SIXTEENTH

WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG

31 MARCH – 7 APRIL 2019

MEMORANDUM FOR RESPONDENT

On behalf of

Black Beauty Equestrian
2 Seabiscuit Drive, Oceanside,
Equatoriana

'RESPONDENT'

Against

Phar Lap Allevamento
Rue Frankel 1, Capital City,
Mediterraneo

'CLAIMANT'

BOND UNIVERSITY

BENJAMIN BOGGS • MARTIN FLORO • POURIA SHARIFI SAVOJBOLAGHI • RENEE SHIKE

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INDEX OF ABBREVIATIONS

Abbreviation	Definition
%	Percent/Percentage
&	And
Arbitration Agreement	Clause 15 within the Frozen Semen Sales Agreement that details the arbitration agreement
Art./Arts.	Article/Articles
C x	CLAIMANT's Exhibit x
CISG	United Nations Convention of Contracts for the International Sale of Goods
CLAIMANT	Phar Lap Allevamento
Contract Price	The fee contained within clause 6 of the Frozen Semen Sales Agreement
DAL	Danubian Arbitration Law. A verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration.
DCL	Danubian Contract Law. A verbatim adoption of the UNIDROIT Principles of International Commercial Contracts with the exception of Arts. 4.3 and 6.2.3(4)(b).
EAL	Equatorianian Arbitration Law. A verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration.
HKIAC Rules	The 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
ICC	International Chamber of Commerce
MAL	Mediterranean Arbitration Law. A verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration.
MCL	Mediterranean Contract Law. A verbatim adoption of the UNIDROIT Principles of International Commercial Contracts
Memorandum for Claimant	Memorandum for CLAIMANT submitted by Institut de Droit des Affaires Internationales (IDAI) Cairo University

Nijinsky	Nijinsky III, the stallion belonging to CLAIMANT
No.	Number
PO2	Procedural Order Number 2
p/pp	Page/Pages
para/paras	Paragraph/Paragraphs
Parties	CLAIMANT and RESPONDENT
R x	RESPONDENT's Exhibit x
RESPONDENT	Black Beauty Equestrian
Sales Agreement	The Frozen Semen Sales Agreement between CLAIMANT and RESPONDENT, including the Arbitration Agreement
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)
UNIDROIT	United Nations Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
WTO	World Trade Organisation

INDEX OF AUTHORITIES

	Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/783	
Pilkov	Konstantin Pilkov, *Evidence in International Arbitration: Criteria for Admission and Evaluation* (2014)	40
Poznanski	Bernard G. Poznanski, 'The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration' (1987) 4 Journal of International Arbitration 71	67
Redfern/Hunter	Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2008)	39
Redfern/Hunter (2015)	Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015)	10, 11
Rimke	Joern Rimke, 'Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts' (1999-2000) *Pace Review of the Convention on Contracts for the International Sale of Goods* 197	82, 84
Schlechtriem/Butler	Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Springer Science & Business Media, 2008)	105
Schwenzer (2008)	Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39 *Victoria University of Wellington Law Review* 709	62, 94
Schwenzer (2010)	Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (3rd ed, 2010) Edited by Ingeborg Schwenzer	106
Schwenzer (2016)	Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (4th ed, 2016) Edited by Ingeborg Schwenzer	92, 93, 94, 102, 104

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United Kingdom

United States of America

INDEX OF STATUTES, RULES AND TREATIES

Cited as	Citation
CISG	*United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988)
Hague Principles	The Hague Principles on Choice of Law in International Contracts, Hague Conference on Private International Law 2015
HKIAC Rules	HKIAC 2018 Administered Arbitration Rules, Hong Kong International Arbitration Centre
Suggested Clauses HKIAC Rules	Suggested Clauses HKIAC 2018 Administered Arbitration Rules, Hong Kong International Arbitration Centre
IBA Guidelines	*International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration,* 2014
IBA Rules	*IBA Rules on the Taking of Evidence in International Arbitration*, 2010
ICC Hardship Clause 2003	*ICC Hardship Clause 2003 in ICC Publication No. 650*
ICC Incoterms® 2010	*International Chamber of Commerce Incoterms® 2010*
Model Law	*UNCITRAL Model Law on International Commercial Arbitration*, 2006 (1985 with amendments as adopted in 2006)
New York Convention	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, open for signature 10 June 1958, 330 UNTS 38 (entered into force7 June 1959)
UNCITRAL Rules	UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)
UPICC	*UNIDROIT Principles of International Commercial Contracts* 2016

STATEMENT OF FACTS

1. Phar Lap Allevamento ('CLAIMANT') is an equestrian company that operates Mediterraneo's oldest stud farm, known for its racehorse breeding. Black Beauty Equestrian ('RESPONDENT') is an Equatorianian equestrian company that expanded to establish a racehorse stable in 2015.
2. The Government of Equatoriana temporarily lifted its ban on artificial insemination in the racehorse industry in 2017. RESPONDENT contracted with CLAIMANT for the importation of 100 doses of semen from CLAIMANT's stallion, Nijinsky. After some negotiation, the Parties agreed on DDP delivery, subject to certain conditions, but before the agreement could be finalised, the representatives of CLAIMANT and RESPONDENT were injured in a car accident and replaced by other negotiators.
3. During April 2017, Mediterranean Presidential Candidate Bouckaert announced his protectionist approach to trade in agricultural products. After his election, President Bouckaert also appointed 'Superminister' Frankel, who was known to be an ardent critic of free trade.
4. Negotiations for the Agreement were finalised by the Parties' new negotiators on 6 May 2017. The Sales Agreement provided that the 100 doses would be delivered in three shipments against payment in two instalments of US$5 million each. An Arbitration Agreement, which was a 'narrowed' version of the HKIAC Model Clause, was included. It contained no choice of law clause and named Danubia as the seat of arbitration.
5. On 15 November 2017, the Government of Mediterraneo imposed 25% tariffs on agricultural imports from Equatoriana. The Government of Equatoriana then announced retaliatory tariffs of 30% on selected products from Mediterraneo on 19 December 2017. Upon seeking clearance for the final shipment of frozen semen, CLAIMANT was informed that Equatoriana's tariffs, that took effect from 15 January 2018, also applied to racehorse semen. Following a phone call in which the Parties discussed the additional tariffs, CLAIMANT paid the tariffs and sent the final shipment.
6. On 12 February 2018, RESPONDENT met with CLAIMANT in good faith to discuss an adjustment to the Contract Price. RESPONDENT however terminated negotiations after CLAIMANT accused it of breaching a resale prohibition that CLAIMANT alleged was contained in the Sales Agreement.
7. CLAIMANT referred the dispute to arbitration under the HKIAC rules on 31 July 2018, requesting that the price of the Sales Agreement should be adapted. RESPONDENT submitted their Answer to the Notice of Arbitration on 24 August 2018. CLAIMANT later obtained information that RESPONDENT had been involved in arbitral proceedings with a third party pertaining to reimbursements resulting from the agricultural tariffs. CLAIMANT sought to obtain a copy of the Partial Interim Award issued in those proceedings through an intelligence company, who has likely obtained the Award through a breach of confidentiality or through an illegal hack of RESPONDENT's computer systems. RESPONDENT has objected to the admission of this evidence.

PROCEDURAL ISSUES

I. THE TRIBUNAL LACKS JURISDICTION AND POWERS TO ADAPT THE AGREEMENT UNDER THE ARBITRATION AGREEMENT

8. While arbitral tribunals generally have broad jurisdiction and powers, they must operate within the bounds of the arbitration agreements in which they are constituted. To fail to do so would compromise the validity of the arbitration proceedings by not complying with the intentions of the parties to such agreements. Contrary to CLAIMANT's submissions [*Memorandum for Claimant, pp. 11-20*], the Tribunal does not have the power to adapt the Agreement. Rather, as the law of Danubia governs the Arbitration Agreement **[A]**, the Arbitration Agreement should be interpreted narrowly to exclude contract adaptation **[B]**. In any event, a finding by the Tribunal that it lacks jurisdiction and powers to adapt the Agreement would not be in violation of the HKIAC rules **[C]**.

A. The law of Danubia governs the Arbitration Agreement

9. In this case, no express choice of law has been made to govern the Arbitration Agreement **[1]**. In the absence of an express choice, the law of Danubia should govern the Arbitration Agreement as it is the law of the seat of arbitration **[2]**. Even if the Tribunal does not find that the law of Danubia should be applied in this manner, the law of Mediterraneo cannot be treated as an implied choice of law for the arbitration agreement, and the law of Danubia should be applied as it has the closest and most real connection to the Arbitration Agreement **[3]**.

1) No express choice of law governing the Arbitration Agreement has been made

10. The Parties made no express choice of law governing the Arbitration Agreement, as there is no clause in the Agreement to that effect. If an express choice of law is made in respect of the Arbitration Agreement, then the law chosen will govern it [*Redfern/Hunter (2015), p.160, 164-165; Sulamérica*]. In this case, the Parties expressly stated that the Sales Agreement would be governed by the law of Mediterraneo, making no choice of law for the Arbitration Agreement [*C 5, p. 14*]. Although the term 'Sales Agreement' is not defined in the Agreement, it should be interpreted to reference those parts of the Agreement excluding the Arbitration Agreement. The fact that the reference to the 'Sales Agreement' precedes the clause incorporating the Arbitration Agreement [*C 5, p. 14, Clause 15*], which is then followed by a reference to 'the Agreement', denoting both the Sales and Arbitration Agreements, indicates that the Parties only intended to make a choice of law of the law of Meditarraneo to govern the substantive obligations.

2) The law of Danubia should govern the Arbitration Agreement as the law of the seat

11. As Danubia was chosen by the Parties as the seat of arbitration, its laws should be used. In the absence of an express choice of law to govern an Arbitration Agreement, it is necessary to determine whether an implied choice has been made [*Redfern/Hunter (2015), pp.159-163; Born (2016), p.40; Sulamérica*]. If a choice of law is to be implied, the beginning presumption should be that the parties intended for the law of the seat of arbitration to govern the Arbitration Agreement [*Firstlink v GT Payment*]. This approach should be followed because it is most representative of the intentions of the Parties. Consequently, the presumption should be that the Parties intended for the law of the seat to apply.

12. The beginning presumption that the law of the seat should govern the Agreement is further supported by the Parties' intentions. Parties' intentions inform implied choice and can be inferred from the course of negotiations [*Sulamérica; Firstlink v GT Payment*]. During the course of negotiations, RESPONDENT proffered a clause selecting the law of the neutral seat of arbitration as the law governing the Arbitration Agreement [*R 1, p. 33*], to which CLAIMANT did not object when it had the opportunity to do so [*R 2, p. 34*]. As such, while not present in the final Sales Agreement, it remained the negotiators' intentions that the Arbitration Agreement be governed by a neutral law; that of Danubia. This is because RESPONDENT did not object to the absence of choice of law of the Arbitration Agreement on the basis that it understood the choice of Mediterraneo law to apply only to the Sales Agreement [*R 3, p. 35*], after a previous draft of the Agreement had contained an express choice of law of the seat [*R 1, p. 33*]. As such, by implication, the laws of Danubia should apply because it was chosen as the seat of Arbitration.

3) In the alternative, the Tribunal should apply Danubian law as it has the closest and most real connection to the Arbitration Agreement

i) The law of Mediterraneo should not be implied to govern the Arbitration Agreement

13. Even if the Tribunal finds against the presumption that the law of the seat should apply, the law of Mediterraneo should not be applied as the implied choice of law. CLAIMANT may argue that the alternative English law presumption that favours the substantive law of a contract as the starting point should instead apply. However, this presumption is negated if there are sufficient factors tending towards a different conclusion [*Sulamérica*]. Such a factor is an express choice of the seat – which is an implied acceptance that the arbitration be conducted in accordance with the *lex arbitri* [*Sulamérica*; *Judgement of 28 September 1995*] and demonstrates parties' intentions that the law of the seat govern the arbitration agreement [*Sulamérica; C v D; XL Insurance v Owens Clothing*]. Such an express choice is alone sufficient to move away from the presumption that the law of a Sales Agreement apply [*BCY v BCZ*]. This factor is further supported by the Parties' intentions to arbitrate in a neutral venue [*R 2, p. 34; R 3,*

p. 35; PO 2, para 14]. As the Parties expressly chose the seat of arbitration to be Danubia, they impliedly accepted the *lex arbitri*.

14. A further factor tending against the presumption that the law of the Sales Agreement apply to the Arbitration Agreement is that the Parties' intentions that the law of the Sales Agreement apply cannot be clearly made out. This is because the law of the Arbitration Agreement, in previous drafts, was never that of Mediterraneo [*R 1-3, pp. 33-35*]. As such, the assertion that the law of Mediterraneo governs the Arbitration Agreement is ambiguous at best.

15. The express choice of law governing the Sales Agreement should similarly not be interpreted to imply a choice of law for the Arbitration Agreement. 'Standard Terms' are designed for repeated use and drafted in advance [*Art. 2.1.19(2) MCL/DCL*], and should be interpreted with regard to the 'reasonable expectations of their average users', not the actual understanding of the Parties [*Art. 4.2(4) MCL/DCL*]. As the choice of law [*C 5, p.14, clause 14*] for the Sales Agreement is not in italics, crossed out or underlined [*PO 2, p.55, para 3*], it was evidently part of the basic industry template and is a 'Standard Term' within the meaning of Art. 2.1.19(2) MCL/DCL. Consequently, no inference as to the Parties' intentions or implications, with regard to the law governing the Arbitration Agreement, can be drawn from the choice of law to govern the Sales Agreement.

16. The application of the doctrine of separability is a further factor that tends against the conclusion that the law of Mediterraneo should be implied to govern the Arbitration Agreement. The doctrine of separability considers an arbitration agreement contained within a Sales Agreement to be a separate and independent agreement [*Born (2014); Lew/Mistelis/Kröll; Born (2016), p.40; Fiona Trust v Privalov*]. Because the Arbitration Agreement is to be regarded as separate from the Sales Agreement, CLAIMANT is unable to allege that the express choice of law [*C 5, p.14, clause 14*] governs the Arbitration Agreement. The doctrine of separability acts against the presumption that the law of the Sales Agreement applies, because the choice of law applying to the Sales Agreement should not be used to support an implied choice of the law of Meditteraneo governing the Arbitration Agreement. As such, the express choice of law of the Sales Agreement does not immediately apply to the Arbitration Agreement and should be considered a factor tending against the beginning presumption of *Sulamérica*.

ii) The law of Danubia has the closest and most real connection to the Arbitration Agreement

17. If the Tribunal were to find that no choice of law can be implied, the law of Danubia has the closest and most real connection to the Arbitration Agreement because it is the law of the seat. Where no express choice of law governing an arbitration agreement has been made, and no choice of law is able to be implied, the law that bears the 'closest and most real connection' to the arbitration agreement is to be chosen [*Dicey/Morris/Collins, 16-016; Sulamérica; Firstlink v GT Payments*]. This is often the law of

the seat [*Bulbank; Sulamérica*] and can be chosen despite differences with law of the Sales Agreement [*Matermaco v PPM Cranes*]. The law of the seat determines the standard to which an Arbitration Agreement is verified [*Lew/Mistelis/Kröll*], while Art. V(1)(a) of the New York Convention stipulates that in the absence of an express or implied choice of law, the place where the award is made is to be imposed as the law governing the Arbitration Agreement. Because Danubian law governs the arbitral procedure, it is the Danubian judicial system that would be required to support the arbitral award. As such, the law of Danubia has the closest and most real connection and should be applied.

B. The Arbitration Agreement does not confer the Tribunal with the power to adapt the Agreement

18. The Tribunal should find that it does not have the power to adapt the Agreement, because it has not been conferred with the power to do so by the Arbitration Agreement. An express conferral of powers to adapt the Agreement is required for the Tribunal to have the power to do so [*Art. 28(3) DCL; Art. 6.2.3 (4)(b) DCL*]. The Tribunal does not have the power to adapt the Agreement, because the Arbitration Agreement should be interpreted narrowly in accordance with Danubian law **[1]** and, even if the applicable law is that of Mediterraneo, the Tribunal should interpret the Arbitration Agreement to exclude jurisdiction for contract adaptation **[2]**.

1) The Arbitration Agreement should be interpreted narrowly, in accordance with the law of Danubia

19. The Arbitration Agreement should be interpreted narrowly to exclude claims for adaptation as it is governed by the law of Danubia. The 'four corners' rule of interpretation of DCL limits interpretation to a clause's wording and does not permit reliance on external evidence [*Art. 4.3 DCL*; *Answer to the Notice of Arbitration, p.32, para 16; PO 1, para. II, p.52*]. Consequently, CLAIMANT is unable to rely on extraneous information from its drafting and communication history to interpret the Arbitration Agreement. In particular, discussions between the Parties on 12 April 2017 pertaining to the inclusion of an express mention of adaptation [*C 8, p.17*] should not be used in the interpretation of the wording of the Arbitration Agreement, with an assessment instead limited to the words as they appear. A claim for adaptation of the agreement falls outside the wording of the Arbitration Agreement **[i]**, **[ii]**, **[iii]**.

i) The claim for contract adaptation does not fall within the meaning of 'any dispute'

20. Despite CLAIMANT's assertions [*Memorandum for CLAIMANT, p. 12*], the claim for contract adaptation does not fall within the meaning of 'any dispute' because it is not a disagreement between the Parties. To constitute a dispute, a claim must be a 'disagreement on a point of law or fact' [*Mavrommatis Palestine Concessions*] and should be 'real and genuine' [*Bank Am v Trans-World Telecom*]. Under a strict interpretive approach, the Tribunal should find that the Parties are not in a disagreement

on a point of law or fact because RESPONDENT has merely denied a request of CLAIMANT for additional payment. As such, under an interpretation in accordance with DCL, the claim for contract adaptation does not fall within the meaning of 'any dispute'.

ii) The claim for contract adaptation did not 'arise out of' the Agreement

21. The claim for contract adaptation did not arise out of the Agreement because the Agreement has been fully performed in accordance with the originally agreed terms and conditions. It arose outside the Agreement merely as a result of the 'request for adaptation', and not as a result of the Agreement or its performance. The claim must hold a 'close association' with the Agreement [*Government of Gibraltar v Kenney*] to be deemed to have arisen out of it. Comparably strict approaches to interpretation have excluded claims for failing to fall within the prescribed bounds of an arbitration agreement [*Marcel Quijano Aguero v Laporte*]. In accordance with the strict interpretation under DCL, the Tribunal should find that the claim did not arise out of the Agreement, because it was made purely as a result of the tariffs and not as a result of the conduct of either of the Parties.

22. The Parties' departure from the HKIAC Model Clause, and the resulting 'narrowed' Arbitration Agreement [*R 1, p.33; R 2, p. 34*], reinforces the conclusion that the claim did not 'arise out of' the Agreement. The parties removed 'or relating to' from the Arbitration Agreement, [*R 1, p. 33*], a phrase present in the HKIAC Model Clause [*Suggested Clauses HKIAC Rules*]. The claim clearly does not 'arise out of' the Agreement, because the Agreement does not provide for it [*C 5, p. 14*]. Further, because the Arbitration Agreement was 'narrowed' from the HKIAC Model Clause, claims merely 'relating to' the Agreement cannot be considered by the Tribunal. As such, because the claim does not 'arise out of' the Agreement, and the Arbitration Agreement excludes claims 'relating to' the Agreement, the claim for adaptation of the Contract Price cannot be considered by the Tribunal.

iii) The claim for contract adaptation does not pertain to the 'existence, validity, interpretation, performance, breach, or termination' of the Agreement

23. The claim for adaptation is unrelated to the 'existence, validity, interpretation, performance breach, or termination' of the Agreement. Despite CLAIMANT's assertion that the claim falls within the meaning of 'interpretation, performance' or 'breach' of the Agreement [*Memorandum for CLAIMANT, p. 12*], the claim in no way relates to the Agreement because the contract had been fully performed by the time at which the claim was made. Under a strict interpretive approach, the Arbitration Agreement must expressly, directly, and unequivocally outline the issues to be referred to the Arbitration [*Gangel v De Groot*]. The Arbitration Agreement has outlined areas in which disputes could be resolved through arbitral proceedings, and clearly makes no mention of adaptation. That the Parties listed specific areas of disputes to be arbitrated in compliance with a stricter interpretive approach, yet omitted to include

adaptation, demonstrates that adaptation was not within their contemplation or intention to be included. As claims for adaptation were not expressly included in the Arbitration Agreement, it should be interpreted to exclude such claims.

2) Even if the Arbitration Agreement is governed by the law of Mediterraneo, it should be interpreted to exclude claims for adaptation

24. The Arbitration Agreement should be interpreted to exclude claims for contract adaptation, even if it is governed by the law of Mediterraneo, because the HKIAC model clause was adapted. In order to prevent arguments surrounding whether a disagreement fits within the bounds of an arbitration agreement, the HKIAC Model Arbitration Clause is purposefully broad in its drafting [*Moser/Bao p.46*]. The Parties however 'narrowed' the wording of the clause from the HKIAC model clause by omitting the words and phrases 'controversy, difference or claim', 'relating to this contract', and 'or any dispute regarding non-contractual obligations' [*R 1, p.33; R 2, p.34*]; all of which are present in the HKIAC Model Clause [*Suggested Clauses HKIAC Rules; C 5, p.14*]. This evidences the Parties' intention for the Arbitration Agreement to cover a narrower range of disputes. Further, as the claim did not 'arise out of' the Agreement, it could only be considered by the Tribunal if 'relating to' was included in the Arbitration Agreement or if it was provided for in the Agreement, to 'arise out of' it. Because it was not provided for by any provision within the Agreement, it cannot be considered by the Tribunal. Therefore, even if the law of Mediterraneo governs the Arbitration agreement and the 'four corners' rule does not apply, the narrowing of the Arbitration Agreement excludes claims for adaptation.

25. This is supported further by the difference between the Parties' final intentions and those in negotiations prior to 12 April 2017. While the Parties discussed including provisions for contract adaptation in the Agreement [*C 8, p.17*], the Parties' final negotiators were unaware of these intentions [*R 3, p.35*]. As such, the Parties' intentions to discuss an adaptation provision cannot have been carried through to the drafting of the final form of the Agreement and was not expressed in it. Because the Parties' final intention was not to include the mechanism for contract adaptation into the Arbitration Agreement, it should be constructed to exclude the claim.

C. In any event, a finding by the Tribunal that it lacks jurisdiction and powers to adapt the Agreement would not be in violation of the HKIAC rules

26. A finding by the Tribunal that it lacks jurisdiction and powers to adapt the Agreement would not be in violation of the HKIAC Rules. CLAIMANT's contention, that the Tribunal should find it has jurisdiction and powers in order to avoid 'unnecessary delay or expense' [*Memorandum for Claimant, p.13; Art. 13.1 HKIAC Rules*], is irrelevant because the scope of Art. 13.1 HKIAC pertains only to the adoption of 'suitable procedures' of the arbitration [*Art. 13.1 HKIAC Rules*]. In any event, an alternative

finding that the Tribunal lacks jurisdiction and powers to adapt the Agreement would lead to inefficiency and procedural unfairness in violation of Art. 13.5 HKIAC Rules. As such, a finding by the Tribunal that it lacks jurisdiction and powers to adapt the Agreement would not be in violation of the HKIAC Rules. Rather, finding that it does hold jurisdiction and powers to adapt the Agreement would lead to procedural inequality and unfairness.

II. THE TRIBUNAL SHOULD NOT ADMIT THE UNLAWFULLY OBTAINED EVIDENCE

27. Despite CLAIMANT's assertion that arbitration is subject to 'prevailing principles of transparency' [*Email by Langweiler, p.49*], procedural principles central to the arbitral process should not be subverted through the admission of unlawfully obtained evidence. While there is a general trend in arbitration to admit evidence more widely and without reliance on strict procedural requirements common to the court process, tribunals nevertheless must protect the integrity of arbitration proceedings by ensuring the fair and equal treatment of parties through an appropriate determination of whether to admit evidence [*Art.13.5/13.1 HKIAC Rules*].

28. The Tribunal has broad and general powers to determine the admissibility, relevance, materiality, and weight of evidence under the chosen institutional rules [*Art. 22.2 HKIAC Rules*] and Danubian Arbitration Law [*Art. 19(2) DAL*]. As neither Danubian Arbitration Law nor the HKIAC Rules contain express provisions identifying appropriate principles to consider where evidence has been unlawfully obtained, broader evidentiary principles should be applied. These principles are exemplified in guidelines such as the IBA Rules, which are widely considered to demonstrate best-practice for assessments of evidence [*Greenberg/Kee/Weeramantry, p.312; Born (2016) p.41*].

29. As the Parties in this arbitration have not agreed upon the rules of procedure regarding the taking of evidence [*C 5, p.14*], the Tribunal may assess the admissibility of the evidence in a manner it considers appropriate [*Art. 19(2) DAL*]. Three principals central to assessing the admissibility of evidence include whether the evidence was unlawfully obtained, and whether public interest, or the interests of justice favours admitting the evidence [*Blair/Gojković, pp.256-258; Sussman, p.7*]. A determination of evidence in line with these principles is consistent with principles of Danubian Arbitration Law and the HKIAC Rules, including equal treatment and opportunity to present [*Art. 18 DAL; Art. 13.1 HKIAC Rules; Preamble 1 IBA Rules*], and will provide a framework for the fair and efficient conduct of the arbitration [*Art. 13.5 HKIAC Rules; Preamble 1 IBA Rules*].

30. The Tribunal should exclude the Partial Interim Award from RESPONDENT's other arbitration proceedings because it has been unlawfully obtained and is inadmissible **[A]**. Alternatively, public interest **[B]** or the interests of justice **[C]** favour excluding the evidence. Excluding the evidence would result in a breach of procedural fairness **[D]**.

A. The unlawfully obtained evidence is inadmissible

31. CLAIMANT has asserted that the evidence is admissible even though it was obtained unlawfully [*Memorandum for* Claimant, *p.25*]. Contrary to this submission, the evidence is inadmissible because CLAIMANT bears some fault for the evidence being unlawfully obtained from the files of RESPONDENT. If a party who seeks to introduce evidence that was unlawfully obtained from the files of a party to the arbitration bears some fault in that evidence's unlawful obtainment, the evidence should be presumptively inadmissible unless it is the only evidence available and is absolutely necessary for the party to prove its case [*Boykin/Havalic, p.35*]. It is not in dispute that the evidence was obtained from the files of RESPONDENT [*PO2, para 41*]. Irrespective of how the fault should be apportioned between the parties responsible for this unlawful procurement, it cannot be said that CLAIMANT bears no fault in this matter. CLAIMANT actively procured the Partial Interim Award with full knowledge that it would be unlawfully obtained without any legal entitlement and, despite this knowledge, furthered the unlawful procurement by funding it [*PO2, para 41*]. Were it not for CLAIMANT's conduct, the unlawful activity would likely not have occurred. CLAIMANT's knowledge can be inferred by its awareness of the intelligence company's doubtful reputation [*PO2, para 41*], understanding that HKIAC arbitration awards are confidential [*Art. 45.1 HKIAC Rules*], and its disregard for RESPONDENT's express statement that the evidence was obtained unlawfully [*Email by Fasttrack, p.50*]. CLAIMANT's active procurement of the evidence distinguishes the present situation from cases where a party comes upon evidence as a result of its widespread dissemination [See *Bible, para 4; Audiencia, para 5; Bancoult, para 16; Caratube; Yukos*], or inherits the evidence as an innocent party with clean hands relying on the product of a third party's illegal activity [*Blair/Gojković, p.251; Persia International Bank, para 95; Yukos; ConocoPhilips*]. Consequently, the evidence is inadmissible and should not be admitted.

32. The presumption against admissibility cannot be rebutted because the evidence is neither the only evidence available for CLAIMANT, nor is it absolutely necessary to prove its case. The requirement that evidence be 'the only evidence available' and 'absolutely necessary' establishes a high threshold for admissibility that is rarely achieved [*Boykin/Havalic, p.35*], as to satisfy this requirement there must effectively be no other means of proving the case [See *Iranian Hostages; Wultz*]. In the present case, the unlawfully obtained evidence is not crucial to CLAIMANT's arguments. While RESPONDENT submits that CLAIMANT's arguments are not valid, many surrounding facts submitted by both Parties are available for CLAIMANT to argue that Mediterranean law governs the Arbitration Agreement and that the Tribunal should adapt the Sales Agreement. Consequently, the presumption against admissibility should not be rebutted.

B. Public interest favours rejecting the evidence

33. Notwithstanding the fact that the evidence is inadmissible because it was unlawfully obtained, the evidence should not be admitted because public interest favours rejecting the evidence. Public interest favours rejecting the unlawfully obtained evidence because admitting the evidence would undermine the integrity of the express confidentiality protections provided by the HKIAC Rules **[1]** and would implicitly endorse illegal activity **[2]**.

1) Admitting the evidence would undermine the integrity of the express confidentiality protections provided by the HKIAC Rules

34. Admitting the evidence would undermine the integrity of the express confidentiality protections provided by the HKIAC Rules. The confidentiality of awards is well-established under the HKIAC Rules. Art. 45.1 HKIAC Rules expressly provides that any award rendered by a tribunal is confidential unless otherwise agreed upon by the parties [*Art. 45.1 HKIAC Rules*]. The evidence attempting to be introduced is a Partial Interim Award that was rendered by a tribunal under the HKIAC Rules [*PO2, para 39*]. Neither RESPONDENT nor the other party in the proceedings agreed that the confidentiality of this award may be waived [*Email by Fasttrack, p.50; PO2, para 39*]. Thus, Art. 45.1 HKIAC applies, and the evidence is confidential.

35. CLAIMANT has asserted that admitting the evidence would not contravene Art. 45.1 HKIAC because it benefits from the exception under Art. 45.3(a)(i) HKIAC [*Memorandum for Claimant, p.26*]. Contrary to this assertion, Art. 45.3(a)(i) relates to the disclosure of awards by parties that were involved in the proceedings in which the award being disclosed was rendered [*Art. 45.3 HKIAC Rules; Moser/Bao, p.283; Parakou Shipping*]. As CLAIMANT was not a party to the arbitration proceedings in question [*PO2, para 39*], this exception does not apply, and the evidence is confidential. The HKIAC has gone to great lengths to ensure the confidentiality of its arbitration proceedings and the awards produced within it by incorporating an express provision of confidentiality in its rules. As a matter of policy, admitting the evidence would directly undermine the value this institution places on confidential information. Thus, public interest favours rejecting the evidence.

2) Admitting the evidence would implicitly endorse unlawful activity

36. Further, public interest does not favour admitting the evidence because doing so would implicitly endorse unlawful activity. While CLAIMANT did not directly participate in any unlawful activity, it actively sought out and funded the unlawful obtainment of the evidence. Were it not for CLAIMANT's conduct, it is unlikely that unlawful access to this confidential award would have occurred. It is irrelevant whether the evidence was obtained through an illegal hack or by bribing former employees of RESPONDENT; acceptance of this type of behavior promotes undesirable conduct and should not

be condoned [*Boykin/Havalic, p.33; Methanex, para 56*]. By admitting the evidence, the Tribunal would effectively be endorsing unlawful activity and incentivizing future unlawful disclosures. This could erode the notions of equal treatment, justice and good faith and harm the integrity of future arbitration proceedings [*Blair/Gojković, p.256*].

C. The interests of justice favour rejecting the evidence

37. The Tribunal is responsible for adopting suitable procedures for the conduct of the arbitration, provided that such procedures ensure equal treatment of the Parties [*Art. 13.1 HKIAC Rules; Art. 18 DAL; Art. Preamble 1 IBA Rules; Ashford, p.9*]. The Tribunal may exclude evidence based on considerations of fairness or equality of the Parties [*Art. 9.2(g) IBA Rules*]. The interests of justice favour rejecting the evidence because CLAIMANT has not acted in good faith and admitting the evidence would offend the principles of fairness and natural justice **[1]**; and the evidence not relevant **[2]**, or material **[3]**, to the dispute.

1) Admitting the evidence would offend the principles of natural justice and fairness because CLAIMANT has not acted in good faith

38. The evidence should not be admitted because CLAIMANT has not acted in good faith and to do so would offend the principles of natural justice and fairness [*Preamble 3 IBA Rules*]. Tribunals have emphasized the general duty of good faith and these principles when determining whether evidence is admissible [*Blair/Gojković, p.250; Sussman, p.4*]. These principles may be breached when a party attempts to introduce unlawfully obtained evidence into arbitration proceedings [*Methanex, para 56*]. It can be inferred that CLAIMANT obtained the Partial Interim Award with the knowledge that it would be unlawfully obtained [*See para 31 above*]. By pursuing evidence in this manner, CLAIMANT has not acted in good faith and has violated these principles by seeking to access confidential information in an attempt to unfairly gain a perceived advantage to its own case. The exclusion of the disputed evidence is therefore necessary to avoid unfair prejudice to RESPONDENT and to maintain the procedural integrity of this arbitration.

39. Further, RESPONDENT had a legitimate expectation and right to confidentiality that should be respected in these proceedings. Unlike other arbitral rules, which are silent on the issue of confidentiality [See *DAL; MAL; 2010 UNICITRAL Arbitration Rules*], the HKIAC Rules expressly codify the duty of confidentiality imposed on parties to arbitration proceedings [*Art. 45.1 HKIAC; Moser/Bao, p.282*]. The effect of the express provision is that the duty of confidentiality provided under the HKIAC Rules is more than a mere implied obligation [*Redfern/Hunter, p.145; Born (2009), p.2256;* See *Esso; US v Panhandle*]. Rather, it is an express right imposed on parties designed to ensure the confidentiality of the entire proceedings [*Moser/Bao, p.282; Born (2016), p.205*]. RESPONDENT therefore has both a right

to confidentiality and a justified expectation that the evidence and all other information shared or produced during the arbitration proceedings will remain confidential. CLAIMANT is aware of the importance of confidentiality and by seeking to rely on this evidence it is breaching good faith and fair dealing [*Preamble 3 IBA Rules*]. Further, the Partial Interim Award may contain privileged information, including confidential commercial information regarding one or both of the parties [*IBA Toolkit*, *p.14*]. Admitting the evidence would divulge this information and further disadvantage RESPONDENT, further undermining the principle of equal treatment. In the interest of justice, the evidence should be excluded.

2) Even if the Tribunal determines that the evidence is not inadmissible, the evidence should be excluded because it is not relevant to the dispute

40. Contrary to CLAIMANT's submission that the evidence is necessary to make its case [*Memorandum for Claimant, p.24*], the evidence is not relevant to the present dispute. A party cannot insist on the admission of evidence that the tribunal considers irrelevant [*Pilkov, p.149*]. 'Relevance' suggests that the document must be useful to establish the truth of factual allegations on which legal arguments are based [*Moser/Bao, p.193*]. The evidence is not useful to CLAIMANT in this dispute because it neither helps CLAIMANT prove that the Tribunal has jurisdiction and powers to adapt the Agreement **[i]**, nor that the price of the Agreement should be adapted **[ii]**.

i) The evidence does not help CLAIMANT prove that the Tribunal has jurisdiction and powers to adapt the Sales Agreement

41. The Parties in the present case did not include an express choice of law clause in favour of MAL in the Arbitration Agreement [*C 5, p.14*]. Consequently, in order for CLAIMANT to prove that the Tribunal has jurisdiction and powers to adapt the Sales Agreement, CLAIMANT must prove that the surrounding circumstances indicate that the Parties mutually intended that the law of Mediterraneo would govern the Arbitration Agreement. The evidence does not help CLAIMANT prove this, because the parties in the other proceedings expressly chose the law of Mediterraneo to govern their arbitration agreement [*PO2, para 39*]. In this way, the evidence is not relevant because it does not help CLAIMANT prove that MAL is the law governing the Arbitration Agreement, and therefore that the Tribunal has jurisdiction and powers to adapt the Agreement.

42. Further, in order for CLAIMANT to prove that the Tribunal has jurisdiction and powers to adapt the Agreement, it must be able to prove that the Arbitration Agreement can be interpreted to include disputes concerning price adaptation. The evidence is not useful to CLAIMANT to do this because the parties in the other arbitration proceedings mutually agreed to create their arbitration agreement using unedited versions of the HKIAC model clauses with all of the additions [*PO2, para 39*]. In contrast, the

Parties in the present case mutually agreed to amend the standard HKIAC model clauses in their Arbitration Agreement by removing the phrases 'controversy, difference, or claim' and any dispute 'relating to' the Arbitration Agreement [*C 5, p.14*; S*uggested Clauses HKIAC Rules*]. The effect of this decision is that the HKIAC clause included in the Parties' Arbitration Agreement significantly narrows the scope of jurisdiction and powers conferred to the Tribunal in comparison to those in the other arbitration proceedings [*R 1, p.33; R 2, p.34; C 5, p.14*]. Therefore, the evidence is not useful because it does not help determine whether non-standard arbitration agreements using purposely narrowed HKIAC clauses can be interpreted to include a 'claim' for price adaptation. Further, since DAL governs the Arbitration Agreement, an express conferral of powers is required to provide the Tribunal with jurisdiction and powers to adapt the Sales Agreement [*Art. 28(3) DAL; PO2, para 36*]. As the evidence does not help provide this conferral, it is not useful to CLAIMANT. Therefore, the evidence is not relevant because it does not help CLAIMANT prove that the Tribunal has jurisdiction and powers to adapt the Sales Agreement.

ii) The evidence does not help CLAIMANT prove that the Tribunal should adapt the Sales Agreement

43. CLAIMANT has asserted that the evidence is relevant to proving that the Tribunal should adapt the Sales Agreement [*Memorandum for Claimant, p.24*]. Contrary to this assertion, the evidence does not help prove this because, unlike the present case, the sales agreement between the parties in the other proceedings contained a 2003 ICC Hardship Clause [*PO2, para 39*]. The 2003 ICC Hardship Clause is much broader than the clause contained in the Sales Agreement, and thereby provides for adaptation of the Sales Agreement due to hardship caused by tariffs. However, as the Parties in this case expressly chose not to include a hardship clause in their Sales Agreement, this fact is of no use to CLAIMANT. Accordingly, the evidence is not relevant because it does not help CLAIMANT prove that the Tribunal should adapt the price of the Agreement.

3) In the alternative, even if the Tribunal determines that the evidence is relevant to the dispute, the evidence should not be admitted because it is not material

44. CLAIMANT has argued that the evidence is material because it is necessary to be considered in order for the Tribunal to make an accurate decision [*Memorandum for Claimant, p.24*]. Contrary to this submission, the evidence is not necessary because it only establishes two facts relevant to this case, and these facts are to be established by the Tribunal based on their own knowledge and other evidence. To be 'material', the Tribunal must determine that the document is necessary to allow complete consideration as to the truth of a factual allegation [*Hilmer, p.193*]. Tribunals may exclude evidence where it is adduced to establish a fact which the tribunal already considers has been established by other

evidence [*Art. 22.3 HKIAC Rules; Moser/Bao, p.193*], by their own sufficient common knowledge [*Waincymer, p.780; Nicaragua, para 40/41*], or if it is so obvious that proof is not required [*Waincymer, p.780*]. In this case, the evidence first establishes that if tribunals can interpret the wording of the arbitration agreement using the law governing it to provide jurisdiction and powers to adapt the Sales Agreement, then they will have jurisdiction and powers to allow adaptation. This fact is not necessary because it merely illustrates the principle of party autonomy, and that arbitral tribunals are to determine their jurisdiction and powers in accordance with the intentions of the parties as indicated by the specific wording of the arbitration agreement. The Tribunal is aware of this principle as it is reflected in Art. 19(1) MAL/DAL and the HKIAC Rules. Second, the evidence establishes that under MCL, tribunals have power to adapt contract prices if tariffs result in hardship for a party to a sales agreement. This fact is not necessary because it has already been established by the tribunal based on their knowledge of consistent jurisprudence of the courts of Mediterraneo regarding Art. 6.2.3 para 4b MCL [*PO2, para 39*]. As the evidence only establishes facts already established by this Tribunal, it is not material and should be excluded.

D. If the evidence is excluded CLAIMANT will not be denied a reasonable opportunity to present its case

45. CLAIMANT has asserted that excluding the evidence would constitute a violation of their right to be heard and opportunity to present their case, and that any subsequent award may consequently be set aside [*Memorandum for Claimant, p.22*]. Contrary to this assertion, excluding the evidence would not violate CLAIMANT's right to present its case because Art. 18 DAL should be interpreted as obligating the Tribunal to provide the Parties with a 'reasonable' opportunity to present their case [*Shaughnessy, p.461*], not a 'full' one, and this can be accomplished without breaching the confidentiality of the award of the other proceedings under the HKIAC Rules. The word 'reasonable' provides tribunals with discretion to determine the meaning of a 'reasonable opportunity' to present one's case, and to take the most proportionate and pragmatic approach to limiting the scope of the evidence a party wishes to present [*Moser/Bao, pp.162-163*]. To determine the appropriate limits for evidence a party wishes to present, tribunals often weigh the materiality and relevance of evidence against the unlawfulness of acts committed, public interest, and the interests of justice [*Boykin/Havalic, p.34*]. As the evidence is not relevant or necessary to this dispute, CLAIMANT's desire for the evidence does not outweigh the value that public interest places on rejecting expressly confidential evidence that has been unlawfully obtained, or the unfairness created by admitting the evidence. Further, in most jurisdictions, the threshold for challenging an award on procedural violation grounds is high [*Born (2014), p.2184; Moser/Bao, p.163*]. Consequently, it is unlikely that any award rendered will be set aside or deemed unenforceable based on CLAIMANT being denied an opportunity to present its case, and the evidence should be excluded.

ARGUMENTS ON THE MERITS

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

46. CLAIMANT is not entitled to have the Contract Price adapted as the imposition of additional tariffs does not constitute hardship under clause 12 of the Sales Agreement. The Sales Agreement is expressly governed by 'the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods' [*C 4, p.14*]. Given the international nature of the Sales Agreement [*Art. 1(a) CISG*], the meaning of hardship under the Sales Agreement should be determined under Art. 8 CISG. CLAIMANT bore the risk of increased importation tariffs in contracting for DDP delivery **[A]**. Further, CLAIMANT's circumstances as a result of the additional tariffs do not constitute hardship **[B]**. Even if CLAIMANT's circumstances constitute hardship, the Parties' narrowing of the application of hardship means that CLAIMANT cannot rely on the hardship exemption under clause 12 in this instance **[C]**. Even if the Tribunal finds that CLAIMANT was in hardship, the Sales Agreement does not allow for an adaptation of the Contract Price **[D]**. Even if the Tribunal can adapt the contract, the standards for adaptation mean that CLAIMANT should not receive an increase in the Contract Price **[E]**. Further, CLAIMANT cannot rely on RESPONDENT's resale of Nijinsky's semen to support an argument for adaptation as RESPONDENT was entitled to re-sell **[F]**.

A. CLAIMANT assumed the risk of additional tariffs in accepting DDP delivery

47. The Parties agreed on DDP delivery [*C 4, p.12*] and intended to insert the 'DDP Incoterms® 2010' into the Sales Agreement, even though it was not included in verbatim [*PO2, para 10*]. The term 'DDP' used in clause 8 of the Sales Agreement is to be interpreted in accordance with Art. 8(1) CISG. DDP Incoterms® 2010 require that the seller bears risks associated with shipping until the goods reach the buyer, and that the seller assumes responsibility for import and export duties [*Mudric, p.8*]. The context in which 'DDP' has been used in this transaction supports its interpretation as 'DDP Incoterms® 2010' [*Johnson, pp.380-381*] given the Parties' adherence to the requirements when contracting. CLAIMANT understood that it was to bear any extra costs for importation and the increased risks in shipping, and provided information related to insurance and place of delivery in alignment with DDP Incoterms® 2010 [*C 4, p.12; PO2, para 10*]. Consequently, it is evident that the Parties intended that 'DDP' was to be interpreted as 'DDP Incoterms® 2010'.

48. CLAIMANT bore the risk of increases in importation tariffs by contracting for DDP delivery and only excluding liability for certain other risks normally associated with DDP delivery. Under DDP delivery, the seller is responsible for import clearance and duties [*Mudric, p.8*], including importation tariffs which are classified as import duties [*World Trade Organisation*]. The Parties expressly agreed to exclude certain,

very specific, risks from CLAIMANT's liability, such as the cost of tank rental, some storage costs and force majeure risks [*C 6, p.14*]. The levying of additional importation tariffs is not similar to increased 'health and safety requirements' [S*ee para 65 below*], and therefore had the Parties intended to exclude the risk of increased tariffs it would have been specified. As the Sales Agreement does not identify the imposition of additional tariffs as an exception to DDP, the risk was to be borne by CLAIMANT.

B. The imposition of additional tariffs did not place CLAIMANT in circumstances that constitute hardship

49. Although the Parties agreed that CLAIMANT would not be responsible for 'hardship' and adjusted the existing force majeure clause accordingly [*C 5, p.14; C 4, p.12*], this term was not defined. As hardship should be defined with reference to the applicable law of the Sales Agreement [*Fucci, p.11*], the interpretation principles under Art. 8(2) CISG are applicable. A reasonable person would understand that the Parties intended to import the definition of hardship contained in the ICC hardship clause, as the Parties specifically referenced and used this clause during negotiations [*Art. 8(3) CISG; C 4, p.12*]. CLAIMANT's circumstances do not constitute hardship within the meaning of hardship in the ICC hardship clause **[1]**. Further, the Tribunal should reject CLAIMANT's use of the UPICC hardship definition [*Memorandum for Claimant, p.30*] as it is contrary to the CISG's interpretation principles. Even if hardship were to be defined using UPICC, the additional tariffs did not place CLAIMANT in hardship **[2]**.

1) The imposition of additional tariffs did not place CLAIMANT in circumstances that constitute hardship under clause 12, when interpreted in alignment with the ICC hardship clause

50. As the Parties expressly referenced the ICC hardship clause during negotiations, the term 'hardship' in clause 12 of the Sales Agreement should be interpreted in line with the meaning of hardship under the pro forma clause the Parties used as the base for their agreement. Under the ICC hardship clause, hardship occurs when one party's 'continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and it could not reasonably have avoided or overcome the event or its consequences' [*ICC Publication No. 650*]. Although the imposition of additional tariffs was beyond the reasonable control of CLAIMANT, it could reasonably have been expected to take the additional tariffs into account as they were foreseeable **[i]**, the performance of the Sales Agreement did not become excessively onerous **[ii]** and CLAIMANT could have been reasonably expected to avoid the tariffs or overcome the consequences **[iii]**.

i) The imposition of additional tariffs was foreseeable

51. Contrary to CLAIMANT's submissions [*Memorandum for Claimant, p.15*], the imposition of additional tariffs was foreseeable at the time of contract and could have reasonably been taken into account by CLAIMANT. The Parties were aware of the political climate and the accompanying risks for international trade **[a]**. Additionally, the risk of the imposition of agricultural tariffs was high and horse semen is an agricultural product **[b]**.

a) CLAIMANT was aware of the political climate at the time of contracting

52. CLAIMANT should have taken into account President Bouckaert's protectionist approach to international trade in the agricultural sector at the time of contracting. Parties do not have to foresee the specific event that gives rise to circumstances that may constitute hardship, but rather only have to foresee the possibility of the occurrence of an event [*Fucci, p.17*]. At the time of contracting, Mr Bouckaert had announced his preference for a protectionist approach to agricultural products in his presidential campaign [*C 6, p.15*]. After his election in April 2017, Mr Bouckaert appointed 'Superminister' Frankel a day before the Sales Agreement was signed. Frankel was known to be a critic of free trade in foreign agricultural products [*PO2, para 23*]. A reasonable person in CLAIMANT's position should have provided for the possibility of such changes as these were not outside the bounds of probability [*Perillo, p.23*]. Although the retaliatory Equatorianian tariffs ultimately affected the Sales Agreement, the Parties were aware of the political climate and should have contracted to exclude risks associated with importation tariffs or restrictions. Parties cannot claim they were unaware of macro-economic adversities [*UNCITRAL Award of May 4 1999; ICC Award No. 2142*]. Accordingly, by failing to distribute the risk of tariffs where it was reasonably foreseeable that tariffs may be imposed that affect international trade transactions, CLAIMANT bore those risks.

b) CLAIMANT should have been aware that horse semen is an agricultural product for the purposes of sales between members of the WTO

53. At the time of contracting, it was foreseeable that any potential agricultural tariffs would affect horse semen, which is included in the WTO's list of agricultural products. Both Parties are members of the WTO, which utilises the Harmonised System Nomenclature to define agricultural products for the purposes of international trade and specifically mentions frozen equine semen under chapter 5 [*World Customs Organisation*]. CLAIMANT has experience in the provision of frozen semen in other areas of equestrian sport and should have been aware of this categorisation. Therefore, the potential for agricultural tariffs to impact the Sales Agreement could have been reasonably taken into account by CLAIMANT at the time of contracting.

ii) CLAIMANT's performance of its contractual duties did not become excessively onerous

54. The ICC hardship clause requires that if a contract becomes 'more onerous' a party is still liable perform and it is only where it becomes 'excessively onerous' that hardship may be invoked. Although clause 12 merely requires that the Sales Agreement becomes more onerous, this does not lower the threshold for hardship **[a]**. In any event, the performance of the Sales Agreement did not become more onerous **[b]**.

a) The inclusion of the phrase 'more onerous' in clause 12 is not a derogation from the requirement that hardship under the Sales Agreement should be 'excessively onerous'

55. The ICC hardship clause requires that if a contract becomes 'more onerous' a party is still liable perform and it is only where performance becomes 'excessively onerous' that hardship may be invoked. Although clause 12 merely requires that the Sales Agreement becomes more onerous, this does not lower the threshold for hardship. Through negotiations, the Parties intended to import the ICC hardship clause into clause 12 but narrow its application. In giving effect to these intentions, the degree of onerousness required for hardship should not be lowered by the inclusion of the phrase 'more onerous' because this would broaden the scope of hardship. The use of the word 'more' instead of the word 'excessively' was likely a drafting error by the new negotiators in attempting to include the original negotiators' terms into the Sales Agreement. Parties should be aware that contracting internationally can be financially profitable or detrimental [*Girsberger, p.132*], therefore, tribunals should not interfere with the agreement between the Parties except in extreme cases [*UNCITRAL Award of May 4 1999*]. Regard should be had to preserving the Sales Agreement rather than unnecessarily impeding the Parties' agreement. It is therefore unlikely that the Parties intended to invoke hardship when the contract performance merely became 'more onerous' rather than requiring that performance must become 'excessively onerous' in order to constitute hardship.

b) The Sales Agreement did not become more onerous for CLAIMANT to perform

56. The imposition of additional tariffs did not make the Sales Agreement more onerous for CLAIMANT to perform as the fixed costs were likely miscalculated. In calculating the costs for the insemination, CLAIMANT assumed the cost of production of one dose of frozen semen was the same as one natural covering. Contrary to this, 10-20 doses may be taken for frozen semen from the equivalent amount of ejaculate used for one natural covering. This is because a horse may produce an average of 40-60ml of semen in each ejaculate, which equates to 10-15 doses [*Dogan, p.121*]. The costs for CLAIMANT would therefore be far less than a natural covering as several doses can be obtained for CLAIMANT's fixed costs of $80,000. Therefore, CLAIMANT's profit margin was likely larger as the fixed and variable costs were overcalculated.

iii) CLAIMANT could have overcome the additional tariffs and its consequences

57. CLAIMANT's circumstances do not constitute hardship as the tariffs and their consequences could have been avoided and overcome. To 'overcome' an impediment means to take the necessary steps to preclude the consequences of the impediment [*Bianca/Bonell, p.581*]. The imposition of additional tariffs could have been overcome by taking reasonable precautions to offer alternatives as to the date of delivery. Relief for hardship is only to be granted when efforts to overcome the impediment would have been beyond what can reasonably be expected [*Enderlein/Maskow, p.324*]. Moving the shipment date forward to overcome the imposition of tariffs was not beyond what CLAIMANT could have been reasonably expected to do. CLAIMANT was aware that the tariffs were announced on 19 December 2017 [*PO2, para 25*], as it read the article by 'Peak Business News' dated 20 December 2017 [*PO2, para 26*]. The tariffs' financial effect could have been avoided by simply moving the shipping date one week forward as the tariffs came into effect on 15 January 2018. CLAIMANT took no action until two days before delivery was due and instead threatened to not perform its contractual obligations [*C 7, p.16*]. Therefore, the Tribunal should find that CLAIMANT could have overcome the effects of the imposition of 30% tariffs.

2) Even if the definition of hardship under Art. 6.2.2 UPICC applies, CLAIMANT's circumstances do not constitute hardship

58. CLAIMANT has submitted that the definition of hardship under UPICC is applicable to the Sales Agreement [*Memorandum for Claimant, p.28*]. Although this is inconsistent with the interpretation principles under the governing law, even if the Tribunal were to apply this definition of hardship, CLAIMANT's circumstances do not constitute hardship. When assessing hardship under Art. 6.2.2 UPICC, CLAIMANT expressly bore the risks of additional tariffs in accepting DDP delivery [*See paras 47-48 above*], even though the additional tariffs became known after the conclusion of the contract and were outside of the control of the Parties. CLAIMANT could reasonably have taken into account the possibility of the imposition of additional tariffs at the time of contracting [*See paras 51-53 above*]. Further, the imposition of additional tariffs did not fundamentally alter the equilibrium of the Sales Agreement **[i]**.

i) The additional tariffs did not fundamentally alter the equilibrium of the Sales Agreement

59. CLAIMANT's increase in the cost of performance was not a fundamental alteration of the contractual equilibrium. The contractual equilibrium may be affected if the cost of performance increases [*Art. 6.2.2 UPICC*]. Fundamental alteration requires a factual analysis of objective criteria [*Girsberger, p.125*], including onerousness [*Vogenauer, p.814*]. Further, a party is not entitled to use a hardship defence only because the contract turned out to be less profitable than expected at the time of conclusion of the

contract [*Girsberger, p.123*]. Although clause 12 of the Sales Agreement requires that performance becomes 'more onerous', this does not lower the threshold for hardship **[a]**. Further, there has not been a fundamental alteration of the contractual equilibrium **[b]**.

a) The requirement for a fundamental alteration of the contractual equilibrium to meet the threshold for hardship is not affected by clause 12 requiring that performance becomes merely 'more onerous'

60. Although clause 12 only requires that the Sales Agreement becomes 'more onerous' to constitute hardship, there still must be a fundamental alteration of the contractual equilibrium to meet the threshold for hardship. The contractual equilibrium is affected when there is an increase in the cost of performance or a decreased value of performance [*Art. 6.2.2 UPICC*]. In order to determine whether the increase in the cost of performance fundamentally altered the equilibrium of a contract requires a nominal and circumstantial analysis [*Girsberger, p.130*]. Requiring that the Sales Agreement merely becomes 'more onerous' does not affect the requirement that there be a fundamental alteration. This is because 'onerousness' is only one aspect of the equilibrium [*Vogenauer, p.814*]. The nominal and circumstantial requirements for fundamental alteration therefore remain, even if the contract only needs to become 'more onerous'. Although clause 12 requires that hardship makes the Sales Agreement 'more onerous', the threshold for hardship has therefore not been lowered.

b) The contractual equilibrium was not fundamentally altered by the additional tariffs

61. The imposition of the additional tariffs increased the importation costs borne by CLAIMANT; however, this did not result in a fundamental alteration of the contractual equilibrium. UPICC commentary previously supported a minimum threshold of a 50% increase in the cost of performance to constitute hardship [*UPICC 1994*]. The Tribunal should note that although the 50% consideration was removed, this was only to eliminate the assumption that a price increase of 50% would automatically entitle a party to relief [*Girsberger, p.127*]. Price increases under 50% have not been considered sufficient to constitute hardship under Art. 6.2.2 UPICC [*Dawwas, p.10; Girsberger, p.128*]. There are no known arbitral awards where arbitrators have granted relief merely because the costs of performance have increased by 50% or less compared to what had been agreed in the contract [*Girsberger, p.126*]. Rather, a 50% increase is seen as too low and arbitrary, especially in international contracts where it has been suggested that a minimum of 80% should apply [*Brunner, p.432*]. CLAIMANT's cost of performance has only increased by 30%, not reaching the minimum threshold.

62. Although CLAIMANT's financial position means that performance of the Sales Agreement may affect the viability of its business, this is due to its own failure to manage profit margins. If a party's risk of financial ruin is due to a lack of managerial skills, it should not be entitled to lower the alteration

threshold [*Girsberger, p.131*]. CLAIMANT specifically contracted for a 5% profit margin and added $200 per dose for DDP delivery [*PO2, paras 8, 31*]. CLAIMANT's previous experience with DDP delivery meant that it should have understood the risks associated and altered their profit margin. Further, the profit margin in the racehorse sector is relevant [*Schwenzer (2008), p.716*]. In live coverage, CLAIMANT contracts for a 15% profit margin, which is 5% higher than the ordinary profit margin due to Nijinsky's pedigree [*PO2, para 19*]. As one natural coverage was equated to one dose in the calculation of costs, CLAIMANT may have calculated a higher profit margin, particularly considering Nijinsky's pedigree. CLAIMANT made an unfavourable business decision in contracting for a lower profit margin even in circumstances where it assumed more risks with DDP delivery. The fact that the additional tariffs affected its financial position was due to a lack of management of profit margins. Additionally, CLAIMANT would not be at risk of financial ruin as it would merely have to sell the dressage section of its company in negotiating a new line of credit. This is the result of financial constraints CLAIMANT has undertaken in arranging high-interest loans to finance new stables for itself in 2013 [*PO2, para 29*]. The threshold should not be lowered due to CLAIMANT's financial situation as it was endangered by its own conduct and would not face bankruptcy in bearing the costs.

C. Even if CLAIMANT's circumstances constitute hardship, the Parties' narrowing of the application of hardship means that clause 12 is not applicable in these circumstances

63. The Parties limited the application of hardship under clause 12 to 'hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous' [*C 6, p.14*]. The imposition of additional importation tariffs does not fall within this limited category as they were are not comparable to health and safety requirements, were foreseeable [*See paras 51-53 above*] and did not make the Sales Agreement more onerous [*See para 56 above*].

64. Clause 12 of the Sales Agreement should be interpreted narrowly to exclude importation tariffs as these had been considered during negotiations but were ultimately not included. Under Art. 8 CISG, the Sales Agreement must be interpreted according to the intentions of the Parties [*Art. 8(1) CISG, Art. 8(3) CISG*]. During negotiations, CLAIMANT indicated it was not willing to bear the risks associated with 'additional health and safety requirements' due to its past experiences [*C 4, p.12*], with this specific circumstance subsequently provided for in clause 12. While CLAIMANT also initially sought to redistribute risks associated with 'customs regulations or import restrictions' [*C 4, p.12*], the final version of clause 12 did not incorporate these risks. As the Parties agreed to the finalised version of clause 12, it should be interpreted narrowly to exclude 'customs regulations or import restrictions', which may otherwise have insulated CLAIMANT from the risks of importation tariffs.

65. Additionally, the tariffs are not 'comparable' to health and safety requirements. Health and safety requirements are rules imposed by governments, typically to protect food and feed hygiene, consumer

safety and animal health status [*European Commission*]. These affect the performance of a sales agreement as the parties may have extra obligations or be prevented from discharging their contractual duties [*Official Journal of the European Union (2009)*]. CLAIMANT experienced such problems in a previous transaction based on DDP delivery, where the imposition of additional health and safety requirements after contract conclusion resulted in a price increase because performance became impossible for a period of time [*C 4, p.12; PO2, para 21*]. The additional importation tariffs by the Government of Equatoriana are merely tariffs that require an additional payment, but no alteration to the actual performance of the obligation for which they contracted. The price of performance was merely higher, and it was not a case of delaying or causing extra performance obligations. Therefore, the imposition of additional tariffs is not 'comparable' to the imposition of additional health and safety requirements.

D. In any event, the Contract Price cannot be adapted

66. Although CLAIMANT has stated that the Tribunal should adapt the Sales Agreement [*Memorandum for Claimant, p.28*], the Contract Price cannot be adapted under the Sales Agreement **[1]** or through the application of international principles in UPICC **[2]**.

1) The Sales Agreement does not allow for an adaptation of the Contract Price

67. Clause 12 does not explicitly provide for an adaptation of the Contract Price in the event of hardship. The principle of *pacta sunt servanda* applies to the Sales Agreement through the application of the CISG [*Magnus*], therefore the Parties are bound to the clauses they agreed to [*Zaccarria, p.1*] as they are responsible for taking precautions and allocating risks [*Berger, p.1355*]. Contrary to the submissions of CLAIMANT, which asserted that the mere existence of a hardship clause entitles CLAIMANT to adaptation [*Memorandum for Claimant, p.28*], tribunals are only inclined to derogate from this principle when the contract contains a renegotiation or adaptation clause, when the economic conditions have changed, and the applicable law permits it [*Harms, p.322; Berger p.1354*]. The CISG does not allow for a price adaptation in any of its provisions. Further, parties cannot rely on hardship to supplement a failure to contract for an adaptation as priority is given to the principle of *pacta sunt servanda* [*ICC Award No. 1512*]. Therefore, the Tribunal may not adapt the Sales Agreement. Additionally, if adaptation by Tribunals were allowed in international transactions, this may expose parties to uncertainty and changing obligations that were not accepted when contracting [*ICC Award No. 6281*]. As the Parties did not specifically contract for an adaptation, CLAIMANT assumed the risk of future contingencies by consciously not contracting against it [*Carbonneu, p.593; Poznanski, p.71*]. Further, the fact that RESPONDENT agreed to negotiate with CLAIMANT does not constitute assent to an adaptation by the Tribunal. RESPONDENT has expressed its opposition to an adaptation due to the uncertainty it places on the Sales Agreement [*Answer to Notice of Arbitration, p.32*]. Although CLAIMANT discussed

adaptation, it was not expressly contracted for, suggesting it was the decision of CLAIMANT to bear such risks.

68. The Sales Agreement does not provide a remedy for hardship. The Parties specifically chose to incorporate hardship into the existing force majeure clause, adapting the ICC hardship clause to the circumstances [*PO2, para 12*]. This clause was specifically chosen by CLAIMANT and does not provide for an adaptation in the event of hardship [*C 4, p.12*]. It places an obligation on the Parties to negotiate, and if no agreement is reached, the contract may be terminated [*ICC Publication No. 650*]. Although the Parties did not import the effect of hardship, it may be implied as the Parties modified the ICC hardship clause for the Sales Agreement [*PO2, para 12*]. A reasonable person would assume that the effect of hardship within the ICC hardship clause was also imported in the use of the clause in the Sales Agreement [*Art. 8(2) CISG*]. Further, there are no remedies which can be implied under the CISG. Therefore, the effect of hardship under the ICC hardship clause should be adopted to terminate the Sales Agreement after the failure of negotiations.

69. As the Sales Agreement is short-term, there is limited application for an adaptation. Although some courts have adapted a contract in the absence of an express enabling contract clause, these have been in long-term contracts to ensure continued performance, benefitting both parties [*Zaccarria, p.2; Aluminium Company of America (ALCOA) v Essex Group Inc*]. Although CLAIMANT has submitted that adaptation will benefit both Parties [*Memorandum for Claimant, p.16*], the Sales Agreement has been performed, and the only benefit in an adaptation would be for CLAIMANT to receive extra payment.

2) The Contract Price cannot be adapted through the application of UPICC

70. Even if UPICC is utilised to define hardship in the Sales Agreement, CLAIMANT is not entitled to an adaptation in accordance with Art. 6.2.3 UPICC. The article stipulates that adaptation may occur 'if reasonable'. RESPONDENT met with CLAIMANT in Equatoriana to negotiate a possible adaptation of the Contract Price due to the additional tariffs. Although RESPONDENT was under no contractual obligation to do so, it nevertheless attended the negotiations in good faith at the request of CLAIMANT, in accordance with Art. 6.2.3 UPICC. During negotiations, parties are obligated to refrain from any form of obstruction and provide all necessary information [*UPICC, p.225*]. Further, negotiations cannot be a purely tactical manoeuvre [*Dawwas, p.14*]. CLAIMANT deviated from these duties to negotiate in good faith by confronting RESPONDENT about its resale of Nijinsky's semen. This is because the information was not necessary to the negotiations and may have been a tactical manoeuvre to claim any profits RESPONDENT made from the resale. CLAIMANT would have also known that this would detrimentally affect negotiations of the Contract Price. The adaptation of the Contract Price under Art. 6.2.3 UPICC is not reasonable as the opportunity to adapt with the consent of both Parties was terminated as a result of CLAIMANT not acting in good faith.

71. Although CLAIMANT stated that the concept of hardship is directed at adaptation [*Memorandum for Claimant, p.30*], Art. 6.2.3 UPICC allows for both termination and adaptation, privileging neither remedy. Although RESPONDENT attempted to negotiate the Sales Agreement with CLAIMANT, it has not consented to an adaptation by the Tribunal. The principle of party autonomy allows parties to derogate from UPICC [*Art. 1.5 UPICC*] and the CISG [*Art. 6 CISG*]. An adaptation by the Tribunal would infringe upon RESPONDENT's autonomy by imposing an obligation to perform on modified terms that it did not contract for. Although CLAIMANT has submitted that the failure of negotiations means it is the arbitrator's 'task' to adapt [*Memorandum for Claimant, p.28*], in circumstances where one party requests adaptation and the other requests termination, there is a tendency for tribunals to terminate contracts unless the circumstances are extraordinary [*Brunner, p.502*]. The additional tariffs and CLAIMANT's financial situation are not extraordinary. CLAIMANT paid for travel to Equatoriana for negotiations with RESPONDENT, made the payments for arbitration without difficulty, and paid to obtain the Partial Interim Award from RESPONDENT's other proceedings. If CLAIMANT was in financial difficulty, it would not be able to make such extraneous payments. The Sales Agreement should remain terminated as an adaptation would be contrary to RESPONDENT's autonomy and the Sales Agreement.

72. As the Sales Agreement was terminated through performance by both Parties, it cannot now be adapted. Adaptation should only occur at a date prior to the termination [*Brunner, p.501*] and retroactive adjustments have not been accepted in literature, commentary or cases [*Fucci, p.39*]. They have only had effect where they are applied over time in continuing contracts [*Fucci, p.39*]. As both Parties have performed all obligations under the Sales Agreement, an adaptation cannot be awarded. CLAIMANT is therefore not entitled to a retroactive contract adaptation.

E. Even if the Tribunal adapts the Sales Agreement, the standards for adaptation mean that CLAIMANT should not receive an increase in the Contract Price

73. If the Tribunal allows an adaptation due to hardship, CLAIMANT should not be entitled to an increase in the Contract Price. If the Tribunal adapts the Sales Agreement in alignment with Art. 6.2.3 UPICC, adaptation must occur with a view to restoring its equilibrium. This is with regard to a 'fair distribution of losses' [*UPICC, p.226*]. CLAIMANT had the opportunity to mitigate its losses by coming to an agreement during negotiations with RESPONDENT. Due to CLAIMANT's bad faith, these negotiations failed [*See para 70 above*]. CLAIMANT is not entitled to an adaptation of the Contract Price as its losses lie solely with them. Even if the Contract Price may be increased, RESPONDENT should bear a lower burden as it would fairly distribute losses.

F. RESPONDENT was entitled to re-sell Nijinsky's semen

74. Although CLAIMANT has stated that an adaptation of the Contract Price should occur as RESPONDENT profited from the resale of Nijinsky's semen, RESPONDENT was entitled to re-sell Nijinsky's semen under the Sales Agreement, and no adaptation should be made. Clause 1 states that the 100 doses of semen may be used for other mares 'after information of the seller'. CLAIMANT stated that it would 'like to be informed' on the use of the doses when negotiating the terms of the Sales Agreement [*C 2, p.10*]. This indicates an intention to inform CLAIMANT of the use of the semen, not seek approval for the use or resale. Further, a reasonable person would interpret 'others after information of the sellers' as an obligation to merely inform that the doses were being used. Given the detail provided throughout the Sales Agreement, specifically in relation to the mares, if CLAIMANT intended for an approval process to be required, this would have been expressly provided for. Under the Sales Agreement, RESPONDENT was only obligated to inform CLAIMANT of the use of the semen.

75. Through the negotiations, CLAIMANT also requested that the doses would not be re-sold to third parties without 'express written consent'. RESONDENT did not agree to this as it stated that 'most of the terms are acceptable, including the general applicability of your general terms and conditions' [*C 3, p.11*]. The resale request was not a 'general condition' as RESPONDENT was directed to the standard form Sales Agreement and the conditions on CLAIMANT's webpage [*C 2, p.10*]. Therefore, RESPONDENT did not accept the requirement that it would need to obtain consent to resell. Further, RESPONDENT's resale was not precluded by the Sales Agreement and does not affect CLAIMANT's circumstances. Therefore, CLAIMANT should not be entitled to use the resale to support its request for an adaptation of the Contract Price.

IV. THE TRIBUNAL SHOULD REJECT CLAIMANT'S REQUEST FOR ADDITIONAL REMUNERATION AS ADAPTATION OF THE CONTRACT IS NOT POSSIBLE UNDER THE CISG

76. CLAIMANT does not have a right to claim increased remuneration under the CISG. Adaptation of the Contract Price is not an allowed remedy under the CISG as CLAIMANT's alleged financial hardship falls outside of the CISG's scope of application **[A]**. Alternatively, if the Tribunal finds that financial hardship falls under the CISG's scope of application, CLAIMANT cannot rely on Art. 79 for relief against the imposition of the 30% tariffs **[B]**. Even if the Tribunal finds CLAIMANT suffered an impediment under Art. 79 CISG, the Tribunal should not adapt the Contract Price **[C]**. In addition, the Tribunal should reject CLAIMANT's allegations that the Parties agreed to modify the Contract Price **[D]**.

A. The Tribunal should reject CLAIMANT's claim for adaptation of the Contract Price as financial hardship falls outside the scope of application of the CISG

77. CLAIMANT is not entitled to adaptation of the Contract for financial hardship as it does not fall under the scope of application of Art. 79 CISG **[1]**. In addition, the Tribunal should not extend the application of Art. 79 CISG so as to incorporate the hardship doctrine by reference to external sources as this would be contrary to Art. 7 CISG **[2]**.

1) CLAIMANT has no grounds to claim financial hardship under any CISG provision

78. CLAIMANT cannot claim an adaptation as financial hardship falls outside the scope of application of the CISG. Hardship was expressly excluded by the drafters and a calibrated and calculated effort has been taken towards eliminating the word 'hardship' from the international sale of goods law lexicon [*Kessedjian (2005), p.261*]. This is because an exemption to liability on the basis of unexpected and excessive economic hardship was out of place in international sales [*UNCITRAL Yearbook V, Annex III p.66*]. Art. 79 CISG governs circumstances where a party may be exempt from liability for a failure to perform due to an impediment beyond its control [*Flambouras (2001), p.261*]. This should be narrowly construed as a force majeure clause that does not extend to hardship [*DiMatteo et al. (2016), p.693*]. As such, a disturbance which does not fully exclude performance but makes it considerably more onerous, such as hardship, cannot be considered as an impediment [*Flambouras (2002), para 7; Vital Berry Marketing NV v Dira-Frost NV*].

79. The exclusion of hardship from the scope of Art. 79 CISG is evident from its legislative history, in which financial hardship under Art. 79 has been discussed at length and ultimately rejected [*DiMatteo (2015), p.279*]. Moreover, the UNCITRAL outline of coded issues for all CISG Articles does not include a specific code for issues of economic impediment or hardship, which is indicative of a lack of specific provision for the issue of economic duress in a contract [*UNCITRAL thesaurus*].

80. Further, courts and tribunals have generally adhered to the original drafters' intention to exclude hardship from Art. 79 CISG. Courts consistently refuse to exempt parties from liability due to hardship, as the fluctuations of price have never been deemed drastic enough under international commercial contracts [*Davies/Snyder (2014), p.334*], particularly for increased and onerous transportation costs in delivery [*Sunflower seed case*; *Canned oranges case*]. Similarly, CLAIMANT's increased cost of performance [*Notice of Arbitration, para 21*] does not constitute an impediment under the CISG because it merely amounts to an increased cost in delivery and not impossibility. Therefore, the Tribunal should not find that CLAIMANT is entitled to an exemption under the CISG as hardship falls outside the application of the CISG.

2) Additionally, the Tribunal should not extend the application of Art. 79 CISG so as to incorporate external sources as authority

81. The Tribunal should observe the principles of Art. 7 CISG. The Tribunal should adhere to the CISG's principles of 'uniformity' and 'good faith' in accordance with Art. 7(1) CISG, rejecting CLAIMANT's incorporation of financial hardship into the CISG **[i]**. Further, CLAIMANT's assertions to incorporate hardship into the CISG in conformity with UPICC under Art. 7 (2) [*Memorandum for Claimant, p.38*] are inappropriate and prohibited by the CISG **[ii]**.

i) CLAIMANT cannot invoke Art. 7 (1) CISG to incorporate hardship into the CISG.

82. Interpretations of the CISG must be done with regard to its international character of the document, uniformity and good faith in international trade [*CISG Art. 7(1)*]. The CISG's autonomy, illustrated by the lack of reference to accepted wording and concepts of other legal jurisdictions means that there can be no resort to such doctrines [*Elderlin/Maskow, p.574*]. As hardship did not have a sufficiently international character, featuring predominantly in civil law jurisdictions [*Flechtner (2011), p. 97*], hardship was deliberately omitted from the CISG [*Rimke, p.219*].

83. Additionally, CLAIMANT cannot invoke the principle of 'good faith' under Art. 7(1) CISG to incorporate hardship into the CISG. The principle of good faith does not support exemptions on the basis of hardship, or the obligation to renegotiate. Instead, this principle requires the enforcement of the contract's terms, parties' bargains, and performance of the contract in good faith despite hardship [*Ferrari (2017), p.101*]. Accordingly, 'good faith' does not justify the incorporation of hardship into the CISG, rather it requires the CLAIMANT to perform under the terms and obligations of the Sales Agreement.

84. Moreover, the principle of 'good faith' should not be used to bypass explicit provisions of the CISG, in this instance Art. 79 (5), which states the legal effects of the exemption [*Rimke, p.223*]. As the remedies of exemption for impediments under Art. 79 and for hardship differ substantively, the two doctrines cannot be used synonymously under Art. 79 CISG [*Carlsen, II-D*]. Consequently, hardship cannot be incorporated into the CISG since its remedy of adaptation would bypass the remedies available to CLAIMANT under the CISG. The remedy of adaptation is not expressly provided in the CISG, rendering it impossible to award under Art.79 (5) [*Bianca/Bonell, p.592*]. Providing this remedy would jeopardise the harmony and the aims of the CISG as stated in Art. 7(1) [*Bianca/Bonell. p.595*]. Therefore, the Tribunal should find that the principle of 'good faith' as stated in Art. 7 (1) CISG cannot be invoked by CLAIMANT to incorporate hardship into the CISG, and instead prohibits it.

ii) CLAIMANT cannot incorporate hardship into the CISG by supplementing it through UPICC under Art. 7(2) CISG

85. CLAIMANT cannot gap-fill using UPICC to incorporate hardship into the CISG. The use of the UPICC as a means of interpreting and supplementing the CISG must be examined in light of Art. 7(2) CISG. Hardship, however, is not specifically addressed by the CISG and therefore not governed by it [*See paras 78-80 above*]. Incorporation of provisions of UPICC into the CISG via gap-filling, particularly where those same approaches were proposed and rejected during the drafting of the CISG, would amount to an unacceptable way of imposing the approaches of the civil law on non-civil law states that never agreed to those approaches [*Flechtner, p.97*]. Consequently, the Tribunal should find that hardship cannot be incorporated into the CISG as the use of UPICC would not only be inappropriate under Art. 7(2) CISG, but also not in alignment with Art. 7 (1) CISG.

B. Alternatively, even if financial hardship falls under the scope of application of the CISG, CLAIMANT cannot rely on Art. 79 CISG for relief

86. The incorporation of clause 12 into the Sales Agreement expressly evidences the Parties' intention to exclude the applicability of Art. 79 CISG, in accordance with Art. 6 CISG **[1]**. Even if the Tribunal finds that Art. 79 CISG is applicable, the imposition of the additional tariffs did not constitute an impediment, as CLAIMANT was able to readily perform **[2]**.

1) The Parties expressly derogated from Art. 79 CISG by incorporating clause 12 as provided by Art. 6 CISG

87. The Parties clearly intended to tailor specific prerequisites for hardship instead of the provisions for impediments under Art. 79 CISG. The Tribunal should adopt the general approach to assess parties' derogation from the CISG regime through the objective test of a reasonable person in accordance with Art. 8 (2) CISG [*Lookofsky (2008), p.43*]. Art. 8 (3) CISG further requires a tribunal to give due consideration to all relevant circumstances, including negotiations. The Parties' intention to derogate from the application of Art. 79 CISG is evident in their negotiations which the eventual drafters heavily relied upon in concluding the Sales Agreement [*PO2, para. 12*]. This intention is clear since CLAIMANT itself offered to derogate from CISG to include the ICC Hardship clause [*R 2, p. 34*]. Choosing an ICC model is itself an act of derogation from the CISG [*Lookofsky (2005), p.435*], accentuated by the Parties' decision to insert a more narrow version of the ICC Hardship clause into the force majeure clause to regulate specific risks [*R 3, p.35*]. Hardship was thereby distinguished from, not equated to, force majeure. CLAIMANT knew this narrowing the ICC Hardship clause meant it only addressed specific risks tailored for the purposes of this Sales Agreement, namely 'health and safety requirements' [*PO2,*

para 12]. Specifying specific risks clarifies the intent of the parties [*Art. 8 (1) CISG; MCC-Marble Ceramic Centre, Inc v Ceramica Nuova D'Agostino*].

88. The Parties inserted a clause that was aimed at narrowing the ICC Hardship clause and did not use the ICC Force Majeure clause, which resembles Art. 79 [*Brunner, p.75*]. There are significant differences between the ICC Force Majeure clause and the ICC Hardship clauses [*Nwafor, p.170*]. The ICC Force Majeure clause relives liability even when other sundry remedies may apply, whereas the ICC Hardship clearly does not exclude liability [*Brunner, p.75*]. Therefore, the Parties demonstrated a clear intention to exclude the application of Art. 79 CISG.

89. Alternatively, under Art. 8 (2) CISG, a reasonable person of the same kind as CLAIMANT, in the same position, would have understood that the narrow, specific and direct reference to risks incorporated into the force majeure clause in clause 12, based on negotiations of the ICC Hardship clause, were a derogation from Art. 79 CISG [*Art. 8 (2) CISG*; *Ferrari (2003), p.98*]. Therefore, the Parties clearly intended to exclude the applicability of Art. 79 and instead provided for a more specific and suitable mechanism under the force majeure clause in clause 12.

2) In any event, the Tribunal should find that the payment of 30% tariffs did not constitute an impediment since CLAIMANT has performed

90. Despite CLAIMANT's assertions [*Memorandum for Claimant, p.42*], *CLAIMANT* has not suffered an impediment under Art. 79 CISG through Equatoriana's imposition of the 30% tariffs. These tariffs do not constitute an impediment that was beyond CLAIMANT's control **[i]**. Additionally, these tariffs were foreseeable and should have been accounted for by CLAIMANT at the time of conclusion of the Sales Agreement **[ii]**. Further, CLAIMANT could have avoided and/or overcome the consequence of the effect of the additional 30% increase in cost imposed by the tariffs **[iii]**.

i) The risk of an increase in the cost performance was not beyond CLAIMANT's control

91. The Tribunal should reject CLAIMANT's claim of financial hardship because the effects of the payments of the tariffs were within its control. A party is not liable for a failure to perform only when the failure was due to an impediment beyond its control [*CISG Art. 79 (1)*]. Financial health is always within a contracting party's control and Art. 79(1) CISG should be interpreted as such [*Perillo, p.16*]. The risk of financial ability to perform a contractual undertaking is a basic assumption underlying all contracts that it can only be excused in the narrowest of circumstances [*Perillo, p.16*]. In this case, CLAIMANT allowed a DDP delivery arrangement and accepted further risk. Additionally, CLAIMANT's present financial position has predominantly been caused by prior events [*PO2, para 21*]. As such, the Tribunal should find that CLAIMANT was in control of accepting risks associated with performance and reject its claim for financial hardship.

ii) The imposition of 30% tariffs by Equatoriana was foreseeable

92. CLAIMANT should have taken into account the imposition of the additional tariffs at the time of conclusion of the Sales Agreement. Circumstances that were foreseeable cannot be raised as grounds for an exemption under Art.79. CISG [*Kröll/Mistelis/Perales Viscasillas, p.1075*]. A party is regarded as having taken the risk of an event into account if that risk would have been appreciated by a reasonable person in the shoes of the promisor [*Schwenzer (2016), p.1134*]. CLAIMANT should reasonably have taken into account the imposition of additional tariffs given the political climate at the time of contracting and the fact that horse semen is an agricultural product [*See paras 52-53 above*]. As foreseeability forms part of risk allocation [*Kröll/Mistelis/Perales Viscasillas, p.1075*], CLAIMANT had assumed the risk of additional tariffs in accepting DDP delivery [*See paras 47-48 above*].

iii) The additional 30 % tariffs do not constitute an impediment as CLAIMANT was able to perform

93. Even if the Tribunal finds CLAIMANT could not have reasonably foreseen the imposition of the additional tariffs, CLAIMANT must prove that it could neither avoid nor overcome the consequences of the impediment. In this respect the requirements applied in international trade must be very strict [*Schwenzer (2016), p.1135*]. CLAIMANT could have overcome the imposition of the 30% tariffs by considering an alternative delivery date [*See para 57 above*].

94. Moreover, CLAIMANT's financial loss is not an impediment as CLAIMANT was able to readily perform despite the imposition of the tariffs. CLAIMANT must further prove that it could neither have avoided nor overcome the imposition of the 30% tariffs. Essentially, both conditions must be fulfilled [*Liu, (4.5)*]. CLAIMANT's financial loss due to the imposition of additional tariffs does not cross the required 'limit of sacrifice' as CLAIMANT was able to perform readily and was capable of overcoming the consequences. To amount to an impediment under the CISG, the increase in costs must cross a limit of sacrifice above which the party cannot reasonably be expected to fulfil the contract [*Schwenzer (2016), p.1142; AC Opinion No. 7*]. Even a 100% increase in cost does not constitute hardship [*Schwenzer (2016), p.1143*], with tribunals consistently concluding that the threshold in international transactions should be raised to 150% to 200% [*Schwenzer (2008), p.710-711*]. An increased price is foreseeable for a company involved in international trade [*FeMo Alloy Case*]. Thus, a mere 30% increase in CLAIMANT's cost of performance should not amount to an economic impediment under the CISG as it falls significantly below the threshold.

95. Further, CLAIMANT's alleged financial hardship in fact falls below 30%. In a case of an alleged cost increase, both past and future performances must be considered [*Brunner, p.462*]. CLAIMANT has wrongly asserted that it has lost its 5% profit margin and now makes a 25% loss to the imposition of tariffs [*Notice of Arbitration, para 18*]. The performance of instalment contracts is analysed by offsetting

financially 'good' years against 'bad' years [*Brunner, p.463*] and it should be borne in mind that the shipments in 2017 were not subject to the additional tariffs imposed on 15 January 2018 [*PO2, para 25*]. These shipments constituted half of CLAIMANT's total performance with a cost of $US 5,000,000 [*C 5, p. 14, clause 8*]. It is only CLAIMANT's last shipment that was subject to the tariffs. Therefore, the initial contractual performance cost of $US 9,500,000 for 100 doses, was merely increased by $US 1,500,000 on account of the tariffs, bringing CLAIMANT's overall cost of performance to $US 11,000,000. This equates to a 15.79% increase. Therefore, the imposition of the 30% tariffs do not constitute an economic impediment, especially since CLAIMANT's value of performance was only hindered by 15.79%of the entire contractual undertaking at the time of the conclusion of the Sales Agreement.

96. Additionally, CLAIMANT's increase in the cost of performance does not constitute hardship since CLAIMANT was able to readily perform its obligations. Circumstances which lead to financial hardship are those which fall short of their 'limit of sacrifice' beyond which the obligor cannot be reasonably expected to perform [*AC Opinion No. 7*]. An alleviation of the 100% threshold for economic impediments is only conceivable in extreme situations [*Brunner, p.436*]. CLAIMANT's 15.79% increase in the cost of performance is not extreme, falling significantly below the minimum 100% 'limit of sacrifice'. CLAIMANT is reasonably expected to overcome the additional tariffs, particularly as it performed its delivery obligations and has continued to expend extraneous costs [*See para 71 above*]. It is only unreasonable to demand performance if it would result in the obligor's lasting financial ruin [*Brunner, p. 436*]. The only consequence facing CLAIMANT is the probability that it may have to sell the dressage part of its business in order to overcome the consequences of paying the 30% tariffs [*PO2, para 29; See para 62 above*]. Further, it is integral that the element of 'financial ruin', does not unduly favour parties simply because they are without resources [*Brunner, p. 436*]. CLAIMANT's is clearly not at the level of lasting financial ruin as they gained profit from Nijinisky's fully booked breeding season in 2017 [*PO2, para 11*]. Accordingly, CLAIMANT clearly had the means to perform as it readily did, has other means of revenue, and is not facing insolvency nor lasting financial ruin. More importantly, the increase in cost of performance for CLAIMANT is significantly lower than the threshold required for the 'limit of sacrifice'. Therefore, CLAIMANT's circumstances do not constitute an impediment under Art. 79 CISG as the 'limit of sacrifice' has not been reached.

C. Even if the Tribunal finds that an impediment exists through an implicit inclusion of financial hardship within the scope of Art. 79 CISG, the Tribunal should not adapt the Contract Price

97. Even if the increase in CLAIMANT's cost of performance constitutes an impediment, adaptation is not available to CLAIMANT. Adaptation of the Contract Price is not a remedy available under Art. 79

CISG **[1]**. Further, adaptation of the Contract Price is not one of the remedies available under the general principles of the CISG, in accordance with Art. 7 **[2]**. The Tribunal should refrain from the inappropriate use of UPICC to interpret the remedies under the CISG **[3]**.

1) Contractual Adaptation is not a remedy available to CLAIMANT under Art. 79 CISG

98. The Tribunal should not accept CLAIMANT's claim for an adaptation of the Contract Price, given CLAIMANT has already performed and the Sales Agreement is now terminated. The effect of Art. 79 CISG is only to provide an exemption from the remedy of damages otherwise available to an aggrieved party. Therefore, alternative remedies such as termination, demand for negotiations or judicial alteration of contract are not provided for [*Ferrari (2017), p.97*]. CLAIMANT had refused to perform unless another solution could be found, without a contractual entitlement to do so, and attempting to impose this additional condition upon RESPONDENT [*C 7, p.16*]. This was not within CLAIMANT's rights under Art. 79 CISG which merely relieves CLAIMANT from exemption for damages for non-performance. Therefore, the Tribunal should find that CLAIMANT does not have a right of remedy for negotiating a new Contractual Price nor adapting one, under Art. 79 CISG.

2) Additionally, the Sales Agreement cannot be adapted under the general principles of the CISG

99. The Sales Agreement cannot be adapted under general principles of the CISG. Even if the Tribunal finds that there is an internal gap because hardship is governed but not expressly settled by the CISG, such a gap has to be settled in conformity with the general principles of the CISG itself under Art. 7(2) CISG. The hardship gap was intended to restrict the remedies available under Art. 79 when the CISG was drafted [*Flechtner (2011), p.89*]. Consequently, the other remedies available to the Parties if there exists an impediment under Art. 79 CISG are the right to avoid the contract, to recover interest under Art. 78 and 84 and reduction of price under Art.50 [*Lookofsky (2008), p.139*].

100. CLAIMANT cannot assert that a claim of price adaptation should succeed through gap-filling by analogy, in particular by analogy to the remedy provided for reducing the price of non-conforming goods under Art. 50 CISG. The use of the analogy with Art. 50 is limited in its application as it only provides a remedy to a buyer [*Shin (2005), p.348*]. Any assertion that Art. 50 is somewhat applicable for the development of a remedy for adjustment of the contract has been met with criticism and has been dismissed [*Flechtner, p.238*; *Ishida, p.379*]. Additionally, even if the general definition of 'impediment' was broad enough to cover extreme cases of hardship, it cannot lead to a possible adaptation of the contract, unless expressly provided for by the parties [*Bianca/Bonell, p.591*]. The Parties have not in expressed an adaptation mechanism for dealing with the consequences of the circumstances of hardship in the Sales

Agreement [*C 5, p.13-14*]. Therefore, The Tribunal should find that the Sales Agreement cannot be adapted due to the lack.

3) Finally, the CISG should not be supplemented through UPICC to supplement Art. 79 CISG, in accordance with Art. 7 CISG.

101. The Tribunal should not provide CLAIMANT with the remedy for adaptation of the Contract Price by interpreting the CISG through the UPICC principles. The Tribunal should not treat UPICC as an authoritative source when defining the meaning of the CISG. CLAIMANT has wrongly asserted that Art. 7 CISG demands uniformity through conformity with the law governing the Sales Agreement which it incorrectly states as UPICC [*Memorandum for Claimant, p.38*]. The governing law of the Sales Agreement is rather the CISG [*C 5, p.14, clause 14*]. The CISG must be interpreted autonomously in accordance with Art. 7(1) CISG. UPICC should not be incorporated into the CISG merely because it provides a remedial mechanism for hardship. UPICC has no more basis for incorporation into the CISG than the presence of domestic law doctrines justifies the indiscriminate use of that law to interpret similar provisions in the CISG [*Ferrari (2017), p.101; Electronic hearing aid case*]. Therefore, the incorporation of UPICC into the CISG would violate the uniformity rule under Art. 7(1) CISG.

102. CLAIMANT cannot justify that UPICC should apply simply because hardship is not 'expressly settled' in the CISG [See *Art. 7(2) CISG*]. In fact, the use of UPICC to incorporate additional remedies for hardship under CISG has been met with significant criticism [*Ferrari (2017), p.99; Flechtner (2011), p.84; Lookofsky/Anderson, p.199*]. UPICC cannot be explicitly incorporated into the CISG as general principles since the first version of the UPICC did not exist until 14 years after the promulgation of the final version of the CISG [*Schwenzer (2016), p.117*]. Further, some of the UPICC principles contradict rules found in the CISG, signifying that the UPICC cannot be taken to completely reflect the CISG's general principles [*Ferrari (2017), p.101*]. As such, CLAIMANT cannot argue that UPICC reflects the same general principles which were intended by Art. 7 to be incorporated into the CISG.

103. Also, the Tribunal cannot simply apply UPICC as an interpretive tool for the CISG. The stand-alone decision of *Steel Tubes Case* wrongly reasoned that UPICC was an appropriate interpretative tool for the CISG because the Preamble of UPICC provides such authority and also, it has been proposed by an international organisation [*Steel Tubes Case*]. Even though the preamble of UPICC states that it may be used for such purpose, this by itself, does not equate UPICC with the CISG's general principles [*Ferrari (2017), p.101*]. Further, UPICC cannot be given priority nor equal authority in interpreting the CISG as the two differ significantly in status. On the other hand, the CISG attains the status of domestic law through formal legislation in the respective nation [*Ferrari (2017), p.101*]. Ultimately, the Tribunal should not supplement the CISG through the use of UPICC as the Parties did not clearly express such preference in their Sales Agreement. CLAIMANT cannot rely on UPICC to resort to the remedy of

adaptation of Contract Price, in accordance with Art. 7 (2) CISG. Therefore, the Tribunal should not provide CLAIMANT with the remedy of adaptation of the Contract Price by interpreting the CISG through UPICC principles.

D. CLAIMANT is not entitled to a modification of the Contract Price as the Parties did not modify the Sales Agreement in accordance with Art. 29 CISG

104. The Sales Agreement may be modified by the 'mere agreement' of the Parties [*Art. 29 CISG*]. Modification under Art. 29 CISG is subject to the elements of formation in the CISG [*Schwenzer (2016), p.495*]. CLAIMANT is not entitled to an increase in the Contract Price as the Parties merely agreed to negotiate and not modify the Sales Agreement. In the phone call between the Parties on 21 January 2018, RESPONDENT made it clear to CLAIMANT that it did not have the authority to make any binding commitments [*R 4, p.36*]. CLAIMANT also understood this. Therefore, any 'agreements' that may have been made would not be binding on RESPONDENT.

105. Even if RESPONDENT was authorised to make an agreement, the Parties did not agree to any adaptation. Statements and conduct of the parties must be interpreted according to Art. 8 CISG [*Schlechtriem/Butler, p.87*]. CLAIMANT was aware that Shoemaker wanted to make further inquiries as to the conditions and obligations under the Sales Agreement [*R 4, p.36*]. Further, RESPONDENT only stated that the Parties would 'find an agreement … if the contract allowed'. CLAIMANT understood this as it stated a solution was yet to be found and sent the shipment before the details were agreed upon [*C 8, p.18*]. At most, the Parties only came to a consensus on a need to negotiate, which was discharged when the Parties met in Equatoriana. The phone call did not impose any obligations to increase the Contract Price.

106. In any event, RESPONDENT did not agree to increase the Contract Price. A statement of acceptance must express the offeree's assent, intention to be bound by it, and its terms [*Schwenzer (2010), p.317*]. There can also be no acceptance as there is no intention where parties hold reservations regarding individual points still to be negotiated [*Schwenzer (2010), p.317*]. RESPONDENT did not accept a modification. It merely stated that an agreement on price would be made, on the condition that the 'contract allowed' [*R 4, p.36*]. Although CLAIMANT failed to note this condition, RESPONDENT's recollection is more reliable as the statement was written down and read out. A seller's offer to modify a contractual price is not accepted unless it is explicitly consented to by the Buyer [*Plastic chips case*]. RESPONDENT's statements do not confer any intention to be bound as a reasonable person would understand the statements to mean that any promise was conditional on the Sales Agreement allowing for an adaptation [*Art. 8(2) CISG*]. Further, RESPONDENT expressed concerns about CLAIMANT's obligations to pay the tariffs under DDP delivery [*R 4, p.36*]. This does not infer an intention to be bound to an offer to increase the Contract Price.

107. Additionally, CLAIMANT had a contractual obligation to send the final 50 doses, regardless of whether it could invoke hardship under Art. 6.2.2 UPICC. This is because requesting a renegotiation of the Sales Agreement does not entitle the disadvantaged party to withhold performance [*Art. 6.2.3(2) UPICC*]. Therefore, regardless of CLAIMANT's statement that RESPONDENT 'urged' it to send the last shipment [*Memorandum for Claimant, p.40*], CLAIMANT was obliged to perform its contractual obligations. Additionally, RESPONDENT urged shipment due to the time-sensitive nature of the Sales Agreement. Due to the testing RESPONDENT was to undertake and the start of the breeding season [*PO2, para 11*], the shipments had to be sent on time to maintain the commercial basis of the Sales Agreement. Therefore, CLAIMANT's performance of the Sales Agreement was due to a contractual obligation and to preserve the commercial basis of the Sales Agreement.

REQUEST FOR RELIEF

RESPONDENT respectfully requests that the Tribunal find that:

1) The Tribunal does not have the jurisdiction and powers to adapt the Agreement;
2) CLAIMANT is not entitled to submit the Partial Interim Award from RESPONDENT's other proceedings as evidence;
3) RESPONDENT is not liable to pay CLAIMANT any additional amount; and
4) CLAIMANT bears the costs of the Arbitration.

Respectfully submitted

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Martin Floro

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Renee Shike