XVI ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT HONG KONG

YONSEI UNIVERSITY

MEMORANDUM FOR RESPONDENT

CLAIMANT	RESPONDENT
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana

COUNSEL

Dongwook Kim • Sun Kim • Hyojung Roh • Sung Hyun Park • Shihoon Lee •
Jin Hwan Jung • Yeseul Han

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LIST OF ABBREVIATIONS

¶/¶¶	Paragraph/paragraphs of the Memorandum
Art. / Arts.	Article / Articles
CE	Claimant's Exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	*Exempli gratia*; for example
i.e.	*id est*; that is
Lex arbitri	The governing law applicable to the arbitration
PO	Procedural Order
Para.	paragraph
Parties	Phar Lap Allevamento and Black Beauty Equestrian
Problem	26th Annual Willem C. Vis International Commercial Arbitration Moot Problem
RE	Respondent's Exhibit
Tribunal	Arbitrators consisting of Ms. Wantha Davis, Dr. Francesca Dettorie, and Prof. Calvin de Souza for this arbitration
Arbitration Agreement	The arbitration agreement between Phar Lap Allevamento and Black Beauty Equestrian, signed on 6 May 2017 (included in Art. 15 of the Contract)
Sales Agreement	The Sales Agreement between Phar Lap Allevamento and Black Beauty Equestrian, signed on 6 May 2017

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STATEMENT OF FACTS

1. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in several world champion show jumpers and international dressage champions. Three years ago, Black Beauty decided to establish a racehorse stable and acquired ten mares with an excellent racehorse pedigree.

2. The CLAIMANT, is Phar Lap Allevamento (Phar Lap), a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. In its racehorse section Phar Lap provides stallions, and offers frozen semen of its champion stallions for artificial insemination, which is of long-living and of superior quality.

3. On 21 March 2017, RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III for its newly started breeding programme [*CE1*]. Due to the Equatorianian Government's temporary lift on the ban on artificial insemination for racehorses, RESPONDENT was particularly interested in the frozen semen of Ninjinsky III. Considering CLAIMANT's considerable experience with the use of artificial insemination in other areas of horse sports, together with the particular situation in Equatoriana and Black Beauty's investors, RESPONDENT requested a high number of 100 doses.

4. The negotiation process that CLAIMANT provides is skewed in several aspects. On the email of 28 March 2017, RESPONDENT requested the delivery on the basis of DDP [*CE3*] while objecting to the forum selection clause. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked relief from all risks associated with such a delivery *or* at least to be protected against the risk of changing health and security requirements through a hardship clause [*CE4*]. As the first option was not acceptable for RESPONDENT, the following negotiations of the Parties were therefore centered on the latter option: the inclusion of a hardship clause. Here RESPONDENT considered the originally suggested ICC-hardship clause to be too broad; instead methods were taken to regulate several possible risks directly and then *merely* add a hardship wording to the existing force majeure clause.

5. As shown in Mr. Antley's latest draft of 10 April 2017 [*RE1*], RESPONDENT has clearly expressed its sincere wish for an arbitration agreement that was governed by the law of the place of arbitration, and not by the law of the contract. CLAIMANT responded to such proposal by precisely changing the suggested *place* of arbitration but not the *law* of the place of arbitration [*RE2*]. Therefore, the newly suggested neutral place of arbitration, Danubia, was acceptable by RESPONDENT under the fact that also the choice of law provision be changed. Such understanding was further necessary to avoid uncertainties from the absence of a choice. Indeed, Mr. Antley intended this point be addressed in the

final contract [*RE3*].

6. That the choice of law clause, however, was not included into the final Sales Agreement was merely due to an oversight resulting from the fact that the original negotiation team was no longer available, due to the dreadful car accident on 12 April 2017. Inevitably, the successors from each side of the Parties − originally uninvolved in the detailed negotiations − had to finalize the contract, particularly by merging the draft of the relevant parts contained in the email of 11 April 2017 [*RE2; PO2, para. 6*].

7. Resultantly, the negotiations between Mr. Krone and his counterpart from the CLAIMANT's side, Mr. John Ferguson, resulted in a very narrowly worded clause, which was then included into the existing force majeure clause; which did not provide for any adaptation by the arbitral tribunal. Truly, it was common ground between the parties restarting negotiations that clause 12 of the Sales Agreement be interpreted more narrowly than the ICC 2003 clause [*PO2, para.12*].

8. Unlike CLAIMANT's allegations, RESPONDENT did not agree to any adaptation following CLAIMANT's request in January 2018. Instead, Mr. Shoemakers made clear during the telephone conversation with Ms. Napravnik that his understanding of the contract was that CLAIMANT bear the additional costs. Shoemakers also mentioned that he would verify with the persons involved in drafting (as he himself had no authority to agree on an adaptation [*RE4*]); what is strongly assumable here is that CLAIMANT's threats to stop delivery prevented Mr. Shoemaker from rejecting outright.

1. Further, CLAIMANT's insinuations of bad faith and assumptions concerning the intentions of RESPONDENT's investors are baseless. Neither are CLAIMANT's allegations supported by submission of proof, nor does the contractual document contain any resale prohibition. Whether and at what price RESPONDENT has sold does to other breeders is completely irrelevant to the present case.

ARGUMENTS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

I. THE LAW OF DANUBIA SHALL GOVERN THE ARBITRATION AGREEMENT

1. CLAIMANT alleges that the Tribunal has jurisdiction and power to decide the case on the grounds that CLAIMANT expressed its intention to have the arbitration clause governed by the law of the contract, to which RESPONDENT made no objection, thereby making the law of Mediterraneo the parties' choice of law. Such claim is unwarranted as the Parties indeed have made agreements to govern the Arbitration Agreement with the law of the place of arbitration, i.e., the law of Danubia (**2**). CLAIMANT further argues that the law of the contract nonetheless applies to the Arbitration Agreement absent the express provisions as to the governing rule of the Arbitration Agreement; however, such claim cannot be justified under the doctrine of separability (**II**). Rather, absent the Parties' agreement on the governing law of the Arbitration Agreement, the law of the place of arbitration – the Danubian law – should be applied (**III**).

1. The first draft for the dispute resolution clause proposed by RESPONDENT clearly included a choice of law provision, distinct from a choice of seat provision with respect to the Arbitration Agreement

2. It is evident from the Parties' discussions that preceded the drafting of the arbitration clause that they understood the difference between the law governing the arbitration agreement and the seat of arbitration. In relation to the arbitration clause, RESPONDENT made clear its intention to distinguish the law of the arbitration clause and the seat of arbitration. Such clause was actually included in Mr. Antley's latest draft of 10 April 2017 [*RE1*]:

> "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*

The seat of arbitration shall be Equatoriana.

The law of this arbitration clause shall be the law of Equatoriana (emphasis added).

The number of arbitrators shall be three.

The arbitration proceedings shall be conducted in English."

3. The abovementioned proposal by RESPONDENT clearly provides that the initial draft of the arbitration agreement respectively included "*the seat of arbitration*" and the "*law [that governs the] arbitration clause*." The respective provisions illustrate that the Parties had prior understanding as to how the "*seat*," and the "*law*" of arbitration are clearly distinguishable entities.

2. RESPONDENT expressed its intention to have the arbitration clause governed by the law of the place of arbitration, to which CLAIMANT made no clear objection

4. The law of Danubia governs the Arbitration Agreement as it was the Parties' mutual intention to choose the law of the place of arbitration as *lex arbitri*.

5. CISG Art. 8 shall be used to interpret the mutual intention of the Parties. The CISG applies when interpreting the contractual parties' intentions whose places of business are in different contracting states of CISG [*Art.1(1) CISG*]. Also, it is the position of UNCITRAL and case law that "*when Article 8 applies, it precludes application of domestic interpretative rules* [*Landgericht Hamburg, Germany, 26 September 1990*] [*UNCITRAL Digest*]."

6. Further, CISG Art. 8(3) provides that "*in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case (emphasis added) including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties* [*Art. 8(3) CISG*]." In the present case, all relevant circumstances, including the Parties' negotiations surrounding the drafting history of the arbitration clause, point toward the application of the Law of Danubia as *lex arbitri*.

7. As mentioned above, RESPONDENT had clearly proposed to use the law of the place of arbitration as the governing law of the arbitration agreement (¶2). The first draft of the arbitration agreement indeed contained an explicit choice of law provision for the

arbitration clause; it submits the arbitration clause to the law of the place of arbitration, Equatoriana [*RE1*]. In its reply, CLAIMANT had not made objections to RESPONDENT's proposal that the law of the place of arbitration should be the *lex arbitri* [*RE2*]. Indeed, CLAIMANT has "*largely accept[ed RESPONDENT's] proposal with an amendment as to [only] the place of arbitration* [*RE2*]." RESPONDENT acknowledges that under CISG, silence or inactivity of a party does not in itself amount to acceptance. However, acceptance can be made in implied form, and one's inactivity can be considered as an acceptance given "*all relevant circumstances of the case*," including the negotiation processes of the Parties [*Art. 8, Art. 18 CISG*]. It should be noted that CLAIMANT had precisely challenged the suggested place of arbitration but has made no objection to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement [*RE2*].

8. Thus, as the surrounding circumstances and the drafting history of the arbitration clause hitherto illustrate that there was an implied consent from the part of CLAIMANT, the Law of Danubia shall govern the arbitration agreement.

3. In accordance with case laws, the inferred intention of the parties to select a neutral *lex arbitri* means the law of the arbitral seat should apply

9. Case laws also reason that by seating the arbitration in a particular state, it can be inferred that the parties implicitly agreed that the arbitration clause should be governed by the law of the seat. In particular, if the parties agreed on a third state arbitration seat, it is reasonable to assume that the parties intended to apply *lex loci arbitri* as a neutral means of dispute resolution.

10. For instance, in *Karaha Bodas Co. v Perusahan Pertambang Minyak Dam Gas Bumi Negara* [*Karaha Bodas Co. Case*] and *Steel Corporation of the Philippines v. International Steel Services*, courts reasoned that choosing an arbitral seat could be seen as an act of choosing the procedural law of the seat [*Steel Corp of the Philippines Case*].

II. EVEN IF DANUBIAN LAW IS NOT CONSIDERED AS THE APPLICABLE LAW FOR THE ARBITRATION CLAUSE, THE LAW OF MEDITERRANEO THAT GOVERNS THE CONTAINER CONTRACT IS NOT NATURALLY APPLIED TO

THE ARBITRATION AGREEMENT UNDER THE DOCTRINE OF SEPARABILITY

1. In light of the doctrine of separability, the law of the main contract shall not automatically govern the arbitration agreement; rather, it should be determined whether parties have expressly agreed upon the choice of law governing the arbitration agreement

11. Contrary to CLAIMANT's allegations, the law of the contract shall not automatically govern the arbitration clause, because under the doctrine of separability, the arbitration agreement is considered to be legally separate from the main contract of which it forms part. Both Art. 16 of the Danubian Arbitration Law and Art. 16 of the Mediterranean Arbitration Law adopt this doctrine [*PO2, para. 14*].

12. One of the implications of the doctrine of separability is that it is possible and common for the parties to have their arbitration agreement to be governed by a law different from the governing law of the main contract. Such implication has been widely shared by various commentaries and case law. One ICC case stated that "*an arbitration clause in an international contract may perfectly well be governed by a law different from that applicable to the underlying contract* [*ICC Case No. 1507*]." In an English judicial decision, the court ruled that "*in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole* [*Sulamerica Case*]."

13. Thus, it should be noted that the mere statement of "*this Sales Agreement is governed by the law of Mediterraneo*" shall be construed to govern the main contract only, excluding the arbitration agreement. Rather, if there is any consent as to the governing rule of the arbitration agreement between the Parties, the *lex arbitri* shall be decided based on such consent.

2. Contrary to the allegations of CLAIMANT, the Parties have never made agreement on the governing rule of the Arbitration Agreement

14. CLAIMANT seems to opine that the Parties have made agreement on the governing rule of the arbitration agreement, but it cannot be evidenced from the records. The Parties have never made agreement as to the law that governs the arbitration agreement.

15. RESPONDENT proposed a draft of an arbitration clause on 10 April 2017, containing provisions for both the seat of arbitration and the law of this arbitration clause [*RE1*]. In response, CLAIMANT made amendment as to the seat of arbitration *only*, and *deleted* the law of the arbitration provision [*RE2*]. Such deletion performed unilaterally by CLAIMANT cannot possibly constitute an agreement between CLAIMANT and RESPONDENT to govern the arbitration clause with the governing law of the Contract (i.e. the law of Mediterraneo); neither can it constitute tacit consent of RESPONDENT to have the law of Mediterraneo govern the arbitration clause, absent express provisions on the *lex arbitri*. For such agreement to exist, there must be manifestations of an offer and its acceptance, which clearly do not exist in the present case. No one has offered, and thus no one has accepted, to have the arbitration agreement governed with the law of the contract.

16. As can be witnessed from Respondent's Exhibit 3, RESPONDENT recognized the need to "*clarify*" the "*applicable law*" for the arbitration clause, but the Parties failed to reach an agreement due to the unfortunate car accidents [*RE3*].

17. CLAIMANT presumably would argue that it offered to govern the entire contract, i.e. the Sales Agreement *including* the arbitration agreement, with the law of Mediterraneo, as CLAIMANT in its response on 11 April 2017 mentioned that its offer is "*naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo* [*RE2*]." However, pursuant to the aforementioned doctrine of separability, such argument is without merit. It is worth reiterating that an arbitration agreement can be governed by a law different from that applicable to the underlying contract, and it is ungrounded to simply assume that agreement on the law governing the contract incorporates agreement on the law of the arbitration clause. Indeed, unlike many other contracts, the governing law of the Sales Agreement is provided under a *separate* clause, preceding the arbitration clause [*Problem, p. 31*].

III. IN ABSENCE OF PARTIES' AGREEMENT ON LAW APPLICABLE TO ARBITRATION AGREEMENT, THE LAW OF ARBITRAL SEAT SHOULD BE APPLIED

18. Even in the case that the Tribunal does not acknowledge the Parties' intention to have the law of the Danubia as the law governing arbitration clause, the law of Danubia should still govern the Arbitration Agreement. This is because in the absence of choice of law by parties, traditional jurisprudence and numerous international rules and jurisdictions dictate the law of the arbitral seat as the *lex arbitri*.

1. It is a well-established jurisprudence that the Arbitration Agreement shall be governed by the law of the arbitral seat

19. The seat theory is based on doctrine of separability. Since an arbitration agreement is independent from the underlying contract, the *lex arbitri* is not necessarily the law of the underlying contract. Therefore, inferring the substantive law of the contract as the *lex arbitri* does not easily correspond with the separability presumption. On the other hand, it is indeed a well-established jurisprudence that an arbitration agreement shall be governed by the law of the arbitral seat – the *lex loci arbitri*.

20. It should be noted that one of the most renowned arbitrators and scholars, Claude Reymond, stated the following:

> *"When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connection factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators"* [*Reymond, p. 1-3*].

Thus, the *lex loci arbitri* is intended to be its *"center of gravity"* in arbitral proceedings [*Redfern & Hunter, p. 85*].

21. Other commentators point out that the effectiveness of arbitration process is derived from binding power of the state. *Mann* reasons that just as an agreement between private persons is legally empowered by the state law, an arbitration agreement and an award acquire binding power and becomes executable when the pertinent arbitration procedure is connected to the law of the arbitral seat [*Mann, p. 244*]. Petrochilos explains that the *lex loci arbitri* is a peculiar law that governs the general arbitration process and at the

same time function as the standard for judging validity of arbitral awards [*Petrochilos, p. 22*].

22. Thus, in the absence of an express agreement on the *lex arbitri*, the law of the place of arbitration – the law of Danubia – shall govern the Arbitration Agreement as a *"center of gravity"* governing *"the general arbitration process."*

2. International rules state that the law of the place of arbitration should govern an arbitral agreement when there is no party agreement.

A. New York Convention states that the law of arbitration seat shall be applied to gauge the validity of an arbitration agreement when there is no agreement of choice of rules for arbitration

23. New York Convention, a treaty lying at the core of international arbitration, states that the law of arbitration seat shall be applied to evaluate the validity of an arbitration agreement when there is no agreement of choice of rules for arbitration.

24. New York Convention Art. V(1)(a) provides that the party may request for refusal of the award when, *inter alia*, *"the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"* (emphasis added). In essence, the article presumes that the law of the place of arbitration shall govern the arbitration agreement when the parties have not chosen the *lex arbitri* and that if the arbitration agreement is not valid based on the law of the place of arbitration, the enforcement of the award can be refused. Authorities such as Born share the same view, denoting that the article provides for *"application of the law of the arbitral seat to the substantive validity of the arbitration agreement"* [*Born, p. 495*].

25. Some commentators may refute that that the New York Convention Art. V(1)(a) is not self-evident in cases when the parties have not chosen the place of award in the first place. However, it should be noted that such concern is not of relevance to the present case, as the Parties have expressly designated the arbitral seat: Danubia. Another potential objection that may be raised by commentators is that the term '*award*' in Art. V(1)(a) may not refer to the enforcement of the arbitration '*agreement*'. However, it is a widely accepted position that *"a systematic interpretation of the Convention, in principle,*

permits the application by analogy of the conflict rules of Art. V(1)(a) to the enforcement of the agreement" (emphasis added) [*van den Berg, p. 126*].

B. UNCITRAL Model Law and European Convention also provide for the application of the *lex loci arbitri* to the Arbitration Agreement

26. Just as the provision under New York Convention, so UNCITRAL Model Law presumes that the law of the place of arbitration shall be used as the governing rule of an arbitration agreement in deciding its validity as to setting aside or rejecting enforcement of the arbitral award. In other words, these provisions prescribe a basic principle as to the choice of law: an arbitral tribunal shall select the law of the arbitral seat when parties fail to come up with any autonomous choice of law [*Born, p. 526-527*].

27. UNCITRAL Model Law Art. 34(2)(a)(i) allows a court to set aside an arbitral award if a party proves, inter alia, "the [arbitral] agreement is not valid *under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State"*. Art.36(1)(a)(i) provides for the same mechanism that enforcement of an arbitral award can be refused if, aside other options, *"the [arbitral] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*" (emphasis added).

28. European Convention on International Commercial Arbitration Art. VI is more explicit in providing for the applicability of the *lex loci arbitri*. It states that, in taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement under, *inter alia*, the law of the country in which the award is to be made – i.e., the *lex loci arbitri* – in case when a party agreement on the *lex arbitri* is missing.

3. A number of jurisdictions from both common and civil law have applied the law of the arbitral seat to arbitration agreements in the absence of a party agreement on the *lex arbitri*

A. Numerous jurisdictions have applied the law of the arbitral seat to evaluate the validity of international arbitration agreements

29. In practice, several jurisdictions have applied the law of the arbitral seat to gauge the validity of international arbitration agreements. In *Shashoua and others v. Sharma* case,

the law of the underlying contract was New York State law, but the tribunal applied the English law because the arbitral seat was London [*Shashoua and others Case*]. Similarly, in *Bulgarian Foreign Trade Bank Ltd v. A.l. Trade Finance Inc.* case, the law of arbitral seat, the Swedish law, was chosen as the *lex arbitri* even though the underlying contract was governed by law of Austria [*Bulgarian Foreign Trade Bank Case*].

B. English Courts also have recently adopted presumption that the law governing an international arbitration agreement should be the law of the arbitral seat

30. In recent years, English court has changed its stance to emphasize more on the law of arbitral seat in choice-of-law issue. In *Sulamerica Cia Nacional De Seguros SA v. Enesa Engenharia SA*, tribunal reasoned that:

> *"[A]greement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective"* [*Sulamerica Case*].

The court's rationale behind its decision was that an arbitration agreement is more likely to be governed by the law of the seat than the law of underlying contract because the law of the seat usually has the closest connection with the arbitration agreement.

31. Revision of LCIA Arbitration Rules 2014 is in accordance with the change in courts' stance. Art. 16 (4) is as follows: *"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."*

32. Moreover, Singaporean court strongly assume that if arbitral seat that parties agreed on is different from the state that provides applicable law for the contract, the parties have intention to govern arbitration by the *lex loci arbitri*. *FirstLink Investment Corp Ltd v. GT Payment Pte Ltd* case is based on this assumption [*FirstLink Case*].

4. As to the closest relationship standard, the law of the arbitral seat, the Danubian law, has the closest connection with the Arbitration Agreement

33. An arbitration agreement is more closely related to the law of the place of arbitration than the law of the contract because the arbitration agreement serves as the ground for acknowledging arbitration jurisdiction. And as to the choice-of-law issue, relevance with characteristic obligation is generally taken into consideration. Since the characteristic obligation of an arbitration agreement is the obligation to proceed to arbitration, an arbitration agreement has the closest relationship with the seat of arbitration [*Lim, p. 72*]. For instance, in *EWCA Civ 1282* case, the court has applied the *lex loci arbitri* because the court decided that the arbitral seat had the closest connection with the arbitration agreement [*EWCA Civ 1282*]. Applying this standard, the Danubian law should be the governing law of the Arbitration Agreement, for Danubia has the closest connection with the Arbitration Agreement.

5. Validation principle should not be plainly applied to the present case

34. Validation principle refers to the principle that the governing law shall be the law which will give effect to the parties' agreement to arbitrate; in other words, the Tribunal shall choose the law that "*validates*" the arbitral agreement. In *Hamlyn & Co. v. Talisker Distillery* case, the House of Lords did not simply follow the seat theory but reasoned that "*it is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions*" [*Hamlyn & Co. Case*]. Thus, as *Born* explained, *"the choice of lex arbitri must be drawn from the commercial purposes of parties to international arbitration agreements and from the underlying objectives of the international arbitral process*" [*Born, p. 544*]

35. However, validation principle is of no relevance to the present case, because RESPONDENT's position is not to invalidate the arbitration agreement itself. RESPONDENT is duly challenging the scope of the Arbitration Agreement. If the law of the Sales Agreement is chosen to govern the Arbitration Agreement notwithstanding the aforementioned submissions, it will result in irrevocable deviation from the neutral resolution of international dispute, an underlying premise of the international commercial arbitration.

36. In conclusion, even if parties did not have explicit or implied agreement on choice of the *lex arbitri*, the law of Danubia should be the *lex arbitri* considering precedents, international conventions, and jurisprudences supporting the seat theory. Hence, given that the law of Danubia excludes all extraneous evidence for the interpretation of contract pursuant to the four corner rule, the Tribunal is not authorized to adapt the Sales Agreement through arbitration agreement between CLAIMANT and RESPONDENT, as such express adaptation provision is not included in the Arbitration Agreement.

ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

IV. CLAIMANT'S DOCUMENTS SHOULD NOT BE ACCEPTED AS THEY ARE ILLEGALLY COLLECTED EVIDENCE

1. The Tribunal has the authority to decide whether to accept evidence on the grounds of illegal collection

37. It is true that the Exclusionary Rule was designed to prevent unlawful investigations from being carried out by the police or prosecution. However, more recently, the Exclusionary Rule has been expanded into the private realm, ultimately to the field of international arbitration, and was put at the centre of attention in the wake of Wikileaks [*Blair, p. 236*].

38. The IBA Rules have articles on the acceptability of evidence. While the rules are a recommendation and not in themselves a recognized standard, the weight of the suggestions made by the arbitrators who designed these rules are not to be overlooked. Art. 9.2(b) and (e) of the IBA Rules state that the Tribunal "*shall [...] exclude from evidence or production any Document, statement, oral testimony or inspection*" on the grounds of "*legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*" or "*grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling*." In comparison, the LCIA Rules and the UNCITRAL Model Law have broader admissibility standards but still leave the issue of taking of evidence to the tribunal.

2. CLAIMANT cannot argue that it was the third-party company, not CLAIMANT, that was responsible for the illegal collection of evidence

39. In the present case CLAIMANT first attempted to obtain evidence via Mr. Velazquez, but when that attempt failed, contacted a third-party company with the intention of purchasing a copy of the Partial Interim Award. The third-party company is of ill repute, especially regarding the source of its information, and the possible sources of the information, including the fact that there was indeed an illegal hack of RESPONDENT's computer system, are enough to suggest the involvement of this third-party company in illegal activity.

40. The UNCITRAL Transparency Rules, also referred to simply as the Transparency Rules for convenience, are in fact the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. These rules apply only to arbitration carried out between a state and an investor, so are irrelevant to this current issue. CLAIMANT is simply abusing the word *"Transparency"* to justify its submission of illegal evidence without regarding the actual scope of the rules in question.

41. The "*Clean Hands*" doctrine seemingly suggests that because CLAIMANT was not directly engaged in the act of obtaining the said documents through a breach of confidentiality, CLAIMANT has Clean Hands and thus is not acting in bad faith by submitting said evidence. However, allowing such an argument to be made is in itself an obstruction of justice. Hiring a third-party company to physically carry out illegal activity is tantamount to incitement. While the degree of criminal liability assigned to incitement differs by jurisdiction, it is clear that CLAIMANT, the inciter, should be held liable for the actions of the third-party company. Thus CLAIMANT is in violation of the Clean Hands doctrine.

42. Even if CLAIMANT were to argue that they had been unaware of the third-party's dubious activities, such an argument would simply lead to the conclusion that CLAIMANT was acting in willful blindness. Willful blindness, also referred to as willful ignorance, is a concept that states that a person that intentionally leaves himself unaware of facts that would cause him to be liable cannot escape civil or criminal liability. In *United States v. Jewell,* the court ruled that proof of willful ignorance satisfied the requirement of knowledge as to criminal possession and importation of drugs. Similarly, if CLAIMANT hired a third-party company that had a reputation of using shady methods

without inquiring into its modus operandi, such actions would be an act of willful blindness, leaving CLAIMANT liable.

43. In a case precedent, the Tribunal ruled that leaked emails and documents could in principle be admitted as evidence as long as the weight of interests being in favor of admitting the evidence exceeded the weight of denying its submission – taking into account factors including fairness and equality between the parties, the extent to which the information was known to the public domain, and the deterrence of cyber-crime [*ICSID Case No. ARB/13/13*]. On this basis, CLAIMANT is making the claim that the award in question was already public knowledge and thus the nature of its source should not be an issue. However, the case in question as well as several others such as *ConocoPhilips v. Venezuela*, *Opic Karimum Corporation v. Venezuela* and *Kılıç v. Turkmenistan*, the evidence in question was already available on the world wide web, mostly through the efforts of Wikileaks. The degree of which the information could be considered "*public*" is substantially different from the present case, as was the degree of involvement. In the case of Wikileaks, the party aiming to use the illegally obtained information took no part in the actual obtaining of the evidence, whereas CLAIMANT actively attempted to gather said knowledge in the present case.

3. The present case and the arbitration between RESPONDENT and the third-party company cannot be joined or consolidated

44. While CLAIMANT suggests a consolidation of the two arbitrations is possible, Art. 28.1 of the HKIAC Rules set forth three possible reasons for a consolidation: where the parties agree to do so, all the claims are made under the same arbitration agreement, or if claims are made under more than one arbitration agreement, where a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and HKIAC finds the arbitration agreements to be compatible.

45. RESPONDENT does not agree to a consolidation and the arbitration between the RESPONDENT and the third party are not made under the same arbitration agreement as the one between the RESPONDENT and the CLAIMANT. Neither is it the case that the arbitrations arise from the same transaction or series of transactions – a transaction

between CLAIMANT and RESPONDENT and RESPONDENT and the third party are clearly separate transactions. The content of the transactions being of the same type of item is no reason to consider two separate transactions to be identical.

46. Art. 27.1 of the HKIAC Rules is on the Joinder of Additional Parties, and it allows the arbitral tribunal to join arbitrations provided that the additional party is bound by an agreement under these (the HKIAC) Rules giving rise to the arbitration, including any arbitration under Art. 28 (Consolidation) and 29 (Single Arbitration under Multiple Contracts). Here, as seen previously, there is no connection between the two arbitration cases, and as consolidation is also impossible, there is no means to justify a joinder of the additional parties.

47. We see CLAIMANT desperately grasping at straws in an attempt to justify its illegal evidence, resorting to such tactics as attempting to skew the meaning of the HKIAC Rules by simply using words taken out of context, as with the arguments on Transparency and Joinder/Consolidation. To allow the use of such illegal evidence would be going against what legal and arbitration procedure has been aiming at for centuries: the realization of justice itself.

ISSUE 3: CLAIMANT'S REQUEST FOR AN ADDITIONAL REMUNERATION OF 1,250,000 USD BASED ON AN ADAPTATION OF THE CONTRACT IS UNJUSTIFIED

V. CLAUSE 12 OF THE SALES AGREEMENT DOES NOT ALLOW FOR PRICE ADAPTATION BY THE ARBITRAL TRIBUNAL

1. Clause 12 of the Sales Agreement is not applicable to the present impediment caused by the tariff imposition

A. The CISG governs the Sales Agreement and guides the interpretation of its terms

48. CLAIMANT argues that the "*plain language*" of the Sales Agreement renders the term "*hardship*" in clause 12 applicable to the present case [*CL memo, ¶¶106, 117*]. However, CLAIMANT's interpretation of clause 12 is unclear in two distinct yet interrelated ways:

first, which legal rule or guidance CLAIMANT uses to interpret the clause in the Sales Agreement and second, how the tariff imposition in the present case satisfies the conditions required by the narrowly worded hardship clause in the Sales Agreement [*CL memo, ¶¶117-8*].

49. The CISG applies to the Sales Agreement and thereby provides an interpretative guidance absent in CLAIMANT's argument. Art. 1(1) lit. (a) CISG stipulates that the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States. First, Mediterraneo and Equatoriana are undisputedly Contracting States of the CISG [*PO1, para. 53*]. Second, the Sales Agreement is a contract of sale of goods (i.e. frozen semen of Nijinsky III) between the Parties in terms of Art. 1(1) CISG.

50. Even if the applicability of Art. 1(1) lit. (a) CISG is disputed for any reason, the CISG is applicable since the Parties have expressly chosen the CISG as the governing law of the Sales Agreement and have shown no clear intention to exclude the application of the CISG or derogate from any of its provisions regarding the interpretation of the contract. First, the principle of party autonomy as a main principle of the CISG grants the Parties the authority to "*choose the CISG as applicable law in the event that it is not otherwise applicable to the contract*" [*Gül, p. 81*]. The Parties expressly agreed in clause 14 of the Sales Agreement that the contract shall be governed by the law of Mediterraneo, including the CISG [*CE5*]. Second, parties may exclude the application of the CISG or derogate from any of its provisions pursuant to Art. 6 CISG by showing clear intent to do so [*AC Opinion No. 16 §3,4*]. In the present case there was evidently no such clear intention of the parties to derogate from any of the provisions regarding the interpretation of the contract at the time of or after the conclusion of the contract. Thus, the CISG indisputably governs the Sales Agreement.

51. Pursuant to the norms of interpretation and evidence in the CISG provided in Art. 11 and Art. 8(3) CISG, extrinsic evidence such as oral statements or previous correspondence of the Parties is to be considered in interpreting the terms of the Sales Agreement. In line with Art. 8(3) CISG, most academics and court decisions hold that recourse to the *parol*

evidence rule[1] or the *plain meaning rule*[2] is impermissible where the contract is governed by the CISG [*Huber/Mullis, p. 13-14; AC Opinion No.3 §1, 2*].

52. Parties may derogate from such norms of interpretation and evidence in the CISG only through an express agreement to exclude the use of extrinsic evidence.[3] Such an agreement is clearly absent in the present case. Thus, extrinsic evidence is to be considered to interpret the terms of the Sales Agreement in accordance with the norms in the CISG.

53. Art. 8 CISG guides the interpretation of the terms of the Sales Agreement. Whilst the wording of the provision only refers to the interpretation of the Parties' statements and conduct, legislative history and case law provide that Art. 8 CISG "*is equally applicable to the interpretation of 'the contract', when the document is embodied in a single document*" [*UN Conference on Contracts, p. 18; AC Opinion No. 3 §1.1.1.*].

54. The Swiss Bundesgericht (Federal Supreme Court of Switzerland) showed this in practice by concurring with the decision made in the Court of First Instance wherein the contract language was interpreted under Art. 8(2) CISG [*Roland Schmidt GmbH Case; UNCITRAL Digest, p. 35*]. The parties had a different understanding of the meaning of the contract, and hence the quality of the goods required by the parties' agreement had to be determined by the court. The court adopted Art. 8(2) CISG in deciding that a reasonable person of the same kind as the buyer, being an expert, would have concluded the contract with full knowledge of the machinery's technical limitations, and hence the buyer was not entitled to expect the machinery to conform to the latest technical standards.[4]

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[1] A rule in several common law jurisdictions that prevents the use of extrinsic evidence to contradict the written agreement

[2] A US law doctrine which bars the use of extrinsic evidence to interpret terms found in the contract unless the term in question has first been deemed sufficiently ambiguous

[3] Such an agreement may take the form of a Merger Clause (also termed Entire Agreement Clause) [*AC Opinion No. 3 §3*]

[4] As stipulated in the sales contract between the Parties, the [Seller] was required to guarantee all the qualities in the goods sold which the [Buyer] was entitled to expect. The Court of First Instance held that the [Buyer] was not entitled to expect that the acquired machine would be able to print a rapport length of 1018mm since the [Buyer] was an expert and knew that the machine offered was not new, but one which was built fourteen years ago and consequently did not conform to the latest technical expectations. Accordingly, the Court of First Instance held that the [Seller] was entitled to expect that the [Buyer] had concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment. The Bundesgericht affirmed that

55. Likewise, clause 12 of the Sales Agreement must be interpreted under Art. 8(1) or 8(2) CISG, with extrinsic evidence such as oral statements or previous correspondence of the Parties being given due consideration.

B. Contrary to CLAIMANT's allegations, RESPONDENT never intended to relieve CLAIMANT from "*any*" possible risks associated with unforeseen changes in the delivery terms in drafting clause 12 of the Sales Agreement

56. Under Art. 8(1) CISG, the statements or conduct of a party (likewise the contract) are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. CLAIMANT alleges that the hardship clause was included to exempt CLAIMANT from "*any*" risks associated with unforeseen changes in the delivery terms, and that RESPONDENT was aware at the time of the conclusion of the Sales Agreement that the hardship clause reflected this intent.

57. Contrary to this allegation, RESPONDENT never intended to relieve CLAIMANT from *all* risks associated with unforeseen changes in the delivery terms by including the hardship clause in the Sales Agreement. Instead, the narrowly worded hardship clause was included to address only specific kinds of possible risks and cases of hardship caused by unforeseen changes in the delivery terms. Circumstantial evidence strongly suggests that it is only reasonable to accept the narrower interpretation of the hardship clause and to reject CLAIMANT's interpretation.

58. During the Parties' negotiation process regarding the delivery method, RESPONDENT had insisted on DDP delivery in its email correspondence on 28 March 2017 [*CE3*]. Notably, the Parties had agreed on INCOTERMS 2010 rules [*PO2, para. 10*]. This agreement reflects the Parties' mutual intent to use commercial terms in accordance with the interpretations provided in INCOTERMS, even though INCOTERMS are not law. According to INCOTERMS 2010, "*DDP represents the maximum obligation*" for the seller, as opposed to other possible modes of delivery [*Incoterms*]. The term DDP means that "*the seller delivers the goods to the buyer, cleared for import [...],*" and that "*the seller has to bear all the costs and risks involved in bringing the goods thereto including, [...] the risk of the carrying out of customs formalities and the payment of formalities,*

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this decision was undoubtedly compatible with Art. 8(2) CISG.

customs duties, taxes and other charges" [*Incoterms*].

59. With full awareness of its obligations, CLAIMANT accepted RESPONDENT's request for a DDP delivery and yet asked (1) to be relieved from all risks associated with such a delivery, or (2) "*at minimum*" to include a hardship clause "*to address such subsequent changes*" [*CE4*].

60. The first option suggested by CLAIMANT was unacceptable for RESPONDENT. CLAIMANT had increased the selling price by 1000 USD per dose to cover the additional costs associated with the DDP delivery [*CE4*]. RESPONDENT paid the additional costs with the expectation to receive the due benefits, including CLAIMANT's assumption of "*all costs and risks involved*" during the delivery of the goods to Seabiscuit Drive, Oceanside, Equatoriana [*Incoterms*]. RESPONDENT never intended to pay the extra costs and yet forego the benefits by accepting CLAIMANT's wish to be relieved from all risks associated with a DDP delivery.

61. Hence RESPONDENT considered CLAIMANT's second suggestion to include a hardship clause to regulate a number of possible risks. It must be emphasized here that clause 12 of the Sales Agreement was not introduced to relieve CLAIMANT from "*any*" risks associated with unforeseen changes in the delivery terms but rather to regulate a number of possible risks ("*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*") and to address particular cases of hardship that may be caused by unforeseen events comparable to "*additional health and safety requirements*" [*CE5; RE3*]. With a common understanding of the Parties, clause 12 of the Sales Agreement was deliberately worded more narrowly than the initially suggested ICC 2003 hardship clause to pursue its objective to address *specific* risks and hardships, as opposed to *any* unforeseen event "*beyond [CLAIMANT's] reasonable control*" that renders CLAIMANT's performance "*excessively onerous*" [*RE3; PO2, para. 12; ICC 2003, p. 15*].

62. Thus, it is only reasonable to infer from the circumstantial evidence that clause 12 of the Sales Agreement was not included to relieve CLAIMANT from all risks associated with unforeseen changes in the delivery terms, but instead to regulate the particular risks and

causes of hardship listed in the written contract.

C. A reasonable person of the same kind as CLAIMANT would not expect clause 12 of the Sales Agreement to cover the tariff imposition as an unforeseen event "*comparable*" to "*additional health and safety requirements*"

63. CLAIMANT may nevertheless deny having had a mutual understanding with RESPONDENT that clause 12 of the Sales Agreement was included only to cover a number of possible risks and causes of hardship, as opposed to any risks associated with changes in the delivery terms. Art. 8(2) CISG stipulates that in the case that the Parties' intent is indeterminable under Art. 8(1) CISG, the statements or conduct of the Parties (likewise the contract) 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.

64. Accordingly, a reasonable person of the same kind as CLAIMANT with full knowledge of the obligations associated with DDP delivery would have understood from the aforementioned negotiation process that the hardship clause was deliberately worded narrowly and precisely to (1) protect CLAIMANT against unforeseen events that are "*comparable*" to CLAIMANT's past experience with "*additional health and safety requirements*" and (2) guarantee RESPONDENT the due benefits from a DDP delivery by ensuring that CLAIMANT was not wholly relieved from all possible costs and risks associated with unforeseen changes in the delivery terms.

65. The hardship element in clause 12 was added to specifically address possible circumstances similar to CLAIMANT's past experience with DDP delivery, which involved an unexpected increase in the cost of performance by "*up to 40%*" as a result of "*unforeseeable additional health and safety requirements*" [*PO2, para. 12; CE4*]. As explicitly stated in the email correspondence of 31 March 2017, CLAIMANT wished to address such unforeseeable changes with a hardship clause, which was taken into consideration by RESPONDENT based on its interest in maintaining a long-term relationship with CLAIMANT [*CE3*].

66. A reasonable person of the same kind as CLAIMANT would understand that the Parties had specifically intended to protect CLAIMANT against an increase in cost comparable

to CLAIMANT's previous experience by including a narrowly worded hardship clause. If, as CLAIMANT alleges, the Parties had intended to seek broad coverage, then terms such as "*gross inequity*" or "*unduly onerous or burdensome*" would have been used [*Ullman, p. 91*]. Such a broadly worded hardship clause may have been applicable to unforeseen changes of circumstances that are not necessarily comparable to CLAIMANT's prior experience but merely render the performance of the contractual obligation sufficiently onerous. However, in the present case, both Parties had knowingly agreed on the inclusion of a narrowly worded hardship clause with a specific reference to CLAIMANT's previous experience with unforeseen changes in "*additional health and safety requirements*" [*CE5; PO2, para. 12*].

67. Given the narrow wording of the hardship element, clause 12 of the Sales Agreement is inapplicable to the present case. Contrary to CLAIMANT's allegation that the tariff imposition in the present case is sufficiently similar to its previous experience with unforeseen changes in health and safety requirements, the cost increase induced by the tariff imposition in the present case is significantly lower than the cost increase formerly experienced by CLAIMANT. The email correspondence of 31 March 2017 reflects the very objective of the hardship element in clause 12 of the Sales Agreement: namely to address hardship caused by unforeseen events "*comparable*" to CLAIMANT's previous experience with additional health and safety requirements – i.e. an increase in cost of "*up to 40%*" caused by unforeseen changes [*CE4; CE5*].

68. The tariff imposition on the other hand made the third shipment of the semen merely 30 percent more expensive than anticipated [*CE8*]. Since the percentage of increase in cost is significantly lower than in CLAIMANT's previous experience, it is reasonable to infer that the two events did not render comparable consequences for CLAIMANT. It follows that CLAIMANT is not entitled to expect clause 12 of the Sales Agreement to be applicable to the present case.

D. A reasonable person of the same kind as CLAIMANT would have foreseen the events associated with the retaliatory tariff at the time the contract was executed

69. Assuming *arguendo* that the tariff imposition at issue and CLAIMANT's previous

experience of health and safety requirements are comparable events since they are both changes associated with customs regulations, the tariff imposition nonetheless fails to qualify as a cause of hardship regulated by clause 12 of the Sales Agreement. Contrary to CLAIMANT's argument that the tariff imposition was unforeseeable at the time of the conclusion of the Sales Agreement, the series of changes in trade conditions between Mediterraneo and Equatoriana had not been entirely unforeseeable at the time the Sales Agreement was executed.

70. Like most other hardship clauses, clause 12 of the Sales Agreement includes the requirement of unforeseeability [*CE5*]. The purpose of this requirement is to ensure that parties take precautions to avoid foreseeable occurrences [*Ullman, p. 87*]. Whether the law of Mediterraneo as the governing law of the main contract belongs to the civil or common law tradition, courts in both civil (French) law and common (US) law jurisdictions have shown that strict standards are applied for unforeseeability [*Ullman, p. 86-90*].

71. For example, in *Eastern Airlines v. Gulf Oil Corp.,* Gulf Oil defended its breach of contractual obligations by claiming that the energy crises had caused the price of foreign crude oil to increase, thereby unduly burdening the company and giving rise to "*commercial impracticability*" [*Gulf case*]. The court rejected Gulf's claim of hardship, firstly because it had in fact failed to establish great hardship under the respective hardship provision [*Id.*]. Yet even if Gulf had established great hardship, "*Gulf would not prevail because the events associated with the so-called energy crises were reasonably foreseeable at the time the contract was executed*" [*Id.*]. When such a change in trade conditions is foreseeable, it no longer belongs to the scope of the hardship clause, because the party disadvantaged by the occurrence of the change had the chance to protect itself in the contract [*Id.*].

72. Likewise, despite CLAIMANT's financial difficulties and the impact of the 30 percent retaliatory governmental tariff on CLAIMANT's financial situation, the foreseeability of the changed circumstance renders CLAIMANT's hardship claim baseless [*PO2, para. 22, 28*]. The series of changes in trade conditions between Mediterraneo and Equatoriana had been certainly extraordinary but not entirely unforeseeable at the time the Sales Agreement was executed.

73. Firstly, Mr. Bouckaert, the President of Mediterraneo who had imposed the initial tariff of 25 percent had publicized during his election program back in January 2017 his protectionist approach to international trade "*in particular in relation to agricultural products*" [*CE6*]. After his election in April, he appointed Ms. Cecil Frankel, "*one of the most ardent critics of free trade*" and an "*outspoken protectionist,*" as his "*superminister for agriculture, trade and economics*" on 5 May 2017 – i.e. *before* the Parties' signing of the Sales Agreement on 6 May [*PO2, para. 23*]. Given such circumstances, the President's 25 percent tariff imposition effective from 15 November may reasonably be said to have been "*foreseeable*".

74. Secondly, Equatoriana's retaliatory tariffs may have come as "*a big surprise,*" but was not entirely unforeseeable [*CE6*]. Even though Equatoriana has been a renowned supporter of free trade whose government has at most times resolved trade disputes "*amicably*" or via the relevant WTO dispute resolution mechanism, it does have history of imposing direct retaliatory measures against restrictions imposed by another country affecting imports from Equatoriana [*CE6*].

75. Given the facts of the circumstance, a reasonable person of the same kind as CLAIMANT could have foreseen, and accordingly prevented itself against such changes in trade conditions. Clause 12 of the Sales Agreement to some degree is a manifestation of such a preventive measure, demonstrating that CLAIMANT did foresee the occurrence of such changes even at the time of drafting the contract; yet as previously established, the percentage of increase in cost of performance in the present case is insufficient to be comparable to the case referenced in clause 12. Thus, clause 12 of the Sales Agreement provides no basis for CLAIMANT's hardship claim on Equatoriana's 30 percent tariff imposition.

2. Assuming *arguendo* that the present case is a hardship case under clause 12 of the Sales Agreement, CLAIMANT nevertheless has no basis to ask for a price adaptation

A. Contrary to CLAIMANT's allegations, RESPONDENT had never agreed to resort to arbitration for a price adaptation either *ex-ante* or *ex-post*

76. CLAIMANT alleges that the Parties had an *ex-ante* tentative agreement to include an adaptation clause into the contract that would entitle the Arbitral Tribunal to adapt the Sales Agreement if the Parties fail to agree on an amendment [*CE8*]. This assumption is based upon a statement made by Mr. Antley, RESPONDENT's former negotiator, that "*in his view, it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" [*CE8*]. Contrary to CLAIMANT's allegation, Mr. Antely's statement was neither an offer nor acceptance of an adaptation clause, and thus cannot be interpreted to evidence that RESPONDENT had intended to resort to arbitration for adaptation; rather, as correctly pointed out by CLAIMANT, it was a promise to simply consider drafting such an adaptation clause and to come back with a suitable proposal [*CE8*].

77. The proposal was never made due to the accident that prevented the former negotiators from continuing the negotiations with regard to the adaptation clause. It is clear from the witness statement of Mr. Krone, successor of Mr. Antley, that no further discussion regarding the adaptation clause was made between the successive negotiators who finalized the Sales Agreement on behalf of the Parties [*RE3*]. As stated by Mr. Krone, even if the negotiations regarding the adaptation clause had continued, RESPONDENT "*would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion*" [*RE3*]. This is consistent with the final wording of clause 12 of the Sales Agreement which is a very narrowly worded clause that does not provide for any adaptation by the Arbitral Tribunal. Thus, it is reasonable to infer that no *ex-ante* agreement to include an adaptation clause into the Sales Agreement had been made.

78. CLAIMANT further alleges that there had been an *ex-post* agreement pursuant to Art. 29 CISG to make a price adaptation following CLAIMANT's request on 20 January 2018 [*CE7; RE4*]. The allegation is based upon the telephone conversation on the following day between Ms. Napravnik representing CLAIMANT and Mr. Shoemaker, the manager of the development of the racehorse breeding program in RESPONDENT's company. CLAIMANT insinuates that Mr. Shoemaker had agreed to adapt the price of the third shipment [*CE8*]. However, as Mr. Shoemaker had made clear in the phone conversation, he was not involved in the negotiations of the contract nor was he in the position to directly consent to additional payments outside the contract [*CE8, RE4*]. Given his

position in RESPONDENT's company, Mr. Shoemaker had simply stated that the Parties could find an agreement on the price "*if the contract provides for an increased price in the case of such a high additional tariff*," which, as previously established, does not [*RE4*].

79. Based upon the aforementioned circumstantial evidence, it is reasonable to conclude that RESPONDENT had never expressed any intent to resort to the Arbitral Tribunal for a price adaptation in case of hardship. Therefore, there had been neither an *ex-ante* nor *ex-post* agreement between the Parties.

B. A reasonable person of the same kind as CLAIMANT would not expect clause 12 of the Sales Agreement to assume a concomitant adaptation clause

80. CLAIMANT supposes that clause 12 of the Sales Agreement as a hardship clause necessarily assumes a concomitant adaptation clause, given the Parties' intent to maintain a long-term business relationship and to avoid termination of the contract. It is true that hardship clauses usually appear in long-term contracts "*to provide flexibility in the event of unforeseen or unusual conditions*" and thus the basic function of the clause is to ensure that Parties renegotiate in such cases rather than terminate the agreement [*Ullman, p. 105*]. Accordingly, case law in both civil and common law jurisdictions and scholarly opinion together suggest that hardship clauses assume a duty to renegotiate in good faith [*Ullman, p. 92-5*].

81. However, CLAIMANT must realize that the duty to renegotiate does not automatically grant the court or the arbitral tribunal the power to modify the contract upon their discretion. The distinction is important because traditionally, courts in both common and civil law jurisdictions eschew court-imposed contract modifications; French case law even regards court-imposed modification as "*an infringement of the will of the contracting parties*" [*Ullman, p. 98-100*]. Cases that did not take this traditional approach do exist, but the contracts at issue contained either an escalation clause[5] or an indexation clause[6] based upon which the courts could either modify the price term in the contract or

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[5] An escalation clause allows for changing the price terms in the contract based on the market price [*Aluminum case; Ullman, p. 99*]

[6] The indexation clause in the E.D.F. case contained a floor price (cost) and a ceiling price (sale price). The sharp rise in the price of crude oil resulted in an "*absurd*" situation wherein the cost exceeded the sale price [*E.D.F. case; Ullman, p. 100*].

order the parties to attempt another round of negotiations with a court-appointed observer respectively, for a fairer enforcement of the clauses [*Aluminum case; E.D.F. case*]. On the other hand, the Sales Agreement in the present case does not require a price adaptation for its fair enforcement, since it does not contain such price fixing clauses.

82. Even if the Parties agreed that the present case was a hardship case under clause 12 of the Sales Agreement calling for renegotiations, which it did not, there was no agreement to resort to arbitration for price adaptation in the case that the Parties fail to reach an agreement to a modification. Thus, at best, a reasonable person of the same kind as CLAIMANT would have the understanding that, based upon clause 12 of the Sales Agreement, it may invoke the duty to renegotiate in good faith but cannot, as presently claimed, ask the Arbitral Tribunal to adapt the price.

VI. CLAIMANT CANNOT RELY ON ART. 79 CISG FOR PRICE ADAPTATION

1. Art. 79 CISG does not apply to the present case as the Parties have derogated from it via the inclusion of clause 12 of the Sales Agreement

83. Pursuant to Art. 6 CISG, parties may choose to derogate from or vary any of the provisions in the CISG to exclude its application. Likewise, Art. 6 CISG illuminates the primary principle of party autonomy in international commerce [*UNCITRAL Digest, p. 33; Gül, p. 86*]. In the present case, the Parties have chosen to derogate from Art. 79 CISG and thus does not provide for the requested remedy by CLAIMANT, i.e. adaptation by the Tribunal.

84. The inclusion of the force majeure or hardship clause (clause 12) into the Sales Agreement constitutes a derogation from Art. 79 CISG. Whether the parties have implicitly excluded the application certain provisions of the CISG is to be determined pursuant to Art. 7 and 8 of the CISG [*Gül, p. 86*]. Thus, interpretation of the Parties' intent involves "*all relevant circumstances of the case including the negotiations*"; here, it is a rule-of-thumb that if the parties "*agree on contractual terms <u>inconsistent</u> with specific provisions of the CISG, then the CISG is not applicable implicitly*" [*Gül, p. 89*]. In the present case, there indeed exists <u>inconsistency</u> between Art. 79 CISG and clause 12 of the Sales Agreement as to its scope and subject matter: Art. 79 CISG does not govern hardship (**VI. 2. A**), whereas clause 12 explicitly addresses it (in this case narrowly, by

regulating a number of possible risks directly).

85. Indeed, the fact that the CISG does not directly address the issue of hardship runs parallel to how "*parties to international sales transactions [...] frequently include special clauses in their contracts dealing with matters of hardship and force majeure*" [*Rimke, p. 198*]. Such is the case where CLAIMANT and RESPONDENT agreed to explicitly include clause 12 of the Sales Agreement to provide for a special regulation of the problem of changed circumstances. Indeed, if it were not the case, with the CISG not inclusive of hardship provisions, the Parties "*may otherwise run the risk of a lengthy dispute on the very question of whether the CISG allows for such a defense*" [*Kessedijan, p. 419*]. In any case, that the Parties have *explicitly included the hardship clause* in the Sales Agreement constitutes intention to derogate from the incongruent Art. 79 CISG; therefore, application of Art. 79 CISG for price adaptation is excluded.

2. Even if Art. 79 CISG does apply it does not provide for price adaptation

A. Art. 79 CISG provides exemption for parties experiencing impediment, not hardship

86. Nowhere in the CISG is the language "*hardship*" included. Art. 79 CISG under the section "*Exemptions*" provides "*a party is not liable for a failure to perform any of his obligations [...] due to an impediment beyond one's control*." In fact, the drafting process of the CISG demonstrates that "*a provision which specifically [deals] with [the problem of hardship] has been deliberately omitted from the CISG*" [*Rimke, p. 220*]. That is, the term "*impediment*" of Art. 79 is a revised and deliberate wording that has been employed instead of "*hardship*."

87. The legislative history of Art. 79 CISG effectively illustrates the restrictiveness underlying the word "*impediment*." Art. 74 of the Uniform Law of the International Sales of Goods (ULIS), the predecessor of CISG, has been criticized as being used to excuse non-performance "*too readily*," and thus "*mak[ing] it too easy for the promisor to excuse his non-performance of the contract*" [*Flambouras, §3; Rimke, p. 212*]. In light of such a concern, the drafting members of the CISG were "*in favour of restricting the grounds for relief*," making the term "*impediment*" one of a stricter nature [*Rimke, p. 212*].

88. Many scholars recognize such a restrictive interpretation of the language of Art. 79 CISG,

as "*only govern[ing] impossibility of performance*" and conclude that "*disturbance which does not fully exclude performance, but makes it considerably more difficult/onerous (e.g., change of circumstances, hardship, economic impossibility commercial impracticability, etc.) cannot be considered as impediment*" [*Uribe, p. 240*]. Thus, the term "*impediment*" of Art. 79 CISG refers to circumstances "*severe enough to actually prevent performance*" for the disturbed party to claim exemptions [*Nagy, p. 10*].

89. Therefore, based on the meaning and scope of Art. 79, particularly with regard to its legislative history and intent, the tariff imposition that occurred to the detriment of CLAIMANT cannot be considered as impediment; it is absent of a "*disturbance [of any kind that] fully exclude[s] performance* [*Uribe, p. 240*]." Indeed, the newly imposed tariffs by the government of Equatoriana has made the shipment of semen more *costly*, but this must not be exaggerated nor falsely described as a situation of *impediment*.

B. The present case does not satisfy the requirements provided in Art. 79 CISG

90. Art. 79 CISG provides requirements for a party to avoid liability upon "*a failure to perform any of his obligations*." The party must prove that: 1) the "*impediment [is] beyond his control*" and 2) "*he could have not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract*." The first requirement is agreeably met as the present case involves an imposition of tariffs by the government of Equatoriana, which remains outside the control of CLAIMANT. The second requirement of unforeseeability however, has not been met since, as previously established (**V. 1. D**), the tariff imposition in the present case was not entirely unforeseeable.

91. Contrary to CLAIMANT's argument that the retaliatory tariffs imposed by Equatoriana was of unprecedented nature, there has been a case wherein Equatoriana exercised direct retaliatory measures against another import country [*CE6*]. Even if such a precedent did not exist, changes in market prices are generally foreseeable and a natural part of business risk all buyers and sellers must assume.

92. Moreover, the recent changes in the conditions of the Mediterranean market fostered by President Bouckaert, the newly elected president of Mediterraneo on 25 April 2017, provided CLAIMANT opportunities to foresee future international market developments

that may influence their business. With the appointment of Ms. Cecil Frankel, known as an "*ardent critic*" of free trade, the protectionist approach of the Mediterranean government and the following retaliation by Equatoriana was indeed foreseeable [*PO2, para 23*]. These developments could have "*reasonably [been] taken into account*" prior to 6 May 2017, when the Sales Agreement was signed between CLAIMANT and RESPONDENT. Indeed, "*ending up with an unprofitable transaction is a part of the business risk all operators in international trade have to accept*" and thus cannot be a basis to grant relief under Art. 79 CISG [*Miettinen, p. 13*]. Further, the CISG Advisory Council clearly provides that "*in most cases market fluctuations are not to be considered an "impediment" under CISG Article 79, because such fluctuations are a normal risk of commercial transactions in general*" [*AC Opinion No. 7, para. 39*].

93. Furthermore, general courts and arbitral tribunals have rejected the possibility that negative market developments can be considered as constituting "*impediment*" under Art. 79 CISG. Specifically, in cases where "*price fluctuation*" was the basis for seeking relief, case law demonstrates that courts take a conservative approach [*Uribe, p. 243*]. Even where claims involved price "*variations of more than 100% over the agreed price*" courts have denied relief and have "*used language requiring that an impediment be an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility, or excessive onerousness*" [*Uribe, p. 243; Nagy, p. 22*].

C. Even if Art. 79 CISG does regulate hardship, the present case does not satisfy the requirements of hardship

94. Even assuming *arguendo* that Art. 79 CISG does regulate hardship, "*the reported cases are inconclusive and demonstrate that the approach of the courts […] is very restrictive, imposing high standards for the nature and consequences of the impediment to be considered as an excuse under Art. 79*" [*Uribe, p. 243*]. That is, such high standards employed by the courts in interpreting Art. 79 CISG "*imply that only in situations amounting to impossibility will relief be granted to the affected party*" [*Uribe, p. 243*].

95. If it is accepted, however, that "*a situation of genuinely unexpected and radically changed circumstances, in truly exceptional cases, may qualify as an "impediment" under Article 79(1),*" the *limit of sacrifice standard* can be accepted. The CISG Advisory

Council "*describes the circumstances that can lead to exemption on the basis of economic impediment*" as "*what in some legal system is conceptualized as a limit of sacrifice beyond which the obligator cannot be reasonably expected to perform*" [*Miettinen, p. 34; AC Opinion No. 7, §38*]. However, CLAIMANT in the present case fails to go beyond the *limit of sacrifice* – which traditionally requires "*economic impossibility*" when associated with economic hardship [*Nagy, p. 22*].

96. Court decisions and arbitral practice also reveal that the present case falls short of "*supervening excessive onerousness*" [*Slater, p. 256*]. In an Italian Case, the court held that "*even if Art. 79 had applied*" to the case, a market price increase by 30 percent does not qualify as impediment, "*by reading impediment to mean impossible*" [*Nuova Fucinati v. Fondmetall International, Italy*]. Furthermore, the language employed by previous cases demonstrate that "*custom sanctions, trade sanctions, or an embargo – appear to be favored as impediments*" which the present case does not correspond to [*Coal Case, Butter Case*]. Never can the tariff imposition by the government of Equatoriana be considered as a complete barrier that makes it impossible for CLAIMANT to deliver the goods; indeed, the CLAIMANT did successfully perform its final shipment

D. UNIDROIT Principles do not apply nor corroborate CISG and thus its Art. 79

97. Art. 7(2) CISG provides: "*questions concerning matters governed by the CISG which are not expressly settled in the CISG are to be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law*."

98. This provision recognizes that there will "*inevitably be certain questions which are not specifically dealt with in the CISG*" even though "*they fall into its legal scope of application*" [*Huber/Mullis, p. 34*].

99. Art. 7(2) CISG mandates that the gap-filling of the CISG must first be done with the general principles underlying the CISG and then be done with resort to applicable domestic law. The UNIDROIT Principles, as clearly an "*external instrument which came into existence considerably later than the CISG*" cannot be used for gap-filling under Art. 7(2) CISG [*Huber/Mullis, p. 36*].

a. Art. 79 CISG contains no gap and thus provides no remedy based on hardship

100. While there are enthusiastic efforts to invoke the UNIDROIT Principles as a gap-filling device of the CISG, this is particularly inappropriate with regard to the abovementioned legislative history of Art. 79 CISG (¶¶86-89). As the drafters attempted to refrain from "*granting too much relief to a nonperforming party*," and deliberately excluded contract adaptation mechanisms in the CISG, the hardship provisions of UNIDROIT Principles are particularly "*incongruous*" with the CISG [*Slater, p. 259*].

101. In order to supplement the CISG with UNIDROIT Principles, it is "*necessary to derive the underlying principle*" of the disputed provision in CISG and then "*determine whether the corresponding UNIDROIT Principle fits with it*" [*Arroyo, p. 32*]. However, as the drafting history of the CISG "*reveals incongruencies*" between the Convention and UNIDROIT Principles, the appropriate conclusion must be that Art. 79 CISG contains no legal gap. Therefore "*no remedy based on hardship is available*" and the "*nonperforming party is not excused from performing his or her contractual obligations*" [*Slater, p. 260*].

102. Furthermore, contrary to what some commentators and scholars argue, the UNIDROIT Principles are "*not general principles on which CISG is based*"' [*Slater, p. 261*]. That is, the application of the hardship principles in UNIDROIT will "*[achieve] a different outcome*" to the "*general principles favoring performance of contracts*" underlying the CISG [*Slater, p. 298, fn. 196*]. Hence it is inappropriate to conclude that UNIDROIT Principles share and thus can be used to corroborate the general principles underlying the CISG; on the contrary, the difference in the outcomes achieved by the application of the respective principles demonstrates that "*no hardship remedy is available for contracts governed by the CISG*" [*Slater, p. 261*].

b. The original scope of Art. 79 CISG must not be arbitrarily extended to threaten the uniformity of its application

103. The recent Belgium decision in the case *Scafom International BV v. Lorraine Tubes S.A.S.* was an extraordinary departure from the original mandate of Art. 79 CISG. The Appellate Court reversed the ruling of the Court of First Instance, and the Court of Cassation confirmed that "*the wording of Art. 79(1) CISG [be interpreted] in a broad manner*" and thus "*hardship was not implicitly excluded from its scope*" [*Arroyo, p. 4*].

They determined that the under Art. 7 (2) CISG, French law should apply to situations "*not expressly settled by*" the CISG, in this case due to the fact the CISG "*does not contain clear provisions to exempt liability due to force majeure*" [*Arroyo, p. 4*].

104. As the following decision involved a huge extension of the original scope of CISG, it unsurprisingly triggered criticism among academics, as a "*parochical bias of the Court against the interpretation of [the CISG] with regards to its international character*" [*Arroyo, p. 4*]. Opponents to this decision that allowed "*adaptation of contracts governed by the CISG*" argue that the court has "*hallucin[ated] a gap*" in the CISG, and thus "*threatens against the uniformity in its application*" [*Arroyo, p. 4*]. Furthermore, "*the fact that the Court did not provide with a solid explanation of why the rise of 70% was seen as a situation of hardship*" is another ground of critique; "*it simply stated an increase of such a rate created hardship*" [*Arroyo, p. 27*].

105. Inasmuch as the decision in the *Scafom* case remains controversial, not to mention the unclarities that permeate the working of Art. 79 CISG and the mechanisms of Art. 7(2), the true spirit of the Convention should not be undermined. Again, the drafting of the CISG was necessitated to "*promote predictability and legal certainty in international trade law*" and "*uniformity*" remains the Convention's main goal, as provided in its Art. 7(1) [*Arroyo, p. 5*].

106. Invocation of the good faith principle to provide for price adaption also remains highly problematic, "*as a definitive and precise meaning of the term is elusive*" [*Zeller, p. 219*]. In this light it is highly questionable to whether the good faith principle alone, it being of such an abstract and unclear nature, can be a basis to argue for price adaptation. The indiscrete usage of this principle to chance contractual terms, in situations of changed circumstances, will not only undermine the uniformity of law's application but would inevitably "*[give] too much room for divergent judicial interpretation*" [*Uribe, p. 241*].

E. Even assuming *arguendo* that UNIDROIT Principles apply, it does not provide for price adaptation as the present case fails to satisfy its requirements

107. Even if the hardship provisions contained in UNIDROIT Principles were to be applied, the present case fails to meet the requirements for price adaptation.

108. Art. 6.2.2 of UNIDROIT Principles provides: "*there is hardship when the occurrence of*

events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased [...] and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."

109. Whereas CLAIMANT argues the "*fundamental equilibrium of the contract*" has been altered due to the tariff imposition by the Equatoriana government, a close examination via the criteria provided in Art. 6.2.2 UNIDROIT Principles demonstrate otherwise.

110. It is highly questionable whether the present case which involves an increase in cost incurred by merely a 30 percent tariff, can qualify as a *fundamental shift* in the contractual equilibrium. While it is clearly provided in the UNIDROIT Principles that "*whether an alteration is fundamental [...] will of course depend upon the circumstances*," it must be taken into consideration that in "*international commercial arbitration cases*" such as the present dispute, "*a cost increase by 13%, 30%, 44% or 25-50% was considered insufficient to qualify as hardship*" [*Brunner, p. 427*]. Even if such an inflexible numerical approach to the definition of *fundamental alteration* is inappropriate, the establishment of a consistent trend of "*50% or more*" is noteworthy; in fact, in the "*travaux préparatoires*" of the 2004 edition of the UNIDROIT Principles, the 50 percent threshold was criticized as being "*too low and in any event rather arbitrary*" [*Girsberger/Zapolskis, p. 127; UNIDROIT 2003*].

111. Furthermore, "*no arbitral awards are known [...] where arbitrators would have granted relief merely because the costs of performance have increased by 50% or less compared to what had been agreed in the contract*" [*Girsberger, p. 126*]. In this light, the mere increase in cost of performance cannot be a basis for CLAIMANT to seek exemptions. Previous arbitral cases that have not granted relief in cases involving "*a cost increase by 13%, 30%, 44% or 25-50%*" as they "*considered [it] insufficient to qualify as hardship*" further undermine that assertion that CLAIMANT is suffering from actual hardship [*Girsberger, p. 126*].

112. CLAIMANT also fails to satisfy requirements of unforeseeability in Art. 6.2.2 (b), and

risk assumption in Art. 6.2.2 (d). As previously established, the change in the domestic political circumstances in Mediterraneo prior to the conclusion of the Sales Agreement allowed CLAIMANT to foresee such tariff barriers being built between Mediterraneo and its trading counterparts. In addition, the past business experience of CLAIMANT based on DDP delivery rather demonstrates that there was risk assumption on the part of CLAIMANT. Based upon CLAIMANT's previous experience whereby the "*strict new health and safety requirements*" imposed by its Danubian counterpart in 2014 had threatened the financial stability of CLAIMANT, CLAIMANT would have been aware of the inherent risks associated in international transaction [*PO2, para. 21*].

113. While CLAIMANT argues that the hardship clause was included because they "*were not willing to take over any further risks associated with [...] a change in the delivery terms*" the assumption of risk need not be necessarily taken over expressly, and "*may follow from the very nature of the contract*" [*CE4; UNIDROIT Principles, p. 221*]. It is undeniable that the context of the Sales Agreement lies in taking advantage of a temporary lift of the Equatorianian government of the ban on artificial insemination for racehorses. A huge volume of 100 doses of frozen semen sold by CLAIMANT, for one reason or another, cannot be completely free from possessing a speculative nature of some sort. Indeed, the large quantity sold at a profitable cost of 99.500 USD per dose, was a "*good opportunity to increase their revenues*" [*Problem, p. 5*]. As a "*party who enters into a speculative transaction is deemed to accept a certain degree of risk*," it is arguable that CLAIMANT did assume risk before or during the time it entered into the Sales Agreement [*UNIDROIT Principles, p.221*]. Also, while CLAIMANT argues that their low profit margin of 5 percent indicates their low level of risk assumption, this alone cannot be a basis for arguing that it assumed no risk.

3. The law of Mediterraneo does not provide for price adaptation in the present case

114. Art. 7(2) CISG does not alone mandate that domestic law be used to corroborate gaps within the CISG. In fact, some scholars argue that "*resort to domestic laws is precluded by Article 7(2) [...] if the domestic law applicable under conflicts rules were applied to fill the supposed gap, there would be a danger of the CISG's liability system bursting*" [*Rimke, p. 220*]. Indeed, the language of Art. 7(2) CISG strongly suggests that "*any*

consideration of a domestic system [be] left as a last recourse" [*Kessedijian, p. 417*]. This becomes clearer by hypothesis: to indiscreetly bring in domestic laws to solve international disputes would be highly contrary the goal of "*uniformity*" on which the CISG is based [*Rimke, p. 219*].

115. Even assuming *arguendo* that the present case reveals an unsettled gap in Art. 79 CISG, the law of Mediterraneo does not provide for price adaptation. As the law of Mediterraneo is an *in verbatim* adoption of UNIDROIT Principles, the aforementioned failure to meet its requirements under Art. 6.2.2 (**VI. 2. E**) further precludes price adaptation.

116. At the heart of international trade lies the justice and stability of international trade agreements. RESPONDENT fully understands the difficult financial situation CLAIMANT has faced, but its claim for remuneration of 1,250,000 USD is baseless. RESPONDENT fears that CLAIMANT's request jeopardizes the stability of international trade agreements and genuine trust CLAIMANT had in the Sales Agreement. Consequently, RESPONDENT respectfully submits the Tribunal to safeguard the justice and stability of international trade by rejecting the unwarranted claims by CLAIMANT.

117. Additionally, CLAIMANT shall pay the cost of arbitration, including but not limited to RESPONDENT's expenses for legal representation. Notwithstanding the fact that 2018 HKIAC Administered Arbitration Rules contain no presumption in favor of the recovery of costs by the successful party, it is a long-term staple of legal tradition and the majority of HKIAC awards' position that the successful party shall be entitled for the total cost [*ICC Report*]. Thus, RESPONDENT submits that CLAIMANT shall pay the entire cost incurred for this arbitration process.

REQUEST FOR RELIEF

In light of the foregoing submissions on behalf of RESPONDENT, Counsel respectfully requests the Tribunal the following:

TO DISMISS ALL CONTRARY REQUESTS BY CLAIMANT,

TO ADJUDGE AND DECLARE THAT:

1. It lacks both the jurisdiction and powers under the Arbitration Agreement to adapt the contract **[Issue 1]**.
2. CLAIMANT should not be entitled to submit evidence from the other arbitration proceedings **[Issue 2]**.
3. CLAIMANT is not entitled to any payment, either resulting from an adaptation of the price or otherwise **[Issue 3]**.

AND TO ORDER CLAIMANT TO:

1. Pay the costs of arbitration, including RESPONDENT's expenses for legal representation.

On behalf of Black Beauty Equestrian,

Dongwook Kim Sun Kim Hyojung Roh Sung Hyun Park

Shihoon Lee Jin Hwan Jung Yeseul Han