award obtained illegally from the other arbitration proceedings. As the evidence lacks sufficient relevance and materiality, its submission would only serve to prolong the arbitration proceedings at an unnecessary expense. In any event, the submission of such evidence would violate the fundamental principles of good faith and procedural fairness. Further, as the evidence is a confidential arbitral award, the Tribunal should be careful to avoid being seen to condone breaches of confidentiality obligations (**Issue II**).

9 The Parties' arbitration agreement does not authorise the Tribunal to adapt the Contract because the law of Danubia governs the arbitration agreement. This is because the Parties chose the law of Danubia. In any case, the law of Danubia, as the law of the arbitral seat, has the closest connection to the arbitration agreement. Interpreted according to the law of Danubia, the arbitration agreement does not give the Tribunal jurisdiction over the Parties' claim as to adaptation. Even if the law of Mediterraneo governs the arbitration agreement, the Tribunal has no jurisdiction over the claim because the Parties specifically narrowed

the scope of the arbitration agreement. Further, the Tribunal does not have the power of adaptation since neither the *force majeure* clause nor the arbitration agreement expressly confers such power as required by Danubian Arbitration Law (**Issue I**).

10 The Claimant is not entitled to an adaptation of the Contract on the basis of alleged hardship caused by the Tariff. The Claimant cannot claim an adaptation under Clause 12 of the Contract because Clause 12 provides only for termination, not adaptation; because the imposition of the Tariff is not within the scope of Clause 12; and because the effect of the Tariff is not sufficiently severe to constitute hardship under Clause 12. Neither can the Contract be adapted under the CISG since it does not provide for hardship and adaptation. Finally, the Claimant cannot rely on the UNIDROIT Principles. The concepts of hardship and adaptation in the UNIDROIT Principles cannot be used to supplement the CISG as they run counter to the legislative history of the CISG. In any case, the Tariff does not fulfil the requirements for hardship under the UNIDROIT Principles. Even if the Claimant is entitled to an adaptation of the Contract, it is only entitled to US$500,000 as it must bear a portion of the costs of the Tariff (**Issue III**).

ARGUMENT

I. THE ARBITRAL TRIBUNAL HAS NEITHER THE JURISDICTION NOR THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

11 The Tribunal does not have the jurisdiction or the power to adapt the Contract. Clause 15 of the Contract ("**Arbitration Agreement**") provides that disputes arising out of the Contract are to be resolved by arbitration [*Exh. C5, Clause 15, p. 14*]. Clause 14 of the Contract ("**Governing Law Clause**") states that "*[t]his Sales Agreement shall be governed by the law of Mediterraneo*" [*Exh. C5, Clause 14, p. 14*].

12 The Claimant argues that the Tribunal has the jurisdiction and the power to adapt the Contract on the basis that that the law of Mediterraneo governs the Arbitration Agreement [*Cl. Memo, ¶ 1*]. However, the Arbitration Agreement is governed by the law of Danubia (**A**). The Tribunal therefore does not have jurisdiction over the Parties' claim as to adaptation (**B**) or the power to adapt the Contract (**C**).

A. The law of Danubia governs the Arbitration Agreement and its interpretation

13 An arbitral tribunal is to ascertain the law governing the arbitration agreement based on the parties' choice [*Art. 4.1(1) UNIDROIT Principles; ICC Case No. 14581 (2012), pp. 71–72; Gaillard/Savage, p. 230*]. Where the parties have not expressly or implicitly chosen the governing law in their contract, the governing law is the law with the closest connection to the arbitration agreement [*Arsanovia, p. 5; ICC Case No. 4237 (1984), p. 55; Berger, Evidentiary Privileges, pp. 510–511; Harisankar, p. 635*]. The Parties chose the law of Danubia to govern the Arbitration Agreement (**1**). Even if the Parties did not choose a law to govern the Arbitration Agreement, the law of Danubia, as the law most closely connected to the arbitration, is the law governing the Arbitration Agreement (**2**).

1. The Parties chose the law of Danubia to govern the Arbitration Agreement and its interpretation

14 The Claimant relies on the Parties' negotiations to argue that they chose the law of Mediterraneo [*Cl. Memo, ¶¶ 5, 16*]. However, the negotiations show that the Parties could not have expressly chosen the law of Mediterraneo to govern the Arbitration Agreement (**i**). Rather, their negotiations and their choice of Danubia as the arbitral seat indicate an implied choice of the law of Danubia (**ii**).

i. The Parties did not expressly choose the law of Mediterraneo

15 The Claimant argues that the Parties expressly chose the law of Mediterraneo to govern the Arbitration Agreement as they understood the word "*Agreement*" in the Governing Law Clause to refer to all the clauses in the Contract, consistent with the ordinary meaning of "*agreement*" [*Cl. Memo, ¶¶ 4–6*]. However, the literal meaning of a word is not decisive [*ICC Case No. 14581 (2012)*]. As a part of the substantive contract, the Governing Law Clause is itself governed by the law of Mediterraneo, which includes the CISG [*Exh. C5, Clause 14, p. 14*]. Under Article 8(3) of the CISG, the clause is to be interpreted with due consideration to all relevant circumstances of the case including the negotiations between the parties [*Machinery Case, p. 7; UNCITRAL CISG Digest, p. 57*].

16 The Parties' negotiations show that they did not share an intention for the Governing Law Clause to be a choice of the law governing the Arbitration Agreement. Mr Antley's note after the Parties' discussion on 12 April 2017 stated that one issue for further negotiations

was to "*[c]larify in arbitration clause … applicable law*" [*Exh R3, p. 35*]. Since the basic industry template provided for the law governing the substantive provisions to be the law of Mediterraneo [*Exh C5, Clause 14, p. 14*], there would have been nothing to clarify had the Parties understood the Governing Law Clause to extend to the Arbitration Agreement.

17 This situation did not change when the Parties finalised the Contract. The intentions of contracting parties are to be determined when they enter into the contract [*ARAMCO, p. 172; CRCICA Case No. 29 (1995); Chitty, p. 932*]. When taking over the negotiations for the Respondent, Mr Krone read a note that Mr Antley had written in his negotiation file [*Exh. R3, p. 35*]. The meaning of the note was not completely clear to Mr Krone, who thought that it referred to clarifying the law applicable to the substantive contract [*Exh. R3, p. 35*]. Further, Mr Krone and Mr Ferguson did not discuss any amendments to the Governing Law Clause but rather copied it from the template [*PO2, p. 55, ¶ 6*]. As they did not even turn their minds to whether the Governing Law Clause extended to the Arbitration Agreement, they could not have made an express choice in the Governing Law Clause for the law of Mediterraneo to govern the Arbitration Agreement.

ii. The Parties implicitly chose the law of Danubia

18 As the Governing Law Clause refers to the law of Mediterraneo, the Claimant relies on a presumption that parties intend the same system of law to govern their substantive contract and their arbitration agreement to argue that the Parties made an implied choice of the law of Mediterraneo [*Cl. Memo, ¶ 15*]. However, a governing law clause in the substantive contract cannot be presumed to be a choice, whether express or implicit, of the law governing the arbitration agreement; this is because the parties will "*only very rarely*" consider the law applicable to the arbitration agreement when negotiating the governing law clause [*Berger, Re-examining the Arbitration Agreement, p. 320; Gaillard/Savage, p. 222*]. Consistent with this, the Parties did not even negotiate the Governing Law Clause but rather retained it from the Claimant's basic industry template [*Exh C5, Clause 14, p. 14; PO2, p. 55*].

19 Additionally, the presumption advocated by the Claimant disregards the doctrine of separability [*Born, Law Governing International Arbitration Agreements, p. 832*]. Under the doctrine of separability, parties are presumed to intend their arbitration agreement to be independent of and separable from the substantive contract for choice-of-law purposes

[*Born, International Commercial Arbitration, pp. 395, 479; UNCITRAL Model Law, Arts. 34(2)(a)(i), 36(1)(a)(i); UNCITRAL Model Law Explanatory Note, p. 30*]. As a consequence, while the law governing the substantive contract may govern the arbitration agreement, it does not do so automatically [*ICC Case (2003); ICC Case No. 1507, p. 216; Bernardini, Arbitration Clauses, p. 201*]. The rationale is that the promise to resolve disputes by international arbitration has a different nature from the parties' other commercial promises in the substantive contract; the arbitration agreement is an ancillary agreement with the specialised function of providing a dispute resolution mechanism distinct from the parties' substantive contract [*Westacre, p. 755; Berger, Re-examining the Arbitration Agreement, p. 319; Born, International Commercial Arbitration, p. 360*].

20 Even if there is a presumption that the same law governs the substantive contract and the arbitration agreement, the presumption is rebutted by the Parties' contractual negotiations coupled with their choice of Danubia as the seat of the arbitration. A choice of the law governing the substantive contract does not conclusively indicate the parties' intention as to the arbitration agreement [*Firstlink, p. 6; Sulamérica, p. 9*]. Rather, where the law of the seat governs the arbitral procedure and therefore governs many aspects of the arbitration agreement, the parties are taken to intend the whole arbitration agreement to be governed by that same law [*Glick/Venkatesan, p. 143; Redfern/Hunter, Law and Practice, p. 151*]. The Arbitration Agreement provides that the seat of arbitration shall be Vindobona, Danubia [*Exh. C5, Clause 15, p. 14*], and the Claimant acknowledges that the Danubian Arbitration Law governs the arbitral procedure [*Cl. Memo, ¶ 34*]. In selecting Danubia as the seat, the Parties intended the law of Danubia to govern all aspects of the Arbitration Agreement, including its interpretation.

21 The Claimant argues that the Parties implicitly chose the law of Mediterraneo to govern the Arbitration Agreement as they "*did not consider it critical*" to include a governing law provision for the final version of the Arbitration Agreement [*Cl. Memo, ¶ 16*]. However, Mr Ferguson and Mr Krone "*cannot remember with sufficient certainty*" why they did not include the governing law provision from Mr Antley's draft [*PO2, p. 55, ¶ 6*]. As they had a short time to finalise the Contract [*Exh. R3, p. 35*], this does not show that they did not consider such a provision critical.

22 The Claimant also relies on the Parties' negotiations to argue that they chose the law of Mediterraneo [*Cl. Memo, ¶ 5*]. However, the Parties' correspondence shows that they

envisaged the law of the seat governing the Arbitration Agreement. The Claimant relies on an email by Ms Napravnik [*Cl. Memo, ¶ 5*], and the preceding email by Mr Antley dated 10 April 2017 sets out his draft of the Arbitration Agreement [*Exh. R1, p. 33*]. It explicitly provided that Equatoriana would be the seat of arbitration and that the law of Equatoriana would govern the Arbitration Agreement [*Exh. R1, p. 33*]. Mr Antley explained that the Respondent considered the draft clause appropriate "*in light of the fact that the Sales Agreement is governed by the law of Mediterraneo*" [*Exh. R1, p. 33*]. This shows that the Respondent intended the Governing Law Clause to govern the substantive contract but not the Arbitration Agreement. In her reply on 11 April 2017, Ms Napravnik accepted the draft with only an amendment changing the seat of arbitration from Equatoriana to Danubia, on the condition that "*the law applicable to the Sales Agreements [sic] remains the law of Mediterraneo*" [*Exh. R2, p. 34*]. Her statement was consistent with Mr Antley's earlier statement that "*the Sales Agreement is governed by the law of Mediterraneo*" [*Exh. R1, p. 33*]; the Claimant did not contradict the Respondent's intention that the law of the seat was to govern the Arbitration Agreement.

23 Nothing in the subsequent negotiations changed the Parties' implied choice of the law of the seat. Mr Krone and Mr Ferguson did not discuss the Arbitration Agreement or the Governing Law Clause [*PO2, p. 55, ¶ 6*]. When they finalised the Contract, they combined the drafts in Mr Antley's email of 10 April 2017 and Ms Napravnik's email of 11 April 2017 [*PO2, p. 55, ¶ 6*]. To determine how to combine the drafts, they would likely have read the emails setting out the drafts. Thus, the law of Danubia, as the law of the seat [*Exh. C5, Clause 15, p. 14*], governs the Arbitration Agreement.

2. Alternatively, the law of Danubia, as the law of closest connection to the Arbitration Agreement, governs the Arbitration Agreement and its interpretation

24 In identifying the system of law with the closest connection to the arbitration agreement, the "*most significant*" factor is the seat of arbitration chosen by the parties [*Gaillard/Savage, p. 225*]. It is the courts of the seat that will exercise the supervisory jurisdiction necessary to ensure that the arbitral procedure is effective and that will determine the existence of the agreement in any proceedings to set aside the arbitral award [*UNCITRAL Model Law, Arts. 6, 34(2); Sulamérica, p. 11; Briggs, Agreements on Jurisdiction and Choice of Law, p. 406*]. An agreement to resolve disputes by arbitration in a given place in accordance with its arbitral law therefore has its closest juridical

connection to the law of the arbitral seat, not to the law governing the subject matter of the substantive contract that has a purpose unrelated to dispute resolution [*Sulamérica, p. 11*]. The Parties stipulated in the Arbitration Agreement that "*[t]he seat of arbitration shall be Vindobona, Danubia*" [*Exh. C5, Clause 15, p. 14*]. Consequently, the law of Danubia governs the Arbitration Agreement.

B. The Tribunal does not have jurisdiction over the Claimant's request for adaptation

25 Jurisdiction refers to the ability of a tribunal to hear and determine a dispute [*Briggs, The Conflict of Laws, p. 53; Redfern/Hunter, International Arbitration, p. 335*]. This is distinct from the powers of a tribunal to order relief such as adaptation [*Lew/Mistelis/Kröll, pp. 329, 652*]. The Claimant argues that the Tribunal has jurisdiction over its claim for adaptation [*Cl. Memo, ¶ 24*]. However, adaptation of a contract is a task that does not fall within the role of an arbitral tribunal (**1**). Alternatively, the Arbitration Agreement, whether interpreted according to the law of Danubia (**2**) or the law of Mediterraneo (**3**), does not extend to a claim as to adaptation.

1. Adaptation is a task beyond the role of an arbitral tribunal

26 The Claimant argues that the Arbitration Agreement is capable of extending to a claim for additional payment [*Cl. Memo, ¶ 25*]. However, adaptation involves rewriting the contract, which goes beyond the role of an arbitral tribunal. During the drafting of the UNCITRAL Model Law, it was recognised that "*the activity of the arbitral tribunal is concentrated on the interpretation and application of contractual agreements and legal provisions*" [*UN Doc. A/CN.9/263, p. 58*]. The tribunal may only determine the parties' pre-existing rights arising out of the contract because a defining characteristic of arbitration is its judicial character, which distinguishes it from other mechanisms such as conciliation, mediation, and settlement [*Kröll, p. 12; Mustill/Boyd, p. 41; Redfern/Hunter, International Arbitration, p. 24*]. The rewriting of a contract price is not a judicial act since there is neither a prior claim by one party for a breach of contract nor an assessment of that claim by a third party [*Motulsky, p. 47*].

27 The adaptation of a contract is a matter not for arbitration but for expert determination [*Pharmacy Lease Case; Fasching, p. 2168; Münch*]. A power to adapt is a power to modify rights and duties [*Faruque, p. 161*], so an arbitrator cannot decide a claim for adaptation unless authorised by the parties to act as *amiable compositeur* or rule *ex aequo*

et bono, *i.e.*, to decide the case based on equity and conscience [*Berger, Power of Arbitrators, p. 2*]. Since the Contract does not authorise the Tribunal to act as such, the Tribunal cannot decide a claim for adaptation.

2. Alternatively, under the governing law of Danubia, a request for adaptation falls outside the scope of the Arbitration Agreement

28 The Claimant argues that even if the arbitration agreement is interpreted under the law of Danubia, the Tribunal may rule on the issue of adaptation "*in spite of the lack of a specific provision in the [Contract] that empowers the Tribunal to do so*" [*Cl. Memo, ¶ 32*]. However, under Danubian Contract Law, arbitration agreements are interpreted narrowly [*PO1, p. 52, ¶ II*]. Further, in the telephone conference of 4 October 2018 with the Tribunal, the Parties agreed that, under Danubian Contract Law, there is a high likelihood that the Arbitration Agreement will not be interpreted as authorising the Tribunal to adapt the Contract [*PO1, p. 52, ¶ II*]. The Claimant cannot now argue otherwise.

3. Even if the law of Mediterraneo governs the Arbitration Agreement, a request for adaptation falls outside the scope of the Arbitration Agreement

29 The law of Mediterraneo provides that the CISG applies to the interpretation of arbitration clauses in sales contracts governed by the CISG [*PO1, p. 53, ¶ 4*]. Under Article 8 of the CISG, a contractual term is to be interpreted according to the parties' intentions. The Claimant argues that, under the law of Mediterraneo, the phrase "*disputes arising out of this contract*" in the Arbitration Agreement is capable of extending to a request for adaptation [*Cl. Memo, ¶ 25*]. However, the nature of the Contract and its clauses as well as the Parties' deletion of words in the HKIAC Model Clause indicate otherwise.

30 Given the principle of sanctity of contract, contracting parties are responsible to take precautions in their contracts against unforeseen circumstances and to bear the risk of changed circumstances where the contract does not refer to adaptation [*Berger, Power of Arbitrators, p. 9*]. The nature of the contract and its clauses are relevant to determining whether the parties intended their arbitration agreement to extend to issues of adaptation [*ICC Case No. 5754 (1988); Berger, Power of Arbitrators, p. 8; Craig/Park/Paulsson, p. 112*]. An arbitration agreement should be interpreted as extending to an adaptation where the contract is a long-term one containing provisions that may require adjustment over time as this gives effect to the parties' intentions regarding the purpose of the

agreement [*ICC Case No. 5754 (1988); Berger, Power of Arbitrators, p. 8; Craig/Park/Paulsson, p. 112*]. However, since the Contract is a one-off sales contract without provisions that may require adjustment over time [*Exh. C5, pp. 13–14*], the Arbitration Agreement cannot be interpreted to confer jurisdiction over a request for adaptation of the Contract.

31 Further, in determining whether there is a "*dispute*" within the scope of an arbitration agreement, reference must be had to the intention of the parties as expressed in the clause [*Overseas Union, p. 425; Seifert, p. 636; Born, International Commercial Arbitration, p. 1346*]. Where the parties have deliberately deleted words from a standard term, the deletion shows what the parties agreed to exclude from their contract [*Mottram Consultants, p. 209; Punjab National Bank; Lewison, pp. 79–80*]. The Respondent highlighted to the Claimant that the Arbitration Agreement deliberately "*narrowed down and streamlined a little the fairly broad wording of the [HKIAC Model Clause]*" [*Exh. R1, p. 33*], and the Claimant did not object to the narrower wording [*Exh. R2, p. 34*]. The Parties' intention to have a narrow arbitration agreement is apparent when the HKIAC Model Clause is compared to the Arbitration Agreement.

HKIAC Model Clause	Arbitration Agreement
Any dispute, **controversy, difference or claim** arising out of **or relating to** this contract, including the existence, validity, interpretation, performance, breach or termination thereof **or any dispute regarding non-contractual obligations arising out of or relating to it** shall be referred to and finally resolved by arbitration … [emphasis added]	Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration …

32 The Respondent deleted the phrase "*controversy, difference or claim*", retaining only the word "*dispute*". While "*dispute*" may be interpreted broadly [*Tjong Very Sumito, p. 757*], the deletion shows that the Parties understood "*dispute*" to have a different meaning from "*controversy, difference or claim*". A "*dispute*" exists only where the tribunal must make a decision regarding a claim by one party for a breach of contract or assess that claim [*Brunner, p. 494; Gaillard/Savage, p. 25*]. The Respondent also deleted "*relating to [the*

Contract]" and "*any dispute regarding non-contractual obligations arising out of or relating to it*". The phrase "*relating to*" extends to a broad range of claims encompassing non-contractual claims [*Pennzoil, p. 1068; X Ltd, p. 779; Born, International Commercial Arbitration, p. 1349*]. By deliberately omitting such broad phrases from the Arbitration Agreement [*Exh. C5, Clause 15, p. 14*], the Parties intended to exclude claims concerning non-contractual claims, such as the claim for increased payment in the present case. Consequently, the Parties did not confer on the Tribunal jurisdiction over the Claimant's present request for adaptation.

C. In any event, the Tribunal does not have the power to adapt the Contract

33 The Claimant argues that the Tribunal has the power to adapt the Contract [*Cl. Memo, ¶ 28*]. However, for the Tribunal to have the power of adaptation, the power must be expressly conferred as required by Danubian Arbitration Law (**1**). Clause 12 of the Contract does not expressly confer such power on the Tribunal (**2**). Further, whether the law of Danubia or the law of Mediterraneo governs the Arbitration Agreement, the Arbitration Agreement does not expressly confer the power of adaptation (**3**).

1. The Tribunal has the power of adaptation only if Danubian Arbitration Law authorises it

34 Article 28(3) of the Danubian Arbitration Law, which is identical to the UNCITRAL Model Law [*PO1, p. 53, ¶ 4; PO2, p. 60, ¶ 36*], constrains the Tribunal's powers. As interpreted by the Danubian courts, Article 28(3) provides that an arbitral tribunal shall adapt a contract "*only if the parties have expressly authori[s]ed it to do so*" [*Art. 28(3) UNCITRAL Model Law; PO2, p. 60, ¶ 36*].

35 Even if law of the substantive contract contains provisions on adaptation, such provisions have no effect unless the arbitration law confers procedural authority on the tribunal to adapt the contract when the substantive requirements for adaptation are fulfilled [*Bernardini, Stabilization and Adaptation, p. 107; Brunner, p. 493; Ferrario, p. 77*]. The rationale is that the tribunal derives its power to adapt the contract from two sources that must both confer the power of adaptation. One is the parties' arbitration agreement, the basic source of the tribunal's powers, as supplemented or restricted by the law governing the arbitration agreement; the other is the law applicable to the arbitration, which determines whether the tribunal is procedurally authorised to adapt the contract [*Berger, Power of Arbitrators, pp. 7–11; Redfern/Hunter, International Arbitration, pp. 308–309*].

36 The law applicable to the arbitration has the closest relationship to the arbitral process and questions concerning the tribunal's powers [*Born, International Commercial Arbitration, p. 3085*]. If the law applicable to the arbitration does not authorise the tribunal to adapt the contract, recognition or enforcement of an arbitral award adapting the contract may be refused under the New York Convention and the UNCITRAL Model Law because this law determines whether a decision constitutes an enforceable award [*Art. V(1)(d) New York Convention; Art. 36(2)(a)(iv) UNCITRAL Model Law; Berger, Power of Arbitrators, p. 10; Van den Berg, p. 46*]. Thus, the Danubian Arbitration Law empowers the Tribunal to adapt the Contract only if expressly authorised.

2. Clause 12 of the Contract does not expressly confer the power of adaptation as required by the Danubian Arbitration Law

37 Article 28(3) of the Danubian Arbitration Law requires parties to "*provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal*" [*UNCITRAL Model Law Explanatory Note, p. 34*]. Thus, for the tribunal to have express authorisation to adapt the contract, the authorisation must be "*unambiguous and absolutely certain*" [*Hilgard/Bruder, p. 56*]. The authorisation should clearly and precisely indicate the scope and extent to which adaptation should be effected [*Berger, Power of Arbitrators, p. 8*]. Although Clause 12 of the Contract refers to "*hardship*", for which adaptation is one possible remedy, the Claimant cannot rely on Clause 12 as an express authorisation for the Tribunal to adapt the Contract.

38 This is because the Parties did not intend Clause 12 to provide the remedy of adaptation. As a part of the substantive contract, Clause 12 is governed by the law of Mediterraneo [*Exh. C5, Clause 14, p. 14*]. Under Article 8(1) of the CISG, a party's statements and conduct should be interpreted according to that party's intention where the other party knew or could not have been unaware of that intention. The primary criterion is the parties' common intention [*Chemical Products Case, p. 5; Packaging Machine Case, p. 4; Schlechtriem/Schwenzer, pp. 150–152*]. Where one party unequivocally expresses its intention to the other party, this is equivalent to the parties' common intention unless it is contradicted by the other party [*Chemical Products Case, p. 5; Schlectriem/Schwenzwer, p. 152*].

39 On a subjective interpretation of the Parties' intention, Clause 12 does not contemplate the

remedy of adaptation. In her email dated 11 April 2017, Ms Napravnik stated that the Parties should place "*reliance on the ICC-Hardship clause*" to insert a hardship reference into the Contract [*Exh. R2, p. 34*]. The ICC Hardship Clause does not provide the remedy of adaptation; the only remedies available for an unforeseen event causing hardship are the negotiation of alternative contractual terms and the termination of the contract [*ICC Hardship Clause*]. When negotiating the Contract, the Parties did not have a common intention that Clause 12 would provide the remedy of adaptation.

40 Under Article 18(1) of the CISG, "*[s]ilence or inactivity does not in itself amount to acceptance*"; there must be other circumstances indicating acceptance [*Schlechtriem/Schwenzer, pp. 339–340*]. The only mention of adaptation during the Parties' contractual negotiations was Ms Napravnik's suggestion to add an adaptation mechanism to the Contract [*Exh. C8, p. 17*]. Mr Antley did not indicate that the Respondent accepted her suggestion. Rather, he said that he would "*come back with a proposal*", which he could not eventually do due to the accident [*Exh. C8, p. 17*]. Further, as Ms Napravnik acknowledged in her witness statement, the final negotiators "*did not include such an express reference [to adaptation] either in the arbitration agreement or the hardship clause they finally negotiated*" [*Exh. C8, p. 17*]. Had the Parties contemplated that an arbitral tribunal would have the power to adapt the Contract, they would have included an express reference in the Contract reflecting their subjective intention.

41 Even on an objective interpretation under Article 8(2) of the CISG, the Parties did not contemplate the remedy of adaptation. Article 8(2) requires interpreting Clause 12 according to the understanding of a reasonable business entity [*Roland Schmidt Case, p. 7; UNCITRAL CISG Digest, p. 56*]. A reasonable entity would have understood Clause 12 to be a *force majeure* clause that would exempt the Claimant from liability in certain situations but would not provide for adaptation.

42 Clause 12, based on the Claimant's own Standard Frozen Semen Sales Agreement, provided that "*Seller shall not be responsible*" for specified events not within the Claimant's control [*Exh. C2, p. 10; Exh. C5, Clause 12, p. 14; PO2, p. 55, ¶ 3*]. The Parties do not dispute that Clause 12, as originally worded, was a *force majeure* clause [*Exh. C5, p. 14; PO2, p. 56, ¶ 12*], and it is similar to *force majeure* clauses commonly used in commercial contracts [*Gorman, pp. 410–411; Kelley, p. 103; Leciercq, p. 240*]. *Force majeure* clauses provide for the discharge of a contract upon the occurrence of a

supervening event, not for an adaptation of the contract [*Maskow, pp. 664–665; Nicholas, pp. 234–236; Wallach, p. 223*]. Although the Parties discussed amending the original wording of Clause 12, they did so only to modify the scope of events in Clause 12, not the legal consequence of Clause 12 [*Exh. C4, p. 12*]. The phrase "*Seller shall not be responsible … for hardship*" in Clause 12 only means that the Claimant is not liable for non-performance due to an event causing hardship. It does not provide any clarification, let alone specifically empower the Tribunal to adapt the Contract, as required by Article 28(3) of the Danubian Arbitration Law.

3. The Arbitration Agreement does not expressly confer the power of adaptation as required by the Danubian Arbitration Law

43 Under the law of Danubia, as stated above [¶ *28*], arbitration agreements are interpreted narrowly and cannot be contradicted or supplemented by prior statements or agreements [*PO1, p. 52 ¶ II; PO2, p. 61, ¶ 45*]. The Arbitration Agreement does not provide any clarification to specifically empower the Tribunal to adapt the Contract; it does not refer even indirectly to the concept of adaptation. When interpreted according to the law of Danubia, the Arbitration Agreement does not authorise the Tribunal to adapt the Contract.

44 Even if the law of Mediterraneo governs the Arbitration Agreement, such that prior statements may be considered and a standard arbitration agreement is sufficient to grant the power of adaptation [*PO2, p. 60, ¶ 39*], the Parties did not intend the Arbitration Agreement to empower the Tribunal to adapt the Contract. The Claimant argues that the Parties intended that *"the Tribunal would have the innate power to decide on the adaption [sic] of the [Contract]*" [*Cl. Memo, ¶ 18*]. However, Ms Napravnik's witness statement reflects only "*[her] preference and understanding of the existing provisions*" [*Exh. C8, p. 17*]. Although Ms Napravnik thought that the Parties reached a "*tentative agreement*" on the issue, Mr Antley had merely promised that he would return with a proposal to include an express reference to adaptation in the Contract [*Exh. C8, p. 17*]. Further, while Ms Napravnik told Mr Antley that an express reference was not necessary from a legal point of view, she acknowledged that the purpose of including such a reference was "*to clarify that issue … to avoid any doubts*" [*Exh. C8, p. 17*]. As Ms Napravnik recognised, it was uncertain whether the existing provisions provided a mechanism that would ensure an adaptation of the Contract. Given such uncertainty, there is no basis to find that the Parties shared an intention to confer the power of adaptation upon the Tribunal.

45 Accordingly, the Tribunal has neither the jurisdiction nor the power under the Arbitration Agreement to adapt the Contract.

II. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

46 The Claimant is not entitled to submit documents from the other arbitration involving the Respondent. The Claimant seeks to submit the Award rendered in the other arbitration and has arranged to purchase it from a company that provides intelligence on the horseracing industry [*PO2, pp. 60–61, ¶ 41*]. Although the company has refused to disclose its source of the Award [*PO2, pp. 60–61, ¶ 41*], it is undisputed that the Award was procured either from a hacker or from a former employee of the Respondent who breached obligations of confidentiality [*Letter by Fasttrack, p. 51*].

47 The Parties have agreed to conduct the arbitration proceedings under the 2018 edition of the HKIAC Rules [*PO1, p. 52, ¶ II*]. Although the Tribunal is not required to apply strict rules of evidence under Article 22.2 of the HKIAC Rules 2018, an arbitral tribunal should always have regard to established rules of evidence to avoid an arbitrary or irrational decision [*Ma/Brock, ¶ 15.074*]. The Claimant argues that the principle of due process entitles it to submit the Award [*Cl. Memo, ¶¶ 39–44*]. However, the Claimant has omitted the principles of good faith and procedural fairness, of which due process is one aspect. The illegally obtained evidence should not be admitted as its submission would render the Claimant in breach of its duties to arbitrate in good faith and to respect procedural fairness (**A**). Alternatively, the evidence should not be admitted given its confidentiality (**B**). In any case, it should be excluded for lack of sufficient relevance and materiality (**C**).

A. The principles of good faith and procedural fairness justify excluding the evidence

48 Parties to an arbitration have duties to arbitrate in good faith and to respect procedural fairness [*EDF (PO3, 2008), p. 21; Methanex (2005), p. 28; Born, International Commercial Arbitration, p. 1258*]. By agreeing to arbitration, the parties commit to cooperate in good faith with the tribunal and other parties to resolve the dispute fairly, objectively, and efficiently [*ICC Case No. 8486 (1996); Born, International Commercial Arbitration, p. 1258; Gaillard/Savage, p. 627*]. Here, the Claimant alleges that the Respondent has acted in bad faith by taking different legal positions on adaptation and not disclosing its legal position in the other arbitration proceedings to the Tribunal [*Cl. Memo,*

¶¶ *51–52*]. However, a party to an arbitration is not estopped from taking different legal positions in different arbitration proceedings [*Schreiber, pp. 323–324*]. It is the Claimant, not the Respondent, who seeks to violate its duties of good faith and procedural fairness by submitting illegally obtained evidence (**1**). To uphold the integrity of the arbitral process, the Tribunal should not admit the Award (**2**).

1. Submitting the illegally obtained Award would violate the Claimant's duties to arbitrate in good faith and to respect procedural fairness

49 The Claimant argues that to deny the admissibility of the Award would be to deny the Claimant "*a full opportunity*" to present their case [*Cl. Memo,* ¶¶ *40–43*]. However, ensuring the parties have a full opportunity to present their case does not require the tribunal to admit every piece of evidence offered by a party or to deal with every evidentiary application by a party [*OGH, docket no. 3 Ob 35/05a; Zeiler, p. 139*]. Where the admission of evidence would disturb the equality of arms between the parties, a refusal to take evidence offered does not violate the right to be heard because neither party should be placed at a substantial disadvantage *vis-à-vis* the other [*Dombo Beheer BV*; *O'Malley, pp. 225, 320; UNCITRAL CISG Digest, p. 148*].

50 Under Article 9.2(g) of the IBA Rules, which the Claimant recognises as "*international best practices*" [*Cl. Memo,* ¶ *35*], the tribunal may exclude evidence on considerations of fairness and equality or of a lack of good faith [*EDF (PO3, 2008), pp. 25–26*]. Where a party uses illegal means to obtain evidence against the other party, it may violate its duties to conduct itself in good faith and to respect the equality of arms between the parties [*EDF (PO3, 2008), p. 21; Methanex (2005), p. 21; O'Malley, pp. 321–322*]. Similarly, where a party submits illegally obtained evidence with knowledge of its confidential nature or with reckless disregard for its illegal procurement, this is sufficient to render the party in breach of these duties [*Methanex (2005), pp. 26–27; Wee Shuo Woon, p. 111*].

51 The manner in which the Award was obtained runs contrary to the principles of good faith and procedural fairness. The information in the Award concerns private business arrangements for a sales contract between the Respondent and another party [*Letter by Langweiler, p. 50*]. The Award was obtained through unethical conduct, which was either an illegal hacking of the Respondent's computer system or a breach of confidentiality obligations by the Respondent's former employees [*Letter by Fasttrack, p. 51; PO2,* ¶ *41,*

p. 61]. The Claimant may also be found to be in receipt of stolen property, which is a crime in various jurisdictions [*UK Theft Act, § 22(1); Canada Criminal Code, § 354; United States Code, § 2315*]. Further, the illegal manner in which evidence is obtained points in favour of exclusion [*Ross, p. 3*]. Although the Claimant was not directly involved in illegally obtaining the Award, the Claimant knows of its illegal procurement [*Letter by Fasttrack, p. 51*]. Thus, its submission of the illegally obtained Award would violate its duties of good faith and respect for procedural fairness.

2. To uphold the integrity of the arbitral process, the Award should not be admitted

52 The Claimant portrays itself as concerned with the integrity of arbitral proceedings, "*one of the key elements of arbitration itself*" [*Cl. Memo, ¶¶ 36, 42*]. The integrity of arbitral proceedings is so important that an arbitral tribunal has inherent power to safeguard the fairness and integrity of its own process [*Libananco (Preliminary Issues, 2008), p. 37; Brown, p. 231; Wälde, p. 182*]. Yet the Claimant wishes to submit evidence whose admission would undermine the integrity of the arbitral process.

53 Since the principles of good faith and procedural fairness are fundamental to international arbitration, an arbitral tribunal should not admit evidence where there are good reasons to believe that those principles have not been respected [*EDF (PO3, 2008), pp. 25–26; Fusimalohi, p. 46; Methanex (2005), pp. 26, 28*]. Illegally obtained evidence is to be admitted only in exceptional circumstances, such as where its exclusion would lead to an award that is "*factually wrong in light of publicly available information*" [*Blair/Gojkovic, p. 258*]. Further, the possibility of obtaining the same evidence lawfully is relevant to its admissibility [*Valverde, p. 24*]. Even where the party submitting illegally obtained evidence alleges that the opposing party has thwarted its other lawful evidence-gathering activities, it would be "*wrong to allow [the party] to introduce this documentation … in violation of a general duty of good faith*" [*Methanex (2005), pp. 22, 23, 28*]. Under Article 22.3 of the HKIAC Rules 2018, the tribunal may require a party to produce documents. However, the Claimant has not even attempted to obtain the Award through proper channels by applying for discovery.

54 Absent exceptional circumstances, the admission of illegally procured documents would provide a perverse incentive for third parties to procure documents illegally [*Methanex (2005), p. 26; Boykin/Havalic, p. 36*]. The admission of the Award would incentivise third

parties, such as the persons who supplied the Award to the intelligence company, to violate the law to profit from their misdeeds. Consequently, upholding the integrity of the arbitral process requires that the Award be excluded.

B. Alternatively, confidentiality concerns justify excluding the evidence

55 Confidentiality is a cornerstone in international arbitration proceedings and a key reason why parties select arbitration over other forms of dispute resolution [*Brown/Miles, p. 329; Cremades/Cortes, pp. 26–27; Smeureanu, p. xvi*]. The Claimant argues that the Award should not be excluded as "*confidentiality must not be manipulated to circumvent integrity and justice*" [*Cl. Memo, ¶¶ 61–63*]. However, justice and the integrity of the arbitral process support excluding the Award. The Award should be excluded as it contains confidential information (**1**). It remains confidential despite being leaked to the intelligence company (**2**). Alternatively, the Tribunal, itself constituted under the HKIAC Rules, should be careful to avoid condoning a breach of the duties of confidentiality that protect the Award under the HKIAC Rules (**3**).

1. The Award should be excluded on grounds of commercial confidentiality

56 Under Article 9.2(e) of the IBA Rules, a tribunal may exclude a document from evidence on "*grounds of commercial or technical confidentiality*". Where a party would normally go to great lengths to keep a document from being disclosed to business contacts or the public, its admission would constitute an "*unacceptable invasion of [business] privacy*" [*ICC Case No. 1000 (2006); O'Malley, p. 301*]. This applies to information regarding the financial status of a company, formulas, business transactions involving third parties, or other proprietary information that is generally not made known to the public [*ICC Case No. 1000 (2006); Merrill & Ring Forestry, p. 10; Sourgens/Duggal/Laird, p. 252*].

57 The Award potentially contains sensitive commercial information concerning the Respondent's previous transaction with the third party in the sale of the mare. This may include information concerning the financial situation of the parties, the contract price for the sale of the mare, or the profit margin that the Respondent would have made from the sale of the mare. Disclosure of the Award may result in negative repercussions for the Respondent. It could prejudice the Respondent in any future contractual dealings with the Claimant concerning the sale of racehorses. Having knowledge of the Respondent's previous financial situation and contractual arrangement with other parties would give the

Claimant leverage when negotiating contractual terms.

2. *The Award remains subject to confidentiality protections despite being leaked*

58 Although the intelligence company is willing to sell the Award to the Claimant, the Award remains confidential. The fact that confidential information has been made available to a non-party to the arbitration does not destroy its confidentiality [*Wee Shuo Woon, p. 106*]. The likelihood that the public will access the information and the degree to which the public has in fact accessed it are relevant factors [*Bancoult Case, pp. 204–205; Wee Shuo Woon, p. 106*]. Tribunals tend to admit leaked confidential information only where it has been made publicly available on platforms such as Wikileaks [*Caratube; Blair/Gojkovic, p. 251; Ross, p. 3*]. The Award has only been leaked to the intelligence company [*PO2, p. 61, ¶ 41*]. The Claimant had to actively contact the intelligence company and arrange to pay US$1,000 for the Award [*PO2, p. 61, ¶ 41*]. As there is no evidence that the Award has been made available to others via online platforms or otherwise, the Award is not publicly available information.

3. *Alternatively, the Tribunal should avoid being seen to condone a breach of the confidentiality duties that protect the Award under the HKIAC Rules*

59 The other arbitration involving the Respondent was conducted under the HKIAC Rules 2013 [*Letter by Fasttrack, p. 51*]. Under the HKIAC Rules 2013, parties and witnesses have an express duty of confidentiality regarding any award made in and information relating to the arbitration [*HKIAC Rules 2013, Art 42.1*]. The former employees of the Respondent who may have provided the Award to the intelligence company were witnesses in that other arbitration [*PO2, pp. 60–61, ¶ 41*]. They were therefore bound by an express duty of confidentiality under the HKIAC Rules 2013 to not disclose the Award.

60 Although this duty regarding the other arbitration does not bind the Claimant, it is not open to the Claimant to argue that the duty does not affect its entitlement to submit the Award. If the Tribunal were to admit the Award as evidence, it may be seen to condone a flagrant breach of the HKIAC Rules by the Respondent's former employees. This would undermine the private and confidential nature of commercial arbitration [*Aita, p. 583; Dolling-Baker, p. 1213; Redfern/Hunter, International Arbitration, p. 30*]. Consequently, the fact that the Award was at least originally confidential justifies excluding it.

C. The evidence should be excluded for a lack of sufficient relevance and materiality

61 The Claimant argues that the Award from the other arbitration proceedings ought to be admitted on the basis that it is relevant and material [*Cl. Memo, ¶ 45*]. The Claimant may further argue that such relevance and materiality ought to outweigh the violations of good faith, procedural fairness, and confidentiality. However, the Award should be excluded as the Claimant's position glosses over significant factual differences between the other arbitration and the present case. Under Article 22.2 of the HKIAC Rules 2018 read with Article 9.2(a) of the IBA Rules, the Tribunal has the power to determine the relevance and materiality of evidence and may exclude evidence for "*lack of sufficient relevance to the case or materiality to its outcome*". This power serves to increase the efficiency of proceedings by filtering out unnecessary document production [*Kankkunen, p. 37*].

62 The Claimant argues that the Award is relevant as the dispute in the other arbitration is similar to the present claim [*Cl. Memo, ¶ 47*]. Evidence is relevant only if it is useful to establish the truth of a party's factual allegations on which its legal conclusions are based [*Raeschke-Kessler, p. 22*]. The tribunal is to consider whether the evidence is likely to be necessary for a party to prove an allegation [*O'Malley, p. 270*]. However, the Claimant has not addressed how the Award would enable it to establish the truth of any factual allegations. It merely states that the Award would make the Tribunal "*aware of various approaches to a similar conflict*" [*Cl. Memo, ¶ 48*]. The Claimant thus seeks to rely on the Award as legal precedent, not as evidence to prove a factual allegation.

63 Further, the Award would not even make the Tribunal "*aware of various approaches to a* similar *conflict*" as alleged by the Claimant [*Cl. Memo, ¶ 48, emphasis added*]. The contractual terms framing the dispute in the other arbitration and in the present arbitration differ materially. The contract in the other arbitration contained an ICC Hardship Clause [*PO2, p. 60, ¶ 39*], which the Respondent expressly rejected during the contractual negotiations as too broad [*Exh R3, p. 35; PO2, p. 56, ¶ 12*]. The contract in the other arbitration also contained a Model HKIAC Clause providing for the law of Mediterraneo to govern the arbitration agreement and the place of the arbitration to be Mediterraneo [*PO2, p. 60, ¶ 39*]. All these elements, which affect the jurisdiction and power of a tribunal to adapt a contract, are absent from the Contract [*Exh. C5, pp. 13–14*].

64 The Claimant argues that the Award is material to the outcome of the present case as the

Respondent's different positions on adaptation show a lack of good faith [*Cl. Memo, ¶¶ 49–53*]. However, as stated above [*¶ 48*], a party to an arbitration may take different legal positions in different arbitration proceedings. Evidence is material only if it is necessary to allow complete consideration of whether a factual allegation is true [*Raeschke-Kessler, p. 22*]. It is not material if a party is able to show sufficient proof without it and the evidence does not affect the tribunal's deliberations in reaching a final award [*O'Malley, p. 272; Raeschke-Kessler, p. 22*].

65 The Respondent's argument in the other arbitration that Mediterraneo's tariff was unforeseeable is not necessary for the Tribunal to have complete consideration of whether Equatoriana's tariff was unforeseeable. The other arbitration concerned Mediterraneo's tariff, which affected the sale of a mare [*PO2, p. 60, ¶ 39*], while the present case concerns Equatoriana's tariff, which affected the sale of horse semen. Further, the foreseeability of an event allegedly causing hardship does not depend on a party's subjective view; foreseeability is an objective inquiry to be made by the tribunal [*Art 6.2.2, Comment 3(b), UNIDROIT Principles; Art 79(1), CISG; Schlechtriem/Schwenzer, p. 1134; Lindström, p. 8–9; Flambouras, pp. 270–271*]. Regardless of the Respondent's position in the other arbitration, the Tribunal is sufficiently equipped to decide whether the Tariff was unforeseeable based on the facts before it. It may consider the circumstances at the time the Contract was concluded, which indicated that a trade war between Mediterraneo and Equatoriana was already brewing [*Exh C6, p. 15; PO2, p. 58, ¶ 23*].

66 Accordingly, the Tribunal should not admit evidence from the other arbitration proceedings.

III. THE CLAIMANT IS NOT ENTITLED TO ADDITIONAL PAYMENT OF US$1,250,000

67 The Parties contractually agreed that the Respondent would pay US$10,000,000 for the frozen horse semen [*Exh. C5, Clause 6, p. 14*]. In accordance with the Contract, the Respondent made the final payment on 21 January 2018 [*Exh. C8, p. 18*]. Yet, the Claimant seeks an additional payment of US$1,250,000 from the Respondent, beyond what the Parties agreed under the Contract [*Cl. Memo, ¶ 67*].

68 The Respondent respectfully requests the Tribunal to reject the Claimant's claim for an additional payment of US$1,250,000. The Claimant is not entitled to payment arising from a modification of Clause 12 of the Contract (**A**). Further, the Claimant is not entitled to an

adaptation under Clause 12 of the Contract (**B**), under the CISG (**C**), or under the UNIDROIT Principles (**D**). Even if the Claimant is entitled to an adaptation, it is only entitled to payment of US$500,000 (**E**).

A. The Claimant is not entitled to payment arising from a modification of Clause 12 of the Contract

69 The Claimant argues that the Parties agreed to modify Clause 12 of the Contract such that the Respondent would bear the cost of the Tariff [*Cl. Memo, ¶ 67*]. The Claimant alleges that such modification occurred when Ms Napravnik called Mr Shoemaker to inform him of the Tariff and formed the impression that the Respondent would bear the bulk of the Tariff [*Cl. Memo, ¶ 67; Exh. C8, p. 18*]. The Claimant further asserts that the Respondent has breached this modified obligation by not bearing the cost of US$1,250,000 incurred by the Claimant [*Cl. Memo, ¶ 67*]. However, the Parties did not modify Clause 12 because Mr Shoemaker was not authorised to modify the Contract on behalf of the Respondent (**1**). Even if Mr Shoemaker was so authorised, he did not agree to modify Clause 12 (**2**).

1. Mr Shoemaker was not authorised to modify the Contract on behalf of the Respondent

70 Although Mr Shoemaker was an employee of the Respondent [*Exh. R4, p. 36*], he was not authorised to modify the Contact on behalf of the Respondent. The CISG does not govern questions relating to the authority of agents to bind their principals to contractual obligations [*Metalic Slabs Case; Shop Furnishings Case; Welding Devices Case*]. In light of Article 7(2) of the CISG, issues regarding the authority of agents are to be settled according to the rules applicable by virtue of the rules of private international law.

71 Here, the rules of private international law indicate that the UNIDROIT Principles are to be applied to settle issues relating to the authority of agents. The applicable rule of private international law is the Hague Principles as it has been adopted by Equatoriana, Mediterraneo, and Danubia as their conflict of laws rules [*PO2, p. 61, ¶ 43*]. Article 1 of the Hague Principles gives primacy to the law chosen by contracting parties in deciding the applicable law. The Parties chose the law of Mediterraneo to govern the substantive obligations in the Contract [*Exh. C5, Clause 14, p. 14*]. The law of Mediterraneo, whose contract law is identical to the UNIDROIT Principles [*PO1, p. 53, ¶ 4*], therefore applies to the issue of the authority of agents to bind principals.

72 Article 2.2.5(1) of the UNIDROIT Principles provides that "*[w]here an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.*" Article 2.2.5(2) further states, "*[h]owever, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and the agent is acting within the scope of the authority, the principal may not invoke against the third party the lack of authority of the agent.*" In other words, a principal is not bound by acts of its agent conducted without authority unless the principal has caused the third party to reasonably believe that the agent has authority to act on the principal's behalf [*Vogenauer, pp. 436–437*].

73 Mr Shoemaker did not have the authority to alter contractual terms on behalf of the Respondent. Mr Shoemaker is a veterinarian by training, and his role was to develop the Respondent's racehorse breeding program [*Exh. R4, p. 36*]. Further, Mr Shoemaker had been placed in charge of the Respondent's racehorse breeding program only on 1 November 2017, almost 6 months after the Contract was concluded on 6 May 2016 [*Exh. C5, p. 13*], and was in no way involved in the negotiation of the Contract [*Exh. R4, p. 36*].

74 It is not open for the Claimant to argue that the Respondent led it to reasonably believe that Mr Shoemaker was authorised to alter the Contract since the Claimant was told to direct "*all questions concerning*" the Contract to Mr Shoemaker [*PO2, p. 59, ¶ 32*]. However, authorising Mr Shoemaker to answer questions regarding the Contract does not entail authorising him to alter the Contract. Mr Shoemaker had explicitly informed Ms Napravnik that he did not have the "*required authority*" to commit the Respondent to any obligations outside of the Contract [*Exh R4, p. 36*]. Ms Napravnik herself recognised [*Exh. C8, p. 18*] that Mr Shoemaker could not directly authorise any additional payment because he did not have the authority to do so [*Exh. R4, p. 36*]. Thus, Mr Shoemaker did not have the authority to modify the Contract on behalf of the Respondent.

2. *Even if Mr Shoemaker was authorised to modify the Contract, he did not agree to modify Clause 12 of the Contract*

75 Under Article 29(1) of the CISG, parties may agree to modify an existing contract. Modification requires a clear indication of an agreement between the parties [*Cámara Agraria; UNCITRAL CISG Digest, p. 123*]. Mr Shoemaker did not give any assurances to Ms Napravnik that Clause 12 was to be modified. Having no legal training [*Exh. R4,*

p. 36], Mr Shoemaker only agreed to future negotiations regarding the purchase price conditional upon the Contract containing an adaptation mechanism, which turned out not to be the case. He told Ms Napravnik that an agreement on the price would be found "*if the contract provides for an increased price in the case of such a high additional tariff*" [*Exh. R4, p. 36*]. As explained below [¶¶ *76–87*], the Contract does not provide for a price increase in the case of the Tariff. The Claimant itself acknowledges that it is responsible for the additional cost arising from the Tariff [*Cl. Memo,* ¶ *77*]. Consequently, the Claimant is not entitled to additional payment due to a modification of Clause 12.

B. The Claimant is not entitled to an adaptation under Clause 12 of the Contract

76 Clause 12 is to be interpreted in accordance with the parties' intention under Articles 8(1) and 8(2) of the CISG, as explained above [¶¶ *38, 41*]. Any prior negotiations or conduct must be considered in determining the parties' intention [*Propane Case, p. 162; Tantalum Powder Case; UNCITRAL CISG Digest, p. 57*].

77 Clause 12 states that "*[s]eller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*." Clause 12 would entitle the Claimant to an adaptation only if, *inter alia*, the following criteria are fulfilled: (a) the remedy of adaptation is available under Clause 12; (b) the Tariff falls within the scope of Clause 12; and (c) the effect of the Tariff is sufficiently severe to constitute hardship within the meaning of Clause 12. The remedy of adaptation is not available under Clause 12, whether interpreted subjectively or objectively (**1**). Alternatively, the Tariff falls outside the scope of Clause 12 (**2**). In any event, the effect of the Tariff is not sufficiently severe to constitute hardship under Clause 12 (**3**).

1. The remedy of adaptation is not available under Clause 12 of the Contract, whether on a subjective or an objective interpretation of the Parties' intention

78 As elaborated above [¶¶ *38–42*], Clause 12 does not contemplate the remedy of adaptation, whether on a subjective or an objective interpretation of the Parties' intention. On a subjective interpretation, the Parties based Clause 12 on the ICC Hardship Clause [*Exh. R2, p. 34*], which only provides for termination in cases of hardship and does not contemplate adaptation [*ICC Hardship Clause*]. Further, when Ms Napravnik proposed

including an adaptation mechanism in the Contract, Mr Antley did not agree [*Exh. C8, p. 17*]. He merely stated that he would "*come back with a proposal*" but never managed to do so [*Exh. C8, p. 17*]. On an objective interpretation, Clause 12 was originally a *force majeure* clause that did not provide for adaptation [*Exh. C5, p. 14; PO2, p. 56, ¶ 12*]. When amending Clause 12, the Parties merely expanded the scope of Clause 12 to include hardship events [*Exh. C4, p. 12*]. Crucially, the Parties retained the phrase "*[s]eller shall not be responsible*" and did not add a reference to adaptation [*Exh. C5, Clause 12, p. 14; PO2, p. 55, ¶ 3; Exh. C8, p. 17*]. Thus, Clause 12 does not provide for adaptation.

2. Alternatively, the Tariff does not fall within the scope of Clause 12 of the Contract

79 Applying Article 8(1) of the CISG, the Parties did not have a subjective common intention for Clause 12 to encompass the imposition of the Tariff. Although Ms Napravnik stated in her email dated 31 March 2017 that a hardship clause should be included to address "*changes in customs regulation or import restrictions*" [*Exh. C4, p. 12*], the Respondent did not agree to such broad terms. Instead, Mr Krone suggested the narrower wording of "*additional health and safety requirements or comparable unforeseen events making the contract more onerous*" to address the specific risks of "*health and safety requirements*" mentioned in Ms Napravnik's email [*PO2, p. 56, ¶ 12; Exh. C4, p. 12*]. The fact that the Parties used Mr Krone's wording, rather than a general reference to customs regulation or import restrictions [*PO2, p. 56, ¶ 12*], demonstrates that they intended Clause 12 to cover only limited, specific events "*comparable*" to health and safety requirements, not tariffs.

80 On an objective interpretation, the phrase "*comparable unforeseen events making the contract more onerous*" is defined neither in the Contract nor in the Parties' negotiations. Applying Article 8(2) of the CISG, a reasonable entity would have understood "*comparable unforeseen events*" to mean unforeseen events similar to the Claimant's past experience of "*health and safety requirements*" which formed the basis of the hardship reference in Clause 12 [*Exh. C4, p. 12; PO2, p. 56, ¶ 12*]. This interpretation is supported by the Parties' agreement that the Claimant would undertake DDP terms according to the INCOTERMS 2010 [*PO2, p. 56, ¶ 8; Exh. C5, Clause 12, p. 14*; *PO2, p. 56, ¶ 10*]. A seller undertaking DDP under the INCOTERMS 2010 must pay "*the costs of customs formalities necessary for export and import as well as all duties, taxes and other charges ... prior to delivery*" [*INCOTERMS 2010; Gabriel, p. 71*]. A reasonable entity in the Respondent's position would have understood Clause 12 to be a narrow carveout of the

Claimant's DDP obligations, only encompassing events comparable to "*health and safety requirements*". This is because a wide interpretation encompassing all "*changes in customs regulation or import restrictions*" would have deprived the Respondent of the benefit of contracting on DDP terms, particularly since the Respondent paid a premium for the Claimant to undertake DDP terms [*PO2, p. 56, ¶ 8*]. Thus, Clause 12 only encompasses a narrow scope of events comparable to "*health and safety requirements*" rather than all "*changes in customs regulation or import restrictions*".

81 The Tariff is not comparable to "*health and safety requirements*" as it has a different nature from the health and safety requirements specified in Clause 12 arising from entirely different sets of events. The health and safety requirements referred to by the Claimant had been imposed because of an outbreak of a "*rare and aggressive type of foot and mouth disease*" [*PO2, p. 56, ¶ 21*]. In contrast, the Tariff was imposed as a result of a trade war triggered by protectionist measures imposed by the newly elected president of Mediterraneo [*Exh. C6, p. 15*]. Thus, the Tariff does not fall within the scope of Clause 12.

3. In any event, the effect of the Tariff is not sufficiently severe to constitute an event causing hardship within the meaning of Clause 12 of the Contract

82 The Parties' subjective intention regarding the threshold required for an event to cause hardship under Clause 12 cannot be clearly discerned because the Parties did not discuss it in their negotiations. It is not open for the Claimant to argue that it indicated a threshold during contractual negotiations as it raised a previous incident where costs increased by "*up to 40%*" due to health and safety requirements and destroyed the commercial basis of that deal [*Exh. C4, p. 12*]. However, this 40% figure does not indicate the severity required of an event causing hardship under Clause 12. It merely illustrated a previous transaction in which the Claimant sold three mares to farms in Danubia [*PO2, p. 58, ¶ 21*], a transaction involving a counterparty from a different country and concerning a different subject matter. In any case, "*silence or inactivity*" cannot amount to an acceptance of a contractual term [*Art. 18(1) CISG*]. There is no indication that the Respondent had accepted the 40% figure stated by the Claimant to be incorporated into Clause 12.

83 On an objective interpretation of Clause 12, a reasonable entity in the circumstances of the Parties would interpret the threshold for hardship under Clause 12 to be the same as that of hardship under the UNIDROIT Principles. This is because both parties are

experienced commercial entities [*NOA, pp. 4–5, ¶¶ 1–4*] and are based in countries that adopt the UNIDROT Principles as their contract law [*PO1, p. 53, ¶ 4*]. A reasonable entity would understand the Parties' use of the word "*hardship*" to import the threshold for hardship under the UNIDROIT Principles, which the Parties would be familiar with.

84 Under Article 6.2.2 of the UNIDROIT Principles, hardship exists where there is an event that "*fundamentally alters the equilibrium of the contract*". A key consideration is the percentage increase in the cost of performance by the disadvantaged party [*Doudko, p. 495; Fucci, pp. 20–27; Vogenauer, pp. 814–816*]. Increases in a party's cost of performance amounting to 30% [*Nuova Fucinati*]; 44% [*Cargo Ship Case*]; 50% [*ICC Case No. 2508 (1976)*]; and 80% [*Himpurna California*] are insufficient to fundamentally alter the contractual equilibrium. A significantly greater increase in a party's cost of performance of at least 100–200% is required [*Brunner, pp. 431–432; Schwenzer, p. 717*].

85 The increase in the Claimant's cost of performing the Contract is far below the threshold required for hardship under the UNIDROIT Principles. The Claimant emphasises that the 30% figure imposed by the Tariff causes a "*severe imbalance in the equilibrium*" of the Contract [*Cl. Memo, ¶ 83*]. However, the 30% figure is misleading because the Tariff only affected the third instalment of horse semen [*Exh. C8, pp. 17–18*]. In determining whether hardship exists, a party's overall financial situation must be considered [*Dalhuisen, p. 110; Girsberger/Zapolskis, p. 132*]. As shown in the table below, once the first and second instalments are taken into account, the total increase in the Claimant's cost of performance only amounts to 15.8%. Even in the only case cited by the Claimant where a court found the existence of hardship [*Cl. Memo, ¶ 84*], the increase in the cost of performance was 70% [*Scafom International Case*].

	3rd Instalment	**Contract Total**
Claimant's Cost of Performance	$4,750,000	$9,500,000
Claimant's Cost of Performance including Tariff	$4,750,000 + $1,500,000 = $6,250,000	$9,500,000 + $1,500,000 = $11,000,000
Percentage increase in Cost of Performance	$\frac{\$1,500,000}{\$4,750,000} \times 100 = 31.6\%$	$\frac{\$1,500,000}{\$9,500,000} \times 100 = 15.8\%$

86 It is not open to the Claimant to argue that the Tariff alters the fundamental equilibrium of the Contract as it has caused financial difficulties for the Claimant [*Exh. C8, p. 17*]. Only in the most extreme cases should the potential financial ruin of a party be considered in determining hardship [*Brunner, p. 436*]. This is because a party should not be allowed to easily shift the risk of its own financial deterioration to another party [*Brunner, p. 436; Girsberger/Zapolskis, pp. 131-132*]. Further, the consideration of potential financial ruin is generally appropriate only in long-term contracts, which carry a greater risk of supervening events causing the financial ruin of a party [*ICC Case No. 9994 (2001); Brunner, pp. 435–437*].

87 The Contract is not a long-term contract since the time between the formation of the Contract and the final date of performance was less than 9 months [*Exh. C5, pp. 13–14*]. Further, the financial difficulties of the Claimant are not sufficiently extreme to warrant consideration. The Claimant will likely obtain additional financing through the sale of its dressage business and avoid insolvency [*PO2, p. 59, ¶ 29*]. Additionally, the Tariff is not the sole cause of the Claimant's financial difficulties. The Claimant has been making losses since 2014, primarily due to paying high interest on a loan taken in 2013 [*PO2, p. 59, ¶ 29*]. Its financial difficulties should therefore be given little or no weight in determining whether the Tariff amounts to an event causing hardship. Consequently, the Claimant is not entitled to an adaptation of the Contract under the UNIDROIT Principles.

C. The Claimant is not entitled to an adaptation under the CISG

88 The Claimant argues that Article 79 of the CISG exempts it from any responsibility to pay the Tariff [*Cl. Memo, ¶ 77*]. However, Article 79 does not provide the remedy of adaptation (**1**). Alternatively, Clause 12 of the Contract derogates from Article 79 (**2**). Even if Article 79 applies to the Contract, the imposition of the Tariff does not satisfy the criteria in Article 79 (**3**).

1. Article 79 of the CISG does not provide the remedy of adaptation

89 Under Article 79(1) of the CISG, "*[a] party is not liable for failure to perform any of his obligations if he proves that the failure was due to an impediment*". Article 79(5) states "*[n]othing in this article prevents either party from exercising any right other than to claim damages under [the CISG]*". The Claimant argues that its "*responsibility for the 30% tariff is exempted pursuant to [Article 79]*" [*Cl. Memo, ¶ 77*]. However, Article 79

merely exempts parties from failing to perform contractual obligations where such failure is due to an impediment and explicitly precludes any claim for damages. Nothing in Article 79 provides for adaptation or exempts the Claimant from performance already carried out. Since the Claimant has performed the Contract by delivering all three instalments [*Exh. C8, pp. 17–18*], there is no failure of performance, and Article 79 does not apply.

2. Alternatively, Clause 12 of the Contract derogates from Article 79 of the CISG

90 Under Article 6 of the CISG, contracting parties "*may exclude the application of [the CISG] or ... derogate from or vary the effect of any of its provisions*". A derogation may be implicit where the circumstances indicate that the parties intended to exclude the application of the CISG entirely or partially [*Bianca/Bonell, pp. 55–56; Ferrari, pp. 20–23; Winship, pp. 1-34–1-35*]. A clear indication of such an intention may exist where the parties have agreed on contractual terms that are inconsistent with specific provisions of the CISG [*Corn Case; ICC Case No. 11333 (2002), ¶ 14; Ferrari, pp. 28–29*]. The Claimant argues that Clause 12 does not derogate from Article 79 of the CISG as the Parties did not express sufficiently clear intentions to that effect [*Cl. Memo, ¶ 78–80*]. However, the circumstances surrounding the formation of the Contract show that the Parties unambiguously intended Clause 12 to derogate from Article 79 of the CISG.

91 During their negotiations, the Parties agreed to include a "*narrow hardship reference*" in the Contract [*Exh. R3, p. 35; Exh. C8, p. 17*]. In Clause 12, the Parties provided that the Claimant would not be responsible for events causing "*hardship ... making the contract more onerous*" [*Exh. C5, Clause 12, p. 14*]. In contrast, Article 79 concerns only *force majeure* events that make contractual performance impossible [*Frozen Raspberries Case; Schlechtriem, p. 102; Honnold/Flechtner, pp. 627–630*]. Clause 12 derogates from Article 79 by encompassing events causing hardship and is inconsistent with Article 79. Article 79 therefore does not govern the Parties' relationship, and only Clause 12 governs the issue of a change in circumstance between the Parties. As explained above [*¶¶ 37–42*], the Claimant is not entitled to an adaptation under the Clause 12.

3. Even if Article 79 applies to the Contract, the imposition of the Tariff does not satisfy the criteria in Article 79

92 Under Article 79(1) of the CISG, a party is exempted from liability for failure to perform its obligations where its failure to perform is due to an "*impediment*" that "*he could not*

reasonably be expected to have taken … into account at the time of the conclusion of the contact". The Claimant argues that the imposition of the Tariff constitutes an impediment under Article 79 [*Cl. Memo,* ¶ *77*]. However, the Tariff does not constitute an impediment within the meaning of Article 79 (**i**). Alternatively, the Claimant could reasonably have been expected to take the Tariff into account when concluding the Contract (**ii**).

i. The Tariff is not an impediment within the meaning of Article 79 of the CISG

93 The word "*impediment*" in Article 79 of the CISG only encompasses *force majeure* events that render performance impossible; it does not extend to events of hardship that render performance more onerous but falls short of impossibility [*Frozen Raspberries Case; Nuova Fucinati; Schlechtriem, p. 102*]. This interpretation is supported by the drafting history of the CISG, where a proposal for Article 79 to allow a party to avoid a contract for unexpected "*excessive difficulties*" was rejected as it would be difficult to define the class of events causing hardship "*without introducing a rather questionable element of arbitrariness*" [*UNCITRAL YB 1974, p. 67; UNCITRAL YB 1977, p. 57; Garro, CISG Comparison,* ¶ *IV10*]. Situations of hardship are best left to the parties to define contractually [*UNCITRAL YB 1974, p. 67*], particularly because the CISG applies by default to contracts for the sale of goods between parties located in contracting states to the CISG [*Art. 1 CISG*].

94 The Tariff did not render the Claimant's performance of the Contract impossible. Although the Tariff increased the Claimant's cost of performance for delivering the third instalment of horse semen by approximately 30% [*Exh. C8, p. 17*], the Claimant completed its performance of the Contract without delay [*Exh. C8, p. 18*]. The Tariff therefore does not constitute an impediment under Article 79.

ii. Alternatively, the Claimant could reasonably have been expected to take the Tariff into account when the Contract was concluded

95 Under Article 79(1) of the CISG, if the impediment was reasonably foreseeable, Article 79 cannot exempt the non-performing party from liability [*Bund, p. 386; Ramberg, p. 125*]. The rationale for excluding foreseeable events from Article 79 is that, absent a contrary provision in the contract, the party seeking adaptation is considered to have assumed the risk of foreseeable events [*Bianca/Bonell, p. 580; Brunner, p. 156; Schlechtriem/Schwenzer, p. 1135*]. The test is whether a reasonable person in the position

of the party relying on Article 79 should have foreseen the impediment, taking into account the circumstances in which the contract was concluded and similar past events [*Flambouras, pp. 270–271; Lindström, p. 8–9; Zeller, p. 158*]. An impediment is foreseeable if it could "*potentially*" occur [*Autopista, p. 35; Brunner, p. 163*].

96 The Claimant argues that it could not reasonably be expected to have taken the Tariff into account when the Contract was concluded [*Cl. Memo, ¶ 88*]. However, the circumstances in which the Contract was concluded indicate otherwise. President Bouckaert was elected as the President of Mediterraneo on 25 April 2017 [*PO2, p. 58, ¶ 23*], before the Parties concluded the Contract on 6 May 2017 [*Exh. C5, p. 13*]. Since January 2017, President Bouckaert had made clear that he was in favour of imposing protectionist measures for Mediterraneo's agricultural sector [*Exh. C6, p. 15*]. On 5 May 2017, he appointed Ms Cecil his "*superminister*" for agriculture, trade, and economics; as "*one of the most ardent critics of free trade*", she too advocated protectionist measures for Mediterraneo's agricultural sector [*PO2, p. 58, ¶ 23*].

97 Equatoriana had previously responded to import restrictions with retaliatory trade measures [*Exh. C6, p. 15*], and Equatoriana's Ministry of Economics had been discussing taking a strong stance against the trade measures proposed by President Bouckaert [*Exh. C6, p. 15*]. The circumstances at the time the Contract was concluded indicated that a trade war between Mediterraneo and Equatoriana was brewing and that tariffs could be imposed upon the election of President Bouckaert. The Claimant could therefore reasonably have been expected to take the Tariff into account when it entered into the Contract. Consequently, the CISG does not entitle the Claimant to an adaptation of the Contract.

D. The Claimant is not entitled to an adaptation under the UNIDROIT Principles

98 Unlike the CISG, the UNIDROIT Principles expressly provide for the concepts of hardship and adaptation under Articles 6.2.2 and 6.2.3. The Claimant asserts that the UNIDROIT Principles may be used to import concepts of hardship into the CISG [*Cl. Memo, ¶ 89–90*]. However, the UNIDROIT Principles regarding the concepts of hardship and adaptation may not be used to supplement the CISG (**1**). Even if the UNIDOIT Principles apply, the Claimant is not entitled to an adaptation because the requirements for hardship under the UNIDROIT Principles have not been fulfilled (**2**).

1. The UNIDROIT Principles regarding hardship and adaptation may not be used to supplement the CISG

99 The Claimant argues that the articles on hardship under the UNIDROIT Principles may be used to supplement Article 79 through the gap-filling mechanism in Article 7(2) of the CISG [*Cl. Memo, ¶ 89–92*]. However, this cannot be done because the articles on hardship under the UNIDROIT Principles are inconsistent with the CISG.

100 Under Article 7(2), "*[q]uestions concerning matters governed by [the CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based*". The general principles referred to in Article 7(2) are to be distilled from the text of the CISG and not from external rules such as the UNIDROIT Principles [*Brandner, p. 4; Monberg, p. 3; Sim, p. 20*]. This is because such external rules were created by institutions with political backgrounds and mandates different from the drafters of the CISG, and those rules in some instances intentionally deviate from the CISG [*Anderson/Schroeter, pp. 24-25; Schlechtriem/Schwenzer*, *p. 131; Uribe, p. 122*].

101 The CISG does not explicitly address the concept of hardship [*Dimatteo, p. 273; Ishida, p. 381; Kessedjian, p. 419*], and the legislative history of the CISG shows that the articles on hardship under the UNIDROIT Principles are incompatible with the principles of the CISG [*Garro, UNIDROIT Gap Filling Role, p. 1158; Veneziano, pp. 141–142; Viscasillas, p. 20*]. During the drafting of the CISG, proposals to allow an "*equitable revision*" or termination of the contract where there are "*excessive difficulties*" to be included under Article 79 were explicitly rejected [*AC Opinion No. 7, p. 10; CISG Official Records, pp. 381–382; Rimke, pp. 219–220*]. Further, Article 79 was defined narrowly to only encompass "*wars, storms, fires, government embargoes and the closing of international waterways*" [*Honnold*, *p. 445*; *Slater, p. 259*]. Since the CISG specifically excluded the issues of hardship and adaptation, resort to the UNIDROIT Principles to import provisions to that effect into the CISG would be improper.

2. Alternatively, the Claimant is not entitled to an adaptation as the requirements for hardship under the UNIDROIT Principles have not been satisfied

102 The Claimant argues that the Tariff is an event causing hardship under Article 6.2.2 of the UNIDROIT Principles such that it is entitled to an adaptation [*Cl. Memo, ¶ 92*]. Under Article 6.2.2, hardship occurs only where, *inter alia*: (a) the disadvantaged party has not

assumed the risk of the event; (b) the disadvantaged party was not reasonably able to take the event into account when the contract was concluded; and (c) the event fundamentally alters the contractual equilibrium due to an increase in the cost of performance. The Claimant is not entitled to an adaptation under the UNIDROIT Principles as the Claimant assumed the risk that the Tariff could be imposed (**i**). Further, the Claimant could have reasonably taken the Tariff into account when concluding the Contract (**ii**). Finally, the Tariff did not fundamentally alter the contractual equilibrium (**iii**).

i. The Claimant assumed the risk of the imposition of the Tariff

103 A party contractually assumes the risk of a particular event if it explicitly or implicitly assumes the risk of the consequences of changed circumstances [*Brunner, p. 424*]. Whether a party has assumed the risk is to be determined considering the circumstances surrounding the contract and the nature of the contract [*Vogenauer, p. 818*].

104 The Claimant assumed the risk of the Tariff by agreeing to deliver the horse semen on DDP terms under Clause 8 of the Contract [*Exh. C5, Clause 8, p. 14*]. As explained above [¶ *80*], the Respondent paid a premium for the Claimant to undertake DDP terms and to assume the risk of paying all duties and taxes until the point of delivery in Equatoriana [*PO2, p. 56,* ¶ *8; Exh. C5, Clause 12, p. 14*; *PO2, p. 56,* ¶ *10*]. Although Clause 12 provides that the Claimant is not required to bear the risk of "*additional health and safety requirements or comparable unforeseen events*", the Tariff does not fall within the scope of Clause 12, as stated above [¶¶ *79–81*]. As a tax imposed by Equatoriana [*Exh. C6, p. 15*], the Tariff falls within the scope of the Claimant's DDP obligations.

ii. The Claimant could have reasonably taken the Tariff into account when the Contract was concluded

105 In determining whether an event could be reasonably taken into account, past occurrences of similar events or any indicators that the event might occur are to be considered [*Dawwas, p. 10; Doudko, p. 499; Perillo, pp. 16–18*]. As elaborated above [¶ *96*], when the Contract was concluded, there were indications of a trade war brewing between Mediterraneo and Equatoriana. President Bouckaert had been elected as President of Mediterraneo and had appointed Ms Cecil as his "*superminister*" for agriculture, trade and economics [*Exh. C5, p. 13; Exh. C6, p. 15*]. Both were strong proponents of imposing protectionist measures for Mediterraneo's agricultural sector [*Exh. C6, p. 15; PO2, p. 58,*

¶ *23*]. In view of impending protectionist measures by Mediterraneo, Equatoriana's Ministry of Economics and Prime Minister had been discussing a need to "*react strongly*" against such measures. Equatoriana had also imposed retaliatory measures on one occasion [*Exh. C6, p. 15*]. Upon the election of President Bouckaert, the Claimant could have reasonably taken the Tariff into account.

iii. The Tariff did not fundamentally alter the equilibrium of the Contract

106 As elaborated above [¶¶ *84–87*], the Tariff did not fundamentally alter the equilibrium of the Contract within the meaning of Article 6.2.2 of the UNIDROIT Principles. An increase in a party's cost of performance must be at least 100–200% to fundamentally alter the contractual equilibrium [*Brunner, pp. 431–432; Schwenzer, p. 717*]. Once the first two installments are taken into account, the Claimant's cost of performance for the Contract increased only by 15.8%, far below the requisite threshold to find hardship [¶ *85*]. Further, the Claimant's financial difficulties are not extreme enough to justify a finding of hardship as the Claimant can obtain funding to avoid insolvency [¶¶ *86–87*]. Consequently, the UNIDROIT Principles do not entitle the Claimant to an adaptation of the Contract.

E. Even if the Claimant is entitled to an adaptation of the Contract, the Claimant is only entitled to payment of US$500,000

107 Even if the Contract is adapted to require an additional payment to the Claimant, the Claimant is only entitled to receive US$500,000. In adjusting the price of a contract, it is essential to consider that the performing party is ordinarily bound to perform the contract even though performance has become more onerous [*Art. 6.2.1 UNIDROIT Principles; Delta Comercializadora; ICC Case No. 8486 (1999)*]. As a result, where a contract is adapted due to hardship, the performing party must bear a portion of the increased costs [*CMS Gas, p. 72; ICC Case No. 2508 (1976); Fucci, p. 36*]. In allocating the costs to be borne by each party, adaptation seeks to restore the original equilibrium of the contract, taking into account the intentions of and conduct by the parties both before and after the contract was concluded [*Brunner, p. 500; Hillman, pp. 21-25; Vogenauer, p. 821*]. It is often appropriate to apportion the increased costs between the parties equally [*Brunner, p. 500; Harrison, p. 592*].

108 The Claimant claims that it is entitled to US$1,250,000 as it represents the Claimant's loss resulting from the 25% increase in the cost of delivering the third instalment of horse

semen [*NOA, p. 7, ¶ 18*]. However, this fails to consider the Claimant's profit from the first and second instalments that were not affected by the Tariff [*NOA, p. 6, ¶ 9*]. Taking into consideration the first and second instalments, the Claimant's loss arising from the Contract only amounts to US$1,000,000, not US$1,250,000 as the Claimant asserts.

	1st & 2nd instalments	**3rd Instalment**	**Contract Total**
Contract Value	$5,000,000	$5,000,000	$10,000,000
Claimant's Cost of Performance	$4,750,000	$4,750,000 + $1,500,000 (Tariff) = $6,250,000	$11,000,000
Total Profit/ Loss	+ $250,000	- $1,250,000	-$1,000,000

109 Restoring the original equilibrium requires the Claimant to bear at least an equal portion of the cost of events such as the Tariff. The Parties had agreed that the Claimant would deliver the horse semen DDP under the INCOTERMS 2010 [*Exh. C5, Clause 12, p. 14*; *PO2, p. 56, ¶ 10*], which required the Claimant to pay for "*all duties, taxes and other charges*" before delivery [*INCOTERMS 2010*]. The Claimant's US$1,000,000 loss is therefore to be apportioned equally between the Claimant and the Respondent. Should the Contract be adapted, the Claimant will only be entitled to US$500,000.

110 Accordingly, the Claimant is not entitled to additional payment of US$1,250,000.

REQUEST FOR RELIEF

111 For the reasons above, the Respondent respectfully requests the Tribunal to find that:

1. The Tribunal has neither the jurisdiction nor the power under the Arbitration Agreement to adapt the Contract;
2. The Claimant is not entitled to submit evidence from the other arbitration proceedings; and
3. The Claimant is not entitled to the payment of US$1,250,000 resulting from an adaptation of the Contract under Clause 12 of the Contract or under the CISG.

Certificate of Authenticity

We hereby certify that this memorandum was written only by the persons whose names are listed and signed below.

Singapore, 24 January 2019.

WAYNE YEO

NICOLE NG

CLAIRE LIM

FAITH HWANG

GEROME GOH

JAYAKUMAR SURYANARAYANAN

MEGAN HO

Certificate and Choice of Forum
To be attached to each Memorandum

I JAYAKUMAR SURYANARAYANAN, on behalf of the Team for SINGAPORE MANAGEMENT UNIVERSITY 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 SINGAPORE MANAGEMENT UNIVERSITY

Name: JAYAKUMAR SURYANARAYANAN

Signature ______________________________