TWENTY-SIXTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA

MEMORANDUM FOR CLAIMANT

DEAKIN UNIVERSITY

Phar Lap Allevamento v Black Beauty Equestrian

On behalf of	*Against*
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City, Mediterraneo	Oceanside, Equatoriana
- CLAIMANT -	**- RESPONDENT -**

COUNSEL FOR CLAIMANT

REID HADAWAY ○ STEPHANIE JOHNSON ○ VIVIEN JONES
KAYLA LAIRD ○ JESSIE NYGH

STATEMENT OF FACTS

PHAR LAP ALLEVAMENTO ("CLAIMANT") is a longstanding and renowned stud farm, located in Mediterraneo. Known for its racehorse breeding success, CLAIMANT also sells frozen semen from its champion stallions for artificial insemination.

BLACK BEAUTY EQUESTRIAN ("RESPONDENT") operates a racehorse stable in Equatoriana.

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21 March 2017	RESPONDENT contacted CLAIMANT inquiring about purchasing frozen semen from CLAIMANT's star stud Nijinsky III, as a reaction to the temporarily lifted ban on artificial insemination for racehorses in Equatoriana.
24 March 2017	CLAIMANT makes an offer to RESPONDENT for 100 doses of frozen semen from Nijinsky III.
28 March 2017- **12 April 2017**	CLAIMANT and RESPONDENT negotiate the terms of the sales agreement. The Parties agree on an HKIAC arbitration agreement ('**AA**') with Danubia as the seat of the arbitration. The Parties agree that Mediterraneo law and the CISG apply to the contract, on DDP delivery and to include a hardship clause.
12 April 2017	The Parties negotiators were injured in a car accident and replaced with new negotiators.
April 2017	Mediterraneo imposes a 25 per cent tariff on agricultural products.
6 May 2017	Parties' new negotiators agree and sign the sales agreement, finalising the hardship clause and the modifications to DDP.
20 May 2017	CLAIMANT sends first shipment to RESPONDENT.

3 October 2017	CLAIMANT sends second shipment to RESPONDENT.
19 December 2017	Equatoriana imposes a 30 per cent Tariff on agricultural products from Mediterraneo.
20 January 2018	CLAIMANT becomes aware the final shipment will be subject to the 30 per cent tariff, and unsuccessfully calls, and then emails RESPONDENT with the news and to find a solution to the additional cost.
21 January 2018	RESPONDENT calls CLAIMANT and advises he is unable to directly authorise an additional payment to cover the Tariffs. RESPONDENT urges CLAIMANT to ship the semen as planned.
23 January 2018	CLAIMANT ships final instalment as per the sales agreement and pays the Tariff.
12 February 2018	RESPONDENT breaks off negotiations for a price adaptation.
31 July 2018	CLAIMANT files its Notice of Arbitration ('**NoA**') requesting a price adaptation of $1.25m
24 August 2018	RESPONDENT files its Response to the NoA ("**RNoA**"), in which it disputes the jurisdiction of the tribunal to adapt the price.
2 October 2018	CLAIMANT contacts the HKIAC Arbitral Tribunal ("**Arbitral Tribunal**") alerting them of RESPONDENT's inconsistent use of extraneous evidence in the RNoA, and that RESPONDENT asked for an adaptation in another sale affected by the same set of tariffs.
3 October 2018	RESPONDENT answers CLAIMANT'S allegations. In reply, RESPONDENT submits CLAIMANT's allegations of inconsistent requesting of adaptation in a separate proceeding is misleading and the partial interim award is protected by confidentiality agreements. Furthermore,

RESPONDENT submits the evidence was obtained illegally through a hack or breach of employee's contractual duty of confidentiality.

4 October 2018	Parties agreed via telephone conference with the Arbitration Tribunal to the HKIAC Rules 2018.
5 October 2018	The tribunal releases Procedural Order No. 1 ('**PO1**')
2 November 2018	The tribunal released Procedural Order No 2 ('**PO2**')

INTRODUCTION

1. One cannot contract with another on the grounds that they will bear none of the risk and all of the reward. And yet RESPONDENT appears to wish for just that. The parties to this matter entered into a contract for the sale of goods seeking to build a relationship. CLAIMANT accepted risk with the promise of dealing in good faith. However, RESPONDENT now seeks to shirk their duties and deny the fair rebalancing of a now economically unsound contract.
2. CLAIMANT, in answer to the questions raised by the Tribunal in Procedural Order 1 ('**PO1**'), submits the following. The Tribunal is clearly empowered by the Arbitration Agreement to adapt the contract (**ISSUE ONE**). CLAIMANT is entitled to furnish the Tribunal with the partial interim award (**ISSUE TWO**). Finally, CLAIMANT is entitled to adaptation under Clause 12 and Clause 14 of the Sales Agreement (**ISSUE THREE**).

ISSUE ONE: THE TRIBUNAL HAS THE JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

I THE ARBITRATION AGREEMENT SATISFIES THE REQUIREMENTS OF THE MODEL LAW

II THE SCOPE OF THE SALES AGREEMENT INCLUDES THE POWER TO ADAPT THE CONTRACT

3. The parties only dispute the scope of the **AA**. CLAIMANT submits that the Sales Agreement contains a substantive right of adaptation which the Tribunal must enforce (**I**). Upon the acceptance of a prima facie right of adaptation within the Sales Agreement, RESPONDENT has no grounds upon which to maintain that the AA is too narrow to allow adaptation (**II**). CLAIMANT submits that regardless of the law applied to interpreting the AA the scope of the agreement remains the same (**III**). In the event that CLAIMANT cannot show a right of adaptation in the Sales Agreement, the parties agreed to include adaptation as an independent substantive right of the parties and power of the Arbitrators (**IV**).

A. The Sales Agreement contains a right to adaptation which the Tribunal has jurisdiction to enforce

4. The phrase "*any dispute arising out of this contract… shall be referred to and finally resolved by arbitration*" [*Exh C5 Cl 15 p 14*] is the imprimatur of the ambit of the Tribunal's powers. In its plain meaning, this phrase is determinative of the AA's scope.
5. CLAIMANT will submit that the parties to the Sales Agreement are granted a right to adaptation under said Agreement. The inclusion of a hardship provision in Clause 12 of the Sales Agreement ('***Cl* 12**') impliedly provides for adaptation. Alternatively, the parties agreed in Clause 14 of the Sales Agreement ('***Cl* 14**') to make the law of Mediterraneo the governing law of the contract. Therefore, CLAIMANT submits below that adaptation is provided for in the United Nations Convention on the International Sale of Goods ('**CISG**') or in the UNIDROIT Principles of International Commercial Contracts ('**UNIDROIT Principles**') as adopted in *Cl* 14. If the Tribunal is satisfied that a right to adaptation exists in either *Cl* 12 or *Cl* 14, those rights arise out of the contract. The parties are in dispute about these rights. Therefore, the Tribunal clearly has the jurisdiction to consider questions of adaptation. The question for the Tribunal then becomes, simply: is the enforcement of the right to adapt appropriate in the present circumstances?
6. Notwithstanding the above, the Tribunal's jurisdiction to consider matters of adaptation remains. The parties dispute the existence of the right to adaptation within the contract. This is a dispute arising out of the contract. The Tribunal has the jurisdiction to decide on the existence of adaptation,

including that no such right exists. RESPONDENT appears to acknowledge this by asking the Tribunal to notify them if it finds that it lacks jurisdiction, so as to reconsider its objections to jurisdiction [*POI para II(4)*]. It is in the interests of both parties that the Tribunal be empowered to make a *res judicata* decision.

B. If, as CLAIMANT submits, a right to adaptation exists in Cl 12 or Cl 14, RESPONDENT has no grounds to argue that the AAs is too narrow

7. Paragraph II(4) of POI [*p* 52], as mentioned above, appears to indicate that if CLAIMANT's submissions on Cl 12 and Cl 14 are accepted by the Tribunal, RESPONDENT will maintain an assertion that the Tribunal lacks jurisdiction to adapt. CLAIMANT submits that for the following reasons such an argument does not withstand scrutiny. The common canons of contract interpretation support CLAIMANT's above submissions (**1**). Principles of interpretation specifically applied to arbitration agreements support CLAIMANT's above submissions (**2**).

1. The application of common principles of interpretation does not support a narrow reading of the AA

7. The identification of applicable interpretative rules is the sole focal point for the parties submissions on the law applicable to the AA [*Not. Of Arb., paras 15 and 16; Ans. to Not. Of Arb., paras 13, 16 and 17*]. CLAIMANT submits that canons of contract interpretation are the logical beginning of any interpretative analysis of the AA [*Born, pp 1320 and 1321*]. In particular, that the common intention of the parties as expressed by the plain meaning of the text (**a**). And the background circumstances and knowledge reasonably available to the parties at the time of contract (**b**). The application of such canons supports CLAIMANT's submission that adaptation can be exercised by the Tribunal in accordance with the AA.

a. The common intention of the parties as expressed by the plain meaning of the text supports the CLAIMANT's interpretation of the AA

8. It is an internationally accepted principle of contract interpretation that a contract be interpreted according to the common intention of the parties when making their agreement in good faith.

[*PECL Art 5:101(1); Second Restatement of Contracts §202(1); Herbots p 425*]. The clearest manifestation of common intention is the words used by the parties in drafting their agreement [*Investors Compensation Scheme, per Lord Hoffman*]. In this instance, as stated above at para 2, the phrase "*any dispute arising out of this contract... shall be referred to and finally resolved by arbitration*" is so clear and unequivocal as to be determinative of the Tribunal's remit.

9. It is difficult to conjecture how RESPONDENT may argue that on the plain meaning of the AA, it is too narrow. However, CLAIMANT acknowledges that the above quoted phrase [*paras 2 and 7*] includes the words "*including the existence, validity, interpretation, performance, breach or termination thereof*" [*Exh C5 Cl 15 p 14*]. CLAIMANT submits that these matters are merely illustrative and cannot be interpreted as restrictive. Moreover, RESPONDENT draws attention to the changes in the HKIAC model arbitration clause and argues that words were omitted to ensure the clause could not be interpreted as empowering the Tribunal to adapt [*Ans to Not of Arb p 31 para 13*]. The omitted are "*[a]ny... controversy, difference or claim... or relating to... or any dispute regarding non-contractual obligations arising out of or relating to it*". CLAIMANT submits that RESPONDENT's assertion that the exclusion of these words excludes adaptation is manifestly unfounded. The wording of the final AA continues to allow for the inclusion of adaptation as a right arising out of the contract, as CLAIMANT addresses below [paras 4-7].

b. The Tribunal should give consideration to the background knowledge available to the parties at the time of contract

10. RESPONDENT submits that the law of Danubia applies to the AA and therefore the "four corners rule" does not allow the Tribunal to consider extraneous evidence to interpret the Agreement [*ANoA para 16 p 32*] . CLAIMANT submits that if the Tribunal accepts these submissions, subject to CLAIMANT's arguments below, certain background matters may still be considered. This "*factual matrix*" [*The Diana Prosperity, per Lord Wilberforce*] is made of all the legal, factual and regulatory framework. In particular in the case of commercial contracts, Lord Hoffman observed that "*the restriction on the use of background has been quietly dropped*" [*Mannai Investment*

[779]]. It is important to note that outside of common law jurisdictions, background is readily admissible and is not issue.

11. CLAIMANT submits, therefore, that the negotiating lawyers reasonably inferable and relevant [*Bank of Credit and Commerce v Ali,* per Lord Hoffman] knowledge is admissible and persuasive. Both companies are situated in countries which have adopted the UNIDROIT Principles as their contract law. The UNIDROIT Principles provide for Arbitral adaptation in cases of hardship or gross disparity [UNIDROIT 2016, Arts 1.11, 3.2.7(2) and 6.2.3(4)(b)]. Lawyers with experience negotiating contracts in these countries would understand the inclusion of an adaptation right in contracts governed by UNIDROIT Principles and which expressly refer to hardship without listing remedies [UNIDROIT 2016 Art 6.2.3(4)(b)]. The inclusion of UNIDROIT Principles through the Law of Mediterraneo in Cl 14 demonstrates a clear intention to include adaptation in the contract. As the first instance dispute resolution mechanism [Model Law, Art 8(1)] the Tribunal is open to find that the parties intended to allow for adaptation by an arbitral tribunal if it accepts CLAIMANT's submissions on Cl 12 and Cl 14.

2. Applying the principles of interpretation specific to arbitration agreements renders a construction commensurate to CLAIMANT's

12. A limited suite of interpretative canons and presumptions has been developed to apply to arbitration agreements in favor of domestic rules of interpretation. The beginning position must be that the scope of the agreement be interpreted liberally [*Fiona Trust*] (**a**). Furthermore, commentators have identified a number of common principles of interpretation applicable to arbitration agreements [Fouchard, Gaillard and Goldman pp 254-258 paras 473-482 ; Waincymer pp 140, 141 and 142] (**b**). The overarching principle of interpretation is that of good faith, from which flows the principle of effective interpretation (*effete utile*). According these interpretative methods, the CLAIMANT's interpretation according to plain meaning remains the only reasonable construction.

a. The Tribunal should favour a liberal approach to the scope of the AAs

13. Traditionally, there was a gulf between civilian and common law jurisdictions in their approach to interpreting arbitration agreements. Civilian jurisdictions have been more open to a liberal reading of the ambit of arbitration agreements [*Waincymer p 144*]. While common law jurisdictions favoured a narrow reading of arbitration clauses, according to the exact wording of the agreement [see *Heyward v Darwins Ltd; Harbour Assurance v Kansa*]. However, courts in the United States of America had long favoured a pro-arbitration interpretative approach [*Mitsubishi Motor Company v Soler Chrysler-Plymouth Inc* (1985) 472 U.S. 614]. Born reasons that the rational business person, acting in good faith, would not seek to submit their disputes to separate and multiplicitous dispute resolution [*Born, p 1319*]. Notably, the United States Supreme Court in *First Options of Chicago Inc. v Kaplan* (1995) 514 U.S. 938 asserted that the above reasoning applied only to matters of scope, a central issue in the current proceedings.

14. Differences in approach have, however, largely disappeared. The UK House of Lords in *Fiona Trust v Privalov* asserted that arbitration clauses should be interpreted liberally, reasoning that when the parties to an arbitration agreement entered into it, they intended to submit all of their disputes to a single dispute resolution mechanism. Lord Hoffman reasoned that this was true, *a fortiori*, in commercial contracts where the purpose of an arbitration agreement was as a neutral and efficient dispute resolution measure (*Fiona Trust* at [6]-[7]). Almost all countries to have adopted the UNCITRAL Model Law have accepted this approach. Applying this presumption, CLAIMANT reiterates that the AA was clearly drafted in such a way as to include "*any dispute*".

b. The principles of effective interpretation and interpretation in good faith favour CLAIMANT's construction of the AA

15. In addition to the above presumption, Fouchard, Gaillard and Goldman frame the interpretation of arbitration agreements through the prism of good faith. This is one of the most widely accepted "general principle[s] of law" [ICSID Award, *AMCO Asia Corp. v The Republic of Indonesia* YCA 1985, at 61]. Applying this principle involves consider the reasonable and legitimate consequences

envisaged by the parties when they agreed, in good faith, to submit any dispute to arbitration [*AMCO* at 63*; Fouchard Gaillard and Goldman* p. 258[477]), and reading the agreement as a whole [*ICC Award No. 8694* (1996)]. CLAIMANT submits that, in accordance with interpretation in good faith, if the Tribunal accepts CLAIMANT's submissions on Cl 12 or Cl 14 or the oral agreement by the parties to include adaptation, then adaptation must be included within the AA and RESPONDENT's attempts to narrow the Agreement are a bad faith derogation of the agreement and should not be accepted.

16. In addition to good faith, and related to it, is the principle that the agreement be given an effective interpretation (*effete utile*) (*Fouchard, Gaillard and Goldman* p 258[478]; *Waincymer* pp. 140-1; Art 1157 of the Code Civil; UNIDROIT 2016, Art 4.5]. This canon has been accepted as a "*universally recognised rule of interpretation*" [*ICC Award No. 1434* (1975)]. According to *effete utile*, where an arbitration agreement can be interpreted in two ways, effective or ineffective, the interpretation should be preferred that gives an effective meaning to the words. In this case, the Tribunal should accept CLAIMANT's submission that adaptation is included within the plain meaning of the AA as arising out of Cl 12 or Cl 14 because this construction gives effect to the plain meaning of the words and the parties' good faith agreement. Meanwhile, RESPONDENT's construction of the Agreement seeks to make it less effective and runs contrary the good faith agreement. This approach should be distinguished from the approach in favorem validitatis, which prescribes an interpretation in favour of arbitration where the mere existence of an agreement is raised. This is unhelpful here as neither party is challenging the validity of the agreement before a court. Moreover, Fouchard, Gaillard and Goldman entirely reject such an approach [pp. 261-2[481]].

III THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT DOES NOT MATERIALLY AFFECT THE INCLUSION OF THE POWER TO ADAPT

17. It is universally accepted that an arbitration agreement is separable from the main agreement of which it forms a part [recognised in Art 16 of the Model Law]. It is a consequence of this that the AA may be governed by a separate law to the main contract. Part of determining applicable law is to

ascertain any choice of law, which would be binding on the Tribunal [HKIACR 2018, Art 36; see also New York Convention, Art V(1)(a)]. This choice may be either express or implied.

18. CLAIMANT submits that the Tribunal is empowered to adapt the contract regardless of which law is deemed applicable to the AA. As CLAIMANT submits above [paras 4-7], the Sales Agreement expressly confers a right to adapt upon the parties in Cl 12 and Cl 14, and the Tribunal has jurisdiction to consider matters of adaptation. Moreover, the application of common canons of interpretation accepted across jurisdictions yields CLAIMANT's construction regardless of law.
19. CLAIMANT acknowledges the Tribunal's question concerning the applicable law [*PO1 III(1)(a)*], and will make submissions on the basis that the Tribunal may wish to determine an applicable law for the purpose of Art. V(1)(a) of the Convention for the Recognition and Enforcement of Foreign Arbitral Awards ('**New York Convention**'). CLAIMANT submits that the better view is that the law governing the contract contained in Cl 14 should also governs the AA (**1**). In the alternative, CLAIMANT maintains that adaptation remains within the Tribunal's jurisdiction if the the law of Danubia governs the AA (**2**).

1 The law of Mediterraneo, as the governing law of the contract, governs the AA

19. CLAIMANT submits that the parties made the governing law of the contract, is also the governing law of the AAs. The choice of law should be conducted according to the three step closest connection test, whereby the Tribunal first determines whether an express choice has been made, then, failing an express choice, whether an implied choice has been made, then, failing any implied choice, the law applicable is the law with the closest and most real connection to the contract [*Dicey, Morris and Collins* Rule 64(1) p 829]. CLAIMANT submits that the Cl 14 is an express choice of law governing the AA (**a**). Failing this, Cl 14 is an implied choice of law governing the contract and bears the closest and most real connection to the AA (**b**).

a. The choice of law in Cl 14 expressly governs the AA

20. We submit that it is open to the Tribunal to find that Cl 14 is an express choice of law governing the AA. We further submit that the Doctrine of Separability is not required to be applied in this

instance, making the AA more closely linked with the Cl 14 choice of law. We make these submissions on the basis that the article within the lex arbitri which establishes the presence of the doctrine is worded so as to be narrow in its application. Article 16(1) of the Model Law provides that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". This sentence is followed by the words "for that purpose" and the treatment of the agreement as separate. We submit that the use of "for that purpose" narrows the provision considerably, so that the doctrine is most properly applied only in circumstances whereby the main contract is impugned or otherwise tainted by possible invalidity.

21. Therefore, we submit that because the main contract is not impugned by either party in this case, the doctrine does not apply and Cl 14 is an express choice of law provision covering the AA. This view of the doctrine has seen some success among commentators and courts [see Primrose (2017); BCY v BCZ [2016] SGHC 249]. And it is open to the Tribunal to accept that Cl 14 is an express choice of law governing the AA. However, we acknowledge that commentators have come to opposing views on the matter [Glick and Venkatesan (2018)] and the Tribunal is also open to determining the law of the seat of arbitration as the law applicable.

b. Failing the above, the choice of law in Cl 14 impliedly governs the AA

22. The law of the contract contained in Cl 14 is clearly an implied choice of the law governing the AA. There is no consensus on an appropriate presumptive choice of law for arbitration agreements. Many of the cases that deal with the question of choice of law are not directly relevant to our analysis. The principles elucidated within seminal judgments on this subject were considered in light of questions of the existence of a valid agreement being considered under Art. 8 of the Model Law. Moreover, the final decision in many instances is made on a factual basis, often where one law would invalidate the agreement. As such, the presumptions and comments made within are of limited use, given that the true question under consideration here is the scope of the AA. However, CLAIMANT considers the judgement in *Sulamercia v Enesa* and the view of the joint reasons that an express choice of law within the main contract is a "s*trong indication*" of the law governing the AA, a persuasive

indication of the approach the Tribunal should adopt. Moreover, this approach has been adopted in jurisdictions across the world [see *BCY v BCZ; National Thermal Power Corp v. Singer Co*] and in arbitral awards [see *ICC Award No. 2626; ICC Award No. 6379; ICC Award No. 6572; ICC Award No. 6752; Interim Award in ICC Case No. 6840*]. CLAIMANT submits that the Tribunal should adhere to the pattern set by international arbitral awards and apply the law of the contract to the AA.

2 Applying the law of Danubia to the AA does not affect the Tribunal's power to adapt

23. As CLAIMANT has submitted above, the application of principles accepted across jurisdictions results in the Tribunal being empowered to adapt the contract. As such, CLAIMANT will only address the peculiarities of Danubian law and RESPONDENT's assertion that it was agreed that the law of the seat would apply to the AA.
24. CLAIMANT submits that the requirement under Danubian substantive law that adaptation be expressly conferred upon the Tribunal (PO2 para 45) does not affect CLAIMANT's submission that such a conferral occurred. CLAIMANT submits that Cl 12 and Cl 14 of the Sales Agreement confer the power to adapt. Danubian contract law does not govern the main contract, therefore, there is no requirement of an express conferral of adaptation. In the alternative, as CLAIMANT will submit below, the parties made an agreement to include adaptation as a power of the arbitrators, therefore expressly conferring the power upon them through an oral agreement which forms part of the AA.
25. The Danubian four corners rule does not affect CLAIMANT's construction of the AA. CLAIMANT asserts that the plain meaning of the AA, read in conjunction with the contract of which it forms a part, includes a power to adapt the contract. Therefore, the Danubian four corners rule is inconsequential. The possible consideration of extrinsic evidence would only support the CLAIMANT's submissions, and it is not the foundation of them.

IV Alternatively, the parties agreed that the Tribunal would be empowered to adapt the contract

26. Should the tribunal not be convinced that the plain meaning of *Cl* 15 covers CLAIMANT's claims under *Cl* 12 and 14, CLAIMANT argues in the alternative that Ms Napravnik and Mr Antley made

an agreement that '*it should be the task of the arbitrators to adapt the contract if the parties could not agree*' to an amendment (Exh. C8 [4]). Therefore, *Cl* 15 plus Ms Napravnik and Mr Antley's agreement forms the arbitration agreement. This agreement to adaptation was binding as the parties were acting within their authority. The later sales agreement does not contradict this and therefore the original agreement stands.

27. According to Ms Napravnik's witness statement, on 12 April 2017 (the day of the car accident) herself and Mr Antley had a '*short discussion*' (Exh. C8 [3] p. 17) where Ms Napravnik mentioned *'that for us* [CLAIMANT] *it was important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment*' (Exh. C8 [4] p. 17). Mr Antley replied '*in his view that it should probably be the task of the arbitrators to adapt the contract if the parties could not agree*' (Exh. C8 [4] p. 17). Ms Napravnik stated in her witness statement, '*Since that had also been my preference and understanding of the existing provisions, I suggested to clarify that issue and to include an express reference into the hardship clause or the arbitration clause to avoid any doubts, irrespective of the fact that from a legal point of view that was not necessary. Mr. Antley promised he would come back with a proposal the next morning. Due to the accident he never managed to do so*' (Exh. C8 p. 17).
28. CLAIMANT submits that the parties had an actual meeting of the minds, and intended that an adaptation mechanism would be included in either *Cl* 12 or 15 because Mr Antley said it should probably be the task of the arbitrators (Exh. C8 [4] p. 17), and Ms Napravnik suggested to add an express reference into either *Cl* 12 or *Cl* 15. That agreement is binding on the parties because Ms Napravnik and Mr Antley were acting within their authority to bind the parties.
29. CLAIMANT concedes that Ms Napravnik and Mr Antley did not consummate an agreement as to the exact form and wording of the adaptation mechanism. However, CLAIMANT maintains that the parties did consummate an actual subjective agreement that adaptation should be be task of the arbitrators if the parties could not agree to an amendment, and to avoid any doubts, an adaptation mechanism would be included in either *Cl* 12 or *Cl* 15. The fact that Ms Napravnik mentions a '*tentative agreement*' (Exh. C8 [5]) is merely because the exact form and wording of the agreement

had not been finalised, not that because the agreement that adaptation should be included was tentative.

30. It is not material whether the parties would have included the mechanism in *Cl* 12 or *Cl* 15, it would be within the tribunal's jurisdiction to adapt the contract. If the mechanism was included in *Cl* 12, it would be '*arising out of the contract*' and therefore within the jurisdiction of the tribunal on the plain meaning of *Cl* 15. Alternatively, if the mechanism was included in *Cl* 15, the power of adaptation would be expressly conferred on the tribunal.
31. Although Mr Antley's note from his negotiation file does not mention an agreement to adaptation (Exh. R3, p. 35), it is not inconsistent with an agreement. CLAIMANT does concede that Mr Antley's note does state '*list of issues for further negotiations*' (Exh. R3, p.35), however also submits that the '*further negotiations*' is only a reference to the exact form and wording of the adaptation mechanism, rather than the question of whether an adaptation mechanism would exist. Alternatively, it is not clear that 'connection of hardship clause with arbitration clause' even refers to the adaptation mechanism. Therefore, the better view is that the parties consummated a binding agreement to an adaptation mechanism.
32. Furthermore, RESPONDENT received the notice of arbitration and attached exhibits and is aware of Ms Napravnik's assertion that an agreement was made. RESPONDENT has had the opportunity to refute these claims if they believe them to be untrue in their RNoA, as Mr Antley is merely retired and could have been asked to give evidence.
33. The tribunal should therefore take Ms Napravnik's evidence as true, or alternatively is permitted to draw an adverse inference from RESPONDENT"s failure to respond to Ms Napravnik's assertion, as it is logical to presume Mr Antley's withheld evidence is adverse to the RESPONDENT, absent a valid excuse (Waincymer 10.4.8.2 p. 775). Therefore, the better view is that the parties made a binding agreement that adaptation should be within the power of the tribunal.
34. This agreement meets the form requirements of Art 7 Model Law. Option II of Art 7 Model Law is satisfied by any form of agreement. If Danubia has adopted Option I of Art 7 Model Law, it satisfied

as the agreement is recorded in Ms Napravnik's witness statement (C Ex 8 p 17; Art 7(2),(3)), which is not rebutted by RESPONDENT.

35. Alternatively, the requirements of Option I of Art 7 Model Law are satisfied because the agreement is alleged in the CLAIMANT's NoA (p. 7 [16]) '*during the first discussion of the adaptation clause RESPONDENT's Mr Antley had explicitly stated to CLAIMANT's Ms Napravnik that the arbitrators should adapt the contract in case the parties should not be able to reach a solution.*', and the RESPONDENT did not deny the agreement in its RNoA (pp. 29-32) or any of it's exhibits.
36. The later negotiators, Mr Krone and Mr Ferguson, simply did not turn their minds to adaptation, and therefore did not include an express reference to either allow or disallow it. CLAIMANT concedes that if they had turned their minds to it and disallowed adaptation, it would constitute a binding agreement to amend the contract pursuant to Art 29(1) CISG and oust adaptation. However, this did not occur. As a result, the original agreement made by Ms Napravnik and Mr Antley remains binding on the parties.
37. Mr Krone stated '*I would have objected to transfer powers…to increase the price'*, meaning <u>if</u> he had turned his mind to it he would have objected (Exh. R3[3]). That he later stated this is not to be taken as truth as to what his state of mind would have been, as it was stated with the benefit of hindsight when adaptation no longer suited the RESPONDENT. Furthermore, an adaptation mechanism was important to CLAIMANT and there is no evidence that RESPONDENT would have let the entire sales agreement die over this issue. The written contract is not incompatible with adaptation because the word including is not limiting, and the list is therefore not exhaustive.

V CONCLUSION FOR ISSUE ONE

38. As the above submissions outline, CLAIMANT submits that the plain meaning of the AA empowers the Tribunal to adapt the contract. RESPONDENT cannot narrow the AA. Generally accepted canons of interpretation as well as canons specific to the interpretation of arbitration agreements are supportive of the CLAIMANT's construction of the AA. The law applicable to the AA is inconsequential to this analysis. CLAIMANT submits that the only logical outcome for the

interpretation of the AA is that the Tribunal's mandate encompasses the power to adapt the contract and based on our lower submissions, CLAIMANT will ask that the Tribunal exercise this power.

ISSUE TWO: THE CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS REGARDLESS OF HOW THAT INFORMATION WAS OBTAINED

I The Claimant should be entitled to submit the Partial Interim Award from the other arbitration proceedings

39. If the tribunal is in any doubt regarding its jurisdiction to adapt the contract should the CLAIMANT be successful in showing a cause of action under *Cl* 12 or 14, the CLAIMANT should be entitled to submit evidence from the other arbitration proceedings, being the partial interim award ('*PIA*').

40. The tribunal is entitled to determine the admissibility of the evidence under Art. 22.2 *HKIAC Rules 2018* and Art 19 Model Law,, and may allow the CLAIMANT to produce the document if it determines it is relevant to the case and material to its outcome, under Art. 22.3 *HKIAC Rules 2018.*

A. Might have information showing RESPONDENT is misleading the tribunal in breach of its duty to arbitrate in good faith

41. It is not known exactly what is contained within the *PIA.* What is known about the *PIA* is:
    a. The dispute concerned the sale of a mare by RESPONDENT to a buyer in Mediterraneo, negotiated by Mr Antley (PO 2 [39] p 60).
    b. The contract and arbitration agreement were subject to Mediterraneo law, and the seat of arbitration was Mediterraneo.
    c. The contract provided for delivery DDP Mediterraneo, contained an ICC hardship clause, full model HKIAC arbitration clause.
    d. Following the imposition of the tariff, RESPONDENT asked for renegotiation of the contract under the ICC hardship clause and Art 6.2.3 UNIDROIT, and refused delivery of the mare.
    e. The buyer disputed the powers of the tribunal to adapt the contract under either the hardship clause or Art 6.2.3 UNIDROIT.

f. The tribunal confirmed its power to adapt the contract under the hardship clause and Art 6.2.3 UNIDROIT if the tariff resulted in hardship for RESPONDENT.

42. Information that could be contained in the partial interim award, which is relevant to these proceedings:

a. RESPONDENT's arguments in the proceedings

i. RESPONDENT must have argued that adaptation was available under the national law (UNIDROIT) notwithstanding that the parties had also, in that case, provided for 'special regulation of the problem of changed circumstances' (RNoA [20], namely the ICC clause, which does not provide for adaptation.

b. Proof RESPONDENT is misleading the present tribunal in breach of their duty to arbitrate in good faith, which which arises as an implied element of the agreement to arbitrate (Waincymer 10.3.3 p. 753; Born 2009 p. 1009-1010).

i. Born argues that most lawyers are subject to professional conduct rules that mandate they act with candour and fairness towards tribunals and counter-parties, and these are fundamental to arbitration proceedings (2009, p. 2315).

ii. RESPONDENT's counsel argues in this proceeding that '*RESPONDENT never have entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators*' (RNoA [19], p. 32). Mr Krone stated '*I would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion*'.

iii. However, this is plainly untrue. In the other proceeding, RESPONDENT clearly entered into a contract where the financial dimension was dependent on the discretion of the arbitrators, and the same counsel (PO 2 [38], p. 60) sought to enforce this in arbitration. This is a breach of RESPONDENT's duty to arbitrate in good faith and their counsel's duty of candour and fairness. It would be a further breach for RESPONDENT to contest the introduction of the *PIA* under the guise of confidentiality, if the real reason is that RESPONDENT does not want the tribunal to know it is misleading it.

43. In addition, the tribunal should accept the *PIA* and consider is as a persuasive authority regarding the tribunal's jurisdiction in the current dispute. Both contracts were subject to Mediterraneo law,

including the CISG and UNIDROIT. Both contracts contained specific hardship clauses, arguably providing for *'special regulation of the problem of changed circumstances'* (RNoA [20]. Yet in that dispute, the tribunal found they had the jurisdiction to adapt the contract under Art 6.2.3 UNIDROIT. The tribunal's reasoning is not yet known as CLAIMANT does not have a copy of the *PIA* at present (PO 2 [41] p. 60). However, CLAIMANT is able to obtain a copy and provide it to the tribunal if permitted (PO 2 [41] p. 60).

44. If the tribunal is satisfied that the *PIA* might contain relevant evidence, it should admit it to allow CLAIMANT a reasonable opportunity to present its case pursuant to Art 13.1 HKIAC Rules 2018.

B. Alternatively, the tribunal should not decide to exclude the evidence when it has not yet been obtained and it is not known what it contains

45. Alternatively, if the tribunal is not satisfied that the *PIA* is relevant based on what might be contained within it, CLAIMANT submits the tribunal should not hold against it until CLAIMANT has obtained the *PIA* and can provide information about what is contained within it. This would also ensure that the CLAIMANT receives a reasonable opportunity to present its case as required by Art. 13.1 of the HKIAC Rules 2018.

C. The evidence may not have been illegally obtained

46. RESPONDENT may argue that the evidence was illegally obtained and should therefore not be admitted. It should be noted that there is no blanket rule that automatically disqualifies illegally obtained evidence (Blair p. 259; Art 22.2 HKIAC Rules 2018). Furthermore, it is not clear that the evidence was, in fact, illegally obtained. It is likely that the *PIA* came from either a hack of the RESPONDENT's computer system, or one of RESPONDENT's former employees (p. 50(?), PO 2 p. 61[41]).
47. However, it is not known exactly how the third party came to be in possession of the *PIA* (PO 2 [41]). It is possible that it obtained the evidence from a third source. In particular it is not clear how Mr Velasquez, who previously worked for the Mediterraneo buyer in the other proceeding, came to know that the third party was in possession of the *PIA*. It is possible that he or someone else from the Mediterraneo buyer provided this information to the third party.

48. CLAIMANT concedes that if the PIA was obtained from a hack of the RESPONDENT's computer system, it is almost certainly illegally obtained, and the fact that RESPONDENT used an outdated firewall that made it easy for hackers to enter their system does not change this.
49. However, if it was obtained from one of RESPONDENT's former employees, or from the Mediterraneo buyer in the other arbitration, it is not clear that it was illegally obtained. CLAIMANT concedes that as the arbitration was under the HKIAC Rules 2013, the parties did have an obligation not to publish, disclose or communicate any information relating to the arbitration or the award (Art 42.1 HKIAC Rules 2013), and that the former employees of RESPONDENT were under a contractual obligation to keep all information about the other arbitral proceedings confidential. However, it is not clear if this duty continued after they were fired, 'they had been under a contractual obligation' (Emphasis added, PO 2 [41], p. 61). However, a breach of a contractual obligation does not necessarily entail illegality in the sense of a criminal activity. It is not clear if the Mediterraneo buyer's employees were even under a contractual obligation to keep the information confidential.
50. CLAIMANT concedes that purchasing the PIA from a third party who should not be in possession of it due to its confidential nature means its hands are not entirely clean, however the tribunal should note that CLAIMANT is not paying the third party to procure the PIA, it is merely purchasing information the third party is already in possession of. It is not clear that purchasing this information is illegal. As the RESPONDENT would be alleging that the evidence was obtained illegally the burden rests with RESPONDENT to prove that to the satisfaction of the tribunal (Art 22.1 HKIAC Rules 2018).
51. The tribunal should not be satisfied that the evidence was obtained illegally because it is not clear that the *PIA* was obtained via an illegal hack, and is at least as likely to have been obtained from an employee/former employee of either RESPONDENT or the Mediterraneo buyer. It is not clear that the second scenario is illegal, nor that CLAIMANT purchasing the information from a 3rd party is.

A. If the tribunal finds that the evidence was illegally obtained, it should still admit it

52. There is no blanket rule that automatically disqualifies illegally obtained evidence (Blair p. 259) .It is entirely at the discretion of the tribunal (Art. 22.2 HKIAC Rules 2018).

53. Blair suggests 3 relevant factors to consider based on analysis of numerous cases: whether CLAIMANT obtained the evidence unlawfully, whether public interest favours rejecting the evidence as inadmissible, and whether the interest of justice favours admission of the evidence.

1. CLAIMANT has limited culpability in obtaining the evidence

54. CLAIMANT concedes that its hands are not entirely clean but notes that it did not procure the third party to obtain the evidence (PO 2 [41], p. 61). Further it is not clear that purchasing the PIA is illegal.

2. There is no public interest in refusing to admit the PIA

55. Blair suggests privileged information should attract a strong presumption against admissibility (p. 257). The PIA contains no privileged information, as a tribunal handed down the PIA, and privileged information by its nature does not go before a tribunal. RESPONDENT may argue that there is a public interest in deterring parties from obtaining evidence illegally. CLAIMANT submits the interest of justice in this case outweighs this. See [43].

3. The interest of justice favours the admission of the PIA

56. The interest of justice favours the admission of the PIA to ensure CLAIMANT receives a reasonable opportunity to present its case as required by Art. 13.1 of the HKIAC Rules 2018. This is especially important as the tribunal's decision is final and not subject to appeal (Art. 2.2 HKIAC Rules 2018). Because of this, the tribunal should allow access to as much evidence as possible in order to help them reach a just and well-supported decision (Blair p. 239).

II Issue 2 Conclusion

57. CLAIMANT should be entitled to submit evidence from the other arbitration proceeding because it is likely relevant. The tribunal should not be satisfied that it was obtained illegally, as that is only one possible scenario. Even if RESPONDENT can satisfy the tribunal that it was illegally obtained, CLAIMANT did not procure the 3rd party to obtain the evidence, and there is no public interest in excluding the evidence that outweighs the interest of justice in admitting it. Furthermore,

CLAIMANT is entitled to a reasonable opportunity to present its case under Art 13.1 HKIAC Rules 2018 and the tribunal should not rule against CLAIMANT prior to CLAIMANT obtaining the PIA and its contents.

ISSUE THREE: THE CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE

I The Claimant is entitled to $1.25 million under clause 12 of the contract

58. As previously outlined in para [...] above, the question of applicable law is only relevant in determining whether to apply the restrictive 'four corners rule' of evidence from Danubia. Therefore, it is an irrelevant distinction as CLAIMANT is entitled to reimbursement under *Cl* 12 of the contract which is governed by Mediterraneo law and the CISG under *Cl* 14.
59. In order to interpret *Cl* 12, the Tribunal may look at, firstly the plain meaning of the words within the Sales Agreement and secondly, the interpretative principles within the CISG under article 8(1), (2) and (3) in order to ascertain the intent of the parties.
60. Firstly, it will be demonstrated that the Tariff falls within the scope of *Cl* 12 (**A**). Once established, there are four alternative remedies entitling CLAIMANT to the $1.25 million (**B**).

A. The Tariff falls within the scope of clause 12

61. *Cl* 12 states, '*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*' (Exh. C5, p. 14).
62. Upon the plain meaning of *Cl* 12 and articles 8(1)-(3) CISG, the Tariff falls under the ambit of *Cl* 12 for several reasons; (**a**) the Tariff caused a hardship, (**b**) the contract has been made more onerous, (**c**) the Tariff is a health and safety requirement and, (**d**) alternatively, the Tariff is a comparable unforseen event to a health and safety requirement.
63. Each of these elements will now be addressed in turn.

1. The increase in price due to the imposition of the Tariff is a hardship

64. Scholars state that, in general the doctrine of hardship applies where performance of the contract has become excessively onerous or the equilibrium of the contract has fundamentally altered (Schwenzer 2008, p. 716; Ferrario 2017, p. 71, 83; Girsberger p. 122). This opinion is generally reflected in the context of long-term contracts as unforeseen events fundamentally altering the equilibrium of the contract have an increased chance of occurring.
65. In the case at hand, the equilibrium of the Sales Agreement has been fundamentally altered amounting to a hardship which will be demonstrated below.
66. CLAIMANT's profit margin was 5%, and therefore a 30% cost increase shifts CLAIMANT from a position of profit to a 25% loss (Exh. C8, p. 17[6]).
67. The Tariff results in a fundamental alteration of the equilibrium of the contract because:
    a. CLAIMANT's profit margin was only 5% (NoA, p. 7). A 30% Tariff had the effect of resulting in a 'serious unforseen imbalance' between the parties (Zeller, p. 156).
    b. In particular, CLAIMANT was suffering from financial difficulties (PO2, [15], [21]-[22], [28]-[30]). Whilst RESPONDENT was aware of rumours regarding CLAIMANT's financial difficulties they were also aware of the impact the Tariff would have on CLAIMANT's financial situation (PO2 [22],[28]). Although the payment of the Tariff would not financially endanger CLAIMANT (PO2 [30]), negotiating a new credit line would be very difficult and require the sale of a dressage part of CLAIMANT's business (PO2 [29]). CLAIMANT's 'limit of sacrifice' must be considered within the context of their financial difficulties and heightened need to enter into profit making agreements.
    c. RESPONDENT's position is entirely different. RESPONDENT is able to bear the risk and cost of the Tariff, given that the value of Nijinsky's foals will have increased and they will obtain additional profit from any approved on-selling of the horse semen. After the imposition of the Tariff, the product will become more difficult to obtain, and therefore it is understandable that the profit margin would increase further. If RESPONDENT was to bear the Tariff, it would equalise the equilibrium between the parties.

68. It is necessary to establish whether such an imbalance amounts to hardship. On a comparative analysis, a threshold between 100%-200% should be favoured based on a general trend of domestic and international situations (Schwenzer 2008, p. 716). Hof van Cassatie, states that in some cases an increase of 70% has constituted hardship on the basis that parties do not intend to enter contracts that result in fundamental alteration of the equilibrium between the parties. Furthermore, Schwenzer (2008) states that the profit margin in the trade sector and the financial ruin of the CLAIMANT is an important consideration in lowering the threshold.
69. For these reasons, the current case should be distinguished from instances where an increase of above 30% did not amount to hardship. CLAIMANT had agreed to a reduction of their profit margin as RESPONDENT had intended to continue the relationship with CLAIMANT long-term. Therefore, they did not account for the contract resulting in a substantial alteration of the original agreed terms.

2. The Tariff has made the contract more onerous

70. The Tariff has made the contract more onerous for CLAIMANT as they have moved from a position of profit to one of loss, this is also demonstrated previously under paragraph I.A(a).

3. Tariff is a health and Safety Requirement

71. Upon the plain reading *Cl* 12, this Tariff is a health and safety requirement, as the original Tariff imposed on agricultural products by the Mediterraneo government was for the purpose of national security (Exh. C6, p. 15). Tariffs are employed for national security reasons as a trade barrier to protect industries that are deemed to be strategically important. This approach enhances national security by ensuring the health of the population and securing agricultural production within the country. The Tariff may be reducing importation of international goods, reducing biosecurity risks and supporting the domestic economy. Therefore, logically the Tariff imposed by Mediterraneo is a health and safety requirement.
72. The retaliatory Tariff imposed by the Equatoriana government would be akin to this. Although it has been imposed as a retaliatory measure, the Tariff is similar in all other manners as it was imposed by an external government, on the same form of goods, namely agricultural products, and results in

an increase of costs. Therefore, it could be said that this Tariff has the same effect on national security of Equatoriana; promoting agricultural production and the health of the population.

73. In the alternative, it was RESPONDENT's intent in accordance with 8(2) CISG, that the '*customs regulations and import restrictions*' be included within *Cl* 12 (Exh. C5, p. 14; Exh. C4, p. 12[4]; PO2 p. 56[12]).
74. Under article 8(3) CISG, the tribunal can take into account parol evidence to interpret the intent of the parties. As RESPONDENT drafted *Cl* 12 of the Sales Agreement '*with reference to the risks*' included in CLAIMANT's email, it is not unreasonable for CLAIMANT to believe that the final wording of *Cl* 12 was broad enough to include all the risks mentioned in their email (Exh. C4, p. 12[4]; PO2, p. 56[12]).

4. Alternatively, Tariff is a comparable unforeseen event to a health and safety requirement

75. The first requirement under this element is that the Tariff is a comparable event.
76. On the plain reading of *Cl* 12, there are two alternative readings. Firstly, a 'health and safety requirement' is constrained within the ordinary definition and therefore the comparable unforeseen event must fall within the definition of health and safety. Alternatively, health and safety requirements refers to the past event experienced by CLAIMANT.
77. Firstly, the Tariff on agricultural goods is comparable to a health and safety requirement as both measures enhance national security by protecting the domestic agricultural business and supporting the domestic economy. Therefore, within the definition of health and safety. Additionally, both the health and safety requirement and Tariff has the effect of making performance more onerous and increasing the cost in performance of the contract.
78. Secondly, the *'health and safety requirements'* refers to the past event. The tribunal may consider parol evidence to ascertain RESPONDENT's intent when drafting *Cl* 12.
79. CLAIMANT states, '*as we both know from past experiences*' in an email to the RESPONDENT, which demonstrates that both the parties possessed knowledge of the past event in Danubia that resulted in a substantial increase in cost for CLAIMANT (PO2, p. 58[21]; Exh. C4, p. 12[4]). Furthermore, CLAIMANT expressly stated that such an increase in cost destroyed the 'commercial

basis for the deal' (Exh. C4, p. 12[4]). Secondly, CLAIMANT expressly stated that they did not assume any risks for '*changes in customs regulation or import restrictions*' (C4, p. 12[4]). Therefore, for the purposes of 8(1) CISG, RESPONDENT should have been aware that CLAIMANT had no intention of assuming any additional costs beyond the agreed delivery terms.

80. Therefore in accordance with 8(2) CISG, a reasonable person in CLAIMANT's position would have understood that RESPONDENT intended to cover all unforeseeable events that would result in an increase in cost for CLAIMANT because, *Cl* 12 was drafted '*with reference to the risks mentioned by Ms Napravnik*' (PO2, [12]; Art. 8(3) CISG).
81. Therefore, the Tariff is comparable to '*health and safety requirements*'.
82. The second requirement of this element is that the Tariff was unforeseeable.
83. Given the unusual series of events that occured, CLAIMANT '*could not reasonably be expected to have taken the impediment into account*' (Zeller 2010, p. 175). Scholars agree that all events are, in some sense, foreseeable (Schlechtriem and Schwenzer; Kroll, p. 1059[51]). However, there are divergent views on whether state interventions such as Tariffs are reasonably foreseeable. It is unclear whether foreseeability refers to the exact individual events or the consequences of the events generally. However, CLAIMANT could not have reasonably foreseen the following events, occurring together.
84. As both Mediterraneo and Equatoriana are WTO members (PO2 [47]), it was not reasonable for CLAIMANT to foresee that the Equatorianian government would impose a retaliatory Tariff, in breach of Artt. 22 & 23 of the World Trade Organisation [WTO] DSU obligations. Retaliation measures are prohibited and even when approved by the dispute settlement system, are limited to the value of the original Tariff imposed, pursuant to Art. 22.4.
85. Alternatively, under article 8(2) CISG, even a party as experienced as CLAIMANT in the transport of horse semen (Exh C1, p. 9), would not reasonably foresee the Equatoriana government's act given that previously, Equatoriana had always tried to resolve disputes with other state governments '*amicably or via invoking the relevant WTO dispute resolution mechanism'* (Exh. C6, p. 15[2]). Such

a prospect was so unlikely that the parties would not have turned their minds to this possibility when drafting the contract.

86. In the alternative, the Tariff imposed on agricultural products to include horse semen was unforeseeable. Firstly, the ban on artificial insemination was lifted temporarily until the end of December 2018 (Exh. C1, p. 9[1]). Therefore, because the ban was lifted to account for the restrictions on transport of live animals given the '*latest foot and mouth disease crisis in Equatoriana*' (Exh. C1, p. 9[1]), the parties would not have turned their minds to the possibility of additional costs or restrictions being imposed until after the end of December 2018 (Exh. C1, p. 9[1]). Secondly, CLAIMANT and RESPONDENT were both surprised that horse semen would be included within the category of an 'agricultural product' (Exh. C7, p. 16[1]; Exh. C7, p. 17[6]; Exh. R4, p. 36[2]). Additionally, Mr Shoemaker, for the RESPONDENT, could not confirm immediately that horse semen was included in the Tariff on '*animal products*' as ministry employees were also '*not certain*' (Exh. R4, p. 36[2]). Therefore, under article 8(2) CISG, a reasonable person in both the CLAIMANT and RESPONDENTs position would not have foreseen that horse semen would be covered by the Tariff.

A. Claimant is entitled to a remedy under clause 12

87. Upon establishing that a Tariff falls within the scope of a hardship under *Cl* 12, CLAIMANT is entitled to one of the four following remedies:

1. Hardship clause implies adaptation

88. The express use of the word 'hardship' in *Cl* 12 and during negotiations (Exh. C4, p. 12[4]; Exh. C5, p. 14[12]), implies that the parties intended to allow adaptation in the event of changed circumstances. Ferrario (2017, p. 83) states that '*the aim of a hardship clause is to rebalance the contact in order for the parties to maintain their relationship instead of terminating it...*'. Additionally, Ferrario (2017, p. 77) establishes that there is a favourable trend to recognise adaptation where unforeseen events have fundamentally altered the economic equilibrium of the contract.

89. Firstly, upon the plain reading of *Cl 12,* the parties intended to allow for adaptation in the event of changed circumstances that fundamentally alter the equilibrium of the contract.

90. Several scholars support the view that there is an inherent duty to renegotiate the terms of the contract in light of changed circumstances based upon Art 7(1) CISG (Berger, p. 1352; Zaccaria, p. 153-4; Stoll & Schlechtriem, p. 617). Some scholars indicate that the frequent use of hardship clauses in international contracts may lead to the belief that adaptation without express reference, notwithstanding the variance in hardship clauses, is implied (Zaccaria, p. 160; Garro p. 1183-4; Schlechtriem & Butler 2009, [291]). This same view holds for the failure to include a specific renegotiation or adaption clause (Perillo, p. 117). Zaccaria (2005, p. 153) states that renegotiation and adaptation clauses in contracts generally contain practices used in commercial settings and therefore, are unlikely to be sufficient to adequately deal with an unforeseen event and it would be necessary for the parties to renegotiate the contract in good faith. Logically, during renegotiations, parties should attempt to balance the equilibrium of the contract resulting in adaptation. Failing renegotiation, Schwenzer (2008, p. 722-3) states that this does not preclude the parties from seeking adaptation through the courts.

91. Notwithstanding the agreement to adapt, discussed above at paragraph [26]-[37], the parties have failed negotiations and therefore, whether the parties should themselves attempt to balance the equilibrium of the contract or refer to the courts for adaptation.

92. Alternatively, under Art. 8(2) CISG, given the parol evidence discussed, a reasonable person in CLAIMANT's position would have believed that adaptation was implied by the inclusion of *Cl* 12 into the contract as both Ms. Napravnik and Mr Antley were under the impression that adaptation was intended.

2. Adaptation is a trade usage under article 9(2)

93. An alternate view is that there is an international trade usage under art 9(2) CISG that implies the parties made applicable the right of the court to adapt the contract to restore the equilibrium of the contract (Atamer, p. 1074[89]; Schlechtriem & Butler 2009 [291]).

94. As mentioned above, Ms Napravnik and Mr Antley discussed a mechanism for the inclusion of an adaptation clause into the contract (Exh. C8, p. 17). Ms Napravnik expressed the view that the

parties should make reference to an adaptation clause '*irrespective of the fact that from a legal point of view that was not necessary*' (Exh. C8, p. 17[4]).

3. Plain reading of Cl 12, if claimant is not responsible, then the respondent should be

95. Upon the plain reading of *Cl* 12, CLAIMANT is not responsible for the Tariff and therefore RESPONDENT should bear the cost of the Tariff. Alternatively, the tribunal is able to give consideration to all relevant circumstances including any negotiations, usages and subsequent conduct of the parties under Art. 8(3) CISG in order to ascertain their intention when drafting *Cl* 12 for the purposes of Art. 8(2) CISG.

96. The Claimant did not assume the risk for the Tariff for one of the following reasons:

a. The parties agreed to a variation of normal DDP delivery

97. CLAIMANT and RESPONDENT agreed to undertake the delivery by DDP notwithstanding *Cl* 12 and Ms Napravnik's email qualifying the risks they would bear (Exh. C3, p. 11; Exh. C4, p. 12).

98. On the plain reading of *Cl* 12, CLAIMANT is not responsible for *'lost semen shipments or delays in delivery,.... missed flights, weather delays, failure of third party service'* (Exh. C5, p. 14). Therefore, the parties clearly deviated from ordinary DDP delivery and RESPONDENT should bear the costs of the Tariff.

99. In the alternative, the Tribunal may consider parol evidence to ascertain the intention of the RESPONDENT when drafting *Cl* 12 the understanding a reasonable person in CLAIMANT's position would have had in the same circumstances (Artt. 8(2)-(3) CISG).

100. RESPONDENT requests DDP delivery on the basis of the '*urgency of the delivery*' and the CLAIMANT's '*much greater experience*' which includes the '*necessary export and import documentation*' (Exh. C3, p. 11). Upon acceptance of RESPONDENT's request, CLAIMANT does not agree to any '*additional costs associated with a DDP delivery*' beyond the potential existing costs of $1,000 USD. Therefore beyond the known costs associated with DDP delivery, RESPONDENT assumed responsibility.

101. It is not unreasonable for a reasonable person in CLAIMANT's position to have believed that upon drafting *Cl* 12, RESPONDENT intended for the CLAIMANT not to bear any further

risks beyond the known costs of DDP in accordance with the qualifications in CLAIMANT's email (Art 8(2) CISG; Exh. C4, p. 12). Therefore, RESPONDENT assumed responsibility for all risks in *Cl* 12.

102. Alternatively, during negotiations between the parties when drafting *Cl* 12, '*the removal of certain risks associated normally with a DDP delivery obligation had been used as an argument to lower the overall price*' (PO2, p.56[8]). Despite Mr Shoemaker stating that it was his '*understanding that DDP meant that all risks had to be borne by Phar Lap*', it was clearly the intention of the parties at the time of drafting *Cl* 12, that certain risks had been removed (Exh. R4, p. 36). Therefore, it can be viewed that RESPONDENT conceded that CLAIMANT does not bear all the risks associated with DDP.

b. RESPONDENT was responsible for obtaining insurance under *Cl* 13

103. Alternatively, on reading *Cl* 12 in context of *Cl* 13, confirms the risk of the Tariff lies with RESPONDENT due to *Cl* 13 regulating insurance. *Cl* 12 was written on the premise that some other risks were regulated directly in the contract, including *Cl* 13, and therefore *Cl* 12 cannot be read in isolation (Exh. R3 [4]). *Cl* 13 provides that the goods are not insured in transit, but insurance can be purchased through FedEx. In a DDP delivery, insurance risk is usually borne by the shipper (CLAIMANT). However, with *Cl* 13 the parties placed the insurance risk on the RESPONDENT. Tariffs and other unforeseen governmental regulations can be insured against with political risk insurance. On plain meaning of *Cl* 13, the CLAIMANT is not responsible for insurable risks in transit, including the insurable risk of an unforeseen Tariff. Therefore, the RESPONDENT is responsible for the Tariff. CLAIMANT concedes that it did not plead this in the NoA and seeks leave under Art. 18.1 HKIAC Rules 2018 to supplement its claim.

4. Clause 14 - Adaptation direct through clause 14 as a remedy for clause 12

104. Under *Cl* 14 of the Sales Agreement, the parties have decided upon the governing law of the contract to be the law of Mediterraneo and CISG. The law of Mediterraneo includes UNIDROIT as the governing law of the Contract. The agreement of the parties is paramount. Therefore, the CISG is the primary source for interpreting the contract.

105. The parties also chose the law of Mediterraneo as the domestic law of the contract at *Cl* 14 of the Sales Agreement. The law of Mediterrano is UNIDROIT, so should there be reluctance to incorporate the terms of UNIDROIT into the contract through a gap, UNIDROIT can be included as the domestic governing law of the contract.

II The Claimant is entitled to the money under the CISG

106. The parties are entitled to look to the CISG for a remedy for the following reasons:

a. Through *Cl* 14 of the Sales Agreement - Model Law, Parties have chosen MED Law and the CISG applies, and CISG is in danubia as well - bound by an agreement of the parties
b. The parties failed to provide a remedy under clause 12, and therefore did not exclude the CISG
c. In drafting clause 12, the parties intended to add to the CISG rather than exclude it, by specifically identifying particular risks they turned their mind to, to guarantee they are covered under the hardship provisions
    i. This means they wouldn't need to show all the hardship elements under CISG/UNIDROIT for health and safety/comparable unforeseen events

A. The Claimant is entitled to a remedy under Art 29 as the Claimant and Respondent entered into a post-contractual agreement which constitutes an agreement to vary the contract pursuant to Art. 29

107. Alternatively, Mr Shoemaker and Ms Napravnik made an agreement to vary the contract to include negotiation for a price adaptation in the event of hardship. Contracts need not be evidenced in writing, and can be proven by a witness [Art. 11 CISG]. In this case, the witness statements indicate an intention to reach an agreement on the modification of price (Exh C6, p. 15; Exh R4, p. 36). The CISG provides that offer and acceptance can be ascertained with reference to the events leading up to reaching an agreement (Schlechtriem & Schwenzer, p. 247[48]).

108. In this case, Ms. Napravnik was informed that the Tariff applied to the shipment of horse semen (Exh. C7, p. 16; Exh C8, p. 17). Ms. Napravnik urgently called and emailed Mr. Shoemaker (Exh. C7, p. 16) stating that 'You will understand that we will have to find a solution...before we can start the shipment'. (Exh. C7, p. 16). The CLAIMANT never intended to ship the last installment of horse semen unless an agreement was reached by the parties, and. Mr Shoemaker could not have been

unaware that was CLAIMANT's intention on plain meaning of the email (Art. 8(1) CISG). Furthermore, Mr. Shoemaker states he was personally aware that the CLAIMANT would not deliver if he rejected the CLAIMANT's request to negotiate the price (Art. 8(1) CISG; Exh R4, p. 36).

109. The conversation represented a consummated agreement to negotiate a price adaptation in good faith. The offer was effective when it reached Mr. Shoemaker (Art. 15 CISG) on 21 January 2018 (Exh C8, p. 16).

110. For the purpose of Art 8(1) CISG, Ms. Napravnik was not aware that Mr. Shoemaker's intention was to 'ensure the remaining 50 doses were actually shipped', whilst 'avoid[ing] making any concessions which [he] could not keep', but without 'reject[ing] their (CLAIMANT's) request outright (Exh. R4 p.36).

111. Therefore, statements made by Mr. Shoemaker are to be interpreted according to the understanding that a reasonable person in Ms. Napravnik's circumstances would have had (Art 8(2) CISG. A person in Ms. Napravnik's position (Art. 8(2)) would have interpreted Mr. Shoemaker's statement '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' (Exh. R4, p. 36) to be an agreement to negotiate in good faith on a price adaptation. This is especially so because Ms. Napravnik knew herself and Mr. Antley had agreed that adaptation would be within the tribunals jurisdiction and power (see [16]-[27]), and the parties had included Cl 12, which is a hardship clause that covers the unforeseen tariff (see [81]-[108]), because Ms. Napravnik understood that CLAIMANT already had a remedy in case the parties couldn't agree.

112. Though Mr. Shoemaker did state that he 'could not directly authorise any additional payment' (Exh. C8, p. 18; Exh. R4, p. 36) the totality of his other representations led the CLAIMANT to believe an agreement would be reached on the price in good faith. In particular:

113. Mr. Shoemaker never indicated that he wished to abandon from the contract or would not negotiate on the Tariff price. Rather, Mr. Shoemaker stated that he 'saw (CLAIMANT's) problem' and that 'he was certain a solution would be found through negotiation given the good relationship between the parties and their interest in a long term relationship' (Exh. C8, p. 18).

114. RESPONDENT had the opportunity to respond to Ms. Napravnik's statement that he asserted he was certain a solution would be found on price, but failed to. Mr. Shoemaker concedes that the 'primary concern was to ensure that the remaining 50 doses were actually shipped' (Exh. R4, p. 36; PO2 [11], [33]). Mr. Shoemaker confirmed the CLAIMANT 'would not deliver if I were to reject the request outright' (Exh. R4, p. 36) supporting CLAIMANT's assertion that there was an agreement to negotiate on the price. Both witness statements are consistent in this regard (Exh. C8, p. 18; Exh R4, p. 36).

115. Subsequently, RESPONDENT broke off negotiations in bad faith because '[w]hen confronted with our discovery (that RESPONDENT had been onselling in breach of the contract) RESPONDENT's CEO, got very angry and aggressive. She…was no longer interested in further cooperation with Phar Lap (CLAIMANT). She stopped the negotiations and refused to pay any additional amount for the tariffs. (Exh. C8 p. 18). This constitutes a breach of contract under Art 71 CISG, because RESPONDENT failed to perform its obligation to negotiate on a price adaptation under the amendment to the contract pursuant to Art 29(1) CISG. CLAIMANT is therefore entitled to damages under Art 74 CISG equal to its loss. CLAIMANT concedes that it did not plead damages for a breach of contract in the NoA and seeks leave under Art. 18.1 HKIAC Rules 2018 to supplement its claim.

B. In the alternative, if the Tribunal is to find that the burden of the Tariff lies with the Claimant, notwithstanding clause 12 and paragraph II(1), the Claimant is able to claim 1.25 million under Art 79 CISG

1. Hardship falls within the scope of Art. 79.

116. Refer to paragraph I(1)(a) above for Tariff is a hardship discussion

117. The CISG avoids words such as 'hardship' and 'force majeure', because it avoids terminology which is linked with any particular country (Rimke, p. 241). Whilst some scholars contend that Art. 79 does not include situations of hardship (Petsche, p. 166; Rimke, p. 226), the majority of scholars interpret Art. 79 as inclusive of hardship (CISG Advisory Opinion No 7, Kroll, p. 1070[79], Schwenzer 2008, p. 713). The majority base this rationale on the CISG's aspiration for uniformity in

international trade and leaving a concept such as hardship to domestic law, would result in inconsistent application (Kroll, p. 1070[79]). It is appropriate that the Tribunal adopts a broad understanding of Art. 79 as is consistent with recent jurisprudence under Art. 79 (Hof van Cassatie).

2. The following elements must be met for the CLAIMANT to satisfy the criteria under Art 79.

a. The tariff was an impediment beyond the CLAIMANT's control.

118. 'Impediment' is not defined within the CISG, however most scholars agree that economic hardship is a impediment within Art. 79 (Kroll; Schwenzer 2008, p. 713). This view is based on the rationale that economic hardship may result in performance being excessively onerous upon one party (Zeller; Schwenzer 2008).

119. However, scholars differ on how severe an economic hardship must be to constitute an impediment that is excessively onerous. This threshold issue is sometimes discussed by scholars concurrently with reasonable foreseeability (Kroll), and at other times in determining whether an impediment can be reasonably overcome (Zeller). Indeed, similar issues are raised in both discussions. In this submission, the threshold for determining whether the impediment is excessively onerous, will be addressed during the discussion of whether the impediment can be reasonably overcome (See [125]-[132]).

120. Finally, acts of authorities, such as government tarifs, are beyond the CLAIMANT's personal sphere of control (Kroll, p. 1056[46]; Zeller, p. 155).

b. The tariff was not reasonably foreseeable.

121. The test is 'whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices, ought to have foreseen the impediments initial or subsequent existence' (Schlechtriem & Schwenzer, 4 ed, p. 1134[13]).

122. The reasonable person is 'halfway between the inveterate pessimist who foresees all sorts of disasters and the resolute optimist who never anticipates the least misfortune' (Tallon in Bianca & Bonell, p. 580-1).

123. The CLAIMANT submits to the Tribunal that only an 'inveterate pessimist' would have foreseen the unique and cumulative events that led to the Tariff.

124. It is unclear whether foreseeability refers to the exact individual events or the consequences of the events generally. We concede to the tribunal that the CLAIMANT could reasonably have foreseen a government Tariff, however that the CLAIMANT could not have reasonably foreseen the following events, occurring together. (Refer to paragraphs....)

c. The tariff could not be reasonably overcome.

125. CLAIMANT's efforts to overcome the Tariff are judged by a reasonable person with all the facts and circumstances in mind (Zeller 2010, p. 175).

126. On the facts, CLAIMANT did all that was reasonably possible to overcome or avoid the consequences of the impediment. No alternative route or method of transport would have avoided the impediment (Kroll, p. 1061[57]) given the required place of delivery was located in Equatoriana (PO 2 [10]). It was also not possible for the CLAIMANT to be exempted or reduce the price of the Tariff (PO2 [27]).

127. Scholars agree that essentially any impediment can be financially overcome (Zeller, p. 175; Lindstrom). However, scholars differ on to what degree a client should be expected to financially overcome an impediment. Some scholars state that 'all means are not economically possible and a party cannot be obliged to perform miracles' (Lindstrom 2006). Opposing scholars state that a party should be 'expected to perform the contract and overcome the impediment in the agreed manner, even when this results in a greatly increased cost and even a loss' (Achilles, Kommentar [8]).

128. Even taking into account both views, it is largely accepted that CLAIMANT is not expected to exceed the 'limit of sacrifice' (CISG Advisory Opinion No 7). The limit of sacrifice differs depending on the facts of each case, and is determined at the discretion of the tribunal (Zeller; Kroll, p. 1072[82]).

129. It is appropriate for the 'limit of sacrifice' to sit below 30% given the circumstances discussed above at paragraphs [...]-[...]

130. In some cases, price fluctuations of over 100 percent do not constitute a ground for exemption under Art. 79 (CIETAC, 2 May, 1996, CISG online 1067). Such decisions are based on the rationale that market fluctuations are reasonably foreseeable and the risk should be mitigated from within the contract.

131. However, in other cases an increase of 70% has constituted hardship and resulted in adaptation of the contract (Hof van Cassatie). Such an approach recognises that parties do not intend to enter into contracts that result in considerable hardship, or that fundamentally alter the equilibrium between the parties.

132. Other scholars provide that in instances of economic impossibility, it will be sufficient if a change of circumstances is of '*such gravity that the fabrication of goods would cause the seller to incur unreasonable costs in relation to the contract price*' (Schwenzer & Schlechtriem, 4 ed, p. 1142[31]). This approach is consistent with Zeller's approach, that 'it would be sufficient...to show that a serious unforeseen imbalance at the conclusion of the contract is sufficient to fall under Art. 79' (Zeller 2010, p. 156). On the facts, CLAIMANT would never have entered into the contract had it known the contract would result in a deficit.

d. The CLAIMANT did perform, but only on reliance of Respondent's representations

133. On 20 January, when CLAIMANT became aware that the tariff was applicable to the final shipment, CLAIMANT had a right under Art 79 CISG to not perform and be exempted from paying damages to RESPONDENT. This is because as shown in [116]-[132], the tariff was an impediment beyond CLAIMANT's control, was not reasonably foreseeable, nor reasonably able to be overcome. Ms Napravnik stated in her email to Mr Antley 'we will have to find a solution in that regard before we can start the shipment'. Ms Napravnik's email must be interpreted according to her intent not to ship because on plain meaning of the words in the email, Mr Antley must have known, or could not be unaware that Ms Napravnik intended to hold the shipment until an agreement on a change in price was made (Art 8(1) CISG).

134. CLAIMANT gave away rights under Art 79 in good faith and on reliance of RESPONDENT's assurances of negotiation in good faith on a price adaptation.

135. RESPONDENT has breached its duty of good faith by breaking off negotiations, and is therefore entitled to damaged under Art 74 CISG. See [

3. The CLAIMANT is entitled to a remedy under article 79

a. The CLAIMANT can get adaptation within the walls of Article 79

136. Many scholars conclude that adaptation is not available within Art. 79 of the CISG (Schwenzer 2008, 724; Rimke, 238, Petsche, 168). However, the rationale underpinning these opinions does not take into account the unique facts of this case, nor the emerging trend of tribunals reading Art. 79 broadly and with reference to providing outcomes that reflect the principles of good faith.

137. For instance, Rimke's objection to adaptation within Art. 79 was written in the year 2000, alongside the statement that hardship is not included in Art. 79's scope. During the 1990's this was a well recognised view (Rimke; Slater p. 231). Such arguments relied on the rationale that concepts such as hardship and adaptation within 79 had been rejected during the drafting of Art. 79 (Rimke, p. 221).

138. However, since this time, the emerging trend has been to read Art. 79 broadly as inclusive of hardship (Schwenzer; Garro; Schlechtriem & Schwenzer; Cf *Fucinati v. Fondmetall*), and in some instances, even adaptation (Hof van Cassatie).

139. CISG Advisory Opinion Number 7 provides that adaptation is available within the scope of Art. 79, with reference to the principles of good faith. Indeed, 'one may infer from the obligation to interpret the Convention in good faith a duty imposed upon the parties to renegotiate the terms of the contract with a view to restore a balance of the performances' (CISG Advisory Opinion No 7 [40]). In scenarios, such as the current case, where negotiations between the parties fail, the Tribunal should be given the tools through 79(5) to adapt the contract to reflect the changed circumstances and restore the equilibrium of the contract (CISG Advisory Opinion Number 7[40]).

b. Alternatively, the CLAIMANT can get adaptation pursuant to Art. 50 of the CISG

140. It is proposed, albeit 'speculatively', that adaptation may be available to the parties within the CISG pursuant to Art. 50 (Schlechtriem). Art. 50 addresses price reductions in instances where the

goods do not conform with the contract. Whilst these circumstances don't apply to the facts of this case, Schlechtriem's underlying rationale of permitting adaptation where the price no longer reflects the goods identified in the contract should be expanded to similar situations, such as those at hand.

141. For instance, Nijinsky's semen has likely escalated in value given the lifting of the ban and the imposition of Tariffs. The value of the product is heightened, and the equilibrium of the contract has fundamentally shifted, resulting in a 25% loss making deal for CLAIMANT, and a significantly higher value product for RESPONDENT. Adaptation should be available to ensure the contract adequately reflects the equilibrium the parties intended when negotiating the contract.

c. In the alternative, if the tribunal finds that adaptation is not available within Art. 79 or Art. 50, CLAIMANT can gain adaptation through UNIDROIT by a gap in the CISG.

142. Therefore, if the CISG has a solution to a particular issue arising within the Contract, then the Parties have chosen that law to apply (Waincymer, p. 988). However, if the CISG has a gap, then the arbitration tribunal has a broad discretion to determine which law to apply in order to fill the gap (Waincymer, p. 988).

143. A 'gap' in the CISG can be defined as anything unresolved in the CISG but which falls within the scope of the CISG (Anderson 2008, p. 19; Felemegas, p. 73). However, the matter must not have been excluded (Anderson 2008, p. 23; Felemegas, p. 73). Where there is a 'gap' within the CISG, the prevailing view among scholars is that UNIDROIT can be used to supplement the CISG (Bonnell 2008, p. 70).

144. CISG Art. 7(2) allows matters not expressly settled in the text of the CISG to be settled consistently with 'the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law' (Art. 7(2) CISG).

145. Felemegas contends that although CISG precedes UNIDROIT, it can aid in the interpretation of the CISG under Art. 7(2) CISG as a 'general principle' upon which the CISG is 'based'. Both the CISG and UNIDROIT share a common intent and resorting to UNIDROIT would prevent recourse to domestic laws upholding the purpose of the CISG under Art. 7(1). The

word 'based' in Art. 7(2) should be interpreted broadly as both documents have similarities in origin, substance and purpose (Felemegas, p. 79; Magnus).

d. Hardship is governed by the CISG but is not expressly settled therefore the Tribunal can resort to domestic law

146. Where the CISG is silent, or where a topic is not exhausted by the CISG, the Tribunal may turn to other sources to aid in interpreting the contract. In this instance, the domestic law can be used as a method of assistance when interpreting the contract. The domestic law chosen by the parties is the law of Mediterraneo, which is consistent with UNIDROIT. Hardship under UNIDROIT is defined at Art. 6.2.1, which provides that where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to 6.2.2 and 6.2.3.

a. Under UNIDROIT Art. 6.2.1 parties are bound to the terms of the contract with which they have agreed. There are limited circumstances where a party can avoid their obligations, or request negotiations to adjust the terms of the contract, hardship being one of the circumstances in which a party can request a change in obligations.

b. Hardship is when an event or series of events fundamentally alters the equilibrium of the contract, resulting in a loss for one of the parties, and the event became known to the parties after the conclusion of the contract, or could not have been reasonably foreseen, or was beyond the control of the party, and the risk was not assumed by the disadvantaged party in accordance with Art. 6.2.2 UNIDROIT. CLAIMANT is entitled to be released from their contractual duties because when the Tariffs were introduced the fundamental equilibrium of the contract shifted, and it was no longer possible for CLAIMANT to perform their contractual obligations without incurring a substantial loss. Under UNIDROIT the events must occur or become known to the disadvantaged party after the conclusion of the contract. On the facts the Tariff was only introduced after the second shipment of semen had been sent, on 19 December 2017.

147. Further, the events must not be of such that CLAIMANT could have reasonably taken them into account at the time of the contract conclusion. On the facts, CLAIMANT requested the

inclusion of a hardship clause into the final contract as a reaction from previous 'health and safety requirements', which resulted in hefty tariffs on the import of certain goods (*Exh. C5. p. 12*)It is arguable that this could brand CLAIMANT as liable under UNIDROIT 6.2.2 for foreseeing the Tariff. However, CLAIMANT submits that as the Tariff that was imposed which altered the fundamental equilibrium of the contract was unforeseeable, as it was the result of a political campaign, and not for genuine 'health and safety' reasons. Therefore CLAIMANT could not have reasonably foreseen the Tariff which was imposed at the conclusion of the contract, despite having foreseen the possibility of a potential sickness related tariff. Finally, as CLAIMANT could not possibly have changed the outcome of a political dispute, it would be unreasonable to suggest that CLAIMANT was able to control the events for the purpose of 6.2.2(c).

148. Finally, as CLAIMANT could not possibly have changed the outcome of a political dispute, it would be unreasonable to suggest CLAIMANT was able to control the events for the purpose of UNIDROIT 6.2.2(c).

149. Under UNIDROIT 6.2.2(d) there can be no hardship if the disadvantaged party has assumed the risk of the changed circumstances. CLAIMANT explicitly told RESPONDENT they would not be prepared to take on any further risk associated with the delivery of the goods, and specifically mentioned this would include eliminating any risk or liability for any further costs associated with the delivery, including health and safety tariffs. Therefore, CLAIMANT did not assume the risk imposed by the unforeseen tariff.

150. In accordance with UNIDROIT Art. 6.2.3(1) if a party is subject to hardship under UNIDROIT, that party is entitled to request negotiations. CLAIMANT is therefore well within their rights to ask for negotiations and adaptation from RESPONDENT. The elements under Art. 6.2.3 require the request for negotiations to be made without undue due delay, and the disadvantaged party must state the grounds under which they are requesting adaptation. CLAIMANT met these requirements on 20 January 2018 when they promptly contacted RESPONDENT after the introduction of the Tariffs the day prior [*Exh C7 p16*]. In this email

CLAIMANT notifies RESPONDENT of the reasons for adaptation, stating that the Tariff will greatly impact CLAIMANTS ability to perform their obligations under the contract.

151. Therefore CLAIMANT is within their right to request negotiations and change in the contract terms under hardship in UNIDROIT 6.2.1, 6.2.2 and 6.2.3.

C. Claimant is entitled to damages under Article 74 CISG for breach of contract

152.

D. Article 6.2.3 UNIDROIT can give the parties a right to renegotiate with the desirable result of adaptation if this provision can be defined as a trade usage for the purposes of article 9(2) CISG.

153. In the alternative, if the tribunal finds that the UNIDROIT cannot be used to interpret or supplement the CISG, according to article 9(2) CISG, principles within UNIDROIT may be defined as 'trade usages ... in international trade widely known' because they represent 'a worldwide consensus in most of the basic matters of contract law and refines and expands on the CISG (Bonell 2008, p. 71). An acceptance of art. 6.2.3 UNIDROIT as a trade usage would prevent courts and tribunals from resorting to potentially disparate national laws and promote uniformity in the application of the CISG (Bonell 2008, p. 71).

154. Therefore, CLAIMANT would be entitled to an adaptation of the contract in accordance with art. 6.2.3 UNIDROIT.

E. CLAIMANT IS ENTITLED TO $1.25M DAMAGES UNDER ART. 74 CISG FOR BREACH OF CONTRACT

1. If the tribunal is not satisfied that the CLAIMANT is entitled to a price adaptation, the tribunal should award damages under Art. 74 CISG for a breach of contract under Art 61. CISG.
2. CLAIMANT concedes that it did not plead damages for a breach of contract in the NoA and seeks leave under Art. 18.1 HKIAC Rules 2018 to supplement its claim.
3. The RESPONDENT breached the contract under Art. 61 CISG by breaching its duty to act in good faith under Art 7 CISG by inducing CLAIMANT to send the goods under the guise of further negotiation on a price adaptation and assurance of future business.

4. Under Art 61 CISG, CLAIMANT is therefore entitled to claim damages under Art. 74 equal to CLAIMANT's loss, including loss of profit. CLAIMANT's loss is the price of the Tariff CLAIMANT was required to pay in order to deliver the goods, $1.5m. This amount includes the CLAIMANT's 5% profit margin. However, in the interests of good faith CLAIMANT is willing to give up its 5% profit margin and instead claim $1.25m to lessen RESPONDENT's burden.
5. Alternatively, RESPONDENT breached the contract under Art 61. CISG by onselling doses of the product. CLAIMANT's offer to sell 100 doses of the product was made with the express condition that it 'may not be re-sold to third parties without our express written consent' (Exh. C2, p. 10). CLAIMANT concedes this express wording was not included in the final contract. However, this was impliedly included in the final contract by way of the statement 'This semen is to be used for the following mares (and others after information of the seller)' (Exh. C5), meaning the product was to be used on the provided list of mares plus any others that RESPONDENT advised CLAIMANT they were going to use it on, or that CLAIMANT gave express written consent to (PO 2 [16]).
6. RESPONDENT breached the contract by onselling 15 doses at a 20% premium over their purchase price (NoA p. 8 [20]; PO 2 [20]). CLAIMANT alleged this in their NoA p.8 [20], and RESPONDENT in their RNoA did not deny this claim, and merely stated it was irrelevant and the burden of proof rests on the CLAIMANT. The CLAIMANT concedes it bears the burden of proof in line with Art 22.1 HKIAC Rules 2018. However, CLAIMANT has evidence from another breeder who informed them that he knew 15 doses had been sold to 10 different breeders, and he had bought one or two doses for 20% more than RESPONDENT's purchase price. Therefore, the better view is that the RESPONDENT did breach the contract by onselling the doses. However, CLAIMANT concedes that RESPONDENT may require a further opportunity to respond to this evidence in order to ensure a reasonable opportunity to present its case under Art 13.1 HKIAC Rules 2018. Notwithstanding this, 'RESPONDENT had planned to sell at least 25 doses per year to other breeders' (PO 2 [11]).

7. If the tribunal is satisfied that the RESPONDENT breached the contract by onselling doses, the CLAIMANT is entitled to claim damages under Art 74 CISG equal to CLAIMANT's loss, including loss of profit. In onselling the doses, Nijinsky III's premium for future natural coverings could be at risk if the semen is onsold for use in mares that are not up to pedigree and don't produce high performing offspring (PO 2 [19]), which is why CLAIMANT insisted RESPONDENT was not to onsell without CLAIMANT's express written consent. Nijinsky III currently has a 5% premium on natural coverings, presumably because demand allows for it due to his own successful career as a racehorse and the quality of his offspring (*NoA* [5], PO 2 [19]). 'The price which can be charged for frozen semen and natural coverings is strongly influenced by the success of offsprings.' Therefore, as RESPONDENT is selling on to mares of unknown pedigree, Nijinsky III's 5% premium for natural coverings is likely at risk if the mares do not produce successful offspring. The 5% premium is $5500 per natural covering (PO 2 [19]). Assuming Nijinsky III could complete 50 natural coverings a year and has 5 years of breeding years left, the CLAIMANT's loss is at least $1.25m. CLAIMANT concedes it may have to provide more evidence of its projected loss, including loss of profit, and submits to provide this at the next hearing (?)
8. RESPONDENT ought to have foreseen that if they onsold to mares not up to pedigree it would threaten Nijinsky III's premium earnings for covering fees as RESPONDENT is famous for its broodmare lines (*NOA* [4]), meaning it is an established horse breeder, and must know that the price which can be charged for frozen semen and natural coverings is influenced by the success of the offspring. Therefore, CLAIMANT's damages will not be reduced under Art 74 CISG.

PRAYER FOR RELIEF

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

1. That the Tribunal has the power and jurisdiction to adapt the contract;
2. That the partial interim reward be deemed admissible; and

3. That CLAIMANT is entitled to the payment of US$1,250,000 or any other amount the Tribunal sees fit to award through an adaptation of the price

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

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