SIXTEENTH ANNUAL WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

PHAR LAP ALLEVAMENTO (CLAIMANT)

v.

BLACK BEAUTY EQUESTRIAN (RESPONDENT)

MEMORANDUM FOR RESPONDENT

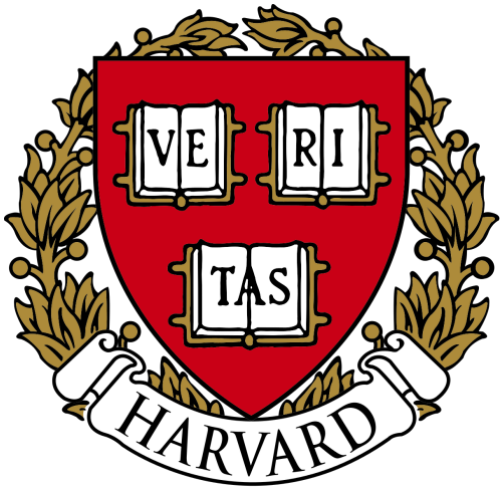

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TABLE OF ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
§/§§	Section/Sections
Art./Arts.	Article/Articles
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Memo	Claimant's Memorandum
Cmt.	Comment
CoC	Code of Conduct
Ex.	Exhibit
GC	General Conditions
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
Ibid.	*Ibidem*
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration
n.	Note
No.	Number
NoA	Notice of Arbitration
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
R.	Record
RNoA	Response to Notice of Arbitration
SA	Frozen Semen Sales Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN GCP	United Nations Global Compact Principles
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar

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STATEMENT OF FACTS

1. Phar Lap Allevamento (CLAIMANT) operates a financially struggling stud farm in Mediterraneo [*NoA ¶1; PO2 ¶29*]. Black Beauty Equestrian (RESPONDENT; jointly, the "Parties"), located in Equatoriana, is famous for its broodmare lines and is in the process of building up its own racehorse breeding program [*NoA ¶4*]. On 21 March 2017, following Equatoriana's temporary lifting of its ban on artificial insemination for racehorses, RESPONDENT's Mr. Antley contacted CLAIMANT's Ms. Napravnik and expressed an interest in purchasing 100 doses of frozen semen from CLAIMANTs Nijinsky, a sought-after stallion for racehorse breeding [*Ex. C1*].

2. While the large quantity sought "came as a surprise," CLAIMANT, eager to make a profit, agreed to provide the requested doses in several installments on 24 March 2017 [*PO2 ¶15; Ex. C2; PO2 ¶29*]. Because CLAIMANT is much more experienced in the shipment of frozen semen, RESPONDENT requested DDP delivery [*Ex. C3*]. In response, CLAIMANT agreed to provide DDP delivery in principle but asked to be relieved from all associated risks and to add a hardship clause to the Sales Agreement (the "SA") [*Ex. C4*]. Neither was acceptable to RESPONDENT, who was not willing to pay for a higher price for receiving little in return and considered the suggested ICC-hardship clause to be too broad [*RNoA ¶4*]. As a result, in lieu of a separate hardship clause, the Parties agreed to regulate certain risks directly and merely add hardship wording to the existing force majeure clause [*Ibid.; SA*]. The clause was thus limited in scope to circumstances "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*SA*].

3. The Parties also had a disagreement with regard to the choice of law and forum selection clauses. After the Parties agreed to include an arbitration agreement, RESPONDENT proposed that the arbitration agreement be governed by the law of the place of arbitration rather than by the law of the contract [*RNoA ¶5; Ex. R1*]. CLAIMANT did not object to this proposal but changed the seat of arbitration from Equatoriana to Danubia [*Ex. R2*]. To make the choice of law clear given this new neutral place of arbitration, Mr. Antley listed choice of law as one of the points to address in the final agreement [*SA*]. Unfortunately, because of a car accident at the annual colt auction in Danubia, which severely injured both Mr. Antley and Ms. Napravnik, CLAIMANT's Mr. Ferguson and RESPONDENT's Mr. Krone had to abruptly take over final negotiations for the SA [*RNoA ¶8*]. While Mr. Krone discovered Mr. Antley's note, he did not understand its significance and the Parties ended up not including a choice of law provision for the arbitration agreement [*Ex. R3; SA*].

4. Finally, while CLAIMANT initially required express written consent before any dose could be resold to third parties, such a provision did not make its way into the SA, which merely had an information requirement [*Ex. C2; SA*].

5. In April 2017, Mr. Bouckaert, known for his preference for a more protectionist approach to international trade in the agricultural sector, was elected President of Mediterraneo and he promptly levied a 25% tariff on agricultural products from Equatoriana [*Ex. C6*]. Equatoriana responded in kind by imposing a 30% tariff on all agricultural imports from Mediterraneo, including frozen horse semen [*Ibid.; Ex. C7*]. Because the tariff came into effect on 15 November 2017, the final shipment of frozen semen, set for 23 January 2018, was impacted [*SA*]. After learning of the tariff, Ms. Napravnik reached out to Mr. Shoemaker on 20 January, threatening RESPONDENT with non-delivery if the Parties fail to find a solution [*Ex. C7*]. In his ensuing telephone conversation with Ms. Napravnik, Mr. Shoemaker emphasized that he was not a lawyer and had not been involved in the negotiations of the SA [*Ex. R4*]. He stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*Ibid.*]. In making this statement, Mr. Shoemaker merely confirmed RESPONDENT's intent to abide by the contract and did not commit to adaption of contract, which he had no authority to agree to in any case [*Ibid.*].

6. After commencing arbitration, CLAIMANT received illegally-obtained evidence of a partial award from an HKIAC arbitration in which RESPONDENT had been party [*R. p.*50]. CLAIMANT sought to admit this information as "material evidence" demonstrating alleged inconsistencies in RESPONDENT's position, despite the fact that it was barred under the express confidentiality requirement articulated in HKIAC Art. 42 [*Ibid. pp.50–51*].

SUMMARY OF ARGUMENT

7. This Tribunal does not have jurisdiction over this dispute as it lacks the power to adapt the contract and therefore cannot provide claimant's requested relief. Danubian law governs the arbitration agreement, meaning the Tribunal lacks the power to adapt the contract given that system's strict four-corners rule of contract interpretation. Further, even if Mediterraneo law governed the arbitration agreement, the Tribunal would still lack the power to adapt the contract [**1**].

8. Claimant is not entitled to USD 1,250,000 or any other amount as a result of an adaptation of the price of the third delivery of horse semen. Interpreting the SA in accordance with UNIDROIT, clause 12 of the SA must be read to place responsibility for the additional costs of the delivery with Claimant. Under the subjective test, reasonableness test, and mechanisms for resolving unclear contract terms under UNIDROIT Art. 4, Claimant agreed to incur the costs from any custom regulations in keeping with DDP and at no point was there an agreement for these terms to be changed subsequent to the SA. Claimant also cannot rely on the CISG to seek price adaptation. Firstly, CISG Art.79 has been implicitly derogated by clause 12 of the SA, which exhaustively lists grounds for exemptions and thus provides for a special regulation of the problem of changed circumstances. This interpretation is consistent with both case law and the Parties' intent. Secondly, even if CISG Art.79 has not been derogated, legislative history makes clear that it does not even cover situations of hardship. Moreover, the price adaptation remedy sought by Claimant is simply not permissible under Art. 79 based on a plain reading of the provision and the CISG regime as a whole. This result may not be bypassed through supplementation of CISG Art. 79 by UNIDROIT Art. 6.2.3. Not only is there no veritable gap within CISG Art. 79 to be filled, but UNIDROIT Art. 6.2.3 is also an ill-suited candidate to introduce a remedy patently incompatible with the CISG. Finally, the requirements of CISG Art. 79(1) are not met to justify its invocation because the tariff was reasonably foreseeable and claimant may reasonably overcome its consequences. Even if the Tribunal decides to adapt the price against all odds, extraneous factors like the Parties' relative financial standing and post-contract behavior should not be considered in making such a determination. To restore the equilibrium of the contract, the most claimant could ask for is to spread the losses evenly between the two parties [**II**].

9. Claimant's submission of Respondent's prior Interim Award should be barred. The award is neither relevant to the dispute, nor material to its resolution. Further, the means under which the evidence was obtained render it inadmissible. The Interim Award is not publicized information, was

procured illegally, and conflicts with the confidentiality guarantees of international arbitration. On balance, the harm of admitting this evidence outweighs any probative value and its exclusion is necessary for a fair and just award [**III**].

ARGUMENT

I. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT

10. Despite freely assuming any potential risks in choosing to enter into the Sales Agreement ("SA") with RESPONDENT, CLAIMANT now seeks to evade those risks by arguing that this Tribunal has the power to adapt the contract [*see Cl. Memo ¶1*]. CLAIMANT's argument, however, is both factually and legally unsound. CLAIMANT not only applies the wrong legal standard for determining the law of the arbitration agreement [*Cl. Memo ¶4*], their application of this standard depends on a non-existent shared intent to apply Mediterranean law to the arbitration agreement [*Cl. Memo ¶5–15*], as well as a selective review of international case law [*Cl. Memo ¶16–18*]. CLAIMANT further fails to correctly apply the CISG when interpreting the arbitration agreement under Mediterranean law [*Cl. Memo ¶20–28*]. Therefore, even assuming Mediterranean law applies, their conclusion is unsupported by this law.

11. Contrary to CLAIMANT's argument, the arbitration agreement does *not* grant this Tribunal the power to adapt the contract. Danubian law, not Mediterranean law, governs the arbitration agreement [**A**]. Under Danubian contract law's strict "four-corner rule" of contract interpretation, the arbitration agreement cannot be interpreted to allow for adaptation [*PO1*, *II*], a proposition both parties agreed to and which CLAIMANT reiterates in their memorandum [*Ibid.*; *Cl. Memo ¶11*]. Further, even if Mediterraneo law governed the arbitration agreement, the Tribunal would still lack the power to adapt the contract [**B**].

A. Danubian law, not Mediterranean law, governs the arbitration agreement

12. Danubian law, not Mediterranean law, governs the arbitration agreement. CLAIMANT correctly notes that party choice is decisive in determining which law governs the arbitration agreement [*Cl. Memo ¶2*]. However, CLAIMANT wrongly relies on the substantive law of the underlying contract in determining party choice. Rather, the Model Law provides the proper means of determining the law applicable to the arbitration agreement [***1***]. Under the Model Law's two-prong standard, the parties clearly implied that they intended Danubian law to apply [***2***]. International case law lends further support to the choice of Danubian law [***3***]. Finally, the application of Mediterranean law is directly in

conflict with the doctrine of separability, one of the most important principles in international arbitration [*4*].

1. The Model Law, not the CISG, determines the Parties' choice of law

13. The Model Law, not the CISG, determines the law applicable to the arbitration agreement. Since the HKIAC Rules do not offer a standard for determining which law applies to the arbitration agreement in the absence of an express choice by the parties, this Tribunal must look to an alternative source for guidance on how to determine the proper choice of law for the arbitration clause. In the absence of an HKIAC standard, CLAIMANT seizes on Art. 8 of the CISG, the law of the underlying contract, as the proper framework for determining the Parties' choice of law [*Cl. Memo* ¶*4*]. Relying on the "bootstrap rule," CLAIMANT asserts that because the parties chose Mediterraneo law as the law of the underlying contract, Mediterraneo law provides the choice of law principles the tribunal should apply to determine the law of the arbitration agreement [*Ibid*]. However, CLAIMANT fails to note that the Model Law governing this arbitration specifies that "any designation of the . . . legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of law rules" [*Model Law Art. 28(1)*]. The purpose of this provision is to allow the arbitrators to determine the applicable law according to the conflict-of-laws rules they consider appropriate [*Model Law Art. 28 (2); Model Law Explanatory Note* ¶*39*]. The designation of Mediterranean law in SA clause 14 does not expressly provide that Mediterranean law applies to the choice of law as well as the substantive law of the contract. CLAIMANT's assumption that Mediterraneo law provides choice of law rules is thus unsubstantiated.

14. The Tribunal is free to develop its own conflict rules because it is not bound to follow any *lex fori*, even that of the seat of arbitration i.e. Danubia [*Berger, p. 306; SA cl. 15*]. However, the Tribunal may draw inspiration from the conflict rules of the *lex arbitri*, domestic law, or international legal rules such as the New York Convention to develop its own system [*Ibid.*]. Theoretically, the Tribunal could use Mediterraneo law for this reason, although CLAIMANT failed to make this argument [*see Cl. Memo.* ¶*4*].

15. However, here, the Model Law, not Mediterraneo law, provides the best choice of law rule as its implementation results in the highest probability of enforcement, whether in Danubia or abroad. In the event that this Tribunal's award is attacked in a setting aside proceeding in Danubia, Danubian courts will apply the conflict of law rules in the Model Law to determine if the Tribunal properly

assessed its own jurisdiction [*Berger*, *p. 306–307*]. Similarly, in recognition or enforcement proceedings in Mediterraneo, or any other contracting state to the New York Convention, the courts would apply the conflict rules of the Convention to the same effect [*Ibid*, *p. 307*]. Since the Convention approach parallels that of the Model Law [*Born §4.04(A)(2)(i)*], application of the Model Law approach would increase the likelihood of the award being upheld in either a setting-aside or an enforcement proceeding. And because under HKIAC Art. 13.10, the Tribunal must make every reasonable effort to ensure that an award is valid [*HKIAC Rules Art. 13.10*], choosing to follow the Model Law thus ensures the Tribunal adheres to its duties.

2. Under the Model Law's choice of law standard, Danubian law applies

16. Under the Model Law's approach, Danubian law clearly applies to the arbitration agreement. Model Law Arts. 34(2)(a)(i) and 36(1)(a)(i) set out a two-prong standard for determining the law applicable to the arbitration agreement [*Born, §4.04(A)(2)(i)*]. The Tribunal first gives effect to any express or implied choice-of-law by the parties [*Ibid.*]. In the absence of an express or implied agreement the tribunal defaults to the law of the seat of arbitration [*Ibid.*]. Here, the Parties did not include a choice of law provision in the arbitration agreement, so their implied intent is at issue [*Sulamérica* ¶¶*5,10* (holding that parties' implied choice of law is at issue where arbitration agreement lacked an express choice of law provision)]. However, they impliedly agreed that Danubian law would apply [***i***], and even if they had not, Danubian law still applies since it is the law of the seat [***ii***].

i. The Parties implicitly agreed that Danubian law would apply

17. The Parties implicitly agreed that Danubian law would apply to the arbitration clause. Although the choice of law clause contained in the underlying contract might be a one indication that the parties intended the same law to govern the arbitration clause [*Sulamérica*], that is not the end of the assessment. CLAIMANT's narrow focus on the law of the underlying contract fails to consider the importance of the *lex arbitri* in international arbitration [*Cl. Memo* ¶*6–7*]. It is widely acknowledged that an arbitration agreement is "more closely connected with the law of the seat of the arbitration" than to any other legal system [*Berger p. 315*]. The law of the seat thus takes on particular significance in arbitration proceedings, a fact that many national courts and arbitration institutions have recognized this in decisions concluding the law of seat should apply to the arbitration agreement [*Redfern & Hunter* ¶*3.15*]. Although CLAIMANT cites *Sulamérica* in support of its position [*Cl. Memo* ¶*17*], the court there actually rejected the law of the underlying contract in favor of the law of the arbitration agreement. In

fact, they determined that the choice of London as the seat of arbitration demonstrated "acceptance by the parties that English law would apply to the conduct and supervision of the arbitration" and thus implied the parties had chosen English law as the law governing the arbitration [*Redfern & Hunter* ¶*3.23, Sulamérica* ¶*29*; *see also C v. D, XL Insurance Ltd*]. The court further noted that the plaintiff, "must have been aware" of this fact in choosing the seat of arbitration [*Sulamérica* ¶*29*]. Likewise, here. CLAIMANT and RESPONDENT, as savvy businessmen, must have been aware of the impact of choosing Danubia as the seat of arbitration. That CLAIMANT attempts to ignore this fact now only proves their desire to avoid the risks they freely undertook. In a case similar to *Sulamérica,* the *Bulbank* case, the Swedish Supreme Court reached the same result. There, the court ignored the parties' choice of Austrian law to govern the underlying contract in favor of the law of the seat of arbitration [*Bulbank p. 291; Redfern & Hunter* ¶*3.23*]. International case law thus supports the contention that Danubian law governs the arbitration agreement, contrary to CLAIMANT's assertion [*Cl. Memo* ¶¶*17–18*].

18. Further, even in cases where courts have acknowledged that there may be a reason to favor the choice of the underlying contract, they have acknowledged that this is a rebuttable presumption [*see, e.g. Sulamérica* ¶*11*]. In *BCY v. BCZ*, for example, the Singapore Supreme Court noted that "anything which suggests the parties may not have intended to have their arbitration agreement governed by the same law as the main contract would still be a factor to consider" [*BCY v BCZ* ¶*74*]. CLAIMANT chose to ignore this conclusion in their argument [*Cl. Memo* ¶*18*], but it suggests that the mere presence of a choice of law in the underlying contract is not the deciding factor in assessing the law governing the agreement.

19. Here, the Parties' pre-contractual negotiations, "an excellent indicator of the intent of the parties" [*ICC Case No. 7920*], suggests they did not intend Mediterraneo law to apply to the arbitration agreement. Although the parties agreed that Mediterranean law would govern the SA [*SA clause 14*], the doctrine of separability dictates that the arbitration agreement is independent and distinct from the main contract [*Lew/Mistrelis/Kröll* ¶*6-9*]. Danubian law is thus the only system directly connected to the arbitration agreement that was not explicitly rejected by one or both parties. RESPONDENT refused Mediterranean jurisdiction over the dispute in its initial communications with CLAIMANT [*Ex. C1, C2*], and CLAIMANT rejected RESPONDENT's later choice of Equitoriana law [*Ex. R1, R2*]. The parties did, however, agreed to submit to Danubian jurisdiction over the dispute by choosing that as the law of the seat [*Redfern & Hunter* ¶*3.23*]. The joint acceptance of Danubia, combined with the

importance of the seat for arbitration proceedings generally, thus supports the conclusion the parties implicitly agreed Danubian law would apply.

ii. Even if the Parties failed to choose the applicable law, Danubian law still applies

20. In the event this Tribunal finds the Parties failed to agree on the applicable law, Danubian law still applies. The Model Law designates the law of seat of arbitration as the default in the event the parties fail to agree [*Born §4.04(A)(2)(i)*; *Model Law Arts. 34(2)(a)(i) & 36(1)(a)(i)*]. The arbitration agreement lists Vindobona, Danubia as the seat of arbitration [*SA clause 15*]. Thus, Danubian law is the default law applicable to the arbitration agreement.

3. ***The doctrine of separability counsels against application of Mediterranean law***

21. Contrary to CLAIMANT's assertion [*Cl. Memo ¶19*], the doctrine of separability counsels against application of Mediterranean law. Under the doctrine of separability, the arbitration agreement is considered "a separate contract, independent and distinct from the main contract" [*Lew/Mistrelis/Kröll ¶6-9*]. Thus, parties generally begin with the presumption the arbitration agreement is separable from the underlying agreement [*Born §3.01*]. By contrast, CLAIMANT begins with the presumption that the arbitration agreement is *not* separate from the contract, focusing on the fact the arbitration agreement is contained in the same document, and not physically separated [*Cl. Memo ¶7*]. Placing great emphasis on the lack of physical separation between the two documents is rebutted, however, by the fact that complete separation is not the cornerstone of separability [*See, e.g., Redfern & Hunter ¶2.101*]. RESPONDENT concedes that separability does not necessarily preclude the arbitration clause from being governed by the same law as the underlying agreement [*Cl. Memo* ¶19]. CLAIMANT, however, makes no claim for why it is appropriate to ignore the principle of separability in this case.

4. Supposing the CISG did govern the interpretation of the Parties' choice of law, Danubian law would still apply

22. Supposing the CISG governed the interpretation of the Parties' choice of law, Danubian law would still apply. Under CISG Art. 8, the Tribunal would need to find either that the parties either subjectively or objectively agreed that Mediterraneo law would apply to the arbitration agreement [*CISG Arts. 8(1) & 8(2)*]. This means looking at the wording of the agreement, as well as any relevant surrounding circumstances, such as contractual negotiations [*Schlectriem/Schwenzer p. 150–151; CISG Art. 8(3)*]. Here, the wording of the agreement and negotiations indicate the parties chose Danubian law, not Mediterranean.

23. First, the wording of choice of law clause in the contract specifically states that "*This Sales Agreement*" is to be governed by Mediterranean law. Since the principle of separability treats the arbitration clause as a separate contract [*supra* ¶21], it is not necessary for the parties to have differentiated between the substantive contract and the arbitration agreement for it to be clear that the arbitration agreement is functionally separate. Separability is not dependent on physical isolation from the main contract [*supra ¶21*]. CLAIMANT is thus mistaken in its emphasis on clause 14 of the contract as decisively indicating the parties agreed Mediterranean law would apply [*Cl. Memo* ¶7].

24. Further, the drafting history indicates an agreement to have Danubian law, not Mediterranean law, apply [*supra ¶19*]. Thus, Danubian law governs the contract even if the CISG determines the choice of law of the arbitration agreement.

B. Even if Mediterraneo law governed the agreement, the Tribunal would still lack the power to adapt the contract

25. Even if Mediterraneo law applied, the Tribunal would still lack the power to adapt the contract. CLAIMANT correctly notes that Mediterraneo Law applies the CISG, and that there is consistent jurisprudence in Mediterraneo indicating that arbitration agreements contained in sales contracts governed by the CISG are also governed by the CISG [*Cl. Memo ¶20*; *PO1 p. 53*]. But though CLAIMANT applies the CISG to its interpretation of the arbitration agreement [*Cl. Memo ¶21*], CLAIMANT not only fails to cite to a specific provision of the CISG, it also reaches the wrong conclusion as to the parties' intent [*Cl. Memo ¶20–21*].

26. CISG Art. 8, provides the relevant framework, as it governs the interpretation of all legally relevant conduct of the parties [*Schlectriem/Schwenzer p. 144*]. A tribunal has the power to adapt the contract only if it can find: (1) that was the parties shared intention [*CISG Art. 8(1)*] or (2) a reasonable person would have understood the parties intended the arbitration agreement to be read broadly [*CISG Art. 8(2)*]. In conducting this analysis, a tribunal may consider all the relevant circumstances surrounding the arbitration agreement [*Schlechtriem/Schwenzer pp.150–151*], including any practices the parties established between themselves, usages, and subsequent conduct of the parties [*CISG Art. 8(3)*]. The primary starting point, however, is the wording of the agreement [*Schlechtriem/Schwenzer pp.150–151*].

27. Here, an analysis of the relevant circumstances shows that the parties neither shared an intent to allow the Tribunal to adapt the contract, nor would a reasonable person have concluded that the Parties intended such an agreement [*1*].

1. The parties did not share a subjective or an objective intent to allow the Tribunal to adapt the contract

28. The parties did not intend the Tribunal to have the power to adapt the contract. Although CLAIMANT places particular emphasis on wording of the agreement, especially the phrases "any dispute and "arising out of this contract," they fail to address the significance of the fact that RESPONDENT deliberately reduced the scope of HKIAC's Model Clause by deleting any provision which might be interpreted as empowering the Tribunal to adapt the contract [*RNoA ¶13; Ex. R1*]. CLAIMANT fixates on the present wording of the agreement despite the deliberate narrowing in scope [*Cl. Memo ¶23*]. Not only that, but CLAIMANT accepted RESPONDENT's modification as to scope without note [*Ex. R2*]. The only alteration CLAIMANT made to the arbitration clause was to change the seat of arbitration from Equitoriana to Danubia [*Ex. R2*]. CLAIMANT was clearly aware that the Tribunal's powers were therefore restricted and manifested its acceptance in agreeing to the new clause. If nothing else, CLAIMANT should have clarified with respondent whether what the modification meant for potential price adaptation given the its importance in CLAIMANT's mind [*Ex. C8*; *Schlechtriem/Schwenzer p. 152*]. It failed to do so.

29. The contract negotiations lend further support to the conclusion the parties failed to agree to allow for adaptation, despite CLAIMANT's assertion to the contrary [*Cl. Memo ¶28*]. Despite extensive negotiations about the form and function of the arbitration agreement [*Ex. C3, C4, R1, R2*], the Parties never came to an agreement as to whether to allow adaptation or not [*Ex. C8;* R3]. CLAIMANT argues they did, it arrives at its conclusion through a deliberate mischaracterization of its own witness's statement. Although Ms. Napravnik did mention during negotiations that it would be important to allow for contract adaptation in the event the Parties could not agree on an amendment, RESPONDENT did not wholeheartedly agree as CLAIMANT would have the Tribunal believe [*Cl. Memo ¶28*]. According to Ms. Napravnik, Mr. Antley only said that that it should *probably* be the task of the arbitrators and that he would come back with a proposal on that issue the next morning [*Ex. C8*]. Such follow up never occurred [*Ibid.*], and Mr. Antley's successor explicitly stated he would never have agreed to give the Tribunal the power to adapt the price had he known this to still be at issue [*Ex. R3*]. And, as discussed above, the final agreement deliberately narrowed the scope of the Tribunal's powers under

the HKIAC Model Clause [*RNoA ¶13; Ex. R1*]. Thus, the parties cannot be said to have a shared intent to allow the tribunal to adapt the contract.

30. For the same reasons as above, a reasonable person in the Parties' position would not conclude that the Parties agreed to allow for adaptation. Thus, the Tribunal cannot be said to have the power to adapt the contract under Mediterraneo law.

II. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER EITHER THE SA OR THE CISG

31. CLAIMANT is not entitled to the payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under either the SA [***A***] or the CISG [***B***].

A. Pursuant to UNIDROIT Art. 4, clause 12 of the SA must be read to place responsibility for the additional costs associated with the tariff on CLAIMANT

32. Under UNIDROIT Art. 4, the SA must be interpreted such that CLAIMANT is responsible for the additional delivery costs arising from the tariff. UNIDROIT Art. 4.1 sets out a framework for the interpretation of contracts. Art. 4 provides that either a contract shall be interpreted "according to the common intention of the parties" or otherwise "according to the meaning that reasonable persons of the same kind as the parties give to it in the same circumstances" [*UNIDROIT Art. 4*]. CLAIMANT is responsible under both the subjective test [***1***] and reasonableness test [***2***] set out in the article. It is also responsible pursuant to UNIDROIT Art. 4.6's mechanism for resolving unclear terms [***3***].

1. CLAIMANT is not entitled to payment under the Subjective Test

33. CLAIMANT is not entitled to payment under the subjective test. Art. 4.3 provides the relevant circumstances for the analysis, including the preliminary negotiations, practices established between the parties, conduct of the parties subsequent to contracting, the nature and purpose of the contract, as well meanings and usages of the terms. Each of these provisions, when combined with the unambiguous assignment of responsibility for imports and tariffs under DDP [*see infra ¶43*], establish that CLAIMANT was responsible for the tariff and not entitled to an adaptation and recovery of additional costs incurred. Firstly, the preliminary negotiations between the parties clearly establish DDP as the standard for delivery and, while customs regulations were discussed alongside health and safety regulations, only the latter was prioritized enough to make it into the SA. Furthermore, in addition to tariffs not being included in the hardship clause, the conduct of the parties subsequent to the *SA* does not indicate that there was an agreed modification such that DDP would not include responsibility for customs regulations.

i. The preliminary negotiations do not entitle CLAIMANT to a price adaptation

34. The preliminary negotiations do not demonstrate that RESPONDENT must incur the cost of the tariff. Even if the Parties discussed relieving CLAIMANT of responsibility for customs regulations during preliminary negotiations, this understanding was not reflected in the SA [*Lemire* ("[E]xpectations raised during the negotiations of the [*SA*] must be reflected in the text of the Agreement")]. While Ms. Napravnik demonstrated a concern about customs regulations and health and safety requirements, she asked for there to be "[a]t minimum" a hardship clause in the contract [*Ex. C4*]. Ultimately, the minimal hardship clause that CLAIMANT was able to negotiate only covered health and safety requirements, but not new tariffs [*SA clause 12*]. Given that Ms. Napravnik herself stated that additional health and safety requirements could raise the cost by up to 40% and "destroy the commercial basis of the deal," it is reasonable to assume that including this in the hardship clause was a higher priority for CLAIMANT than coverage for further tariffs. The preliminary negotiations show that CLAIMANT prioritized items to be carved out of DDP as it only carried its health and safety concerns through from preliminary negotiations to the final agreement. This reasoning is logical as, even *ex post*, the 30% increase in cost for the Equatoriana tariff is lower than the anticipated potential increase of 40% from health and safety requirements.

35. RESPONDENT "insist[ed]" on delivery on the basis of DDP [*Ex. C3*], and for this reason accepted an increase in the delivery price. The supposition that responsibility for tariffs was carved out of DDP because the final price reflected an increase per dose of USD 500 as opposed to the USD 1000 increase initially proposed by CLAIMANT is fanciful. While the *SA* reflected a price of USD 100,000 per dose, a middling position which might reflect narrow hardship exceptions for health and safety and similar events as mentioned in the SA, a carve-out of responsibility for tariffs under DDP would have undermined the basis for RESPONDENT's insistence on DDP. As the main distinguishing factor of DDP is the coverage of import requirements, it is hardly conceivable that RESPONDENT would have agreed to a USD 500 increase in the purchase price despite not receiving the substance of the very term it wanted in exchange for such an increase [*INCOTERMS*]. The reduction in price per dose that would be expected from such a broadly reduced responsibility under DDP was also not reflected in Ms. Napravnik and Mr. Shoemaker's discussions subsequent to the contract [*see infra* ¶*36*]. CLAIMANT erringly urges the Tribunal to hold that CLAIMANT received DDP pricing without DDP responsibility [*Cl. Memo* ¶*45*]. The Tribunal should reject such a flawed supposition.

ii. The subsequent conduct of the parties does not entitle CLAIMANT to a price adaptation

36. The actions of the Parties subsequent to concluding the SA demonstrate that DDP remained the standard of delivery. Contrary to CLAIMANT could have argued, RESPONDENT did not agree to a modification of the price. In the communications between Ms. Napravnik and Mr. Shoemaker subsequent to her learning of the Equatoriana tariff Shoemaker did not imply a modification was agreed to for the third shipment of doses. At no point did Mr. Shoemaker propose or agree to a modification of the price in his call with Ms. Napravnik. In fact, he made it very clear that he was not a lawyer, that he had not been involved in the negotiations, and that he correctly understood DDP to mean that CLAIMANT would incur all costs of delivery [*Ex. R2*]. Ms. Napravnik herself states that Shoemaker said he could not directly authorize an additional payment [*Ex. C3*]. It would therefore be unreasonable to interpret Shoemaker's statements communicating his confidence that a solution would be found through negotiation as modification of the SA. It is thus the case that in both the preliminary negotiations and the subsequent conduct of the Parties there was no modification of DDP as the standard of delivery. CLAIMANT's advocacy for an adaptation contravenes the prohibition of *venire contra factum proprium*, acts against one's own conduct [*Ad hoc Arbitration* (prohibiting French company from acting in contravention of agreement to act jointly with Costa Rican company in bidding process)].

37. CLAIMANT is bound by the terms of the SA it freely entered into. Ms. Napravnik states herself that CLAIMANT "agreed on a DDP delivery" [*Ex C3*]. She states, despite what DDP clearly encompasses, that the primary purpose of agreeing to DDP was to ensure quality transportation, with it somehow "[being] clear" to the Parties that another critical element of DDP (covering tariff costs) was not to be included. While Ms. Napravnik is correct that the CLAIMANT did not bear *all* risks associated with DDP, carve-outs for specific risks were explicitly provided for in the SA [*SA clause 12*]. There is simply nothing within the SA to support Ms. Napravnik's claim that the limitation of seller responsibility for additional tariffs is "reflected in the contract" [*Ex. C8*].

38. Subsequent to the contract, CLAIMANT learned "to [its] great surprise" that there would be a 30% tariff. The fact that this tariff would be challenging to CLAIMANT given their financial difficulties does not relieve them of responsibility for the additional tariff costs [*Ex. C8*]. Developments subsequent to the conclusion of a contract exposing a party to the downside of the risks they incurred are not grounds for the adaptation of the express terms of a contract *ex post* [*Russia 11/2002* (ruling

that German company as seller could not refuse to pay Russian company as intermediary due to buyer later returning goods sold because contract was not conditional on successful sale)]. While the imposition of tariff is an unfortunate development for CLAIMANT's financial position, it does not change the reality that CLAIMANT *must* foot the cost according to the DDP responsibilities it freely agreed to [*PO2 ¶¶ 28 and 30*]. It is unclear why Ms. Napravnik would have the "impression" that RESPONDENT agreed to incur costs that were specifically the CLAIMANTs absent written or explicit agreement to this end, and the Tribunal should just reject such claims.

2. CLAIMANT is not entitled to payment under the reasonableness test

39. An objective understanding of the SA also demonstrates that CLAIMANT is not entitled to payment for the additional costs incurred as a consequence of the tariff. In the first instance, an objective reading of the SA makes this clear [***i***]. Furthermore, the nature and purpose of the contract [***ii***] as well as the common meaning of the term DDP [***iii***] clearly show that CLAIMANT was to foot the cost of the tariff and is thus not entitled to payment.

i. CLAIMANT is bound to cover the cost of the Equatoriana Tariff in accordance with the ordinary meaning of clause 8 of the SA.

40. When identifying a basis to ascertain the understanding of reasonable persons in the parties' respective position the ordinary reading of the text of an agreement provides the clearest indication. This is because the text of the contract, given its "natural and ordinary meaning" (but also considering specific meanings and usages), is the most important factor in contract interpretation [*Vogenauer p. 587*]. While not explicitly spelled out as a UNIDROIT 4.3 relevant factor, Vogenauer posits that this is because "it goes without saying that anyone interpreting a text studies its words" [*Ibid.*]. This is not least because reasonable parties would be expected to not consent to an agreement the ordinary reading of which would be counter to their intentions. Clause 8 of the SA clearly and repeatedly expressing that delivery DDP was to be the standard, with DDP not being further conditioned in the SA clause 12 to remove responsibility for tariffs, would lead reasonable parties to be of the understanding that they agreed to DDP terms placing the core responsibility for tariffs with the seller.

41. Clause 12 expressly delineates the agreed to understanding of hardship in a manner that does not envision the Equatoriana tariff. Hardship in the SA can be caused by one of the two factors. Firstly, it can be "caused by additional healthy and safety requirements[.]" [*SA clause 12*]. Secondly, it can be caused by "comparable unforeseen events" which would make the contract "more onerous."

[*SA clause 12*]. The retaliatory tariff in question is not a health and safety requirement. Furthermore, the tariffs were not an unforeseen possibility. The parties explicitly discussed DDP, with RESPONDENT paying a higher price to absorb what CLAIMANT described as the "additional costs associated with DDP" [*Ex. C4*]. It is further understood that the terms of the hardship clause were meant to be read narrowly and not expansively [*PO2 ¶12, Ex. R3*]. Additionally, the provisions of SA clause 12 do not in any part provide for price adaptation [*SA clause 12*]. Also, at no point in his discussion with Ms. Napravnik did Mr. Shoemaker agree to an adaptation of the contract [*Ex. R4*.] Thus, the provisions in clause 12 of the SA that would absolve the seller of responsibilities associated with hardship do not cover the costs accruing from the Equatoriana tariffs, the seller's responsibility for which is explicitly established in agreeing to DDP in cl. 8 [*SA cl. 8*].

ii. The nature and purpose of the SA demonstrate that CLAIMANT should bear responsibility for the additional costs of the Equatoriana tariff

42. The purpose and nature of the SA also point to CLAIMANT's responsibility for the additional costs associated with the tariff. This transaction involved a relative newcomer in the field of racehorse breeding, RESPONDENT, contracting with a much more experienced and renowned actor in the industry, CLAIMANT, in an effort to expand its capacity and stature [*Ex. C1*]. The fact that CLAIMANT had a higher relative capacity for delivery as an industry heavyweight was reflected in the nature of the contract. RESPONDENT negotiated for delivery DDP precisely because it believed the nature of the transaction was such that CLAIMANT would be better disposed to efficiently transport the product, including with regard to importation matters [*Ex. C3*]. Thus, the nature of this contract, namely one for seller to enter a market to which it was new and receive a delivery it had no experience carrying, provides additional support for why CLAIMANT should bear the resulting responsibilities from DDP.

iii. The common meaning and usage of the term DDP demonstrate that it includes responsibility for tariffs

43. Delivery Duty Paid is unambiguous in that it entails the assumption of all risks by the seller. As is stated in the Incoterms 2010, "[the] seller is responsible for arranging carriage and delivering the goods at the named place, cleared for import and all applicable taxes and duties paid" [*INCOTERMS, Brunner 2008 p.131* ("[T]he seller is responsible and assumes the risk for export and import clearance of the goods")]. Vogenauer points directly to the INCOTERMS as terms that would fall under commonly given meanings within a given trade pursuant to UNIDROIT Art. 4.3(e) [*Vogenauer p. 590*]. Furthermore, what sets DDP apart is that it maximizes the obligation of the seller, and is in fact the

only rule where the seller is responsible for import clearances and duties [*Ibid.*]. UNIDROIT Art. 1.9(2) provides the definition for "usages" as used in UNIDROIT Art. 4.3 [Komarov p. 39]. In stating that "[t]he parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned," UNIDROIT Art. 1.9 provides further backing that RESPONDENT should be bound by its acceptance of DDP, as understood in the industry, bearing additional costs as required [UNIDROIT Art. 1.9(2)]. The use of DDP, thus, entails a very specific and unique assignment of responsibilities for the seller, and reasonable actors who deliberately request and agree to use DDP in commerce would understand that it entails responsibility for tariffs. This is consistent with the text of the SA, which did not exclude responsibility for custom regulations under its hardship clause. In fact, such an exclusion would have rendered clauses 8 and 12 contradictory since responsibility for customs regulations is at the core of DDP.

44. The agreement to DDP is only limited by the language of SA clause 12, which does not carve out tariff responsibilities. It is very clear that health and safety requirements do not include tariffs. While UNIDROIT makes no explicit mention of health and safety requirements, it is firmly established across jurisdictions, including Australia and the United States, that health and safety requirements concern ensuring the physical safety of employees [see e.g. *Hatting p. 70*, see also *House of Representatives p. 1*]. If "comparable unforeseen events" were to be read to include tariffs, this slippery slope of ambiguous use could conceivably be abused by CLAIMANT to extricate itself from a swathe of its responsibilities under DDP, which would be have been unacceptable to RESPONDENT. As explored below, such a one-sided resolution should be rejected [see *infra* ¶*46*].

45. If what CLAIMANT wanted was not delivery DDP it should have sought alternative terminology in the SA. If CLAIMANT sought to add more constraints to its DDP responsibilities outside the two specific hardship scenarios envisioned by SA clause 12, it would have explicitly included them in the SA. It can thus be concluded that common meaning and usage of DDP points towards CLAIMANT being responsible for the tariff.

3. The Contra Preferentum Rule precludes CLAIMANT's interpretation of SA clause 12 as removing its DDP responsibilities for tariffs under SA cl. 8

46. UNIDROIT Art. 4.6 set out the *Contra Preferentum* Rule, stating that "[i]f contract terms supplied by one party are unclear, an interpretation against that party is preferred" [*UNIDROIT Art. 4.6*; *Khanty-Mansisysk* (resolving an ambiguous construction contract concerning time of performance

against the party which proposed the inclusion of the term)]. Art. 4.6 goes on to clarify, via comment, that "the less the contract term in question was the subject of further negotiations between the parties, the greater the justification for interpreting it against the party who included it in the contract" [*UNIDROIT Art. 4.6*]. As a result of CLAIMANT's contentions, there is a lack of clarity in the relationship between clause 8 and clause 12. CLAIMANT advocated for the inclusion of a hardship clause and yet in the current case seeks to utilize an alleged ambiguity in said clause to secure an unfair advantage [*Ex. C4*]. While clause 8 sets out the delivery standard to be DDP, CLAIMANT contends that clause 12's terms in relation to hardship constrains DDP in such a manner as to relieve its responsibility for the additional costs of the tariffs. This contention is made despite the two situations specified by the hardship clause containing no mention of tariff increases [see *supra* ¶*41*]. CLAIMANT argues that the catch-all term "comparable unforeseen events" envisions retaliatory tariffs. This, however is reading in ambiguity and an incredibly advantageous term in a manner that would have been unacceptable to the RESPONDENT [*SA clause 12*]. CLAIMANT should not be allowed to benefit from implying a dispositive term in a contract that does not set out such a term in writing. As called for by UNIDROIT Art. 4.6, the Tribunal should resolve such unclear terms against CLAIMANT as they originally proposed it.

47. CLAIMANT is thus not entitled to the payment of USD 1,250,000 under clause 12 of the *SA*. Interpretation of the SA under both the reasonableness test and objective test under *UNIDROIT Art. 4* demonstrate that CLAIMANT agreed to DDP and is bound by its responsibilities. CLAIMANT therefore must cover the costs of the tariff. The DDP terms agreed to are only limited by the express hardship scenarios of either health and safety requirements or comparable unforeseen events, neither of which have occurred. While CLAIMANT seeks to advocate a reading where clause 12 relieves CLAIMANT of responsibility for the additional tariff costs with the third shipment, such an unclear reading should be resolved against CLAIMANT as the party that proposed its inclusion. CLAIMANT made a gamble in knowingly taking on a substantial amount of risk in the present transaction. While it is unfortunate that CLAIMANT eventually lost that gamble, CLAIMANT cannot doubly benefit from the increase in sale price it received for accepting DDP along with the windfall of not being bound by DDP's associated risks.

B. CLAIMANT cannot rely on the CISG to seek adaptation

48. CLAIMANT's reliance on the CISG as a last resort to seek price adaptation is misplaced. CISG Art. 79 is inapplicable to the instant case because the Parties have derogated this article through cl. 12 of the SA [***1***]. Moreover, CISG Art. 79 does not cover situations of hardship. [***2***] Even if it were to cover certain extreme cases of hardship, price adaptation is simply not a permissible remedy under CISG Art. 79, a result that cannot by bypassed through its supplementation by UNIDROIT Art. 6.2.3 [***3***]. Finally, the requirements of CISG Art. 79(1) are not met to justify its invocation [***4***]. The Tribunal, therefore, should dismiss CLAIMANT's resort to the CISG as a ground for adaptation of the SA.

1. CISG Art. 79 is derogated by cl. 12 of the SA

49. Party autonomy is an underlying principle of the CISG, Art. 6 of which recognizes that "[t]he parties may . . . derogate from or vary the effect of any of its provisions" [*CISG Art. 6*]. CISG Art. 79 is not excepted from this principle [UNCITRAL Digest p.393 ¶23]. Contrary to what CLAIMANT argues, derogation from Art. 79 is more than a theoretical possibility and could be effectuated implicitly through the inclusion of an exhaustive list of grounds for exemption [Cl. Memo *¶56; Miettinen p.38*]. In this case, clause 12 of the SA provides for a special regulation of the problem of changed circumstances and thus should be read as implicitly replacing CISG Art. 79.

50. CLAIMANT is correct to point out that the inclusion of a cursory force majeure clause without any specificity does not have the effect of derogating CISG Art. 79. Indeed, in the *OLG Hamburg* case CLAIMANT relies on, in which the force majeure clause was considered in tandem with CISG Art. 79, the text of the clause reads as: "The Seller shall not be held responsible if due to force majeure, Seller fails to make delivery within the time stipulated in this sales contract or cannot deliver the goods" [*OLG Hamburg*]. Clause 12 of the SA is categorically different from this cursory formulation but instead exhaustively listed grounds for exemptions and specifically narrowed the application of hardship to situations "caused by additional health and safety requirements or comparable unforeseen events for additional insurance fees" [*SA*]. Clause 12 of the SA thus provides a specific definition and is therefore more analogous to the force majeure clause in *CLOUT No. 142* Case, whose exhaustive listing of grounds for exemptions was read as implicitly replacing CISG Art. 79 [*CLOUT No. 142; Saidov §5.11*]. CLAIMANT additionally cites a U.S. case [*Cl. Memo ¶57*]. The applicable law there, the Uniform Commercial Code, does not allow implicit derogation and CLAIMANT also does not elaborate reasons for why the operation of U.S. domestic laws should be of any guidance for CISG [*Murray*].

51. Consequently, it is consistent with the intent of the Parties to read cl. 12 of the SA as derogating CISG Art. 79. By introducing the force majeure/hardship clause in the context of a DDP standard, the Parties were interested in precisely defining the scope of the responsibilities taken on by CLAIMANT in the fulfillment of its delivery obligations and there were extensive discussions over how broad or narrow the clause should be drafted [*e.g. RNoA ¶4; Ex. R3*]. It could not have been the intent of the Parties to have its carefully negotiated clause superseded by CISG Art. 79, the interpretation of which never played a role in the Parties' negotiations. Thus, CISG Art. 79 is derogated by cl. 12 of the SA and inapplicable to the present case.

2. CISG Art. 79 does not cover situations of hardship

52. Even if the Tribunal finds CISG Art. 79 applicable despite the presence of cl. 12 of the SA, CLAIMANT's argument still fails because it does not cover situations of hardship. Art. 79 (1) states:

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

Contrary to CLAIMANT's characterization, there is no scholarly consensus regarding whether hardship could properly be considered within the meaning of impediment in CISG. Art. 79 [*Cl. Memo ¶60; e.g. Rimke §IV.D; Tallon §2*]. Indeed, the fact that the three conditions required to invoke Art. 79 constitute the traditional components of force majeure seems to suggest otherwise [*Rimke §IV.C.1*]. This specific formulation is not accidental but the result of a drawn-out negotiation process, a careful study of which would reveal CLAIMANT's position as untenable.

53. Given that international law is built on the foundation of state consent, the legislative history of CISG, a legally binding international treaty, is important to understand the intentions of the drafting states and counteract the tendency to view the Convention through the lenses of domestic law [*e.g. Bonell pp.101–102*]. This is especially true in the case of facially ambiguous provisions like Art. 79 where different legal systems have come up with different structures to solve the issue in domestic settings [*Rimke §III*]. During the negotiation process, the parties made clear that they did not wish to allow easy exemption from contractual obligations and the predecessor to CISG Art. 79, ULIS Art. 74, was specifically repudiated on that basis [*Ibid. §IV.B.2*]. The requirements of impediment in CISG Art. 79 were therefore both more demanding than, and unrelated to, flexible concepts of hardship that existed in some national jurisdictions [*Honnold p.252*]. In fact, a Norwegian proposal for the inclusion of

economic hardship as a ground for exemption was rejected precisely because it would have introduced the doctrine of *imprévision* into the CISG [*Rimke §IV.B.2*]. Therefore, given such clear legislative intent, CISG Art. 79 should not be read as covering situations of hardship.

3. Price adaptation is not a permissible remedy under CISG Art. 79

54. Even if CISG Art. 79 (1) is arguably flexible enough to cover some extreme situations of hardship where performance has not been made literally impossible [*e.g. Schwenzer p.725*], it does not follow logically that all situations of hardship, even those whose only possible remedies were never contemplated by Art. 79, are covered. In fact, Art. 79 (5), which states that "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention," makes clear that all Art. 79 does is to immunize the party that has suffered the impediment against the other party's right to claim damages [*Rimke §IV.C.5*]. Moreover, the CISG regime as a whole nowhere even contemplates the remedy of adaptation [*e.g. Carlsen §D*]. While CLAIMANT's suggestion that the remedy of price reduction provided by CISG Art. 50 could be conceptualized as a form of adaptation is certainly creative [*Cl. Memo ¶66*], price reduction in the event of non-conforming goods is a remedy characteristically different from price adaptation in the event of changed circumstances and it would be too far a stretch to extrapolate from this narrow remedy a general right to adaptation. Lastly, the rule *pacta sunt servanda*, a cornerstone of every contract and an implied principle of the CISG, is also generally understood to let the loss lie where it falls and forbid adaptation in the event of economic changes [*Magnus §5(b)(2); Kessedjian §1.1.5; Schwenzer p.709*]. While CLAIMANT correctly recognizes the principle of *favor contractus* in the CISG, adaptation is likewise a deviation from that principle [*Cl. Memo ¶67*]. CLAIMANT's discussion of adaptation as a better alternative in service of this principle compared to exemption of performance and/or termination of contract is premised on the assumption that a remedy is called for, an assumption that CLAIMANT has failed to establish [*Ibid.*]. Therefore, price adaptation is simply not a permissible remedy under the CISG regime.

55. Neither can this result deduced from the CISG regime as a whole be bypassed through supplementation by UNIDROIT Art. 6.2.3. It is worthwhile to note at the outset that it is at least somewhat contradictory to say that hardship is a matter govern by CISG Art. 79 but that the matter is not expressly or sufficiently determined by it so as to invoke the gap-filling mechanism. While CISG Art. 7(2) allows veritable gaps in the CISG to be filled in conformity with general principles on which the CISG is based, it is not even clear whether there is a gap within CISG Art. 79 at all [*e.g. Rimke*

§IV.D.2; Schwenzer p.724]. Textually, there does not appear to be a gap. Even if certain severe situations of hardship are arguably covered under Art. 79, it is simply not within the ambit of the provision where the impediment is not so severe as to result in a failure of the disadvantaged party to perform contractual obligations. In this particular case, although the tariff would cause CLAIMANT some financial difficulties, it did not result in CLAIMANT's failure to deliver [*Ex. C8*]. Indeed, even accepting CLAIMANT's account of the events, CLAIMANT was quite willing to fulfill its delivery obligations even though no specific figure was agreed to for the supposed price increase [*Ibid.*]. In any case, the present situation is plainly not covered within CISG Art. 79 and there is thus no need to find a solution outside of the CISG.

56. Even if there is such a veritable gap within CISG Art. 79, the gap-filling role of the UNIDROIT Principles cannot be taken for granted given the decidedly different legal character of the two documents. While the CISG is a legally binding international treaty, the UNIDROIT Principles are nothing more than a non-binding, advisory document put together by a group of experts [*Bonell pp.101–104*]. In fact, the UNIDROIT Principles cannot be said to be a mere restatement of general principles as they were explicitly drafted to provide for "best solutions, even if still not yet generally adopted" [*Kofod §3.2.3 & UNIDROIT Introduction (1994)*]. The determination that a UNIDROIT provision is a suitable gap-filler must therefore be decided on a cautious, ad hoc basis.

57. It would amount to letting the exception swallow the rule if the gap-filling mechanism in CISG Art. 7(2) can be invoked to introduce a remedy that is patently incompatible with the CISG regime. In this respect, it is especially problematic to supplement CISG Art. 79 with UNIDROIT Art. 6.2.3. Firstly, given that the diversity of approaches in national jurisdictions to the problem of changed circumstances, it is very suspect that hardship could amount to a general principle through its inclusion in the UNIDROIT Principles alone [*Rimke §III; Zeller p.160*]. Secondly, the CISG and the UNIDROIT Principles conceptualize the problem of changed circumstances in starkly different terms, making the latter an ill-suited candidate to fill gaps in the former. CLAIMANT's assertion that there is wide support for this gap-filling practice is misleading at best [*Cl. Memo ¶68*]. Scholarly opinion on this issue is far from uniform [*e.g. Rimke §VII.C; Kofod §3.2.6; Schwenzer p.724; Carleson §V; Flechtner pp.92–93; Zeller p.158*]. Schwenzer even believes that this approach "can hardly be conceived" [*Schwenzer p.724*]. While CLAIMANT relies on a Belgian Supreme Court case, *Scafom*, in making its case [Cl. Memo ¶69], that decision has been criticized as stretching CISG Art. 79 beyond its recognition [*e.g. Kofod §3.2.6; Flechtner*

pp.92–93]. Whereas CISG Art. 79 explicitly applies only when the party disadvantaged by an impediment has failed to perform contractual obligations, UNIDROIT Art. 6.2.3 specifies that the request of the party suffering hardship for renegotiation "does not in itself entitle the disadvantaged party to withhold performance." Based on the text alone, therefore, the two provisions seem to be more contradictory than complementary. Moreover, in addition to introducing the impermissible remedy of adaptation, UNIDROIT Art. 6.2.3. also requires good faith renegotiation before adaptation could be attempted. This additional remedy is also impractical and impermissible [*Schwenzer p.723; Kofod §3.2.6*]. In sum, UNIDROIT Art. 6.2.3 does not capture the specific principles underlying CISG Art. 79 and thus may not serve as its gap-filler.

1. The requirements of CISG Art. 79(1) are not met

58. In any case, CLAIMANT has failed to meet the requirements of CISG Art. 79(1) to justify its invocation. Specifically, the tariff imposed on CLAIMANT Equatoriana was both reasonably foreseeable [***i***] and reasonably possible to overcome its consequences [***ii***].

i. The tariff was reasonably foreseeable

59. Evident from the paucity of successful cases, the foreseeability requirement of CISG Art. 79(1) has long been regarded as very difficult to prove [Liu §4.4]. In an abstract sense, almost all impediments to international commerce have become increasingly foreseeable. In this vein, courts have found situations including general economic circumstances, currency fluctuations, failure of central bank, and the outbreak of armed hostilities to be reasonably foreseeable [*Fucci §II.B; Perillo §IV.D*]. For the present case, it is not necessary to delineate the precise boundaries of what constitutes an unforeseeable event given that the situation at hand falls far below the threshold.

60. Because the reference is the reasonable person, the *bon père de famille*, subjective intentions of CLAIMANT does not matter in this determination. As a general matter, protective measures such as tariffs are commonly undertaken by countries and any savvy participant in international trade should be expected to take such events into account. More specifically, while it is true that Equatoriana has rarely resorted to retaliatory tariffs, the fact that it has used retaliatory tariffs in a previous instance demonstrates such an event as more than merely theoretical [*NoA ¶19; Ex. C6*]. Importantly, at the time of the conclusion of the contract, the new president of Mediterraneo had just been elected and had announced a preference for a more protectionist approach to international trade [*Ex. C6*]. Given the circumstances, it is only fair to say that a retaliatory tariff was reasonably foreseeable from the

perspective of a reasonable person in CLAIMANT's situation. Because CLAIMANT deviated from this reasonable practice and did not actually foresee this possibility or take steps to protect itself, the Tribunal should hold CLAIMANT accountable for its own mistake.

ii. It is reasonably possible to overcome the consequences of the tariff

61. The 30% tariff paid by CLAIMANT on the last shipment is not sufficiently onerous to justify judicial intervention. Most scholars agree that even if CISG Art. 79 is to cover hardship, it could apply only in extreme situations [*e.g. Schwenzer p.716–717; Kofod §3.1.2*]. While some authors have advocated for a threshold of 100% fluctuation in costs as a general rule of thumb, Schwenzer notes that many cases involving a change of more than 100% have been found to be insufficient and she believes a 150-200% margin to be more advisable as a benchmark [*Brunner p.428–441; Schwenzer p.717*]. Even under the looser UNIDROIT standards, the example of hardship included in Official Comment to UNIDROIT Art. 6.2.3 was the result of an 80% currency devaluation. The *Scafom* case that CLAIMANT relies on similarly involves a 70% price increase. By comparison, the 30% tariff appears miniscule.

62. In fact, CLAIMANT did overcome the consequences of the tariff since it has so far sustained the loss while continuing its operations. While CLAIMANT may have to sell a proportion of its business in order to stay solvent, the difficult financial situation of CLAIMANT is of its own making as it had been making losses since 2014 due to its poor investment and financing choices [*PO2 ¶29*]. RESPONDENT should not be made to bear the consequences of CLAIMANT's own mistakes.

63. Consequently, because CISG Art. 79 is derogated by cl. 12 of the SA, does not cover situations of hardships, does not permit the remedy of price adaptation, and lays out requirements not met by CLAIMANT, CLAIMANT may not rely on Art. 79 to seek price adaptation.

C. Even if the Tribunal decides to adapt the price, the amount requested by CLAIMANT is way overblown

64. In the unlikely event that the Tribunal decides to adapt the price, it should do so with a view towards restoring the equilibrium of the *contract* [UNIDROIT Art. 6.2.3]. In making this determination, extraneous factors such as the relative financial standing of the parties should not be considered. While CLAIMANT attempts to use RESPONDENT's financial well-being against itself [*Cl. Memo ¶78*], it would certainly be perverse to punish the party who manages its own business better. Under CLAIMANT's

logic, if there were a dispute between an individual and a corporation, the corporation should always be made to bear the costs of hardship since it is almost invariably in a better financial situation.

65. While CLAIMANT accuses RESPONDENT of violating a consent requirement in reselling certain doses to breeders in Equatoriana, such a consent requirement never made its way into the written contract [*Ibid. ¶77*]. The SA merely requires that RESPONDENT inform CLAIMANT of the mares on which the doses are used and the violation of such information requirement could entail no monetary damages [*Ex. C6*]. Therefore, the reselling practices of RESPONDENT are similarly irrelevant.

66. To restore the equilibrium of the contract, the most the Tribunal should do by way of price adaption is thus to spread the losses evenly between the two parties.

III. CLAIMANT'S EVIDENCE SHOULD BE BARRED; IT IS NEITHER RELEVANT NOR MATERIAL

67. CLAIMANT's evidence is neither relevant to the case, nor material to its outcome. While RESPONDENT agrees with CLAIMANT that the general standards for evaluation of evidence are its relevance and materiality to the case, neither requirement was satisfied here. Arbitration creates no precedent and it is immaterial what the other Tribunal determined. Equally, the mere fact that the general legal claims were similar does not prove that the circumstances in both cases are sufficiently similar so as to make the prior arbitration relevant to this dispute. Contracts are a product of negotiation, and CLAIMANT fails to grasp that negotiations and arbitration in a separate dispute, to which it is not a party, can have no bearing on the current case. CLAIMANT, should instead be concerned with presenting a legitimate reason why it should prevail given the facts in this case as opposed to relying on RESPONDENT'S arguments in an unrelated arbitration [**A**]. Further, even if CLAIMANT can carry its burden of showing some relevance, nevertheless the evidence remains inadmissible. The evidence is not publicized information and is subject to strict privacy requirements. Equally, the illegal means by which the evidence was procured precludes its admission. Even if CLAIMANT is able to prove the award was secured by a third party, CLAIMANT's knowing use of illegally sourced evidence in violation of international arbitration principles should not be rewarded. Confidentiality concerns further impede admissibility of the evidence. On balance, considering the various impediments to admitting RESPONDENT's prior Interim Award, and weighing the Interim Award's limited probative value, it is clear that the evidence is not necessary to ensure a fair and just award [**B**].

A. Neither relevance nor materiality justify submission of RESPONDENT's prior Interim Award

68. CLAIMANT fails to sufficiently prove that the evidence is either relevant or material to advancing their argument. As a general rule, and as adopted by HKIAC Art. 22(3), "all relevant evidence, that is material to the outcome of the arbitration is admissible." [*Moser/Bao ¶ 9.162; HKIAC Art. 22(3)*]. This is a baseline requirement and the arbitral tribunal nevertheless retains the power "to exclude evidence…otherwise admissible" [*Ibid.*]. CLAIMANT fails to satisfactorily provide how proof of RESPONDENT'S prior arbitration and the Interim Award is either relevant or material to the current arbitration. First, CLAIMANT erroneously states that the prior tribunal's decision can provide significant guidance as to the power of the Tribunal to adapt the current contract [*Cl. Memo ¶84*]. Equally, the interpretation of the hardship provision in RESPONDENT'S prior contract with a third-party, is immaterial to this Tribunal's resolution of the question of hardship in the present dispute [*Cl. Memo ¶85*] [**1**]. Further, while the facts in the current proceeding and RESPONDENT'S prior arbitration appear similar, each proceeds from unique negotiations and should not be conflated [**2**]. The only value of admitting RESPONDENT'S prior award is a poorly concealed attempt to prejudice the Tribunal against RESPONDENT and impeach its character [**3**].

1. The prior tribunal's decision is not dispositive

69. Precedent plays a limited role in international arbitration [*Commission, p. 135*]. While prior *published* decisions *can* carry persuasive authority, a prior decision "has no binding force except between the parties and in respect of that particular case" [*ICJ Statute Art. 59*]. An arbitral tribunal is *temporarily* established to pronounce judgement on a *specific* case, and there is less concern with ensuring consistency of decisions as there is with tailoring the award to suit the particular merits of that arbitration [*Born §27.04(C)*]. Some scholars argue that arbitrators should be entitled to disregard even long-standing case law of the highest domestic courts, where the law does not conform with the needs of international trade and commerce [*Ibid.*]. In the limited circumstances in which decisions and awards from prior commercial arbitrations may act as precedent, two conditions must be met: (1) there should be a degree of homogeneity amongst various awards that reach the same decision, and (2) the decisions should be accessible to the public [*Commission, p. 135*].

70. Here, CLAIMANT relies solely on RESPONDENT'S unpublished Interim Award and fails to meet both crucial conditions for precedent to apply. CLAIMANT's insistence that RESPONDENT's unpublished Interim Award from a prior arbitration should carry any authority is unsupported by

international law. CLAIMANT fails to provide any examples of international arbitrations that have sought guidance from unpublished awards.

2. The facts in the prior arbitration are not sufficiently similar to draw comparisons

71. The facts in the prior arbitration are not sufficiently similar to the current dispute to draw comparisons. While the contracts appear similar—both contain an ICC Hardship Clause and lack express reference to possibility of price adaptation—this does not mean that they are identical. Each contract reflects a unique negotiation process and CLAIMANT's superficial recitation of similar provisions fails to consider the motivations, intent, bargaining, and concessions that comprise the negotiation process. Here, CLAIMANT has no detailed knowledge of the prior dispute and cannot convincingly show that the facts are sufficiently similar so as to justify a similar outcome. As noted above there is limited role for precedent in international arbitration and to depart from the general rule, CLAIMANT must more satisfactorily show that the facts are *so* similar that the Tribunal can arrive at *no other decision*. CLAIMANT has failed to do this and RESPONDENT's prior arbitration must therefore be excluded.

3. The only purpose of the evidence is to impeach RESPONDENT

72. CLAIMANT is acting deceitfully when they claim that their desire to submit evidence of RESPONDENT's prior arbitration is anything but an attempt to impeach RESPONDENT's reputation. Yet where the evidence's sole value is to discredit RESPONDENT, and has no probative value, CLAIMANT cannot argue that the evidence is relevant. Rather than presenting a legal argument as to why they should prevail, CLAIMANT has resorted to cheap tactics meant to prejudice Tribunal against RESPONDENT.

B. The evidence is inadmissible in the present case

73. The evidence is inadmissible in the present case. CLAIMANT conveniently disregards the legitimate reasons for opposing submission of the evidence. Not only does the evidence fail to have any meaningful probative value, but it should be rejected on multiple other grounds as well. Significantly, the Interim Award is subject to expectations of confidentiality and cannot be construed as publicized information [*1*]. The breach of confidentiality is testament to the illegal means by which CLAIMANT procured the Interim Award, and further compels exclusion of the evidence. Whether CLAIMANT is directly implicated in the illegal breach or merely seeks to benefit from a third party's illegal conduct, is immaterial [*2*]. Confidentiality concerns compel exclusion [*3*]**.** Despite CLAIMANT's

exaggerations, exclusion of the Interim Award does not impede the Tribunal's ability to render a just and fair award. However, its inclusion, *would* unfairly impeach RESPONDENT and lead to an unjust outcome [***4***].

1. CLAIMANT misleadingly characterizes the information as "publicized"

74. CLAIMANT misleadingly states that the Interim Award is publicized information. The illegal disclosure of RESPONDENT's confidential information, subject to strict privacy requirements, cannot be treated as "publicized information." In *Bancoult III*, the admissibility of a leaked Wikileaks as evidence in a dispute over the legality of a marine protected area was justified by "extraordinary circumstances" and because the contents were "so widely disseminated in the public domain as to destroy any confidentiality or inviolability that could sensibly attach to it" [*Bancoult III* ¶ *20*]. It would be a gross exaggeration to state that the confidential Interim Award, which remains inaccessible to the larger public can be compared with a Wikileaks which constitutes a wide scale disclosure [*See also El-Masri v. Macedonia*]. Here, the information is not readily available to the public [*PO2* ¶*41*], and the leak is through a single discrete source, making it possible to prevent additional disclosure of the Interim Award, unlike in *Bancoult III*, where subsequent mitigation of disclosure was impossible.

2. Illegality precludes admission of the evidence

75. Even if CLAIMANT can satisfactorily show that any illegal conduct was engaged in by a third party, nevertheless the evidence should not be admitted because by benefitting from the fruit of the poisoned tree, this Tribunal will be sanctioning such illegal conduct. Further, CLAIMANT is still wholly guilty of profiteering from such a lapse of the rule of law and rules of international arbitration [***i***]. And international case law explicitly and implicitly prohibits admission of illegal evidence in the present case [***ii***].

i. CLAIMANT is guilty of profiteering from a lapse of rule of law and rules of international arbitration

76. CLAIMANT incorrectly asserts that evidence may only be excluded if there is proof it was directly involved in the evidence's illegal procurement [*Cl. Memo* ¶*89*]. First, CLAIMANT mischaracterizes the holding in *Methanex v. U.S.* by asserting that evidence may *only* be excluded if there is proof that the party was directly involved in its illegal procurement [*Ibid.*]. *Methanex v. U.S.* actually stands for the proposition that where a party procures evidence illegally it cannot be admitted, *not* that the absence of personal culpability warrants admission of illegally obtained evidence [*Methanex*

v. U.S. ¶*55 et seq.*]. While the legal parameters for admissibility remain in flux, it is generally accepted that "in a prima facie analysis, the fact of the evidence having been obtained illegally would weigh against admissibility in light of public policy grounds" [*Ortiz, Transnational Notes, 2018*]. Further, a defining feature of arbitration is the guarantee of the preservation of confidentiality [*Noussia p. 20*]. Parties specifically choose to arbitrate rather than litigate "precisely because they do not want the subject matter of their dispute to become public" [*Ibid.*]. While flexibility and freedom in how parties conduct their proceedings is only marginally impacted by exclusion of illegal evidence, to enable CLAIMANT to admit evidence of a prior arbitration would reduce the significance of confidentiality in arbitral proceedings and incentivize others to engage in similar illegal conduct.

77. If this Tribunal permits submission of RESPONDENT's Interim Award, despite RESPONDENT's continued request to preserve confidentiality, this will weaken the value of arbitration and its continued relevance as an alternative forum for dispute resolution. Therefore, even if the Tribunal is sufficiently convinced that CLAIMANT is innocent of wrongdoing, the fact that the evidence was illegally procured should preclude its admission.

ii. International law prohibits admission of illegal evidence in the present case.

78. While HKIAC Rules and the Model Law are silent on the question of illegal evidence, silence does not necessarily signify approval of its admission [*Cl. Memo* ¶*92*]. Rather, the drafters, by granting the Tribunal broad discretion in admitting evidence, intended that the Tribunal would consider the unique facts of each arbitration and make determinations appropriately [HKIAC 22(3)]. Similarly, while the Parties' respective national laws do not render the evidence inadmissible, neither does it explicitly grant admission.

79. Moreover, contrary to CLAIMANT's assertions [*Cl. Memo* ¶¶*92,95*], including the evidence would contradict the character of international arbitration and its recognition of the right to confidentiality in its proceedings [*supra* ¶*78*].

80. Equally, a well-recognized exclusionary rule on evidence, the "Fruit of the Poisonous Tree Doctrine", speaks clearly to the inadmissibility of CLAIMANT's evidence [*See Nardone v. U.S.* (first articulating this doctrine)]. This rule, while frequently used in American courts, is also used in international arbitration [*Boykin/Havalic, TDM*]. The CLAIMANT mischaracterizes the purpose of this rule as intending to "protect" members of a jury from illicit information so that they may decide a case fairly and without prejudice, thus rejecting the concern as valid in an arbitration before a Tribunal

[*Cl. Memo* ¶*95*]. While the Tribunal is better qualified to decide the case, that does not diminish the evidence's prejudicial value. Where there is little probative value, the prejudicial nature is a serious concern.

81. Additionally, IBA Rules dictate that the evidence should not be permitted. IBA Art. 9(2)(b) provides that information obtained in violation of a legal impediment is inadmissible. The evidence at issue was initially obtained by a third party in violation of a legal impediment. The IBA rules do not specify that the violation must be perpetrated by a party to the dispute. Rather, it speaks in general terms, thereby encompassing third-party violations.

82. Though IBA Art. 9(3) states that such a legal impediment can be waived, RESPONDENT has never agreed to waive its rights to protect its confidential information. Respondent's email was not intended to waive its right as CLAIMANT alleges [*Cl. Memo* ¶*97*], but rather to argue for its continued protection.

3. Confidentiality concerns impede admissibility of the evidence

83. Confidentiality concerns warrant exclusion of RESPONDENT's Interim Award. While HKIAC Art. 42(1) explicitly creates a duty of confidentiality only for parties implicated in the arbitration, CLAIMANT seeks to exploit this provision [*Cl. Memo* ¶*99, 100*]. Where parties uphold confidentiality and third parties do not act illegally, there is no need to confer a duty of confidentiality on third parties, because they would not have access to confidential information. Therefore, the absence of a duty of confidentiality for third parties does not equate with an implicit admission by HKIAC that CLAIMANT may admit evidence of RESPONDENT's prior arbitration. Further, RESPONDENT remains bound by its prior duty of confidentiality and if this Tribunal should permit the Interim Award to be admitted, it will expose RESPONDENT to litigation by the other party to RESPONDENT's former arbitration. This Tribunal should respect RESPONDENT's legal obligations and bar admission of the prior Interim Award.

84. Equally CLAIMANT rejects RESPONDENT's valid confidentiality concerns [*Cl. Memo* ¶*101*]. RESPONDENT is engaged in a competitive business and the nature of arbitration often requires divulging highly sensitive information e.g. financial, trade secrets etc. While this disclosure may be a necessary evil in order to resolve a dispute in arbitration, it cannot be justified to support CLAIMANT's fishing expedition. CLAIMANT also asserts that the confidentiality protections of the current arbitration will prevent disclosure of any information revealed during the arbitration [*Cl. Memo* ¶*102*]. However,

in light of the existing breach of confidentiality, CLAIMANT's assertions are contradictory. Either confidentiality protections in arbitration are absolute, thereby barring RESPONDENT's prior Interim Award, or, such protections are vulnerable, negating CLAIMANT's assurances that the current arbitration will be subject to confidentiality.

4. The evidence is not necessary to ensure a fair and just award

85. Evidence of RESPONDENT's prior arbitration is not necessary to ensure a fair and just award. Rather, its inclusion is irrelevant to the dispute and would be unduly prejudicial. RESPONDENT's legal arguments in the prior case, in a context distinct from the case at hand, have no bearing on this Tribunal's evaluation of RESPONDENT's arguments in the present case. CLAIMANT cites a concern for contradictory legal evaluations, but the very nature of confidential arbitrations is such that they do not create binding precedents [*supra ¶69*].

86. Failure to admit the Interim Award will not endanger enforceability of a potential award in the present case as CLAIMANT argues [*Cl. Memo ¶106*]. CLAIMANT is not unduly restricted and is free to bring forward evidence that directly applies to the current dispute. HKIAC Art. 13(1) requires only that *relevant* evidence be admissible [*HKIAC Art. 13(1)*]. Here, the evidence is irrelevant and immaterial to the resolution of the dispute [*supra §III.A*]. If all the evidence that a party wished could be admitted, irrespective of materiality, the efficiency and efficacy of arbitration would be greatly compromised.

87. CLAIMANT failed to present a legitimate argument and instead resorts to tactics of impeachment. This Tribunal should recognize that the evidence in question serves little relevance to the dispute and its probative value, if any exists, is greatly outweighed by the prejudicial harm it represents. The Interim Award is not publicized, was procured illegally and in violation of RESPONDENT's expectation of confidentiality. Admitting this evidence would undermine interests of justice and fairness. The Tribunal should not admit RESPONDENT's prior Interim Award.

CONCLUSION

88. In a desperate attempt to force RESPONDENT to pay for risks it willingly assumed, CLAIMANT's arguments rest on a fundamental misunderstanding of the systems of law governing this arbitration and a deliberate misreading of the contractual terms to which it agreed. Not only does this Tribunal lack the power to adapt the contract under the arbitration agreement, but CLAIMANT is not entitled to remuneration of any amount under either the SA's hardship clause or the CISG. CLAIMANT's attempts to bring in evidence from RESPONDENT's prior arbitration, which are neither relevant nor material to

the present case, further illustrate its desire to evade responsibility for its situation. This Tribunal should therefore find that it does not have the power to adapt the contract and deny CLAIMANT's requests for payment. The partial award from RESPONDENT's prior arbitration should likewise be excluded.

***

REQUEST FOR RELIEF

On the basis of the foregoing submissions, CLAIMANT respectfully requests that the Tribunal:

1. Find that it does not have the power to adapt the contract;
2. Deny admission of the Partial Interim Award from RESPONDENT's prior proceeding;
3. Determine that CLAIMANT is not entitled to USD 1,250,000 under either
    a. clause 12 of the SA; or
    b. under the CISG.

Vindobona, Danubia 6 December, 2018

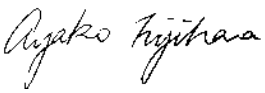
Respectfully submitted,

Tamsin Parzen

Jacob Omorodion

Varuni Balasubramaniam

Youzhihang Deng



Ayako Fujihara