SIXTEENTH ANNUAL

INTERNATIONAL COMMERCIAL ARBITRATION COMPETITION

HONG KONG, 30 MARCH – 7 APRIL 2019

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

MEMORANDUM FOR RESPONDENT

PHAR LAP ALLEVAMENTO v. BLACK BEAUTY EQUESTRIAN

PHAR LAP ALLEVAMENTO
RUE FRANKEL 1
CAPITAL CITY, MEDITERRANEO

– CLAIMANT –

BLACK BEAUTY EQUESTRIAN
2 SEABISCUIT DRIVE
OCEANSIDE, EQUATORIANA

– RESPONDENT –

COUNSEL FOR RESPONDENT

MARTINE GAETAN • LAURA BRETT HARSHBARGER • JIHAD KOMIS • JORDAN ALEXANDRA NELSON

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TABLE OF ABBREVIATIONS

AC	Advisory Council
ANS.	Answer to Notice of Arbitration
Arb1	RESPONDENT'S previous arbitration
Art.	Article
C	CLAIMANT'S Exhibit
CEO	Chief Executive Officer
cf.	compare (*confer*)
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant's Br.	CLAIMANT'S brief
Co.	Corporation
e.g.	for example (*exempli gratia*)
et al.	and others (*et alii/et aliae/et alia*)
et seq./et seqq.	and the following one/s (et sequens/et sequentes)
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
i.e.	that is (id est)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution

ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Ltr	Letter
LLC	Limited Liability Company in the United States
Ltd.	Limited
Mr.	Mister
Ms.	Miss
NOA	Notice of Arbitration
No.	Number
Op.	Opinion
p./pp.	page/pages
¶/¶¶ or para./paras.	paragraph/paragraphs
PIA	Partial Interim Award
PO 1	Procedural Order No. 1, dated 5 October 2018
PO 2	Procedural Order No. 2, dated 2 November 2018
R	RESPONDENT'S exhibit
UN/U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA/U.S.	United States of America
USD	United States Dollar(s)
v.	against (versus)

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STATEMENT OF FACTS

1 **Black Beauty Equestrian** ("**RESPONDENT**") is a company based in Oceanside, Equatoriana, and is renowned for its broodmare lines. It is building up its race horse breeding program. **Phar Lap Allevamento** ("**CLAIMANT**") is a company based in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport.

2 On **21 March 2017**, RESPONDENT wrote to inform CLAIMANT that the Equatorianian government's ban on artificial insemination for race horses had been temporarily lifted and solicited an offer for 100 doses of frozen semen from CLAIMANT'S star race horse, Nijinsky III. CLAIMANT responded to RESPONDENT'S solicitation on **24 March 2017**, offering USD 99.5 per dose of race horse semen, pick up at its premises, and a contract governed by Mediterraneo law. On **28 March 2017**, RESPONDENT wrote back, insisting on delivery DDP, and requesting the courts of Equatoriana have jurisdiction over potential future contract disputes. On **31 March 2017**, CLAIMANT accepted the additional risk of DDP delivery, and increased tenfold the price per dose to USD 1,000.

3 On **10 April 2017**, RESPONDENT drafted a dispute resolution clause, specifying Equatoriana as the seat of arbitration, and that Equatorianian law govern any dispute arising under the arbitration clause. In its **11 April 2017** response, CLAIMANT amended the seat of arbitration, but did not comment on the law governing the arbitration clause. The Parties entered the **Frozen Semen Sales Agreement** ("**Sales Agreement**") on **6 May 2017**, stipulating that unforeseen events making the contract more onerous trigger the hardship clause, and that the law of Mediterraneo govern the Sales Agreement only.

4 On **20 December 2017**, the Equatorianian government imposed 30 per cent tariffs on all animal products imported from Mediterraneo. This retaliatory measure was widely publicized. On **21 January 2018,** the Parties had a phone conversation about the tariffs, and CLAIMANT agreed to ship the products at its own expense.

5 CLAIMANT submitted its **Notice of Arbitration** ("**NOA**") on **31 July 2018**, claiming it incurred hardship as a result of the tariffs, and that the Arbitral Tribunal should adapt the contract price to reflect the tariffs. It designated Ms. Wantha Davis as arbitrator. On **24 August 2018**, RESPONDENT submitted its Answer to the Notice of Arbitration ("**ANS.**"), arguing lack of arbitral jurisdiction, and opposing CLAIMANT'S request for an adaptation of the contract price.

It designated Dr. Francesca Dettorie as co-arbitrator. On **14 September 2018**, the designated co-arbitrators nominated the Presiding Arbitrator, Professor Calvin de Souza and the Arbitral Tribunal was constituted four days later, on **18 September 2018**.

6 On **2 October 2018**, CLAIMANT informed the Arbitral Tribunal about confidential information from another proceeding in which RESPONDENT is a party. RESPONDENT responded the next day, objecting to the submission of materials, pursuant to Article 42 of the HKIAC 2013 Rules which stipulates proceedings be kept confidential.

7 **Procedural Order No 1** ("**PO 1**") was released on **5 October 2018**, followed by the release of **Procedural Order No 2** ("**PO 2**") on **2 November 2018**. On **6 December 2018**, CLAIMANT submitted its Complaint.

ARGUMENT

ISSUES I AND II: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION OR POWER UNDER THE ARBITRATION CLAUSE TO ADAPT THE SALES AGREEMENT (ISSUE I) AND SHOULD NOT PERMIT CLAIMANT TO INTRODUCE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDINGS (ISSUE II).

8 Under Danubian arbitration law, the Arbitral Tribunal does not have the jurisdiction or power to adapt the Sales Agreement without express authorization by the Parties. The Arbitration Clause and its preceding negotiating history provide no such authorization, and because the Parties made an implied choice of Danubian arbitration law the Arbitral Tribunal is limited to only interpretation and application of the Sales Agreement. The Arbitral Tribunal should also deny CLAIMANT'S request to admit into evidence confidential information from an arbitration to which RESPONDENT was previously a party. RESPONDENT does not consent to the disclosure of this sensitive evidence, and both the 2018 HKIAC Arbitration Rules and the International Bar Association ("IBA") Guidelines counsel against admission of such evidence.

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION OR POWER UNDER THE ARBITRATION CLAUSE TO ADAPT THE SALES AGREEMENT.

9 The Parties agree that the Arbitral Tribunal has the jurisdiction and power to settle matters of dispute "arising out of" the Sales Agreement. [NOA ¶ 14]. However, the authority vested by the

Parties in the Arbitral Tribunal is specific to only interpretation and application of the Sales Agreement, including its "existence, validity, interpretation, performance, breach or termination". [*Id.*] Contrary to CLAIMANT'S contention, the Arbitral Tribunal does not have the power to change the terms of the Sales Agreement by adapting the contract price. [Claimant's Br. ¶ 72]. Arbitration is an inherently flexible process—had the Parties intended to grant this power to the Arbitral Tribunal, they could have done so expressly. Because the Parties did not, under Danubian law, which is established below as the procedural law applicable to this Arbitration, the Arbitral Tribunal does not have the jurisdiction and power to adapt the Sales Agreement.

10 Danubian law governs interpretation of this issue on the basis of (1) traditional interpretive principles such as the doctrine of separability, (2) the Parties' intent as reflected through their conduct, and (3) the choice of law rules of the HKIAC Rules 2018.

A. Danubian law is the appropriate procedural law to govern the Arbitration Clause because the "doctrine of separability" applies.

11 The negotiating history between initial representatives Ms. Napravnik (CLAIMANT) and Mr. Antley (RESPONDENT) demonstrates that the Parties reached an agreement that Mediterraneo law would govern the *substance* of the Sales Agreement, as reflected in para. 14 of the Sales Agreement. [*See* Ex. R 1]. However, in discussions with Ms. Napravnik, Mr. Antley made specific reference to the distinction between the law governing the substantive law of the Sales Agreement and the procedural arbitration law: "…we have prepared a first draft for the dispute resolution clause which we would consider appropriate in light of the fact that the Sales Agreement is governed by the law of Mediterraneo." [Ex. R 1]. Mr. Antley specifically proposed the arbitration law of Equatoriana while acknowledging the choice of Mediterraneo substantive law, thereby invoking the "doctrine of separability." [*See id.*]. Under this doctrine, the Arbitral Tribunal should find that Mediterraneo substantive law does not extend to the Arbitration Clause and that Danubian arbitration law is the proper procedural law because it reflects the Parties' choice of a neutral venue and process for arbitration.

12 In international commercial arbitration there are typically three sources for governing procedural arbitration law: (1) the law expressly chosen by the parties to apply to the arbitration clause, (2) the law of the substantive contract, or (3) the law of the seat of arbitration. [*See HKIAC Adds Choice of Law Provisions to its Model Clause*]. Where parties do not specify their choice of procedural arbitration law in the arbitration agreement, many courts and tribunals have held that

the law of the seat of arbitration serves as the procedural law. Professor Berger has explained:

> [The doctrine of separability] separates the arbitration agreement legally from the main contract even if it is physically included in that contract, and the particular character of an arbitration agreement involving both substantive and procedural aspects ascribes it a special character different in nature from the main contract. Both aspects speak against an automatic extension of the standard choice of law clause to the arbitration agreement . . . parties rarely, if ever, consider the arbitration clause when negotiating the choice of law clause in the contract . . . therefore . . . the second tier of the two-tier transnational conflict rule applies: the law of the seat of the arbitration should be applied to determine the substantive validity of the arbitration agreement. [Berger at 319–20].

13 Under the doctrine of separability, not only is the arbitration clause considered to be a separate contract from the main agreement between the parties, but it is understood that the parties may have different grounds for choosing applicable law. Some countries specify the effects of the omission of an express provision for choice of law—in England, for example, the courts have recognized a "rebuttable presumption" that the law of the seat of arbitration (the *lex fori*) serve as the procedural law:

> [I]f the arbitration is to be held in the territory of a state which is party to the New York Convention on the Recognition and Enforcement of Awards, section 5(2)(b) of the Arbitration Act 1975 [now section 103(2)(b) of the Arbitration Act 1996] appears to give rise to a rebuttable presumption that the law governing the validity of the arbitration agreement is the law where the award is to be made. [*Sulamérica* ¶ 17, quoting Mustill & Boyd, *Commercial Arbitration*, 2nd ed.].

14 Though *Sulamérica* acknowledged the existence of a rebuttable presumption on the basis of the express and/or implied choice and the determination of which law has the "closest and most real connection" to the arbitration agreement, the court held that the presumption was not overcome by the connection between the substantive contract and the arbitration agreement, because the "nature and purpose" of these agreements are very different. [*Sulamérica* ¶ 32]. Lord Justice Moore-Bick noted that "the system of law governing the policy of insurance" does not have a "close juridical connection" with the agreement to arbitrate. [*Id.*]. Similarly, in this case the purpose of the Parties' agreement to arbitrate in Danubia was to ensure neutrality and equity in the arbitration process, and has no connection to the substantive legal concerns of the Sales Agreement. [Ex. R 2].

15 The court in *Sulamérica* also found an implied choice of the *lex fori* because to apply the law of the substantive contract would likely "significantly undermine [the arbitration] agreement." [*Sulamérica* ¶ 31]. The facts of this dispute are not analogous. Danubian law excludes adaptation

of the contracted price by the Arbitral Tribunal in the absence of an express empowerment. It does not preclude all arbitration arising out of the Sales Agreement, and thus does not undermine the agreement to arbitrate simply by limiting the Arbitral Tribunal's powers to those expressly granted by the Parties.

16 Still courts in other jurisdictions have found that the application of *lex fori* is not merely a rebuttable presumption, but that the absence of an express choice of law provision for the arbitration agreement automatically assumes the applicability of the law of the seat. In 2014, the Singapore High Court held that the omission of such a provision is understood to be the implied choice of *lex fori* as the *lex arbitri*:

> In the absence of indications to the contrary . . . the parties have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a direct competition between the chosen substantive law and the law of the chosen seat of arbitration. All things being equal, the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace the parties' intention to have the law of the seat be the proper law of the arbitration agreement. [*FirstLink Investments* ¶ 16].

17 The LCIA also supports this interpretation: "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." [LCIA Arbitration Rules Art. 16.4]. Because the Parties agreed to a Danubian venue for the purposes of neutrality and equity in light of the fact that Mediterraneo substantive law governs the general Sales Agreement, this Arbitral Tribunal should find that under the doctrine of separability Danubian law is the proper procedural law to govern this Arbitration.

B. The Parties implicitly selected Danubian arbitration law in the Arbitration Clause.

18 The record shows that in negotiating the Sales Agreement and Arbitration Clause, the Parties agreed to Mediterraneo law as the substantive law of the Sales Agreement and separately negotiated the appropriate venue and procedural law for arbitration. [*See* Ex. R 1; Ex. R 2.] In doing so, the Parties made an implicit choice of Danubian arbitration law. CLAIMANT argues that because there was no express choice of law provision, this Arbitral Tribunal should apply the substantive law of the Sales Agreement. [NOA ¶ 15; *see also* Claimant's Br. ¶ 74]. However, CLAIMANT mischaracterizes the nature of the negotiations between the Parties and misuses the doctrine of separability to assume that the Parties' agreement on substantive law matches their

intent for arbitration and that the choice of a Danubian venue was purely geographic. [Claimant's Br. ¶¶ 74–78, 86–88]. To the contrary, Blackaby, Partasides, Redfern and Hunter highlight the special relevance of the chosen seat of arbitration:

> An international commercial arbitration usually takes place in a country that is 'neutral', in the sense that none of the parties to the arbitration has a place of business or residence there. This means that in practice the law of the country in whose territory the arbitration takes place, the *lex arbitri*, will generally be different from the law that governs the substantive matters in dispute.
> [Redfern & Hunter at 173].

19 The negotiating history between the Parties reflects their shared intention to maintain fairness in the dispute resolution process: RESPONDENT'S negotiator Mr. Antley made clear that RESPONDENT would not agree to both the jurisdiction of CLAIMANT'S courts and the application of CLAIMANT'S law. [Ex. C 3]. Mr. Antley first drafted the Arbitration Clause, which as he noted to CLAIMANT'S negotiator Ms. Napravnik, was "largely based on the model clause suggested by the HKIAC." [Ex. R 1]. RESPONDENT did include a choice of law provision in this draft, which noted that the *lex arbitri* was to be that of the seat of arbitration. [*See id.*]. CLAIMANT'S responsive draft changed the seat from Equatoriana to Danubia, noting that CLAIMANT'S internal policy would require special approval for "consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty." [Ex. R 2]. This alteration solved the issue by selecting a neutral forum for arbitration. The Sales Agreement is governed by CLAIMANT'S domestic law, and is therefore not "submitted to a foreign law" even though Danubian arbitration law applies to the *procedure* of any potentially arising arbitration. [*See id.*]

1. RESPONDENT agreed to Danubia as the venue in the interest of fairness and did not intend for Mediterraneo law to serve as the procedural law for this Arbitration.

20 RESPONDENT ceded choice of its own law in both substantive and procedural matters through the Sales Agreement and Arbitration Clause. However, there is no basis to support CLAIMANT'S assertion that in doing so RESPONDENT consented to the application of CLAIMAINT'S laws for both the substantive and procedural aspects of the Parties' agreement. In fact, RESPONDENT notified CLAIMANT early in the process of negotiations that it would not consent to complete control of Mediterraneo law and courts—Mr. Antley wrote "we consider it not appropriate that your law applies and your courts have jurisdiction. We could accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction." [Ex. C 3]. This reflected

RESPONDENT'S view that the choice of seat and law for this Arbitration were a compromise between the Parties—offering either equity through an Equatorianian venue, or neutrality through a Danubian venue. RESPONDENT'S objection was based on fairness, not concerns of convenience such as the difficulty of travel or costs in a non-domestic forum. Therefore, to interpret the agreement on Danubia to apply only to the geographic location of the arbitration while still permitting Mediterraneo procedural law to govern the arbitration directly contradicts RESPONDENT'S stated priorities and intent.

2. The Parties' consistently demonstrated intent supports the application of Danubian arbitration law, notwithstanding the change of negotiators.

21 RESPONDENT'S intent was consistent from the beginning of the negotiating process, notwithstanding its change in party negotiator. Following Mr. Krone's instructions, Mr. Antley drafted a preliminary Arbitration Clause that clearly identified not only the seat of arbitration but also the applicable law. [Ex. R 1]. Though he was later receptive to Ms. Napravnik's suggestion that the Arbitral Tribunal be empowered to adapt the contract if the Parties could not reach an agreement, there is no support for the argument that this receptiveness equates an agreement to change the applicable arbitration law or a commitment to empower the Arbitral Tribunal in such a way without further negotiation. [Ex. C 8]. Though the loss of the initial negotiators from the process inarguably introduced complications to the resolution of the Sales Agreement, it does not justify an assumption that negotiations were concluded in favor of CLAIMANT'S position when it is unsupported by the record and would run contrary to RESPONDENT'S communicated intent. [Claimant's Br. ¶ 93]. At most, Ms. Napravnik's statement suggests that the final version of the Arbitration Clause, based largely upon her last draft, was flawed in its failure to include an express choice of law provision. In such a case, it is most appropriate to apply the *lex fori*, in this case the law of a neutral venue.

3. The Parties did not agree to empower the Arbitral Tribunal to adapt the sales price; furthermore, to do so would not have required the application of Mediterraneo arbitration law.

22 The Parties did not include a provision empowering the Arbitral Tribunal to adapt pricing either in the final version of the Arbitration Clause or in any of the draft versions during the negotiation process. The key distinction between Danubia and Mediterraneo's arbitration laws is the requirement of an express empowerment giving an arbitral tribunal the power to adapt a contract.

[ANS. ¶ 13]. Though CLAIMANT'S negotiator Ms. Napravnik says in her witness statement that she briefly discussed the topic of adaptation with RESPONDENT'S negotiator Mr. Antley, no alterations were made to the Clause pursuant to this discussion. [Ex. C 8]. This alone is not enough to demonstrate mutual intent to apply Mediterraneo arbitration law. [Claimant's Br. ¶¶ 98–99]. Ms. Napravnik states:

> Mr. Antley replied that in his view that it should *probably* be the task of the arbitrators to adapt the contract if the Parties could not agree . . . I suggested to clarify that issue and to include an express reference into the *hardship clause or the arbitration clause* to avoid any doubts . . . Mr. Antley promised that he would come back with a proposal the next morning. [Ex. C 8, emphasis added].

23 This testimony shows that though RESPONDENT'S representative may have seen merit in providing this specific power to the Arbitral Tribunal, the Parties' negotiators had not in fact come to an agreement on how this might be implemented. The suggestion that an express reference might be incorporated into the Hardship Clause rather than the Arbitration Clause implies that the negotiators did not discuss the matter in the context of determining which country's procedural laws should govern the arbitration in general. Such a provision might have been included in either Clause regardless of which law governed—Danubian law does not prohibit adaptation by the Arbitral Tribunal, it merely requires express authorization, as Ms. Napravnik had suggested. This discussion therefore was preliminary because it necessitated further proposals rather than embodying a final version of the Arbitration Clause, and did not directly indicate an intent to establish or alter the procedural law.

24 Mr. Julian Krone, head of RESPONDENT'S legal department and Mr. Antley's supervisor, stated that he and Mr. Antley "discussed the main strategy, i.e. the need for DDP delivery and the non-acceptability of the courts of Mediterraneo". [Ex. R 3]. Mr. Antley had also made a personal note to "clarify in arbitration clause that neutral venue and applicable law." [*Id.*] This demonstrates that RESPONDENT considered that maintaining neutrality and fairness in the choice of procedural law and venue was a main priority, and that this was communicated to CLAIMANT as discussed above.

C. The HKIAC Rules 2018 and its explanatory notes support the conclusion that the *lex fori* should apply in the absence of an express choice of law provision.

25 The HKIAC Rules 2018 do not require an express choice of law provision for arbitration, and in the absence of such a provision they support the presumption that the *lex fori* should apply.

Art. 19.2 of the HKIAC Rules enshrines the doctrine of separability into the Rules by indicating that the arbitration agreement "shall be treated as an agreement independent of the other terms of the contract." Art. 36.1 states:

> Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

26 Though this does leave open the possibility that an arbitral tribunal may find laws other than the *lex fori* to be appropriate in terms of the applicable procedural law, it proves that the existence of a choice of substantive law provision does not provide the basis for arguing its transferability to procedural law. The HKIAC *100 Questions and Answers* publication explicitly states, "What is the significance of the place of the arbitration? […] it determines which jurisdiction's arbitration laws apply to the proceedings". [¶ 42]. It then addresses the *Sulamérica* test with regards to *substantive* law by indicating that where no governing law has been chosen for the *contract,* it will be "the law of the jurisdiction with which the contract has the closest connection." [*Id.* ¶ 46.] The HKIAC publishes on its website a list of Model Clauses for arbitration, in which it suggests that parties should include an express choice of law provision "particularly where the law of the substantive contract and the law of the seat are different." [*Model Clauses*]. Though it notes that this provision is "optional," coupled with the publications discussed above it suggests that the HKIAC Rules understand the *lex fori* to be the implied choice of the parties absent an express provision or significant evidence to the contrary beyond the choice of substantive law.

27 RESPONDENT'S intent has been consistent throughout the negotiating process with CLAIMANT, and should not be reinterpreted to allege an implied choice of law that runs contrary to that fundamental intent just because Mr. Antley was receptive to the idea that the Arbitral Tribunal might be able to resolve the specific issue of price adaptation. Arbitration is an inherently flexible and customizable process, and parties may consent to the extent of jurisdiction and power for an Arbitral Tribunal that they deem desirable. If the negotiations between the Parties had in fact resolved to provide the Arbitral Tribunal with the ability to adapt the contract, this could have been done by express provision. It would not have required that the applicable procedural law be changed to that of Mediterraneo, and therefore Mr. Antley's initial receptiveness to the suggestion is not sufficient to overcome the presumption that the *lex fori* should apply. Danubian procedural

law provides a neutral context for arbitration, which was the demonstrated desire of both Parties.

28 The Parties agreed to a neutral venue for arbitration, balancing RESPONDENT'S desire for fairness such that Mediterraneo law and courts not control the entirety of the Sales Agreement and any resulting arbitrations against CLAIMANT'S company policy discouraging "dispute resolution in the country of the counterparty". [*See* Ex. C 3; Ex. R 2]. This result demonstrates that the Parties viewed the Sales Agreement and the Arbitration Clause to be legally distinct in accordance with the doctrine of separability, and the Parties' selection of a Danubian seat should be interpreted by this Arbitral Tribunal as an implied choice of Danubian arbitration law, as supported by the HKIAC Rules 2018. In finding that Danubian law is the most appropriate procedural law in this dispute, the Arbitral Tribunal should also find that it does not have the jurisdiction or power to adapt the contracted sales price because the Parties failed to reach a meeting of the minds on this empowerment and did not expressly include such a provision as is required by Danubian arbitration law.

II. THE ARBITRAL TRIBUNAL SHOULD PROHIBIT THE INTRODUCTION OF EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING.

29 The Arbitral Tribunal should decline to permit CLAIMANT to admit into evidence the Partial Interim Award or other submissions ("**PIA**") from an arbitration in which RESPONDENT was previously engaged ("**Arb1**"). To act otherwise would be to violate principles of confidentiality provided by the HKIAC rules which were selected to bind both the current Arbitral Tribunal and that of Arb1 (**Section A**). Preventing the introduction of the PIA would also be in line with the "Clean Hands Doctrine" as CLAIMANT actively sought and incentivized disclosure of this confidential information (**Section B**). This Arbitral Tribunal must also exercise its sound discretion to prevent admission of the PIA in order to preserve equal protection of the parties (**Section C**) and because doing so does not infringe upon CLAIMANT'S reasonable opportunity to present its case (**Section D**). Finally, declining to admit the PIA is in line with the wisdom of the International Bar Association ("IBA") Guidelines on Evidence (**Section E**).

A. Admitting evidence from the other arbitration proceeding would violate principles of confidentiality.

30 The Arbitral Tribunal should uphold the validity of the HKIAC confidentiality provisions and find that the PIA is inadmissible. Arb1, to which RESPONDENT was a party and from which CLAIMANT now seeks to introduce the PIA, was governed by the HKIAC Arbitration rules.

[Fasttrack Ltr., 3/10/18]. By selecting these rules, RESPONDENT sought the strong confidentiality protections enshrined in the HKIAC provisions. Art. 42 of the HKIAC rules reads:

> Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration. [HKIAC Art. 45.1].

The duty of confidentiality to prevent disclosure of sensitive information extends to arbitral tribunals. [HKIAC Art. 45.2]. Although CLAIMANT was not a party to Arb1, CLAIMANT is seeking to utilize confidential information from Arb1. This Arbitral Tribunal should find that HKIAC's protections attach not just to the parties of the agreement, but to the information sought to be protected.

31 The HKIAC rules emphasize party consent before information can be disclosed. RESPONDENT does not now, and did not ever, consent to the publication and disclosure of the PIA from Arb1 which not only includes information concerning the underlying dispute, but also arguments advanced by the parties, deliberations of the arbitrators, and specific commercial contracts RESPONDENT maintains. [PO 2 ¶ 39]. That the other party involved in Arb1 has protested the manner in which CLAIMANT intends to use the PIA underscores that CLAIMANT is acting without any consent, and the confidentiality protections that attached once the parties opted for the HKIAC rules have not been nullified. [Fasttrack Ltr., 3/10/18]. The only way for these protections to not be rendered meaningless is for this Arbitral Tribunal to recognize their validly and reject CLAIMANT'S attempt to present evidence from Arb1.

32 Confidentiality is perceived to be one of the key advantages of international commercial arbitration. [Queen Mary]. Confidentiality plays an essential role in fulfilling the objectives of an international commercial arbitration agreement. [Rodgers & Alford at 21]. For these reasons, it is no coincidence, and no surprise, that most recent revisions of institutional arbitration rules have enhanced the confidentiality obligations on both parties and arbitrators. [*Id.*]. This reflects the expectations of users of international arbitration, as well as the objectives that international arbitration agreements are intended to achieve. [*Id.* at 22].

33 The precise extent of confidentiality in an arbitration proceeding depends on the applicable laws as well as the parties' agreement, including the choice of governing institutional rules. [Moser & Bao, §12.27]. Hong Kong is one of the few jurisdictions where the duty of confidentiality is expressly codified by statute. [Choong & Weeramantry]. The confidentiality obligations of

HKIAC Art. 42.1 are wider in scope than the Hong Kong Arbitration Ordinance and are meant to protect sensitive commercial information or trade secrets that frequently arise in the context of international commercial arbitration. [Moser & Bao, §12.29]. These concerns apply to arbitral awards, interim or otherwise such as the PIA that CLAIMANT now seeks to admit. Even at the conclusion of arbitral proceedings, an award or other submission may entail the publication of commercial confidences.

34 Allowing CLAIMANT to admit the PIA from Arb1 contra the express confidentiality that protects the parties to that arbitration would violate party autonomy by rendering defunct the confidentiality provisions of HKIAC. The importance of these confidentiality provisions to the parties is made clear by the fact that RESPONDENT took actions to protect the information to be disclosed over the course of the proceedings in Arb1. RESPONDENT'S employees, who had been witnesses in Arb1, were placed under a contractual obligation to keep all information about the Arb1 proceedings confidential. [PO 2 ¶ 41]. That Mr. Kieron Velazquez, who until May 2018 had been working for the other party in Arb1, could not manage to obtain from his former employer a copy of the PIA in Arb1 demonstrates the extent to which the parties in Arb1 sought to keep the information strictly confidential. [PO 2 ¶¶ 40–41]. If this Arbitral Tribunal were to permit CLAIMANT to admit the PIA, it would be in effect facilitating the disclosure of this sensitive information to additional individuals, despite strict confidentiality provisions and express diligence by the parties. This would serve to deter similarly situated parties from engaging in commercial arbitration.

35 Additionally, if the Arbitral Tribunal fails to enforce the confidentiality provisions governing Arb1, any award issued in this arbitration would similarly be rendered less worthy of confidentiality protection. The very same HKIAC confidentiality provisions that are meant to protect the PIA from Arb1 are the ones the current Parties elected to take effect here. A future arbitral tribunal would be permitted, if not encouraged, to freely consider and disclose the deliberations and decisions of this Arbitral Tribunal because this very tribunal deemed it appropriate to do so to a previous HKIAC protected arbitration. Both Parties stand to be harmed by this approach because sensitive business practices and strategies may need to be disclosed to the Arbitral Tribunal to adjudicate the merits of this dispute and it would serve both Parties to ensure such information is not freely disclosed.

B. CLAIMANT acquired the evidence in a manner that violates the clean hands doctrine.

36 There are two possible sources for the evidence before this Arbitral Tribunal. First, it could have been procured through two former employees of RESPONDENT who were witnesses in the Arb1 proceedings and subject to contractual obligation to keep all information about Arb1 confidential. [Fasttrack Ltr. 3/10/18]. Second, it could have been procured through a hack of RESPONDENT'S computer system which occurred in September 2018, during which, hackers managed to retrieve a considerable amount of confidential data. [*Id.*]. Under either set of circumstances, the evidence was obtained illegally. In such circumstances, past arbitral tribunals have applied the unclean hands doctrine: a party who lacks "clean hands" in the publication of confidential material should not be able to benefit from its availability.

37 This principle is best demonstrated by *Methanex v. United States*, where the Canadian company Methanex attempted to rely on documents obtained through "dumpster diving," an illegal activity that involves going through an entity's waste and trash—in this instance, that of a particular lobbying organization. [*Methanex*]. The tribunal unanimously found the unlawfully obtained documents to be inadmissible. "Just as it would be wrong for the USA […] to misuse its intelligence assets to spy on [the investor] and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for [the investor] to introduce evidential materials obtained by [the investor] unlawfully." [*Id.* ¶ 54]. The tribunal emphasized the need to preserve the general duty of good faith and the basic principles of justice and fairness: "[i]t would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration." [*Id.*].

38 Here, CLAIMANT'S hands are "unclean," as demonstrated by the means through which it plans to procure the PIA. CLAIMANT is not yet in possession of this evidence and intends to acquire it by paying a large sum of money to a company which provides intelligence on the horseracing industry. It is undisputed that this company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand. [PO 2 ¶ 41]. Thus, it is not clear whether the person who had provided the award to the company was the hacker or one of RESPONDENT'S former employees. This is to say that the evidence will become available

only through CLAIMANT'S financial incentivizing.

39 The Arbitral Tribunal should follow the international standards and exclude the illegal evidence CLAIMANT had an active role in securing. The Arbitral Tribunal is guided not only by past cases and commentary [Blair & Vidak Gojković], but also by the HKIAC rules consented to by both Parties, which counsel that "[t]he arbitral tribunal and the parties shall *do everything necessary to ensure the fair*…conduct of the arbitration." [Art. 13.5].

C. Evidence from RESPONDENT'S previous arbitration must be excluded to preserve the equal protection of the Parties.

40 The HKIAC rules provide that "the arbitral tribunal shall adopt suitable procedures for the… equal treatment of the parties." [Art. 13.1]. Indeed, the equality of treatment of parties before an arbitral tribunal is a fundamental principle of justice [*Tehran Inc.*]. The "equal treatment" principle is meant to ensure that the parties are operating on a level playing field. [Born, p.2173]. The guarantee of equal treatment is applicable to all aspects of the arbitral procedure including evidentiary admissibility decisions. [*Id.*] Permitting evidence from another arbitration in which RESPONDENT was engaged violates this principle. RESPONDENT would effectively be placed in a position in which it must overcome additional hurdles to obtain redress for contractual rights as a consequence of pursuing such redress in the past. RESPONDENT has no way of collecting this same kind of information concerning CLAIMANT because HKIAC does not regularly publish arbitral tribunal awards. CLAIMANT would be placed in an advantageous position because it found a business willing to violate confidentiality agreements and secure copies of the PIA. The Arbitral Tribunal should prevent the inequity this practice creates. To do otherwise would leave room for a challenge to the award and render it vulnerable to being set aside or deemed unenforceable. [Moser & Bao, § 9.18]. According to Art. 13.10 of HKIAC Rules, the Arbitral Tribunal is obligated to make an effort in ensuring the validity of the award. In order to protect this validity, the Arbitral Tribunal should exclude CLAIMANT'S evidence.

D. Exclusion of evidence from the other arbitration proceeding does not deprive CLAIMANT of a reasonable opportunity to present its case.

41 CLAIMANT alleges that if the Arbitral Tribunal were to deny CLAIMANT'S request, its right to present its case would be violated. [Claimant's Br. ¶ 106]. It is universally accepted that an arbitral tribunal is not bound to hear all the evidence adduced by the parties so as to comply with their right to be heard. [Kaufmann-Kohler/Rigozzi, at 281 §6.33]. This is because the right to be

heard is not absolute. [T.H. Webster at 272]. The HKIAC rules provide for a "reasonable opportunity" rather than a "full opportunity." [HKIAC Art. 13.1; Gregoire at 34]. Courts regularly dismiss applications to set aside tribunal awards that followed exclusions of evidence when such evidence is either cumulative or the aggrieved party had other available legal means to present its case. [Gregoire at 34].

42 The right to a full opportunity to present a case does not presumptively override an arbitral tribunal's power to determine admissibility or weight of evidence. [Waincymer, § 10.17.10.]. Therefore, any refusal by the arbitral tribunal to address relevant evidence does not violate the parties' procedural rights. [*Karaha Bodas Co*]. Only the dismissal of evidence which is material to the outcome of the case impairs the parties' procedural right to a fair trial. [Kaufmann-Kohler/Rigozzi, p. 281, §6.33]. The PIA is neither relevant, nor material. Hence, the dismissal of its request will by no means undermine CLAIMANT'S right to be heard.

43 CLAIMANT'S evidence is not material because CLAIMANT can present its case without evidence from RESPONDENT'S previous proceeding. The question before the Arbitral Tribunal is whether the Arbitral Tribunal may adapt the contract to account for unforeseen tariffs consistent with the intention of the Parties, the applicable deliberations and contract, and the parameters of the governing law. As demonstrated by the record before the dispute, the Parties corresponded extensively both before, during, and after the drafting of the contract at issue and the Arbitral Tribunal has been supplied with that correspondence documenting the intention of the Parties as well as the actual Sales Agreement. The Arbitral Tribunal should base its decision on these documents and it is not necessary to delve into RESPONDENT'S actions concerning another party, another contract, under different law. The PIA is not relevant because the other dispute involves a different set of negotiations that occurred under circumstances distinct from those of the dispute before this Arbitral Tribunal now and, as argued above, is governed by different national law. Regardless of RESPONDENT'S submissions in Arb1, the Arbitral Tribunal is bound by the Parties' intentions and deliberations in the present case.

E. Contrary to CLAIMANT'S argument, the IBA Evidence Rules are not applicable to the present dispute and do not support admitting evidence from the other arbitration proceeding.

44 CLAIMANT encourages the Arbitral Tribunal to seek guidance from the IBA Evidence Rules in resolving the present evidentiary dispute. [Claimant's Br. ¶ 108]. However, the IBA Rules do not

apply to this arbitration as the Parties did not choose to apply them and the IBA Rules cannot bind the Arbitral Tribunal without the Parties' explicit consent. [Waincymer at 757]. Applying a set of rules in the absence of the Parties' agreement would violate the principle of party autonomy. [O'Malley at 7, ¶ 1.20]. The Arbitral Tribunal is only bound by the mandatory laws of the *lex arbitri* [Redfern & Hunter, ¶¶ 26–71]. The IBA Rules are not per se mandatory for the Arbitral Tribunal [Born at 2212]. As they are part of soft law [Kaufmann-Kohler/Rigozzi at 26–27, §§1.77-1.78 and at 318, §6.68], the Parties need to expressly agree upon their application. [Art. 1(1)(2) IBA Rules; Born at 2212].

45 Even if the Arbitral Tribunal were to turn to the IBA Guidelines for counsel in resolving the current evidentiary dispute, these rules do not support permitting CLAIMANT to use the PIA from Arb1. As the evidence CLAIMANT seeks to introduce is neither material nor relevant, the IBA Rules on Evidence counsel against admission of the evidence. [IBA Art. 9].

46 First, the requested documents must be material to the resolution of the case. [Born at 2362; O'Malley, ¶ 3.76]. A document is material when it influences the tribunal's determination of issues in dispute. [Waincymer at 859]. CLAIMANT argues that use of the evidence from the other arbitration sheds light on RESPONDENT'S intention with respect to various provisions of the Sales Agreement. As discussed above, the Arbitral Tribunal has ample evidence to infer these intentions by the numerous documents tracking the correspondence, deliberations, and agreements of the Parties. The Arbitral Tribunal need not examine the evidence from the previous proceeding to make an informed decision. Second, as Arb1 implicated different law than that which this Arbitral Tribunal must consider here, the PIA from Arb1 is not relevant.

47 Moreover, the IBA Rules provide that "at the request of a Party or on its own motion, [the Tribunal shall] exclude from evidence or production any Document, statement, oral testimony or inspection" based on "grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling." [IBA Rules, Art. 9(2)(f)]. The documents CLAIMANT seeks to enter are protected by commercial confidentiality. In Arb1, both parties expected from each other that the terms and conditions of their contract would not be revealed. This should be acknowledged by the Arbitral Tribunal as duties owed to a third party and the risk of legal liability are crucial in assessing the objection based on business confidentiality. CLAIMANT is seeking access to information pertaining to the purchase price paid by this third party. The price calculation, negotiations concerning pricing and the price itself, typically fall within the realm of

commercial confidentiality. Although CLAIMANT claims to already know the content of the PIA, [Claimant's Br. ¶ 116] the fact that both RESPONDENT and the other party to Arb1 jointly contend that CLAIMANT'S contentions regarding the PIA "do not reflect reality and are taken out of context" does away with this argument. [Fasttrack Ltr., 3/10/18]. Article 9.2(2) of the IBA Rules was implemented to protect 'valid business secrets' [Raeschke-Kessler at 429], particularly those found in a party's business documents which is the very case here.

48 The Arbitral Tribunal should, in line with the provisions of the HKIAC arbitration rules and leading cases and commentary, prevent CLAIMANT from admitting the PIA into evidence in violation of principles of confidentiality, the clean hands doctrine, and the equal treatment of the Parties.

ISSUE III: CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE CONTRACT PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT (SECTION I), OR UNDER THE CISG AND UNIDROIT PRINCIPLES (SECTION II).

49 Despite knowledge of the Equatorianian government's imposition of a 30 per cent tariff on all animal products imported from Mediterraneo, CLAIMANT shipped RESPONDENT the last installment of race horse semen in accordance with the freely negotiated terms of the Sales Agreement. Although, in so doing, CLAIMANT incurred more expense, CLAIMANT'S voluntary act does not entitle it to an adaptation of the contract price under clause 12 of the Sales Agreement (**Section I)**, nor under the CISG and UNIDROIT Principles (**Section II**).

I. CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT.

50 The Parties negotiated and agreed to a "hardship clause" in clause 12 of the Sales Agreement, a provision that allows for the adaptation of the contract under certain circumstances. The clause states:

> Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous. [Ex. C 5 ¶ 12].

The Parties expressly and explicitly listed circumstances where an adaptation is permissible, expressly limiting the clause to account for uncontrollable circumstances, as well as hardship experienced as a result of "health and safety requirements" or "comparable unforeseen events." The clause does not apply to the circumstances present here because the Equatorianian

government's imposition of tariffs do not constitute an additional "health and safety requirement" or a comparable unforeseen event (**Section A**), and CLAIMANT did not suffer a hardship (**Section B**). In the absence of these two elements, CLAIMANT is not entitled to an adaptation of the contract price under clause 12.

A. CLAIMANT is not entitled to an adaptation of the contract price under clause 12 of the Sales Agreement because the Equatorianian government's tariffs are not comparable to unforeseeable "additional health and safety requirements."

51 It is a basic principle of contract law that parties to a contract accept certain risks, namely, that those circumstances prevailing at the time of the contract's formation may change while their duties remain the same. Generally, only a "fundamental change in circumstances" merits an adjustment of a contract. [Brunner at 401–402; Article 6.2.2 UPICC]. For example, the arbitral tribunal in the *Turkish buyer & Dutch supplier* case found that no fundamental change occurred when private manufacturers were introduced into the Turkish economy, resulting in a fall of the price of the product. Likewise, in the *Turkey & The Netherlands* case, an increase of the fuel price by 50 per cent was not significant enough to constitute a fundamental change. Such a high burden of proof is meant to encourage parties to attempt to foresee changed circumstances, and to account for them in their contracts. [Brunner at 408]. In the instant case, the Equatorianian government's tariffs do not constitute a fundamental change because (1) the action was foreseeable and (2) CLAIMANT did not experience a hardship as a result. In the absence of these findings, the Arbitral Tribunal should not provide CLAIMANT an exit from its voluntarily assumed contractual obligations.

1. The Equatorianian government's tariffs are not comparable to "additional health and safety requirements."

52 CLAIMANT may only invoke relief under clause 12 if it can demonstrate its hardship is caused by events comparable to "additional health and safety requirements." [Ex. C 5 ¶ 12]. These "requirements" refer to those "highly expensive tests" [Ex. C 4] and the quarantine time imposed by the Equatorianian government on animals to prevent the spread of infectious diseases. [PO 2 ¶ 21]. Thus, if the events leading to CLAIMANT'S hardship resemble medical tests and animal quarantine time, CLAIMANT may be granted an adaptation.

53 However, the two events, the imposition of health and safety requirements and the imposition of government tariffs, are innately incomparable. Health and safety requirements seek to protect a

country's citizenry from tangible harm. This objective is exemplified by the Equatorianian government's past imposition of "serious restrictions." [NOA ¶ 5] involving "long quarantine time" for all living animals upon its discovery of a "rare and aggressive type of foot and mouth disease" that killed one third of the local cow population. [PO 2 ¶ 21]. As indicated, the restrictions did not affect foreign imports alone, but the entire domestic industry as well. Importantly, this government action did not serve as a political vendetta, but aimed at resolving a real health problem.

54 The instant government action is quite unlike government mandated health and safety requirements: it is not justified by a tangible threat to the public. Instead, the imposition of discriminatory tariffs on animal products originating from Mediterraneo is a classic retaliatory measure imposed to satisfy political aims by reacting promptly and severely against what the Peak News Report article "An End of Open Markets?" described: "more of a mockery of the system than a good faith effort to justify the controversial [Mediterraneo] tariffs within the boundaries of the existing system." [Ex. 6]. The retaliatory tariffs (Mediterraneo was first to impose similar tariffs. [PO 2 ¶ 23]), amount to little more than a political battlefield between sovereigns, and have nothing to do with the sound imposition of health and safety requirements. CLAIMANT is therefore not entitled to an adaptation under clause 12 because the government imposition of tariffs on race horse semen is not comparable to mandated safety tests or quarantine time for livestock.

2. The government imposition of tariffs was not unforeseeable.

55 In the event the Arbitral Tribunal does find the imposition of tariffs comparable to "additional health and safety requirements," CLAIMANT'S appeal for an adaptation of the Sales Agreement is still untenable because the imposition of tariffs was foreseeable. For relief under clause 12, the comparable event amounting to a fundamental change must be unforeseeable, understood by the international community as a "distortion of the contractual equilibrium [that] could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract." [Da Silveira at 323]. Past arbitral tribunals have found that only "truly exceptional circumstances" can amount to an unforeseen event, where, for example, even the dramatic decrease in price of a product, or currency fluctuations do not constitute unforeseen events and do not merit an adjustment in a contract price. [*Turkish buyer & Dutch supplier* case quoting *Jarvin/Derains*]. For example, in *Himpurna*, the contraction of the Indonesian economy by 15 per cent in one year alone (1998-1999), the loss of 5 million jobs nationwide, the 80 per cent loss of

the local currency's value, and inflation rate exceeding 75 per cent was not deemed unforeseeable.

56 Similarly, the Equatorianian government's tariffs on horse semen does not constitute an unforeseeable act, meritorious of an adjustment of the contract price. At the time of the contract's formation, CLAIMANT knew of Equatoriana's nebulous political environment. In its first email to CLAIMANT, RESPONDENT declared the ban on artificial insemination for race horses lifted "at least temporarily." [Ex. C 1]. RESPONDENT repeated itself, declaring the lift temporary until the end of December 2018, a mere 20 months away. [*Id.*]. Although RESPONDENT enthusiastically declared it was "confident that [the lift] will become permanent," it nonetheless tempered its statement in its very next breath—"Irrespective of whether our expectations will materialize." This cautionary language revealed to CLAIMANT the possibility that the Equatorianian government would revoke its lift of the ban on race horse semen, and that RESPONDENT'S expectation would not materialize after all. Additionally, as revealed by CLAIMANT in its NOA, CLAIMANT interpreted RESPONDENT'S enthusiasm as an inducement to additional breeders to "fight for a permanent lifting of the ban." [NOA ¶ 6].

57 RESPONDENT again invoked the potential for adverse government action in its email dated 28 March 2017: "[W]e are highly interested in long-term cooperation… [t]hat would … involve natural coverage … should the lifting of the ban expire or be revoked in Equatoriana." [Ex. C 3]. This is an unequivocal expression of the uncertainty of government action toward the importation of animal semen. CLAIMANT confirmed knowledge of the Equatorianian government's past treatment of the importation of living animals ("serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease for the past two years" [NOA ¶ 5]) and, in its own words, referred to the ban on artificial inseminations as "temporarily lifted." [*Id.*]. CLAIMANT knew RESPONDENT wanted to take advantage of the temporary lift, also evidenced by RESPONDENT'S timing in requesting an offer promptly after the lift of the ban ("At that time, the Equatorianian Government had imposed serious restrictions on the transportation of all living animals ... which already lasted for two years." [NOA ¶ 5]). CLAIMANT understood that the high number of doses (100) would benefit RESPONDENT, because "under relevant Equatorianian law all doses acquired during the lifting of the ban could be used" to RESPONDENT'S advantage. [NOA ¶ 6].

58 Finally, once agreeing to DDP delivery, CLAIMANT assumed the known risk by dramatically increasing its price per dose from USD 99.5 to USD 1,000. [Ex. C 4]. The direct additional cost

associated with transportation and DDP delivery per dose is USD 200 [PO 2 ¶ 8], leaving USD 800 to cover CLAIMANT'S profit margin and all other costs. As a sophisticated and established business mogul ("[CLAIMANT] operates Mediterraneo's oldest business and most renown stud farm" [NOA ¶ 1] and "Claimant had regularly sold frozen semen…" [PO 2 ¶ 15]), CLAIMANT should have accounted for the nefarious political climate in Equatoriana in its price per dose. However, CLAIMANT admits it "did not question [the RESPONDENT'S] information [about the lift of the ban]…, since for them the contract was a good opportunity to increase their revenues without any major additional risk." [NOA ¶ 6]. RESPONDENT should not suffer the consequences of CLAIMANT'S lack of foresight when CLAIMANT freely and knowingly assumed the risk of conceivable deleterious government action.

59 CLAIMANT attempts to bolster its claim that the scope of the tariffs was unforeseeable by arguing that racehorse breeding is generally categorized separately from other "pigs, sheep, or cattle." [NOA ¶ 11]. However, racehorse semen, an animal byproduct, would naturally qualify as an animal product within the tariff's reach. CLAIMANT further seeks to bolster the unforeseeable nature of the tariffs by citing to the "competent authorities [who] could only clarify the scope [of the executive order] after some time." [Claimant's Br. ¶ 12]. The fact that government officials took one afternoon [Ex. R 4] to respond to RESPONDENT'S Mr. Shoemaker's inquisition is not atypical of a bureaucracy, where lack of knowledge among ministry staffers and delay is anticipated. Both arguments are tenuous, and do not succeed in demonstrating that the government act was unforeseeable.

B. The tariffs do not constitute a hardship for CLAIMANT.

60 In order to adapt the contract price, CLAIMANT must also prove it experienced hardship. Hardship is usually defined as a dramatic change in circumstances that leads to a "fundamental disruption of the contractual balance," where performance of the terms becomes radically more onerous. [Da Silveira at 323]. However, as demonstrated by case law, even an "abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like" does not of itself affect the bargain. [*British Movietonenews* case; *see also Neal-Cooper Grain* "We will not allow a party to a contract to escape a bad bargain merely because it is burdensome"].

61 For example, in the *France & Algeria* case, a general lack of security in Algeria created by attacks against foreigners, particularly French nationals, difficulties in doing business in Algeria, such as in sending materials, spare parts, recruiting of personnel etc., transportation problems due to the

degradation of the Algerian national road network and the periodic closing of roads, interruption in supplies of asphalt due to production shut-downs at Algerian supplier factories, natural elements, including heavy rains and sand storms, and the defendant's alleged improper use of the road under construction, necessitating repairs did not amount to hardship. Likewise, in *Petrobras*, the R$1.6 billion loss when there was an anticipated R$500 million gain was not deemed a hardship. Here, although an increase of 25 per cent of the contract price is doubtless economically burdensome for CLAIMANT, the experience is not sufficiently grave to satisfy the requisite hardship threshold.

1. The tariffs amounting to 25 per cent of the contract price do not constitute hardship.

62 Pursuant to international standards, a 25 per cent increase of the contract price falls within the "ordinary range of commercial probability" [Brunner at 409] and is therefore underserving of adaptation. Based on a comparative law analysis, the contractual equilibrium must be altered by at least 100 per cent to be deemed fundamental [Brunner at 428–435], with an advisable 150–200 per cent margin for a successful claim. [Schwenzer at 717]. Both courts and arbitral tribunals have been very reluctant to grant hardship claims, effectively erecting a "barrier to a possible flood of litigation, discouraging evasion." [Brunner at 418]. For example, in *Turkey & The Netherlands* case, the arbitral tribunal did not find the 25–50 per cent increase in the fuel price a hardship meritorious of adaptation, nor in *Maple Farms* did the U.S. court find the 23 per cent increase in the supplier's input prices a hardship deserving of relief. However, in *ALCOA*, the U.S. court found that the 600 per cent increase of the cost to convert raw material into aluminum constituted an "extreme and unreasonable difficulty," meritorious of adaptation.

63 Like the *Turkey & The Netherlands* case and *Maple Farms* and vastly unlike *ALCOA*, here, CLAIMANT only suffered a 25 per cent increase of the purchase price, a percentage well below the range courts and arbitral tribunals find meets the fundamental hardship threshold. Without proving a fundamental hardship, CLAIMANT cannot succeed on its appeal for an adaption under clause 12 and be relieved from its freely-assumed contractual duties.

2. In any event, CLAIMANT did not experience hardship as evidenced by its conduct.

64 Should the Tribunal find that a 25 per cent increase in the contract price does rise to the level of hardship, this is of no moment, because CLAIMANT, in its early conduct, demonstrated that it

did not suffer hardship. To succeed on a hardship claim, the moving party must demonstrate it experienced "unbearable difficulties." [*Turkey & The Netherlands* case]. For example, in *Turkey & The Netherlands* case, since the seller admitted that the contract in dispute represented only a small percentage of its revenues, the tribunal found it unlikely that the performance of the contract at the agreed prices would have caused "unbearable difficulties." Similarly, here, CLAIMANT demonstrated via its conduct that it did not experience hardship as a result of the government action. Instead, it freely acted according to its best business judgment.

65 CLAIMANT'S shipment of the last 50 doses of frozen semen despite the contractual stipulation that payment be made before shipment indicates CLAIMANT did not in fact experience hardship. Despite RESPONDENT'S appeal for urgent shipment [Ex. C 8, p. 18], CLAIMANT had no contractual duty to ship the last installment until after the Parties accounted for the changed circumstance, pursuant to clause 5 of the Sales Agreement ("… Buyer specifically agrees and understands that no semen will be shipped until all fees have been paid." [Ex. C 5 ¶ 5]). In its capacity of sophisticated dealer, CLAIMANT used its best judgment and made a conscious decision to forgo its profit margin and absorb the tariffs in order to nurse a long-term relationship with RESPONDENT. [Ex. C 8, p. 18].

66 In addition, Article 6.2.3 Official Comment n.2 provides that "[t]he request for renegotiations must be made as quickly as possible after the time at which hardship is alleged to have occurred," where "[t]he delay in making the request may … affect the finding as to whether hardship actually existed and, if so, its consequences for the contract." CLAIMANT submitted its NOA on 31 July 2018, approximately six months after its shipment of the race horse semen [NOA, p. 8], and five months after the discussion with RESPONDENT'S CEO about the matter. [Ex. C 8, p. 18]. CLAIMANT'S delay in its request for relief demonstrates CLAIMANT did not in fact experience hardship. Otherwise, it would have acted sooner to recover its million-dollar loss.

3. CLAIMANT did not experience hardship caused by the government tariffs.

67 Finally, CLAIMANT did not experience hardship because there is no causation. The government tariffs did not cause CLAIMANT'S distress as required by clause 12, which states hardship must be "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [Ex. C 5 ¶ 12]. CLAIMANT'S troubles are attributed to prior financial strain. [Ex. C 8, p. 17]. This financial predicament, however, is not RESPONDENT'S burden to share in. Unfortunately for CLAIMANT, it was hit by a series of unfortunate events

and made a bad deal. This bad deal, however, is not deserving of a contractual remedy under clause 12.

C. Finally, clause 12 of the Sales Agreement should not govern because Mr. Shoemaker's representation was not binding on RESPONDENT.

68 RESPONDENT'S Mr. Shoemaker did not have the authority to make a promise to be enforced by this Arbitral Tribunal, nor was his statement a promise which would permit CLAIMANT an adaptation of the contract price.

1. RESPONDENT'S Mr. Shoemaker did not have actual or apparent authority to bind RESPONDENT to a renegotiation of the contract price.

69 RESPONDENT'S Mr. Shoemaker did not have the actual authority to bind RESPONDENT to an adaptation of the contract. Replacing his colleague as responsible for the development of the racehorse breeding program a mere two and a half months before the disputed conversation transpired [Ex. R 4], Mr. Shoemaker was not yet entrusted with the requisite authority to single handedly alter the contract, something even matured CEOs do not enjoy without consulting their legal department.

70 Nor did Mr. Shoemaker have the apparent authority to bind RESPONDENT. Although RESPONDENT introduced Mr. Shoemaker to CLAIMANT'S Ms. Napravnik as responsible for the race horse breeding program "including all questions concerning" the Sales Agreement [PO 2 ¶ 32], Mr. Shoemaker limited the scope of his authority himself by communicating to Ms. Napravnik several times that he was "not a lawyer and had not been involved in the negotiations of the contract" and that he had to first confirm with either his superiors or the legal department and the drafters of the Sales Agreement about whether CLAIMANT was obligated to deliver at the conditions agreed upon. [Ex. R 4]. Ms. Napravnik admits that Mr. Shoemaker had conveyed he "could not directly authorize any additional payment" [Ex. C 8, p. 18], revealing she was aware of the confines of his authority as responsible. With this in mind, CLAIMANT'S request to adapt the contract based on its reliance on RESPONDENT'S agent does not hold because Mr. Shoemaker was never in a position to bind RESPONDENT, and CLAIMANT knew it.

2. In any event, RESPONDENT'S representation does not amount to a promise of adaptation.

71 In the event the Arbitral Tribunal finds that Mr. Shoemaker did indeed have the authority to bind RESPONDENT in a guarantee of adaptation, Mr. Shoemaker's statement to CLAIMANT'S Ms.

Napravnik does not rise to the level of a promise. The statement, "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [Ex. R 4], would not lead a reasonable person to believe the speaker was promising an adaptation of the contract price. Mr. Shoemaker did not state when a discussion would be held, how a decision would be made, who would make the decision etc… Without more, the statement is overly ambiguous. Although it was CLAIMANT'S burden to clarify, and force RESPONDENT to commit, CLAIMANT chose to rely on the "impression" that RESPONDENT "accepted our position" for an adaptation of the contract price. [Ex. C 8, p. 18]. CLAIMANT is now regretting its decision, and requests an adaptation of the contract when there is no legitimate basis for its claim. Mr. Shoemaker's assertion does not amount to a promise, and therefore, he did not bind RESPONDENT in an adaptation of the contract price.

72 In sum, Clause 12 of the Sales Agreement is not triggered to permit an adaptation of the contract price because CLAIMANT did not suffer a comparable unforeseen hardship as defined under the clause and CLAIMANT did not reasonably rely on RESPONDENT'S representation to its detriment.

II. CLAIMANT IS NOT ENTITLED TO AN INCREASED PAYMENT FROM RESPONDENT UNDER THE CISG (SECTION A) OR UNDER THE UNIDROIT PRINCIPLES (SECTION B).

73 CLAIMANT is not entitled to the payment of USD 1,250,000 or any other increased amount resulting from an adaptation of price under the CISG. The Equatorianian government imposed tariffs on horse semen, causing CLAIMANT to lose some profit, and now CLAIMANT unfairly seeks increased payment from RESPONDENT. However, CLAIMANT'S loss has nothing to do with RESPONDENT; it relates specifically to government tariffs and it would be unfair to saddle RESPONDENT with any resulting burden. CLAIMANT is not owed additional payment under the CISG (**Section A**) and the UNIDROIT Principles (**Section B**).

A. CLAIMANT is not entitled to an increased payment under the CISG.

74 CLAIMANT claims that CISG Article 79 allows it to avoid performance without liability when an impediment makes performance impossible. However, Article 79 is inapplicable to this dispute, and even if Article 79 was applied, the tariffs do not constitute an impediment that made performance impossible. In fact, CLAIMANT'S actions prove that performance was possible. CLAIMANT successfully delivered the final doses exactly as envisioned by the Sales Agreement.

Further, the Parties never agreed to renegotiate a new contract price under Article 8 and RESPONDENT acted in good faith while working with CLAIMANT. CISG Article 79(1) does not apply because the Parties specifically derogated from its application in the Sales Agreement (**Section 1**), and even if Article 79(1) were to apply, it is not relevant because CLAIMANT failed to avoid performance (**Section 2**). Moreover, the government's tariffs do not constitute an impediment (**Section 3**) and their imposition did not result in any agreement between the Parties to renegotiate the contract price (**Section 4**). Finally, at all times, RESPONDENT abided by its duty of good faith under Article 7(1). For each of these reasons, CLAIMANT is not entitled to an increased payment.

1. CLAIMANT is not entitled to payment under CISG Article 79 because the Parties expressly and specifically derogated from its application.

75 CLAIMANT'S argument that it is entitled to an increased payment under CISG Article 79(1) fails because its application contradicts the express and specific terms agreed on between the Parties in the Sales Agreement, specifically the force majeure and hardship clause. While the Parties have generally agreed that the CISG governs the Sales Agreement [Ex. C 5 ¶ 14], the Parties derogated from application of all provisions of the CISG through their specific agreement to the force majeure and hardship clause. This approach is allowed under CISG Article 6, which states "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." [Art. 6]. Article 79 allows a seller to avoid performance when there is a hardship. [Art. 79]. This contradicts the Parties' express and specific negotiated terms as reflected in the Sales Agreement, which includes a force majeure and hardship clause which provides guidance on changed circumstances, excluding other force majeure or hardship clauses, including Article 79. Here, application of Article 79 would be a derogation under Article 6. As explained by a prior ICC tribunal: "[w]hen a contractual clause governing a particular matter is in contradiction with the Convention, the presumption is that the parties intended to derogate from the Convention on that particular question." [*Machine* case]. Thus, the Parties have derogated from application of Article 79, the Parties' original agreement shall prevail, and CLAIMANT cannot seek payment under Article 79.

2. Even if CISG Article 79 were to apply, CLAIMANT failed to avoid performance.

76 Even if CISG Article 79 were to apply, CLAIMANT failed to avoid performance. Article 79 is limited in scope and only allows a seller to avoid performance without liability. CLAIMANT

seeks post-performance compensation, which Article 79 does not address. Article 79(1) allows a party to avoid performance without liability when an impediment prevents performance. Specifically, Article 79(1) states:

> A party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. [Art. 79(1)].

77 CISG Advisory Council Opinion No. 7 explains its scope: "Article 79 exempts a party from liability for damages when that party has failed to perform any of its obligations, including the seller's obligation to deliver conforming goods." Here, CLAIMANT did not avoid or fail to perform. Instead, CLAIMANT delivered the final 50 doses, as planned. [Ex. C 8, p. 18]. As a result, CLAIMANT did not avoid performance after claiming an impediment. Because the final doses were delivered, Article 79(1) does not apply. Article 79 does not address the issue of liability after completing performance, thus, CLAIMANT cannot invoke Article 79(1) to receive additional compensation when it did not properly avoid performance under the Article.

3. In the alternative, even if Article 79 applies to post-performance liability, the tariffs do not constitute an impediment and CLAIMANT cannot avoid liability.

78 Even if Article 79(1) applies to post-performance liability, the tariffs do not constitute an impediment and CLAIMANT cannot avoid liability. To be an impediment, the tariffs must be (a) beyond the control of CLAIMANT and CLAIMANT could not reasonably foresee the increase in tariffs, and (b) CLAIMANT could not have overcome the tariffs. [Art. 79(1)]. As explained below, the tariffs were foreseeable, and CLAIMANT could have overcome the tariffs, and in fact did overcome the tariffs when CLAIMANT delivered the final 50 doses. [Ex. C 8, p. 18]. Additionally, (c) CLAIMANT did not renegotiate a price before delivering the final doses, as required to avoid liability under Article 79(1).

a. While the tariffs were beyond CLAIMANT'S control, they were reasonably foreseeable.

79 While the tariffs were beyond CLAIMANT'S control, they were reasonably foreseeable and cannot constitute an impediment. Pursuant to Article 79, an impediment must be unforeseeable to the party avoiding performance. [Art. 79(1)]. For example, one tribunal found that a prohibition on exports implemented after the conclusion of the contract may still be foreseeable at the time

the contract is concluded. [*Coal* case]. Here, CLAIMANT should have been aware that the Equatorianian government could prohibit the import of horse semen, given the previous ban on horse semen and the communications between the Parties. [Ex. C 1].

80 As discussed above in Section I(A)(2), CLAIMANT was on notice of the high likelihood of the Equatorianian government imposing tariffs or bans on horse semen, making the tariffs foreseeable. [¶¶ 55–59]. RESPONDENT repeatedly referred to the government's lift of the ban as only "temporary," beginning with their initial email to CLAIMANT. [Ex. C 1]. RESPONDENT again stressed the temporary nature of the government's lift of the ban when RESPONDENT asked for a long term business relationship that would involve "natural coverage… should the lifting of the ban expire or be revoked in Equatoriana." [Ex. C 3]. CLAIMANT was aware that the ban was only temporarily lifted, as evidenced by their understanding that RESPONDENT requested a high number of dosages because of the temporary nature of the ban. [NOA ¶ 5]. Although, the ban was not reinstated, the tariffs created an economic block on delivering horse semen causing a similar effect as the previous ban. Given RESPONDENT'S repeated assertions and CLAIMANT'S own understanding that the lift on the ban was only temporary, CLAIMANT could reasonably foresee the government reinstating the ban, or other government impediments similar to tariffs, to the importation of horse semen. Thus, while the tariffs were beyond CLAIMANT'S control, they were reasonably foreseeable and cannot constitute an impediment.

b. CLAIMANT could have avoided or overcome the tariffs.

81 The tariffs were not an impediment because CLAIMANT could and did avoid and overcome the tariffs. Article 79 states that an incident is only an impediment when the party cannot overcome or avoid the consequences of the incident. [Art. 79(1)]. A tribunal in Germany stated that an impediment must be "an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness". [*Chinese Goods*]. Moreover, even when a seller loses a significant amount of money due to market price of supplies rising unforeseeably, the seller cannot claim exemption under article 79(1) and avoid delivering the goods as contracted. [CLOUT case No. 54]. Here, the tariffs were not so excessive as to make the delivery of the goods economically impossible. CLAIMANT may have lost its profit, but a loss in profit alone does not constitute impossibility, thus, CLAIMANT had the ability to avoid the impediment. [CLOUT case No. 54].

82 Further, CLAIMANT, in fact, overcame the impediment when it delivered the final 50 doses, proving that the increased tariffs did not amount to an "economic impossibility." [*Chinese Goods*]. "To overcome means to take the necessary steps to preclude the consequences of the impediment." [Tallon]. Thus, if a seller can prevent the consequences of the impediment, then, the seller is able to overcome the event, rendering the event no longer an impediment. Here, CLAIMANT argues that the tariffs were an impediment to the Sales Agreement because the tariffs made delivery impossible due to the financial burden. [Claimant's Br. ¶ 22]. However, CLAIMANT then was able to overcome the financial burden of the tariffs and delivered the horse semen. By delivering the horse semen, CLAIMANT overcame the impediment, therefore, eliminating the impediment altogether. CLAIMANT could, and did, avoid and overcome the financial burden of the tariffs, thus, the tariffs cannot constitute an impediment to the Sales Agreement and no relief is available.

c. CLAIMANT failed to renegotiate a price before delivering.

83 Even if the tariffs constituted an impediment under Article 79, CLAIMANT failed to renegotiate the payment amount with RESPONDENT as required to properly avoid performance under Article 79(1). The party seeking exemption due to economic hardship has an obligation to renegotiate the contract. [*Scafom*]. CLAIMANT merely mentioning that it wished to find a "solution" does not alone constitute a renegotiation of the contract price. [Ex. C 7]. In fact, even after stating that it needed to find a solution before delivery, CLAIMANT failed to actually renegotiate the contract price and delivered the final doses. By delivering the final doses, CLAIMANT showed that it could deliver without finding a "solution." CLAIMANT'S failure to renegotiate a price is further evidence that CLAIMANT did not perceive the tariffs as an impediment, as CLAIMANT knew it could deliver without renegotiating a price increase. Relief is not warranted under Article 79 because the tariffs did not constitute an impediment and CLAIMANT did not renegotiate a new price before performing.

84 Although Article 79 should not apply to this dispute because Article 79 is a derogation of the Sales Agreement and Article 79 does not apply to post-performance liabilities, when Article 79 is applied to the facts of this dispute the tariffs do not constitute an impediment. CLAIMANT cannot seek additional payment for an incident that did not constitute an impediment. Additionally, CLAIMANT is not entitled to increased payment under CISG Article 8 or Article 7(1).

4. RESPONDENT did not intend to renegotiate the contract price after the increase in tariffs thus, under CISG Article 8 the original contract price remains in force.

85 Under Article 8, RESPONDENT never intended to renegotiate the price after, therefore, the original contract price should prevail. CLAIMANT argues that RESPONDENT led CLAIMANT to believe that RESPONDENT intended to renegotiate the contract price after the final delivery. [Claimant's Br. ¶ 15]. CISG Article 8 governs renegotiation of contract price and provides:

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

86 Article 8(1) allows for a subjective analysis of what a party actually understood the other party's intent to be based on its statements, whereas, Article 8(2) allows for an objective analysis of how a reasonable person would construe the intent of the other party based on its statements.

87 Here, RESPONDENT manifested an intent *not* to renegotiate the contract price, thus, CLAIMANT could not have subjectively construed RESPONDENT'S statements as evidence of intentions to renegotiate. Under Article 8(1), the subjective intent of a party is only relevant if the intent was manifested in some fashion, thus, "the intent that one party secretly had is irrelevant." [*Textiles* case]. RESPONDENT'S representative, Mr. Shoemaker, told CLAIMANT that he did not have the authority to authorize an increased contract price. [Ex. R 4]. In addition, Mr. Shoemaker emphasized RESPONDENT'S belief that CLAIMANT was liable for any delivery costs, including tariffs, under the DDP agreement. [Ex. R 4]. Thus, RESPONDENT did not manifest an intent to renegotiate the contract price.

88 Under Article 8(2), a reasonable person in the same industry would not have construed RESPONDENT'S comments as an intent to renegotiate the contract price. "Paragraph (2) requires a tribunal to hypothesize a reasonable person of the same kind as the other party with respect, for example, to such matters as linguistic background and technical skill." [Farnsworth]. Here, the RESPONDENT'S representative, Mr. Shoemaker stated that he did not have the authority to alter the contract price. [Ex. R 4]. CLAIMANT'S representative, Ms. Napravnik, was a lawyer. A reasonable person of the same kind of technical background as CLAIMANT'S representative, a lawyer, would have understood Mr. Shoemaker's lack of authority to make binding legal

statements after he stated that he was "unauthorized" to make decisions without his supervisor's approval. [Ex. R 4]. Thus, a reasonable person in CLAIMANT'S circumstances, could not have interpreted RESPONDENT'S statements as a manifestation of intent to amend the contract price.

89 Without a manifestation of intent to renegotiate or a reasonable belief that RESPONDENT intended to renegotiate, CLAIMANT'S argument that RESPONDENT led CLAIMANT to believe it would increase payment fails. Under Article 8, the original contract price prevails.

5. Further, RESPONDENT acted in good faith pursuant to CISG Article 7(1), and, thus, does not owe an increased payment to CLAIMANT.

90 Pursuant to CISG Article 7(1), RESPONDENT does not owe an increased payment because RESPONDENT acted in good faith while dealing with CLAIMANT. Article 7(1) states that the CISG is to promote "the observance of good faith in international trade." [Art. 7.1]. Thus, parties are expected to act in good faith during business dealings governed by the CISG. As discussed above, RESPONDENT did not manifest an intent to renegotiate the price. Thus, RESPONDENT never attempted to mislead CLAIMANT to believe RESPONDENT would renegotiate. Also, CLAIMANT has no basis for its allegations that RESPONDENT misled CLAIMANT about the use of the final doses. RESPONDENT did not urge CLAIMANT to deliver the final doses to sell to third parties, rather, RESPONDENT needed the final doses because the breeding season was starting. [Ex. R 4]. Additionally, even if RESPONDENT did sell to third parties, the Sales Agreement does not disallow selling to third parties. Instead, the Sales Agreement states: "The semen is to be used for the following mares: (and others after information of the seller)." [Ex. C 5]. This unclear term does not prohibit the sale of semen to third parties. RESPONDENT did not mislead CLAIMANT, and acted in good faith throughout the Parties' dealings, thus, CLAIMANT is not entitled to damages.

B. CLAIMANT is not entitled to increased payment under the UNIDROIT Principles.

91 CLAIMANT is not entitled to an increased contract price under the UNIDROIT Principles. CISG Article 7(2) calls for any gaps to be filled by the general principles on which it is based, which is regularly construed as the generally recognized uniform rules, the UNIDROIT Principles, or the applicable domestic law. [CLOUT case No. 202; CLOUT case No. 1189; CLOUT case No. 445]. Equatoriana and Mediterraneo adopted verbatim the UNIDROIT Principles as the respective countries' contract laws. [PO 1 ¶ 4]. Here, the UNIDROIT Principles are both the uniform rules and the laws of Equatoriana and Mediterraneo, thus, the UNIDROIT Principles should fill any

gaps within the CISG, including hardship and fraud.

92 Pursuant to Article 6.2.1, the tariffs do not amount to hardship, thus, CLAIMANT could not avoid performance. Further, RESPONDENT did not fraudulently induce CLAIMANT to deliver the final shipment. If the UNIDROIT Principles are used to decide issues of (1) hardship and (2) fraud, RESPONDENT is not liable for an increased payment to CLAIMANT.

1. The tariffs do not alter the equilibrium of the contract and CLAIMANT assumed the risk of the tariffs; thus, the tariffs do not amount to hardship under the Hardship Clause of the UNIDROIT Principles.

93 The tariffs are not a changed circumstance that constitute hardship, thus, CLAIMANT was required to perform under Article 6 of the UNIDROIT Principles, and could not have avoided liability. [Art. 6.2.1]. CLAIMANT claims that it would have avoided performance if it knew that the Parties would not renegotiate the contract price. Even if CLAIMANT avoided performance, the avoidance would not have been proper under the UNIDROIT Hardship Clause. [Claimant's Br. ¶ 49]. "[P]erformance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party… [E]ven if a party experiences heavy losses instead of expected profits… the terms of the contract must nevertheless be respected." [Cmt. 1, Art. 6.2.1]. A party may only avoid performance when changed circumstances amount to hardship. [Art. 6.2.1]. Article 6.2.2 states that hardship occurs when "events fundamentally alters the equilibrium of the contract … because of the cost of a party's performance has increased."

94 The tariffs did not fundamentally alter the equilibrium of the contract because the tariffs were a foreseeable cost under the DDP agreement. CLAIMANT accepted DDP delivery, which assumed the risk of increased delivery costs, including tariffs. [Ex. C 4]. RESPONDENT cannot be burdened for CLAIMANT accepting a contract where CLAIMANT could reasonably foresee government tariffs, and thus, could reasonably foresee losing profit. Given the foreseeability of increased delivery costs under the DDP agreement, the tariffs did not fundamentally alter the equilibrium of the contract, thus, CLAIMANT could not avoid liability for non-performance.

95 Even if the tariffs fundamentally altered the equilibrium of the contract, the tariffs do not constitute a hardship under the additional requirements of 6.2.2. Article 6.2.2. requires:

> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
>
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

96 Here, the tariffs did not constitute a change in circumstances that constitute a hardship. As previously discussed, CLAIMANT knew of the former ban on horse semen imports, thus, it was reasonable to take future bans or taxes into account when the contract was concluded. [6.2.2(b)]. Moreover, CLAIMANT assumed the risk of all delivery associated costs when it accepted DDP delivery, and, thus, assumed the cost of tariffs. [6.2.2(d)]. Under Article 6.2.2(b) and (d), CLAIMANT should have taken the possibility of tariffs into account at the time the contract was concluded and assumed the risk of tariffs; thus, CLAIMANT could not avoid performance because the tariffs did not constitute a hardship. Under Article 6.2.2, CLAIMANT is not entitled to increased payment.

2. RESPONDENT never fraudulently induced CLAIMANT to deliver the final doses and thus does not owe damages under the UNIDROIT Principles.

97 Pursuant to the UNIDROIT Principles Article 3.4, RESPONDENT did not fraudulently induce CLAIMANT to perform, and, thus, RESPONDENT is not liable for damages. Under the UNIDROIT Principles Article 3.8, a party may avoid performance "when it had been led to conclude the contract by the other party's fraudulent representation." [Art. 3.8]. As previously discussed, RESPONDENT did not mislead CLAIMANT to deliver the final 50 doses, rather RESPONDENT manifested an intent not to renegotiate the price. RESPONDENT stated that it believed CLAIMANT was liable for all delivery associated costs, and the representative made it clear that he did not have the authority to agree to renegotiate the contract price. [Ex. R 4]. RESPONDENT did not fraudulently induce CLAIMANT to believe that RESPONDENT would renegotiate the contract price, thus, RESPONDENT does not owe damages.

98 Further, RESPONDENT did not fraudulently induce CLAIMANT to deliver by lying about the use of the last 50 doses, thus, RESPONDENT does not owe damages. CLAIMANT has no basis for its accusations about RESPONDENT'S use for the doses and, regardless, the Sales Agreement did not prohibit sales to third parties. RESPONDENT urged CLAIMANT to deliver the final doses because the breeding season was starting, not because they wished to sell to third parties. [Ex. R 4]. Even if RESPONDENT was selling to third parties, that would not be fraudulent because, as previously discussed, the Sales Agreement does not expressly prohibit the sale of horse semen to third parties. [Ex. C 5]. RESPONDENT does not owe CLAIMANT damages for

fraudulent inducement because RESPONDENT did not mislead CLAIMANT regarding its intent to renegotiate or its use of the final doses of horse semen.

99 Pursuant to the CISG and UNIDROIT Principles, CLAIMANT is not entitled to an adaptation of the Sales Agreement.

PRAYER FOR RELIEF

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

1. Dismiss CLAIMANT'S request for lack of jurisdiction;
2. Prohibit the introduction of evidence from the other arbitration proceeding;
3. Dismiss CLAIMANT'S request for damages with prejudice; and
4. Order CLAIMANT pay RESPONDENT'S legal costs expended on these proceedings.

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

Certificate and Choice of Forum

To be attached to each Memorandum

I _____Laura Brett Harshbarger____, on behalf of the Team for (name of School)

_____The George Washington University Law School_____ hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) __ The George Washington University Law School_____

Name____Laura Brett Harshbarger_____

Signature _____