The John Marshall Law School

SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION

HONG KONG SAR
31ST MARCH TO 7TH APRIL 2019

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

RESPONDENT

AGAINST:

Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

CLAIMANT

COUNSEL FOR RESPONDENT:

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

&	and
%	percent
¶ or para(s).	paragraph/paragraphs
AAA	American Arbitration Association
AG	Amtgerich, Lower Court, Germany
Ans. NOA	Answer to Notice of Arbitration
Arb.	Arbitration
Art(s).	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Cl.	Clause
DAL	Danubia Arbitration Law
Dec	December
DDP	Delivered Duty Paid
DIS	German Institute of Arbitration
et al.	and others
Exhibit C	Claimant's Exhibit
Exhibit R	Respondent's Exhibit
Hague Principles	The Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ibid.	ibidem (in the same place)
IBA	International Bar Association

ICC	International Chamber of Commerce
ICDR	International Center for Dispute Resolution
Jan	January
LCIA	The London Court of International Arbitration
Model Law	UNCITRAL Model Law
NAFTA	North American Free Trade Agreement
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number
NOA	Notice of Arbitration
OLG	Oberlandesgericht, Appellate Court, Germany
p./pp.	page/pages
PCA	The Permanent Court of Arbitration at the Hague
PO 2	Procedural Order No. 2 of 2 November 2018
Res.	Response
Sales Agreement	Frozen Semen Sales Agreement
SCC	The Arbitration Institute of Stockholm Chamber of Commerce
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
USD	United States Dollar
v.	versus

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INDEX OF CASES

INDEX OF ARBITRAL AWARDS

INDEX OF LEGAL TEXTS

Cited as	Source
CISG	United Nations Convention on Contracts for the International Sale of Goods
Hague Principles	The Hague Conference on Private International Law Principles on Choice of Law in International Commercial Contracts
IBA Rules of Evidence	International Bar Association Rules of Evidence
ICC Rules	International Chamber of Commerce Rules of Arbitration
Black's Law Dictionary	Black's Law Dictionary
UN-ECE Rules	United Nations Economic Commission for Europe Rules
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration with the 2006 Amendments
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	UNIDROIT Principles of International Commercial Contracts

STATEMENT OF FACTS

1. Black Beauty Equestrian [RESPONDENT] is a company based in Equatoriana famous for its broodmare lines, resulting in a number of world champion show jumpers and international dressage champions. [*NOA, p. 5, para. 4*]. Considering the popularity of horse racing in Equatoriana, in 2015, RESPONDENT acquired ten mares with an excellent racehorse pedigree to establish a racehorse stable. [*Ibid.*].

2. After meeting with Phar Lap Allevamento [CLAIMANT] at Equestrian World in 2016, RESPONDENT became interested in establishing a business relationship with CLAIMANT. [*Exhibit C-1, p. 9*]. CLAIMANT operates Mediterraneo's oldest and most renown stud farm and covers all areas of the equestrian sport, including providing stallions for racehorse breeding. [*NOA, p. 4, para. 1*].

3. On **21 March 2017**, with the intention to become one of the leading breeders for racehorses, RESPONDENT contacted CLAIMANT to inquire about the price and availability of Nijinsky III, which is one of the most sought-after stallions for breeding. [*Exhibit C-1, p. 9*]. From there, RESPONDENT and CLAIMANT [the PARTIES], two renowned businesses, entered into a series of negotiations with respect to their international transaction. [*Exhibit C-8, p. 17*].

4. Responding to the inquiry, CLAIMANT stated its interest in entering into a long-term mutually beneficial relationship with RESPONDENT. [*Exhibit C-3, p. 11*]. As a result, CLAIMANT agreed to sell 100 doses of frozen semen from Nijinsky III at US $99,500 per dose which was to be picked up from CLAIMANT's premises. [*Exhibit C-2, p. 10*]. CLAIMANT also provided a Standard Frozen Semen Sales Agreement. [*Ibid.*].

5. After reviewing the Standard Frozen Semen Sales Agreement, RESPONDENT immediately contacted CLAIMANT on **28 March 2017** and objected to several terms of the offer. [*Exhibit C-3, p. 11*]. Specifically, RESPONDENT objected to the delivery terms and insisted on DDP delivery. [*ibid.*]. RESPONDENT also objected to the arbitration clause which initially contained a forum selection clause in favor of the courts in Mediterraneo. [*PO 2, p. 55, para. 4*].

6. On **31 March 2017**, CLAIMANT accepted DDP delivery on the condition of increasing the shipment price and being relieved from further risks associated with a change in the delivery terms. [*Exhibit C-3, p.12*]. CLAIMANT also sought to discuss the issues of the Hardship Clause and the Arbitration Clause in a personal meeting in April. [*Ibid.*].

7. On **10 April 2017**, RESPONDENT's main negotiator, Mr. Antley, proposed that the law governing the Arbitration Clause shall be the same law of the seat of arbitration rather than the law governing the contract. [*Exhibit R-1, p. 33*]. CLAIMANT responded with a change in the seat of arbitration but did not object to RESPONDENT's request that the law of the seat of arbitration should govern the arbitration clause. [*Exhibit R-2, p. 34*].

8. Mr. Antley met with CLAIMANT's main negotiator, Ms. Napravnik on **12 April 2017**. [*Exhibit C-8, p.17*]. Both negotiators discussed the most recent proposal for the dispute resolution clause and the Hardship Clause. [*Ibid.*]. As evidenced in Mr. Antley's notes, the PARTIES agreed to the newly suggested place of arbitration in the neutral country of Danubia, yet the choice of law governing the arbitration clause needed to be discussed before finalizing the contract. [*Exhibit R-3, p. 35*].

9. Due to a tragic car accident on **12 April 2017**, the original negotiators were no longer able to provide their input and the negotiation was taken over by employees on both sides who were not previously involved in the process. [*Answer to NOA, p. 30, para. 7*]. Therefore, the final Arbitration Clause, Clause 15 of the Sales Agreement, did not include the updated choice of law clause. [*Answer, p. 30, para.8*].

10. RESPONDENT objected to the original ICC-hardship clause as it was too broad. [*Exhibit R-3, p. 35*]. RESPONDENT preferred to allocate risk by direct reference and merely add a hardship wording to the existing force majeure clause, which was adopted by the PARTIES in the final Sales Agreement. [*PO, p. 56, para. 12*; *Answer, p. 30, para. 4*]. Therefore, Clause 12 ("Hardship Clause") of the Sales Agreement stated CLAIMANT would not be responsible "*for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*." [*Sales Agreement, p. 14*]. CLAIMANT agreed to a narrowly worded Hardship Clause because it was concerned with health and safety regulations, but not potential tariffs. [*Exhibit R-3, p. 35*; *Exhibit C-4, p. 12*]. CLAIMANT'S reason for doing so was to save its business which had been operating at a loss since 2014. [*PO 2, p. 59, para. 29*].

11. On **6 May 2017**, RESPONDENT and CLAIMANT entered into the final Sales Agreement for three shipments of frozen semen via DDP delivery and two installments of US $5,000,000 each. [*Sales Agreement, p. 14*]. The first two shipments of frozen semen were delivered successfully. [*NOA, p. 9, para. 9*]. On **19 December 2017** the Equatoriana government announced a 30% tariff on all

agricultural goods from Mediterraneo in retaliation for a 25% tariff imposed by Mediterraneo's President. [*Exhibit C-6, p. 15*; *PO 2, p. 58, para. 25*].

12. CLAIMANT read a news article from **20 December 2017** regarding the tariff but did not take any action. [*PO 2, p. 58, para. 26*]. A month passed between the executive order announcing the tariff and the tariff's effect taking place. [*PO 2, p. 58, para. 25*]. The tariff took effect on **15 January 2018** after which the CLAIMANT attempted to ship the third installment on **19 January 2018**. [*Ibid.*].

13. On **20 January 2018**, Ms. Napravnik emailed Mr. Shoemaker that the new tariff made the shipment 30% more expensive and CLAIMANT could not ship the last installment until a "solution" was found. [*Exhibit C-7, p. 16*]. The following day, Mr. Shoemaker spoke to Ms. Napravnik and explicitly stated his lack of authority to approve any additional payment and that he was not a lawyer. [*Exhibit R-4, p. 36*]. Mr. Shoemaker suggested that a price increase would be agreeable only if the contract allowed for an increase in a case such as this where there was an imposition of a tariff. [*Ibid.*]. Mr. Shoemaker reiterated that based on the DDP delivery terms, it appeared that CLAIMANT bore the risk of shipment. [*Ibid.*].

14. CLAIMANT willingly authorized the third shipment and paid the 30% tariff on **23 January 2018** before the PARTIES reached any oral or written agreement on the tariff. [*Exhibit C-8, p. 18*]. CLAIMANT requested a meeting with RESPONDENT on **12 February 2018** to further discuss the tariff. [*PO 2, p. 60, para. 35*]. RESPONDENT agreed to hear CLAIMANT'S concern; however, CLAIMANT accused RESPONDENT of selling doses to other parties. [*Exhibit C-8, p. 18*]. RESPONDENT became upset at CLAIMANT'S "permanent additional requests" and the meeting ended. [*Ibid.*].

15. On **31 July 2018**, CLAIMANT filed the Notice of Arbitration to seek remuneration of the delivery of the third shipment and request RESPONDENT to bear all additional costs associated with the tax tariff. [*NOA, p. 8*].

SUMMARY OF ARGUMENT

16. Both RESPONDENT and CLAIMANT are sophisticated business entities that willingly entered into a business transaction with a clear understanding of risk allocation. RESPONDENT fully performed its obligations under the Sales Agreement and is not liable for any further payment to CLAIMANT. Pursuant to the PARTIES' agreement to arbitrate, this Tribunal does not have the jurisdiction or the power to decide on CLAIMANT's request for remuneration. First, the PARTIES agreed that the Law of Danubia shall apply to the Arbitration Clause by selecting Danubia as the seat of the arbitration. Second, applying the Law of Danubia, this Tribunal does not have the power to adapt additional terms into the Sales Agreement. The language of the Arbitration Clause, coupled with the PARTIES' correspondence during the negotiations, evidenced the PARTIES' intention to limit the power of this Tribunal to stay within the terms written in the Sales Agreement.

17. This Tribunal should not allow CLAIMANT to submit evidence from RESPONDENT's prior arbitration proceedings. First, the Partial Interim Award is neither relevant to this case nor material to its outcome. Second, the illegal nature of the award's procurement prohibits its admission. CLAIMANT produced this evidence either by hacking into RESPONDENT's computer system or gathering information through RESPONDENT's prior employees. Third, in the event that the Partial Interim Award is admitted into evidence, this Tribunal should not draw adverse inferences against RESPONDENT in determining the outcome of the case.

18. CLAIMANT is not entitled to a price adaptation under the Hardship Clause or CISG Art. 79. First, CLAIMANT is not entitled to a price adaptation under the Hardship Clause of the Sales Agreement because the imposed tariff was outside the scope of the unforeseeable events detailed in the Hardship Clause. Second, the PARTIES excluded CISG Art. 79 from the Sales Agreement by inserting a detailed Hardship Clause. Even if this Tribunal ruled that the PARTIES did not derogate from CISG Art. 79 does not regulate hardship in this case and cannot be supplemented by UNIDROIT Principles. The increased 30% delivery cost resulting from the tariff imposition did not alter the contractual equilibrium because CLAIMANT willingly authorized the third shipment before any agreement was reached. Neither CISG Art. 79 nor UNIDROIT Principles shall be used as a weapon to restore the loss whenever a sophisticated contracting business party, like CLAIMANT, lost its profit margin under its own assumption of risk. Therefore, CLAIMANT is not entitled to any price adaptation under the Hardship Clause, CISG Art. 79, or UNIDROIT Principles.

ARGUMENT

ISSUE I: THIS ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION OR THE POWER TO ADAPT THE CONTRACT

19. This Tribunal does not have the jurisdiction or the power to decide on CLAIMANT's request for remuneration beyond the terms provided by the Sales Agreement. First, the PARTIES' agreement to arbitrate did not expressly confer such a broad power upon this Tribunal. The language of the Arbitration Clause expressly confers only a limited power upon this Tribunal. A claim for adapting additional terms is beyond the scope of this Tribunal's power to interpret the Sales Agreement. Second, a close comparison of the Arbitration Clause with the HKIAC model clause shows that the PARTIES did not intend for this Tribunal to have the power to adapt the Sales Agreement. The Arbitration Clause was significantly altered from the HKIAC model clause by deleting several broad provisions. As provided below, the omission of key words from the model clause evidenced the PARTIES' intention to limit the power of this Tribunal to stay within the terms written in the Sales Agreement.

A. The Law Of Danubia Governs The Interpretation Of The Arbitration Clause Contained In The Sales Agreement

20. Contrary to CLAIMANT'S position that the Law of Mediterraneo governs the Arbitration Clause, RESPONDENT states that the Arbitration Clause should be governed by the *lex arbitri*, the Law of Danubia, for the following reasons. First, the language of the Arbitration Clause indicates that the PARTIES agreed to the application of *lex arbitri* by selecting Danubia as the seat of arbitration without providing a separate choice-of-law clause. Second, under the principles of international arbitration practice, the Law of Danubia, *lex arbitri*, is the proper governing law of the Arbitration Clause as it has the closest and most real connection with the language of the Arbitration Clause and the PARTIES' common intention.

21. As set forth in the Sales Agreement, the PARTIES agreed to arbitrate in accordance with the following terms: "*[a]ny 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 administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted…[t]he seat of arbitration shall be Vindobona, Danubia…[t]he number of arbitrators*

shall be three…[t]he arbitration proceedings shall be conducted in English." [*Sales Agreement, p. 14, para. 15*].

22. Under the competence-competence principle, this Tribunal has the power to decide on its own jurisdiction and scope of authority. [*Chang, p. 182*; *Blackaby, p. 346, para. 5.98*]. Although this Tribunal has the jurisdiction to determine its own authority, it does not have the jurisdiction and power to provide additional terms, such as a remuneration claim, to the Sales Agreement. More importantly, the powers of this Tribunal can only be conferred by the Arbitration Clause where they "are permissible under the law applicable to the arbitration agreement and under the *lex arbitri*." [*Blackaby, pp. 350-351, para. 5.109*].

1. The Sales Agreement's reference to the Law of Mediterraneo does not extend to the Arbitration Clause because it is severable from the rest of the Sales Agreement

23. The choice-of-law clause contained in the Sales Agreement does not extend to the Arbitration Clause because the Arbitration Clause is independent and severable from the rest of the Sales Agreement. In interpreting the Arbitration Clause, this Tribunal should follow a three-step test to determine the governing law of the Arbitration Clause: "(1) the parties' express choice; (2) the implied choice of the parties as gleaned from their intentions at the time of contracting; or (3) the system of law with which the arbitration agreement has the closest and most real connection." [*Mustill/Boyd, p. 63; BCY v BCZ, para. 40; see also Sulamérica Cia Nacional v. Enesa Engelharia SA, para. 25*; *Claimant's Brief, para. 12*]. However, CLAIMANT has misapplied the three-step test here. As CLAIMANT's own case authority demonstrates, a correct application of the three-step test shows that the PARTIES did not agree to have the Law of Mediterraneo as the governing law of the Arbitration Clause.

24. First, the PARTIES' explicit choice-of-law clause contained in the main Sales Agreement cannot constitute an express choice of law clause for the Arbitration Clause. [*contrast Claimant's Brief, para. 15*]. The final Arbitration Clause did not include any provision that provides for choice-of-law. [*Sales Agreement, p. 14, para. 15*]. An "express" provision means that something is "made known distinctly and explicitly, and not left to interference or implication." [*Black's Law Dictionary*]. When the arbitration agreement does not contain a choice-of-law clause spelled in writing, there is no express choice from the parties. [*BCY v. BCZ, para. 40*]. CLAIMANT misapplied the test when it used inferences from the PARTIES' correspondence to determine whether there is an express choice. Such an inference is considered "going too far to interpret such clauses as

containing an express choice as to the law governing the arbitration agreement." [*Gaillard/Savage, p. 222, para. 425*].

25. Second, an in-depth analysis of the PARTIES' drafting history and exchange of emails prior to the final Arbitration Clause shows that the implied choice of law was not the Law of Mediterraneo as CLAIMANT has asserted. Indeed, CLAIMANT's argument that the PARTIES' implied choice of law shall be the Law of Mediterraneo is incorrect for two reasons. First, as stated above, the PARTIES expressly selected Danubia as the seat of the arbitration. [*Sales Agreement, p. 14, para. 15*]. Second, the PARTIES were aware that RESPONDENT explicitly rejected the jurisdiction of the Mediterraneo courts. [*Exhibit C-3, p. 11*]. When the parties have selected the seat of the arbitration and there is a direct conflict between the law governing the main contract and the law of the seat of the arbitration, international practice provides that the law of the main contract shall not always be the implied choice of law for the arbitration agreement. [*Blackaby, p. 166, para. 3.10*; *Sulamérica Cia Nacional v. Enesa Engelharia SA*]. Under the principle of party autonomy, an arbitration agreement is required to be treated as a separate provision from the main contract "when determining the applicable law." [*Gaillard/Savage, p. 222, para.* 425]. Here, the PARTIES selected Danubia as the seat of the arbitration, yet there is a conflict between the Law of Danubia and the Law of Mediterraneo. Accordingly, the law of the Sales Agreement, the Law of Mediterraneo, cannot be the implied choice of law for the arbitration agreement.

26. Third, the Law of Mediterraneo does not have the "closest and most real connection" with the Arbitration Clause. Mediterraneo has adopted the CISG in the formation of sales contracts. [*PO 2, p. 53, para. 4*]. When the arbitrators consider the application of the CISG to an arbitration clause, one principle of particular importance is that "the CISG affirms and preserves the absolute autonomy of the parties to determine the content of their contract," where the scope of the CISG is limited by parties' express or implied choices. [*Schlechtriem/Butler, p. 3, para. 3*]. This principle allows "parties to opt out of the CISG in whole or in part," which can be "affected by the choice of a different law, or by the express rejection of the CISG without other choice of law." [*Schlechtriem/Butler, p. 19, para. 19*; *see also Lookofsky, p. 27, section 2.7*]. When there is a clear indication that the parties intended to exclude the application of the CISG, the principle of party autonomy shall control and the application of the CISG should be excluded in accordance with the parties' intention. [*Schlechtriem/Butler, p. 19, para. 20*]. As RESPONDENT stated in two separate emails, showing the same intention, it did not agree to either the application of the Law of

Mediterraneo or the jurisdiction of the courts of Mediterraneo and offered that "the courts of Equatoriana shall have jurisdiction…[and] the seat of arbitration shall be Equatoriana." [*Exhibit C-3, p. 11*; *Exhibit R-1, p. 33*].

27. Specifically, the UN Convention itself has limited the "ambit of the CISG" by excluding "some substantive issues which can arise during a sale of goods, issues which also occur in regard to contracts other than sale of goods contracts," such as "jurisdiction and arbitration clauses do not fall within the ambit of the CISG as they are better seen as procedural law." [*Schlechtriem/Butler, p. 42, para. 41*; *see also* CISG*, Article 90*; *Plastic granulate case*]. Under such occasions, questions "must be resolved in accordance with domestic (non-CISG) rules of law." [*Lookofsky, p. 22, section 2.6*]. Hence, as the Law of Danubia is a verbatim adoption of the UNCITRAL Model Law, like the arbitration laws of Mediterraneo and Equatoriana, the Law of Danubia shall apply to the formation and interpretation of the Arbitration Clause.

2. The conduct and correspondence of the PARTIES show that the Law of Danubia should govern the interpretation of the Arbitration Clause

28. As there is no express agreement between the PARTIES with respect to the governing law of the Arbitration Clause, it is fair for this Tribunal to inquire whether the PARTIES intended for the law of the seat of the arbitration or the law which governs the contract as a whole to govern the Arbitration Clause. [*Blackaby, p. 166, para. 3.11*]. Considering the drafting history and the PARTIES' intentions, the Law of Danubia, the law of the seat of the arbitration, shall be the proper law governing the Arbitration Clause.

29. First, the starting point of this inquiry is whether "the parties intended the whole [of] their relationship to be governed by the same system of law." [*Sulamérica Cia Nacional v. Enesa Engelharia SA, para. 11*]. CLAIMANT's assertion that "only very special circumstances may call for the applicability of a different law to the arbitration agreement" is inaccurate in the international practice of arbitration. [*Claimant's Brief, para. 25*; *see also Blackaby, p. 166, para. 3.10*]. Specifically, it is not a proper assumption that the same law governing the substantive contract also extends to the arbitration agreement. [*Blackaby*, *p. 166, para. 3.10*; *Born, p. 70*]. It has been firmly established that "in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole," especially where the PARTIES have indicated for such an intention. [*Sulamérica Cia Nacional v. Enesa Engelharia SA, para. 11*]. As the PARTIES were aware, RESPONDENT rejected the contention that both the Sales

Agreement and the Arbitration Clause would be governed by the Law of Mediterraneo and thus chose a different system of law by proposing a seat of arbitration other than Mediterraneo. [*Exhibit R-1, p. 33*]. Therefore, the PARTIES revoked the application of the law of the Sales Agreement and intended for a different law, the law of the seat of the arbitration, to be the proper law of their Arbitration Clause.

30. Second, as CLAIMANT admitted, the impact of the choice of the arbitral seat is "of particular importance for the arbitral proceedings," and it "was of utmost importance since neither party was willing to accept the home jurisdiction of the other party[.]" [*Claimant's Brief, paras. 30 & 31*]. Specifically, several jurisdictions have taken the approach that the arbitration agreement shall be governed by the law of the seat of the arbitration when such an agreement "has an international connection and the parties have not agreed upon a choice of law." [*C v. D*; *XL Insurance Ltd v. Owens Corning*]. There is a strong presumption that the arbitration agreement should be governed by the law of the seat of the arbitration, "which usually coincides with the place with which the agreement to arbitrate (as opposed to the underlying contract as a whole) has 'the closest and most real connection…[and] is analogous to an exclusive jurisdiction clause." [*A v. B*; *Weissfisch v. Julium*; *West Tankers v. RAS*]. In fact, "it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration…[t]he reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place." [*Sulamérica Cia Nacional v. Enesa Engelharia SA, para. 21*].

31. Additionally, when there is no dispute as to the validity of the arbitration agreement, the courts tend to favor the application of the law of the seat of arbitration, considering the doctrine of severability. [*Bulgarian Foreign Trade Bank Ltd v. Al Trade Finance Inc.*; *Matermaco SA v. PPM Cranes Inc.*]. Here, the drafting history of the Arbitration Clause also shows that the PARTIES intended to have a separate law governing the Arbitration Clause and the rest of the Sales Agreement. Objecting to the application of the Law of Mediterraneo, RESPONDENT offered that the Law of Equatoriana would apply. [*Exhibit R-1, p. 33*]. In response, CLAIMANT provided Danubia to be the seat of the arbitration. [*Exhibit R-2, p. 34*]. As RESPONDENT'S main negotiator stated, the PARTIES referred to the choice-of-law clause as applicable to the Sale Agreement, not

the Arbitration Clause. [*Exhibit R-3, p. 35*]. It is evident that the business relationship between CLAIMANT and RESPONDENT has international connection. As neither party was willing to accept the jurisdiction of the other party's home country, it is proper to infer that the PARTIES intended to have the Law of Danubia, the neutral country, govern the Arbitration Clause.

B. Under The Narrow Scope Of The Law Of Danubia, This Tribunal Lacks The Authority To Determine A Price Adaptation Claim

32. In the international commercial practice, an arbitration agreement operates as a "mandate" conferring the powers upon an arbitral tribunal "to decide any and all of the disputes that come within the ambit of the agreement," which does not allow the tribunal to go beyond the mandate. [*Blackaby, pp.106-107, para. 2.55*; *see also New York Convention Art V(1)(c)*; UNCITRAL Model Law, Arts. 34(2)(iii) and 36(i)(a)(iii*)*]. Applying the Law of Danubia, this Tribunal does not have the power to adapt the Sales Agreement because the PARTIES did not expressly confer such power upon this Tribunal and CLAIMANT's demand falls outside the ambit of the PARTIES' agreement.

33. Moreover, RESPONDENT states that an objection to this Tribunal's jurisdiction and power complies with the principle of good faith, as this Tribunal is only empowered to the extent of the authority granted by the Arbitration Clause. CLAIMANT's argument that RESPONDENT has acted in bad faith is incorrect and improper. CLAIMANT has failed to provide any direct evidence to show that RESPONDENT induced CLAIMANT to deliver the third installment of the frozen horse semen.

1. The PARTIES' deviation from the HKIAC Model Clause shows their intention to limit the scope of the Arbitration Clause

34. The wording chosen and adopted by the PARTIES in the Arbitration Clause is an important factor to "fulfill the intentions of the parties" and "in determining whether a dispute is to be referred to arbitration or to state court proceedings." [*Blackaby, p. 108, para. 2.57*; *Welser/Molitoris*, *p. 17*]. CLAIMANT does not dispute or address this point. A narrow arbitration agreement has been held "to include only disputes on contractual obligations." [*Welser/Molitoris, p. 20*]. Under this correct narrow interpretation, the PARTIES intended to only arbitrate contractual obligations, not remuneration of price absent in the Sales Agreement. [*Answer, p. 31, para. 13*].

35. The general words "such as 'claims,' 'differences,'and 'disputes'…[and] linking words such as 'in connection with,' 'in relation to,' 'in respect of,' 'with regard to,' 'under' and 'arising out of'…" are of importance in deciding the scope of an arbitration agreement. [*Blackaby, p. 109,*

para. 2.60-2.61]. Particularly, if some words are used while other words are omitted, the courts may consider that "the parties intended some limitation on the kind of disputes referred to arbitration." [*Blackaby, p. 109, para. 2.60*; *see also Prima Paint Corp v. Conklin Mfg Co.*; *Cape Flattery Ltd. v. Titan Maritime LLC.*].

36. In RESPONDENT'S email proposing the Arbitration Clause, RESPONDENT explicitly stated that "the proposal has narrowed down and streamlined a little the fairly broad wording of the clause." [*Exhibit R-1, p. 33*]. The model clause of HKIAC contains the following language *"[a]ny 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 administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted." [*Model Clauses, Arbitration under the HKIAC Administer Arbitration Rules* (emphasis added)]. The Arbitration Clause contained in the Sales Agreement omitted the broad wording in the model clause, "*[a]ny dispute~~, controversy, difference or claim~~ arising out of ~~or relating to~~ this contract.*" [*Sales Agreement, p. 14, para. 15*]. Such an omission of the wordings was not a careless error but a deliberate choice of the PARTIES to restrict the jurisdiction of this Tribunal.

37. When drafted narrowly, an arbitration agreement "should be interpreted restrictively, meaning that the power of an arbitral tribunal is limited to the literal meaning of the words used in the arbitration clause." [*Gravel/Peterson, p. 534*]. For example, the Paris Court of Appeals noted that "the conferment of powers to interpret the contract meant that the arbitrators could only define the obligations of the parties which gave rise to the dispute, but they could not sanction a breach of those obligations." [*Ibid.*; *see also Gaillard/Savage, p. 300, para. 517*; *Quijano Aguero v. Laporte*]. Similarly, the Arbitration Clause here confers this Tribunal the power to decide on the disputes arising out of the Sales Agreement, however this Tribunal can only decide on what is written within the Sales Agreement and not the entire legal relationship of the PARTIES. Because the PARTIES limited the wording of the model clause, it is reasonable for this Tribunal to determine that the PARTIES did not intend that this Tribunal decide all disputes between them but only the disputes arising out of the Sales Agreement, especially when the Law of Danubia governs the Arbitration Clause.

2. This Tribunal cannot decide a price adaptation claim because this claim is outside the limited scope of the Arbitration Clause

38. Applying the Law of Danubia, this Tribunal should find that CLAIMANT's request for an adaption of price is beyond the scope of the Arbitration Clause because there was no such express empowerment in the Sales Agreement. [*Answer*, *p. 31, para. 13*]. Any party may object to the jurisdiction of the arbitral tribunal if the parties agreed to arbitrate but failed to meet the formal requirements under Art. 7 of the Law of Danubia. [*Explanatory Note of UNCITRAL, para. 19*]. In the present case, without express empowerment set forth in the Sales Agreement, the PARTIES did not grant this Tribunal the power to adapt additional terms into the Sales Agreement.

39. Moreover, CLAIMANT'S demand of remuneration cannot be a "*dispute arising out of"* the Sales Agreement. A claim of remuneration based on "unjust enrichment of one of the parties in the context of the performance or non-performance of a contract" is considered as an extra-contractual issue. [*Gaillard/Savage, p. 307, para. 524*]. The arbitrator will have jurisdiction over extra-contractual claims only if "the terms of the arbitration agreement are wide enough for it to be established that the parties intended such claims to be resolved through arbitration…for instance, where the clause refers to all disputes arising…in connection with the present contract." [*Gaillard/Savage, p. 307, para. 524*; *see also ICC Award No. 5779*; *Supra-Penn v. Swan Finch Oil Corp*]. In ascertaining the PARTIES' intention through the interpretation of the Arbitration Clause, this Tribunal shall take into consideration the language of the Arbitration Clause and specific facts related to the formation of the Arbitration Clause. [*Roose Industries Ltd v. Ready Mixed Concrete Ltd.*; *Halki Shipping Corp. v. Sopex Oils Ltd*.]. Here, as the PARTIES deleted the phrase "in connection with" to restrict this Tribunal's power, this Tribunal shall not go beyond the PARTIES' intention with regards to arbitration.

3. RESPONDENT did not act in bad faith by contesting this Tribunal's jurisdiction

40. Absent clear evidence of fraudulent conduct, CLAIMANT's assertion that RESPONDENT acted with bad faith must fail. CLAIMANT improperly stated that RESPONDENT acted in violation of the good faith principle when both PARTIES knew each other's intention. Mr. Shoemaker, an employee of RESPONDENT, stated "if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price," when he knew that CLAIMANT would not deliver the last shipment if he "were to reject their request outright." [*Exhibit R-4, p. 36*]. Arbitration requires that each party be in good faith when entering into and performing a

contract, and the principle of good faith is generally accepted in international arbitration. [*Tetley*; *Cremades*]. In international disputes, good faith is "an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act." [*Powers*]. In contrast, bad faith requires some "intentional conduct equivalent to fraud" such as dishonesty, ill will, or improper motive. [*Tetley*].

41. Here, RESPONDENT acted reasonably and without an improper motive during contract performance. Therefore, RESPONDENT'S objection to the jurisdiction of this Tribunal is not a violation of good faith. Mr. Shoemaker's statement that RESPONDENT would seek a price agreement if the Sales Agreement provided for a price increase was entirely consistent with RESPONDENT'S later refusal to adjust the purchase price provided in the Sales Agreement because the Sales Agreement did not provide for such a provision. [*Exhibit R-4, p. 36*]. Further, Mr. Shoemaker's statement was not a general promise to increase the purchase price, as CLAIMANT alleges. Rather, his statement reflected that he had no authority to approve additional payments, and he believed that CLAIMANT would breach its delivery obligation if he outright rejected CLAIMANT'S request. [*Ibid.*]. Accordingly, RESPONDENT has acted in good faith during the formation and performance of the Sales Agreement.

ISSUE II: CLAIMANT'S ATTEMPT TO SUBMIT EVIDENCE FROM RESPONDENT'S PRIOR ARBITRATION PROCEEDINGS IS IMPROPER BECAUSE THAT EVIDENCE IS INADMISSIBLE

42. Admissibility of evidence in arbitration proceedings is not governed by one principle alone, but instead depends on the circumstances surrounding the parties' agreement to arbitrate. Generally, parties follow principles of confidentiality as well as guidelines set forth in governing law. When disputes about the admissibility of evidence arise, the parties are subject to a series of exclusionary rules and the arbitral tribunal's discretion. Here, CLAIMANT attempts to introduce into evidence a Partial Interim Award from a prior arbitration involving a sale of goods between RESPONDENT and a third party. That award is inadmissible in this arbitration for three reasons. First, the Partial Interim Award is neither relevant to this case nor material to its outcome. Second, the illegal nature of the award's procurement prohibits its admission. And third, no limited circumstances exist to allow the admission of the award. Additionally, in the event that the Partial Interim Award is admitted into evidence, this Tribunal should not draw adverse inferences against the RESPONDENT in determining the outcome of the case.

A. The Partial Interim Award Is Inadmissible Because It Is Neither Relevant To This Case Nor Material To Its Outcome

43. Art. 22 of the HKIAC Rules deals with the admissibility of evidence in arbitration proceedings. Section 22.2 states that *"[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence."* [*HKIAC Rules Art. 22.2*]. The language of Art. 22 does not require the arbitral tribunal to admit evidence. Instead, it gives the tribunal discretion to make that decision if the tribunal determines that the evidence is relevant to the case and material to its outcome. [*HKIAC Rules Art. 22.3*]. Evidence is considered relevant if it "applies to the matter in question" and material if it is "important" or "necessary." [*Black's Law Dictionary*]. The decision of whether to classify evidence as relevant and material is entirely subjective, left up to the arbitral tribunal and the fact-specific circumstances surrounding the case.

44. CLAIMANT argues that the Partial Interim Award is relevant to this case and material to its outcome because it shows RESPONDENT'S prior contradictory behavior. [*Claimant's Brief, para. 19*]. Specifically, CLAIMANT asserts that RESPONDENT was a party to a sales agreement which had been affected by an unforeseen tariff of 25% imposed by the president of Mediterraneo and that RESPONDENT itself asked for an adaptation of the price invoking an unforeseeable change of circumstances. [*Langweiler Letter, p. 50*]. Assuming, but not conceding, that RESPONDENT'S request in the prior arbitration seems to run contradictory to its refusal to adapt the contract here, RESPONDENT'S prior actions are not relevant because they do not apply to the matter in question. RESPONDENT'S prior actions were based on a separate contract not the agreement at issue, involved a separate transaction for the sale of a mare not frozen semen, and were made between RESPONDENT and a third party not RESPONDENT and CLAIMANT. [*PO 2, p. 60, para. 39*].

45. RESPONDENT'S prior actions are not material to the outcome in this case because the facts, even if only marginally different, are not the same. CLAIMANT has no way of knowing the extent of the details in the prior arbitration and has not yet received a copy of the award to confirm any of its assertions. [*PO 2, pp. 60, para. 41*]. Furthermore, CLAIMANT'S attempt to receive a copy of the Partial Interim Award and reliance on a dubious company to obtain it shows nothing more than desperation fueled by its own selfish gain. Although similarities exist between the two proceedings, there is no indication that RESPONDENT would have acted in the same way had its position been reversed in either proceeding. Since it is well established that an arbitral tribunal has

discretion in determining whether evidence is admissible based on a subjective interpretation of fact-specific circumstances, this Tribunal should look only to the facts of the case at hand to determine the proper amount of relief, if any.

B. The Partial Interim Award Is Inadmissible Because Of The Unlawful Nature Of Its Procurement

46. Allowing admission of interim awards is difficult due to their limited nature and enforcement power. Interim awards, absent extraordinary circumstances, cannot be used to issue provisional measures that would have a binding effect on a third party not privy to the agreement. [*Savola, p. 74*]. Moreover, the view in favor of enforcing such awards is still a minority view, with many tribunals focusing on three preconditions before granting interim measures: (i) the existence of an arguable case on the merits; (ii) the existence of a risk of "irreparable" or at least "serious" harm, which cannot be adequately compensated for by damages; and (iii) the lack of prejudgment on the merits. [*Savola, p. 82*; *Born*]. These preconditions, however, are not exhaustive and in many cases subject to different interpretations. Additionally, arbitral tribunals have invoked other considerations, such as the nature of the procurement of the award, as criteria for granting relief. [*Savola*, *p. 82*]. Hence, admissibility of interim awards as evidence in arbitration proceedings does not simply rest on its relevance and materiality but also on the way in which it was obtained.

1. Evidence obtained through an unlawful hack of RESPONDENT'S computer system is inadmissible

47. The IBA Rules on Taking of Evidence bar evidence which has been obtained through a hack of a computer system. CLAIMANT plans to purchase a Partial Interim Award from a company with a dubious history that "has refused to disclose its sources in the case at hand." [*PO 2, p. 60, para. 41*]. These facts compel the conclusion that this third party procured this award either through an illegal hack or the breach of a confidentiality agreement, both of which bar the admissibility of the Partial Interim Award. RESPONDENT incorrectly argues that IBA Rules on Taking of Evidence Art. 9 "does not address the issue of improperly obtained evidence." [*Claimant's Brief, para. 128*]. In fact, under Art. 9 Section 2, "the Arbitral Tribunal shall… exclude from evidence or production any Document… for… the following reasons: legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable… grounds of special political or institutional sensitivity… that the Arbitral Tribunal determines to be compelling." The illegal hack

of RESPONDENT'S computer system would make the Partial Interim Award inadmissible even in the strictest reading of that provision.

48. Furthermore, the "clean hands doctrine" bars the admissibility of the Partial Interim Award. In international arbitration, "the idea underlying the clean hands doctrine is that the lawfulness of the investors conduct is a precondition for the bestowal of jurisdiction upon the arbitral tribunal." [*de Alba, p. 322*]. In international arbitration, the clean hands doctrine has been applied when investors were involved in acts of corruption because it is "such a wrongful conduct that the responsible party cannot be allowed to resort to international arbitration." [*Ibid. at 327*].

49. In *World Duty Free Company Limited v. The Republic of Kenya*, for example, the arbitral tribunal stated that "bribery is contrary to international public policy of most, if not all states," and ruled that it lacked jurisdiction after learning that World Duty Free paid $2 million dollars to Kenya's President after obtaining an investment contract. [*Ibid.*] Likewise, in *Metal-Tech Ltd. V. The Republic of Uzbekistan*, an Israeli company was denied a chance to invoke its rights under the Israel-Uzbekistan BIT because "the investment was contaminated by an illegal activity such as corruption." [*Ibid*.]. The tribunal there stated that "the law is clear – and rightly so – that in such situation the investor is deprived of protection, and consequently, the host State avoids any potential liability." [*Ibid. at 328*].

50. Here, the illegal hacking of RESPONDENT'S computer rises to the same level of corruption as that of bribery. Just like bribery, computer hacking opposes international public policy in most states, and should preclude the admission of the Partial Interim Award in this case. The "clean hands doctrine" should apply equally in this arbitration as it applies in international investment arbitration because the same principles of fair play and good faith apply. For these reasons, the "clean hands doctrine" bars the admissibility of the Partial Interim Award in this case.

2. Evidence obtained through the breach of a confidentiality agreement is inadmissible

51. While CLAIMANT correctly argues that international arbitral tribunals have generally relaxed rules regarding the admissibility of evidence, the Permanent Court of International Justice has excluded evidence on the basis of confidentiality. [*Reisman*]. In the *Chorzow* case, the Court did not consider statements made during negotiations, which were later aborted, for the purpose of preserving the confidentiality of efforts toward settlement. [*Ibid. at 743* (*citing Jurisdiction of the European Commission*)]. Here, this Tribunal should deny the Partial Interim Award because similar dangers

involving the integrity of private arbitration exists. If past arbitral awards, granted by a tribunal based on good faith arguments made before that tribunal, are used against a party seeking to defend itself in a baseless action, parties no longer have an incentive to engage in private arbitration at all. Because the danger of hurting the arbitral process is so great, and the probative value of the Partial Interim Award is non-existent, this Tribunal should not allow the evidence to be admitted.

C. The Partial Interim Award Is Inadmissible Because No Limited Circumstance Exists To Allow Its Admission Into Evidence

52. Although extrinsic evidence may be admitted under limited circumstances, this Tribunal must still follow general standards of disclosure. These standards can be gleaned from the UNICITRAL Arbitration and HKIAC Rules. Where principles of confidentiality or rules agreed upon by the party prohibit the admission of extrinsic evidence, the arbitral tribunal may not admit the evidence. Here, no limited circumstance exists to allow the admission of the Partial Interim Award and this Tribunal should not attempt to make up a circumstance that would allow admission.

1. General principles of confidentiality prohibit the admission of the Partial Interim Award

53. UNCITRAL Arbitration Rules require that parties abide by general principles of confidentiality when adhering to arbitral awards. These principles protect sensitive information from becoming public and can only be breached in certain situations. Under UNCITRAL Art. 34.5, arbitral awards "may be made public with the consent of all parties and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority." [*UNCITRAL Art. 34.5*]. Here, the Partial Interim Award is confidential because the underlying information in that award is not public information. Although confidentiality can be defeated if the information becomes public, neither RESPONDENT nor the third party subject to the award gave consent to make it public. [*Springer, p. 40*; *PO 2, p. 60, para. 41*]. In addition, no other situation under this provision – required legal duty, protection of a legal right, or relation to a legal proceeding – allowed the award to become public. Hence, the award is still subject to principles of confidentiality and cannot be obtained by parties outside of the proceeding.

54. CLAIMANT was aware of this when it intended to purchase the Partial Interim Award from a company with a history of obtaining confidential information using questionable methods. [*PO 2, p. 60, para. 41*]. Specifically, that company obtained the Partial Interim Award by either illegally

hacking RESPONDENT'S computer system or by seeking out disgruntled employees and encouraging them to break their confidentiality agreements. [*Ibid*.]. In other words, the Partial Interim Award was granted after a confidential hearing and remains confidential information. At no point was the information available to the public, and it is not RESPONDENT'S intention to make it public. Because the Partial Interim Award is not available to the public, it remains confidential and should not be admitted in this proceeding.

55. CLAIMANT further justifies its unlawful attempt to introduce the Partial Interim Award by arguing that "there is no such thing as exclusionary rules on evidence in international arbitration," and that the PARTIES' choice to arbitrate in an international forum "precludes any national rules on evidence." In fact, "many parties choose to arbitrate rather than to litigate precisely because they do not want the subject matter of their dispute to become public." [*Springer, p.* 20]. Indeed, this Tribunal need look no further than HKIAC Art. 45.5 to see that CLAIMANT is completely incorrect when it claims that no "exclusionary rules on evidence in international arbitration" exist.

2. HKIAC Art. 45 prohibits the admission of the Partial Interim Award

56. The PARTIES agreed to be governed by the HKIAC Rules. Under Art. 45, "no party or party representative may publish, disclose, or communicate any information relating to: the arbitration under the arbitration agreement and under that article, no exception is made to introduce the evidence for the purpose of "expos[ing] RESPONDENT'S contradictory behavior." [*Claimant's Brief, para. 119; Sales Agreement, P. 14*]. Furthermore, under HKIAC Art. 45.5, an award may only be published if "all references to the parties' names and other identifying information are deleted and no party objects to such publication within the time limit fixed for that purpose by HKIAC." [*HKIAC Art. 45.5*]. HKIAC Art. 45.5 continues to state that "in the case of an objection, the award shall not be published." [*HKIAC Art. 45.5*]. In other words, the Partial Interim Award in and of itself is barred from being admitted into evidence, regardless of how it was obtained. CLAIMANT is unable to introduce the Partial Interim Award without also disclosing Respondent's name. Disclosing RESPONDENT's name is incidental, but necessary, to fulfill CLAIMANT's request. Because CLAIMANT seeks to use the Partial Interim Award to falsely portray RESPONDENT in a negative light and will ultimately disclose the parties' names in the Partial Interim Award, this Tribunal should deny the award from being admitted into evidence.

D. Even If The Partial Interim Award Is Admitted Into Evidence, This Tribunal Should Not Draw Any "Adverse Inferences" Against RESPONDENT Because RESPONDENT Provided An Explanation For Non-Production Of The Award

57. Adverse inferences are a form of legal reasoning where one party's unjustified silence or failure to produce a requested piece of evidence is seen as an advantage for the other party. [*Giemza*]. Adverse inferences create indirect evidence but have two specific consequences. First, an adverse inference does not automatically decide the issue of a case. Instead, the indirect evidence is weighed against all other evidence on the issue. [*Bedrosyan, p. 247*]. Second, indirect evidence may carry less weight than direct evidence and should not be used to determine a case. [*Ibid*.]. In order for an arbitral tribunal to make an adverse inference, a party must first fail to provide a satisfactory explanation for non-production of the document. [*IBA Rules Art. 9(5)*]. Absent a party's failure to provide an explanation for non-production, the arbitral tribunal should not make adverse inferences that determine the proceeding.

58. In the present case, RESPONDENT provided an adequate explanation for non-production of the Partial Interim Award by stating that it was covered under an express obligation of confidentiality supported by HKAIC Art. 42. [*Fasttrack Letter, p. 51*]. Although this Tribunal is already aware of the general nature of that proceeding, CLAIMANT is not. [*PO 2, p. 60, para. 39*]. CLAIMANT was neither a party to that proceeding nor had the chance to obtain a copy of the Partial Interim Award. [*PO 2, p. 61, para. 41*]. Furthermore, CLAIMANT provides no reason for this Tribunal to make adverse inferences based on RESPONDENT'S status as a party in a prior arbitration other than to state that Respondent "strongly objects" to the submission of the award. [*Claimant's Brief, para. 146*]. This Tribunal cannot rely on CLAIMANT'S opinion of the situation when determining the outcome of the current case and should not make adverse inferences in the absence of more convincing reasoning.

59. Even if this Tribunal applied an adverse inference here, that inference would be narrow and not outcome determinative. In *United Postal Services (UPS) v. Canada*, for example, the arbitral tribunal was required to decide on the admission of documents with respect to allegations that Canada breached its NAFTA national treatment obligations. [*UPS v. Canada*; *see also Bedrosyan, p. 262*]. Canada was warned that non-production of the documents would allow the tribunal to "draw an adverse inference on the issue in question." [*UPS v. Canada*, *Note 89, para. 15*]. Canada did not produce the documents and the arbitral tribunal made adverse inferences on the facts of the

case. [*Ibid*.]. Even after making these adverse inferences, the arbitral tribunal still ruled in favor of Canada because the withheld documents allowed it to only infer one thing – that Canada treated the foreign investor differently than it treated a domestic courier service, not that Canada violated its NAFTA obligations. [*Ibid*.]. Similarly, with the Partial Interim Award here, this Tribunal can only infer two things. First, that RESPONDENT was the seller of a mare and a third-party from Mediterraneo was the buyer. Second, that the contract between RESPONDENT and the third-party presented a different issue than the one here. [*PO 2, p. 60, para. 39*]. Hence, adverse inferences are not the best tool available to arbitral tribunals, but if made, do not prevent this Tribunal from finding for the RESPONDENT.

60. As it relates to the adverse inferences this Tribunal may draw from the submission of the Partial Interim Award, CLAIMANT'S "right to be heard" is not violated under 34(2)(a)(i) DAL. [*Claimant's Brief, para. 147*]. CLAIMANT argues that the Partial Interim Award "will shed a completely different light on the case," without explaining with specificity how submission of the Partial Interim Award would accomplish this goal. In other words, there is no basis for CLAIMANT'S argument here. This Tribunal should reject CLAIMANT'S baseless claim that its "right to be heard" is violated if the Partial Interim Award is not admitted into evidence and find that CLAIMANT is able to fully present its position of the case.

ISSUE III: CLAIMANT IS NOT ENTITLED TO A PRICE ADAPTATION UNDER THE HARDSHIP CLAUSE OR CISG ART. 79

61. RESPONDENT fully performed its obligations under the Sale Agreement and is not liable for any further payment to CLAIMANT. CLAIMANT conceded that "by signing the Sales Contract both Parties equally promised to abide all of its terms." [*Claimant's Brief, para. 55*]. However, CLAIMANT attempts to avoid CLAIMANT's promise to deliver "the third and last shipment of 50 does… DDP on 23 January 2018," by painting an inaccurate picture of contract formation and incorrectly arguing the tariff was covered in the narrowly worded hardship. [*Sales Agreement, p. 14*]. CLAIMANT, a sophisticated party, made choices every step of negotiating the contract, the contract execution, and its aftermath but unfortunately lost money due to the risk CLAIMANT knowingly assumed. The Tribunal should not re-write the terms of the PARTIES' agreement.

62. First, CLAIMANT is not entitled to a price adaptation under the narrowly worded Hardship Clause of the Sales Agreement. Second, CLAIMANT is not entitled to a price adaptation under CISG Art. 79 and UNIDROIT Art. 6.2.3. In light of the above, RESPONDENT respectfully requests this

Tribunal find RESPONDENT is not liable for payment of US $1,250,000 to CLAIMANT per the language of the PARTIES' agreement.

A. CLAIMANT Is Not Entitled To A Price Adaptation Under The Hardship Clause Of The Sales Agreement

63. CLAIMANT attempts to pin its business's demise on RESPONDENT by painting an inaccurate picture of the PARTIES' negotiation process. [*Claimant's Brief, para. 63*]. To the contrary, the facts and evidence strongly support RESPONDENT's position that the Hardship Clause did not exempt CLAIMANT from tariff liability. First, the imposed tariff was outside the scope of the Hardship Clause under the plain language. Second, the principle of *contra proferentem* does not apply since RESPONDENT was not the drafter of the Hardship Clause of the Sales Agreement. Third, the Hardship Clause did not grant adaptation as required. Therefore, this Tribunal shall not provide the requested remedy of adaptation.

1. The imposed tariff was outside the scope of the unforeseen events detailed in the Hardship Clause

64. The Hardship Clause stated CLAIMANT was not responsible "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*." [*Sales Agreement, p. 14, para. 12*]. An interpretation of the Hardship Clause guided by CISG Art. 8 shows that the imposed tariffs were not a "comparable unforeseeable event." First, under the CISG Art. 8(1) subjective approach, the PARTIES agreed to cover unforeseen events related to "health and safety requirements." Second, under the CISG Art. 8(2) objective approach, a reasonable person in CLAIMANT'S position would have known the Hardship Clause did not remove CLAIMANT'S DDP delivery. Third, under CISG Art. 8(3), the PARTIES' subsequent conduct shows the PARTIES agreed CLAIMANT bore the risk of the tariff. Finally, under CISG Art. 9(2), the PARTIES knew the tariff was a foreseeable event within international trade. Therefore, CLAIMANT bore the risk of the tariffs.

a. Based on a subjective interpretation under CISG Art. 8(1), the Hardship Clause narrowly covers unforeseen events related to "health and safety requirements," which do not include tariffs

65. The narrow interpretation of the Hardship Clause only covers health and safety regulations, or similar afflictions, that were so unforeseeable that the PARTIES could not have contemplated them. CLAIMANT was narrowly concerned about health and safety regulations which made shipments

more expensive in the past, which led to the wording of the Hardship Clause, not potential tariffs. [*Exhibit C-4, p. 12*]. RESPONDENT'S legal counsel certified that Mr. Antley explicitly stated in his meticulous notes that the PARTIES needed to further discuss that the ICC hardship clause was too broad. [*Exhibit R-3, p. 35*]. The final negotiators, Ms. Krone for the RESPONDENT and Mr. Ferguson for the CLAIMANT, agreed to include a narrow hardship wording for the force majeure clause. [*Ibid.*]. The PARTIES agreed the Hardship Clause would be interpreted more narrowly than ICC hardship clause. [*PO 2, p. 56, para. 12*].

66. The past unforeseeable health and safety requirement that CLAIMANT experienced was an entirely different situation and it was not comparable to the tariff at issue in this case. In 2014, Danubia imposed requirements in response to a rare aggressive disease for the safety of its country and cow population. [*PO 2, p. 58, para. 21*]. In contrast, the tariff imposed here was a retaliatory response that had nothing to do with protecting the health or safety of Equatoriana's human or animal population. CLAIMANT was previously liable for the 40% increase in sales price in that rare situation and CLAIMANT should be liable here as well. [*Ibid.*]. CLAIMANT should have learned from that situation and protected itself here, but it did not and RESPONDENT should not be held liable for CLAIMANT'S failure to do so.

67. Furthermore, the government of Equatoriana is a separate entity from RESPONDENT so its actions should not be imputed onto RESPONDENT simply because RESPONDENT is located in the same country. [*Claimant's Brief, para. 104*]. A seller in CLAIMANT'S position would have used its past experiences, knowledge of its business, and knowledge of its import country to explicitly insulate against foreseeable tariffs. CLAIMANT failed to insulate itself as a responsible seller and RESPONDENT cannot be held liable.

b. Based on an objective interpretation under CISG Art. 8(2), a reasonable person in CLAIMANT'S position would have known the Hardship Clause did not remove CLAIMANT'S obligation to pay tariffs under DDP delivery

68. A reasonable person with the same sophistication as CLAIMANT would have known the Hardship Clause did not adequately remove CLAIMANT'S shipment liability. Courts usually apply the objective standard of CISG Art. 8(2) to interpret a contract more often than Art. 8(1). [*Building materials case*]. The "reasonable person" under CISG Art. 8(2) is a hypothetical party in a similar circumstance, with the same skills, knowledge of prior dealings, and industry knowledge. [*Bianca/Bonell*, *p. 95-102*]. Here, CLAIMANT is a long-standing business with "transportation

expertise". [*Claimant's Brief, para. 67*]. A reasonable person would have understood the PARTIES agreed that CLAIMANT would bear the risk of a tariff by choosing DDP delivery and the Hardship Clause did not alter DDP delivery.

i. Under DDP delivery, CLAIMANT was responsible for all incurred fees, including tariffs, until the shipment reached RESPONDENT'S place of business

69. The fact that CLAIMANT agreed to DDP delivery, increased the purchase price, and inserted several separate risk shifting clauses in the Sales Agreement, indicated its willingness to bear the risk of tariffs. CLAIMANT bore the risk of the tariff by agreeing to DDP delivery under INCOTERMS 2010 edition without any expressed or implied intent to derogate from DDP delivery. [*PO 2, p. 56, para. 10*]. As CLAIMANT concedes with authority, "DDP constitutes the most extensive obligation for the seller" and forces the seller to bear all costs associated with unloading goods to the agreed upon delivery place. [*Claimant's Brief, para. 64*; *Piltz/Bredow, para. D-500; Brunner, p. 131*]. Both PARTIES have sold goods using DDP delivery, so they knew the implications of such a term. [*PO 2, p. 58, 60, paras. 21, 39*]. Under DDP delivery terms, CLAIMANT bore the risk of shipment until the shipment reached the agreed upon address at Seabiscuit Drive, Oceanside, Equatoriana. [*PO 2, p. 56, para. 10*]. CLAIMANT incurred the tariff prior to delivery to RESPONDENT, therefore CLAIMANT bears responsibility.

70. CLAIMANT omitted certain facts and painted a different picture of the price negotiations to suggest that the price increase should not include the risk of the tariff. [*Claimant's Brief, para. 105*]. RESPONDENT did not accept both CLAIMANT'S requests of US $99,500 for the semen and an additional US $1,000 for the change of the delivery term. [*Exhibit C-3, p. 11*]. While negotiating DDP delivery, CLAIMANT agreed to a narrow Hardship Clause for risks explicitly regulated in the Sales Agreement. [*Exhibit R-3, p. 35*].

71. RESPONDENT already bore numerous other risks, and those alone would justify CLAIMANT'S reduction of the delivery price increase from US $1,000 to US $2,000. CLAIMANT used separate clauses to shift the risks of use of semen and handling fees to RESPONDENT but remained silent on the tariff risks. [*Sales Agreement, p. 14*]. For example, Clause 2 provides that "sellers make no guarantee to the fertilizing capacity of any semen;" Clause 9 provides "risks of registry requirements for the use of semen were borne by the buyer;" Clause 10 provides that "all tank rental and handling fees associated with delivery of the semen were borne by the buyer;" Clause 11 requires buyer to inspect immediately and any claims shall be filed within 24 hours of delivery;

Clause 13 also provides that buyer shall pay any additional insurance fees. [*Ibid.*]. Thus, DDP delivery imposed more risk on CLAIMANT rather than RESPONDENT who already bore numerous other risks.

ii. The PARTIES did not alter CLAIMANT'S responsibilities under DDP delivery by adding the Hardship Clause

72. The PARTIES did not clearly alter CLAIMANT'S DDP delivery responsibilities by adding the Hardship Clause. CLAIMANT argues the Hardship Clause "counterbalanced" all risks associated with DDP delivery, but that clause failed to unambiguously show intent to derogate from DDP delivery as required under CISG Art. 6. [*Claimant's Brief, para. 64*]. Although parties may alter the effect of an Incoterm such as DDP delivery using CISG Art. 6, the parties must unambiguously show their intent to deviate. [*Adams/Zierdt, p. 168*] For example, a court rejected a buyer's attempt to show the parties derogated from the CIF Incoterm by seller's retention of title, a note stating goods would be accepted upon inspection, and contract terms addressing customs clearance and payment terms. [*St. Paul v. Neuromed*]. Here, CLAIMANT argues that removing risks associated with DDP delivery effected the purchase price, however no particular figure for this reduction was stated in the Sales Agreement. [*Claimant's Brief, para. 106*; *PO 2, p. 56, para. 8*]. If such reduction occurred, then a sophisticated party like CLAIMANT would have ensured the Sales Agreement reflected the change to prove the derogation from DDP delivery. Further, the PARTIES did not explicitly show they had deviated from DDP delivery terms, therefore the PARTIES failed to unambiguously show their intent to deviate.

73. CLAIMANT repeatedly asserts that it did not bear risks "beyond those of transportation," however, paying a tariff falls well within a transportation risk. [*Claimant's Brief, para. 67*]. Not only is CLAIMANT a sophisticated seller, CLAIMANT is a sophisticated shipper as CLAIMANT owned a shipping business, Phar Lap Transportation LLP, until 2016 and regularly urged customers to use such shipper. [*PO 2, p. 56, para. 9*]. CLAIMANT chose DDP delivery despite usually proceeding with EXW delivery terms. [*PO 2, p. 56, paras. 8-9*]. RESPONDENT wanted the doses as soon as possible to support its new breeding whereas CLAIMANT pushed for the longer delivery schedule to appease its creditors with split revenues in 2017 and 2018. [*PO 2, p. 56, para. 11*]. A reasonable person with CLAIMANT's extensive transportation expertise would have known that it may unexpectedly incur tariffs while shipping. The tariff made the shipment more expensive upon import into Equatoriana, so the tariff is directly related to CLAIMANT'S transportation risk.

c. Under CISG Art. 8(3), the PARTIES' subsequent conduct demonstrates their agreement that CLAIMANT was responsible for the tariff

74. The PARTIES subsequent conduct demonstrates that CLAIMANT bore the risk of the tariff. CLAIMANT insinuated that RESPONDENT induced CLAIMANT into paying the tariff, so RESPONDENT intended to bear the risk. [*Claimant's Brief, para. 87*]. Subsequent conduct may explain the PARTIES' intent at the time of contract. [*Huber/Mullis, p. 14*]. Here, CLAIMANT willingly paid the tariff which suggests that CLAIMANT knew it bore responsibility for the tariff. Mr. Shoemaker explicitly told CLAIMANT that he lacked the required authority to adapt the price of the Sales Agreement. [*Exhibit R-4, p. 36*]. CLAIMANT omitted key words when it quoted Mr. Shoemaker. [*Claimant's Brief, para. 87*]. In full, Mr. Shoemaker stated, "if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price." [*Exhibit R-4, p. 36*]. Mr. Shoemaker reiterated that based on the agreed DDP delivery terms, it appeared that CLAIMANT bore the risk of the tariff. [*Ibid.*]. Thus, the PARTIES' subsequent conduct shows CLAIMANT was intended to bear the risk of the tariff.

d. Under CISG Art. 9(2), the PARTIES knew that tariffs are common and foreseeable within international trade

75. The imposed tariff was foreseeable because tariffs are common within international trade. Under CISG Art. 9(2), it is assumed that parties impliedly know usage that is widely known in international trade. Here, it is a well-established assumption in international arbitration that businesses know their operating risks, and therefore businesses are responsible for adverse consequences that they could have protected themselves against. [*Melis*]. Tariffs have been used since the 18th century and as CLAIMANT'S own authority articulates, "the world is lurching ever closer to a full-blown trade war." [*Batabyal*]. Thus, CLAIMANT knew at contract formation that a tariff was a business risk.

76. CLAIMANT repeatedly asserts that the tariff was unforeseeable and even provided the definition of "unforeseeable" as an event parties could not have "predicted nor anticipated its realization." [*Claimant's Brief, para. 73*; *Black's Law Dictionary*]. CLAIMANT'S assertion that the tariff was unforeseeable is directly contradicted because Equatoriana previously imposed a retaliatory tariff and other countries have previously imposed comparable tariffs as well. [*Claimant's Brief, para. 103*; *Exhibit C-6, p. 15*; *PO 2, p. 58, para. 23*]. A party can only be exempted from liability for hardship if an event occurs that a party could not reasonably have taken into account at the time of

contract formation. [*Schwenzer, p. 719*]. It is assumed the party would have incorporated a clause to protect from the risk, otherwise the party is assumed to have taken the risk. [*Ibid.*]. The PARTIES could have easily added the word "tariff" to the Hardship Clause but did not. CLAIMANT failed to protect itself, so CLAIMANT loses its claim for adaptation.

2. The principle of *contra proferentem* does not apply since RESPONDENT was not the drafter of the Hardship Clause of the Sales Agreement

77. RESPONDENT cannot be considered the drafter of the Hardship Clause under the principle *contra proferentem* therefore any ambiguity cannot be interpreted against RESPONDENT even though the clause is clear. CLAIMANT takes the position that RESPONDENT drafted the Hardship Clause and lowered the standard for hardship under it from "*excessively onerous*" to "*more onerous*". [*Claimant's Brief, para. 79*]. However, there is nothing in the facts that show RESPONDENT explicitly drafted the wording. The record simply states that RESPONDENT "suggested" the wording, there is no written correspondence provided by CLAIMANT showing that RESPONDENT wrote the clause. [*PO 2, p. 56, para. 12*]. In fact, CLAIMANT mainly drafted the Sales Agreement and the PARTIES used CLAIMANT'S standard contract form. [*Exhibit C-8, p. 17*]. Thus, CLAIMANT'S entire argument regarding a lowered standard is irrelevant. RESPONDENT does not qualify as the drafter of the Hardship Clause so even if ambiguity existed, it could not be construed against RESPONDENT.

3. The Hardship Clause did not grant CLAIMANT'S requested remedy of contract adaptation

78. There is no wording in the Hardship Clause that allows for the remedy of "adaptation" which CLAIMANT seeks. [*NOA, p. 7, para. 18*; *see Sales Agreement, p. 14, para. 12*]. Hardship clauses usually define how the contract will be revised with language such as "to restore the equilibrium between the parties as it was at the time of the conclusion of the contract." [*Den Haerynck, p. 239*]. If the parties cannot agree through negotiation after a hardship occurs, the hardship clause must include a sanction because "a hardship clause without a sanction is hardly worth the paper on which it is written." [*Schmitthoff, p. 88*]. Sanctions typically include either contract termination or adaptation by a third party including a court or arbitrator. [*Rimke, p. 228*]. As evidence by the commencement of this arbitration, the parties could not agree regarding the tariff. [*NOA, p. 8*]. Thus, the Hardship Clause did not grant adaptation as required and this Tribunal cannot provide the requested remedy of adaptation.

79. CLAIMANT'S plea for adaptation loses sight of the purpose for adaptation because the Sales Agreement was a short-term contract. Adaptation is meant for long-term contracts where conditions can change over time so that parties can continue business despite an unforeseen impediment. [*Schwenzer, p. 716*]. While both PARTIES hoped for a longer relationship, they did not enter a long-term agreement at the time of the tariff. [*Exhibit C-2, p. 11*] Rather, the agreement only included three shipments over the span of three months which is hardly long term and RESPONDENT would have taken the material in less shipments. [*Sales Agreement, p. 14*]. Additionally, CLAIMANT asserts that this Tribunal should consider its 2014 financial losses in finding hardship here. [*Claimant's Brief, para. 84*]. Those loses are immaterial to this arbitration and CLAIMANT fails to cite any authority in its brief for the consideration of extrinsic prior business difficulties. While RESPONDENT knew of CLAIMANT'S financial difficulties, RESPONDENT did not know the extent of the difficulties until CLAIMANT requested price adaptation after the execution of the Sales Agreement. [*PO 2, p. 58, para. 22*].

4. CLAIMANT could not have been excused from liability under the Hardship Clause if it failed to deliver the third shipment

80. CLAIMANT could not have been excused from liability under the Hardship Clause if it chose to breach the Sales Agreement and CLAIMANT'S hypothetical scenario is outside the scope of this arbitration. It is CLAIMANT'S view that it would have been excused from liability if it failed to deliver the third shipment. [*Claimant's Brief, para. 88*]. CLAIMANT correctly points out that RESPONDENT would have pursued damages if CLAIMANT breached its promise to deliver, but RESPONDENT would have prevailed in such a contract claim. [*Ibid.*]. Even if the impediment could not be foreseen, a party is not exempt from liability if it is possible and reasonable to overcome the impediment. [*Schwenzer, p. 719*]. Contract avoidance is only used as a remedy of last resort if adaptation is not possible. [*Ibid. at 723*]. Here, the tariff did not render performance impossible and CLAIMANT clearly performed by shipping, it simply cost CLAIMANT more money to perform. [*Exhibit C-8, p.17*]. If CLAIMANT failed to deliver the third shipment, then it would have breached Clause 8 of the Sales Agreement calling for three shipments for the delivery of 100 doses. [*Sales Agreement, p. 14*]. Thus, RESPONDENT would have prevailed if CLAIMANT sought to excuse its hypothetical breach.

81. In conclusion, CLAIMANT fails to provide any persuasive argument or evidence to support adaptation in its favor under the Hardship Clause. RESPONDENT was not responsible for insulating

CLAIMANT from financial risk as both PARTIES were responsible for their own actions. While RESPONDENT is sympathetic to CLAIMANT'S situation, RESPONDENT cannot be held liable for CLAIMANT'S poor business decisions nor the Equatoriana government's decision to impose a retaliatory tariff. Both PARTIES agreed to a narrow Hardship Clause so CLAIMANT'S claim for relief under the Hardship Clause must fail.

B. CLAIMANT Is Not Entitled To A Price Adaptation Under CISG Art. 79 And UNIDROIT Principles

82. CLAIMANT'S alternative arguments are baseless and are not supported by evidence. Neither CISG Art. 79 nor UNIDROIT Art. 6.2.3 (4)(B) can serve as a basis for this Tribunal to make price adjustment. First, CISG Art. 79 has been excluded from the Sales Agreement. Second, even if this Tribunal ruled that the PARTIES did not derogate from CISG, Art. 79 does not regulate hardship in this case and cannot be supplemented by UNIDROIT Principles. Third, even if UNIDROIT Principles are applicable here, the imposition of the tariff merely increased CLAIMANT'S cost and that does not meet the threshold of UNIDROIT Art. 6.2.3 hardship exemption as CLAIMANT asserts. Finally, CISG Art. 79 never served as a weapon to restore the loss whenever a sophisticated contracting business party lost its profit margin under its own assumption of the risks.

1. The PARTIES agreed to exclude CISG Art. 79 from the Sales Agreement by inserting a detailed Hardship Clause

83. CLAIMANT wrongfully applied CISG Art. 79, which has been excluded from the Sales Agreement by inserting a detailed Hardship Clause. The PARTIES intended to exclude the application of CISG Art. 79. As correctly acknowledged by CLAIMANT, CISG Art. 6 grants contracting parties right to exclude the application of the CISG or derogate from any of its provisions. [*CISG Art. 6, para. 15*; *Claimant's Brief, para. 92*; *Brunner, CISG, Art. 6 para. 1*; *Kröll et al.*]. CLAIMANT further acknowledged that an implied exclusion can be found as long as parties intention becomes clear. [*Claimant's Brief, para. 92*; *Kröll et al., Art. 6 para. 16.*] Often, when parties have defined force majeure in their contract, they have in fact intended to derogate from CISG Art. 79. [*Djakhongir, pp. 55-56*]. In cases where the contract provided for a list of force majeure circumstances, a Russian tribunal held that such a list indicates the parties' intent to derogate from CISG Art. 79. [*Russia Federation Case 1992*; *Rozenberg, p. 265*].

84. CLAIMANT was correct to the extent that that both PARTIES placed certain value on the regulation of potential hardship situations, however, its assertion that the PARTIES "wanted the Convention to

coexist with the Hardship Clause serving as an additional safeguard," was baseless and contrary to the facts that the PARTIES actually intended to exclude CISG Art. 79. Here, the detailed list provided in the Hardship Clause – lost shipments, weather delays, failure of third-party service, acts of God neither for hardship, or comparable unforeseen events – indicates the PARTIES' intent to derogate from CISG Art. 79. [*Sales Agreement, p. 14*]. Moreover, the negotiation process of the final Hardship Clause makes the PARTIES' intention crystal clear: CLAIMANT was the party who suggested including an ICC-hardship clause, and the final version of the Hardship Clause provides a list including all circumstances that CLAIMANT was worried about. [*Exhibit C-4, p. 12*; *Sales Agreement, p. 13*; *Exhibit R-3*]. Since the Hardship Clause provides for a list of force majeure and hardship circumstances, and since CLAIMANT was the party intended to insert this clause into the contract, the PARTIES have excluded the application of CISG Art. 79.

2. Even if this Tribunal ruled that the PARTIES did not derogate from CISG, Art. 79 does not regulate hardship in this case and cannot be supplemented by UNIDROIT Principles

85. By admitting that CISG Art. 79 does not explicitly address the occurrence of hardship, CLAIMANT attempts to directly apply the Hardship Clause under UNIDROIT Art. 6.2.3 via CISG Art. 7. [*Claimant's Brief, para. 97*]. CLAIMANT argues that "since UNIDROIT considered general principles and trade usage, it should be directly applied here." [*Claimant's Brief, para. 97*; *CISG Art. 7*]. However, this CISG Art. 7argument is problematic in two aspects. First, CISG Art. 79 has no gap regarding hardship situation for UNIDROIT to fill in since the drafters of the CISG intended to exclude hardship. [*Stoll/Gruber, para. 39*]. Second, applying UNIDROIT hardship in this case would not achieve a uniform application of CISG in the international commercial setting under CISG Art. 7(2).

a. CISG Art. 79 does not allow UNIDROIT to fill in gaps regarding hardship situations because drafters of CISG intended to exclude hardship from Art. 79

86. CISG Art. 79 has no gap regarding a hardship situation for UNIDROIT to fill in. At the Vienna Conference when drafting the CISG, a proposal to include hardship concept into CISG Art. 79 was rejected. [*Honnold, p. 602*]. As observed by Professor Honnold, the word "impediment" in Article 79 was substituted for the word "circumstances" in order to disallow the granting of an exemption "mere[ly] because performance became more difficult or unprofitable." [*Honnold*, *p. 483, para. 432.2*]. CISG drafters intended to exclude a hardship concept from CISG Art. 79, which was recognized and honored by numerous tribunals and courts. [*Italian 1993 Case*]. For example, an

Italian court has made a firm stand to hold that a seller could not rely on hardship as grounds for avoidance since CISG Art. 79 did not contemplate such a situation. [*Ibid.*].

87. CISG Art. 79 only applies when a party failed to perform a contractual obligation under an impediment beyond its control. [*CISG Art. 79*]. "The impediment must actually prevent performance or that an external force that objectively renders performance impossible." [*Honnold, p. 602*; *Flambouras*]. Thus, given the fact that the concept of hardship has been considered and rejected at the Vienna Conference, CLAIMANT'S suggestion to directly use UNIDROIT to interpret CISG Art. 79 is problematic. This is because the UNIDROIT contains both an excuse or impossibility provision and a hardship provision, while the CISG possesses the single provision of impediment. [*UNIDROIT 6.2.3*].

b. Applying UNIDROIT hardship concept in this case would not achieve a uniform application of CISG in the international setting

88. CLAIMANT argues that CISG Art. 7 promotes an achievement of a uniform application of the CISG in international setting. [*Claimant's Brief, para. 97*]. However, the inclusion of hardship into CISG regime ironically placed a civil law perspective on the issue of impediment instead of making an autonomous interpretation to consider the international character of the CISG and the importance of uniformity of application. [*CISG Art. 7*].

89. ICC Arbitrators only apply the principle of hardship in exceptional cases and the tariff here does not qualify as an exceptional case. [*Melis, pp. 218-19*]. For instance, war has only been accepted as an exceptional circumstance when war directly prevents a party from performing a contract and performance must be continued after a reasonable time. [*Melis, p. 218*]. Courts are reluctant to grant hardship relief for fluctuations in price and the threshold is even higher in international markets than domestic markets where fluctuations are less expected. [*Schwenzer, pp. 716-17*].

90. Furthermore, common law systems do not recognize a duty to renegotiate in cases of hardship, so RESPONDENT did not have a duty here. [*DiMatteo, pp. 284-85*; *Schwenzer, p. 722*]. Even if RESPONDENT had a duty to re-negotiate in good faith, it satisfied that duty in the 12 February 2018 meeting. In certain civil law systems which recognize the duty to renegotiate, such as France, the negotiation does not have to be successful and it is difficult to demonstrate a violation of good faith. [*E.D.F. v. Shell Francaise*]. Therefore, CISG Art. 79 does not apply to this tariff situation

and UNIDROIT Art. 6.2.3 should not be introduced to fill in the gap. CISG Art. 79 does not apply to this tariff situation and UNIDROIT Principles should not be introduced to fill in the gap.

3. Even assuming that UNIDROIT Art. 6.2 applied to this case, CLAIMANT would not qualify for relief from the tariff under UNIDROIT Art. 6.2.3

91. Even under the UNIDROIT Article 6.2.2 hardship principle, the imposition of the 30% tariffs does not constitute a hardship which fundamentally alters the equilibrium of the contract. UNIDROIT Art. 6.2.2 provides several requirements for the hardship. [*UNIDROIT Art. 6.2.2*]. Contrary to CLAIMANT's arguments, the facts in this case failed to meet these requirements. First, the 30% tariff is not enough to meet the requirement of "fundamentally alter[ing] the contractual equilibrium." Second, CLAIMANT as a business party, should have taken the tariff into account and should be aware of Mediterraneo's possible retaliatory tariffs against its country.

a. A 25% increase in cost resulting from the tariff is not enough to meet the requirement set forth in Art. 6.2.3 of the UNIDROIT principles

92. The 30% tariff is not enough to meet the requirement of "fundamentally alter[ing] the contractual equilibrium" because the tariff only increased CLAIMANT'S costs in an amount less than 25%. CLAIMANT wrongfully applied the "50% rule." [*Claimant's Brief, para. 100*] It argued that a minimum of 50% of the cost of performance might be a fundamental alteration and concluded that this increase of 30% of cost in tariff should be deemed fundamental. [*Ibid.*]. However, the correct application of the "50% rule" should be that a cost/value alteration of less than 50% will not be considered as fundamental; and this also does not allow the conclusion that a cost/value alteration of more than 50% will be considered fundamental. [*McKendrick, p. 719*].

93. CLAIMANT cited Professor Brunner arguing that a party's financial difficulties might lower the threshold for hardship. [*Claimant's Brief, para.* 100]. However, CLAIMANT failed to mention the prerequisite of this argument – that the alteration threshold suggested by Professor Brunner was between 80% to 125%. As a side note, Professor Brunner mentioned that the threshold should be heightened in the case a debtor has assumed a greater risk of contract performance or lowered in the case of financial difficulties. [*Brunner, p. 432*]. Even Professor Schwenzer, who CLAIMANT cites in supporting the hardship to be included in the CISG Art. 79, suggested that even a 100% cost increase is usually insufficient to exempt the party from contractual obligations under the hardship concept. [*Schwenzer, pp. 710-11*].

94. CLAIMANT paints an inaccurate picture of its loss by comparing its increased tariff cost with its anticipated profit margin. [*Claimant's Brief, para. 101*]. CLAIMANT also asserts that "the cost of delivery increased by 12,500%" and should be used to measure the financial burden rather than the 30% tariff. [*Claimant's Brief, para. 83*]. Both comparisons are completely inappropriate because the general practice should be evaluated between the actual expected costs with the estimated objective costs after the occurrence of the supervening event. [*Girsberger/Zapolskis, p. 28*]. Here, the expected cost calculated by CLAIMANT was US $95,000, and after the imposition of US $25,000 tariff, the cost was merely increased to US $120,000. [*PO, p. 59, para. 31*]. Thus, this imposition of the tariff actually only increased the cost by less than 25%. According to Professor Brunner, a cost increase by 13%, 30%, 44% or even threefold was considered insufficient to qualify as hardship. [*Brunner, p. 427*; *Oberlandesgericht case*]. Therefore, this increase of costs is far less than the threshold for altering the fundamental contractual equilibrium.

b. CLAIMANT is in a better position to know of the tariff and CLAIMANT had time to fulfill its contractual obligation without the impact of the tariff

95. CLAIMANT argued that CLAIMANT cannot be accused of not having reasonably considered possible actions because the imposition of the tariff by Equatoriana came as a surprise. [*Claimant's Brief, para. 103*]. However, CLAIMANT'S country, Mediterraneo, announced a 25% tariff on agricultural products from Equatoriana at the end of November, which was two months before the due date of CLAIMANT'S last shipment. [*PO 2, p. 58, para 23,*]. Equatoriana's newly elected Prime Minister favors more protectionist approaches towards international trade. [*Exhibit C-6, p. 15*]. CLAIMANT, as a sophisticated business party doing international commercial transactions all the time, should be highly sensitive towards governmental relationships and the potential retaliatory reactions from Equatoriana against its country of origin. Moreover, the imposition of the 30% tariff by Equatoriana was announced on 19 December 2017 and would not be effective until 15 January 2018. [*PO 2, p. 58, para 25*]. CLAIMANT had more than three weeks to take any necessary procedures that a prudent business party would take to fulfill its third shipment obligation before the tariff became effective.

96. The fact that CLAIMANT did not take any affirmative action to clarify with relevant governmental officers of the tariff impacts on its own products does not render the tariff "unforeseeable." As the renowned international arbitration specialist Professor Pierre Lalive articulated, a disadvantaged party must also show that it attempted to "minimize" the damage caused by changed

circumstances. [*Lalive, p. 449*]. Upon learning that a tariff could affect its business, CLAIMANT had a duty to mitigate but failed to do so. [*Schwenzer/Manner*]. Here, there was a month window between the executive order announcing the tariff and its effect taking place. During that time, CLAIMANT could have inquired whether the tariff applied to their shipment or delivery thereof. [*PO 2, p. 58, para. 25*]. CLAIMANT chose to prepare the shipment one day before the deadline and should have anticipated the risk. [*Exhibit C-8, p. 17*; *PO 2, p. 58, para. 26*].

c. Since the tariff did not constitute a hardship, CLAIMANT cannot request a contract adaptation by using "lost profit" as a basis

97. The PARTIES' original Sales Agreement was not to guarantee "a 5% profit margin for CLAIMANT." [*contrast to Claimant's Brief, para. 109*]. CLAIMANT fails to cite any authority to support its argument that this Tribunal has authority to award incidental damages of lost profits. The Sales Agreement was not intended to protect CLAIMANT from losing any money. CLAIMANT**'S** argument that "only a cost-covering price restores the contractual equilibrium" would turn numerous international contracts afoul. [*Ibid.*]. Businesses know that there are potential risks when negotiating an international contract. [*Melis*]. One of those risks includes rapid changes in international trade where parties expect to earn money off their loss. CLAIMANT'S attempt to show it "made the first step towards a balanced solution by waiving its profit margin," is merely another framing mechanism to gain sympathy from this Tribunal when it experienced such a loss. [*Claimant's Brief, para. 88*; *NOA, p. 7, para. 18*].

98. Contrary to CLAIMANT'S allegation, RESPONDENT did not push CLAIMANT to the edge of bankruptcy. The tariff was announced in 2017 and CLAIMANT had plenty of time to make proper arrangements with regard to its contractual obligations. [*Exhibit C-6, p. 15*]. Furthermore, CLAIMANT, as an expert on breeding horses, should have known its products' tax classification. CLAIMANT placed Respondent in economic duress when it threatened to increase the purchase price and otherwise refused to ship the third installment. [*Exhibit C-7, p. 16*]. Under that condition, RESPONDENT had to take necessary steps to have CLAIMANT perform its obligation under the Sales Agreement. CLAIMANT'S baseless suspicion of RESPONDENT'S resale of the semen was a mere attempt to gain sympathy. Now that CLAIMANT lost its profit margin due to the tariff, CLAIMANT denies its own consent to DDP delivery and unreasonably brings RESPONDENT before this Tribunal to request a price adaptation.

99. In conclusion, despite CLAIMANT'S sympathetic arguments, the tariff only increased the cost of 30% and it is not enough to alter the contractual equilibrium. CLAIMANT is nonetheless able to perform and has already performed. Neither CISG Art. 79 nor UNIDROIT Art. 6.2 shall be used as a weapon to restore the loss of a profit margin under the sophisticated business party's own assumption of the risk. Therefore, CLAIMANT is not entitled to any price adaptation under the Hardship Clause, CISG Art. 79, or UNIDROIT Principles.

REQUEST FOR RELIEF

For the above reasons, RESPONDENT respectfully requests this Tribunal to find that:

1. The Law of Danubia governs the Arbitration Clause and its application provides that this Tribunal does not have the jurisdiction or power under the Arbitration Clause to adapt the contract (**Issue 1**);

2. CLAIMANT is not entitled to submit evidence from RESPONDENT's prior arbitration proceedings because it is inadmissible (**Issue 2**);

3. CLAIMANT is not entitled to an additional remuneration in the amount of US $1,250,000 under the Hardship Clause of the Sales Agreement or Article 79 of CISG (**Issue 3**).

/s/Humza Ansari

Humza Ansari

/s/Sara Geoghegan

Sara Geoghegan

/s/Zhiwen Jie

Zhiwen Jie

/s/Caroline Mazurek

Caroline Mazurek

/s/Gabrielle Neace

Gabrielle Neace

/s/Zike Yang

Zike Yang

Certificate and Choice of Forum

To be attached to each Memorandum

I Kristen E. Hudson, on behalf of the Team for (name of School)

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

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) The John Marshall Law School

Name Kristen E. Hudson

Signature