SIXTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

LA TROBE UNIVERSITY

ON BEHALF OF:	**AGAINST:**
Black Beauty Equestrian	Phar Lap Allevamento
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo
CLAIMANT	**RESPONDENT**

COUNSEL:

|Janna Severine Baggio|Cindy Do|James Karl Fitsioris|
|Mohamed Naleemudeen|Kirtan Swamy|Kian Hong Wilson Tan|

MELBOURNE – AUSTRALIA

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INDEX OF ABBREVIATIONS

§/§§	paragraph/paragraphs
%	Per cent
Art./Arts.	article/articles
BANI	Badan Arbitrase Nasional Indonesia
CLAIMANT	Phar Lap Allevamento
Cl. Memo	Claimant Memorandum
Contract	Frozen Semen Sales Agreement
contra proferentem	interpretation against the draftsman
e.g.	*exempli gratia* (for example)
ed.	edition
Ex. C	Claimant's Exhibit
Ex R.	Respondent's Exhibit
HKAO	Hong Kong Arbitration Ordinance
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IAC	International Arbitration Centre
IBA	International Bar Association
IBA Rules	International Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
Para	paragraph
Record	Twenty Sixth Annual Willem C. Vis International Commercial Arbitration Moot 2018-19 Problem
RESPONDENT	Black Beauty Equestrian
RNoA	Respondent Notice of Arbitration
sensu stricto	strictly speaking
SIAC	Singapore International Arbitration Centre
SIAC 2013 Rules	Singapore International Arbitration Centre Rules (2013)
SIAC 2016 Rules	Singapore International Arbitration Centre Rules (2016)
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985)
UNCITRAL Rules	United Nations Commission on International Trade Law Rules (2013)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)
v.	*Versus* (against)
P.O 1	Procedural Order 1
P.O 2	Procedural Order 2

STATEMENT OF FACTS

1. Phar Lap Allevamento (hereinafter: "CLAIMANT"), a company registered and located in Capital City, Mediterraneo operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport.

2. Black Beauty Equestrian (Black Beauty) (hereinafter: "RESPONDENT") in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. On 21 March 2017, CLAIMANT was contacted by RESPONDENT of the terms and conditions for the provision of 100 doses of frozen semen.

4. On 24 March 2017, CLAIMANT confirmed that they will supply the doses under certain conditions. The Parties agreed that these Conditions would include express written consent regarding resale to third parties and the shipment of the semen in several instalments.

5. On 28 March 2017, RESPONDENT agreed to the terms but disagreed on the proposed delivery terms and dispute resolution clause.

6. On 31 March 2017, CLAIMANT proposed a price increase of US$ 1000 per dose in order to negate the additional costs associated with DDP delivery. CLAIMANT suggested that a hardship clause be included in the contract, and for the jurisdiction to be Mediterraneo.

7. On 10 April 2017, RESPONDENT prepared a draft of the dispute resolution clause which would be governed by the laws of Equatoriana.

8. On 11 April 2017, CLAIMANT suggested that the seat of arbitration be changed to Danubia and the ICC-hardship clause be relied upon. The offer was conditional on the law of Mediterraneo being applicable to the Sales Agreement. CLAIMANT was silent upon the law that should govern the Arbitration Clause.

9. On 12 April 2017, Ms Napravnik (CLAIMANT's lawyer) and Mr Antley (RESPONDENT's lawyer) were negotiating the contract before they were severely injured in a car accident. Both Parties' representatives had to be replaced before the finalisation of the contract which was on 6 May 2017.

10. There were no disputes regarding the first two shipments on 20 May 2017 and 3 October 2017.

11. On 19 December 2017, a 30% tariff was imposed on all imported agricultural goods from Mediterraneo, including animal semen. This affected the third shipment. CLAIMANT contacted RESPONDENT on 20 January 2018, regarding a price adjustment prior to the final shipment as a result of the tariff.

12. On 21 January 2018, RESPONDENT urged CLAIMANT to deliver the third and final shipment prior to payment due to time pressures. RESPONDENT assured CLAIMANT that if the contract allowed for price adaptation, that a solution may be reached. Before an agreement was reached on price, CLAIMANT complied with their obligation to deliver the remaining doses on 23 January 2018.

13. On 12 February 2018, a breakdown of negotiations occurred and the Parties failed to reach an agreement regarding the additional costs associated with the tariffs.

14. CLAIMANT issued the Notice of Arbitration (hereinafter: "NoA") to RESPONDENT on 31 July 2018. RESPONDENT submitted Respondent's Notice of Arbitration (hereinafter: "RNoA") on 24 August 2018.

15. On 2 October 2018, CLAIMANT informed the Tribunal that they had received information relating to RESPONDENT's arbitration in another matter. RESPONDENT objects to the sharing of the information.

SUMMARY OF ARGUMENT

ISSUE A

RESPONDENT submits that in resolving this Conflict of Laws dispute, the Tribunal should arrive at the conclusion that Danubian Arbitration Law governs the Contract's Arbitration Clause. Under Danubian Arbitration Law, the power to adapt the contract with respect to price is beyond the Scope of Material available to the Tribunal. In the alternative, where Mediterraneo Contract Law is found to govern the Arbitration Clause, the Tribunal should still find that the power to adapt the contract with respect to price is beyond the Scope of Material available to the Tribunal.

ISSUE B

RESPONDENT submits that the evidence from the other arbitration proceeding should not be admitted as the evidence is not relevant or material to the case. Additionally, the evidence was procured illegally (B), or obtained through a breach of confidentiality.

ISSUE C

RESPONDENT submits that CLAIMANT is unable to rely on the Hardship Clause to seek an adaptation of the contract price. RESPONDENT did not intend for the Clause to apply to import restrictions. Furthermore, the imposition of the tariff does not fulfil the requirements of hardship.

In the alternative, CLAIMANT is also unable to rely on the CISG to seek adaptation of the contract price. The elements of Art. 79 CISG have not been fulfilled and the Hardship Clause derogates from the Convention.

I. ISSUE A: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWER TO ADAPT THE CONTRACT

16. RESPONDENT submits that the Tribunal has jurisdiction to resolve the Conflict of Laws, with Danubian Arbitration Law the correct governing law **(A)**. Additionally, the Tribunal does not have power under the Arbitration Agreement to adapt the Contract **(B)**.

A. The Tribunal has jurisdiction to resolve the Conflict of Laws, with Danubian Arbitration Law the correct governing law.

17. Neither CLAIMANT nor RESPONDENT denies the jurisdiction of the Tribunal to hear the matter [*P.O 2, p. 61 §48*]. However, RESPONDENT asserts that Danubian Law governs the Arbitration Agreement instead of Mediterranean law as CLAIMANT suggests [*NoA, p. 7 §15*]. RESPONDENT submits that in this Conflict of Laws dispute the correct governing law for the Arbitration Agreement should be Danubian law.

18. In the absence of an expressed jurisdiction by the parties, the Tribunal shall apply the law which it determines to be appropriate to govern the Arbitration Agreement [*Art. 36.1 HKIAC Rules*]. RESPONDENT submits that the correct law governing the Arbitration Agreement is the Law of Danubia.

19. The HKIAC Rules are silent on the resolution of 'Conflict of Law' disputes. RESPONDENT submits that Art. 28(2) HKAO, which is a verbatim adoption of the UNCITRAL Model Law Art. 28(2), should be relied upon to provide guidance for resolution for this 'Conflict of Law' dispute. Where the HKIAC Rules are silent, the HKAO indicates use of the closest connection test as its closest substitute. Accordingly, HKAO Art. 28(2) provides that the Tribunal 'shall apply the appropriate law determined by the Conflict of Laws rule it deems applicable'.

20. In considering these factors, the Conflict of Laws dispute should be resolved through rules deemed applicable by the Tribunal. The appropriate law is then to be applied to the Arbitration Agreement. RESPONDENT submits that the Tribunal should choose to resolve the Conflict of Laws by applying the 'closest connection test'.

1. The 'closest connection test' should be applied to determine the procedural validity of the Arbitration Agreement.

21. CLAIMANT argues that the 'closest connection test' indicates that Mediterranean law should be applied to govern the Arbitration Agreement. RESPONDENT submits that the 'closest connection test' was wrongly applied by CLAIMANT and Danubian law should apply to the Arbitration Agreement.

22. In the absence of an express choice of law governing the arbitration agreement, the 'closest connection test' provides a 'strong indication' of the parties' intention in relation to the law governing the arbitration agreement. [*Sulamerica, §26; Born, p. 828*].

23. The test established in *Sulamerica* had three distinct elements to it: an express choice of law governing the arbitration agreement **(i)**; an implied choice of law governing the arbitration agreement **(ii)** and the law which the arbitration agreement has the closest connection to **(iii)**.

24. Where the situation does not provide an express choice of law in the arbitration agreement, the second stage of the test, implied choice of law, would be applied. CLAIMANT argues that the law of the substantive contract should govern the entire contract, including the arbitration agreement in the absence of an express choice [*Cl. Memo., p. 4 §18*]. CLAIMANT asserts that in *Sumitomo*, the law governing the main contract constitutes the starting point in determining the parties' implied choice, and in *Sulamerica*, the express choice of law to govern the main contract is a strong indication of the implied choice of law to govern the arbitration, barring other factors which point to a different conclusion [*Cl. Memo., p. 4 §18*].

25. Potter J in *Sumitomo* expressed the view that the choice of law to govern the substantive law will usually be decisive in determining the proper law of the arbitration agreement. The arbitration clause provided that 'the proceedings shall be held in London' as a sufficiently express choice of London as the seat of arbitration and therefore of English law as the 'procedural law' of the arbitration [*Sumitomo, pp. 57-59*].

26. CLAIMANT misapplied the legal principle from *Sumitomo* by advocating the law governing the main contract constitutes the starting point of determining an implied choice. The starting point of determining an implied choice should begin with the arbitration agreement, and where there is an express choice of law concerning the seat of the arbitration, the law of the seat is the procedural law of the arbitration, which would be Danubian law.

27. RESPONDENT submits that CLAIMANT's assertion of the law governing the main contract constitutes the starting point in determining the parties' implied choice is mistaken.

28. CLAIMANT's argument that the court in *Sulamerica* opined that the law governing the main contract should be considered as the implied choice of law because such choice is a powerful factor, is mistaken [*Cl. Memo., p. 5 §21*]. CLAIMANT also wrongly assumed that there was no implied choice of law in *Sulamerica*, which necessitated the court choosing English law [*Cl. Memo., p. 5 §21*].

29. Brazilian law was considered as a strong indication of the parties' intention in relation to the agreement to arbitrate because it was the law of the contract [*Sulamerica, §26*], however, the court in *Sulamerica* observed that if Brazilian law had applied, it 'may very well not be possible to give effect to the apparently mandatory and

plainly unqualified provision for arbitration' [*Sulamerica, §61*], as Brazilian law had the effect of binding only one party to the arbitration agreement [*Sulamerica, §30*].

30. The court also considered the approach taken in *C v D* which provides authority for the arbitration clause to be separable from the contract and has a plain close connection with the law of the seat of the arbitration [*Sulamerica, §56*]. The overwhelming significance of the choice of London as the seat of arbitration [*Sulamerica, §26*], combined with the undermining of the arbitration agreement if Brazilian law were to apply, led to English law being chosen.

31. Considering the circumstances of *Sulamerica*, the application of Danubian law does not have the same effect of unfairly disadvantaging one party over the other, and in fact provides the Tribunal with consideration of the 'overwhelming significance' of the law of the seat as the implied choice.

32. As a reflection of the *Sulamerica* decision and the overwhelming significance attached to the law of the seat, the LCIA in 2014 were amended to include Art 16.4 which provides that: "The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."

33. RESPONDENT submits that the "overwhelming significance" attached to the seat by the court in *Sulamerica* is a much more powerful factor as compared to the law governing the main contract. RESPONDENT submits that the law of the seat should govern the Arbitration Agreement as the implied choice, not the law governing the sales contract as the application of Danubian law does not unfairly disadvantage one party over the other.

34. CLAIMANT argues that *Arsanovia v. Cruz City* provides good authority that an agreement on the seat of the arbitration was not by itself enough to displace the inference to be drawn from the express choice of law to govern the main contract [*Cl. Memo., p. 6 §22*]. CLAIMANT has taken the decision in *Arsanovia* out of context and misapplied the legal principle from the case.

35. The court in *Arsanovia* held that the parties had implicitly chosen Indian law as the law governing the arbitration agreement because of a reference within the arbitration agreement not to seek interim relief under the Indian Arbitration and Conciliation Act 1996 [*Arsanovia, §20*]. The resulting consequence was that "where parties have expressly excluded specific statutory provisions of a law, the natural inference is that they understood and intended that otherwise that law would apply" [*Arsanovia, §20*].

36. The court was even willing to hold that reference as an express choice of law by the parties [*Arsanovia, §22*], though if such a reference had not existed, the court would have instead held that English law applied as the law with the "closest and most real connection with the arbitration agreement" [*Arsanovia, §24*].

37. If the reference to Indian law had not been made, the court would have defaulted to the law of the seat of arbitration instead. The material facts of the current case do not make any reference to Mediterranean law while the arbitration clause does express the choice of Danubia as the seat of arbitration. Thus, the reasoning from that case is not applicable by analogy to this matter.

38. RESPONDENT submits CLAIMANT's assertion that a choice of the seat of arbitration is not indicative of the law governing the arbitration agreement is not well-founded, taken out of context and misapplied.

39. CLAIMANT presumes that the parties intended for the same law to govern both the Arbitration Agreement and Sales Agreement, and the governing law of the Sales Agreement should be implied to govern the Arbitration Agreement [*Cl. Memo., p. 7 §25*]. RESPONDENT submits that CLAIMANT is mistaken that Mediterranean law was implied by the parties to govern the Arbitration Agreement in absence of an express choice of law.

40. As provided in *Sulamerica*, the disadvantage caused by the application of the substantive law combined with the "overwhelming significance" of the law of the seat led to English law being chosen. CLAIMANT also argues that the express choice of a seat of arbitration is not enough to displace the assumption that the law of the contract should govern the arbitration agreement per *Arsanovia*. CLAIMANT has misapplied the legal principle from *Arsanovia* insofar as the existence of the reference excluding relief under Indian law overwhelmingly indicated an express choice of Indian law.

41. RESPONDENT submits the law of Danubia should be the governing law of the arbitration agreement based on implied choice between the parties. The legal principle gleaned from Potter J's obiter in *Sumitomo* is that the arbitration agreement provides the starting point for determining an implied choice. As provided for by *Sulamerica*, the seat of the arbitration holds "overwhelming significance" in the absence of an express choice of law governing the arbitration agreement. Hints of that implied choice could come from an express reference to the inclusion/exclusion of a legislation per *Arsanovia*, but a lack of any reference would lead to a default position of the seat of arbitration being chosen as the procedural law.

2. Closest connection test would indicate that Danubian law should apply to the Arbitration Agreement

42. In the alternative that the Tribunal does not find an implied choice of law, the 'closest connection' step of the test requires the determination of the law which the arbitration agreement has the closest connection.

43. Under a closest connection test for the separate agreement, the closest connection is with the seat [*Barraclough & Waincymer, p. 25*]. As provided for in *C v D*, "an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the underlying contract" [*C v D, §26*].

44. CLAIMANT's assertion that Mr Antley's note is not indicative nor binding of the parties' final intention is incorrect [*Cl. Memo, p. 7 §26; Ex. R 3, p. 35*]. The note provides "Clarify in Arbitration Clause that neutral venue and applicable law". From the facts, CLAIMANT is a Mediterranean company whereas RESPONDENT is an Equatorianian company. The neutral venue and law that Mr Antley wrote of, can only point to Danubia as the seat of arbitration and the applicable law.

45. This is additionally supported by Ms Napravnik's email of 11 April 2017, in which she communicated CLAIMANT's wish for arbitration in a neutral country.

46. RESPONDENT submits that the closest connection test would result in Danubian law being chosen as the law governing the arbitration agreement. The principle in *C v D* provides for the seat of arbitration to have a closer and more real connection with the arbitration agreement, and Mr Antley's note which specifies choosing a neutral venue and applicable law, which cannot be taken to mean Mediterranean or Equatorianian law.

B. The Tribunal <u>does not</u> have power under the Arbitration Agreement to adapt the Contract with respect to price.

47. RESPONDENT first submits necessary clarifications in response to CLAIMANT memoranda **(1)**. Danubian Arbitration Law is the correct law of the Arbitration Agreement, which does not grant the Tribunal power to adapt the Contract with respect to price **(2)**. In the alternative, if Mediterranean Arbitration Law is preferred as the law governing the Arbitration Agreement, the Tribunal still does not have power to adapt the contract with respect to price **(3)**.

1. In arguing for adaptation, CLAIMANT incorrectly applied RESPONDENT position. CLAIMANT also put forward arguments which are beyond the scope of material for this issue.

i. CLAIMANT incorrectly indicated that the general jurisdiction of the Arbitral Tribunal was being challenged.

48. CLAIMANT memorandum applied the competence-competence doctrine in paragraphs 29-30 to grant the Arbitral Tribunal power to rule on its own jurisdiction. P.O 2, number 48, clearly stipulates that RESPONDENT does not object to the Tribunal's jurisdiction in general, but only its jurisdiction to adapt the price. CLAIMANT argues that whilst the Tribunal should have general jurisdiction, CLAIMANT did not address price specifically, which is the basis of RESPONDENT's objection. On this basis, the Tribunal should reject this section of CLAIMANT submission.

ii. Operation of the Doctrine of Separability prevents the Tribunal from considering substantive factors in answering the question of adaptation.

49. CLAIMANT has applied interpretive principles to Clause 12 of the Contract, the Hardship Clause, in coming to

their conclusion that the Tribunal has power to adapt the contract with respect to price. Reliance on the Contract's Hardship clause is found in paragraphs 31, 32 and 33 of CLAIMANT memorandum. Any analysis of the Contract's substantive Hardship Clause for this procedural issue is a breach of the doctrine of separability. As such this argument should be rejected as it is incorrect as a matter of law.

50. The fundamental doctrine of separability provides that "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained" [*ICC Case No. 8938*]. Application of this principle means that the arbitration agreement operates "ancillary to the underlying contract for its only function is to provide machinery to resolve disputes" [*Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.*]. Art. 16 of the Danubian Arbitration Law and Art. 16 of the Mediterranean Arbitration Law unambiguously recognises the doctrine of separability [*RNoA, p. 31 §14*]. Accordingly, the principle must be applied by the Tribunal irrespective of whether Danubian or Mediterranean Arbitration Law is found to govern the Contract's Arbitration Agreement. RESPONDENT submits that paragraphs 31-33 of CLAIMANT's memorandum, and any other reference to the substantive contract for the purposes of answering this procedural issue, must be rejected by the Tribunal. Permitting such material would be a direct contravention of the separability doctrine, a "cornerstone of international arbitration" which has been explicitly entrenched in both Danubian and Mediterranean Arbitration Law [*Born, p. 350*].

2. Danubian Arbitration Law is the correct law of the Arbitration Agreement, which does not grant the Tribunal power to adapt the Contract with respect to price

51. RESPONDENT submits that pursuant to the telephone conference on 4 October 2018, both parties have agreed that according to Danubian Contract Law there is a high likelihood that the arbitration agreement would not be interpreted as authorising a contract adaptation by the Arbitral Tribunal [*P.O 1, p 51, II, DP §3*]. This is due to the alleged "four corner rule", entrenched in Danubian Contract Law, which excludes all extraneous evidence for the interpretation of contracts and where arbitration agreements re interpreted narrowly [*P.O 1, p 51, II, DP §3*]. The following submission should be considered in light of this agreement.

52. Operation of the "four corners rule" (also: "parol evidence rule") in Danubian Arbitration Law requires that an interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [*RNoA, p. 32 §16*]. This means that "evidence is not allowed to contradict, vary, add to or subtract from the terms of a written contract" [*Rosengren, p. 6*]. Thus, the operation of the exclusionary four corners rule prohibits consideration of the contract's drafting history to interpret its meaning. This invalidates paragraph 35 of CLAIMANT memorandum if Danubian Arbitration Law is applicable to the Arbitration Agreement.

53. A comparison of the HKIAC Model Clause (hereafter: "Model Clause") with the Contract's Arbitration Clause is one interpretive method available within the confines of the four corners rule, as an analysis of this nature does not "contradict, vary, add to or subtract from" the terms of the contract [*Rosengren, p. 6*]. The Arbitration Clause agreed upon by the parties is identical to the Model Clause, with three exceptions. First, the Arbitration Agreement

has been narrowed to only include "any dispute arising out of this contract", as opposed to "any dispute, controversy, difference or claim arising out of or relating to this contract". Second, the phrase "or any dispute regarding non-contractual obligations arising out of or relating to it" has been removed. Third, the Arbitration Agreement does not explicitly identify the law governing the Arbitration Clause.

54. In considering these differences, the Parties deliberately and explicitly narrowed the broad wording of the Model Clause in order to exclude any reference which could be interpreted as permitting contract adaptation. Danubian Contract Law, arbitrators may adapt contracts if express empowerment has been granted [*RNoA, p. 31 ∫13*]. Such express empowerment was not granted by the Arbitration Agreement, as any indicator of such empowerment was removed by the parties. This significant limitation of the Model Clause establishes that a narrow interpretation of the Arbitration Agreement is necessary to reflect the intention of the Parties. A narrow reading of the Arbitration Agreement would suggest that a dispute relating to the introduction of import tariffs is not a "dispute arising out of this contract". On this basis, application of Danubian Arbitration Law should lead the Tribunal to find that adaptation of the contract with respect to price is beyond the scope of the Arbitration Agreement.

3. In the alternative, if Mediterranean Arbitration Law is found to govern the Arbitration Agreement, the Tribunal still does not have power to adapt the Contract with respect to price.

55. If the Tribunal finds Mediterranean Arbitration Law to govern the Arbitration Agreement, it should nonetheless find the power to adapt the Contract with respect to price to be beyond the scope of the Arbitration Agreement. First, CLAIMANT incorrectly applied *Ethiopian & Pulses v. Rio del Mar* in arguing for a broad interpretation of the term "arising out of" in the Arbitration Agreement **(i)**. Second, the drafting history of the Arbitration Clause indicates that adaptation of the contract with respect to price is beyond the scope of material available to the Tribunal **(ii)**.

i. CLAIMANT incorrectly applied *Ethiopian & Pulses v. Rio del Mar*

56. CLAIMANT relied on *Ethiopian & Pulses v. Rio del Mar* in arguing for a broad interpretation of the term "arising out of", which is wording found in the Contract's Arbitration Agreement. CLAIMANT correctly reported the court finding that a claim regarding rectification of the contract is within the scope of the term "arising out of". RESPONDENT submits that this dispute is not regarding rectification, contrary to CLAIMANT's implication. On this basis, *Ethiopian & Pulses v. Rio del Mar* should be given no weight by the Tribunal.

57. Rectification is the process whereby a change in a written document is ordered to reflect what it ought to have said in the first place. In considering the Contract's drafting history, as is permitted by Mediterraneo law, it is evident that the dispute between CLAIMANT and RESPONDENT is not one of rectification. Ms Napravnik, initial negotiator on behalf of CLAIMANT, stated that inclusion of an express reference to adaptation of the contract was "from a legal point of view… not necessary" [*Ex C8, p. 17*]. Whilst an express inclusion of this nature was clearly contemplated by the parties, it was not included and was considered a legally unnecessary

addition. As such a failure to include such an adaptation was not necessary to reflect what ought to have said in the first place. Therefore, this does not amount to a rectification of the contract, but a rewriting of the contract price. The CLAIMANT's submission should be rejected.

ii. The drafting history of the Arbitration Clause indicates that adaptation of the contract with respect to price is beyond the scope of material available to the Tribunal.

58. CLAIMANT's submission concluded with an invocation of the pro-arbitration assumption. This presumes that the Parties would prefer disputes be resolved in a timely manner in one single, centralized forum [*Born, p. 1319*]. This presumption is indeed consistent with the trend in contemporary national court decisions to favour liberal interpretations toward scope of material available to arbitration agreements [*Born, p. 1354*]. However, RESPONDENT submits that adaptation of the contract with respect to price is beyond the scope of the Arbitration Agreement itself, as it is not regarding "any dispute arising out of this contract". In such an instance, it is appropriate for the Tribunal to deviate from the trend of interpreting Arbitration Agreements broadly. The Tribunal should find that the pro-arbitration assumption is not applicable and adaptation of the contract with respect to price is not permissible.

59. The general contract law Mediterraneo is a verbatim adoption of the UNIDRIOT Principles with no relevant exceptions [*P.O 1 ∫4*]. Accordingly, under Mediterraneo Arbitration Law the four corners rule does not apply and the Tribunal may consider the drafting history of the Arbitration Clause. From the drafting history of the arbitration agreement, RESPONDENT stated that it would like the term "arising out of" instead of "arising out and in relation to" [*Ex. R1, p.33*]. This change narrows the HKIAC Model clause and was accepted by CLAIMANT. On this basis, a dispute regarding price adjustment, due to the imposition of an import tariff, should not be found a "dispute arising out of this contract". A narrow lens must be adopted when interpreting this term by the Tribunal, to reflect the intention of the Parties.

60. Art. V(1)(c) New York Convention provides for the non-recognition of awards that exceed the scope of the agreement to arbitrate. Accordingly, the Tribunal must ensure it only arbitrates within the scope of the arbitration agreement. RESPONDENT submits that the scope of the Arbitration Agreement does not extend to price adaptation and any decision on this issue by the Tribunal would be a contravention of Art V(1)(c) New York Convention.

Conclusion for Issue A

61. CLAIMANT submits that the jurisdiction of the Arbitration Agreement is Danubian Contract Law. The Tribunal does not have power to adapt the contract with respect to price.

II. ISSUE B: CLAIMANT IS NOT ENTITLED TO SUBMIT FROM THE OTHER ARBITRAL PROCEEDINGS

62. RESPONDENT submits that the evidence from the other arbitration proceeding should not be admitted as the evidence is not relevant or material to the case **(A)**. Additionally, the evidence was procured illegally **(B)**, or obtained through a breach of confidentiality **(C)**.

A. CLAIMANT should not be allowed to admit evidence from the other arbitration proceeding as it is not relevant or material to the current proceeding.

63. RESPONDENT submits that CLAIMANT has incorrectly drawn similarities between the two arbitration proceedings as the basis to admit evidence **(i)**. Furthermore, CLAIMANT cannot assert that the pursuit of truth outweighs any illegality in obtaining the evidence **(ii)**.

i. CLAIMANT has incorrectly drawn similarities between the two arbitration proceedings as the basis to admit evidence

64. CLAIMANT seeks to admit evidence pursuant to Art. 22.2. HKIAC Rules which provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence". As such, the Tribunal has a broad discretion to determine the grounds of "relevance, materiality and weight of the evidence" to the current proceeding. Additionally, Art. 22.2. HKIAC Rules provides for the Tribunal to apply strict rules of evidence. CLAIMANT must be able to establish the facts relied on to prove its "relevance [and] materiality" [*Art. 22.1 & Art. 22.2 HKIAC Rules*]. Otherwise, the Tribunal should apply strict rules of evidence [*Art. 60. HKAO*].

ii. The pursuit of truth does not outweigh the illegality of the evidence

65. However, CLAIMANT wrongly asserts that the benefits of admitting illegally obtained evidence outweighs the harm caused and argues that the broad discretion of the Tribunal should be used for the protection and pursuit of CLAIMANT's legal interests. The Tribunal should exercise their discretion and exclude the evidence on the grounds of procedural fairness and maintain equality for the parties, not for CLAIMANT alone [*John, §2*].

66. CLAIMANT has loosely drawn similarities between the two arbitrations and asserts that the evidence is relevant and material to the decision in the current proceeding. Both arbitrations are similar insofar as they provide for a renegotiation of the price under the HKIAC Rules due to the imposition of the tariffs. Additionally, they confirm the Tribunal's power to adapt the Contract should the tariff result in hardship.

67. However, the arbitration clause in the other proceeding included an ICC Hardship Clause 2003, an express choice of law clause in favour of Mediterranean law, and the Model HKIAC Arbitration Clause. These crucial points of difference illustrate that the other proceeding is materially different to the current proceeding. RESPONDENT

submits the loosely drawn similarities from the other proceeding is not a sufficient basis to contend that the evidence is relevant or material to the current proceeding.

68. RESPONDENT submits that CLAIMANT has not sufficiently established that the evidence is relevant and material to the current proceeding, pursuant to Art. 22.1 HKIAC Rules. Therefore, the Tribunal should consider the evidence irrelevant, immaterial or inadmissible *sensu stricto* and apply the strict rules of evidence [*Art. 60.1 HKAO; Pilkov, p. 148*].

B. CLAIMANT should not be allowed to admit illegally obtained evidence.

69. CLAIMANT incorrectly asserts that the evidence should be admitted even though it was procured illegally, on the basis that CLAIMANT was not involved in the hacking.

70. RESPONDENT submits that CLAIMANT is not entitled to submit evidence even if CLAIMANT nor the third party was not responsible for the hack **(i)**. RESPONDENT submits that the purchase of information obtained through hacking is not an action of good faith **(ii)**.

i. CLAIMANT is not entitled to submit illegally obtained documents

71. CLAIMANT is suggesting that the purchase of illegally obtained information is an act of good faith so long as CLAIMANT was not directly involved. In the Methanex case, the Tribunal found that the unlawfully obtained evidence by the claimant was a violation of "basic principles of justice and fairness" and refused to admit the evidence [*Mann, §59*]. The Tribunal is obligated to assess whether evidence has been obtained legally [*Art. 22.2 HKIAC Rules*].

72. A Tribunal 'may require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome' [*Art. 22.3 HKIAC Rules*]. Art. 3.9 IBA Rules additionally provides that a party to a dispute may ask the Tribunal 'to take whatever steps are legally available to obtain the requested documents or seek leave from the tribunal to take such steps itself'. This ensures that evidence is properly obtained and the integrity of the arbitral process is upheld.

73. By instead relying on hearsay from Mr Velazquez and commissioning a third party to procure that evidence via hacking, CLAIMANT has ignored the proper procedure provided for by the HKIAC and IBA Rules, as well as contradicting their argument that they acted in good faith pursuant to Art. 9 IBA Rules.

ii. The purchase of information obtained through hacking is not an action of good faith

74. CLAIMANT wrongfully asserts that unless there is conclusive evidence to indicate the third-party company had hacked RESPONDENT and obtained information illegally, the action of a legitimate purchase of the information from the open market was in good faith [*Methanex*]. RESPONDENT submits that CLAIMANT has not

conducted themselves in good faith. By breaching proper procedure provided for in HKIAC and IBA Rules, and in violation of the good faith required under Art. 9 IBA Rules, CLAIMANT is submitting illegally obtained evidence that threatens the procedural fairness and integrity of the arbitral process.

75. It is important for the Tribunal to consider that these documents have not lost their private nature per *Caratube*. In *Caratube*, the Tribunal permitted illegally obtained evidence because the evidence had been published in the public domain for an extended period of time, and therefore lost their private and confidential nature. In the current proceeding, no such publishing has occurred, thus the documents retain their confidential nature. Admission of the evidence would therefore result in a breach of the privileged and private nature of the documents.

C. CLAIMANT should not be allowed to admit evidence obtained through a breach of confidentiality.

76. RESPONDENT submits that the evidence is not admissible as the relevant employees were bound by confidentiality preventing disclosure to third parties [*Born, p. 2782*].

77. CLAIMANT incorrectly asserts that as they were not bound a confidentiality agreement, they are entitled to admit the evidence from the other proceeding. RESPONDENT submits that the evidence is nevertheless inadmissible as it was obtained by employees who were prevented to disclose confidential information to third parties [*Born, p. 2782*].

78. A party representative 'may not publish, disclose or communicate any information' relating to the arbitration proceeding unless otherwise agreed upon by the parties, and this applies to the Tribunal itself, expert or witness [*Art. 45.1 & 45.2 HKIAC Rules*]. This is also similarly reflected in Art.18 HKAO which provides for the confidentiality of arbitral proceedings unless a party was obliged by law, or to protect or pursue a legal right, enforce or challenge an award. In the current circumstances, the employees were not acting to pursue a legal right nor enforce or challenge an award. Therefore, they remain bound by the confidentiality agreement.

79. RESPONDENT submits that both employees were witnesses in the other arbitration proceeding and therefore subject to the HKIAC Rules preventing disclosure of confidential arbitral proceedings [*Art. 45.1 & 45.2 HKIAC Rules*]. Furthermore, as the disclosure was not for the purpose of protecting a right or enforcing or challenging an award, they remain bound to the confidentiality agreement [*Art. 18 HKAO*].

80. An employee is "subject to an implied duty of fidelity which requires him not to divulge confidential information, save for his employer's benefit" [*Double Rise Development, §136*]. Information that is protected by confidentiality includes "price listing, structure and discounts given, lists of customers and suppliers, products ordered and marketing practices" [*Double Rise Development, §30*], all of which are present in the Partial Interim Award. Specifically, confidential information includes information that 'if disclosed to a competitor, will be liable to cause

real or significant harm to the owner' which includes economic damage [*Dextra China*].

81. RESPONDENT submits that CLAIMANT's attempt to submit evidence obtained from the ex-employees is impermissible. The employees had a fiduciary obligation to not divulge or use confidential information other than for their employer's benefit, especially to third parties such as CLAIMANT. There had been a deliberate attempt to spread information intended to cause irreparable harm to RESPONDENT's reputation and future commercial transactions [*Dextra China*]. The disclosure of the Partial Interim Award may jeopardize the current arbitral proceeding and consequently affect future business transactions.

Conclusion for Issue B

82. RESPONDENT submits that the evidence from the other arbitration proceeding should not be admitted as the evidence is not relevant or material to the case. Additionally, the evidence was procured illegally, or obtained through a breach of confidentiality.

III. ISSUE C: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 AS RESULT OF ADAPTATION OF THE PRICE

83. RESPONDENT submits that CLAIMANT is not entitled to the payment of US$ 1,250,000 as a result of the adaptation of the price. CLAIMANT erroneously believes the Hardship Clause protects CLAIMANT from the imposition of tariffs [*NoA, p. 7 ∫18*]. Alternatively, CLAIMANT attempts to rely on the CISG for price adaptation of the contract [*NoA, p. 8 ∫20*]. RESPONDENT respectfully requests the Tribunal to find that CLAIMANT cannot invoke the Hardship Clause of the Contract in these circumstances **(A)**. Additionally, RESPONDENT submits CLAIMANT cannot seek for adaptation of the price under the CISG **(B)**.

A. CLAIMANT cannot invoke the Hardship Clause of the contract in this event

84. Contrary to CLAIMANT's submission [*Cl. Memo., p. 13 ∫39*], they are not entitled to adaptation of price under the Contract's Hardship Clause. RESPONDENT did not intend for the Hardship Clause to apply to subsequent changes in import restrictions **(1)**. The imposition of the 30% tariff does not satisfy the requirements of the Hardship Clause **(2),** and the Clause does not provide for the requested remedy; adaptation by the Arbitral Tribunal **(3).**

1. RESPONDENT did not intend for the Hardship Clause to apply to subsequent changes in import restrictions

85. RESPONDENT submits that intention for the Hardship Clause to apply to the import restrictions cannot be inferred from its prior and subsequent conduct to the signing of the Contract.

86. The Parties' statements and conduct must be interpreted in light of the "intent where the other party knew or

could not have been unaware what that intent was" [*Art. 8(1) CISG*]. This is a subjective test [*Honnold/Flechtner, §105*] which favours RESPONDENT. The issue in question for this test is of imputable awareness, which indicates that CLAIMANT could not have been unaware of RESPONDENT's intention for the Clause to not apply to import restrictions. [*Schlechtriem/Schwenzer, Art. 8 §17; cf. Lookofsky, pp. 42-43*]. Furthermore, where both parties have expressed their intention to the other, they are deemed to have reached a 'meeting of minds'. This has not occurred in this instance.

87. If there is an absence of common intent, then the hypothetical understanding of a reasonable third person of the same kind, when place in the same circumstances, is determined under the objective test provided in Art. 8(2) CISG [*ICC Case No. 7331 (1994); Schlechtriem/Schwenzer I, Art. 8 §20*]. According to Schwenzer, the Contract ought to be interpreted as a whole [*Schlechtriem/Schwenzer I, Art. 8 §§29-30*]. The purpose of the Parties' Contract is to secure the delivery of horse semen by the CLAIMANT to RESPONDENT. It is evident that this commercial contract would serve to profit the commercial purposes of both Parties and protect their commercial interests. Both Parties in their pre-contractual discussions have indicated an interest in building a long-term relationship with mutual benefits [*Ex. C3, pp. 11 §3*]. It would not make commercial sense for RESPONDENT to enter into a contract which poses the risk of placing it in a financially precarious situation due to extraneous events. This reading of the Clause would disregard RESPONDENT's intentions.

88. All relevant circumstances including negotiations, established practices between the parties, usages and any subsequent conduct between parties must be considered, for both the subjective and objective interpretations [*Art. 8(3) CISG*]. The subsequent conduct of the parties should be considered in order to determine the original intent of the Parties [*Art. 8(3) CISG*]. RESPONDENT has acted consistently with a particular interpretation, namely that RESPONDENT's subsequent conduct relies on the belief that the Hardship Clause did not intend to negate the burden of risks associated with changes in customs regulations. RESPONDENT's conduct demonstrates that it acted under the belief that the Hardship Clause was so narrowly worded so as to include only risks expressly included in the Contract and those risks which were directly comparable to the stated risks. [*Ex. R3, p. 35 §3*].

89. This interpretation is consistent with the fundamental principle of arbitration. Party autonomy is a core principle governing international arbitration which allows parties to shape their contract [*Art. 1.1 UNIDROIT Principles; Schulze, pp. 6-7*]. It is not limited to the time when parties decide to enter into contract but is also applicable to the process of shaping its content [*Coester-Waltjen, pp. 41-42, pp. 81-82; Printing v. Sampson*]. RESPONDENT submits that the principle of party autonomy precludes the retrospective addition of extra words into the clause which do not reflect the agreement of the parties.

2. The imposition of the tariff does not meet the requirements of the Hardship Clause

90. The Hardship Clause states that the "seller shall not be responsible… for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". There are three

conjunctive requirements that must be met in order to satisfy the requirements of the Hardship Clause. First, the hardship must be comparable to additional health and safety requirement. Second, it must be unforeseen. Third, it must make performance of the contract more onerous. CLAIMANT erroneously asserts that as the second requirement has been met, the clause can be invoked (*Cl. Memo., p. 13 §39*). CLAIMANT does not address the first or third conjunctive requirements and for this reason alone, their argument must fail. Even if these additional requirements are met, which RESPONDENT rejects, CLAIMANT's argument on the foreseeability is misconceived.

91. RESPONDENT submits that the imposition of the tariffs on agricultural goods could have been foreseen. An unforeseeable event is an event which "could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract" [*Art. 6.2.2 UNIDROIT Principles, Schmitthoff, §83*]. The nature of the business is one which involves the constant lifting and imposing of restrictions by respective Governments to regulate the industry and protect trade [*Ex. C1, p. 9 §1*]. Furthermore, the threat of trade restrictions and tariffs being increased was not unforeseeable. There is a high standard for an event to be considered unforeseen in commercial contracts of this nature [*Neal Cooper v Texas*]. The controversial protectionist measures taken by Mediterraneo targeting Equatoriana should have caused CLAIMANT to be concerned that retaliatory measures would be imposed by Equatoriana [*Cl. Ex 6, p. 39 §2*]. As the imposition of the initial tariff occurred before the conclusion of the Contract, it was entirely foreseeable and even predictable that the targeted state would retaliate.

92. Furthermore, CLAIMANT has previously experienced commercially damaging customs and import restrictions that has increased costs up to 40%, and explicitly anticipated similar issues arising [*Ex C4, p 12 §4*]. This anticipation illustrates the foreseeability of the imposition of customs restrictions. Therefore, CLAIMANT cannot invoke the Hardship Clause.

3. The Hardship Clause does not provide for the requested remedy of adaptation by the Arbitral Tribunal

93. RESPONDENT submits that the subsequent conduct of the Parties does not evidence an agreement to renegotiate the price [*Art. 8(3) CISG*]. Due to the absence of a remedy provided in the Hardship Clause, any expressed or implied agreement made between the Parties should be relied upon, including previous dealings that could amount to established practices [*Art. 8(3) CISG*].

94. CLAIMANT suggests that despite the Hardship Clause not explicitly stating so, CLAIMANT should be protected from changes in customs regulations as this was anticipated in Ms Napravnik's email [*Ex. C4, p. 12 §4*]. RESPONDENT submits that contrary to CLAIMANT's assertion, this correspondence cannot be employed to ascertain the scope of the Hardship Clause. It is primarily the responsibility of parties 'to define their respective spheres of risk in the contract' which is ascertained by 'simple contract interpretation' [*Schwenzer, p. 715, para. 3*]. Therefore, the absence of clarification in the final Hardship Clause should be construed as deliberate.

95. The CISG provides rules for contract interpretation. In the first place an objective approach is to be exercised. Art. 8(1) CISG stipulates that 'statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was'. The potential hindrance of government customs requirements and tariffs had been acknowledged by the Parties in correspondence [*Ex. C4, p. 12 §4*]. Nevertheless, the parties omitted specific reference to 'customs regulations or import restrictions'. In accordance with Art. 8(1) CISG, this exclusion must be construed as deliberate. Furthermore, both CLAIMANT and RESPONDENT ultimately agreed to 'the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract' [*Ex. R3, p. 35 §3*].

96. Alternatively, the objective interpretive test in Art. 8(2) CISG is also met in RESPONDENT's favour. This provides that 'statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances'. While the issue of import and customs regulations was contemplated in correspondence [*Ex. C4, p. 12 §4*], there was a failure to insert terms reflecting this in the final Contract. A reasonable person in such circumstances would interpret the omission as deliberate. This notion is further supported by the fact that even after the conclusion of the Contract, CLAIMANT made no effort to highlight the failure or suggest revising the Clause until the tariff was imposed, compromising their own commercial interests. Art. 8(2) CISG allows consideration of a party's silence in interpreting objective intention. The French Appellate Court found that a seller was justified in interpreting a commercial agent's failure to question a purchase price as an indication of acceptance of said price [*Enterprise Alain Veyron v. Société E. Ambrosio*]. Therefore, even if it is found that there was an error in drafting the Hardship Clause, CLAIMANT's silence regarding its content must be interpreted as acceptance of the Clause.

B. CLAIMANT is not entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price under the CISG.

97. CLAIMANT's circumstances do not sufficiently fulfil the elements of Art. 79 CISG to evoke its operation **(1)**. Furthermore, the nature of the Hardship Clause constitutes derogation from the Convention. CLAIMANT is also unable to rely upon the UNIDROIT Principles in the interpretation of Art. 79 CISG **(2)**.

1. The situation borne by CLAIMANT does not evoke the operation of Art. 79 CISG.

98. CLAIMANT does not fulfil the requirements of Art. 79 to evoke its operation. Namely, the impediment claimed was materially avoided and overcome **(i)**. Furthermore, the impediment was not 'unforeseeable' for the purposes of the CISG **(ii)**.

i. The impediment and its consequences were avoided and overcome by CLAIMANT.

99. Art. 79 CISG only provides protection from liability where a party fails to perform their contractual obligations due to an impediment beyond his control that could not have been avoided or overcome. However, in the current

circumstances, CLAIMANT fulfilled their obligations under the contract by completing the final shipment of semen to RESPONDENT. The decision to do so reflects CLAIMANT's capacity to bear the additional costs caused by the imposition of the tariffs. Therefore, despite claims of the foreseeability, it was nevertheless overcome. Art. 79 is to be interpreted in such a way where 'impediment to performance may result from general economic difficulties and dislocations only if they constitute a barrier to performance…' [*Rimke*]. It is evident that despite shouldering the costs was onerous to CLAIMANT, it did not constitute a barrier to the performance of delivery.

100. Art. 79 does not cater to reimbursement for a party bearing the costs of an unforeseeable impediment. This notion is inherent in the historical context of Art. 79. At the Diplomatic Conference 1980, it was insisted that '[i]f a seller who had delivered a part of the goods was unable, owing to force majeure, to deliver the rest…the seller would be deprived…of the right to require payment, which was unacceptable' [*Ishida, p. 343 §3*]. In order for CLAIMANT to acquire compensation in the circumstances, they must have been unable to deliver part of the goods owing to an impediment that could not have been overcome.

101. CLAIMANT's capacity to bear the costs is further reflected in the reasons asserted for authorising the delivery to RESPONDENT. Ms. Napravnik stated that CLAIMANT agreed to bear the costs associated with the additional tariffs on the basis that RESPONDENT would cooperate in ascertaining a solution and that they were interested in a long-term business relationship.

102. CLAIMANT is unable to assert that the right to adapt the contract arises from unforeseeable circumstances alone. As stated by Schwenzer, '[t]he mere fact that performance has been rendered more onerous than could reasonably have been anticipated at the time of the conclusion of the contract does not exempt the obligor from performing the contract' [*Schwenzer, p. 714 §2*]. Accordingly, CLAIMANT cannot successfully assert that the purpose of the transaction was to attain monetary profit and that the failure to see this gain is a basis for renegotiation or relief of responsibility.

ii. The impediment was not 'unforeseeable' for the purposes of evoking Art. 79 CISG.

103. CLAIMANT suggests that the imposition of the 30% tariff was an unforeseeable event on the basis that the Equatorianian Government had long been a supporter for international free trade [*Ex. C8, p. 17*].

104. RESPONDENT submits that this notion of foreseeability should not be confined to the circumstances of a particular party to a transaction. Rather, what is considered 'foreseeable' for the purposes of Art. 79 must be interpreted in light of the nature of the business [*UNCITRAL Digest 2016, p. 376*]. It is contended that fluctuating customs regulations on agricultural and animal goods should be considered a 'normal risk of commercial activities' [*UNCITRAL Digest 2016, p. 377*]. CLAIMANT has demonstrated that such events have materialised in the past.

In correspondence, Ms. Napravnik prefaced her proposal for a hardship clause with the statement '[a]s we both know from past experiences unforeseeable additional health and safety requirements…can increase the cost by up to 40% and thereby destroy the commercial bass of the deal' [*Ex. C4, p. 12 §4*]. This speculation evidences that CLAIMANT had considered government customs regulations as a possible hindrance to the commerciality of their business activities.

105. Even if economic hardship were to amount to an 'impediment' according to the CISG, the current circumstances do not fall within the generally accepted threshold of a 100% price increase [*Schwenzer, p. 716 §3*].

106. The current case may be likened to the German Iron Molybdenum Case, in which the triplication of the price for iron molybdenum was not found to constitute an 'impediment' per Art. 79 on the basis that the relevant field of business was highly speculative. The pre-emptive concerns raised by Ms. Napravnik demonstrate not only speculation in the field of trade of animal products, but a material history of hefty customs regulations. Therefore, the new regulations, disregarding the perceived political behaviour of the Equatorianian Government, could not have been entirely unforeseen. Accordingly, CLAIMANT is unable to rely on Art. 79 on the basis that the impediment was unforeseeable.

2. Clause 12 of the Sales Agreement derogates from Art. 79 CISG. Accordingly, CLAIMANT is unable to rely on the UNIDROIT Principles to interpret Art. 79 CISG.

107. Art. 6 CISG provides that '[t]he parties may exclude the application of this Convention or, subject to Art. 12, derogate from or vary the effect of any of its provisions'. While there was no explicit agreement to derogate by the parties, derogation may also be ascertained implicitly. The language of Art. 6 purposefully excludes references to agreements to derogate. This was to ensure that implied exclusion was not precluded [*Graves, p. 126 §3*].

108. Whether or not derogation has materially occurred is 'determined by simple contract interpretation' [*Schwenzer, p. 715 §3*]. RESPONDENT submits that CLAIMANT is incorrect in suggesting that if its onerous situation is not addressed by the Hardship Clause, that they may alternatively rely on Art. 79. CLAIMANT has erred in applying Art. 6.2.2 UNIDROIT Principles in order to interpret Art. 79, when its definition of hardship is to be employed in interpreting the contractual Hardship Clause. Therefore, by identifying how Art. 79 CISG and Art. 6.2.2 UNIDROIT Principles diverge, it must be implied that CLAIMANT has derogated from the CISG.

109. CLAIMANT argues that because the CISG does not contain express provisions addressing hardship, the UNIDROIT Principles may be relied upon to 'fill in the gaps'. However, CLAIMANT's application of this principle results in the substitution of the term 'impediment' in Art. 79 with 'hardship'. Art. 6.2.2 UNIDROIT Principles cannot be relied upon to interpret Art. 79, as it provides a definition for 'hardship'. The term does not appear in Art. 79 CISG. A distinction must be drawn between 'impediment' under the CISG and 'hardship' under the UNIDROIT Principles.

110. Art. 6.2.2 UNIDROIT Principles refers to 'hardship' as 'the occurrence of events [which] fundamentally alters the equilibrium of the contract either because of the cost of the party's performance has increased or because the value of the performance of a party receives has diminished'. Art. 79 of the CISG does not encompass 'hardship' as a basis for avoidance of a contract [*Nuova Fucinatti*]. Reference to 'hardship' in the CISG has been deliberately omitted. The drafting history of Art. 79 'excludes the possibility that there is an unstated hardship in the Convention' [*Rimke*]. As such the CLAIMANT cannot use the concept of gap filling to implicitly redraft the CISG to include a basis for avoidance which was specifically excluded by the drafters.

111. The purpose of the provision is to establish 'definite limits as to a promisor's responsibility for breach of contract' [*Rimke*]. If delivering the final shipment to RESPONDENT was factually financially impossible for CLAIMANT, it would amount to a definite limitation which would trigger the operation of Art. 79. However, calculating what classifies as a fundamental change in the equilibrium of the contract requires a more subjective approach. This suggests that 'impediment' and 'hardship' are not inherently interchangeable terms as suggested by CLAIMANT.

112. Previous Arbitral Tribunals have rejected the subjective notion of hardship as a basis for invoking Art. 79 CISG. In the German *Iron Molybdenum Case*, the seller, in failing to deliver the contractual goods to the buyer, sought a finding of hardship on the basis that the price of the goods had increased by almost 30% since the conclusion of the contract. The tribunal found that the seller was not excused under Art. 79 CISG. It was reasoned that 'doing business in a sector that has a very speculative aspect the limits of reasonability are very high. The contract was therefore not commercially unreasonable to an extent that it could be regarded as frustrated'. CLAIMANT has acknowledged that their field of trade has in the past been subject to fluctuations in customs and import regulations [*Ex. C4, p. 12 ∫4*]. This has resulted in price increases of up to 40% in the past. These previous situations are comparable to the current imposition of the 30% tariff. Therefore, CLAIMANT is unable to assert that the tariff is entirely unforeseen for the purposes of relying on Art. 79 CISG. Further, the Belgian Supreme Court has also held that economic hardship specifically is not covered by the CISG [*Scaform International Case*].

113. Additionally, the remedy provided under Art. 79 CISG differs from that of Art. 6.2.3 UNIDROIT Principles, which further supports the fact that the two provisions address different circumstances. The CISG provides the right to suspend the contract or exempt one's responsibilities of the contract [*Art. 79(2)(a) CISG*]. Conversely, the UNIDROIT Principles provide for the duty to renegotiate in good faith [*Art. 6.2.3(1) UNIDROIT Principles*]. The right of suspension is more appropriately attached to a contract that is physically impossible to perform [*DiMatteo, p. 284 ∫2*], as it provides a threshold of finality to the contract. Therefore, the CLAIMANT's argument should fail as it was able to in fact fulfil its responsibility as seller despite the circumstances of this case.

114. In sum, CLAIMANT has incorrectly applied the definition of 'hardship' to Art. 79. The UNIDROIT Principles cannot be relied upon to 'fill in the gaps' in the current circumstances. Consequently, the Hardship Clause constitutes derogation from the CISG.

CONCLUSION OF ISSUE C

115. CLAIMANT is unable to rely on the Hardship Clause in order to seek an adaptation of the contract price. RESPONDENT did not intend for the Hardship Clause to apply to subsequent changes in import restrictions. The imposition of the 30% tariff does not satisfy the requirements of the Hardship Clause and the Clause does not provide for the requested remedy; adaptation by the arbitral tribunal. CLAIMANT is also unable to rely on Art. 79 CISG as an alternative.

REQUEST FOR RELIEF

In light of the above submissions, RESPONDENT requests the Arbitral Tribunal:

(i) To dismiss the claim as inadmissible for a lack of jurisdiction and powers;

(ii) To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;

(iii) To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

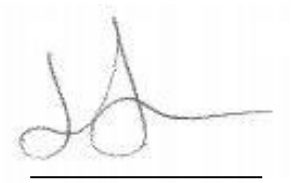
CERTIFICATES

Thursday, 24 January 2019

We hereby confirm that this Memorandum was written only by the persons whose names and signatures appear below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Janna Severine Baggio

Cindy Do



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Mohamed Naleemudeen

Kirtan Swamy

Kian Hong Wilson Tan

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