SIXTEENTH ANNUAL

INTERNATIONAL COMMERCIAL ARBITRATION COMPETITION

HONG KONG, 30 MARCH – 7 APRIL 2019

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

MEMORANDUM FOR CLAIMANT

PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

PHAR LAP ALLEVAMENTO
RUE FRANKEL 1
CAPITAL CITY, MEDITERRANEO

– CLAIMANT –

BLACK BEAUTY EQUESTRIAN
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OCEANSIDE, EQUATORIANA

– RESPONDENT –

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TABLE OF ABBREVIATIONS

AC	Advisory Council
ANS.	Answer to Notice of Arbitration
Art.	Article
AUS	Australia
AUT	Austria
BEL	Belgium
CAN	Canada
CCR	Commonwealth Law Reports
CE	CLAIMANT'S exhibit
CEO	Chief Executive Officer
cf.	compare (*confer*)
chap.	chapter
CHN	China
CIArb	Chartered Institution of Arbitrators
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co.	Corporation
COO	Chief Operating Officer
CPR	International Institute for Conflict Prevention & Resolution (New York,

	United States of America)
DFT	Decision of the Swiss Federal Court (Entscheid des Schweizeri- schen Bundesgerichts)
e.g.	for example (*exempli gratia*)
EO	Executive Order
ESP	Spain
et al.	and others (*et alii/et aliae/et alia*)
et seq./et seqq.	and the following one/s (et sequens/et sequentes)
EU	European Union
EUR	Euro
Ex.	Exhibit
EWHC	High Court of Justice of England and Wales
FRA	France
GBR	United Kingdom of Great Britain and Northern Ireland
GER	Germany
HKIAC	Hong Kong International Arbitration Centre
i.e.	that is (id est)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration

ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
IRL	Ireland
LLC	Limited Liability Company in the United States of America
Ltd.	Limited
MEX	Mexico
Mr.	Mister
Ms.	Miss
NOA	Notice of Arbitration
No.	Number
NYC	New York Convention
Op.	Opinion
Ors.	Others
p./pp.	page/pages
¶	paragraph/paragraphs
PO 1	Procedural Order No. 1, dated 5 October 2018
PO 2	Procedural Order No. 2, dated 2 November 2018
Rd.	Road
RE	RESPONDENT'S exhibit

SA	Sales Agreement
SRB	Serbia
St.	Saint
SUI	Switzerland
UN/U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA/U.S.	United States of America
USD	United States Dollar(s)
v.	against (versus)

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CISG	UN Convention on Contracts for the International Sale of Goods Cited in: ¶¶ 97-122

English Arbitration Act 1996	England, *Arbitration Act of 1996* Available at: https://www.legislation.gov.uk/ukpga/1996/23/section/34 Cited in: ¶ 47
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Born 1	Born B. Gary, *International Commercial Arbitration* (2nd ed. 2001) Cited in: ¶¶ 21, 39

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STATEMENT OF FACTS

1. On **21 March 2017**, RESPONDENT solicited CLAIMANT for 100 doses of frozen semen from its star racehorse and requested CLAIMANT supply its terms and conditions [Ex. C 1].
2. On **24 March 2017**, CLAIMANT advanced an offer, requesting $99.50/dose, pick-up in Mediterraneo, no resale, and a request to be informed about every dose's use. The offer stipulated the contract be governed by CLAIMANT'S "Standard Frozen Semen Agreement" as well as its standards and general conditions [Ex C 2].
3. On **28 March 2017**, RESPONDENT agreed to the general applicability of CLAIMANT'S terms and conditions and to governing Mediterraneo law [Ex. C 3].
4. On **31 March 2017**, CLAIMANT accepted delivery DDP, modifying the sales price to $1000/dose and requesting changes in "customs regulations or import restrictions" trigger a hardship clause [Ex. C 4].
5. On **10 April 2017**, RESPONDENT drafted the arbitration clause [Ex. R 1].
6. On **11 April 2017**, CLAIMANT proposed arbitrations take place in Danubia and Mediterraneo law govern the SA [Ex. R 2].
7. On **6 May 2017**, the Parties signed the SA, incorporating CLAIMANT'S terms and conditions, including RESPONDENT'S duty to pay all fees in two installments before product shipment. The law of Mediterraneo governs the contract and the seat of arbitration is in Vindobona, Danubia [Ex. C 5].
8. On **20 December 2017**, an article in the Peak Business News announced a 30% tariff imposed by the Equatorianian government on agricultural goods from Mediterraneo [Ex. C 6].
9. On **20 January 2018**, CLAIMANT alerted RESPONDENT of the need to renegotiate the contract price before authorizing shipment for the next day [Ex. C 7].
10. On **21 January 2018**, RESPONDENT urged CLAIMANT over the phone to ship the products, claiming he was certain a solution would be found through negotiation [Ex. C 8].
11. On **22 January 2018**, CLAIMANT shipped the products in reliance on RESPONDENT'S representation to its own detriment.
12. On **31 July 2018**, CLAIMANT filed the NOA, requesting an adaptation of the contract price [NOA].
13. On **24 August 2018**, RESPONDENT submitted its answer to the NOA [ANS.].

14. On **2 October 2018**, CLAIMANT alerted the Arbitral Tribunal of parallel proceedings in which RESPONDENT requested an adaptation of the contract price because of changed circumstances and requested the admission of evidence from RESPONDENT'S other proceeding [Letter by Langweiler].
15. On **5 October 2018**, Procedural Order No 1 was released [PO 1].
16. On **2 November 2018**, Procedural Order No 2 was released [PO 2].

ARGUMENT

ISSUES I AND II: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION CLAUSE TO (SECTION I) ADAPT THE CONTRACT BETWEEN THE PARTIES, AND (SECTION II) ALLOW EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING, NOTWITHSTANDING HOW IT WAS OBTAINED.

17. In the absence of an express choice of law provision, Mediterraneo arbitration law is the appropriate law to govern the arbitration clause. Under Mediterraneo law, the Arbitral Tribunal has the jurisdiction and power to adapt the contract between the parties (**Section I**). Further, the Arbitral Tribunal should apply its discretion and admit evidence from another ongoing HKIAC arbitration as part of its consideration of the contract pricing matter (**Section II**).

I. THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION CLAUSE TO ADAPT THE CONTRACT.

18. The Parties agree that arbitration of any dispute arising out of the contract will be seated in Vindobona, Danubia and administered by the HKIAC [Ex. C 5]. Specifically, "HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted" are to be applied [*Id.*]. Though the HKIAC Rules 2013 were in force at the time of submission, the Parties have since agreed to conduct this arbitration under the HKIAC Rules 2018 [NOA, PO 1, p. II].
19. The Arbitral Tribunal has the jurisdiction and the power to adapt the contract because (1) the HKIAC has explicitly indicated that the inclusion of an express choice of law provision is optional and not determinative of the applicable law, (2) where no express provision exists, commentary and case law as well as the HKIAC Rules 2018 support a flexible analysis of the most appropriate laws, and (3) the evidentiary record reflects an intent to apply Mediterraneo law. Finally, as a

matter of public policy, this Arbitral Tribunal should find that Mediterraneo law governs the arbitration clause as well as the substantive contract because the application of Danubian arbitration law would preclude resolution of the issues before the Arbitral Tribunal in contradiction of the Parties' original negotiators' intent.

A. Art. 19 of the HKIAC Rules 2018 and the principle of "competence-competence" empower this Arbitral Tribunal to determine the scope of its own jurisdiction.

20. Art. 19 of the HKIAC Rules 2018 states:

> 19.1 The arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement.
> 19.2 The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part.

21. This Article embodies the principle of competence-competence (also "*Kompetenz-Kompetenz*"); a fundamental principle of arbitration whereby an arbitral tribunal may rule on its own jurisdiction [*See* Born 1] ("Almost all institutional rules grant arbitrators broad power to consider and decide challenges to their own jurisdiction."). In accordance with this principle, both Parties acknowledge the Arbitral Tribunal's jurisdiction to adjudicate disputes arising out of the contract [PO 2, ¶ 48]. The issue in dispute is whether a price change falls within this scope, determined by whether the arbitration clause is governed by Mediterraneo law or Danubian law. RESPONDENT argues that the Arbitral Tribunal lacks the power to adapt the contract price of the Sales Agreement by application of Danubian law [*Id.*]. However, as explained below, Mediterraneo law applies, which permits a broad interpretation of arbitration agreements to encompass the power to change contractual price agreements.

B. Mediterraneo law governs both interpretation of the arbitration clause and the substantive contract law of the Sales Agreement.

22. The Sales Agreement expressly provides that Mediterraneo law governs the contract [Ex. C 5, ¶ 14]. This means Mediterraneo law governs the entirety of the contract, including interpretation of the arbitration clause. RESPONDENT relies on the doctrine of severability to claim that there is a carve out for the arbitration clause because there is no similar choice of law provision within the arbitration clause, which means the law of the seat should apply; that is, Danubian law [ANS. ¶¶ 12-17]. However, (1) the absence of an express choice of law provision for the arbitration clause

does not automatically mean consent to application of Danubian law, (2) the HKIAC Rules 2018, commentators, and case law confirm that this arbitral tribunal may decide which law has the "closest and most real connection" or is most "appropriate" in absence of an explicit choice of law, and (3) the email discussions of the original Party negotiators indicate that there was no shared intent to apply Danubian law to the arbitration clause. Accordingly, this Arbitral Tribunal should hold that it has the jurisdiction and power to decide these claims under Mediterraneo law.

1. The HKIAC model arbitration clauses explicitly indicate that the inclusion of an express choice of law provision is optional.

23. HKIAC clearly indicates on its official website that a choice of law declaration is "optional" in an arbitration clause intended for arbitration under the HKIAC Administered Arbitration Rules [*See* HKIAC Model Clauses]. HKIAC suggests that such a provision "should be included particularly where the law of the substantive contract and the law of the seat are different" [*Id.*]. However, because this provision is optional, HKIAC does not infer that omission of such a provision indicates the Parties' intent to apply and be bound by the law of the seat of arbitration. Art. 36.1 of the HKIAC Rules 2018 states that "failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate" [Moser & Bao at 260] ("[T]he arbitral tribunal is given a broader scope within which to determine which laws apply where the parties fail to agree (i.e., 'the rules of law which it determines appropriate'), whereas under the HKIAC Rules (2008) the arbitral tribunal would have decided the dispute based on 'the rules of law with which the dispute has the closest connection.'").

2. Commentators and case law support a more flexible approach to choice of law rules where the Parties have not expressly indicated the governing arbitration law for a contract.

24. The Court in *Klöckner* addressed the issue of choice of law in arbitration, stating:

> There is no doubt that the proper law of the contract and the *lex arbitri* may be different. There is no doubt too, that practical difficulties may arise when the *lex arbitri* is different to that of the seat of the arbitration . . . But there is no rule that the *lex arbitri* must be the law of the seat of the arbitration.

25. In *Sulamérica*, an English court considered how to determine the law applicable to an arbitration clause and articulated a three-part test. Namely, the court considered the presence of (1) express choice, (2) implied choice, and (3) the closest and most real connection [*Sulamérica*]. Though

holding under the circumstances of the case that the applicable law was that of the seat of arbitration, the Court of Appeal explained that "in the absence of other factors, the implied law of the arbitration agreement will often be the same as the law of the substantive contract" [*Id.*].

26. Though there is no express choice in the arbitration clause in the present matter, the implied choice of the Parties found in the negotiating history through CLAIMANT'S representative Ms. Napravnik's explanation of CLAIMANT'S policy against foreign choice of law [Ex. R 2] and RESPONDENT'S representative Mr. Antley's agreement that change of price should be decided by the Arbitral Tribunal ("Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree.") [Ex. C 8] leans in favor of CLAIMANT'S interpretation of the arbitration clause as governed by Mediterraneo law [*See also Arsanovia*] (finding that the choice of an arbitration seat alone was not sufficient to displace the inference of an implied choice of law through the law governing the substantive contract.).

a. Under Mediterraneo law, this Arbitral Tribunal has jurisdiction over this dispute.

27. The arbitration law of Mediterraneo provides for a broad interpretation of arbitration clauses, in contrast to the narrow interpretation espoused by Danubian arbitration law [NOA, at ¶ 16]. RESPONDENT, accordingly, claims that the clause's reference to disputes "arising out of" the contract should not be read to exclude the issues under consideration in this proceeding. However, the Parties' arbitration clause gives the Arbitral Tribunal the power to interpret the contract and the scope of its clauses.

28. As previously noted by CLAIMANT, "[l]ike in most other jurisdictions the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract" [NOA, at ¶ 16] [*See, e.g.*, Welser & Molitoris at 19] ("On an international level, courts tend to apply a broad interpretation to the scope of arbitration agreements."). This principle is widely accepted and has been espoused by Blackaby, Partasides, Redfern, and Hunter, who write:

> General words such as 'claims', 'differences', and 'disputes' have been held by the English courts to encompass a wide jurisdiction in the context of the particular agreement in question . . . English courts have in the past given a wide meaning to the phrase 'arising out of', and this form of words will usually embrace all disputes capable of being submitted to arbitration [Redfern & Hunter at 109].

29. Here, the HKIAC model clause does contain phrasing to encompass "Any dispute, controversy, difference or claim arising out of or relating to this contract," which does contrast from the "arising out of" language included in the Parties' arbitration clause. However, this alone is not enough to limit the scope of the Arbitral Tribunal's jurisdiction concerning this matter.
30. RESPONDENT asserts that it "would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators" [ANS., at ¶ 19]. RESPONDENT further argues that, pursuant to Danubian law, an "express empowerment" is required to permit arbitrators to adapt a contract [ANS., at ¶ 13]. However, because Mediterraneo law governs, negotiating history can be considered to clarify the Parties' intent. In her witness statement, Ms. Napravnik recounts that RESPONDENT'S negotiator Mr. Antley told her he believed the arbitrators should have the power to adapt the contract if the Parties could not agree, and that Mr. Antley agreed to include an express reference to this in the hardship clause under her suggestion, even though in her words "from a legal point of view that was not necessary" [Ex. C 8]. Because there was no legal requirement under the applicable law to include such an express empowerment, this Arbitral Tribunal should not adopt RESPONDENT'S narrow interpretation of contract law in accordance with a country whose law does not govern the Sales Agreement.

3. The evidentiary record does not reflect a shared intent to have Danubian law govern interpretation of the arbitration clause.

31. A full view of the drafting history in the record confirms that a provision to apply Danubian arbitration law was not "merely forgotten" by Parties that wished to have Danubian law govern the arbitration clause [ANS. at ¶ 15]. To the contrary, the drafting history clearly reflects CLAIMANT'S position that such an arrangement would be unacceptable [Ex. R 2]. CLAIMANT'S representative, Ms. Napravnik, wrote to Mr. Antley explaining that "to avoid any further futile discussion on the issue", for CLAIMANT to "consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty requires special approval" [*Id.*]. She instead offered the alteration to the arbitration clause that the seat of arbitration may be in a "neutral country;" in her version of the clause, Danubia [*Id.*].
32. Ms. Napravnik's articulation of the arbitration clause is the version that was adopted into the Sales Agreement, with minor technical changes that are undisputed by the Parties [Ex. C 5]. Though Ms. Napravnik's version did not include an optional provision on choice of law, her letter to Mr. Antley stated, "That offer is naturally on the condition that the law applicable to the Sales Agreements

remains the law of Mediterraneo" [Ex. R 2]. This reminder that the Sales Agreement in general—not merely the substantive contract portions—will be governed by the law of Mediterraneo, along with Ms. Napravnik's explanation that future discussion would be "futile" on the topic of contravening CLAIMANT'S policy against contracts submitted to foreign law, this Arbitral Tribunal should conclude that the drafting history reflects an intent to apply the law of Mediterraneo to the entirety of the Sales Agreement.

33. RESPONDENT asserts that its own initial draft of the arbitration clause included a choice of law provision for Equatoriana, and that its omission from the final language was "subsequently merely forgotten" [Ex. R 1; ANS., at ¶ 15]. This characterization of the drafting history assumes an intent to be bound by the law of the seat of arbitration purely on the basis of the omission of the choice of law provision, even though RESPONDENT'S negotiator Chris Antley clearly stated that his initial draft of the arbitration clause was simply modeled on the HKIAC's boilerplate model clause [Ex. R 1]. RESPONDENT'S argument that the omission of a provision declared optional by HKIAC is merely an accident but should nonetheless indicate intent to apply Danubian law is self-contradictory. RESPONDENT relies on the clause's inclusion in a draft stating that the applicable governing law would be Equatorianian to demonstrate that the Parties merely forgot to include the same provision in the final clause. Yet, RESPONDENT does not argue that the Parties would have then still applied Equatorianian law; instead it argues for the application of Danubian arbitration law. Under these facts, the omission cannot be solely classified as an accident, because the clause would necessarily still have been altered to reflect the change of law.

a. CLAIMANT did not consent to Danubian law during the negotiation or drafting of the Sales Agreement.

34. Because CLAIMANT expressly indicated an unwillingness to apply foreign law, this Arbitral Tribunal should find that CLAIMANT did not consent to Danubian law. Consent to arbitration and the jurisdiction of the Arbitral Tribunal is a fundamental tenet of commercial arbitration [*See Granite Rock Co.* ("Arbitration is strictly a matter of consent"]. Redfern and Hunter write:

> One of the alleged parties to an arbitration agreement may argue that it is not bound by the agreement, because the arbitration clause was contained in a document to which only the other party had consented . . . or that the whole dispute in issue is outside the scope of the arbitration agreement or not arbitrable under the applicable law [Redfern & Hunter at 344].

35. Because RESPONDENT did not reopen the issue of choice of law, CLAIMANT'S negotiators never had the opportunity to provide or withhold consent to RESPONDENT'S preferred choice of law, nor were they on notice that RESPONDENT was not willing to accept the application of Mediterraneo arbitration law in accordance with Ms. Napravnik's final email.
36. Whether RESPONDENT would now in retrospect have preferred this clarification to be made, Ms. Napravnik's articulation of CLAIMANT'S internal policy makes clear that CLAIMANT would have resisted any contract applying foreign law [Ex. R 2] and RESPONDENT was aware of this policy throughout the remainder of the negotiating process, extracting the very text of the final arbitration clause from the email in which the policy was stated [PO 2, at ¶ 6]. Therefore, there was never any mutual intent between the parties during negotiations to apply Danubian law to the arbitration clause.

b. Mediterraneo law applies to the arbitration clause notwithstanding the mid-stream change in the Parties' negotiators.

37. RESPONDENT asserts in its Answer that its proposal "made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract" [ANS., at ¶ 5, p. 30]. This misrepresents the drafting history of the arbitration clause. Mr. Antley's general objection regarding applicable law and dispute resolution stated "we consider it not appropriate that your law applies *and* your courts have jurisdiction" [Ex. C 3, emphasis in original]. He went on to suggest that RESPONDENT "could accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction" [*Id.*]. This does not amount to a declaration of intent that the arbitration be governed by the law of the seat of arbitration. Mr. Antley's draft arbitration clause indicates only that he had modeled a draft of the arbitration clause on the template provided by HKIAC, claiming both the seat of law and choice of law as that of RESPONDENT'S home country [Ex. R 2]. To impute a "sincere wish" to maintain such a parallel arrangement when the country in question is now a neutral country would read far too much intent into the documented negotiations between the Parties.
38. Following the negotiators' accident, both were replaced by other in-house counsel of the Parties who had access to the entire set of email correspondences between Ms. Napravnik and Mr. Antley [PO 2, at ¶¶ 5-6]. Though RESPONDENT'S replacement negotiator was the head of its legal department and Mr. Antley's superior, Ms. Napravnik was replaced by CLAIMANT'S CEO along with attorney Mr. John Ferguson, who possessed no prior experience in the practice of

international contracting law [Ex. C 8]. RESPONDENT'S replacement negotiator, Mr. Julian Krone, indicates that had he understood that Mr. Antley's personal note after the discussion with Ms. Napravnik listing as an "issue for further negotiation" was "clarify in arbitration clause that neutral venue and applicable law" to refer to the choice of law applying to the arbitration clause, he "would have definitively included an express reference to the law of Danubia" [Ex. R 3]. However, he does not address why he himself never raised this question in the remaining negotiation process, when he as a sophisticated legal party overseeing the general negotiation process could have reopened the drafting of the arbitration clause for negotiations instead of accepting and incorporating the most recent version into the Sales Agreement.

4. Danubia is not the jurisdiction with the "closest and most real connection" to the Sales Agreement.

39. Though it is commonly the case that the closest and most real connection will be to the law of the arbitral situs (the *lex fori*), when a true dispute over the choice of law arises, arbitration principles such as *in favorem validatatis* (the "validation principle") should be applied to find the arbitration law most suitable to the matter. This principle urges a good faith effort to "apply a law that will give effect to the parties' arbitration agreement" [Born 1 at 112]. Berger cites to the writings of arbitrator Julian Lew as well as case law in stating:

> The *in favorem* rule has the effect] that "doubts about the intended scope of an agreement to arbitrate are [to be] resolved in favor of arbitration" [meaning that] a liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation [Berger at 313].

40. While the use of arbitration to resolve disputes between the Parties in the present matter in general is not in contention, the negotiating history of the Parties demonstrates that the arbitration clause was meant to broadly apply to all issues arising out of the contract to include a change in contract price [Ex. C 8]. To give effect to this intent, Mediterraneo law must apply.

41. This Arbitral Tribunal should not permit the selective use of certain parol evidence in order to permit RESPONDENT to then prevent further reference to similar evidence by CLAIMANT. Though Art. 19.6 of the HKIAC Rules 2018 indicates "HKIAC's decision [on its jurisdiction] is without prejudice to the admissibility or merits of any party's claim or defence," this Arbitral Tribunal should nonetheless find that where (1) Danubian law has no close relation to the agreement, (2) would have a preclusive effect on CLAIMANT'S claims, and (3) has no support in

the drafting history of an implied intent to apply such law, Danubian law cannot provide the "rules of law which [the Arbitral Tribunal] determines to be appropriate" [Art. 36.1 HKIAC Rules 2018]. Therefore, this Arbitral Tribunal should hold that Mediterraneo law governs the arbitration clause, and as a result, it has the power to adapt the Sales Agreement by means of a price change.

II. THE ARBITRAL TRIBUNAL SHOULD ALLOW EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING, NOTWITHSTANDING HOW IT WAS OBTAINED.

42. The Arbitral Tribunal has broad discretion to determine which evidence it considers during its review and adjudication of this dispute (**Section A**). RESPONDENT has protested the admissibility of certain evidence on grounds that it was procured from an allegedly improper source. However, leading commentators and cases alike confirm that such evidence should be admissible, notwithstanding how it was obtained, including whether it was derived from an illegal computer hack (**Section B**) or from a breach of a confidentiality agreement that bound one of RESPONDENT'S former employees (**Section C**).

43. The Arbitral Tribunal may seek to inform its discretion by other leading authorities on the taking of evidence. The HKIAC Rules permit this Arbitral Tribunal to do so and such supplemental authority supports CLAIMANT'S ability to admit the evidence in controversy (**Section D**). Accordingly, the Tribunal should admit the evidence from the other dispute because it directly bears on the central issue of the current dispute, involves one of the parties of the current dispute, and presents information that would otherwise be impossible to access by other means, such as RESPONDENT'S disingenuous representations to the Arbitral Tribunal.

A. The Arbitral Tribunal has broad discretion to determine the admissibility of evidence.

44. It is an internationally recognized principle that an arbitral tribunal must have substantial discretion to control the process of evidence taking [*See* Born 2]. Indeed, the 2018 HKIAC Rules, which govern this dispute, adopt this principle in Art. 22, which states "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" [HKIAC art. 22.2]. Art. 22 was drafted to provide "a higher degree of flexibility" for a tribunal to "deal with evidentiary matters" and to conduct the proceedings in a matter that is effectively tailored to the dispute at hand [Moser & Bao at 190]. An arbitral tribunal proceeding under the HKIAC rules can exercise broad discretion in determining what kind of evidence to permit parties to submit to the tribunal for consideration [Ma and Brock at 15.092].

45. This discretion applies with equal weight to oral testimony and documents such as those CLAIMANT wishes to provide. Art. 22.3 of the HKIAC rules read:

> At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits, or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence.

46. Consistent with the rest of article 22, subsection 22.3 grants an arbitral tribunal wide latitude in handling documents [Moser & Bao at 192].

47. The HKIAC's procedural approach to evidence is consistent with other widely utilized rules in international arbitration. For example, the LCIA Rules and the UNCITRAL Model Law both embrace broad, permissive admissibility standards [LCIA Rules Art. 22.1; UNCITRAL Model Law Art. 19]. Similarly, in the investor-state context, ICSID adopts a discretionary approach, granting a tribunal complete authority to determine what kind of evidence shall be admitted [ICSID Arbitration Rules, Art. 34(1)]. The vast majority of national arbitration laws also recognize the discretion of arbitrators when it comes to resolving evidentiary issues [*See, e.g.,* English Arbitration Act 1996 at 34(1) and (2); German ZPO at 1042(4); Austrian ZPO at 599(1); Ukrainian International Arbitration Act at Art. 19(2)].

48. The HKIAC rules and other leading arbitral institutions have adopted this approach because it effectively furthers the goals of arbitration as a method of dispute resolution, including lower costs, quicker outcomes, and greater efficiency [iTalk Global Communs. Inc.]. Arbitral discretion helps to avoid costly and lengthy disputes concerning the admissibility of evidence and testimony. This system also gives the parties greater control and flexibility in presenting their arguments and facilitates a final judgment that is better informed. "One of the hallmarks of arbitration is the freedom that it offers from technical disputes over admissibility of evidence and other procedural matters, which are often designed for particular national litigation procedures" [Born 2 at 2310].

49. If the Arbitral Tribunal were to decline to admit relevant evidence, this decision might impact the validity of its final award. Prohibiting CLAIMANT from relying on relevant and material evidence in CLAIMANT'S possession negatively impacts CLAIMANT'S right to be heard and present its case. It would be far more difficult, however, for RESPONDENT to meritoriously argue that this Arbitral Tribunal erred when it admitted the evidence but failed to properly evaluate its significance [Pilkov]. Thus, tribunals regularly maintain a low bar for admission but give serious consideration to the weight that is to be attached to that evidence should there be reasons to doubt or question the nature or source of the information [*Id.*]

50. Put simply, defects in evidence are usually taken into account in evaluating its credibility, weight and value, rather than in rulings on admissibility [Hunter at 352]. It is for these reasons that international tribunals have adopted the liberal practice of admitting virtually any evidence subject to evaluation of relevance, credibility, and weight [Waincymyer at 10.16]. The Arbitral Tribunal should, accordingly, exercise its discretion and permit CLAIMANT to submit evidence from the other arbitration.

51. RESPONDENT proposes that the Arbitral Tribunal should ignore these internationally recognized principles and, instead, deny CLAIMANT the right to submit its evidence because RESPONDENT takes issue with the alleged source of this evidence [Fasttrack Letter, Oct. 3, 2018]. Assuming, but not conceding, that the source of this evidence is either a computer hack (**Section B**), or a breach of confidentiality (**Section C**), this Arbitral Tribunal should nonetheless permit CLAIMANT to submit the evidence.

B. Even if the evidence from the other proceeding was procured through an allegedly illegal hack, it should be admitted and considered by the Arbitral Tribunal.

52. In September 2018, RESPONDENT's computer systems suffered a computer hack during which hackers may have obtained access to sensitive information [Fasttrack Letter, Oct. 3, 2018; PO 2]. Regardless of this fact, the evidence should be admitted and considered by the Arbitral Tribunal.

53. Past tribunals have applied the "clean hands" doctrine when considering the culpability of the proponent of the evidence in the underlying allegedly illegal act. Where a party seeking to introduce the evidence participated in the unlawful activity that led to its disclosure, the evidence is more likely to be deemed inadmissible on the basis that a party should not be permitted to profit from its own misconduct [Waincymyer at 10.16.6]

54. The "clean hands" doctrine in practice can best be examined by comparing the decision in *Methanex* with those in the *Yukos Majority* awards. Although these cases arose in the investor-state context, the tribunal's analysis is equally applicable to commercial arbitration.

55. In *Menthanex,* the tribunal declined to admit materials that had been obtained by "successive and multiple acts of trespass committed by Methanex over five and half months" [*Methanex*]. After considering Methanex's conduct in securing the information, the tribunal stated that to allow Methanex to introduce this documentation into the proceedings would be a violation of its general duty of good faith and offends against "the basic principles of justice and fairness required of all parties in every international arbitration" [*Methanex*]. Conversely, in the *Yukos Majority* awards, the tribunals permitted use of WikiLeaks cables because it was found that the claimants in the disputes had not operated in bad faith in securing the information [*Yukos Majority* awards]. These cases highlight the importance of examining party conduct in making evidentiary decisions.

56. In the present dispute, nothing in the factual record indicates that CLAIMANT had any role in the computer hack on RESPONDENT'S systems. To the contrary, CLAIMANT has represented that it learned about the other arbitral proceeding at the annual breeder conference and from a conversation with the CEO of one of CLAIMANT'S regular customers [PO 2]. The record before this tribunal is devoid of any materials facts that would impress upon CLAIMANT any culpability in the alleged computer hack.

57. Another factor that tribunals may consider in their admissibility analysis is whether the evidence illegally obtained is also presently available or accessible to the public [*Caratube*]. The rationale is that while tribunals may appreciate the need to protect against cybercrime and the potential unfairness of allowing confidential evidence obtained through hacking to be admitted, a tribunal also needs to have access to information that is in the public domain, and allegedly relevant and material to the dispute. After admitting leaked documents, a tribunal may then resolve issues of authenticity and weight [*Caratube*].

58. Here, it is clear that the information CLAIMANT seeks to offer to the Arbitral Tribunal is no longer private and withheld from the general population. CLAIMANT learned about this information at a popular and annual breeder conference from an individual unaffiliated with RESPONDENT and who was not affiliated with the other dispute and thus did not have a sort of specialized access that would render this third party separate from the general public [PO 2]. Moreover, that RESPONDENT used an outdated firewall to protect this information which made it easy for hackers to enter the system further demonstrates the relative ease of access to this information to members of the general public [*Id.*].

59. There is no universal test for determining whether information obtained from an illegal computer hack should be deemed admissible. However, the prevailing analytical frameworks weigh in favor of permitting CLAIMANT to rely on this evidence and the Arbitral Tribunal should allow the Claimant to do so.

C. The Arbitral Tribunal should permit the evidence even if it was obtained in breach of RESPONDENT'S employee confidentiality agreement.

60. RESPONDENT asserts that another possible source of the evidence CLAIMANT wishes to submit to this Arbitral Tribunal is disclosure by one of two employees who were terminated by RESPONDENT months before the initiation of these proceedings [Fasttrack Letter, Oct. 3, 2018]. RESPONDENT asserts that such disclosure would have been illegal as it would have constituted a breach of a confidentiality agreement [*Id.*]. Even if RESPONDENT'S allegations were true, the Arbitral Tribunal should nonetheless permit CLAIMANT to admit such evidence.

61. Confidentiality concerns can be overridden when they would interfere with the delivery of proper justice. Put simply, the Arbitral Tribunal must balance the importance of upholding confidentiality agreements against other important policy and efficiency concerns. It is for this reason that one or both parties to an agreement may be legally bound to disclose confidential information at the request of some regulatory authority or by a tax, criminal, or judicial authority [Marlon Meza-Salas]. An undue concern for confidentiality also comes at the expense of transparency [Waincymyer at 10.16.7]. An arbitral tribunal may also examine the burden a party will be forced to endure if the tribunal prevents that party from admitting certain evidence in support for its claims due to strict adherence to confidentiality obligations.

62. The evidence at issue here concerns the sale of a mare by RESPONDENT to a buyer in Mediterraneo and bears directly on the delivery of justice by this Arbitral Tribunal. The contract was negotiated in a manner similar to the present dispute and involves similar questions of fact, law, and equity. The importance of this evidence outweighs the policy incentives for strictly enforcing employer/employee confidentiality agreements which typically relate to undue disclosure of trade secrets and client information concerns which are inapplicable in this context.

63. RESPONDENT cites to art. 42 of the HKIAC Rules to support preventing admissibility of CLAIMANT'S evidence. However, that arbitrations proceeding under HKIAC rules, such as the present dispute, are confidential reinforces that the Arbitral Tribunal should permit Claimant to admit this evidence. Any information disclosed in CLAIMANT'S evidence would enjoy safeguards from any additional unnecessary exposure outside the context of this dispute.

D. The IBA Rules on the Taking of Evidence Can Supplement the HKIAC Rules

64. The HKIAC Rules provide the arbitral tribunal with broad discretion to make evidentiary decisions and it is not bound by any formal rules of evidence [Moser & Bao at 190]. In addition, the tribunal has the discretion to consider additional authorities regarding evidence. The HKIAC Rules expressly permit this Arbitral Tribunal to seek this kind of guidance. Art. 13.1 of the Rules provides:

> [t]he arbitral tribunal enjoys broad discretion to manage the proceedings in a manner that avoids unnecessary delay or expense, provided that the procedures adopted ensure equal treatment of the parties and afford the parties a reasonable opportunity to be heard.

65. The seat of this arbitration is Danubia. Frequently, arbitral tribunals applying the HKIAC rules look to the rules or cases of the jurisdiction in which the arbitration is taking place for guidance. Danubia, however, has no specific rules on evidence with respect to how to deal with evidence obtained in breach of contractual obligations or by illicit means [PO 2]. Neither do the countries of either of the parties of this dispute [*Id.*]. Therefore, CLAIMANT invites this Arbitral Tribunal to instead look to internationally recognized standards such as those set forth by the IBA Rules of Evidence.

66. The IBA Rules of Evidence codify the evidentiary procedures used by legal systems all across the globe and are commonly adopted or referred to in HKIAC arbitration [Moser & Bao at 191]. The IBA rules and institutional rules grant broad discretion to the arbitral tribunal in the taking of evidence. Article 9(1) of the 2010 the IBA Rules on the Taking of Evidence provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence" [IBA Rules on Evidence, art. 9(1)]. These rules weigh in favor of permitting CLAIMANT to introduce the evidence it now seeks to do so given the wide discretion afforded to an arbitral tribunal.

ISSUE III: CLAIMANT IS ENTITLED TO DAMAGES RESULTING FROM AN ADAPTATION OF THE CONTRACT PRICE, (I) UNDER CLAUSE 12 OF THE SALES AGREEMENT AND (II) UNDER THE CISG AND UNIDROIT PRINCIPLES.

67. After the Equatorianian government imposed an unexpected 30% tariff on all animal products imported from Mediterraneo, RESPONDENT steadfastly urged CLAIMANT to ship the racehorse semen as stipulated in the contract, while promising to adapt the contract price in accordance with clause 12 of the Sales Agreement. In reliance on RESPONDENT'S representation, CLAIMANT shipped the goods, believing RESPONDENT had agreed to renegotiate the contract price post shipment. CLAIMANT has suffered a significant operational loss, placing its racehorse business at risk of bankruptcy. As a result, Claimant is entitled to relief under clause 12 (**Section I**), and under the CISG and UNIDROIT Principles (**Section II**).

I. CLAIMANT IS ENTITLED TO DAMAGES RESULTING FROM AN ADAPTATION OF THE CONTRACT PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT.

68. Clause 12 of the SA stipulates:

> Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [Ex. C 5].

69. CLAIMANT is entitled to damages under the hardship clause because (**Section A**) the tariffs imposed are covered by the clause and (**Section B**) the Parties intended for the present circumstances to trigger the clause. In the alternative (**Section C**) clause 12 should still apply because CLAIMANT relied on RESPONDENT'S representation to its own detriment.

A. Equatoriana's tariffs triggered the hardship clause, which entitles CLAIMANT to an adaptation of the contract price.

70. To constitute hardship, two conditions must be satisfied: (i) there must be a changed circumstance, independent of the parties, that was "unforeseeable" at the time of the contract's conclusion; and (ii) the supervening circumstance caused a distortion in the contract's equilibrium [Bernardini at 213]. CLAIMANT establishes hardship by demonstrating (**Section** 1) the tariffs constitute an unforeseen event under clause 12, and (**Section** 2) CLAIMANT suffered a hardship that merits redress.

1. The evidentiary record confirms that the tariffs constitute an "unforeseen event" under clause 12 of the Sales Agreement.

71. To satisfy the first prong of the hardship test, the changed circumstance must be "so great as to shock the conscience of a reasonable person" [Da Silveira at 326]. Adjudicatory bodies consider circumstantial evidence to determine whether certain economic and political events were foreseeable [*Borregaard Indus.*; *Himpurna*; *Maple Farms*]. The tariffs constitute an "unforeseen event" as evidenced by (**a**) the writings of the Parties during negotiations; and (**b**) the shock experienced by the public. This will trigger relief under clause 12 of the contract.

a. The tariffs constitute an "unforeseen event" as confirmed by the writings of the Parties during negotiations.

72. Courts look to circumstantial evidence to determine what constitutes an "unforeseen event." For example, in *Himpurna*, the tribunal found the Indonesian economic crisis was foreseeable to the native because of contraction in the economy, loss of millions of jobs, currency devaluation, and 75% inflation. Similarly, in *Maple Farms*, the US Court found the 23% increase in the local milk dealer's input prices were foreseeable because of the 10% price increase in milk the previous year and the area's general inflationary trend.

73. In contrast, CLAIMANT is a "foreigner," doing business with "native" RESPONDENT, who predicted its country's political and economic trends. RESPONDENT'S knowledge of the political climate is evidenced in its treatment of the lift as *de facto* permanent ("[*W*]*e are confident* that [the lift] *will become permanent*" [Ex. C 1]). RESPONDENT, a sophisticated merchant dealing in the subject of the ban, presumably had access to sources that confirmed its belief. RESPONDENT'S initiative to even start business with CLAIMANT immediately upon the lift reveals RESPONDENT'S confidence in the lift's permanence. CLAIMANT, in reliance on RESPONDENT, believed the lift was unequivocally a *fait accompli*.

b. The tariffs constitute an "unforeseen event" as evidenced by the shock experienced by the international community, the Parties, and Equatorianian government officials.

74. The EO shocked "the conscience of a reasonable person," namely, that of the entire international community. As demonstrated in the Peak Business News article:

> The retaliation as well as the size of the tariffs came as a big surprise even to informed circles. Equatoriana has always been one of the biggest supporters of the existing system of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have … never resulted in direct retaliatory measures [Ex. C 6].

The article reveals that the government action was unforeseeable to the world when the Parties forged the contract approximately six months earlier on 6 May 2017.

75. The reaction of the Parties themselves further demonstrates the unanticipated change in the government's treatment of the lift. Following the announcement of the tariffs, the Parties did nothing. Although they both read the scintillating article, they did not expect the frozen semen would be treated as an "agricultural good" [PO 2, ¶ 26]. It is not until CLAIMANT'S Ms. Napravnik asked for customs clearance on 19 January 2018, a month after government action, that CLAIMANT learned of the problem to its "great surprise" [Ex. C 8].

76. Finally, disbelief about the breadth of the order is evidenced by government officials' reactions. RESPONDENT'S Mr. Shoemaker was required to confirm the truth of CLAIMANT'S announcement by contacting Ministry employees [Ex. R 4] who themselves were uncertain whether frozen semen constituted "animal products," taking "some time" to determine the EO's reach [*Id.*]. This reveals the vicissitude of the Equatorianian President's decision, and how unforeseeable the action was at the time of the SA's formation.

2. CLAIMAINT alone suffered a hardship under the Sales Agreement.

77. CLAIMANT'S profit margin was destroyed as a result of the tariffs and its financial situation imperiled—effects that rise to the level of hardship under clause 12. The principle of hardship is best defined as an "occurrence of events [that] fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished ...." [Article 6.2.2 UPICC 2004; §313 German Civil Code (BGB); Brunner at 391]. Under these circumstances, an adjudicator may adapt the contract to reallocate risk by considering the magnitude of the distortion informed by the principle of good faith [Article 6.2.2 UPICC 2004]. To prevail on a hardship claim, the aggrieved party must give a detailed justification of the "unbearable" impact the changed circumstance has upon it [*France & Algeria* case; *Turkey & The Netherlands* case; *Petrobras*]. Furthermore, courts are less likely to find hardship when it can be borne by third parties [Da Silveira at 348].

78. For example, in the *France & Algeria* case, the tribunal rejected claims of hardship because the claimant did not elaborate on how a general lack of security to protect French nationals and the difficulty in doing business in Algeria constituted hardship. Similarly, in the *Turkey & The Netherlands* case, the tribunal found it unlikely performance of the contract at the agreed price would cause "unbearable difficulties" because the seller admitted the contract represented only a small percentage of its revenues. Finally, in *Petrobras,* the Tribunal found the SR 1.6 billion loss out of a net income of SR 17 billion did not constitute hardship.

79. In contrast, here, the tariffs "not only destroy[ed] our profit margin of 5% but result[ed] in considerable hardship" [Ex. C 8]. CLAIMANT explained it had experienced prior financial difficulties and kept afloat only "[t]hrough extensive restructuring measures and a considerable cut of the work force" [*Id.*]. As a result, it would be "impossible for [CLAIMANT] to shoulder this additional 30% tariff..." [*Id.*]. The latter statement is not mere puffing: the racehorse section of CLAIMANT'S business had been operating at a loss since 2014 [PO 2, ¶ 15]. Because CLAIMANT'S access to its two main credit lines is contingent upon its profitability [PO 2, ¶ 29], if there is no adaptation of the contract price, negotiations for a new credit line is unlikely, and CLAIMANT will be obliged to sell its racehorse business [*Id.*].

80. Unlike CLAIMANT, the government tariffs pose no hardship to RESPONDENT. In fact, use of the imported racehorse semen is unimpeded and resulting offspring are guaranteed admission to all races in the country [PO 2, ¶ 17]. Should CLAIMANT have to bear the cost of the tariffs, RESPONDENT'S business would thrive as planned. Pursuant to the principle of good faith, it would be grossly unfair to burden CLAIMANT alone with payment when the same burden would not represent the same magnitude of hardship to RESPONDENT.

B. In any event, the Parties intended for clause 12 to be triggered specifically under these circumstances.

81. International tribunals recognize that where parties to a contract insert a hardship clause, arbitrators will determine what constitutes hardship based on the intention of the parties [Fouchard at 27]. CLAIMANT will establish the Parties' intent to trigger clause 12 under the instant circumstances as evidenced during negotiations for DDP delivery, and in RESPONDENT'S explicit rejection of a stricter hardship standard under the ICC-Hardship clause.

82. The scope of the hardship clause is evidenced during negotiations for DDP delivery, when RESPONDENT explained: "[G]iven the urgency of the delivery and your much greater experience in the shipment of frozen semen including the necessary export and import documentation we would insist for this contract on a delivery on the basis of DDP" [Ex. C 3; *see also* Ex. C 8]. The purpose of DDP delivery was to benefit from CLAIMANT'S expertise, not burden CLAIMANT. This is further evidenced by RESPONDENT'S agreement to the increased purchase price per dose of semen, from the original USD 99.500/dose without DDP delivery [Ex. C 2], to USD 1,000/dose with DDP delivery [Ex. C 4]. RESPONDENT never intended for CLAIMANT to absorb all the risk associated with delivery, including an increase in tariffs, and it made that intent clear.

83. In turn, CLAIMANT did not agree to bear all the risk associated with DDP delivery, "in particular not those associated with changes in customs regulation or import restrictions" [Ex. C 4].

The government tariffs on the importation of animal products is an import restriction, falling clearly within the scope of CLAIMANT'S expressed example of hardship. The discussion reveals the Parties intended clause 12 address any imbalance in the contract equilibrium, and remedy additional risk absorbed by CLAIMANT.

84. Furthermore, CLAIMANT'S intention to apply clause 12 to the instant facts is revealed in its email to RESPONDENT dated 31 March 2017. CLAIMANT wrote

> [B]oth know from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal. At a minimum, a hardship clause should be included into the contract to address such subsequent changes [Ex. C 4].

85. The "experiences" refer to Danubia's 2014 imposition of strict health and safety requirements resulting in a 40% sales price increase for CLAIMANT. As evidenced by the "such subsequent changes" language, reference to the health and safety requirements does not limit the hardship clause to those instances, but applies the clause to all unforeseeable government action. RESPONDENT knew what CLAIMANT was referencing because the case had been widely publicized [PO 2, ¶ 21]. Mutual knowledge of the 2014 event helped inform the Parties in their understanding of clause 12's scope and application to the instant government action.

86. Finally, during negotiations, the Parties agreed to a broad hardship clause that covers the present circumstances, as evidenced by RESPONDENT'S explicit rejection of the ICC-Hardship clause. Where the ICC hardship clause refers to an event that would make contract performance "excessively onerous," clause 12 merely refers to an event comparable to the faulty act of a third party or an act of God, that would make performance of the contract "more onerous." An "excessively onerous" hardship invokes a higher standard of proof than simply an "onerous" hardship. Furthermore, unlike where the ICC clause stipulates the Parties have an obligation to reasonably overcome the event by negotiating alternatives, clause 12 of the contract stipulates no such duty.

87. As is evidenced by RESPONDENT'S express exclusion of the more limited wording of the ICC clause and its heightened hardship standard, the Parties intended for clause 12 to apply under circumstances of unforeseen government actions, such as the one here.

C. In the alternative, clause 12 should still apply because CLAIMANT relied on RESPONDENT'S Mr. Shoemaker's representation to its detriment.

88. RESPONDENT is estopped from arguing that the contract price should not be adapted on the principle of good faith because it induced CLAIMANT to rely on its representation to CLAIMANT'S detriment [Brunner at 393; *Amco*]. Good faith "prevents the obligee from seeking performance under the original terms if the circumstances fundamentally differ from those in place when these terms were agreed" [Da Silveira at 324]. In accordance with this principle, the injured party may bring a claim of estoppel where there is (i) a clear and unambiguous statement of fact; (ii) made voluntarily, unconditionally, and with authority; that (iii) induced reliance in good faith on the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement [Bowett at 202]. Estoppel will effectively prevent the uninjured party from succeeding on an otherwise legal defense. Where one of the three Bowett prongs is lacking, estoppel theories have not succeeded [*Canfor*; *Yukos Majority* awards; *Kardassopoulos*; *Amco*].

89. CLAIMANT meets the Bowett test, thereby demonstrating that estoppel is the appropriate remedy. The three elements of the test are satisfied: RESPONDENT clearly and unambiguously informed CLAIMANT that it intended to renegotiate the shipment price under clause 12; RESPONDENT'S statement to CLAIMANT was made voluntarily, unconditionally, and with authority; and CLAIMANT relied on RESPONDENT'S misleading representation to its detriment.

90. First, RESPONDENT clearly and unambiguously informed CLAIMANT that it intended to renegotiate the shipment price under clause 12. Before making its fatal statement, RESPONDENT'S Mr. Shoemaker was on notice that the tariffs imposed by its government were burdensome for CLAIMANT, overwhelming it with more expense than originally allocated. Knowledge of hardship is evidenced by CLAIMANT'S Ms. Napravnik's email to RESPONDENT, stating "newly imposed tariffs of 30% on agricultural products are applicable to the shipment… That makes this shipment 30% more expensive! You will understand that we will have to find a solution … before we can start the shipment" [Ex. C 7]. Furthermore, during their phone conversation the following day, 21 January 2018, CLAIMANT "told that to Mr. Shoemaker," "that" referring to CLAIMANT'S understanding that it should not bear all risks associated with DDP delivery [Ex. C 8]. Finally, RESPONDENT knew of CLAIMANT'S financial predicament based on floating rumors in the market [PO 2, ¶ 22].

91. Equipped with this knowledge, RESPONDENT'S Mr. Shoemaker stated "[h]e was certain that a solution would be found through negotiation given the good relationship between the Parties and their interest in further business," urging CLAIMANT to authorize payment as planned, further "emphasiz[ing] their interest in a long-term relationship … [due to its] plans to buy … 50 doses from … [CLAIMANT'S] second stallion of world reputation" [Ex. R 4]. Unlike the *Yukos Majority* awards, this statement conveys to CLAIMANT that a renegotiation of price agreeable to both parties because of their interest in a long-term relationship will be reached in due course. The statement meets the first prong of the Bowett test for estoppel, where RESPONDENT knew the additional tariffs and lost profit would constitute a significant hardship for CLAIMANT, and understood CLAIMANT'S intention to adapt the contract price, yet made a representation of fact to derail CLAIMANT into believing an adaptation discussion would transpire after the "urgent" delivery.

92. Second, RESPONDENT'S Mr. Shoemaker's statement to CLAIMANT was made voluntarily, unconditionally, and founded on the breadth of his authority as "[r]esponsible for the development of the racehorse breeding program..." [Ex. R 4] and "all questions concerning the [contract]" [PO 2, ¶ 31]. Like *Kardassopoulos*, where the tribunal invoked estoppel because assurances made by the most senior Government officials of Georgia had "cloaked [the JVA] with the mantle of government authority" [¶192], based on Mr. Shoemaker's position, it was reasonable for CLAIMANT to address her request to him and rely on his representation of a later negotiation.

93. Furthermore, under the circumstances when shipment was scheduled to be made the next day and CLAIMANT had not heard from RESPONDENT, it was reasonable for it to rely on the representation without waiting for the legal department's confirmation over the course of the weekend.

94. Finally, CLAIMANT relied on RESPONDENT'S misleading representation to its detriment and to RESPONDENT'S advantage. Unlike *Canfor*, here, RESPONDENT in bad faith induced CLAIMANT to rely on its representation to gain a benefit at CLAIMANT'S expense. This objective is evidenced in Mr. Shoemaker's affidavit, where he states: "My primary concern was to ensure that the remaining 50 doses were actually shipped…" [Ex. R 4] and "I knew that CLAIMANT would not deliver if I were to reject their request outright" [*Id.*]. Hence, to induce CLAIMANT to act against its interest and for RESPONDENT'S benefit, RESPONDENT derived a strategy with his wife, a lawyer, to ensure delivery without committing RESPONDENT [PO 3, ¶ 34]. This strategy ran contrary to the contract, which stipulated payment of shipments were to be made prior to shipment ["All fees are payable upon execution of this Agreement. Buyer specifically agrees and understands that no semen will be shipped until all fees have been paid" (SA, ¶ 5]. As responsible, RESPONDENT knew that shipment before payment was not in the ordinary course of business. Therefore, RESPONDENT had an obligation not to urge shipment in violation of the contract because of its contractual duty to CLAIMANT.

95. The combination of the carefully crafted statements, prepared with the advice and consent of a lawyer in the privacy of Mr. Shoemaker's home, made to secure shipment without mitigating CLAIMANT'S known hardship, along with Mr. Shoemaker's blatant disregard for the contract's stipulation that payment for shipment should be made prior to shipment, reveal RESPONDENT'S bad faith in inducing CLAIMANT to act to its detriment. For the foregoing reasons, where RESPONDENT made a clear, unambiguous statement of fact, made voluntarily, unconditionally, and with authority, that induced reliance in good faith to CLAIMANT'S detriment, RESPONDENT should be estopped from arguing no adaptation of the contract price.

96. Clause 12 of the contract is triggered to permit an adaptation of the contract price because CLAIMANT suffered hardship as defined under the clause, and the Parties intended for the clause to cover the present circumstances. In the alternative, RESPONDENT should be estopped from claiming no adaption of the contract price because it induced reliance on its representation of an adaptation to CLAIMANT'S detriment.

II. CLAIMANT IS ENTITLED TO DAMAGES RESULTING FROM AN ADAPTATION OF THE CONTRACT PRICE UNDER BOTH (SECTION A) THE CISG AND (SECTION B) THE UNIDROIT PRINCIPLES.

A. CLAIMANT is entitled to increased payment under the CISG.

97. CLAIMANT is entitled to increased payment under CISG Articles 79, 8, 55, and 7. The CISG governs this dispute according to paragraph 14 of the Sales Agreement [Ex. C 5]. Pursuant to the CISG, CLAIMANT: **(1)** properly attempted to avoid performance due to hardship according to Article 79(1), **(2)** agreed to deliver because RESPONDENT manifested an intent to renegotiate the price under Article 8, **(3)** agreed to an open price contract with RESPONDENT under Article 55, and **(4)** is owed damages because RESPONDENT failed to abide by the duty of good faith under Article 7(1).

1. To avoid the economic hardship imposed by the tariffs, CLAIMANT followed the procedures of CISG Article 79.

98. CLAIMANT would have properly avoided delivering the horse semen under Article 79(1) after the unforeseen hardship of the tariffs, but for RESPONDENT'S agreement to renegotiate prior to the final shipment. Specifically, Article 79(1) provides, that "[a] party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that could not reasonable be expected to have taken the impediment into account at the time of the conclusion of the Sales Agreement or to have avoided or overcome it or its consequences" [Art. 79(1)]. As explained below, pursuant to Article 79(1) of the CISG, CLAIMANT attempted to avoid performance of its obligation to deliver goods after the unforeseen tariffs occurred.

a. The tariffs were an impediment to the Sales Agreement and were beyond CLAIMANT'S control.

99. In accordance with CISG Article 79(1), the new 30% tariff on horse semen imposed on Mediterraneo created an impediment beyond CLAIMANT'S control [Art. 79(1)]. A change in circumstances that causes an economic hardship, may constitute an impediment [*Scafom;* CLOUT case No. 166]. An impediment includes "legal impediments such as the outbreak of hostilities or the imposition of foreign exchange controls" [Ziegel]. Tariffs constitute a "legal impediment" that is a "foreign exchange control," thus, tariffs constitute an impediment under Article 79(1).

100. Here, the tariffs were an impediment beyond CLAIMANT'S control that made it economically infeasible for CLAIMANT to perform its obligations. No tariff existed when the Sales Agreement was executed [Ex. C 6]. However, as previously discussed in para. 99, the Equatorianian government imposed a 30% tariff on horse semen [Ex. C 6; Ex. C 8]. The 30% tariff not only diminished any profit for CLAIMANT but would cost CLAIMANT to deliver the horse semen to

RESPONDENT [Ex. C. 8]. Moreover, CLAIMANT had no control over the Equatorianian government's decision to impose tariffs. These economics eliminated any profit to CLAIMANT, and instead imposed costs that were exclusively borne by CLAIMANT. This created an impediment, beyond CLAIMANT'S control, which was exclusively to the detriment of one party to the Sales Agreement, the CLAIMANT.

b. When the Sales Agreement concluded, CLAIMANT could not reasonably have expected a 30% tariff.

101. CLAIMANT could not have reasonably expected the impediment of the 30% tariff on horse semen when the contract was finalized [Art. 79(1)]. A party may not claim exemption under Article 79(1), unless the party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract" [Art. 79(1)]. Tribunals applying Art. 79(1) have generally found that impediments from market fluctuations are not unexpected, rather market fluctuations are a part of regular business dealings [*Vital*]. For instance, in *Vital*, the tribunal found that a buyer could not seek avoidance under 79(1) when the price of raspberries dropped significantly lower than the price the buyer had contracted to pay, because market fluctuations are foreseeable [*Vital*]. Also, sellers are not exempt under Art. 79 when a government prohibits delivery by banning goods, if the ban was in place at the time the contract was concluded [*Coal* case]. A seller should be aware of all relevant government bans when contracting to sell goods, otherwise the impediment is foreseeable [*Malaysia*].

102. Here, as discussed previously in para. 101, CLAIMANT could not have expected the tariffs at the time the Sales Agreement was concluded. In contrast to the *Vital* case, which involved an economic impact arising from simple market fluctuations, the severe tariffs that impacted the Sales Agreement, were unexpected and not within the realm of normal business dealings [*Vital*]. The tariffs were unexpected by both parties, as well as to the rest of the horse breeding community – as evidenced by the article in Peak Business News [Ex. C 6]. Further, the ban was not in place at the time the contract was concluded. Unlike the *Coal* case and *Malaysia* case, where government bans were already in place at the time of contract formation, here, the tariffs were not in place at the time the Sales Agreement was finalized [*Coal* case; *Malaysia*; Ex. C 8]. Under these circumstances, CLAIMANT could not reasonably have expected the tariffs at the time the Sales Agreement was concluded.

c. CLAIMANT could not have avoided or overcome the tariffs.

103. CLAIMANT could not have avoided or overcome the impediment of the 30% tariff, because there was no "commercially reasonable substitute" available in place of delivering the horse semen to RESPONDENT. Art. 79(1) states that a party cannot claim exemption if the party could have avoided or overcome the impediment and its consequences [Art. 79(1)]. When a seller is unable to deliver goods because of an impediment, they may still be able to perform the contract by delivering a "commercially reasonable substitute" [*Macromex*]. For example, in *Macromex*, the buyer suggested that the seller deliver to an alternate location, which provided a commercially reasonable substitute to delivering to the original location, thus, the seller could not claim an exemption under Art. 79(1) [*Macromex*].

104. Here, there was no commercially reasonable substitute, because RESPONDENT insisted on immediate shipment to their stables in Equatoriana [Ex. C 8]. Given, that RESPONDENT'S business is located in Equatoriana, there was no alternative delivery location to get the horse semen to the RESPONDENT'S horses. Also, there was no alternate product that CLAIMANT could have delivered that was exempt from the tariffs to avoid the impediment. Accordingly, CLAIMANT could not have reasonably avoided the tariffs.

d. Given the increased tariffs, CLAIMANT gave timely notice to RESPONDENT that it would be unable to deliver the goods.

105. Under Art. 79(4), CLAIMANT gave RESPONDENT reasonable timely notice of its inability to deliver goods because of the tariffs. Art. 79(4) of the CISG requires the party who fails to perform to "give notice to the other party of the impediment and its effect on his ability to perform" [Art. 79(4)]. Additionally, "[i]f the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt" [Art. 79(4)]. The party seeking exemption must ensure the other party r*eceives* the notice within a reasonable amount of time [Sarcevic]. Consequently, a party cannot claim exemption under Art. 79, unless the party gives notice within a reasonable amount of time and ensures the opposing party received the notice.

106. Here, CLAIMANT informed RESPONDENT of its inability to deliver the horse semen as soon as CLAIMANT learned of the tariffs, providing RESPONDENT with reasonable timely notice of the impediment as required by Art. 79(4). Specifically, CLAIMANT informed RESPONDENT by email on 20 January 2018, the same day it learned of the increase in tariffs [Ex. C 7]. CLAIMANT

ensured that RESPONDENT *actually* received the notice in a reasonable amount of time, by repeatedly attempting contact until RESPONDENT responded. Pursuant to Art. 79(4), CLAIMANT'S many and continued attempts to reach RESPONDENT constituted reasonable timely notice of the tariffs effects on its ability to deliver the horse semen.

e. CLAIMANT attempted to renegotiate payment to remedy the impediment to the Sales Agreement.

107. CLAIMANT attempted to renegotiate the payment with RESPONDENT so that CLAIMANT could still deliver the horse semen, even with the impediment of the tariffs. The party seeking exemption due to economic hardship has an obligation to renegotiate the contract [*Scafom*].

108. Here, to remedy the economic hardship, CLAIMANT contacted RESPONDENT and initiated a renegotiation of payment on 20 January 2018 by sending an email to RESPONDENT that asked to "find a solution" so that CLAIMANT would be able to send the final shipment [Ex. C 7]. CLAIMANT, thus, met its burden to attempt to renegotiate the contract price in order to lessen the financial hardship.

109. CLAIMANT met all of the requirements of Art. 79, to be exempt from having to perform its part of the contract given the impediment of the tariffs. However, CLAIMANT decided to deliver the last shipment because RESPONDENT agreed to renegotiate payment, which would remove the economic hardship of the impediment.

2. The Parties intended to renegotiate the contract price after the increase in tariffs under CISG Article 8.

110. Under CISG Article 8, the Parties intended to renegotiate the price after the tariffs. Art. 8 of the CISG states:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

[Art. 8(1), (2)]. Under Art. 8(1), the subjective intent of a party is only relevant if the intent was manifested in some fashion, thus, "the intent that one party secretly had is irrelevant" [CLOUT case No. 5].

111. Here, under Art. 8(1), RESPONDENT knew CLAIMANT intended to renegotiate, and under Art. 8(2) CLAIMANT reasonably understood the statements made by RESPONDENT to show an intent to renegotiate.

112. CLAIMANT relied on RESPONDENT'S apparent intent to renegotiate the price after shipping the last 50 doses, and RESPONDENT was aware of CLAIMANT'S intent to renegotiate. RESPONDENT "knew or could not have been unaware" of CLAIMANT'S intent to renegotiate after CLAIMANT plainly stated that it could not ship the final doses without adjusting the price [Ex. C 7 & 8]. Even though RESPONDENT later states that it never intended to renegotiate the price [Ex. R 4], RESPONDENT manifested its intent to be bound on the phone with CLAIMANT. [Ex. C 8]. RESPONDENT'S secret intentions of not renegotiating are irrelevant when determining intent [CLOUT case No. 5]. Further, a "reasonable person" of the race horse breeding industry would have understood RESPONDENT'S comments on the phone to CLAIMANT to be an agreement to renegotiate the price [C 8]. Therefore, in satisfaction of Art. 8(1) and 8(2) RESPONDENT manifested a subjective and objective intent to renegotiate a new price given the tariffs.

113. RESPONDENT knew or could not have been unaware of CLAIMANT'S intent to renegotiate payment under Art. 8(1). CLAIMANT manifested a subject intent to renegotiate when CLAIMANT stated that it could not ship the last delivery until it found a solution to the economic hardship. [Ex. C 7]. RESPONDENT'S representative stated that it "knew that CLAIMANT would not deliver if [he] were to reject their request outright" [R 4]. That comment shows RESPONDENT'S actual knowledge of CLAIMANT'S request to renegotiate the price. Thus, pursuant to Art. 8(1), RESPONDENT cannot claim that it was unaware of CLAIMANT'S intent to renegotiate.

114. Accordingly, the Parties manifested either a subjective or objective intent to renegotiate the price of delivering the horse semen given the tariffs.

3. The contract price was void once the Parties began renegotiations pursuant to CISG Article 19, which resulted in an "Open Price" contract in accordance with CISG Article 55.

115. The portion of the Sales Agreement discussing the price of $100,000 USD was void once the Parties began renegotiations pursuant to Art. 19, which resulted in an "open price" contract in accordance with Art. 55.

116. CISG Art. 19 provides that a reply to an offer which "contains additions, limitations or other modification is a rejection of the offer and constitutes a counter offer." [Art. 19(1)]. To constitute a counter offer, the reply must involve an additional term that "materially alters" the terms of the agreement. [Art. 19(2)]. An additional term involving a difference in price materially alters the terms of the agreement. [Art. 19(3)].

117. Here, although, the Parties had agreed to a price in the Sales Agreement, CLAIMANT reopened negotiations when tariffs increased and CLAIMANT was disproportionately burdened by the change of circumstances [Ex. C 6, 7]. CLAIMANT accordingly sought to renegotiate the price to reflect the cost of the tariffs, and, thus, suggested to "materially alter" the previous agreement. RESPONDENT agreed to renegotiate, starting a new round of offer and acceptance under Art. 19, thereby voiding the original contract price agreed to in the Sales Agreement [Ex. C 6, R. 4]. The Parties agreed to amend the Sales Agreement when they began renegotiating the price on 20 January 2018, thus, the original price agreement is void.

118. Under Art. 55, RESPONDENT agreed to a new "open price" contract once it agreed to delivery of the final shipment after agreeing to reopen negotiations regarding price [Ex. R 4].

> Art. 55 of the CISG states:
>
> Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

A buyer assents to be bound by an agreement when they accept goods [Art. 18; CLOUT case No. 292].

119. Here, RESPONDENT'S conduct falls squarely within Art. 55 and demonstrates its assent to a new "open price" agreement. RESPONDENT assented to a new price agreement when it accepted the final shipment of horse semen after agreeing to renegotiate the price [Ex. C 8, p. 18]. Because the Parties did not agree to a price before the conclusion of the renegotiated contract regarding price, the Arbitral Tribunal should decide the price based on the price of delivering horse semen "at the time of the conclusion of the contract… under comparable circumstances" [Art. 55]. The 30% tariff at the time of the second contract, makes the price of delivering the horse semen more than the original contract price of $100,000 because of the changed circumstances. The Arbitral Tribunal should find the new price according to the new circumstances of the increased tariffs

[Art. 55]. Before the tariffs, CLAIMANT would have made 5% on the sale of the 50 doses, which amounted to $250,000 in profit [PO 2, ¶ 31]. After the 30% tariff, CLAIMANT lost its profit margin, and the tariffs cost CLAIMANT an additional $1,250,000 to deliver the doses [PO 2, ¶ 31]. Given these new circumstances, the Tribunal can impose a new price for the Sales Agreement and determine that RESPONDENT owes CLAIMANT $1,250,000 under the second "open price" contract to address CLAIMANT'S actual damages.

4. In addition, RESPONDENT breached CISG Article 7(1) by failing to act with good faith, further supporting CLAIMANT'S request of damages.

120. RESPONDENT breached the general principle of good faith and fair dealing, described in Art. 7(1) of the CISG and should pay $1,250,00 to remedy the cost incurred by CLAIMANT on account of RESPONDENT'S bad acts. Art. 7(1) provides that the parties should adhere to the principles of good faith in international trade [Art. 7(1)]. "Article 7 (1) also requires that the Convention be interpreted in a manner that promotes the observance of good faith in international trade" [Digest, p. 43]. RESPONDENT failed to act in good faith when RESPONDENT: (i) misled CLAIMANT to believe it would renegotiate so that and (ii) led CLAIMANT to believe that the last 50 doses were needed immediately for their business, while RESPONDENT actually intended to breach the contract.

a. RESPONDENT acted in bad faith and mislead CLAIMANT to expect renegotiation of the contract price.

121. As previously discussed, RESPONDENT made a conscious decision to allow CLAIMANT to believe it would renegotiate, leading CLAIMANT to deliver the goods to its detriment. RESPONDENT "knew that CLAIMANT would not deliver if [it] were to reject their request outright," so that led CLAIMANT to believe it would renegotiate [R 4]. CLAIMANT stated that it could not deliver unless RESPONDENT agreed to a "solution" to remedy its loss, and RESPONDENT intentionally misled CLAIMANT to believe it would agree to a "solution" [Ex. C 7]. CLAIMANT relied on RESPONDENT'S misrepresentation to its detriment, thus, RESPONDENT should be liable for CLAIMANT'S financial loss.

b. RESPONDENT did not act in good faith when RESPONDENT lied about the reason for needing the final shipment.

122. RESPONDENT acted in bad faith when RESPONDENT told CLAIMANT it needed the final shipment immediately, when in reality RESPONDENT wanted the last shipment to violate the

contract. The contract did not allow for sale of doses to third parties without CLAIMANT'S consent [Ex. C 5, p. 13]. RESPONDENT sold doses of horse semen to third parties, making a profit of $20,000 per resold dose. [PO 2, ¶ 20]. Yet, when CLAIMANT attempted to properly avoid performance under Art. 79, RESPONDENT convinced CLAIMANT to deliver the final shipment under the guise that RESPONDENT needed the doses immediately for its own breeding [Ex. C 8, p. 18]. RESPONDENT misled CLAIMANT to believe that the doses were needed immediately, simultaneously costing CLAIMANT to lose its 5% profit and breaching its agreement not to sell to third parties. RESPONDENT is liable for CLAIMANT'S financial loss of $1,250,000 due to RESPONDENT'S failure to abide by the duty of good faith and fair dealing under Art. 7(1).

B. CLAIMANT is entitled to increased payment under the UNIDROIT Principles

123. The UNIDROIT Principles should govern the issues of hardship, change of circumstances, and fraud because the CISG is silent on these issues. Art. 7(2) of the CISG calls for any gaps to be filled by the general principles on which it is based, which is regularly construed as the generally recognized uniform rules, the UNIDROIT Principles, or the applicable domestic law [CLOUT case No. 202; CLOUT case No. 1189; *Machinery*].

124. Here, the UNIDROIT Principles are both the uniform rules and the laws of Equatoriana and Mediterraneo, thus, the UNIDROIT Principles should fill any gaps within the CISG. Both Equatoriana and Mediterraneo adopted verbatim the UNIDROIT Principles as the respective countries' contract laws [PO 1, ¶ 4].

125. The UNIDROIT Principles should be used to decide issues of (1) hardship and change of circumstances and (2) fraud. Pursuant to Art. 6.2.1, the tariffs are a changed circumstance that amounts to hardship, thus, CLAIMANT should not be forced to perform. Moreover, RESPONDENT fraudulently induced CLAIMANT to deliver the final shipment of horse semen. Accordingly, RESPONDENT should compensate CLAIMANT.

1. Under the Hardship Clause of the UNIDROIT Principles, the tariffs amount to Hardship, thus, CLAIMANT may avoid performance.

126. The tariffs are a changed circumstance that constitute hardship, thus, CLAIMANT may avoid performance under Art. 6 of the UNIDROIT Principles [Art. 6.2.1]. According to Art. 6.2.1, a party is required to perform according to the contract, unless changed circumstances amount to hardship [Art. 6.2.1]. Art. 6.2.2 of the UNIDROIT Principles states that hardship occurs when

"events fundamentally alters the equilibrium of the contract either because of the cost of a party's performance has increased or because the value of the performance a party receives has diminished…" Additionally, Art. 6.2.2. requires:

> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
> (c) the events are beyond the control of the disadvantaged party; and
> (d) the risk of the events was not assumed by the disadvantaged party.

[Art. 6.2.2 (a) – (d)]. CLAIMANT'S cost of performance dramatically increased with the tariffs which disadvantaged CLAIMANT [Ex. C 6, 7, 8]. CLAIMANT did not know of the tariffs before the conclusion of the Sales Agreement [6.2.2(a)], the tariffs were beyond the control of CLAIMANT [6.2.2(c)], and CLAIMANT did not assume the risk of tariffs [6.2.2(d)].

127. CLAIMANT explicitly stated that it was unwilling to take on costs such as tariffs – "we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions" [Ex. C 4]. Under CISG Art. 8(1), the contract was made with the understanding from both Parties that CLAIMANT did not assume the risk of such unforeseen circumstances [6.2.2(d)]. Pursuant to Art. 6 of the UNIDROIT Principles, CLAIMANT should not bear the burden of the financial loss from the tariffs, and should be compensated by RESPONDENT.

2. RESPONDENT fraudulently induced CLAIMANT to deliver the final doses, and should pay damages accordingly.

128. As discussed earlier, RESPONDENT (i) misled CLAIMANT to believe that RESPONDENT planned to renegotiate the price, and (ii) misled CLAIMANT to believe that the last 50 doses were needed immediately. Under the UNIDROIT Principles Art. 3.8, a party may avoid performance "when it had been led to conclude the contract by the other party's fraudulent representation" [Art. 3.8]. Also, Art. 7.4.1, comment 3 of the UNIDROIT Principles states that a party is owed damages, when the opposing party committed fraud.

129. RESPONDENT fraudulently induced CLAIMANT to deliver the final shipment. Leading CLAIMANT to believe RESPONDENT would pay more, when it never intended to pay more is fraudulent inducement [Ex. R 4]. Moreover, RESPONDENT led CLAIMANT to believe it needed the doses urgently, when RESPONDENT was breaching the contract by selling to third parties,

constituting fraudulent inducement [Ex. C 2, C 4, C 8 p. 18]. CLAIMANT relied on RESPONDENT'S misrepresentations, and subsequently suffered economic harm. RESPONDENT'S fraudulent inducement entitles CLAIMANT to damages pursuant to the UNIDROIT Principles Art. 7.4.2.

130. CLAIMANT is entitled to damages in the amount of US $1,250,000, under the CISG and the UNIDROIT Principles.

PRAYER FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Tribunal:

1. Find it has the jurisdiction and the power under the arbitration agreement to adapt the contract;
2. Allow evidence from the other arbitration proceeding, notwithstanding how this other evidence was obtained.
3. Find CLAIMANT is entitled damages in the amount of US $1,250,000 or any other amount resulting under clause 12 of the Sales Agreement and under the CISG.

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