Sixteenth Annual

Willem C. Vis East International Commercial Arbitration Moot

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Loyola University Chicago

School of Law

Memorandum for CLAIMANT

On behalf of
Phar Lap Allevamento
(CLAIMANT)
Rue Frankel 1
Capital City
Mediterraneo
(0) 146 9346359

Against
Black Beauty Equestrian
(RESPONDENT)
2 Seabiscuit Drive
Oceanside
Equatoriana
(0) 213 669804

DEANNA ABURAAD / JULIA CSERNANSKY / JECHONIAS JAMES / SARAH MUENZER

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INDEX OF ABBREVIATIONS

Answer	Answer to Notice of Arbitration
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
Ex. C	CLAIMANT'S Exhibit
Ex. R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC 2013 Rules	Hong Kong International Arbitration Centre 2013 Administered Arbitration Rules
HKIAC 2018 Rules	Hong Kong International Arbitration Centre 2018 Administered Arbitration Rules
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICDR	The International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Jan.	January
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration with Amendments (2006)
Ms.	Miss or Mrs.
n/a	Not applicable
No.	Number
NotC	CLAIMANT'S Notice of Arbitration
Nov.	November
p.	Page
para(s).	Paragraph(s)

PICC	Commentary on UNIDROIT Principles
Pro. Order 1	Procedural Order One
Pro. Order 2	Procedural Order Two
R.	Record
UN	United Nations
USD	United States Dollars
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	International Institute for Unification of Private Law, Principles of International Commercial Contracts
v.	Versus
Vol.	Volume

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STATEMENT OF FACTS

PHAR LAP ALLEVAMENTO ("CLAIMANT") is a renowned stud farm company located in Capital City, Mediterraneo. Its business model covers all areas of the equestrian sport, but it is highly regarded for its success in breeding racehorses. BLACK BEAUTY EQUESTRIAN ("RESPONDENT") is a company located in Oceanside, Equatoriana that is famous for its broodmare lines.

21 MARCH 2017	Chris Antley, RESPONDENT's attorney, sends an email to Julie Napravnik, CLAIMANT'S attorney, indicating RESPONDENT's intent to establish a racehorse line, and expresses interest in acquiring 100 doses of horse semen from Ninjinksy III, CLAIMANT'S star racehorse.
24 MARCH 2017	CLAIMANT responds, stating its willingness to provide horse semen under stated terms and provides RESPONDENT with a price.
28 MARCH 2017	RESPONDENT agrees with most of the terms except the price, delivery terms, applicable law and dispute resolution methods.
31 MARCH 2017	CLAIMANT accepts RESPONDENT's proposed DDP term but increases the price due to the associated increased costs of transporting the doses to RESPONDENT. CLAIMANT also requests that a hardship clause be included to account for changed circumstances that could destroy the commercial basis of the contract.
10 APRIL 2017	RESPONDENT sends an email to CLAIMANT that contains a Hong Kong International Arbitration Centre draft model clause. The draft clause provides that Equatoriana would be the law of the seat and the law of the clause.
11 APRIL 2017	CLAIMANT acknowledges the HKIAC Rules, but amends the arbitration agreement to reflect Danubia as the law of the seat.
12 APRIL 2017	Ms. Napravnik and Mr. Antley, the main negotiators of the contract, are injured in a car accident. As a result, CLAIMANT'S CEO (with the assistance of John Ferguson) and RESPONDENT's head of legal department, Julian Krone, conduct the final negotiations.
06 MAY 2017	The sales contract is executed by the PARTIES. The contract provides for 100 doses to be shipped in three installments. Clause 12 includes a

	hardship provision. The arbitration agreement does not stipulate the law of the arbitration clause.
20 MAY 2017	CLAIMANT ships first installment of 25 doses.
03 OCTOBER 2017	CLAIMANT ships second installment of 25 doses.
23 NOVEMBER 2017	Mediterraneo's newly elected President, Ian Bouckaert, announces a 25 percent tariff on agricultural products from Equatoriana.
20 DECEMBER 2017	The Government of Equatoriana imposes a 30 percent tariff on all agricultural goods from Mediterraneo in retaliation for President Bouckaert's tariff measures.
20 JANUARY 2018	Ms. Napravnik sends an email to Greg Shoemaker, RESPONDENT's employee, indicating that Equatoriana's newly imposed tariffs make the final shipment 30 percent more expensive and requests a solution prior to the final shipment.
21 JANUARY 2018	Mr. Shoemaker calls Ms. Napravnik and informs her that he would confirm with superiors whether RESPONDENT had an obligation to adapt under changed circumstances, but assures Ms. Napravnik that if the contract provided, RESPONDENT would "certainly find an agreement on the price."
23 JANUARY 2018	CLAIMANT authorizes final shipment of 50 doses.
12 FEBRUARY 2018	PARTIES attend a meeting to renegotiate the price. After CLAIMANT asks RESPONDENT to address CLAIMANT's discovery that RESPONDENT has been reselling doses of semen in violation of the agreement, RESPONDENT's CEO, Kayla Espinoza, becomes upset and asserts that requests from CLAIMANT have no basis in the contract and as such, RESPONDENT would not pay any additional amount for tariffs.
31 JULY 2018	CLAIMANT requests that RESPONDENT pay $1,250,000 USD, which is a 25 percent increase in the price of the third delivery.

02 OCTOBER 2018	CLAIMANT wants to submit evidence to the Arbitral Tribunal, which would provide information on another arbitration proceeding where RESPONDENT has taken the opposite position from its position in the instant proceeding after it was negatively affected by a 25 percent tariff increase.
03 OCTOBER 2018	RESPONDENT sends a letter to the Arbitral Tribunal, objecting to CLAIMANT'S allegations and asserting that information from the other arbitration should not be admitted in the instant proceeding.

INTRODUCTION

1. When discussing adaptation as a remedial measure, it has often been called a horse of a different color. Where RESPONDENT has taken a position in favor of adaptation under similar circumstances, however, it must not be allowed to change horses mid-race, and at the same time argue against CLAIMANT's right to adapt under circumstances of hardship.

2. Horse breeding is a lucrative but risky venture, and quite often circumstances beyond the control of the parties such as disease and health and safety requirements can quickly make what was once a lucrative contract too excessively onerous to enforce in good conscience. Here, where CLAIMANT and RESPONDENT entered into a contract for the sale of horse semen from CLAIMANT's prized race horse, Nijinsky III, the PARTIES agreed that CLAIMANT's expertise in the shipping and handling of horse semen made it the sensible choice to take on that responsibility. However, a hardship clause was included to mitigate any unforeseeable risks that might arise to make the contract inequitable.

3. Procedurally, this Tribunal should apply the law of Mediterraneo to the interpretation of the arbitration clause (Issue One), because it is the implied choice of law from the underlying contract. Additionally, the Tribunal *is* empowered to adapt the contract, both because the seat of arbitration allows for adaptation, and because the correct broad interpretation of the arbitration agreement, as well as the inclusion of a hardship clause, operate as consent by the PARTIES to adapt the contract in circumstances of hardship. Additionally, the extraneous evidence of RESPONDENT's other arbitration in which it argued in favor of adaptation under nearly identical circumstances should be admitted because it is relevant and material, and CLAIMANT learned of the evidence without breaching confidentiality or engaging in any illegal conduct (Issue Two). Finally, on the merits, CLAIMANT is entitled to an adaptation of the price based on hardship because the principles underlying the PARTIES' duties and obligations entitles CLAIMANT to adaptation where an unforeseeable event led to the contract becoming so unbalanced as to be more onerous than either PARTY intended (Issue Three).

ISSUE ONE: THE TRIBUNAL HAS THE JURISDICTION AND POWER TO ADAPT THE CONTRACT

4. The PARTIES are bound by their arbitration agreement, which allows them to arbitrate under the aegis of Hong Kong International Arbitration Centre ("**HKIAC**") and in accordance with the 2018 HKIAC Administered Arbitration Rules ("**HKIAC 2018 Rules**") (*Ex. C5, para. 15, R. 14*). The agreement provides the seat of arbitration is Vindobona, Danubia, which serves

as the *lex arbitri* (*Ex. C5, para. 15, R. 14)*. The procedural arbitration law of Danubia is the United Nations Commission on International Trade Law's Model Law on International Commercial Law with 2006 Amendments ("**Model Law**") (*Ex. C5, para. 15, R. 14; Pro. Order 2, para. 4, R. 53*).

5. The Tribunal has both the procedural jurisdiction to adapt the contract under the *lex arbitri* **(I)** and the substantive power to adapt the contract under the law governing the interpretation of the arbitration agreement **(II)**.

I. THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT UNDER THE *LEX ARBITRI*

6. There are two main reasons the *lex arbitri* provides the Tribunal with the jurisdiction to adapt contracts. First, adaptation is not an exceptional power such that it requires express conferral **(A)**. Second, the drafting history of the Model Law indicates strong support for arbitrators' ability to adapt contracts **(B)**.

A. ADAPTATION IS NOT AN EXCEPTIONAL POWER AND THUS DOES NOT REQUIRE EXPRESS CONFERRAL

7. Adaptation in the context of the PARTIES' agreement would be more properly characterized as an equitable remedy which was properly contemplated as a possibility by both PARTIES because of the inclusion of a hardship clause. Article 28(4) of the Model Law states "the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction" (*Article 28(4), Model Law*). The contract terms stated that CLAIMANT shall not be responsible for hardship (*Ex. C5, para. 12, R. 14*). Disputes stemming from hardship clauses in international trade use are commonly settled by adapting the contract at issue (*Beisteiner, p. 107*). The Tribunal should consider Article 28(4) and decide in accordance with the PARTIES' inclusion of the hardship clause, as well as the international trade custom, to adapt for hardship.

8. Adaptation is not a *per se* exceptional power for which an express authorization must always be included. In international trade, adaptation has taken on an ordinary character rather than an exceptional one (*Beisteiner, p. 107*). Danubian courts have interpreted Article 28(3) of the Model Law as providing jurisdiction to adapt only where the parties expressly confer the power to the arbitrators under *amiable compositeur* (*Pro. Order 2, para. 36, R. 60*). The courts reasoned so on the basis that adaptation is an "exceptional power" under all circumstances (*Pro. Order 2, para. 36, R. 60).* Because adaptation in the instant case is not an exceptional power, the

Tribunal may properly depart from this interpretation and find that adaptation is within its jurisdiction.

9. Many countries have adopted legislation to empower courts and tribunals alike to adapt contracts in circumstances of hardship, especially in long-term or installment-based contractual relationships (*Beisteiner, p. 107*). Adaptation is often a preferable resolution to a party's dispute in long-term or installment-based agreements because its aim is to rebalance a contract rather than to nullify it altogether, which is considered a more extreme measure when parties want to maintain a long-term relationship (*Ferrario, p. 83*).

10. RESPONDENT made clear in communications to CLAIMANT that it had a strong interest in a long-term business relationship; twice in its reply to CLAIMANT's initial offer, then again during a phone call between Mr. Shoemaker and Ms. Napravnik (*Ex. C3, para. 1, 3, R. 11; Ex. C8, para. 1, R. 18*). Additionally, the contract at issue provided for three shipments over a period of nine months (*Ex. C5, para. 8, R. 14*). Given that a long-term relationship was contemplated by both PARTIES, and that the original sales agreement at issue was an installment contract, the remedy of adaptation as it applies to these circumstances would be improperly characterized as an exceptional power.

11. RESPONDENT put Mr. Shoemaker forward as the point of contact for all questions concerning the sales agreement at issue (*Pro. Order 2, para. 32, R. 59*). It was on the basis of Mr. Shoemaker's assurances that CLAIMANT sent the final shipment and paid the tariff, with the understanding that a change in price would be negotiated (*Ex. C8, para. 2, R. 18*). Had CLAIMANT not engaged in this good faith effort to provide RESPONDENT with this shipment in the interest of maintaining a long-term business relationship, CLAIMANT might have been able to seek a performance exemption under CISG Article 79 rather than resorting to adaptation as its last means of remedy. The Tribunal should not deny its jurisdiction to adapt where CLAIMANT has made substantial efforts to maintain trust between the PARTIES, and particulary because, in doing so, Claimant deprived itself of the ability to be excused from performance under CISG Article 79. Therefore, this Tribunal should find that it has the procedural authority under ordinary trade usage to adapt the contract.

B. THE GENERAL PRINCIPLES OF THE MODEL LAW INDICATE ARBITRATORS WERE INTENDED TO HAVE THE JURISDICTION TO ADAPT

12. The Model Law does not expressly settle the matter of whether arbitrators have the jurisdiction, or procedural ability to adapt contracts. However, Article 2 A (2) provides that

matters not expressly settled are to be settled in conformity with the general principles on which the Model Law is based (*Art. 2 A (2), Model Law*). As a result, the Tribunal may rely on the Working Group Papers from the Model Law drafters to answer the question of whether arbitrators in Danubia should have the jurisdiction to adapt a contract (*Bentolila, p. 264*).

13. These Working Group Papers indicate the drafters' intention to grant arbitrators the jurisdiction to adapt contracts (*Beisteiner, p. 107*). Because adaptation combines procedural and substantive elements, and because the Model Law is purely procedural, its drafters could not directly include a provision granting arbitrators the jurisdiction to adapt contracts (*Beisteiner, p. 106*). Even so, the Model Law drafters highly encouraged national legislators to adopt domestic legislation granting arbitrators jurisdiction to adapt contracts (*Beisteiner, p. 107*). In response, several countries including the Netherlands, Sweden, Bulgaria, and Portugal have adopted national arbitration laws granting arbitrators jurisdiction to adapt contracts (*Beisteiner, p. 107*).

14. Moreover, while certain articles of the Model Law have been held to be mandatory, such that a tribunal's derogation therefrom would compromise the enforceability of its award, Article 28 has not been held to be one of those mandatory provisions. Rather, it was intended to be flexibly applied (*UNCITRAL Digest 2012, p. 121-122; see e.g. Born III*). Interpreting Article 28 rigidly would be to act contrary to the Article's original intention to provide for more party autonomy in the choice of rules and laws applicable to a dispute. Thus, this inflexible application under Article 28(3) of the Model Law that the jurisdiction to adapt only exists with the express conferral of amiable compositeur by the parties would contradict the drafters' intent.

15. Thus, there are three reasons that this Tribunal has the jurisdiction to adapt the contract under Danubian procedural arbitration law. First, Article 28(4) directs the Tribunal to take into account trade usage applicable to the agreement in its decision-making process; second, it is not mandatory to uphold Danubia's interpretation of Article 28(3) of the Model Law; and third, Danubia's interpretation of Article 28(3) improperly categorizes adaptation as an exceptional power.

II. THE TRIBUNAL IS EMPOWERED TO ADAPT THE CONTRACT UNDER THE LAW GOVERNING THE ARBITRATION AGREEMENT

16. The Tribunal is empowered to adapt the contract consistent with the conflicts of laws test set forth in the Sulamérica case, which selects Mediterraneo as the proper substantive law to

govern the arbitration agreement **(A)**. Under Mediterraneo's substantive law, the Tribunal is empowered to adapt the contract because of the wide discretion given to arbitrators to employ remedial measures **(B)**; in the alternative, even if Danubian law governs the arbitration agreement, the Tribunal is still expressly empowered to adapt the contract through the inclusion of a hardship clause in the main contract **(C)**.

17. Under the Model Law, Article 28(2) calls for a tribunal, in the absence of an express choice of law, to apply the law applicable to the substance of the dispute through the conflicts of laws rules which it considers applicable. Because the arbitration clause failed to select a law to govern the interpretation of the arbitration agreement itself (*Ex. C5, para. 15, R. 14*), the Tribunal is now tasked with applying the appropriate conflicts of law test. With this in mind, CLAIMANT urges the Tribunal to consider Sulamérica test as the appropriate conflicts of law test.

A. THE TRIBUNAL SHOULD APPLY THE SULAMÉRICA CONFLICTS OF LAW TEST

18. The Sulamérica case both arose from a failure to choose the law to govern the arbitration agreement. The Sulamérica case arose from a dispute regarding a denial of coverage from insurance policies a Brazilian company issued for a Brazilian hydroelectric power plant (*Sulamérica Case, p. 2*). The law governing the underlying contract was Brazilian law, and the seat of arbitration was set as London, England in the arbitration clause (*Sulamérica Case, p. 5*). However, the parties failed to include the law governing their arbitration agreement. Similarly, CLAIMANT and RESPONDENT expressly included Mediterraneo law to govern the underlying contract and set the seat as Vindobona, Danubia, while neglecting to select the law to govern the arbitration agreement (*Ex. C5, para. 15, R. 14*).

19. The Sulamérica test was derived from Article 103 of the English Arbitration Act, the *lex arbitri* governing that arbitration. Its language is nearly identical to the language of Model Law Article 34(2) in Danubia. This language has been interpreted by scholars and tribunals to create the three-step test described in the Sulamérica case (*Born I, p. 494; Singer Case, p. 110; BCY Case, p. 53*). As one scholar points out, a two-prong test is implicitly created by the language in these provisions: it gives effect to (1) an express, or (2) an implied choice of law, in recognition of the parties' autonomic power in choosing a governing law; then, it gives effect to (3) the law of the place where the award was made, *i.e.* the seat of arbitration (*Born I, p. 495*). These arbitration law provisions apply a validation principle ensuring the parties' intentional acts guide tribunals in their decision-making process and ensuring deliver of an enforceable award

(*Born I, p. 494*). Because the Sulamérica test is derived from language nearly identical to the Model Law Danubia has adopted, it is appropriate to apply to the PARTIES' case.

20. The Sulamérica test is applied in a number of countries due to its simplicity. The Indian Supreme Court further characterized this test as an application of the objective test – where "the law of the contract is chosen by the parties, […] such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement" (*Singer Case, p. 110*). Similarly, the latest draft of the Restatement U.S. Law of International Commercial Arbitration ("**Restatement US Arbitration**") validates the presumption that a general choice of law governing an underlying contract is the correct choice of law to apply to the arbitration agreement, as that is most reflective of the parties' common intent (*Restatement US Arbitration, p. 178*).

21. The Tribunal need not disregard the law of the underlying contract's applicability to interpreting the arbitration agreement because of the separability doctrine. The doctrine of separability establishes that where the validity, legality, termination, or very existence of an underlying contract is compromised, that the arbitration agreement contained therein can still stand independently as separate contract (*Born II, p. 402*). Separability does not create a presumption against applying the law of the underlying contract as the law of the arbitration agreement. Only in cases where the underlying contract is subject to a defect should separability be applied, in order to allow the arbitration agreement to sever its ties from the deficient underlying contract (*Born II, p. 466-467*). The underlying contract here is neither defective nor invalid, and thus the law of the underlying contract may properly be applied to the arbitration agreement.

22. While the *lex arbitri*, as discussed above, is held to govern the procedural interpretation of the arbitration agreement, it is permissible for the Tribunal to choose the law of the underlying contract to govern the substantive interpretation of the arbitration agreement. Numerous tribunals have found that applying the law of the underlying contract to an arbitration agreement is proper, even after considering the separability doctrine. One case held that signing the main contract also entails accepting the arbitration agreement without any additional steps required by the parties (*Derains, p. 16-17*). One tribunal went so far as to call choosing the law of the main contract to govern the arbitration clause "commonly accepted" when there is no explicit choice made (*ICC Case No. 2626*). Another tribunal called choosing the law of the main contract "reasonable and natural" to apply in the absence of an express

choice of law (*ICC Case No. 6840*). Similar to the cases above, the PARTIES contained the arbitration agreement within their main contract but failed to include an explicit choice of law. This Tribunal may properly decide in line with the aforementioned cases and choose the law of the underlying contract to govern the substantive interpretation of arbitration agreement.

1. THE LAW OF THE UNDERLYING CONTRACT IS THE IMPLIED CHOICE OF LAW OF THE ARBITRATION AGREEMENT

23. In the instant case, there is no express choice of law under the first step of the Sulamérica test. Moving to the second step, an implied choice of law can be derived from the PARTIES' choice of Mediterraneo law to govern the underlying contract (*Ex. C5, para. 14, R. 14*). In using the law of the underlying contract, the Sulamérica court considered principles of fairness and party intent, even taking separability into account (*Sulamérica Case, p. 17-18*).

24. In the interests of adhering to common party intent, the Tribunal should consider applying the law of an underlying contract to interpreting an arbitration agreement because it is undeniably a part of that contract (*Sulamérica Case, p. 17-18*). The court pointed out that insufficient weight had been given in past decisions to the choice of law governing an underlying contract, attributing this error to overestimating the importance of separability where validity was not an issue (*Sulamérica Case, p. 26*). In Sulamérica, where the choice of law to govern the contract was exclusively Brazilian law, this was pointed to as a strong indicator that the parties also implicitly intended Brazilian law to govern the arbitration agreement (*Sulamérica Case, p. 26*). Because the PARTIES in this case failed to specify a law to govern the arbitration agreement, the Tribunal ought to consider the law of the underlying contract as also intended by the PARTIES to cover interpreting the arbitration agreement.

25. The law of the underlying contract is the correct starting point for an implied choice of law in light of of how frequently parties fail to choose a law to govern an arbitration agreement, even though they negotiate and choose a law to govern the underlying contract (*Sulamérica, p. 11*). In the instant case, the PARTIES' negotiations included a lengthy discussion of the appropriate choice of law to apply to the main contract.

26. CLAIMANT first suggested that Mediterraneo law apply to the contract on March 24, 2018, in accordance with the general conditions it applies to all sales of frozen horse semen (*Ex. C2, para. 5, R. 10*). When RESPONDENT suggested its initial draft of the arbitration clause to be included in the agreement, the law of arbitration was suggested as Equitoriana law, and the seat of arbitration was suggested as Equitoriana (*Ex. C3, para. 3, R. 11*). RESPONDENT

displayed its understanding in this e-mail that supervisory jurisdiction given to the courts of one nation in an arbitration agreement differs from the applicable law. Thus, RESPONDENT cannot claim it always intended for Danubian law to apply to the substance of the arbitration agreement.

27. Additionally, Claimant relayed to Respondent that it had an internal policy which required any contract subjected to a foreign law would require special approval by its creditors' committee. (*Ex. R2, para 1, R. 34*). In light of the fact that Respondent never objected to the application of Mediterraneo law to the contract at any point during negotiations, Claimant's assumption that Mediterraneo law applied to the contract, which included the arbitration agreement, was not unreasonable.

28. Many cases have held that it is appropriate to apply the law of an underlying contract to an arbitration agreement (*ICC Case No.'s 6850, 6752, 6739, 5294; Born I, p. 476*). Although the arbitration agreement and the underlying contract can be potentially considered as two separate agreements, there is only a *possibility* of applying different substantive law; in many instances, a separate law is not actually applied (*Born III, p. 439, 652*).

29. Common-law courts and authorities alike have expanded on how the law of the underlying contract can also govern the interpretation of the arbitration agreement. (*Born I, p. 581-583*). For instance, the Indian Supreme Court held in a dispute where a contract was governed by Indian law and the seat of arbitration was London, England, that the choice of Indian law governing the underlying contract gave rise to an inference that Indian law was intended to govern the substantive issues of the arbitration agreement as well (*Singer Case, p. 109*). A Singapore court also adopted the Sulamérica three-step test in *BCY v. BCZ*, where New York law was chosen to govern a contract, and Singapore was chosen as the seat of arbitration (*BCY Case, p. 58)*. In choosing the law of the arbitration clause, the Singapore Court found that the implied choice of New York Law from the disputed contract was the proper choice of law because its application would not damage the validity of the tribunal's award (*BCY Case, p. 59*). In *BCY*, the court went even further to discuss why the application of the Sulamérica test was preferable "as a matter of principle" (*BCY Case, p. 53*).

30. Notable civil law authorities and courts have also held that a choice of law in an underlying contract creates a strong inference in favor of that law governing the interpretation of an arbitration agreement. Dutch, German, Japanese, and Swiss courts have handed down decisions that *de facto* apply the law governing an underlying contract to an arbitration

agreement (*Born I, p. 581*). One Dutch case explained, "[P]arties in general, would prefer […] to submit the validity of the arbitration cause to the same law which they submitted the main agreement of which the arbitration clause forms a part" (*Owerri Case, p. 706; Born I, p. 581*). A group of German scholars supported the notion that, absent an express choice of law to govern an arbitration agreement, the validity of the arbitration agreement or any other substantive issue, the law of the underlying contract is presumed to apply to the arbitration agreement (*Blackaby, p. 224*). With the above authorities in mind, a choice of law analysis that reflects common party intent should apply, as is found in the Sulamérica test.

2. THE SUBSTANTIVE LAW OF THE SEAT SHOULD ONLY BE APPLIED AS A LAST RESORT

31. Notably, because the facts of Sulamérica can be distinguished in part from the present case, the Tribunal should not move to the third step of the test. *Only* if the implied choice of law would impair the enforceability or validity of an award would the third step, which is to choose the law with the closest and most real connection to the arbitration agreement, be considered (*Sulamérica Case, p. 31*). Because the award's enforceability was impaired under the implied choice of law in the Sulamerica case, the court applied the third step. In the present case, however, applying Mediterraneo law would not render an award invalid if the contract was adapted per CLAIMANT's request. There is no public policy concern in applying Mediterraneo law to determine whether adaptation is an appropriate remedy because Danubian arbitration law does allow contract adaptation as an exceptional power (*Pro. Order 2, para. 36, R. 60*).

32. A choice of seat to govern the substance of an arbitration agreement generally has recently come under harsh criticism. Gary Born stated that applying the law of the seat to substantive issues improperly conflates issues of arbitrability and public policy with the substantive elements of an agreement, where another nation's law might have a much closer connection with the arbitration agreement, such as where the award might actually be enforced (*Born I, Footnote 183*).

B. MEDITERRANEO LAW EMPOWERS THE TRIBUNAL TO ADAPT THE CONTRACT

33. Under the substantive law of Mediterraneo, which is the United Nations Convention on Contracts for the International Sale of Goods (**"CISG"**), the Tribunal may interpret the PARTIES' current arbitration agreement as authorizing it to adapt the contract. The arbitration clause does not substantially limit the types of disputes the Tribunal may hear – it does not describe an exhaustive list of disputes (*Ex. C5, para. 15, R. 14*). Further, there is consistent jurisprudence in Mediterraneo that holds where a sales contract is governed by the CISG, the

CISG also applies to the conclusion and interpretation of the arbitration clause contained therein (*Pro. Order 1, para. 4, R. 53*). There is no consistent case law indicating what "if authorized" means, and thus the inclusion of this language may properly be held to be a distinction without a difference (*Pro. Order 2, para. 45, R. 61*).

1. THE TRIBUNAL DERIVES ITS POWER TO ADAPT THE CONTRACT FROM THE CISG

34. Recent scholarly debate has struggled over whether Article 79 of the CISG encompasses hardship. On its face, Article 79 reads as a force majeure clause, which may excuse from performance a party who encounters an impossibility of performance (*Ishida, p. 333*). Some scholars, however, in seeking to adapt the CISG to modern international legal dilemmas, have read into the term "impediment" in Article 79(1) as a way to open the door to exemption on the basis of hardship as well as force majeure (*Silveira, p. 328*). The PARTIES' sales agreement included a hardship clause which specifically denied CLAIMANT's responsibility for "unforeseen events making the contract more onerous" (*Ex. C5, para. 12, R. 14*). This provision was included alongside a more traditional force majeure clause (*Ex. C5, para. 12, R. 14*). In looking to the PARTIES' intent during negotiations, as well as the text of the clause itself, the PARTIES deliberately carved out an exception for both force majeure and hardship, acknowledging them as separate impediments which arose from separate circumstances. Thus, the Tribunal may find its power to adapt under Article 79(1) on the basis of hardship.

35. Further, a CISG Advisory Council opinion offered Article 79(5) as an authorization for a tribunal to apply whatever remedy is available to restore contractual balance (*Garro, p. 47*). Article 79(5) provides that "[N]othing in this Article prevents either party from exercising any right other than to claim damages under this Convention" (*Art. 79(5), CISG*). The Council put forth Article 79(5) as an opening to allow a tribunal "to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances (*Garro, p. 47*). Therefore, this Tribunal may consider adaptation as a proper remedy to employ under Article 79(5) of the CISG.

36. Hardship generally does not call for proof of impossibility, but only of excessive onerousness, which is lower standard (*Brunner II, p. 211*). The contract performance undoubtedly became more onerous for CLAIMANT as a result of the tariff, forcing it to extensively restructure its entire company, make cuts to its work force, and potentially even sell the dressage part of its company in order to open a line of credit to pay for said tariff (*Ex. C8, para. 6, R. 17; Pro. Order 2, para. 29, R. 59*). In contrast, the RESPONDENT would not be financially endangered if it bore

the full cost of the tariff (*Pro. Order 2, para. 30, R. 59*). Thus, the Tribunal has the power to account for the onerousness CLAIMANT experienced and to adapt in order to restore the contractual balance between the PARTIES under Article 79(5).

37. As soon as CLAIMANT learned that the tariff imposed on Mediterraneo's agricultural products would apply to the third shipment of semen, CLAIMANT immediately e-mailed RESPONDENT to find a solution (*Ex. C7, R. 16*). CLAIMANT spoke with Mr. Shoemaker, the point of contact designated by RESPONDENT for all issues regarding the sales agreement, and felt reassured that renegotiations with RESPONDENT would commence in good faith (*Pro. Order 2, para. 32, R. 59; Ex. C8, para. 1-2, R. 18*). On this basis CLAIMANT approved and shipped the final fifty doses (*Ex. C8, para. 1-2, R. 18*).

38. Article 8 of the CISG calls for courts and tribunals to look to the parties' intent to interpret their statements and conduct (*Art. 8, CISG*). During initial negotiations with RESPONDENT, the inclusion of a hardship clause was acknowledged as an empowerment for the Tribunal to adapt when circumstances provided for it (*Ex. C8, para. 4, R. 17*). Intent can be derived from all relevant circumstances, including negotiations and practices the parties have established between themselves (*Art. 8, CISG*).

39. Applying Article 79 of the CISG to issues of hardship is far from settled, but there is a strong argument that hardship generally is governed by the CISG, if not expressly settled therein. (*Garro, p. 33*). Interests of good faith are mandated in guiding the application of the CISG as an underlying principle, to promote uniformity in international trade, per Article 7(1) (*Art. 7(1), CISG*). CLAIMANT's conduct displays good faith in abundance. CLAIMANT relied on the assertions Mr. Shoemaker made that its interest in a long-term relationship with RESPONDENT would guide the renegotiations (*Ex. C8, para. 2, R. 18*). CLAIMANT and RESPONDENT did in fact enter into negotiations to adapt the price in February of 2018 (*Ex. C8, para. 3, R. 18*). These negotiations after the final shipment can be construed as a manifestation of RESPONDENT's acknowledgement that it never intended for CLAIMANT to bear the full burden of the retaliatory tariff, and as such an adaptation of the price should be within the Tribunal's power.

40. If the Tribunal finds that no explicit provision in the CISG applies, and that the general principles underlying the CISG are an insufficient basis for authorizing it to adapt the contract, then remaining gaps will have to be filled under rules of private international law (*Art. 7(2), CISG*).

2. THE TRIBUNAL DERIVES ITS POWER TO ADAPT THE CONTRACT FROM THE UNIDROIT PRINCIPLES, WHICH FILL REMAINING GAPS IN THE CISG

41. If the Tribunal finds a gap in the CISG concerning hardship, private rules of international law point to the domestic law of Mediterraneo, the proper law governing the arbitration agreement (*Art. 7(2), CISG*). The UNIDROIT Principles of International Commercial Contracts (2016) ("**UNIDROIT Principles**"), which Mediterraneo has adopted verbatim as its contract law, may be used to interpret the arbitration agreement.

42. During preliminary negotiations between the PARTIES, Mr. Antley explicitly said to CLAIMANT's counsel that arbitrators should have the power to adapt the contract should the PARTIES be unable to resolve contractual issues themselves (*Ex. C8, para. 4, R. 17*). In addition, Mr. Shoemaker agreed that "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," indicating RESPONDENT's intent to consider a price adaptation (*Ex. R4, para. 4, R. 36*). Article 4.1(1) of the UNIDROIT Principles gives preference to the common intention of the parties as the starting point for interpretation (*Art. 4.1(1), UNIDROIT Principles; Fouchard, p. 28*). Article 4.3 clarifies that common intention is a subjective test, giving weight to all the circumstances of the case (*Art. 4.3, UNIDROIT Principles*).

43. After the contract concluded, the PARTIES agreed to meet and did in fact meet to negotiate this price adaptation, recognizing it as a means to remedy the dispute (*Pro. Order 2, para 35, R. 60*). However, RESPONDENT's CEO, Ms. Espinoza, refused to continue after CLAIMANT mentioned the doses which RESPONDENT resold (*Ex. C8, para. 3, R. 18*). It was RESPONDENT's direct refusal to cooperate which led to unsuccessful renegotiations. The combination of the PARTIES' preliminary negotiations and the conduct subsequent to the conclusion of the contract indicate their common intent and approval towards contract adaptation (*Art. 4.3(a-c), UNIDROIT Principles*). Because RESPONDENT prematurely ended negotiations, it should not be allowed to evade its duty to renegotiate in good faith by claiming that the Tribunal is not entitled to adapt the contract at issue.

44. According to UNIDROIT Principles Article 4.2(2), where common intention cannot be established, statements and conduct should be interpreted under a reasonable person standard (*Art. 4.2(2), UNIDROIT Principles*). RESPONDENT was aware of CLAIMANT's financial difficulties and CLAIMANT's reluctance to accept more obligations under the main contract (*Pro. Order 2, para. 22, R. 58; Pro. Order 2, para. 28, R. 59*). Article 4.2(2) looks at how a

reasonable person of the same kind as the other party would interpret another's statements and conduct in the same circumstances (*Art. 4.2(2), UNIDROIT Principles*). A reasonable RESPONDENT, familiar with the expenses and potential liabilities concerning shipping horses and horse semen, must have recognized CLAIMANT's intention to minimize any negative impact as a result of the contract.

45. The purpose of the PARTIES' contract was to modestly increase CLAIMANT's profits to make up for its losses since its previous contract nearly resulted in its insolvency (*Pro. Order 2, para. 29, R. 59*). Article 4.2(2) looks to the nature and purpose of the parties' contract, and the meaning commonly given to terms and expressions in the trade (*Art. 4.3(d-f), UNIDROIT Principles*). It is common within long-term business relationships and contracts like the one at issue to require adaptation, should any term become too onerous for either party. A reasonable RESPONDENT would understand the contract's price would potentially have to be adapted by the Tribunal in order to maintain the balance between the PARTIES.

46. Further, the Tribunal has the power to adapt the contract under the hardship clause of the main contract (*Pro. Order 2, para. 39, R. 60*). According to Article 6.2.3 of the UNIDROIT Principles, when parties encounter hardship and then fail to renegotiate to reach a mutual agreement on the adaptation of their contract, the disadvantaged party may turn to "the court" (*Art. 6.2.3, UNIDROIT Principles; Southerington, para. 2.4*). Notably, under Article 1.11, "the court" also includes arbitral tribunals (*Art. 1.11, UNIDROIT Principles*). RESPONDENT's CEO claimed that it was no longer interested in cooperating with CLAIMANT and stopped negotiations in their first and final renegotiation meeting of 12 February 2018 (*Ex. C8, para. 3, R. 18*). In the instant case, where RESPONDENT ended negotiations prematurely, CLAIMANT did not have another recourse to seek the additional remuneration for the tariff, despite RESPONDENT's previous assurances that an agreement could be found on adjusting the price of the final shipment (*Ex. R4, para. 3, R. 36; Ex. C8, para. 3, R. 18*).

47. Thus, if the Tribunal does find that CLAIMANT endured hardship, it is empowered to "adapt the contract with a view to restoring its equilibrium" (*Art. 6.2.3(4)(b), UNIDROIT Principles*). This process is exemplified in RESPONDENT's ICC arbitration taking place in Mediterraneo, where the tribunal agreed it had the power to adapt the contract, as evidenced in the partial award that tribunal has issued in those proceedings (*Pro. Order 2, para. 39, R. 60*). That tribunal affirmed their adaptation powers by following consistent jurisprudence of the courts in

Mediterraneo in the context of Art. 6.2.3(4)(b) Mediterranean Contract Law, the UNIDROIT Principles (*Pro. Order 2, para. 39, R. 60*).

48. The prior arbitration further confirmed that under Mediterraneo's consistent jurisprudence, a standard arbitration agreement in combination with a hardship provision is considered to be sufficient to grant an arbitral tribunal the same powers as a court has under the doctrine of synchronized competence (*Pro. Order 2, para. 39, R. 60*). While the present contract between the PARTIES contains a somewhat narrower arbitration clause than the clause at issue in the other arbitration, this should not limit the scope of the Tribunal's power. Arbitration clause language, such as "[a]ll disputes arising in connection with this contract." which was used by the PARTIES, should be interpreted broadly to encompass adaptation when the conduct of the parties reflects a common intent to allow for it, even though in other contexts it might be given a narrow scope (*Ferrario, p. 146*). Adaptation for hardship is a "dispute" which may be finally resolved by the Tribunal because hardship clauses are intended to allow for adaptation when circumstances call for it, and the RESPONDENT's refusal to renegotiate after their contract concluded create such circumstances (*See Ferrario, p. 146*).

C. IN THE ALTERNATIVE, IF DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT, THE TRIBUNAL STILL HAS EXPRESS POWER TO ADAPT FROM THE HARDSHIP CLAUSE

49. Danubian contract law follows a largely verbatim adoption of the UNIDROIT Principles. However, its hardship provision contains a slight difference concerning whether adaptation is "authorized." Article 6.2.3 paragraph 4(b) of its domestic contract law states, "If the court finds hardship it may, if reasonable, adapt the contract *if authorized* with a view to restoring its equilibrium" (emphasis added) (*Pro. Order 2, para. 45, R. 61*). There is no consistent case law indicating what "if authorized" means (*Pro. Order 2, para. 45, R. 61*). Generally speaking, arbitration agreements are meant to cover disputes typical for the type of contractual relation between the parties (*Fouchard, p. 28; Ferrario, p. 110*).

50. It is widely recognized that hardship, in combination with failed renegotiations by the parties to adapt their contract, generates a dispute which grants the tribunal the power to adapt on their behalf (*Georgia Case; Ferrario, p. 83-84*). In the instant case, a dispute concerning adaptation for failed renegotiations under a proper interpretation of the hardship clause in the PARTIES' main agreement is a dispute typical of the PARTIES' contractual relation, and thus authorizes the Tribunal to proceed to resolve the dispute by reasonable means (*Fouchard, p. 28*).

51. The other difference in Danubia's adoption of the UNIDROIT Principles is its replacement of Article 4.3 with the "four corners rule," which prohibits the use of extraneous evidence in interpreting a contract (*Pro. Order 2, para. 45, R. 61*). The arbitration agreement at issue is contained within a larger contract. Therefore, the "four corners" of the agreement, contrary to RESPONDENT's assertion, can be properly inferred to be the entire contract, not just the one clause in which the arbitration agreement is contained. Because the word dispute "clearly refers to and includes any conflict or difference between the parties on a particular matter that could not be solved by mutual agreement," adaptation can fall properly under the definition of dispute where a contract contains a hardship clause. This is because, as established above, a hardship clause is widely held to be an acknowledgement that the parties properly contemplated adapation being made available to tribunals in making their decisions (*Ferrario, p. 146)*. Thus, the PARTIES' inclusion of a hardship clause within the four corners of the contract empowers the Tribunal to adapt the contract.

52. In addition, the Tribunal should be empowered to adapt the contract due to public policy concerns. Where there is hardship, both parties have a duty to renegotiate in good faith (*Art. 1.7, 5.1.3, UNIDROIT Principles*). If a tribunal did not have the power to adapt the parties' contract, the party which is not disadvantaged, in this case the RESPONDENT, could with impunity circumvent its obligations to renegotiate for an adaptation (*Ullman, p. 103*). Thus, a tribunal needs the power to adapt the contract to ensure the parties negotiate for adaptation in good faith.

CONCLUSION ON ISSUE ONE

53. The Tribunal has both the jurisdiction and power to adapt the contract. Because adaptation in the case of hardship is not an exceptional power, and because Article 28 of Danubia's arbitration law is not mandatory, the Tribunal may find that it has the jurisdiction to adapt a contract without risking an unenforceable award. In applying the CISG to the interpretation of the arbitration agreement, the gaps of which are properly filled by the UNIDROIT Principles, Mediterraneo law is proper as the choice of law governing the arbitration agreement in cases of hardship. If the law governing the arbitration agreement is found to be Danubian law, adaptation is still a remedy available to the Tribunal because disputes arising from hardship clauses authorize adaptation.

ISSUE TWO: THE CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRAL PROCEEDING

I. THIS TRIBUNAL HAS BROAD DISCRETIONARY POWERS TO ADMIT THE EVIDENCE AT ISSUE

54. This Tribunal has broad discretionary powers to admit the evidence from the other arbitral proceeding pursuant to the UNCITRAL Model Law, HKIAC Rules, International Bar Association Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"), and a consensus from commentators and authorities alike. The UNCITRAL Model Law is the *lex arbitri* of this arbitration, the HKIAC is the arbitral institution chosen by the PARTIES, and the IBA Rules are widely accepted guidelines on the taking of evidence (*NotC, para. 4, R. 6; Pro. Order 1, para. 4, R. 52; Ex. R2, para. 2, R. 34*). The rules and principles available to this Tribunal for guidance all affirm that this Tribunal may use broad powers to consider the evidence from the other arbitral proceeding.

55. In the absence of a prior agreement between the parties, the discretion of the arbitral tribunal with respect to the admissibility, relevancy, and materiality of evidence is independent (*1985 UNCITRAL Commentary, p. 23, para. 174*). Article 19.2 of the Model Law reads, "...the arbitral tribunal may…conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence" (*Art. 19.2, Model Law*).

56. In addition to formal guidelines, commentators and authorities alike affirm the broad powers of arbitral tribunals and the unique, flexible nature of arbitrations. Drafters of the Model Law clarify that, "The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence" (*Model Law, Explanatory N. 5, p. 32*). The Preamble to the IBA Rules affirms that, "The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration" (*Preamble, para. 2, IBA Rules*).

57. Thus, the laws and rules used in international arbitrations reflect, "broad, permissive admissibility standards" (*Ortiz, para. 5*). It should be noted that the "general consensus of practitioners and commentators alike is that stricter rules of admissibility are wholly inappropriate for international arbitration or adjudication" *(Reisman, p. 743*). Given that

commentators and authorities alike emphasize the independent, flexible, and liberal rules of admissibility, there is significant support for this Tribunal to admit and consider the evidence from the other arbitral proceeding.

58. The evidence from the other arbitral proceeding should also be admitted and considered by this Tribunal because of the special features of this case. In the other arbitration, RESPONDENT takes a contradictory legal position with respect to the adaptation of contracts after the imposition of an unforeseen tariff (*Letter by Langweiler, para. 2, R. 50; Pro. Order 2, para. 39, R. 60*). RESPONDENT now seeks to prevent CLAIMANT from requesting the same relief after the imposition of a similar tariff (*Letter by Langweiler, para. 2, R. 50*). The evidence at issue informs a more complete understanding of how both PARTIES view the imposition of an unforeseen tariff, and the appropriateness of price adaptation as a remedy in those circumstances. In conclusion, it is appropriate for this Tribunal to exercise its broad discretionary powers to admit and consider the evidence from the other arbitral tribunal.

II. THE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDING IS MATERIAL, RELEVANT, AND ADMISSIBLE

59. Arbitral tribunals have broad power to determine the admissibility, materiality, and relevance of evidence regardless of how it was obtained. According to an investigation conducted by RESPONDENT, the evidence at issue could have been obtained either through an illegal hack or through a breach in confidentiality by two former employees (*Letter by Fasttrack, para. 3, R. 51)*. Therefore, there is ambiguity in the record surrounding exactly how the evidence was obtained (*Letter by Fasttrack, para. 3, R. 51)*. However, ambiguity regarding the origin of evidence is not a novel issue for arbitral tribunals, and ultimately, does not preclude the evidence from consideration by this Tribunal.

60. One authority notes, "…the fact that evidence is obtained illegally will not automatically disqualify such evidence as inadmissible" *(Blair and Gojković, p. 256*). Indeed, arbitral tribunals have relied on evidence obtained in an unclear manner in a number of cases (*Yukos Award; Caratube Award; Methanex Award*). Another authority notes that, "Given this wide discretion and the binding nature of arbitral awards, tribunals generally admit evidence to avoid risking vacatur for failure to provide a full and fair opportunity to present the case, and then consider its credibility, weight and value" (*Sussman, p. 3*). Therefore, in line with other arbitral decisions and notable authorities, the evidence at issue in this case should be admitted by the Tribunal

so CLAIMANT has a full and fair opportunity to present a case for price adaptation after the imposition on an unforeseeable tariff.

61. In addition, common legal and policy elements favor the admission of the evidence at issue. Blair and Gojković note that, "…a common test for deciding the admissibility of unlawfully obtained evidence still remains to be defined…" (*Blair and Gojković*, *p. 256*). However, in the absence of a formal common test, tribunals look to "some common legal and policy elements" considered by other tribunals and courts when determining whether to admit evidence (*Blair and Gojković, p. 256; Boykin and Havalic, p. 33-35*). An analysis of the common legal and policy elements informing arbitral tribunals' decisions to admit illegally obtained evidence will show that, in this case, those factors weigh in favor of admitting evidence from the other arbitral proceeding.

A. THE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDING IS MATERIAL AND RELEVANT

62. Both Blair and Boykin identify materiality as an important element weighing in favor of admitting evidence regardless of how it was obtained (*Blair and Gojković, p. 256; Boykin and Havalic, p. 33-35*). For example, in the *Methanex Award*, the tribunal considered the admissibility of evidence obtained when claimant trespassed into an office, searched through trashcans and dumpsters, and took material expressly subjected to legal professional privilege (*Blair and Gojković, p. 251-252*). Ultimately, the tribunal did not admit the evidence because the documents were of little support in Methanex's case and could not have influenced the result of the case (*Blair and Gojković*, *p. 251-252*). In this case, a determination regarding the unforeseeable nature of tariffs and the approproiateness of price adaptation will influence the result of the case since both are relevant to CLAIMANT's request for relief.

63. In spite of extreme conduct by the claimant in the Methanex Award, the tribunal considered the materiality of the evidence presented (*Blair and Gojković*, *p. 251-252*). Boykin notes, "…by including an element of materiality in its analysis, the Methanex tribunal implicitly acknowledged that the manner in which evidence is obtained would not always justify excluding the evidence" (*Boykin and Havalic, p. 33-35*).

64. In contrast to the *Methanex Award*, the arbitral tribunal in the *Yukos Award* relied on illegally obtained evidence, partly based on its materiality (*Yukos Award*, *para. 1185-1186*). The arbitral tribunal considered evidence obtained through a WikiLeaks hack of confidential diplomatic cables from the United States to determine a factual dispute regarding why a Yukos auditor

chose to withdrawal its audit reports (*Yukos Award, para. 1185-1186*). Like the *Yukos Award*, in this case, the evidence from the other arbitral proceeding is material and relevant to determining a factual and legal dispute in the case.

65. In this case, RESPONDENT takes a contradictory legal position from its position in the other arbitration regarding contract adaptation and tariffs (*Letter by Langweiler, para. 2, R. 50; Pro. Order 2, para. 39, R. 60*). RESPONDENT asserts that its contract should be adapted because it suffered hardship as the result of the tariff war (*Letter by Langweiler, para. 2, R. 50; Pro. Order 2, para. 39, R. 60*). The evidence at issue allows the Tribunal to consider the true intent of the PARTIES with respect to how hardship clauses work, how they operate with unforeseen tariffs, and the appropriateness of price adaptation as a remedy.

66. The evidence from the other arbitral proceeding reveals almost identical facts regarding the subject matter of the contracts, the use of DDP terms, the inclusion of a hardship clause, the imposition of a tariff, and the request for contract adaptation as a remedy (*Letter by Langweiler, R. 50; Pro. Order 2, para. 39, R. 60*). In this case, a 30% retaliatory tariff was imposed by the government of Equatoriana (*Letter by Langweiler, para. 2, R. 50*). In the other arbitral proceeding, a 25% tariff was imposed by the government of Mediterraneo (*Letter by Langweiler, para. 2, R. 50*). In this case, CLAIMANT suffered a 5% greater tariff than RESPONDENT in the other arbitral proceeding.

67. In addition, both contracts deal with sales for reproductive purposes in the equestrian industry. In the other arbitral proceeding, the issue was the sale of a mare; and in this case, it was the sale of frozen semen doses (*Letter by Langweiler, para. 2, R. 50*). Both contracts include DDP terms and hardship clauses (*Letter by Langweiler, para. 2, R. 50; Pro. Order 2, para. 39, R. 60*).

68. Finally, the relief requested in both arbitrations is the same: an adaptation of the contract price due to unforeseeable change of circumstance (*Letter by Langweiler, para. 2, R. 50; Pro. Order 2, para. 39, R. 60*). Indeed, the primary difference between the two contracts and arbitrations seems to be that in the other arbitral proceeding RESPONDENT suffered the effects of an unforeseen tariff and requests relief, while in this proceeding, CLAIMANT is the aggrieved party (*Letter by Langweiler, para. 2, R. 50; Pro. Order 2, para. 39, R. 60*). Given the substantial similarities between the two contracts at issue, and the RESPONDENT's contradictory legal position, this Tribunal should admit and consider the evidence at issue as it is both material and relevant to this arbitral proceeding.

B. THE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDING IS ADMISSIBLE

69. Regardless of how the evidence from the other arbitral tribunal was obtained, it is admissible to these proceedings. As previously noted, tribunals will consider some similar legal and policy elements when determining the admissibility of evidence (*Blair and Gojković, p. 256; Boykin and Havalic, p. 33-35*).

70. The following considerations are applicable in this case with regard to admissibility of the evidence from the other arbitral tribunal: Did the party seeking to introduce the evidence participate in unlawful activity that led to its disclosure? **(1)** Does the public interest favor rejecting the evidence as inadmissible? **(2)** Do the interests of justice favor the admission of evidence? (*Blair and Gojković, p. 256; Boykin and Havalic, p. 33-35*) **(3)**. An analysis of these factors will weigh in favor of admitting the evidence from the other arbitral proceeding.

1. CLAIMANT DID NOT PARTICIPATE IN ANY UNLAWFUL ACTIVITY LEADING TO THE DISCLOSURE OF THE EVIDENCE

71. CLAIMANT acted in good faith and did not participate in any unlawful activity leading to the disclosure of the evidence from the other arbitral proceeding. Blair and Boykin both point to this consideration, which reflects a general requirement of good faith by parties in international arbitrations (*Art. 9, IBA Rules; Blair and Gojković, p. 251-252; Boykin and Havalic, p. 33-35*). In the *Methanex Award*, the tribunal held that the parties owed each other and the tribunal a general duty to conduct themselves in good faith (*Blair and Gojković, p. 251-252*). The tribunal held that since Methanex had participated in the illegal activities, this violated an important good faith standard (*Blair and Gojković, p. 251-252*).

72. In contrast to the *Methanex Award*, in this case CLAIMANT acted in accordance with good faith standards throughout the process of receiving and communicating possession of the evidence to the Tribunal. CLAIMANT received information regarding the evidence at issue during an annual breeder conference from Mr. Velasquez, involved in the other arbitration proceeding as CEO of a company (*Letter by Langweiler, para. 2, R. 49; Pro. Order 2, para. 40, R. 60*). CLAIMANT then immediately communicated the receipt of this information to the Tribunal and requested admission of the evidence for consideration (*Letter by Langweiler, para. 2, R. 49*). This conduct demonstrates a good faith effort on the part of CLAIMANT to communicate with the Tribunal and formally request the admission of evidence unexpectedly received.

73. Additionally, RESPONDENT's investigation into the illegal hack did not point to CLAIMANT as the source of the hack (*Letter by Fasttrack, para. 3, R. 51).* Authorities note, "If the hacking or

leaking had been perpetrated by one of the parties directly, it would likely be considered a bad faith action on the part of that party…" (*Ortiz, para. 6*). In this case, however, there is no evidence whatsoever that CLAIMANT had any participation in an illegal hacking. An investigation conducted by RESPONDENT could not find the source of the illegal hack and could only confirm that an illegal hack indeed occurred (*Letter by Fasttrack, para. 3, R. 51*). Importantly, RESPONDENT's firewall and security systems were outdated, which made the company vulnerable to hacks (*Pro. Order 2, para. 40, R. 60*).

74. CLAIMANT did not perpetrate the illegal hack, and CLAIMANT's conduct was in good faith. Given that good faith conduct will favor the admission of illegally obtained evidence, it is proper for this Tribunal to admit the evidence from the other arbitral proceeding.

2. THE PUBLIC INTEREST DOES NOT FAVOR REJECTING THE EVIDENCE AS INADMISSIBLE

75. There are no public interest concerns in this case that favor rejecting the evidence as inadmissible (*Blair and Gojković, p. 256; Boykin and Havalic, p. 33-35*). Blair clarifies, "Tribunals should take into account public policy considerations, such as legal professional privilege, diplomatic immunity and inviolability…" (*Blair and Gojković, p. 256*). In this case, the evidence from the other arbitral proceedings is not protected by professional legal privilege or diplomatic immunity. Legal professional privilege refers to documents that are protected under attorney-client privilege, and there is no evidence in the record to indicate the evidence is protected by privilege (*Blair and Gojković, p. 257*).

76. The public interest would favor protecting the "honest and transparent" communication between an attorney and their client, but that is not at issue in this case (*Blair and Gojković, p. 257*). Therefore, the public interest does not preclude the evidence from the other arbitral proceeding from being admissible on the grounds of formal legal privilege.

77. In addition, there are no issues of diplomatic immunity in this case. The issue of admissibility and diplomatic communications was weighed in the *Yukos Award,* and the arbitral tribunal still admitted and considered the evidence in spite of diplomatic considerations (*Yukos Award, para. 1185-1186*). In this case, the lack of professional legal privilege, or diplomatic immunity favors the admission of the evidence from the other arbitral proceeding.

3. THE INTERESTS OF JUSTICE FAVOR THE ADMISSION OF THE EVIDENCE

78. In this case, the interests of justice favor the admission of evidence from the other proceeding (*Blair and Gojković, p. 258; Boykin and Havalic, p. 33-35*). Blair clarifies that tribunals need to balance, "…the multitude of principles and interests which may clash on the facts of any

particular case…such as the need to discharge the tribunal's function fairly and justly, and in a way that results in a manifestly right decision…interests of procedural integrity and equality of arms…" (*Blair and Gojković, p. 258*).

79. In his dissent to the *Conoco Award*, Professor Georges Abi-Saab called the decision of the majority not to consider illegally obtained evidence that was publicly available a, "*travesty of justice*" (*Conoco Award, N. 80, para. 67*). Blair elaborates, "There will be occasions when simply ignoring evidence will not make for a just solution, and would lead to an award that is factually wrong in light of publicly available information" (*Blair and Gojković, p. 258*).

80. In this case, the evidence at issue is in the hands of a third party and can be considered generally available to the public, like the evidence considered in Yukos and other arbitral awards (*Pro. Order 2, para. 41, R. 60-61; Yukos Award; Caratube Award*). In this case, ignoring the evidence from the other arbitral proceeding, which is generally available, may lead to inconsistent awards, given RESPONDENT's contradictory legal position. Therefore, in the interest of justice, this Tribunal should admit the evidence from the other arbitral proceeding.

81. In conclusion, the evidence from the other arbitral tribunal is material and relevant to this arbitral proceeding based on similar facts and RESPONDENT's contradictory legal position with respect to contract adaptation and tariffs. Additionally, even if the evidence from the other arbitral processing was obtained through an illegal hack or breach in confidentiality, it is admissible due to considerations of materiality, good faith conduct, the public interest, and the interests of justice and fairness.

CONCLUSION ON ISSUE TWO

82. This Tribunal has broad discretionary power to determine the admissibility of evidence, under the *lex arbitri* and guiding principles of law. The evidence at issue is both material and relevant to the current arbitral proceedings, supplying information crucial to a successful fact and truth finding effort given RESPONDENT's contradictory legal position with respect to contract adaptation and tariffs. In addition, while there is no common test for the admission of evidence, in this case, common legal and policy considerations favor the admissibility of the evidence from the other arbitral proceeding. Therefore, the evidence from the other arbitral proceeding is admissible, relevant, and material, and should be considered in this arbitral proceeding.

ISSUE THREE: CLAIMANT IS ENTITLED TO $1,250,000 PAYMENT UNDER CISG AND CLAUSE 12 OF THE CONTRACT

I. THE CISG PROMOTES THE OBSERVANCE OF GOOD FAITH AND CONSIDERS THE INTENT OF THE PARTIES

83. In the course of negotiations, the PARTIES expressed the desire to maintain a mutually beneficial long-term relationship (*Ex. C2, R. 10; Ex. C3, R. 11*). When parties engage in long-term international contractual relationships, they aim to build and maintain a relationship that satisfies reciprocal interest and expectations grounded in good faith (*Ferrario, para. 3.01*). As such, it is appropriate for this Tribunal, in fashioning an award, to consider the intent of the PARTIES.

84. CLAIMANT is entitled to price adaptation under the CISG and Clause 12 of the contract, because the PARTIES agreed that CLAIMANT would not bear the risks associated with shipping, despite the DDP Incoterm **(A)**, price adaptation restores the equilibrium of the contract **(B)**, and the CISG allows this Tribunal to interpret the contract in view of good faith **(C)**.

A. THE PARTIES AGREED THAT CLAIMANT WOULD NOT BEAR UNDUE RISK ASSOCIATED WITH SHIPPING

85. The PARTIES did not intend for CLAIMANT to bear undue risks associated with shipping, despite use of DDP Incoterm (*Ex. C4, R. 12*). When interpreting intent, the CISG allows a tribunal to consider the statements and conduct of parties as well as any relevant circumstances, including negotiations or any established practices (*Art. 8(3), CISG*).

86. The ICC Incoterm DDP provides that a seller is responsible for delivery of the goods all the way to buyer's country, including responsibility for import and export clearances, as well as ensuring that the buyer's country does not prevent the shipment (*Ramberg, p. 151*). As such, the seller assumes the risk associated with shipping goods (ie. damage, loss) from the moment the goods leave the seller, to the point when the goods are delivered to the port of the buyer (*Ramberg, p. 151*). Jan Ramberg, author of the ICC Guide to Incoterms 2010, explains, however, that under the CISG, a seller may be relieved from obligations when there are unforeseen circumstances that make DDP performance more expensive (*Ramberg, p. 151*).

87. In the instant case, CLAIMANT only accepted RESPONDENT's request to use DDP because RESPONDENT sought to benefit from CLAIMANT'S enhanced experience in shipping frozen doses of semen (*Ex. C3, R. 11*). This does not suggest that CLAIMANT was accepting more risk, but rather that CLAIMANT was willing to facilitate the delivery of the frozen semen.

Indeed, this is in line with the goal of the PARTIES to facilitate a long-term amicable relationship, and the Tribunal should consider this in assessing the intent of the PARTIES (*Montero, p. 91; Art 8(3), CISG*).

88. The Sales Agreement demonstrates that PARTIES did not intend to strictly adhere to the risk normally assumed under DDP. Clauses 9, 10, 12, and 13 all represent a departure from the customary application of DDP because risks that would commonly be assessed to CLAIMANT, under DPP, were shifted to the RESPONDENT (*Ex. C5, para. 9-13, R. 14*). Furthermore, CLAIMANT informed RESPONDENT that it was "not willing to take over any further risks associated with such change in delivery terms, in particular not those associated with customs regulation and import restrictions" (*Ex. C4, R. 12*).

89. Brunner considers it possible that when parties use Incoterms to allocate "risk," the parties do not intend to include unforeseen changes in law (*Brunner, p. 131-132*). Since it is the duty of the seller to ensure that import regulations do not prevent shipment, it is reasonable to imply that parties limit the "legal risk" to those risks that are reasonably foreseeable at the time the import and export approvals are obtained, and the contract is executed (*Brunner, p. 131-132*). Indeed, this is consistent with the demonstrable intent of the PARTIES during negotiations.

90. The PARTIES' conduct provides enough context to conclude that the tariff increase was not something either party intended to be borne by CLAIMANT. Thus, in light of the hardship, it is appropriate for the Tribunal to adapt the price so that CLAIMANT is not unreasonably burdened with the costs associated with shipping the frozen semen under changed circumstances.

B. UNIDROIT PRINCIPLES SEEK TO RESTORE THE EQUILIBRIUM OF THE CONTRACT, WHICH, IN THIS CASE, REQUIRES PRICE ADAPTION

91. The CISG states that where it governs, but fails to expressly cover matters, parties should observe the CISG's general principles on the matter or conform to the law applicable by "virtue of the rules of private international law" (*Art. 7(2), CISG; Bernardini, p. 211*). Additionally, the Tribunal is better suited to resolve the instant dispute and render an award because national forums are often inappropriate for resolving matters concerning international trade dispute (*Bernini, p. 196; Silveira, p. 202*).

92. Schlechtriem suggests that Articles 79 and 50 generally represent the principle that parties may modify a contract to account for changes in circumstances that disturb the balance of performance (*Fletchner, p. 237*). However, the CISG does not provide specific guidance on

price adaptation. As such, it is appropriate for this Tribunal to consider the private rules of international law.

93. In this case, the rules of private international law point to the UNIDROIT Principles, which have been adopted as the domestic law of Mediterraneo. (*Pro. Order 1, R. 52*). The UNIDROIT Principles were drafted with the intention to provide conformity in international commercial trade (*Benedettelli, p. 653*). UNIDROIT Principles are not only appropriate as a gap-filler that the Tribunal may use under private rules of international law, but also because they represent an internationally recognized body of principles from which this Tribunal may draw internationally accepted and equitable results (*Montero, p. 91-92*)

94. Prior to release of the final shipment, CLAIMANT notified RESPONDENT that a solution to the 30% tariff increase was necessary (*Ex. C7, R. 16*). This constituted a request to renegotiate the contract price. UNIDROIT Principles provide that where hardship occurs, the harmed party should make a request to renegotiate without undue delay, indicating the grounds on which it asserts hardship (*Art. 6.2.3(1), UNIDROIT Principles, Comment 2*). To be clear, CLAIMANT'S request for renegotiation was the very premise on which it was willing to ship the final installment.

95. Where parties have failed to successfully renegotiate the terms, "the remedy of price reduction in Article 50 of the Convention is a kind of adjustment of the contract to reflect a disturbed balance between performance on one side and obligation on the other side" (*Silveira, p. 344 citing to Fletchner, p. 237*). Under these circumstances, it is appropriate for a tribunal to amend the contract. Furthermore, UNIDROIT Principles provide a basis for this Tribunal to adapt the contract because the Principles cover events that occur after the completion of the contract - events that are unforeseen and beyond a party's control - as well as circumstances where, as in this case, the CLAIMANT did not assume such risks (*Art. 6.2.2, UNIDROIT*).

96. UNIDROIT Principles define hardship as the occurrence of events that fundamentally alter the equilibrium of the contract either because the cost has increased, or performance has been diminished (*Art. 6.2.2, UNIDROIT*). Here, the former applies. RESPONDENT's refusal to provide additional remuneration, despite increased costs, unfairly shifts the burden of the contract to CLAIMANT while RESPONDENT continues to enjoy the benefit of having received the doses (R. *Ans., R. 33, para 21*).

97. Under the terms of the contract, CLAIMANT expected a 5% profit (*NotC, para. 18, R. 7*). After the imposition of the 30% tariff, CLAIMANT suffered a 25% loss (*Id*). Thus, an additional

payment of $1.25 million to CLAIMANT, which covers the 25% increase in price due to the tariff, would effectively rebalance the performance of both PARTIES under the contract, and it achieves the equilibrium UNIDROIT Principles requires.

98. The 30% tariff increase essentially caused CLAIMANT'S cost of performance to increase under changed conditions (*NotC, para. 18, R. 7*). As such, RESPONDENT's additional payment of $1.25 million is not unfair because it represents the benefit it received in CLAIMANT having shipped the goods under the changed circumstances. Berger discusses this "fair" approach as one where arbitrators seek a result guided by the "no profit – no loss" rule (*Berger, p. 13*). This simply means that under a restructuring of agreement, neither CLAIMANT nor RESPONDENT should be expected to suffer loss or unfairly profit. Accordingly, this Tribunal should adapt the price to account for the increased cost of shipping the final doses, which would entitle CLAIMANT to an additional $1.25 million.

99. Importantly, RESPONDENT has financially benefitted from CLAIMANT'S performance because it resold, without CLAIMANT'S consent, 15 doses of semen to its customers at a 20% profit (*NotC, R. 18; Pro. Order 2, R. 59*). It did this despite CLAIMANT'S requirement that no resale should be made without its express written consent, and in violation of the contract. (*Ex. C5, R. 13*). The Sales Agreement states that the semen would be used for the three mares listed in the contract, "and others after information of the Seller" (*Id*). RESPONDENT never sought permission or provided information about its resales to CLAIMANT, but nonetheless made a profit from its resale of the doses to date of 300,000 U.S.D. (*Pro. Oder 2, R. 57*)

100. To require that CLAIMANT the bear the costs of the tariff increase and while RESPONDENT is unfairly profiting from CLAIMANT'S performance, after the PARTIES agreed otherwise, would be to reach a result that is inconsistent with the CISG and UNIDROIT. CLAIMANT urges the Tribunal to grant CLAIMANT'S request and adapt the price because it would restore an equitable balance of benefits and obligations.

C. THE TRIBUNAL SHOULD INTERPRET THE CONTRACT IN VIEW OF GOOD FAITH, WHICH PROMOTES UNIFORMITY IN INTERNATIONAL TRADE.

101. After being notified of the 30% tariff increase, CLAIMANT informed RESPONDENT that a solution was necessary in order to move forward with the final shipment (*Ex. C7, R. 16*). RESPONDENT, however, responded by conveying a sense of urgency for the doses, given the start of breeding season (*Ex. R4, R. 36*). CLAIMANT therefore shipped the doses of semen and

paid the tariff, but only after RESPONDENT indicated a willingness to accept CLAIMANT'S insistence on a price modification (*Ex. R4, R. 36*).

102. When CLAIMANT shipped the frozen doses of semen, it did so in accordance with good faith, believing that its actions would necessarily give rise to a good faith renegotiation of the contract to achieve a fair solution (*Ex. C7, R. 17*). Even though Mr. Shoemaker asserted that he did not have the authority to enter into an agreement about the price, CLAIMANT reasonably relied on his assurances that RESPONDENT would "certainly find an agreement on price," because Mr. Shoemaker had been introduced to CLAIMANT as the person responsible for "all questions concerning the Frozen Semen Sales Agreement" (*Ex. R4, R.36; Pro. Order 2, R. 59*).

103. The CISG allows this Tribunal to consider good faith in interpreting contracts under the Convention, as it promotes conformity in the international sale of goods (*Art. 7(1), CISG*). At a brief meeting, CLAIMAINT informed RESPONDENT of its concerns regarding the tariff and resale violations while it was attempting to renegotiate the price. RESPONDENT'S CEO, however, refused to share responsibility for the unforeseen tariff, got very angry and aggressive, and left the meeting, indicating it would no longer cooperate (*Ex. C8, R. 18; Answer, R. 30*). Even if the Tribunal finds that good faith is not dispositive of the award or decision, leading case law suggests that the Tribunal may strongly consider this element when determining the persuasiveness of the PARTIES' arguments (*Wild, p. 63-65*).

104. For example, in the *Iran* case, a tribunal found that, based on the principles promulgated in PICC, "the covenant of good faith and fair dealing [. . .] implied in each contract [that] in a case in which the circumstances to a contract undergo […] fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract" (*Art. 6.2.3(4), PICC; Silveira, p. 342*). This is particularly persuasive in the instant case because it highlights the importance of observing the principle of good faith when dealing with unforeseen circumstances. Moreover, in the *Scafom* case, the Court of Appeals overturned a decision by the Court of First Instance on the basis that the circumstances imposed a duty to renegotiate the contract based on the principle of good faith (*Silveira, p. 343-344*).

105. Here, the unforeseen tariff increases, which fundamentally the changed contract, required both PARTIES to act in good faith in order to facilitate the contractual relationship. Because CLAIMANT has met this standard, and because RESPONDENT has not, it is appropriate for this Tribunal to accept CLAIMANT'S request for price adaptation.

II. CLAIMANT IS ENTITLED TO ADAPTATION UNDER CLAUSE 12 BECAUSE TARIFF INCREASE CONSTITUTES AN UNFORESEEN EVENT THAT MADE THE CONTRACT MORE ONEROUS

106. During negotiations, the PARTIES determined that it was necessary to include a hardship clause. (*Ex. C8, R. 17*). It is commonly accepted, however, that parties to long-term international contracts are often unable to account for every extenuating circumstance in advance, and unforeseen political, economic, regulatory and technical circumstances may dramatically change the balance of rights and obligations originally contemplated at the conclusion of the contract (*Montero, p. 86; Brunner, p. 391; Art. 6.2.2, UNIDROIT Principles, Comment 5*). In this case, Clause 12 provides for price adaptation based on the lack of foreseeability **(A)** and the onerous burden placed on CLAIMANT **(B)**.

A. THE TARIFF INCREASE WAS UNFORESEEABLE TO BOTH PARTIES SUCH THAT ADAPTATION UNDER THE CONTRACT IS APPROPRIATE

107. The PARTIES understood Equatoriana to be a strong proponent of free trade and as such, the tariff increase was not something either party could have reasonably foreseen (*Ex. C6, R. 15*). Indeed, acts of public authorities such as an embargo, boycott, import/export and currency restriction, have long been recognized as unforeseen impediments that warrant contract adaptation (*Brunner, p. 207; Montero, p. 86*).

108. A tribunal found, in ICC Case No. 2478, that a cancellation of export authorization was indisputably an impediment. In that case, the tribunal found it necessary for to renegotiate the contract and adapt the price in order to reestablish contractual equilibrium (*ICC Case No 2478*). In ICC Case No. 16369, a tribunal issued in award where a respondent was required to compensate the claimant after the price of goods fell due to an unforeseen collapse in the value that unfairly benefitted the respondent (*ICC Case No. 16369*). These cases illustrate that an adaptation of price, due to unforeseen circumstances, is indeed an acceptable method of resolving international trade disputes.

109. The PARTIES engaged in extensive negotiations which sought to include a hardship provision (*Ex. C8, R. 17*). That the hardship clause ultimately lacked express reference to resolving the present hardship dispute does not imply the PARTIES intended it to be so. Prior to the car accident, RESPONDENT specifically recommended that the Tribunal have the power to adapt the contract should the PARTIES become unable to agree on amendment resulting from hardship (*Ex. C8, R. 17*). Brunner suggests that where parties have included a hardship clause,

but failed to determine renegotiation procedures, it is "assumed that the parties intended to authorize a competent [tribunal] to fill the gap if they fail to reach agreement" (*Brunner, p. 207*).

110. Although the hardship clause does not expressly cover increases in tariffs as hardship, this does not negate the Tribunal's power to fairly interpret the clause (*Ex. C5, R. 15; Fouchard, p. 41*). As mentioned above, it is important to consider that it was the intent of the PARTIES to account for hardship and to insulate CLAIMANT from the burdens associated with shipping. With that in mind, it is appropriate for the Tribunal to read Clause 12 broadly to consider the tariff increase as an unforeseen circumstance. Furthermore, as stated in the ICC Guide to Incoterms, a seller may be relieved, under the CISG, from its obligations when there are unforeseen circumstnaces that make DDP performance more expensive. (*Ramberg, p. 151)* Here, the ICC Guide to Incoterms acknowledges that unforeseen circumstances may warrant aadaptation, despite use of DDP (*Id.* 151). Thus, this Tribunal should interpret the hardship clause to include tariffs as a comparable unforeseen event, because the PARTIES intended to ensure that the Sales Agreement would not impose an unforeseen burden on CLAIMANT *(Bernardini, p. 211-212*).

B. THE TARIFF INCREASE IN ONEROUS BECAUSE IT SUBSTANTIALLY SHIFTS THE COST OF PERFORMANCE TO CLAIMANT

111. The hardship clause states that CLAIMANT is not responsible for unforeseen events that "[make] the contract more onerous" (*Ex. C5, R. 14*). Additionally, CLAIMANT made it clear to RESPONDENT that the clause should address subsequent changes because it was not willing to take any further risks that would destroy the commercial basis of the contract (*Ex. C4, R. 12; Ex. C5, R. 13*).

112. The tariff measure increased the cost of shipping the final installment by $1.25 million USD (*Pro. Order 2, para. 29, R. 59*). Because CLAIMANT has already shipped the doses and can no longer recover/resell the doses for value, it would be onerous to require that CLAIMANT ALSO assume the cost of the tariff increase. In fact, CLAIMANT would likely not be this position but for RESPONDENT's statements that induced CLAIMANT to release the final shipment. The Tribunal should consider CLAIMANT'S current financial position and that it has no other remedy, other than price adaptation, whereby it may recoup the increased costs of the final shipment of frozen doses. UNIDROIT Principles posit that drastic changes, which occur after the completion of the contract, may be so onerous that it would run counter to the principles

of good faith and fair dealing to require performance (*Art. 7.2.2, UNIDROIT Principles, Comment 3(b)*).

113. To be clear, the standard for hardship is not the same as in cases where parties invoke force majeure (*Brunner, p. 323*). While force majeure requires a party to show the burden is excessively onerous, under UNIDROIT Principles, parties to situations involving hardship must rather show that the "impediments (change of circumstances) are considered [to] fundamentally alter the equilibrium of the contract" (*Brunner, p. 323; Art. 6.2.2, UNIDROIT Principles*).

114. Here, the tariff increase and RESPONDENT's failure to renegotiate, has caused CLAIMANT to incur the burden of performance, such that the contract equilibrium has shifted against CLAIMANT. Thus, it is appropriate for this Tribunal to adapt the price given it was the intent of the PARTIES to prevent onerous burdens accruing to CLAIMANT as a result of events not contemplated when the contract was executed.

CONCLUSION ON ISSUE THREE

115. The PARTIES agreed that the CISG would govern the substance of the contract. The CISG allows the Tribunal to use UNIDROIT Principles to fill gaps. The CISG also allows the Tribunal to consider principle of good faith and assess the PARTIES' intent through demonstrable conduct in order to determine the rights and obligations under the contract. Here, the PARTIES engaged in conduct that indicates CLAIMANT would not be expected to bear undue risk associated with shipping. CLAIMANT acted in good faith when it shipped the goods. RESPONDENT has failed to accommodate CLAIMANT'S request to renegotiate. As such, CLAIMANT is entitled a $1,250,000 payment resulting from an adaption in price. This will restore the equilibrium of rights and obligations under the contract.

PRAYER FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Arbitral Tribunal

a. To uphold the claim as admissible because the Tribunal has both jurisdiction and power over the dispute;
b. To accept CLAIMANT'S claim for additional remuneration in the amount of USD$1,250,000;
c. To order RESPONDENT to pay Claimant's costs incurred in this arbitration.

CLAIMANT reserves the right to amend its prayer for relief as necessary.

/SIGNED/

_____/s/Deanna Aburaad_____

DEANNA ABURAAD

____/s/ Julia Csernansky_____

JULIA CSERNANSKY

_____/s/Jechonias James_____

JECHONIAS JAMES

_____/s/Sarah Muenzer_____

SARAH MUENZER

CERTIFICATE

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

/SIGNED/

_____

DEANNA ABURAAD

_____

JULIA CSERNANSKY

_____

JECHONIAS JAMES

_____

SARAH MUENZER