SIXTEENTH ANNUAL WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

LOYOLA LAW SCHOOL, LOS ANGELES

MEMORANDUM FOR CLAIMANT

On Behalf of:	**Against:**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**Respondent**

COUNSEL FOR CLAIMANT:

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IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration	33, 50
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Vienna 2008	32, 40, 41, 50
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards, New York, 1958	14, 40, 41
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LIST OF ABBREVIATIONS

&	And
$	Dollar
%	Percentage
§	Paragraph
2013 Rules	2013 Hong Kong International Arbitration Centre Administered Arbitration Rules
Apr.	April
art(s).	Articles
Arb.	Arbitration
Aug.	August
cl.	Clause
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
C	Claimant
Ct.	Court
Ct. App.	Court of Appeals
DDP Delivery	Duty Paid
Dec.	December
Decl.	Declaration
E.	East / Eastern
ed.	Edition
eds.	Editors
et al.	Et alii (and others)
et seq.	Et sequens (and that which follows)
Ex. C	Claimant Exhibit
Ex. R	Respondent Exhibit
Feb.	February
HKIAC	Hong Kong International Arbitration Centre

IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICISD	International Centre for Settlement of Investment Disputes
i.e.	Id est (that is)
infra	Below
Int'l	International
Jan.	January
Ltr.	Letter
Ltd.	Limited Partnership
Mar.	March
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
No(s).	Number(s)
NoA	Notice of Arbitration
NY Convention	New York Convention
Oct.	October
p(p).	Page(s)
PIA	Partial Interim Award
PO1	Procedural Order 1
PO2	Procedural Order 2
Resp.	Respondent
Req.	Request
RNoA	Response to Notice of Arbitration
Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules

Rules of Transparency	UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration
supra	Above
Switzerland	SZIER
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commision on International Trade Law
UNIDROIT	International Insititute for the Unification of Private Law
USA	United States of America
v.	versus

STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento (hereinafter "CLAIMANT") and Black Beauty Equestrian (hereinafter "RESPONDENT"). CLAIMANT is a reputable stud farm and training center for horse care, breeding, and riding/driving registered and located in Mediterraneo. RESPONDENT has famous broodmare lines and recently established a racehorse stable in Equatoriana.

21 Mar. 2017 RESPONDENT contacted CLAIMANT inquiring about CLAIMANT's racehorse, Nijinsky III, for its breeding program. RESPONDENT requested an offer from CLAIMANT for 100 doses of Nijinsky III's semen after a temporary lift of the ban on artificial insemination for race horses.

24 Mar. 2017 CLAIMANT agreed to sell RESPONDENT 100 doses for 99.500 USD per dose, to be picked up from CLAIMANT'S premises. The offer to provide the doses was contingent on RESPONDENT informing CLAIMANT of every dose's use and doses were not resold without CLAIMANT'S express written consent.

28 Mar. 2017 RESPONDENT accepted most of CLAIMANT'S terms, however, RESPONDENT insisted on DDP delivery and accepted the application of the Law of Mediterraneo if the courts of Equatoriana had jurisdiction.

31 Mar. 2017 CLAIMANT accepted DDP delivery if the price was increased to 1000 USD per dose and CLAIMANT was not responsible for any further risks associated with delivery terms, particularly concerning changes in customs regulations or import restrictions. CLAIMANT insisted on a hardship clause and offered to opt for arbitration in Mediterraneo, rather than submitting to the jurisdiction of the Equatorianan courts.

10 Apr. 2017 RESPONDENT emailed CLAIMANT regarding negotiation of one of the remaining points, the dispute resolution clause. RESPONDENT suggested an arbitration clause based on the model clause in the HKIAC Arbitration Rules providing for arbitration in Equatoriana and Equatorianan law as law of the arbitration.

11 Apr. 2017 CLAIMANT amended the place of arbitration to Danubia, while stating that this offer was contingent on the law of Mediterraneo governing the Sales Agreement, and suggested reliance on the ICC-Hardship Clause.

12 Apr. 2017 CLAIMANT's and RESPONDENT's initial negotiators, Ms. Julie Napravnik and Mr. Chris Antley, respectively, suffered a severe car accident. Prior to the accident, Antley wrote a note stating that the arbitration clause and its connection with the hardship clause needed clarification. While in the car and before the accident, Antley told Napravnik that arbitrators would likely be given the task of adapting the contract if the parties could not agree and that he would come back with a proposal the following morning.

6 May 2017 Due to the 12 April 2017 car crash, the Sales Agreement was concluded by new representatives for CLAIMANT and RESPONDENT. Neither had been part of the original negotiations. The final agreement stated that the seat of arbitration would be Vindobona, Danubia, while the Sales Agreement would be governed by the law of Mediterraneo.

20 Jan. 2018 Napravnik emailed Mr. Greg Shoemaker, responsible for RESPONDENT's development of its racehorse breeding program concerning Equatoriana's newly imposed 30% tariff on agricultural products from Mediterraneo, following Mediterraneo's 25% tariff on agricultural products from Equatoriana. While two shipments of 25 doses had already been made, the remaining 50 doses were set to be shipped on 22 January 2018. CLAIMANT stressed the shipment could not be made until the parties arrived at a solution regarding the increased tariffs.

21 Jan. 2018 Shoemaker explained that he could not authorize any additional payments, but assured CLAIMANT that the parties would come to a solution. Due to time constraints, he urged Napravnik to authorize the shipment and stressed that RESPONDENT planned on purchasing 50 doses from the CLAIMANT'S stallion, Empire State. CLAIMANT authorized the shipment and paid the tariffs after being reassured by RESPONDENT's desire for a long-term relationship.

12 Feb. 2018 CLAIMANT confronted RESPONDENT regarding the resale of doses to third parties. RESPONDENT's CEO refused CLAIMANT'S additional requests and ended the negotiations without paying any additional amount for the tariffs.

31 July 2018 CLAIMANT submitted a Notice of Arbitration to HKIAC.

2 Oct. 2018 CLAIMANT wrote to the Tribunal that CLAIMANT received information concerning another arbitration under the HKIAC Rules which RESPONDENT took part in, where RESPONDENT adopted the position that a contract should be able to be adapted by the arbitrators when RESPONDENT was responsible for delivery of a mare and payment of an additional 25% in tariffs. The tribunal in the other proceeding issued a "Partial Interim Award" allowing the tribunal to adapt the contract.

3 Oct. 2018 RESPONDENT responded to CLAIMANT's 2 Oct. 2018 letter stating the evidence of RESPONDENT's position in the prior proceeding was inadmissible.

SUMMARY OF ARGUMENTS

1. **ISSUE ONE**: The Tribunal has power under the arbitration agreement to adapt the contract under the law of Mediterraneo. The law of Mediterraneo applies to the arbitration agreement, as the doctrine of separability does not mandate that the law governing the arbitration agreement must be distinct from that which governs the underlying sales contract. Furthermore, the Tribunal has discretion to apply choice of law principles in order to determine the choice of law governing the arbitration clause, and should select the principle that applies the law governing the underlying contract to the arbitration clause. Under the broad interpretation of Mediterraneo law and Article 8 of the CISG, the arbitration agreement allows the Tribunal to adapt the contract.
2. **ISSUE TWO:** CLAIMANT is entitled to submit evidence of RESPONDENT's other ongoing arbitral proceedings as the Tribunal has wide discretion to allow CLAIMANT's request to submit evidence of the PIA in RESPONDENT's Other Proceeding. The evidence should also be admitted in the search of truth and justice in the matter, to ensure that that future award is not set-aside or challenged, and to ensure the integrity of the proceedings. Further, the evidence is not barred by evidence or ethical rules, as the Partial Interim Award in the RESPONDENT's other proceeding was disclosed through a third party and admitting it would be in the interests of transparency.
3. **ISSUE THREE:** CLAIMANT is entitled to payment of at least 1,250,000 USD for the 30% tariff under both the contract and the CISG. The plain language of the hardship clause in the contract and the parties' statements during negotiations indicate a clear intent for CLAIMANT not to be responsible for the tariff and for the contract to allow for a price adaptation in such circumstances **(I)**. In the alternative, CLAIMANT was excused from liability for non-delivery under Article 79 of the CISG. Because the CISG does allow for excuse from economic hardship and Article 79 permits a tribunal to subsequently adapt the contract price to offer the aggrieved party a remedy, the Tribunal has the power to adjust the price of the contract in a situation where CLAIMANT notified RESPONDENT of its inability to deliver with the 30% tariff, and RESPONDENT's subsequent failure to renegotiate in good faith **(II)**.

ISSUE ONE: THE TRIBUNAL HAS POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

4. The Parties to the arbitral proceedings are bound by an arbitration agreement allowing them to arbitrate under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted, i.e. the 2013 HKIAC Rules **("2013 Rules")** [*Ex. C 5, p. 14, cl. 15*]. The parties later agreed via telephone conference of 4 October 2018 to conduct the proceedings on the basis of the newest version of the Hong Kong Arbitration Rules, i.e. the 2018 HKIAC Rules **("Rules")** [*PO2, p. 52, § II*]. The arbitration agreement provides that the seat of arbitration shall be Vindabona, Danubia, and is silent as to the choice of law to govern the arbitration agreement. [*Ex. C 5, p. 14, cl. 15)*].

5. RESPONDENT alleges that the arbitration agreement is governed by the law of Danubia, and that the Tribunal lacks the power to adapt the contract according to Danubian law. [*RNoA, p. 31, §§ 12-15*]. Contrary to RESPONDENT's allegations, CLAIMANT will demonstrate that the the law of Mediterraneo governs the arbitration agreement **(I)**, and the Tribunal has power to adapt the contract under the law of Mediterraneo **(II)**.

I. THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT

6. RESPONDENT argues that the parties never agreed to have the arbitration agreement governed by the law of contract, i.e. the law of Mediterraneo, because the arbitration agreement is legally separate from the underlying contract [*RNoA, p. 31, § 14*]. RESPONDENT further claims that the law of Danubia governs the arbitration agreement. [*RNoA, p. 31, § 13*]. However, Claimant will demonstrate that, even though the arbitration agreement is legally separate, the law of Mediterraneo should nevertheless govern the arbitration agreement, because the doctrine of separability does not mandate that the choice of law must be different from that of the underlying contract **(A).** The Tribunal may apply choice of law rules to determine the law governing the agreement, and the applicable rules provide that the law governing the arbitration agreement should be the law of Mediterraneo **(B)**.

A. The Doctrine of Separability Does Not Mandate that the Choice of Law Must be Different from that of the Underlying Contract

7. After extensive discussions about the law of Mediterraneo, the parties agreed to adopt the law of Mediterraneo to govern the sales contract [*Ex. C 5, p.14, cl. 14*]. RESPONDENT alleges that the reference in the choice of law clause directly preceding the arbitration agreement, which selects the law of Mediterraneo to govern the contract, does not refer to the arbitration agreement [*RNoA,*

p. 31, § 14]. RESPONDENT points to Article 16 of both Danubian and Mediterraneo Arbitration Law, which are identically worded, and explicitly acknowledge the doctrine of separability [*RNoA, p. 31, § 14*]. Indeed, these provisions, as well as Article 19.2 of the Rules, provide that the arbitration agreement shall be treated as an agreement independent of the other terms of the contract [*RNoA, p. 31, § 14*; *Rules art. 19*].

8. The doctrine of separability generally deals with the question of the validity of the arbitration agreement, which is not disputed here [*Rules art. 19; Born, p. 375-77*]. An important consequence is that the parties to the contract *may* elect a choice of law to govern the arbitration agreement that is distinct from that which governs the underlying contract [*Born, p. 476*]. However, this does not mean that the law applicable to the arbitration clause *must* be distinct from the law governing the underlying contract [*Born, p. 476*]. In, the fact the two agreements are not totally independent from one another, as acceptance of the contract automatically causes acceptance of the arbitration clause [*Derains, p. 16-17; Redfern & Hunter, p. 159*].

9. Where parties have not expressly indicated a distinct choice of law governing the arbitration agreement, courts have inferred an intention for the law chosen to govern the underlying contract, to also apply to the arbitration agreement [*Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA, § 11*]. Here, while the parties have not included a separate choice of law clause within the arbitration agreement, they have adopted a choice of law clause in the contract. It is clear that they intended the law governing the sales contract, i.e. the law of Mediterraneo, to govern the arbitration agreement itself. Thus, the Tribunal is respectfully requested to reject RESPONDANT's argument that the doctrine of separability proscribes that the underlying choice of law clause does not apply to the arbitration agreement.

B. Alternatively, the Applicable Choice of Law Rules Provide That the Law Governing the Arbitration Agreement Should be the Law of Mediterraneo

10. In the absence of an implied or express designation of the choice of law governing the arbitration agreement, different forums apply different choice of law rules [*Born, p. 491*]. In these scenarios, the principle choice is between the law governing the underlying contract, and the law of the seat of arbitration, which in this case are Mediterraneo and Danubia respectively [*Redfern & Hunter, p. 158*]. Here, in order to adhere to the objectives of arbitration as a whole, the Tribunal should apply the choice of law rule that selects the law governing the underlying contract as governing the arbitration agreement (**1**) and reject the rule that selects the law of the seat of arbitration (**2**).

1. The Tribunal should apply the choice of law principle that selects the law governing the underlying contract as governing the arbitration agreement

11. Many Tribunals have adopted a default rule of applying the substantive law of the underlying contract, where the arbitration agreement does not contain a distinct choice of law clause [*Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd,* § 32; *Born, p. 515*]. This approach has been especially influential where, as here, the contract contains an express choice of law clause [*Born, p. 515*].
12. Party autonomy is a central objective of arbitration [*Born, p. 84*]. This approach comports with that objective by extending the choice of law clause to the arbitration clause itself. In doing this, the Tribunal recognizes the law to which the parties have already consented.
13. Here, CLAIMANT and RESPONDENT discussed the law of Mediterraneo in great detail throughout the negotiation of the sales agreement [*NoA, p.7, § 15*]. They consented to the law of Mediterraneo by incorporating an express choice of law clause in the sales agreement [*Ex. C 5, p.14, cl. 14*]. In order to adhere to objectives of autonomy and consent in arbitration, the Tribunal is respectfully requested to apply the choice of law principle that selects the law governing the underlying contract to govern the arbitration agreement, which in this case, is the law of Mediterraneo.

2. The Tribunal should reject the rule that selects the law of the seat of arbitration

14. The Tribunal should reject the choice of law principle that selects the arbitral seat as the law governing the arbitration agreement, which some courts and institutions have adopted [*Judgment of 26 May 1994; NY Convention Art. V(1)(a)*]. This approach would be improper here, where the parties never consented to the law of Danubia as governing the agreement.
15. It is clear from the parties' correspondence in negotiating the arbitration agreement, that the parties never expressed an intent for Danubia law to govern any aspect of the contract or arbitration agreement itself [*Ex. R 1, p. 33; Ex. R 2, p. 34*]. In fact, the first draft of the arbitration agreement contained an express choice of law clause selecting Equatoriana, not Danubia [*Ex. R 1, p. 33*]. Applying Danubia law would subject the CLAIMANT to substantive law to which is never consented, which does not comport with the principles of party autonomy and consent, which form the cornerstone of arbitration. Thus, the Tribunal is respectfully requested to reject this approach, and adopt the law of Mediterraneo as the law governing the arbitration agreement.

II. UNDER THE LAW OF MEDITERRANEO, THE ARBITRATION AGREEMENT ALLOWS FOR ADAPTATION OF THE UNDERLYING SALES CONTRACT

15. The arbitration agreement between within the sales contract reads that "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Center …" [*Ex. C 5, p. 14, cl. 15*].

16. RESPONDENT alleges that the Tribunal does not have power to adapt the contract under the arbitration agreement [*RNoA, p. 31, § 12*]. CLAIMANT will demonstrate that, under the law of Mediterraneo, the arbitration agreement should be interpreted to allow the Tribunal to adapt the contract. First, the law of Mediterraneo calls for a broad interpretation of arbitration agreements **(A)**. Second, there is consistent jurisprudence in Mediterraneo, that in contracts governed by the CISG, the latter should also govern the interpretation of the arbitration agreement **(B)**.

A. Under the Broad Interpretation of Arbitration Agreements Under Mediterraneo Law, the Tribunal has Power to Adapt the Sales Contract

17. RESPONDENT claims that the arbitration agreement does not provide power to adapt the contract because it does not contain an express conferral of such a power [*RNoA, p. 31, § 12*]. However, the law of Mediterraneo calls for a broad interpretation of arbitration clauses, which would allow for adaptation of the contract without such an express conferral [*NoA, p. 7, § 16*].

18. In a majority of jurisdictions, including Mediterraneo, the law calls for a broad interpretation of arbitration agreements. A broad interpretation the phrase "arising out of" calls for a "pro-arbitration" rule of interpretation. [*Born, p. 1353-54*]. This pro-arbitration view creates a presumption in favor of resolving all disputes in a single proceeding and single forum when there is a question of whether the agreement governs some disputes, but not others [*Born, p. 1326*]. This presumption, applied here, favors an interpretation of the agreement to govern all claims, including CLAIMANT's claim for increased remuneration. Thus, the Tribunal is respectfully requested to find that it has power to adapt the contract under the broad interpretation of the arbitration agreement.

B. Under Mediterraneo Law, in Sales Contracts Governed by the CISG, the CISG Also Applies to the Interpretation of the Arbitration Agreements Contained Therein

19. Tribunals may apply different substantive laws to different issues regarding the arbitration agreement, including its interpretation [*Born, p. 490*]. There is consistent jurisprudence in

Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts [*PO1, p. 53, § 4*]. Thus, the Tribunal may apply the CISG in interpreting the Tribunal's power under the arbitration agreement to adapt the contract.

20. Pursuant to Article 8 of the CISG, the interpretation of contractual obligations is determined first through the parties' subjective intent, or alternatively through an objective interpretation of the parties' intent [*CISG art. 8(1)-(2)*]. The Tribunal may consider all relevant circumstances and negotiations [*CISG art. 8(3)*]. The Tribunal is respectfully requested to find that the parties' subjective intent was to allow adaptation under the arbitration agreement (1), and a reasonable third person would conclude that the parties intended to allow adaptation of the contract (2).

1. The parties intended to allow adaptation of the contract under the arbitration agreement

21. During negotiation, on 12 April 2017, Ms. Napravnik, CLAIMANT's primary negotiator, and Mr. Antley, RESPONDENT's primary negotiator, had a short discussion regarding the arbitration and hardship clauses [*Ex. C 8, p. 17*]. Ms. Napravnik expressed CLAIMANT's intent to include a mechanism for adaptation in the contract, in the event that the parties could not agree on an amendment [*ibid.*]. Mr. Antley expressly stated that this should be the task of the arbitrators, to which Ms. Napravnik agreed and suggested they clarify in either the hardship or arbitration clause [*ibid.*]. Before they were able to do so, both negotiators were seriously injured in a car accident, and the final negotiation of the contract was left to other parties [*ibid.*]. The successors did not include a mention of adaptation in either the hardship or arbitration clauses [*ibid.*].

22. This exchange between the parties clearly indicates that it was their mutual intent to grant the power to adapt the contract to the arbitral Tribunals. Thus, although the express conferral of such a power was absent from the final agreement, the Tribunal is respectfully requested to find that the parties' intended to allow adaptation of the contract under the arbitration agreement.

2. Alternatively, a reasonable third person would conclude that the parties intended to allow adaptation of the contract

23. The conduct between the parties could only be understood by a reasonable third person in the circumstance as allowing adaptation. As discussed above, the primary negotiators explicitly addressed the arbitral Tribunal's power to adapt the contract [*Ex. C8, p. 17*]. At the end of the party's discussion, following Ms. Napravnik's suggestion that they clarify the issue of adaptation, Mr. Antley promised that he would come back with a proposal [*ibid.*]. This can only be understood

in the context that Mr. Antley would propose language that allowed for adaptation, to be incorporated in the contract. Considering the surrounding circumstances, and the car crash that ensued, a reasonable third person would understand that, had the original negotiators concluded the contract themselves, it would have included a clause allowing for adaptation of the contract. Thus, the Tribunal is respectfully requested to hold that a reasonable third person in the circumstance would interpret the arbitration agreement, considering the parties' negotiations, to allow adaptation of the contract.

24. Under Mediterraneo law, which the Tribunal is respectfully requested to apply to the arbitration agreement, the Tribunal may apply the CISG to interpret the agreement. Pursuant to Article 8 of the CISG the arbitration agreement should be interpreted to allow for adaptation of the sales agreement.

CONCLUSION ON ISSUE ONE

25. Contrary to RESPONDENT's allegations, the law of Mediterraneo should govern the arbitration agreement. First, the doctrine of separability does not proscribe that the choice of law governing the arbitration agreement must be distinct from that which governs the underlying contract. Additionally, the Tribunal may apply choice of law rules to determine the proper law to govern the arbitration agreement in the absence of an implied or express choice. The Tribunal is respectfully requested to apply the rule that selects the law governing the underlying contract to govern the arbitration agreement in order to conform to underlying objectives of arbitration, and thus find that Mediterraneo law governs the agreement. Consequently, under Mediterraneo law, the arbitration agreement should be interpreted to allow adaptation because the agreement should be interpreted broadly, and because the parties' intent analyzed under the CISG shows that they intended to allow adaptation. Thus, CLAIMANT respectfully requests that the arbitral Tribunal hold that the Tribunal has power under the arbitration agreement to adapt the contract.

ISSUE TWO: THE TRIBUNAL SHOULD ADMIT EVIDENCE OF RESPONDENT's SECOND ARBITRATION PROCEEDING

26. The Tribunal should admit the evidence of RESPONDENT's position in RESPONDENT's other proceeding ("**Other Proceeding**") to ensure the Tribunal reaches a just decision. The Tribunal in the Other Proceeding, under the 2013 Rules, awarded a Partial Interim Award ("**PIA**") on 29 June 2018, in favor of RESPONDENT in a dispute concerning the sale of a mare, where RESPONDENT was the seller of the mare and refused delivery of it, after being negatively affected by an 25% increase in tariffs [*PO2, p. 61, § 39*]. In the Other Proceeding, RESPONDENT took the position that the Tribunal had the power to adapt its contract with the buyer [*ibid.*; 2 *Oct. 2018 Ltr., p. 50*]. The Tribunal in the Other Proceeding ruled that it had jurisdiction to adapt the contract, which included a choice of law clause in favor of Mediterranean law, should the 25% increase in tariffs result in hardship to RESPONDENT [*PO2, p. 61, § 41*; *NoA, p. 6, § 10*]. CLAIMANT may submit the evidence regarding RESPONDENT's Other Proceeding as the Tribunal has both the discretion to admit the evidence and CLAIMANT is not barred from admitting it under the Rules.

27. CLAIMANT respectfully requests the Tribunal to allow evidence of RESPONDENT's Other Proceeding to be admitted, including the PIA. The agreement by the Parties to arbitrate under the Rules allows for the evidence of the Other Proceeding to be admitted (**I**). Furthermore, there are no ethical or legal barriers that preclude the Tribunal admitting the evidence (**II**).

I. THE PARTIES' AGREEMENT TO ARBITRATE UNDER THE RULES ALLOWS FOR CLAIMANT TO SUBMIT EVIDENCE OF RESPONDENT'S OTHER PROCEEDING

28. Tribunals have wide discretion in admitting evidence [*2012 Model Law Digest, p. 148, §63*; *Lew, Mistelis, & Kröll, p. 565*]. The Rules, the Model Law, which serves as the *lex arbitri* in this proceeding, and the IBA Rules establish that the Tribunal may use discretion when admitting evidence (**A**). Further, by admitting the evidence, the Tribunal allows for justice and truth, the assurance that a future award will not be set-aside or challenged and ensures that the integrity of the proceeding is protected (**B**).

A. The Rules, *Lex Arbitri*, and the IBA Rules Establish That the Tribunal Has Wide Discretion in Admitting Evidence

29. The Parties agreed that the Rules are the institutional rules governing this proceeding. [*PO1*, *p. 52*; *Ex. C 5, p. 13, cl. 15*]. The Rules provide that the Tribunal determines the admissibility of evidence and can decide whether to apply "strict rules of evidence." [*Rules art. 22.2*]. Thus, the Tribunal

does not need to follow stricter national evidence rules and may admit facts as presented. [*Bantekas, p. 172*; *Born, p. 2310*]. Furthermore, many national laws also provide for arbitrator's discretion in admitting evidence. [*Sussman, p. l; Born, p. 2306, fn. 1000*].

30. Furthermore, under the Rules, there is no limitation as to when evidence can be brought forth by a party [*Rules art. 22.3*]. Because there is no time limit imposed by the Rules on bringing forth evidence, the evidence is not barred on this basis. In any event, CLAIMANT brought forth notice of the evidence as soon as it became aware of its existence [2 *Oct. 2018 Ltr., p. 49*].
31. Even if RESPONDENT were to argue that CLAIMANT was barred from bringing forth the PIA as evidence, as it is not a final award on the merits, the Rules do not indicate a difference in interim awards versus awards on the merits in determining whether a party is bound by the award [*Rules art. 35.1-.2*]. The PIA provided a final ruling on the Tribunal's power to adapt the contract, even though a final award on the merits is not expected until Aug. 2019 and shows that RESPONDENT was aware of the PIA at the time this proceeding was established [*PO2, p. 60, § 41*]. Thus, the evidence of the Other Proceeding is not barred for this reason.
32. The Tribunal should also use the *lex arbitri* in its consideration to admit the evidence as there are no specific rules of evidence followed by Equatoriana, Mediterraneo, and Danubia [*PO2, p. 61 § 46*]. Article 19(2) of the Model Law, like the Rules, proscribe that a tribunal has full discretionary power in admitting evidence [*Model Law art. 19(2)*]. Article 19(2) allows the Tribunal to apply its own rules of evidence [*2012 Model Law Digest, p. 101, § 7*; *Holtzmann & Neuhaus, p. 567*]. The Model Law allows the Tribunal the discretion to choose evidence rules which "meet the needs of the particular case," [*A/CN 9/264, p. 45*] and it has been stated that arbitrators are the "master[s] of [their] own procedure." [*Case 618*]. The *travaux préparatoires* of the Model Law also note that the objective of Article 19(2) "was to recognize a discretion of the arbitral tribunal which would not be affected by the choice of law applicable to the substance of the dispute" [*A/40/17, p. 34, § 174*]. Here, the Parties did not agree to predetermined rules of evidence, allowing the Tribunal to admit evidence to its own discretion [*PO2, p. 61, §46*].
33. Under the IBA Rules, the Tribunal also has a wide discretion in admitting evidence, allowing the evidence of the Other Proceeding to be admitted. As the Parties only agreed in utilizing the Rules, and not a specific rule of evidence, the Tribunal may utilize the IBA Rules. [*Bantekas, pp. 66, 172*]. Like the Rules and Model Law, the IBA Rules allows the Tribunal wide discretion in admitting evidence, while allowing a mechanism for the efficient taking of evidence. [*IBA Rules, Preamble, § 1; art. 1(5); art. 9(1)*]. Though the IBA Rules contain exclusions of the Tribunal's discretion,

none of the exceptions are applicable in this request to submit evidence of RESPONDENT's Other Proceeding [*IBA Rules art. 9(2)*]. Thus, the Tribunal has wide discretion to admit the evidence of the Other Proceeding.

B. The Tribunal Should Use Its Discretion to Admit Evidence from the Other Proceeding

34. The CLAIMANT respectfully requests that the Tribunal use its wide discretion to ensure that the proceedings run efficiently and justly by admitting the evidence of the Other Proceeding. Tribunals customarily use wide discretion in admitting evidence, especially at the beginning of proceedings and admit most presented evidence. [*O'Malley*, p. 269; *Pilkov, p. 148*]. The Tribunal should admit the evidence in the interests of the pursuit of truth and justice (**1**). Additionally, the evidence of the Other Proceeding should be admitted to ensure that any future awards may not be set-aside or challenged for failure of allowing CLAIMANT its opportunity to present its case (**2**). Alternatively, the Tribunal should admit the evidence to ensure the integrity of the institution (**3**).

1. The Tribunal should admit the evidence in the interest of the pursuit of truth and justice

35. The evidence of RESPONDENT's Other Proceedings should be admitted as parties have the right to present all of the evidence relevant to present their cases. It is well recognized that the primary purpose of arbitration is to "discern truth" and parties must have the equal opportunity to present their case [*Rogers, pp. 358, 362*]. Tribunals generally admit evidence to ensure that a party has a full opportunity to present its case [*Sussman*, *p. 3*]. If evidence is not admitted, it violates a party's right to offer a full case [*2012 Model Law Digest, p. 147*]. This is also in line with many national laws that allow for evidence to be admitted, to ensure that the "quest for truth" is not hindered [*Rijavec & Kerestš, p. 87*].
36. Evidence must also meet the admissibility standards. At the admissibility stage, one of the only tests that is necessary to fulfill is whether the evidence is relevant to a party's argument. The Tribunal does not need to look for defects in the evidence, only relevancy to ensure that CLAIMANT may have full opportunity to present its case and for the truth of the matter to be shown [*Born, p. 2311*].
37. Here, not only is the PIA in RESPONDENT's Other Proceeding relevant to deciding whether the Tribunal has the power to adapt the agreement between the parties, but in the event that the Tribunal did not allow for the submission of the award, the knowledge of the proceedings by Mr. Velazquez would also satisfy the relevancy requirement. The PIA in the Other Proceeding shows that

RESPONDENT took the position that CLAIMANT is now taking, when increased tariffs by the President of Mediterraneo negatively affected its profit in a sale of a mare, and it refused delivery to its opponent in the Other Proceeding [*PO 2, p. 59, § 39*]. Thus, it is relevant to the current proceedings.

38. Further, the PIA, should be admitted as the Tribunal may use it to discern the truth in deciding whether it has the power to adapt Parties' sales agreement. The Tribunal may utilize the PIA to determine RESPONDENT's intent in the negotiations and what it intended in the final signed contract. The PIA also provided that Mediterraneo law grants an "arbitral tribunal the same powers as a court has under the provision." [*PO2, p. 60, § 39*]. Thus, the evidence will aid the Tribunal in its search for the truth of the matter.
39. In any event, the evidence of the Other Proceeding should be admitted under by the Tribunal in the interests of justice. The PIA in the Other Proceeding shows that RESPONDENT was aware of the Other Proceeding Tribunal's holding that it had the power to adapt a contract under a similar arbitration agreement and contract when it started this arbitration. The interest of justice principle allows evidence to be admitted to ensure RESPONDENT is prevented from making contradictory arguments and to ensure that the legitimate interests of the arbitrating parties are protected [*Smeureanu, p. 124*]. The PIA shows that RESPONDENT is now making a contradictory argument in stating that the sales agreement shall not be adapted in the case of a hardship, now that it is not injured by a set of tariffs. Further, though there are no code of ethics that are controlling in this proceeding for counsel, CLAIMANT would like to note that RESPONDENT's counsel is aware of the positions that have been raised in both proceedings by RESPONDENT as Counsel is also representing RESPONDENT in the Other Proceeding [*PO2, p. 60, § 38*]. Thus, the Tribunal should admit the evidence to ensure in the pursuit of truth and justice.

2. The Tribunal should admit the evidence to ensure a future award is not set-aside or challenged

40. Additionally, the Tribunal should utilize its broad discretion to ensure that CLAIMANT has the full ability to present its case and to ensure a future award is not set-aside or challenged for failure to do so. A tribunal's failure to admit relevant evidence can result in an award being challenged [*Pilkov*, *p. 147*]. The future award may be set aside or challenged under both the NY Convention and Model Law [*NY Convention art. (V)(I)(b)*; *Model Law arts. 18, 34, 35*].
41. An award may be set aside or challenged under the NY Convention, as both Equatoriana and Mediterraneo are signatories [*Rules VEM16, §20*]. A future award in the proceeding may be set-

aside under NY Convention Article (V)(I)(b) when a party is unable to present its whole case [*NY Convention art. (V)(I)(b)*]. Article (V)(1)(b) is in line with both the Rules and the Model Law, which both highlight that the right to be heard is fundamental and a reason why an award may be challenged and set aside [*Rules art. 13.1*; *Model Law arts. 18, 34, 35*]. If the Tribunal does not allow CLAIMANT to provide the evidence of the PIA, CLAIMANT's right to present its case and the fair treatment of the parties will be affected. The Tribunal's consideration of this would be in line with the concept that one of the biggest reasons why tribunals allow for evidence is to ensure that a party has full access to due process and to have its case fully heard [*Waincymer, p. 793*]. Thus, to ensure that any future award is not set-aside and challenged and for the sake of efficiency, the Tribunal should admit the evidence of the Other Proceeding.

3. The Tribunal should admit the evidence to ensure the integrity of the institution

42. In any event, the evidence should also be admitted to ensure that the integrity of the arbitral institution. Evidence of a previous award can serve as guidance for future tribunals, allowing for further efficiency and consistency of results. [*Born, p. 2822*]. Further, a scholar has stated that even though a tribunal's main objective is to settle the dispute that is before it, a tribunal may also use extrinsic evidence to ensure the proper decision is rendered [*Perret, p. 26*]. Allowing evidence of a previous award can allow consistency that protects the arbitral proceedings.

43. Here, the short time between the PIA in the Other Proceeding and this proceeding highlight that the evidence should be admitted ensuring the Tribunal is aware of all the facts to ensure that conflicting decisions are not made within a short time period by two HKIAC Tribunals [*PO2, p. 59, § 39*]. Further, it is especially important that the Tribunal is aware of the Other Proceeding as RESPONDENT is a party to both proceedings and is yet making a contradictory argument here, that differs from its previous position in the Other Proceeding regarding the Tribunal's power to adapt the sales agreement between the Parties [*2 Oct. 2018 Ltr., p. 50*]. Thus, to ensure the integrity of the Tribunal, the evidence should be admitted.

II. THERE ARE NO ETHICAL OR LEGAL BARRIERS THAT BAR ADMITTING THE EVIDENCE

44. The Tribunal should admit the evidence of the Other Proceeding given the prevailing principles of transparency, as there are no legal or ethical barriers barring its admission [2 *Oct. 2018 Ltr., p. 50*]. The trend of transparency, as encapsulated by the Rules of Transparency, extends to international commercial arbitration [*Carmody, p. 96*]. "It is generally accepted that '[j]ustice is almost always best served by a degree of transparency, which brings the relevant facts before the arbitrators.'" [*Born, p. 2345-46*]. The principle of transparency calls for the admittance of the PIA, as there are

no ethical or legal barriers present. The evidence of the Other Proceeding is not barred from being admitted because CLAIMANT is bringing the evidence in good faith (**A**). Regardless of the method taken to obtain the PIA, the Tribunal should admit the evidence of the Other Proceeding as it was obtained by a third party (**B**).

A. CLAIMANT Brought Forth The Evidence of the Other Proceeding in Good Faith and has "Clean Hands"

45. CLAIMANT acknowledges that Parties have a duty to act in good faith throughout the arbitral proceedings [*Sussman, p. 5*; *Methanex, § 59*; *Libananco Holdings*]. Further, commentators acknowledge that there are currently no widely accepted tests to decide whether possibly improperly obtained evidence may be admitted, but there are two principles that appear in many formulations of a possible test: a party must have "clean hands" if the information would benefit it and public policy favors the admittance of the evidence [*Boykin & Havalic, pp. 33-35*; *Sussman p. 7*].

46. Here, CLAIMANT did not access the information regarding the Other Proceeding itself and had clean hands [*PO 2, p. 60, § 40; 2 Oct. 2018 Ltr., p. 50*]. First, Mr. Velazquez, a third party, who was not a party to the Other Proceeding, notified CLAIMANT of the Other Proceeding and that RESPONDENT's position when it benefitted from an adaptation of a contract due to hardship from tariffs [*PO 2, p. 60, § 40*]. When CLAIMANT notified the Tribunal, it was under the assumption that the PIA would be able to be secured [2 *Oct. 2018 Ltr., p. 50*]. CLAIMANT should not be punished for actions taken by others, as it acted in good faith and had clean hands in its attempts to obtain the evidence of the Other Proceeding, including the PIA [*Born, p. 2814*]. Further, CLAIMANT is requesting the evidence be admitted, even prior to taking final action in securing the evidence, as the PIA is not in its possession currently, showcasing that CLAIMANT is taking steps to operate in good faith. Thus, CLAIMANT had "clean hands" and was acting in good faith.

B. The Tribunal Should Admit the Evidence as it was Obtained by a Third Party, Regardless of how the Third Party Obtained The Evidence

47. As the evidence was obtained by a third party, and not CLAIMANT, the evidence may be admitted, regardless of whether it was obtained by a breach of confidentiality or through illicit means by the horse intelligence firm. Here, it is unclear whether the company Mr. Velazquez introduced to CLAIMANT has already accessed the information concerning the PIA; thus, CLAIMANT cannot be penalized and kept from presenting the evidence based on a third party's actions [*PO2, p. 61, § 41*].

48. Contrary to RESPONDENT's position that the evidence is barred by Article 42 of the 2013 Rules, the evidence of the Other Proceedings is not barred. [3 *Oct. Ltr. 2018, p. 50*]. Even though the Rules state parties, arbitrators, and witnesses are obligated to keep the proceedings confidential, which is in line with the Rules, those confidentiality provisions do not apply to third parties like CLAIMANT who would like to utilize the information [*2013 Rules art. 42*]. The Rules' confidentiality provisions are not applicable to non-parties to the arbitration [*Rules arts. 45.1-.2*; *Born, pp. 2788-89*]. When there is not an explicit provision stating that the confidentiality provisions apply to individuals or parties, an implicit duty of confidentiality is not extended [*Bulbank Case, p. 1237; Malatesta, p. 40*].
49. CLAIMANT is not responsible for actions undertaken by third parties, including the two ex-employees of RESPONDENT and the horse racing intelligence company, thus, this cannot be a basis the evidence not being admitted [*Smeureanu*, *pp. 111-112*; *PO2, p. 61, § 41*]. CLAIMANT's willingness to pay 1000 USD to receive the PIA does not mean that CLAIMANT acted in obtaining the evidence, as it already appears the company had gained the PIA prior to CLAIMANT reaching out [*PO2, pp. 60-61, § 41*].
50. Additionally, the evidence of the Other Proceeding is admissible even if the evidence was obtained through a hack of the computer systems. Contrary to RESPONDENT's argument that illicitly obtained evidence is barred by admission as the Rules, Model Law, and IBA Rules do not explicitly bar illicitly obtained evidence [*3 Oct. 2018 Ltr., p. 50*; *Rules; Model Law; and IBA Rules*]. Like the confidentiality provision, if a third party was involved in accessing the PIA, CLAIMANT's use of the information does not taint arbitral proceedings, as it was a third party accessing the data [*Cohen & Morril, p. 16*]. As the proceedings would not be tainted by an absence of good faith on the part of CLAIMANT, the PIA once obtained by CLAIMANT should be admitted.
51. Further, an international tribunal has already admitted evidence originating from computer hacking, when the party requesting the evidence did not take part in the hacking and the information was not privileged [*Caratube*]. In addition, in proceedings concerning sport law, illegally obtained video evidence has been admitted and not seen as violating public policy [*SZIER 4A 362/2013*]. Here, as discussed *supra*, CLAIMANT was removed from any hacking of RESPONDENT's computer systems, and the PIA is not protected by attorney-client privilege, as it would be available to both parties of the Other Proceeding and would not be considered communication between RESPONDENT's counsel and RESPONDENT [*Kuitkowski, p. 68*].

52. In any event, even if the Tribunal was to find CLAIMANT's payment to receive the PIA constituted CLAIMANT as not having "clean hands," the evidence may still be admitted. [*Corfu Channel, pp. 34-36* (allowing evidence that was wrongfully obtained by the U.K. to be admitted within the proceedings)]. Even if the evidence was obtained by illicit means, many countries show that evidence can be admitted after balancing the interests. [*Rijavec & Keresteš, pp 90-100*; *Nunner-Krautgasser & Anzenberger, pp. 195-209*]. Further, as argued in (**I.B.1-3**), admitting the evidence is in line with public policy as it allows the furtherance of interests and justice and ensures the integrity and efficiency of the Tribunal. Though *Corfu Channel* dealt with actions taken by a state actor, arguably CLAIMANT's action of offering to pay 1000 USD to obtain the evidence it had knowledge of, is less than clandestine government observations. Further, in the age of cybersecurity, RESPONDENT's failure to fully secure its computer systems, by allowing an out-of-date firewall program to run, shows that RESPONDENT failed to follow due diligence in securing company data, allowing public access into their files [*Born, p. 2815*; *PO2*, *p. 61, § 42*]. Thus, the Tribunal should admit the evidence of the Other Arbitration as third parties were involved in the disclosure of the PIA, and not CLAIMANT.

CONCLUSION ON ISSUE TWO

53. The Tribunal has wide discretion to allow CLAIMANT's request to submit evidence of the PIA in RESPONDENT's Other Proceeding. Furthermore, the Tribunal should admit the evidence in the search of truth and justice in the matter; to ensure there are no repercussions to a future award, and to ensure the integrity of the proceeding and institution. In the alternative, CLAIMANT is not barred by evidence rules in having the evidence admitted, as the PIA was disclosed through a third party and admitting it would be in the interests of transparency. Therefore, the CLAIMANT respectfully requests that the Tribunal admit the evidence of RESPONDENT's Other Proceeding as the CLAIMANT is entitled to bring forth the evidence.

ISSUE THREE: CLAIMANT IS ENTITLED TO PAYMENT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT OR ALTERNATIVELY UNDER CISG ARTICLE 79 AND ARTICLE 7

54. RESPONDENT does not dispute that the newly imposed tariff was an impediment [*RNoA, p. 32, §19*]. However, RESPONDENT erroneously argues that CLAIMANT may not recover payment under clause 12 of the contract and that the CISG does not apply to the present impediment [*RNoA, p. 32, §§ 18*]. RESPONDENT fails to respect the intent of the parties by prematurely concluding that clause 12 is too narrow to include the tariff [*RNoA, p. 32, §19*]. Additionally, RESPONDENT mistakenly claims clause 12 displaces Article 79 of the CISG and assumes the convention would not offer CLAIMANT relief in such an egregious case of bad faith [*RNoA, p. 32, §§20-21*].
55. CLAIMANT respectfully requests the Tribunal hold the parties intended for clause 12 of the contract to protect CLAIMANT from the risk of additional tariffs and that the parties intended the clause to provide for CLAIMANT's requested remedy of 1,250,000 USD **(I)**. Alternatively, that CISG Article 79 excused CLAIMANT from liability for damages of non-delivery and the price of the contract should be adapted under Article 7 of the CISG **(II)**.

I. THE PARTIES INTENDED FOR A 30% TARIFF TO BE COVERED BY CLAUSE 12, TO PLACE DELIVERY RISKS ON RESPONDENT, AND TO ALLOW FOR PRICE ADAPTATION TO RESTORE THE CONTRACT'S EQUILIBRIUM

56. CLAIMANT will demonstrate that the parties negotiated for a hardship clause in the contract and that its plain language includes an unforeseen tariff at 30% **(A)**. Additionally, it is clear from the intent of the parties that the clause was intended to cover a 30% tariff **(B)** and that the Tribunal should adapt the contract's price because the parties intended such a remedy to restore the equilibrium of the contract (**C**).

A. The Plain Language of the Hardship Clause in the Contract Includes a 30% Tariff

57. Clause 12 of the contract states, "Seller shall not be responsible for...hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C 5, p. 14, cl. 12*]. CLAIMANT clearly expressed to RESPONDENT that it would not be responsible for expenses such as the ones incurred due to the foot and mouth disease testing requirements amounting to a 40% increase in the price [*Ex. C 4, p. 12, §4*].
58. CLAIMANT referenced a prior contract with Danubia where CLAIMANT suffered grave losses due to a price increase. The relevant incident involved the sale of three mares to a farm in

Danubia for an overall price of 4 million USD [*PO2, p. 58, §21*]. After a foot and mouth disease was discovered in Danubia, Danubia imposed strict health and safety requirements necessitating additional tests and quarantine times that amounted to 40% of the sales price, or 1,600,000 USD [*ibid.*].

59. CLAIMANT expressly stated in the clause that it would not be responsible for hardships caused by "additional health and safety requirements" or "comparable unforeseen events making the contract more onerous" [*Ex. C 5, p. 14, cl. 12*]. CLAIMANT's previous contract with Danubia resulting in additional health and safety requirements that increased the price by 1,600,000 USD is comparable to the hardship imposed by the 30 % tariff. CLAIMANT was forced to pay 1,300,000 USD, a price significantly comparable to the hardship of 1,600,000 USD the clause was based on [*Ex. C 4, p. 14, cl. 12*].

B. The 30% Tariff was an Unforeseen Event Comparable to Hardship Caused by Additional Health and Safety Requirements that Made the Contract More Onerous

60. Even if what is included under the hardship clause was not clear from the language of the contract, the parties never intended for CLAIMANT to be responsible for unforeseen and substantial tariffs that threatened the CLAIMANT's livelihood. Under CISG Article 8, clause 12 of the contract is to be interpreted according to the parties' intent where the other party knew or could not have been unaware of what that intent was [*CISG art. 8(1)*].

61. If the intent of a party is indecipherable, the party's conduct and statements 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 and due consideration is to be given to relevant circumstances including negotiations [*CISG art. 8(2) and (3)*]. CLAIMANT is not solely responsible for the tariff under clause 12 of the contract because CLAIMANT expressly disclaimed, and RESPONDENT accepted as part of the negotiations, liability for such delivery risks **(1)**. Additionally, the tariff constituted a hardship that made the contract more onerous and was comparable to hardships associated with additional health and safety requirements **(2)**.

1. The Parties never intended for CLAIMANT to assume the risk of such tariffs

62. In the beginning, CLAIMANT refused to assume any risks associated with transportation of the goods and informed RESPONDENT that the requested doses needed to be "picked up at CLAIMANT's premises" [*Ex. C 2, p. 10, §4*]. Only now does RESPONDENT unreasonably allege CLAIMANT accepted a high level in international standards under DDP delivery, when

RESPONDENT's actions only reasonably indicated a desire for CLAIMANT to handle export and import documentation [*Ex. C 3, p. 11, § 2*]. Although the sales agreement briefly states sellers is to ship a total of 100 doses of Nijinsky III's frozen semen in 3 installments DDP, the CISG calls for due consideration to be given to the reasonable interpretation of any statement or other conduct of a party relating to the terms of the contract [*CISG art. 8; Secretariat Commentary Art. 9*].

63. Here, CLAIMANT never intended to assume the risk of tariff prices, nor could a reasonable person in RESPONDENT's position it have reasonably been interpreted CLAIMANT's actions as an expressed willingness to assume the risk of tariffs. First, despite the concern CLAIMANT had regarding the size of RESPONDENT's order, CLAIMANT agreed to the number of doses subject to basic conditions; the price would be 99.50 USD and RESPONDENT would pick up the doses at CLAIMANT's premises [*Ex. C 2, p. 10, § 4*]. By requiring RESPONDENT to pick up the doses in Mediterraneo, RESPONDENT could not be unaware that CLAIMANT intended for RESPONDENT to be responsible for transporting the frozen semen back to Equatoriana [*CISG art. 8(1)*].
64. CLAIMANT was only willing to consider delivering after RESPONDENT insisted on DDP delivery because of CLAIMANT's experience regarding the necessary import and export documentation [*Ex. C 3, p. 11, § 2]*. CLAIMANT only replied after long internal discussions [*Ex. C 4, p. 12, § 3*]. Because of RESPONDENT's emphasis on the importance of CLAIMANT's experience with import and export documentation, CLAIMANT could not have reasonably been aware of any intent of RESPONDENT to have CLAIMANT assume the risk of additional charges for delivery [*CISG art. 8(1); CISG art. 8(2)*].
65. CLAIMANT's belief that RESPONDENT never intended for CLAIMANT to assume any additional delivery risks is further supported by the fact that CLAIMANT expressly disclaimed any added liability for risks associated with the change in delivery terms [*Ex. C 4, p. 12, § 4*]. Because RESPONDENT only referred to the need for quick and effective delivery and reliance on CLAIMANT's experience with documentation and handling of frozen semen, RESPONDENT could not have been reasonably unaware that CLAIMANT was not negotiating to accept the risk of tariffs [*CISG art. 8(2)*]. Additionally, CLAIMANT clarified what it was willing to accept by stating its particular concern regarding delivery risks with unforeseeable additional costs depriving the deal of its commercial basis [*Ex. C 4, p. 12, §4*].
66. Additionally, CLAIMANT elaborated that an increase in cost of up to 40% was not a risk CLAIMANT was willing to take [*ibid.*]. To fully express CLAIMANT's intention not to be liable

for any additional costs associated with shipping, CLAIMANT stressed that "at a minimum, a hardship clause should be included into the contract to address such subsequent changes" and CLAIMANT's fears surrounding unforeseeable future costs [*ibid.*].

67. Because Equatoriana was previously one of the most established proponents of free trade, it would be unreasonable to require CLAIMANT to expressly state it would not be liable for an increase in tariffs when that risk did not exist at the time the contract was negotiated [*Ex. C 6, p. 15, §2*]. By stating CLAIMANT would not be responsible for unforeseen costs destroying the commercial basis of the deal, RESPONDENT could not have been unaware of CLAIMANT's intent not to pay for an unforeseen tariff that was six times the 5% profit margin CLAIMANT fixed for itself and that threats CLAIMANT's ability to maintain vital credit lines, especially when RESPONDENT was aware of CLAIMANT's financial situation during negotiations [*PO2, p. 58, §22; p. 59, §§29; 31*].
68. Additionally, RESPONDENT never expressly objected to accommodating CLAIMANT's fears surrounding DDP delivery. Quite the opposite, RESPONDENT used CLAIMANT's fears against them during negotiations. While RESPONDENT objected CLAIMANT's original offer of a 1000 USD increase per dose for the additional delivery terms, RESPONDENT used the removal of certain risks associated with DDP shipping to lower the total price, indicating RESPONDENT was more interested in the quick and efficient delivery of the semen rather than the usual high protection for the buyer from delivery risks commonly associated with DDP delivery [*PO2, p. 56, §8*].
69. In the end, RESPONDENT only agreed to spend an extra 200 USD per dose for the transportation and delivery DDP of the frozen semen [*ibid.*]. CLAIMANT originally and reluctantly offered to deliver to RESPONDENT DDP if the price per dose was increased by 1000 USD per and after firmly stating that CLAIMANT was "not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions" [*Ex. C 4, p. 12, §4*]. However, after further negotiating and after RESPONDENT bartered a lower price with decreased liability for the CLAIMANT, CLAIMANT accepted only 20% of its original offer [*PO2, p. 56, §8*]. The only reasonable interpretation of CLAIMANT's sudden willingness to decrease the delivery price by 80% is that RESPONDENT waived CLAIMANT's liability for most, if not all, the risks commonly associated with DDP delivery [*CISG art. 8(2)*].

70. Furthermore, while CLAIMANT's statements express a clear unwillingness to assume additional risks, RESPONDENT indicates an informed readiness to assume varied risks by seeking out and entering into the contract for frozen semen. First, RESPONDENT accepts that CLAIMANT makes no express or implied warranties regarding the fertilizing capacity of any of the doses delivered by the CLAIMANT [*Ex. C 5, p. 14, § 2*]. Second, RESPONDENT accepted the contract not only without guarantees, but with a low chance of success. In the contract, CLAIMANT expressly disclaimed guarantee for the success of fertilization and further disclosed that it was unknown whether any pregnancies resulted from Nijinsky III's frozen semen [*Ex. C 5, p. 14, §§2, 3*].
71. RESPONDENT accepted a contract for semen from Nijinsky III on 6 May 2017 even though Nijinsky III had not been tested for diseases since 3 March 2017 [*Ex. C 5, p. 14, §4*]. With a ban in place due to the rare foot and mouth disease that killed many cows and required expensive testing and with RESPONDENT planning on getting into racehorse breeding, one concerned with risks would have required updated testing before accepting the semen that could potentially pass on an expensive disease for breeders [*NoA, p. 5, §5; PO2, p. 58, §21*].
72. Throughout the negotiations and contract, CLAIMANT expressly stated its concerns with the risks associated with the agreement; one being a raise in price increase the cost by up to 40% and thereby "destroyed the commercial basis of the deal" [*ibid.*]. If RESPONDENT was unwilling to accept the risks CLAIMANT was disclaiming, RESPONDENT would have said anything to indicate that intent rather than using CLAIMANT's concerns as a bartering chip to secure a lower price [*PO2, p. 56, §8*].

2. The Parties intended clause 12 to cover the tariff because it was a hardship comparable to additional health and safety regulations

73. The parties always intended a 30% tariff to be covered under the hardship clause. CLAIMANT had expressly referenced, and incorporated into the contract, specific situations amounting to hardships CLAIMANT would not be responsible for. CLAIMANT mentioned an incident both CLAIMANT and RESPONDENT were aware of that resulted in further health and safety regulations requiring expensive tests [*Ex. C 4, p. 12, §4*].
74. Here, the tariff imposed was due to the same type of situation CLAIMANT expressly stated it would not be responsible for. RESPONDENT informed CLAIMANT that a foot and mouth disease in Equatoriana resulted in the lifting of the ban on racehorse artificial insemination [*Ex. C 1, p. 9, §1*]. Subsequently, CLAIMANT stated that it would not be responsible for the unforeseeable risks like those both parties were aware of involving health and safety regulations

increasing the price [*Ex. C 4, p. 12, §4*]. The 30% tariff was a reaction to the Mediterraneo President imposing a 25% tariff on agricultural products, the stated reason being national security due to Equatoriana's recent foot and mouth crisis [*Ex. C 6, p. 15*].

75. Ultimately, the commercial basis of the contract with RESPONDENT was not only destroyed, but damaged to the point where CLAIMANT would be destroyed in business [*PO2, p. 59, §29*]. RESPONDENT was aware that CLAIMANT was suffering from financial difficulties and aware of the current foot and mouth disease in Equatoriana [*Ex. C 1, p. 9, §1; PO2, p. 58, §22*].

76. RESPONDENT cannot reasonably claim it believed CLAIMANT assumed responsibility for the tariffs when all the negotiations and the contract indicate that RESPONDENT was willing to take many risks for the contract, RESPONDENT was aware of CLAIMANT's concerns involving additional costs stemming from a situation like the foot and mouth disease crisis, and that RESPONDENT used CLAIMANT's concerns to its benefit to lower the price of the contract. Therefore, CLAIMANT was not responsible for the tariffs under the contract.

C. The Parties Intended to Allow for Price Adaptation Under the Contract in the Case of Hardship

77. RESPONDENT underestimates the power of the Tribunal by declaring CLAIMANT may not be remedied because the Tribunal is not able to do something. However, CLAIMANT respectfully requests the Tribunal to find that CLAIMANT was entitled to request renegotiation after hardship **(1)** and that because RESPONDENT refused to renegotiate, that it is well within the Tribunal's power to grant CLAIMANT adaptation of the contract price to restore the contract's equilibrium **(2)**.

1. CLAIMANT was entitled to request RESPONDENT to renegotiate

78. RESPONDENT is asking the Tribunal to overlook the fact that it agreed CLAIMANT was in a bad situation and that an agreement could be reached between the parties [*Ex. C 8, p. 18*]. RESPONDENT may try to mislead the Tribunal by claiming it was unreasonable for CLAIMANT to believe Shoemaker had the authority to adapt the contract price after he told CLAIMANT that he was not directly authorized to make any additional payments [*ibid.*]. However, CLAIMANT was not relying on Shoemaker's ability to increase payment. CLAIMANT was relying on RESPONDENT's objective intention to place Shoemaker in a position of authority by telling CLAIMANT that Shoemaker was responsible for the racehorse breeding program, including all questions relating to the Frozen Semen Sales Agreement [*PO2, p. 59, §32*]. Any reasonable person would have understood RESPONDENT's statement to mean exactly what RESPONDENT said;

if there is a question involving the contract between RESPONDENT and CLAIMANT, Shoemaker is authorized to answer it [*CISG Art. 8(2)*].

79. After CLAIMANT asked Shoemaker about what should be done regarding the tariff, CLAIMANT did not believe Shoemaker had agreed to a price increase because Shoemaker stated he was not authorized to directly make one. Still, CLAIMANT thought, and RESPONDENT had not given CLAIMANT any reason to think otherwise, that Shoemaker was authorized to approve the renegotiation of the price in light of the changed circumstances. RESPONDENT said Shoemaker was in change of the breeding program and the only restraint on his power that CLAIMANT was aware of was the authority to directly approve a price increase immediately. Agreeing to renegotiate the contract was reasonably within Shoemaker's authority.
80. Furthermore, where matters are not expressly settled by the CISG, the Tribunal may look to general principles on which the Convention is based [*CISG art. 7(2)*]. Renegotiation in the face of a hardship in not inconsistent with the CISG. A Belgium Supreme Court has held that parties had a duty to renegotiate after changed circumstances fundamentally altered the equilibrium of the contract under CISG Article 79 [*Steel Tubes Case*].
81. Additionally, the Tribunal may look towards the UNIDROIT Principles under CISG Article 7(2) because both Mediterraneo and Equatoriana have adopted the principles [*CISG art. 7(2)*]. Under Article 6.2.3 of the UNIDROIT Principles, the disadvantaged party in the case of hardship is entitled to request renegotiations [*UNIDROIT Principles art. 6.2.3(1)*]. Furthermore, the disadvantaged party would not be entitled to withhold performance [*UNIDROIT Principles art. 6.2.3(2)*]. Here, CLAIMANT notified RESPONDENT as soon as CLAIMANT was aware of the tariff and performed after Shoemaker stated he was sure they would find a solution through negotiation [*Ex. C 8, p. 18*]. Now, RESPONDENT is trying to deprive CLAIMANT of the fair renegotiation it was entitled to under the law.

2. Because RESPONDENT refused to renegotiate, the Tribunal is able to and should adapt the contract price

82. Even though RESPONDENT agreed to renegotiate the contract price, it is now trying to allege CLAIMANT was never entitled to such negotiation [*RNoA, p. 32, §18*]. If it was against RESPONDENT's intent to allow for price adaptation, RESPONDENT would not have sent their CEO to renegotiation with CLAIMANT after Shoemaker told CLAIMANT he was not directly authorized but an agreement could be reached through negotiations [*Ex. C 8, p. 18*]. Instead of

refusing to go to negotiations at all, the CEO showed up and only became angry after CLAIMANT inquired about information it had regarding the resale of semen [*ibid.*].

83. Also, RESPONDENT agreed in the contract that CLAIMANT would not be responsible for certain hardships such as the tariff, not that CLAIMANT would not be liable for the hardships [*Ex. C 5, p. 14, §12*]. The Oxford Dictionary defines "responsible" as being part of one's job or role [*Oxford English Dictionary*]. By inducing CLAIMANT to ship the doses despite the tariff, RESPONDENT accepted that CLAIMANT was taking on obligations not required by the contract and by CLAIMANT requesting further negotiation and RESPONDENT showing up at the negotiations, RESPONDENT demonstrated a subjective and objective intent to pay CLAIMANT more money [*CISG art. 8*]. Thus, RESPONDENT never intended to exclude renegotiation involving price adaptation from the contract [*ibid.*].
84. Furthermore, price adaptation is not inconsistent with other provisions of the CISG. CISG Article 50 allows for price reduction even after the buyer already paid [*CISG art. 50*]. Additionally, CISG Article 79 still allows for either party to exercise any other right under the convention other than claiming damages [*CISG art. 79(5)*]. Therefore, allowing the Tribunal to adapt the contract price would not be inconsistent with the CISG.
85. Additionally, the UNIDROIT Principles allow the Tribunal to adapt the contract price. If a court finds hardship, it is permitted to adapt the contract with a view to restore its equilibrium [*UNIDROIT Principles art. 6.2.3(4)(b)*]. Here, RESPONDENT is forcing CLAIMANT to take responsibility for tariffs the parties never intended for CLAIMANT to be responsible for. The equilibrium of the contract has been destroyed. Not only is CLAIMANT losing its 5% profit margin, but the contract is costing CLAIMANT an additional 1,250,000 USD [*Ex. C 8, p. 17*]. This may drive CLAIMANT out of business, even though RESPONDENT would not be impacted if it were to bear the cost of the tariff [*PO2, p. 59, §§28-29*]. Therefore, CLAIMANT respectfully requests the Tribunal to exercise its power to restore the equilibrium of the contract and grant an adaptation of the price due to the unforeseeable hardship CLAIMANT was forced to endure alone.

II. IN THE ALTERNATIVE, CLAIMANT IS ENTITLED TO PAYMENT FROM RESPONDENT UNDER THE CISG BECAUSE CLAIMANT WAS EXEMPT FROM LIABILITY UNDER ARTICLE 79 AND RESPONDENT ACTED IN BAD FAITH

86. RESPONDENT asks the Tribunal to ignore not only the intent of the parties, but the fact that RESPONDENT induced CLAIMANT to perform in bad faith, knowing the immense burden CLAIMANT would face by paying the tariff itself and knowing RESPONDENT needed only six

of the fifty doses immediately for use that CLAIMANT explicitly forbid. CLAIMANT respectfully requests the Tribunal to find that the parties did not express clear intent to exclude CISG Article 79 from the contract **(A)**, that the tariff was a circumstance excused under CISG Article 79 **(B)**, and that the Tribunal should adapt the contract price considering RESPONDENT's continuous bad faith throughout the contractual relationship of the parties **(C)**.

A. The Parties did not Exclude Article 79 of the CISG by Including a Hardship and Force Majeure Clause

87. Article 79 of the CISG excuses a party from liability for its failure to perform if its failure was due to an impediment beyond its control and that it 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 [*CISG art. 79(1)*]. Article 79 does not prevent either party from exercising any right other than to claim damages under this Convention [*CISG art. 79(5)*]. Despite neither party ever clearly derogating from CISG Article 79 and despite no other form of law being accepted as a substitute, RESPONDENT claims CISG Article 6 applies. CISG Article 6 states that the parties may exclude the application of the CISG or, subject to Article 12, derogate from or vary the effect of any of its provisions [*CISG art. 6*]. RESPONDENT is asking the Tribunal to interpret Article 6 in a way that would be inconsistent with the Convention's international character and need to promote uniformity because it would go against case law and expert opinion.

88. CISG Advisory Council Opinion No. 16 interpreting CISG Article 6 states that the intent of the parties to exclude a provision of the CISG should be clearly manifested as determined by CISG Article 8 [*CISG-AC 16*]. Generally, such inferred intent to exclude should be inferred from express exclusion of the CISG, choice of the law of a non-contracting state, or by choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application [*ibid.*].

89. Generally, courts have interpreted opting-out under CISG Article 6 to require a clear, unequivocal, and affirmative agreement by the parties [*Digest CISG*]. Because neither CLAIMANT nor RESPONDENT ever mentioned excluding the CISG during negotiations, in the contract, or anytime thereafter before RESPONDENT made its erroneous claim, RESPONDENT cannot reasonably claim the parties excluded CISG Article 6 from the contract. A brief reference to the ICC hardship clause when RESPONDENT concedes it rejected the use of the ICC hardship clause for being too broad [*Ex. R 3, p. 35; RNoA, p. 30, §4*]. Using domestic law terms such as "force majeure" and "hardship" was not enough because the parties did not specify that the clause was

the exclusive application of exemption under the contract [*Adex Int'l Ltd. v. First Int'l Computer Europe B.V.*].

90. Additionally, the contract had a choice of law as Mediterraneo, but included the CISG where other courts finding exclusion of Article 79 due to a force majeure clause only had explicit reference to a domestic choice of law [*Ex. C 5, p. 14, §14; Case 1404*]. Also, the CISG Advisory Council warns against vague domestic law interpretations of force majeure and hardship disturbing uniformity [*CISG-AC 7*]. RESPONDENT claims clause 12 provided for a special regulation of changed circumstances [*RNoA, p. 32, §20*]. Nowhere in the contract does it state "changed circumstances" or how such an occurrence would be governed. Furthermore, as argued *infra* **(II.B.1)**, the CISG covers changed circumstances amounting to hardship, thus, the parties would have had to expressed clear and unequivocal intent to derogate from the CISG regarding changed circumstances.

91. Furthermore, one court found the CISG to be excluded when the seller referred to domestic law in the contract and incorporated relevant domestic statutes into the contract [*Auto case*]. The negotiations briefly referred to an ICC clause, but RESPONDENT rejected the application. Additionally, CLAIMANT stated, at a minimum, that a hardship clause should be included in the contract to protect CLAIMANT [*Ex. C 4, p. 12, §4*]. RESPONDENT could not have reasonably understood this to mean CLAIMANT wanted to waive its protections under the CISG when CLAIMANT set wanted to add a hardship clause at the very least to protect it [*CISG art. 8(2)*]. No reasonable person would believe a party insisting on protection would forgo protections afforded to it by the CISG. Because RESPONDENT cannot point to clear and unequivocal behavior by the parties to indicate that the parties intended to opt-out of CISG Article 79, the Tribunal should find for promoting the clear and affirmative agreement required under Article 6, favored by scholars and courts alike, to enhance uniformity of the Convention [*CISG art. 7(1)*].

B. The Tariff was a Circumstance Excused Under Article 79

92. The CISG would not prevent CLAIMANT from a remedy under the circumstances where one party has misled CLAIMANT and tricked CLAIMANT into a false sense of security. The Tribunal should find that CLAIMANT is entitled to payment from RESPONDENT and that the Tribunal may grant the remedy because Article 79 of the CISG does not preclude, and instead supports, exemption for economic hardship **(1)**, and because CLAIMANT could not have been reasonably expected to consider the tariff at the conclusion of the contract or have been expected to avoid or overcome the tariff's consequences **(2)**.

1. CISG Article 79 allows for economic hardship

93. RESPONDENT mistakenly concludes CISG Article 79 never regulates hardship, despite leading authority and cases that state otherwise [*RNoA, p. 32, §21; CISG-AC 7; Schlechtriem; Steel Tubes Case; Case 1302*]. The drafting history of CISG Article 79 is not conclusive enough to preclude economic hardship falling under the protection of Article 79 [*CISG-AC 7*]. Additionally, Article 79 does not exclude onerous economic burdens from its definition of "impediment" [*Honnold*]. To date, many courts have left open the question of whether an economic hardship could constitute as an impediment for purposes of Article 79, deciding Article 79 did not apply on other grounds, such as foreseeability or control [*CISG-AC 7; Case 102; Case 277; Case 1233*].
94. Here, the tariff was a hardship external to CLAIMANT's sphere of control. The tariff did not involve the market fluctuations regarding frozen horse semen, and thus CLAIMANT did not assume the risk of the price increase by agreeing to sell RESPONDENT horse semen [*Case 102; Case 277*].
95. Furthermore, the hardship was due to the government, not someone under CLAIMANT's control. CLAIMANT did not have the opportunity to pick the government like CLAIMANT would have the opportunity to pick its supplier [*Case 277*]. Courts have not concluded acts of the government could not allow for exemption under Article 79 of the CISG [*Case 1234* (court determined it remained to be seen whether the fluctuation of currency could be exempt under CISG Article 79)]. One court, although ruling CISG Article 79 did not apply because the parties had contracted out of the CISG, noted that when there was a change in legislation preventing an export license, a force majeure circumstance was created under the contract clause or Article 79.
96. Furthermore, the case here is the type of case scholars and the Advisory Council have been waiting for to qualify as an economic hardship under CISG Article 79 [*CISG-AC 7; Schlechtriem; Honnold*]. One court has already found economic hardship to qualify for exemption under Article 79 when the price for steel unexpectedly rose by 70% [*Steel Tubes Case*]. RESPONDENT will try to mislead the Tribunal by arguing a 70% change in the contract price is far greater than the 30% change CLAIMANT was left alone to bear. However, the 70% change was the result of market fluctuations, a risk courts have repeatedly found to be assumed by the seller. The 30% tariff was the result of RESPONDENT's government imposing a tariff that resulted from national security and government retaliation concerns, not the market of horse semen, meaning the tariff was outside CLAIMANT's sphere of control [*Ex. C 6, p. 15*].

97. Additionally, the 30% tariff imposed on CLAIMANT a "limit of sacrifice" beyond which CLAIMANT cannot reasonably be expected to perform [*CISG-AC 7*]. CLAIMANT stands to lose its two main lines of credit, thus threatening it with bankruptcy [*PO2, p. 59, §29*]. During negotiations, CLAIMANT was clear with RESPONDENT regarding its concerns with additional costs that had the potential to destroy the commercial prospect of the deal. Here, CLAIMANT is losing more than just the 5% commercial profit it stood to gain from the deal [*PO2, p. 59, §31*]. CLAIMANT is being forced by RESPONDENT to sacrifice its business, even though RESPONDENT was aware of CLAIMANT's financial difficulties during negotiations and RESPONDENT was never threatened with the same fears of bankruptcy by the tariff [*PO2, p. 59, §§28; 30*]. For the foregoing reasons, CLAIMANT respectfully requests the Tribunal to realize the potential of Article 79 regarding substantial hardships that are external to CLAIMANT and to CLAIMANT's sphere of control. Thus, the tariff was a hardship under CISG Article 79 that was beyond CLAIMANT's control.

2. CLAIMANT could not have reasonably been expected to consider such a high tariff from a free trade supporting country or to have avoided or overcome RESPONDENT's government-imposed cost

98. RESPONDENT cannot claim CLAIMANT should have foreseen tariffs on agricultural goods just because Mediterraneo's new president was elected in January 2017 and opening ran with a protectionist position on international trade, and agricultural goods in particular [*Ex. C 6, p. 15*]. However, Equatoriana's retaliation in general was a big surprise even to those in informed circles let alone the sheer size of the tariff [*ibid.*]. With one exception, not only had Equatoriana never resulted to retaliatory measures before, but the size of the retaliatory measure was shocking as well [ibid].

99. Use of the DDP shipping term is evidence of the parties' inability to consider the possibility of a tariff during contract formation. The parties only discussed required import and export documentation, and never once mentioned tariffs [*Ex. C 3, p. 11, §2*]. In the beginning, CLAIMANT did not even want to ship the doses, and based on the typical high level of risks for the seller typically associated with DDP shipping, CLAIMANT's agreement to only increase the contract price by 200 USD per dose is evidence that CLAIMANT could not have reasonably been expected to account for a 30% tariff if CLAIMANT only increased the price by 200 USD [*PO2, p. 56, §8*].

100. Finally, CLAIMANT could not have avoided or overcome the 30% tariff. The tariff was imposed by RESPONDENT's country, Equatoriana. In order to get the doses to RESPONDENT, CLAIMANT had to send them through customs at Equatoriana and pay the tariff. It was not the case here where CLAIMANT could find a substitute good on the market to deliver to RESPONDENT; paying the tariff was the only way to get the delivery to RESPONDENT [*Case 277*]. The tariff was much more substantial, sudden, and unforeseeable than a market price increase in the goods needed by CLAIMANT [*Case 102*]. Additionally, CLAIMANT notified RESPONDENT that it would not perform due to the tariff immediately after confirming the tariff applied to RESPONDENT's shipment [*Ex. C 7, p. 16, §2*]. As discussed below **(C)**, it was not until RESPONDENT lulled CLAIMANT into a false sense of security that RESPONDENT and CLAIMANT would get together and work the problem out [*Ex. C 8, p. 18, §2*]. Unfortunately, RESPONDENT never gave the parties a chance to come to a fair solution [*Ex. C 8, p. 18, §3*].

C. The Tribunal Should Allow for a Price Adaptation because RESPONDENT Acted in Bad Faith

101. A court or a tribunal applying a remedy it sees fit is not a new concept under Article 79 of the CISG [*AC-OP 7; Steel Tubes Case*]. In the Steel Tubes case, the court cited good faith under CISG Article 7(1) as the basis for allowing a remedy of judicial adaptation and required the parties to renegotiate the contract [*Steel Tubes Case*]. While the CISG does not have a covenant of good faith, Article 7 states that the provisions of the contract should be interpreted in light of good faith [*CISG art. 7*]. General principles of the Convention involving good faith have been interpreted as reasonableness, providing needed cooperation, and loyalty to the contract [*van der Velden; Honnold; Honnold II*]. RESPONDENT has violated all three.

102. The concept of reasonableness implies an ethical standard of behavior requiring one to be judicial and fair [*van der Velden, p. 54*]. RESPONDENT was not judicial because it angrily stormed out of negotiations with CLAIMANT and accused CLAIMANT of adding additional obligations unfounded in the contract and refused to continue negotiations [*Ex. C 8, p. 18, §3*]. Furthermore, RESPONDENT was not fair because it expected CLAIMANT to bear the entire tariff and did not disclose material information that would have substantially limited the harm CLAIMANT suffered. [*Ex. C 8, p. 18, §2*]. CLAIMANT deducted its profit margin from its requested relief. CLAIMANT is agreeing to bear some of the costs while RESPONDENT is refusing to help [*NoA, p. 7, §18*].

103. Additionally, RESPONDENT only needed 6 doses immediately out of the 50 doses of the final shipment [*PO2, p. 59, §33*]. If RESPONDENT told CLAIMANT it only needed 6 doses immediately in the third shipment, CLAIMANT would have paid a 180,000 USD tariff instead of a 1,300,000 USD tariff. Because RESPONDENT was not honest and just told CLAIMANT it needed the entire last shipment immediately, CLAIMANT paid almost eight times the amount for a tariff it would have had to pay otherwise. Moreover, RESPONDENT was just in an arbitration claiming hardship and asking for a price adaptation after the imposition of a 25% tariff [*2 Oct. 2018 Ltr., p. 49*]. For RESPONDENT to claim now that a price adaptation is not allowed or justifiable is the epitome of unfair.

104. In continuation, by refusing to continue negotiations, RESPONDENT refused to provide needed cooperation that RESPONDENT earlier agreed to do through Shoemaker [*Ex. C 8, p.18, § 3*]. On top of everything else, RESPONDENT was not loyal to the obligations of the contract. RESPONDENT sold Nijinsky III's semen to another breeder even though such a resale was expressly forbidden by the contract and in negotiations [*PO2, p. 57, §20*]. The contract states that the doses are to be used for the listed mares [*Ex. C 5, p. 13*]. Furthermore, through negotiations, CLAIMANT stated the semen could not be sold to third parties without CLAIMANT's written consent [*Ex. C 2, p. 10, §3*]. Because RESPONDENT never objected or even mentioned reselling the semen, it was reasonable for CLAIMANT to assume RESPONDENT intended to accept CLAIMANT's condition [*CISG art. 8(2)*].

105. Moreover, because the countries the parties are from have adopted the UNIDROIT principles, the principles can be used to help interpret the contract where the CISG may otherwise be silent [*CISG art. 9*]. The CISG only refers to impediments, not hardships [*CISG art. 79*]. However, the UNIDROIT Principles may be used to interpret the contract because the issue of hardships is not expressly settled by the CISG [*CISG art. 7(2)*]. Under Article 6.2.3, the UNIDROIT Principles allows a court that finds hardship, when reasonable, to adapt the contract with a view of restoring equilibrium [*UNIDROIT Principles art. 6.2.3*]. Because CLAIMANT lost its entire profit from the contract, suffered a devastating loss, was lied to and misled by RESPONDENT, and because RESPONDENT made profits from breaching the contract and would not be substantially harmed if it bore the tariff, CLAIMANT respectfully requests the Tribunal to adapt the price of the contract.

CONCLUSION ON ISSUE THREE

106. The parties did not intend for CLAIMANT to assume the risk of tariffs and the tariffs were comparable to health and safety regulations requiring expensive testing. Furthermore, the parties always intended the contract price to be adapted in the case of such hardship. In the alternative, the parties did not contract out of CISG Article 79 because they did not confer a clear intent to do so. Because CISG Article 79 does not exclude the possibility of hardship, the tariffs should be considered a hardship because they were external to CLAIMANT's sphere of control and assumed risks. Furthermore, the Tribunal should adapt the contract price because of RESPONDENT's grave breach of good faith.

REQUEST FOR RELIEF

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

I. The Tribunal has the power to adapt the contract under Mediterraneo law;

II. CLAIMANT is entitled to submit evidence of RESPONDENT's Other Proceeding;

III. CLAIMANT is entitled to recover at least 1,250,000 USD from RESPONDENT under clause 12 of the contract;

IV. CLAIMANT is entitled to recover at least $1,250,000 USD from RESPONDENT under CISG Article 79.

Alexandra Bernstein Vanessa Nahigian Rachael Weatherly

Certificate and Choice of Forum

To be attached to each Memorandum

I Hiro Aragaki, on behalf of the Team for (name of School) Loyola Law School, Los Angeles 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) Loyola Law School, Los Angeles

Name Hiro Aragaki

Signature Hiro Aragaki