PEPPERDINE UNIVERSITY
School of Law

Straus Institute for Dispute Resolution

MEMORANDUM FOR RESPONDENT

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

CARSON BENNETT • ALEXIA CHAPMAN • RYAN FULLER• ASHLEY GEBICKE
GINSEY KRAMARCZYK • ALLISON MATHER • CLAIRE SCHALIN • TRACY SMITH

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TABLE OF ABBREVIATIONS

&	And
%	Percent
¶	Paragraph
Arb.	Arbitration
Art(s).	Article(s)
Aug.	August
BV	Besloten vennootschap (a type of Dutch limited liability company)
Cent.	Central
Cf.	Conferatur ("compare")
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
CLAIMANT	Phar Lap Allevamento
Cmt.	Comment
Comm.	Commercial
Comp.	Comparative
Co.	Company
Corp.	Corporation
Ct.	Court
Dist.	District
Ed.	Edition
et al.	et alii ("and others")
Eur.	European
Feb.	February
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	*Ibidem* ("in the same place")
i.e.	*id est* ("that is")
Inc.	Incorporated
Ins.	Insurance
Int'l	International
Jan.	January
J.	Journal
L.	Law
LLP	Limited Liability Partnership
Ltd.	Limited
Mar.	March
n.	note
No.	Number
N.Y.	New York
Oct.	October
p.	page
the Parties	CLAIMANT and RESPONDENT
Prac.	Practical
Prof.	Professor
R.	Record
RESPONDENT	Black Beauty Equestrian
Rev.	Review
SA/S.A.	Société anonyme (a type of corporation in mostly civil law countries)

S.A.S.	société par actions simplifiée (type of French corporation)
SCC	Supreme Court of Canada
SCR	Supreme Court Reporter (Canada)
S.D.N.Y.	Southern District of New York
§	section
Sept.	September
SpA	Società per azioni (type of Italian corporation)
UNCITRAL	United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (incl. 2006 amendments)
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States
USA	United States of America
UN	United Nations
U./Univ.	University
v.	versus

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UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration	¶ 65
UNIDROIT Model Clauses	UNIDROIT: Model Clauses for the Use of UNIDROIT Principles of International Commercial Contracts (Jan. 30, 2017)	¶ 11
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STATEMENT OF FACTS

1. Black Beauty Equestrian ("RESPONDENT"), is a company registered in Equatoriana that desired to establish a racehorse stable. Phar Lap Allevamento ("CLAIMANT") operates a renowned stud farm located in Mediterraneo. CLAIMANT sells frozen semen of champion stallions for artificial insemination and Claimant's prize stallion Nijinsky III is highly sought-after for breeding.

2. On 21 March 2017, RESPONDENT contacted CLAIMANT about acquiring Nijinskyy III's frozen semen to build its new breeding program and to avail itself of Equatoriana's temporary lifted ban on artificial insemination. On 24 March 2017, CLAIMANT offered 100 doses of Nijinsky III's frozen semen in installments.

3. On 28 March 2017, RESPONDENT objected to the choice of law and forum selection clause and insisted on DDP delivery due to CLAIMANT'S experience in the shipping and delivering of frozen semen and in import and export documentation. Mr. Antley, RESPONDENT'S negotiator also stated: "Given the desirability of a long-term relationship for the mutual benefit of both parties we consider it not appropriate that your law applies and your courts have jurisdiction."

4. CLAIMANT responded in its 31 March 2017 email accepting DDP delivery but asked to protect against all associated risks or at least the risk of changing health and security requirements with a hardship clause. RESPONDENT did not agree to the first option as it would be a higher DDP price per dose for nothing. RESPONDENT also considered CLAIMANT's suggested ICC-hardship clause to be too broad. Therefore, the approach taken regulated risks directly and added hardship to the existing force majeure clause.

5. RESPONDENT'S 10 April 2017 email expressly requested Equatoriana as the seat and law of arbitration, noting that it would be "appropriate in light of the fact that the Sales Agreement is governed by the law of Mediterraneo." RESPONDENT'S proposal stated that the arbitration agreement should be governed by the law of the place of arbitration and not by the law of the sales contract (Mediterraneo).

6. CLAIMANT'S reply on 11 April 2017 changed the suggested place of arbitration but had not objected to the proposal that the law of the place of arbitration should govern the arbitration agreement. The newly suggested neutral place was acceptable for RESPONDENT, but the choice of law provisions had to be changed to avoid uncertainty.

7. Before finalizing the agreement, the two negotiators, Ms. Napravnik for CLAIMANT and Mr. Antley for RESPONDENT, were severely injured in an accident on 12 April 2017. Prior to the accident, Mr. Antley listed open issues, including "clarify in arbitration clause that neutral venue and applicable law." Mr. Antley had planned to "come back with a proposal the next morning."

8. The failure to include a choice of law for the arbitration clause in the Sales agreement was an oversight due to the replacement of both negotiators after the accident. Mr. Krone, the head of the legal department for RESPONDENT, found Mr. Antley's note but did not fully understand the reference to the law of the arbitration and the hardship clause because such negotiations were conducted exclusively by Mr. Antley.

9. CLAIMANT previously sold mares to farms in Danubia where CLAIMANT was forced to spend 40% of the sales price on further testing due to a rare foot and mouth disease. To avoid such costs, CLAIMANT insisted on adding "health and safety requirements" to clause 12 of the contract. Ultimately, the contract was finalized on 6 May 2017 with a very narrowly worded hardship clause, including the existing force majeure clause and "health and safety requirements" but did not provide for any adaptation by the arbitral tribunal.

10. The first shipment of 25 doses occurred in May 2017, the second shipment of 25 doses in October 2017, and the final shipment of 50 doses was due in January 2018. Before the last shipment, Mediterraneo's President announced a 25% tariff on agricultural products. Equatoriana's government retaliated by imposing 30% tariff on agricultural products, including frozen semen. Mediterraneo's President Bouckaert had indicated intentions for a "protectionist approach" to foreign agricultural products during his campaign and Equatoriana has in the past used direct retaliatory measures in response to such tariffs.

11. Contrary to CLAIMANT'S account, RESPONDENT did not agree to an adaptation in January 2018. Mr. Shoemaker told CLAIMANT, his understanding of DDP was that CLAIMANT had to bear the costs for delivery. However, considering the exigent circumstances, he was "certain that a solution would be found through negotiation." He explained he was not a lawyer and had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment.

12. Given RESPONDENT's interest in timely delivery of the outstanding third shipment and CLAIMANT's threats of breach, Mr. Shoemaker could not reject requests completely.

He could only emphasize the importance of timely delivery. RESPONDENT made timely payment and acceptance of the dose shipments.

SUMMARY OF ARGUMENT

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO RETROACTIVELY INCREASE THE PRICE OF THE CONTRACT

The law applicable to the arbitration clause does not give the tribunal the power to adapt the contract. RESPONDENT never intended for Mediterraneo Law to govern and RESPONDENT explicitly stated Mediterraneo law should not govern the arbitration clause. With no express or implied choice, the natural inference is that the law of the seat should govern. The Parties did not authorize the tribunal to consider an increased remuneration claim. Even if Mediterraneo law applies, the parties did not agree to allow an adaptation. The Tribunal's has broad discretion under the HKIAC Rules or the New York Convention to determine the intent of the parties and honor party autonomy in arbitration.

II. THE TRIBUNAL SHOULD NOT ADMIT CLAIMANT'S STOLEN EVIDENCE

CLAIMANT simply tells the tribunal that it "is entitled" to the stolen evidence and delves into a relevance and materiality inquiry. This Tribunal should refuse to hear evidence as RESPONDENT's concurrent HKIAC proceeding is protected by express confidentiality and the evidence was procured through illegal action. Courts and Tribunals only overlook express confidentiality in matters of public interest that impact the larger community. RESPONDENT has never waived confidentiality, and CLAIMANT is also bound by the HKIAC confidentiality obligations even if not a participant. Moreover, as a matter of course, illegally obtained evidence is generally excluded both in international arbitration and in national courts. Policy considerations encourage excluding when dealing with illegal hacking. Excluding the evidence would not deprive the CLAIMANT from presenting its case.

III. CLAIMANT IS NOT ENTITLED TO AN ADAPTION UNDER CLAUSE 12 OR CISG ARTICLE 79

The tribunal may not adapt the contract under Clause 12 of the contract because tariffs do not constitute a hardship and adaptation is not authorized. CLAIMANT assumed responsibility by accepting the terms of a DDP delivery. Even under Article 79 of the CISG, CLAIMANT may not obtain an adaptation because Clause 12 constitutes a derogation. Even if there was no derogation, Article 79 does not provide relief under these circumstances. Also, Article 6.2.2 of the UNIDROIT Principles would not consider the tariff a hardship because CLAIMANT could have reasonably accounted for it. Moreover, the tribunal may not adapt the contract under UNIDROIT Article 6.2.3 because there has been no express empowerment as

required by Danubian law. Lastly, the principle of good faith and fair dealing does not require a party to make commercially unreasonable concessions unsupported by the parties' contract.

ARGUMENT

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO RETROACTIVELY INCREASE THE PRICE OF THE CONTRACT

A. The Applicable Law Does Not Give The Tribunal The Required Power To Adapt The Contract

1. Contrary to CLAIMANT'S allegations, RESPONDENT is not trying to rid CLAIMANT of anything to which it contracted within the Parties' mutually beneficial bargain. RESPONDENT is merely seeking to maintain the agreed upon terms as they are memorialized in such contract. The baseless claim raised by CLAIMANT requires the arbitrators to step beyond the bounds of that agreement and adapt an already signed finalized contract. Quite simply, the law applicable to the arbitration clause does not give the tribunal the power to adapt the contract. Thus, this tribunal does not have the proper jurisdiction to consider this claim.

1. The Arbitration Agreement is Governed by Danubian Law

2. There is little consistency, indeed no talismanic rule, as to how to determine the law of the arbitration clause where none has been expressed. Thus, tribunals conduct fact-specific analyses that vary from case to case. Regardless of the chosen analysis, RESPONDENT agrees with CLAIMANT that "the starting point must be the terms of the particular clause and the contract in question," and the determination consistently involves a discussion of the parties' common intent and a "natural inference" arising from the parties' relationship. (*FirstLink* at 12.) Here, that common intent is explicitly not Mediterraneo and the natural inference leans toward the law of Danubia.

a. RESPONDENT never intended for Mediterraneo Law to govern and so there is no implied choice and the law of the seat must govern.

3. To show that the parties mutually intended the arbitration clause to be governed by Mediterraneo, CLAIMANT relies on the Parties' drafting history and prior communications. (Cl. Br. at ¶¶14-17, p. 6-7.) Specifically, CLAIMANT suggests that the Parties agreed to Mediterraneo law because CLAIMANT agreed to the law of the seat of Danubia on the condition that the rest of the Sales Agreement remain subject to

Mediterraneo law. (Cl. Br. at ¶45, p. 12.) This piece of evidence clarifies nothing and serves to further muddy what exactly the Parties intended. As easily as this could suggest what CLAIMANT alleges, it could just as easily suggest that Ms. Napravnik, CLAIMANT's negotiator, assumed that Danubian law would govern the arbitration clause so she wanted to clarify that the rest of the agreement remained under Mediterraneo law.

4. Additionally, CLAIMANT takes issue with the fact that "RESPONDENT never mentioned . . . its intention to use Danubian Law throughout the negotiation." (Cl. Br. at ¶15, p. 7.) While RESPONDENT never mentioned Danubian law explicitly, it at least made clear that it wanted the law of the seat to also govern the arbitration clause itself and not just its proceedings when it asked for Equatoriana law to govern both in its initial drafting. (R. at 31, 33.)

5. Moreover, and perhaps most importantly, RESPONDENT explicitly stated that it did not want Mediterraneo law to govern the arbitration clause. In its only suggested drafting, RESPONDENT stated that "in light of the fact that the Sales Agreement is governed by the law of Mediterraneo," RESPONDENT considered it appropriate to make it explicit that the arbitration clause was not also governed by Mediterraneo law, but actually Equatorianian law. (R. at 33.) Further, the issue of applicable law was not finalized upon CLAIMANT'S 11 April 2017 email setting forth the law of the seat. In RESPONDENT'S negotiator's 12 April 2017 note listing open issues, he wrote "clarify in arbitration clause that neutral venue and applicable law." (R. at 35.) Both of these pieces of evidence could either suggest that RESPONDENT'S negotiator was going to agree to Mediterraneo law, but again, it could just as easily suggest that RESPONDENT'S negotiator was going to send a redraft adding a more neutral governing law. Thus, with evidence on both sides, it at least shows that the implied choice as to governing law is unclear, and it certainly shows that RESPONDENT desired the arbitration clause *not* to be governed by Mediterraneo law.

6. Additionally, RESPONDENT made it even more clear that it did not consider it appropriate that the substance of the contract *and* the dispute resolution be governed by CLAIMANT's law. In RESPONDENT's 28 March 2017 email, Mr. Antley states: "Given the desirability of a long-term relationship for the mutual benefit of both parties we consider it not appropriate that your law applies and your courts have jurisdiction." (R. at 11.)

7. Thus, there is no express choice of law in the arbitration clause and the implied choice is at best unclear if not entirely in favor of neutral law. The tribunal must therefore make the natural inference that the dispute resolution clause be governed by the more neutral law: Danubian law.

b. Because there is no express nor implied choice of law in the arbitration clause, the natural inference is that the law of the seat governs.

8. CLAIMANT argues that where parties have explicitly chosen a governing law for an underlying contract, the same law must govern the arbitration agreement. (Cl. Br. at ¶16, p. 7.). However, CLAIMANT does not consider other jurisdictions which lean towards the law of the seat to govern the interpretation of the arbitration agreement. Such jurisdictions do so based on a natural inference of common party intent for a more neutral law to govern the separate relationship of dispute resolution. For instance, in *FirstLink Investments Corp. Ltd. v. GT Payment PTE Ltd.*, the court stated that:

> When commercial relationships break down and parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment . . . and primacy is accorded to the *neutral law* selected by parties to govern the proceedings of dispute resolution.

(*FirstLink* at 12.)

9. Thus, despite what other jurisdictions may imply and absent evidence suggesting otherwise, "it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise." (*Id.*) Contrary to CLAIMANT's claims, (Cl. Br. at ¶ 18-20, p. 7-8), there is generally no "natural inference" that parties would want the same system of law to govern both relationships. This is especially true here given RESPONDENT'S statement that it did not consider it appropriate that CLAIMANT'S law govern

10. In fact, and as noted by CLAIMANT, (Cl. Br. at ¶18, pg. 8), the jurisdictions which lean towards applying the law of the substantive contract are doing so because the governing law of the underlying contract provides a "strong indication of the parties' intention in respect of the agreement to arbitrate." (*Arsanovia*.) Thus, if there is *any* indication that the parties did *not* intend their disputes be governed by the law of the substantive

contract, then this theory lacks any other policy-based foundation or commercial common sense.

11. Additionally, this arbitration is being conducted in Danubia and its procedures governed by Danubian law. CLAIMANT is asking a Danubian tribunal to apply a foreign law. To adequately known how Mediterraneo law operates within the context of dispute resolution matters would require time consuming consultation with Mediterraneo lawyers. (UNIDROIT Model Clauses.)

12. All of the cases and theories CLAIMANT cites all have the same foundation: party autonomy. Ultimately, party autonomy is fundamental to international arbitration. (KARL-HEINZ BÖCKSTEIGEL at 2.) There is simply no mutual intent to have Mediterraneo law govern this dispute resolution relationship. What makes the most commercial common sense, and what the Tribunal can do in good faith to both Parties, is for the dispute resolution to be governed by the neutral law mutually selected by the parties to govern the proceedings of the dispute. Here, that law is the law of Danubia.

2. The Parties Did Not Confer To The Tribunal The Power To Consider An Increased Remuneration Claim

13. In interpreting commercial contracts, Danubian law adheres to the "four corners rule," which means that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon, including drafting history if the wording is clear. (R. at 32.). Specifically to the increased remuneration claim, Danubian law recognizes that "arbitrators may adapt contracts but requires an express empowerment" to do so.

14. Quite simply, there is no express empowerment in the present contract. (R. at 31.) Because this Tribunal cannot look beyond the four corners of the agreement under Danubian law, it must take the contract at its final word. While not explicitly argued by CLAIMANT, it could be said that "any dispute" is vague and thus unclear as to whether it includes adaptation, such that the Tribunal should look to prior communications. However, there is nothing unclear or vague about not including a required, express term. Moreover, both Parties agreed that under Danubian law, "there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal." (R. at 52.)

15. Therefore, the Parties did not afford the Tribunal power to adapt the contract and thus this Tribunal does not have the jurisdiction to do so.

3. Even if Mediterraneo Law Applies, The Parties Did Not Agree to Allow the Tribunal to Adapt the Contract

16. CLAIMANT alleges that the Tribunal's power to adapt the Contract can be ascertained from the Parties' intent based on their prior communications and drafting history. (Cl. Br. at ¶23, p. 9.)

17. Specifically, CLAIMANT states that the record "clearly shows the RESPONDENT'S intention to arbitrate the dispute concerning the adaptation of the contract." (Cl. Br. at ¶32, p. 12.) However, the record is void of any such clear intent from the RESPONDENT. In making such a conclusory statement, CLAIMANT relies on its witness statement, which states that RESPONDENT'S negotiator replied to CLAIMANT'S suggestion of a arbitration mechanism by promising to "come back with a proposal the next morning." (R. at 17.) What CLAIMANT ignores is that there was no official agreement by RESPONDENT to such adaptation powers nor could Ms. Napravnik have relied on such a statement given that Mr. Antley had yet to talk to any official representative of RESPONDENT to confirm this legal position.

18. In fact, there is an express statement from RESPONDENT'S head of legal, Mr. Krone, that he would have objected to transfer powers to the Tribunal to increase the price upon its discretion had he known that was what Mr. Antley meant in his note. (R. at 35.) This is subjective intent directly from RESPONDENT'S mouth that it was not their intention to allow the Tribunal to adapt the contract.

19. Although not expressly argued by CLAIMANT, some jurisdictions do allow for reliance on a party's promise under the doctrine of promissory estoppel. However, this merely entitles that a promise may be enforced if the promisor should have reasonably expected the promisee to rely on the promise. Given the lack of express agreement and the fact that Mr. Antley had not yet confirmed the addition of adaptation powers with RESPONDENT itself, RESPONDENT could not have reasonably expected CLAIMANT to rely on such a promise.

20. Also not expressly argued by CLAIMANT, it is still prudent to raise Mr. Shoemaker's statement, which states that he was "certain that a solution would be found through negotiation," which was in response to the alleged need for additional payments to CLAIMANT. (R. at 18.) However, this was a promise that the Parties could come to a solution based on the exigent circumstances—not that a Danubian Tribunal should

come to a solution on their behalf. Nowhere does Mr. Shoemaker mention that a Tribunal should step in the shoes of the Parties and adapt their mutual agreement.

21. Moreover, Mr. Shoemaker did not have the power to bind RESPONDENT to such a suggestion and CLAIMANT was aware of this fact. In the preceding sentence in CLAIMANT'S witness statement, which CLAIMANT neglects to mention, it states that Mr. Shoemaker told CLAIMANT that "he had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment . . . ." (R. at 18.) As mentioned, a cornerstone of promissory estoppel is that the promisor should have reasonably expected the promisee to rely on the promise. Given Mr. Shoemaker's explicit disclaimer paired with his statement which did not mention a Tribunal's authority to adapt the contract, RESPONDENT, seemingly unaware of Mr. Shoemaker's statement, could not have reasonably expected CLAIMANT to rely on such a promise, nor that that promise had anything to do with a Tribunal's authority to adapt the Contract.

22. Thus, the intent of the parties of whether to adapt the contract is unclear, and the safest, natural inference would be to not allow such and adaptation and allow the Parties to consider adapting through a court system of their choice.

B. RESPONDENT Does not Dispute this Tribunal's Broad Discretion Under the HKIAC Rules or the New York Convention

23. RESPONDENT agrees with CLAIMANT that "[a]daptation of the contract is within the discretion of the arbitral tribunal." (Cl. Br. at ¶31, p. 11.) RESPONDENT assumes that the Tribunal is aware of its broad authority to conduct these proceedings how it sees fit under the HKIAC Rules and the New York Convention. However, as explicitly noted by CLAIMANT (Cl. Br. at ¶31, p. 11), the goal in every arbitration is indeed party autonomy. It is through this Tribunal's broad discretion that it can determine what the Parties intended and what would be mutually beneficial. As described above, allowing the Tribunal to adapt the contract was not what the parties intended.

24. Thus, despite CLAIMANT'S attempts to paint the record in a light most convenient to its legal position, there is nothing clear in the record to suggest that both parties intended to allow the Tribunal to circumvent the Parties' agreed upon terms and adapt the contract on their behalf.

25. Therefore, this Tribunal lacks the requisite jurisdiction to decide CLAIMANT'S baseless increased remuneration claim.

II. THE TRIBUNAL SHOULD NOT ADMIT CLAIMANT'S STOLEN EVIDENCE

26. CLAIMANT spends much of its time avoiding the main issues regarding the contested evidence it wishes to introduce. CLAIMANT simply tells the tribunal that it "is entitled" to the stolen evidence and then goes straight to a relevance and materiality inquiry. (Cl. Br. at ¶ 48, p. 16.) CLAIMANT appears to be placing the cart before the horse when it spends the bulk of its time exploring the document's relevance, and only giving short shrift to its reasons why the stolen document is not subject to an exclusion under IBA Rule 9.2(g) that will exclude the evidence regardless of its relevance or materiality. (*See EDF*.) CLAIMANT may not want to discuss these issues because it wants to avoid the fact that this evidence is protected by confidentiality safeguards and could only have been acquired "by illegal means." (R. at 51.) Additionally, CLAIMANT fails to mention, let alone distinguish, its case from the many tribunals that refused to admit illegally obtained evidence. (*Methanex*, *EDF*, *Libananco Holdings*.) Furthermore, CLAIMANT has not shown how a commercial dispute between two private horse breeders falls with the narrow scope of public-related disputes which might allow for an exception to confidentiality protections and/or exclusions of illegal evidence.

27. Therefore, this Tribunal should refuse to hear evidence that violates RESPONDENT's legitimate expectations of confidentiality in a concurrent HKIAC proceeding and especially when that evidence was procured through illegal action.

A. RESPONDENT's Concurrent Proceeding Is Protected By Express Confidentiality

28. CLAIMANT admits that RESPONDENT's concurrent arbitration is governed by express confidentiality provisions. (Cl. Br., ¶¶ 48, 50, p. 17.) Although CLAIMANT cites to the wrong set of rules, RESPONDENT's expectations are based on the guarantees outlined in the HKIAC Arbitration Rules governing the dispute, in addition to separate contractual obligations. (R. at 51, 61; 2013 HKIAC Rules, Art. 42.)

29. HKIAC Rules extend confidentiality protections to "any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration."

(2018 HKIAC Rules, Art. 42.1.) This definition certainly applies to RESPONDENT's Partial Interim Award.

1. CLAIMANT Is Bound By The HKIAC Confidentiality Obligations Even If It Is Not A Participant Of The Proceedings

30. CLAIMANT tries to distance itself from the HKIAC confidentiality obligations by arguing that "CLAIMANT is not a party to the said arbitration" and so those responsibilities do not apply to it. (Cl. Br. at ¶ 50, p. 17.)

31. But just because CLAIMANT did not participate in the other proceeding does not mean it is free to use the information as it pleases. National courts have extended confidentiality obligations on parties who receive information from an arbitration that is subject to non-disclosure protections. (*Lloyd's Syndicate* and *Hyundai Engineering*.)

32. It is also worth noting that the confidentiality provisions in the HKIAC Rules are some of the most protective of any arbitral institution. The ICC Rules, in comparison, only apply to the institution. (2017 ICC Rules, Art. 6.) The SCC provision only applies to the institution, the tribunal, and any secretary to the tribunal. (2017 SCC Rules, Art. 3.) In contrast, the HKIAC confidentiality obligations bind the parties, the tribunal, any secretary to the tribunal, the witnesses, experts, emergency arbitrators (if any) and the institution itself—in sum, it applies to anyone who could have ever touched information from the proceedings. (2013 HKIAC Rules, Arts. 42.1 and 42.2.)

33. Thus, since the confidentiality rules provide no wiggle room for those entitled to the information, this Tribunal should follow the example of *Lloyd's Syndicate* and apply the same obligations to CLAIMANT who seeks to access the award through nefarious avenues.

2. Courts And Tribunals Only Overlook Express Confidentiality In Matters Of Public Interest That Impact the Larger Community

34. Because confidentiality is one of the "fundamental, if not the most compelling, of reasons for which parties choose to arbitrate," courts are reluctant to ignore it for the purpose of admitting evidence (NOUSSIA at 1; *see also* REDFERN & HUNTER at ¶ 2.161.) Courts will only do so when a "genuine public interest" outweighs the non-disclosure responsibilities previously agreed to by the parties. (REDFERN & HUNTER at ¶ 2.170.)

35. This is simply more common in investor-state disputes and not commercial transactions. The public nature of disputes that effect environmental issues or human rights have been the catalyst for a growing expectation of transparency in investor-state arbitration. (Calamita.) But these new norms, culminating in the Mauritius Convention and the UNCITRAL Rules on Transparency in Investor-State Arbitration, do not apply to commercial disputes.

36. As scholars have noted, such transparency is "untenable in the sphere of international commercial arbitration." (BANTEKAS at 102.) This is because "there is no legal basis in institutional rules or arbitral statues" for disclosure of commercial documents between private parties. (*Id.*) So, CLAIMANT is mistaken to argue there is such thing as a "prevailing principles of transparency" in the realm of international commercial arbitration. (R. at 50.) And CLAIMANT further mischaracterizes the applicability of these new UNCITRAL rules when its brief leaves out the "Investor-State Arbitration" part of the title which limits its scope to a wholly separate type of international dispute resolution. (*Id.*)

37. Some national court systems, such as the United Kingdom, recognize that confidentiality is such a fundamental aspect of arbitration that the courts will extend inherent confidentiality obligations even when the parties have not specifically agreed to keep their proceedings confidential. (*Dolling-Baker*; *Hassneh*; *Ali Shipping*.) Other courts in the U.S. and Sweden will not supply an implied term of confidentiality if it is absent from the parties' arbitration agreement. (*See Panhandle*; *Bulbank*.) Thus express confidentiality provisions are stronger than implied guarantees and CLAIMANT has failed to show why this Tribunal should ignore those confidentiality safeguards.

a. The Parties' Sales Agreement is not a public matter

38. In this case, there is no public interest at issue and so the Tribunal has no grounds to ignore the confidentiality of the concurrent proceeding. The concurrent arbitration is a commercial dispute between two private entities; neither party is a state-owned entity and the decision stemming from that arbitration will not in any way "affect the general public." (REDFERN & HUNTER at ¶ 2.170.)

39. For an example of when such an exception might be appropriate, let us consider the case CLAIMANT cited, *Esso Australia*, in which an investor had contracts to provide natural gas to two public utility companies. There, because the arbitration award directly impacted the pricing increases for the publicly owned and operated utility

companies, the court held that the "public's legitimate interest in obtaining information about the affairs of public authorities" outweighed the express confidentiality protections of the arbitration. (*Esso Australia*.)

40. In contrast, nothing about the concurrent arbitration would trigger this "public interest" exception. RESPONDENT is selling a good (a mare) to a Mediterraneo buyer, not a state-owned entity to later be provided to the public. As a result, the decision stemming from he concurrent arbitration will not in any way "affect the general public." (REDFERN & HUNTER at ¶ 2.170.) It will have no impact on the general public in Mediterraneo, or Equatoriana, let alone Danubia (whose courts, as the arbitral seat, would most likely be the ones required to assess the public impact of the information).

41. Because the information CLAIMANT seeks to divulge has nothing to do with a legitimate public interest, this Tribunal must respect RESPONDENT's legitimate expectations that the other arbitration would be kept confidential even from this proceeding.

3. Outlier Cases that Ignored Arbitral Confidentiality In Fact Spurred An Increase Of Protections From Commercial Arbitral Institutions

42. The backlash of the scant cases similar to *Esso Australia* (i.e., *Panhandle*, *Bulbank*) actually created stronger confidentiality protections.

43. After *Esso Australia* and *Bulbank*, scholars wondered if arbitral institutions would respond with more robust, explicit guarantees now that the implied duties of confidentiality were being questioned by national courts. Practitioners like Gregory Reid and Lucy Greenwood anticipated that the major arbitration institutions would include "broader obligations of confidentiality as a response to users' concerns." (Reid & Greenwood at 1251; *see also* Paulsson & Rawding.) They were right.

44. The anti-confidentiality cases appeared in a twelve-year period roughly spanning the 90s: starting with *Panhandle* in 1988, followed by *Esso Australia* in 1995, and *Bulbank* in 2000. Soon after, the arbitral community reacted with an increase in confidentiality protections.

45. For example, the London Court of International Arbitration ("LCIA") did not have any confidentiality provisions in its 1985 rules, but introduced a robust set of confidentiality duties starting with the next iteration of its rules in 1998. (*Compare* 1985 LCIA Rules, *with* 1998 LCIA Rules, Art. 30.)

46. When younger institutions started promulgating their own rules in the early 2000s, each was sure to include express confidentiality provisions. (*See* 2008 HKIAC Rules, Art. 39; 2007 SIAC Rules, Rule 34; 2007 SCC Rules, Art. 46.) The boundaries of the confidentiality duties vary from institution to institution, but it is now invariably provided for. In fact, some institutions have strengthened confidentiality protections over time. For example, the SIAC confidentiality measures have expanded to include more people, and now give tribunals sanctioning powers for infractions. (*Compare* 2007 SIAC Rules, Rule 34.1, *with* 2016 SIAC Rules, Rule 39.2 and 39.4.)

47. Therefore, it is incorrect to infer, as CLAIMANT does, that these courts' decisions like *Esso Australia* reflect a general erosion of confidentiality protections. (R. at 50.) In fact, the complete opposite is true and even recognized by courts that have noticed "an increasing trend for the privacy of arbitrations to be protected." (Emmott at ¶ 104.) In the battle between confidentiality and transparency, "the principle of confidentiality is still generally prevailing." (M.I.M. Aboul-Enein at 1240.)

4. RESPONDENT Never Waived The Confidentiality Of The Concurrent Proceeding

48. RESPONDENT took active steps to protect its data, not to publish it. If CLAIMANT had argued that RESPONDENT somehow waived the informational accessible for the public because of an old firewall, it would be mistaken.

49. This is not negligent and a far cry from publishing confidential information to the public. Having a firewall is consistent with best practices recommended by the international arbitration community. (*See* ICCA-NYC.) Furthermore, RESPONDENT objected immediately when RESPONDENT first learned that CLAIMANT had procured this evidence and was trying to present it to the Tribunal. RESPONDENT never waived these rights and the confidentiality protections are still in force.

B. Illegally Obtained Evidence Is Generally Excluded

50. CLAIMANT wants to pay someone who stole from RESPONDENT. CLAIMANT would like to downplay the seriousness of the situation and instead point to the talkative Mr. Velazquez. (Cl. Br. at ¶¶47, 50, p. 17.) But this distracts from the main issue. The fact remains that the intelligence company is in possession of a stolen document. Either a hacker stole it from CLAIMANT's servers in the data breach, or one of RESPONDENT's former employees illegally transferred a document that did not belong to him or her.

Whatever the source, the intelligence company could only have attained this file through illegal means and now CLAIMANT wants to pay this unidentified criminal for their efforts.

1. International Tribunals Exclude Illegally Obtained Evidence When Following the IBA Rules for the Taking of Evidence

51. CLAIMANT misunderstands its evidentiary burden under the IBA Rules. CLAIMANT argues that because Article 3.1 requires a party to supply "all [d]ocuments" on which it relies it is as if the tribunal must turn a blind eye to how it is obtained. (Cl. Br. at ¶ 49, p. 17.) But this is the exact opposite of an evidentiary "carte blanch." Article 3.1 means that each party is responsible for its own evidence; it does not grant an absolute right to present whatever it wishes. A tribunal is still able to create limits on what it will hear and what it will not.

52. Furthermore, the IBA Rules that CLAIMANT cites allow for the exclusions for whole swaths of categories of evidence. (*See* IBA Rules, Art. 9.) One provision in particular, Article 9.2(g), allows exclusions for illegal evidence based on "fairness" and the principle of "equality of arms." (O'MALLEY at ¶¶ 9.115 to 9.124.)

53. Multiple ICSID tribunals have refused to admit evidence that was obtained illegally. The case that perhaps matches the present situation the most is *Methanex*. The Canadian investor sought to admit evidence it had acquired after trespassing on the other party's premises and stealing their documents. (*Methanex* at ¶ 55.) The tribunal held that the investor exhibited a "reckless indifference" for how the illegal manner in which the information was acquired and therefore the tribunal refused to admit the stolen documents into evidence. (*Id.*)

54. In our case, there was a similar, digital trespass that was likely the source to the intelligence company. As a result of this trespass, a middleman (the intelligence company) is now in possession of RESPONDENT's information. Given the suspicious reputation of the intelligence company, its refusal to disclose its source, and the fact of the recent data breach, CLAIMANT would be showing a similar reckless indifference to the evidence's illegality if it sought to admit it into evidence.

55. Other tribunals have adopted the holding in *Methanex* and found that illegal evidence can and should be excluded. (*Libananco Holdings*; *EDF*.) The tribunal in EDF grounded its decision specifically on the requirements of good faith and the procedures required by Article 9.2(g) of the IBA Rules. (*EDF* at ¶ 47.) Thus, if the Tribunal uses

the IBA Rules as guidance for the taking of evidence, it would be consistent with its rules and to exclude this illegal evidence based on procedural fairness and equality of arms.

2. National Courts Exclude Illegally Obtained Evidence

56. This concept in international law stems from common practice in domestic systems. National courts do not take illegally obtained evidence lightly. In the United States, courts will exclude evidence that was procured illegally. (*Weeks*; *Mapp*.) The doctrine is commonly called the "fruit of the poisonous tree" saying that any "fruit" or evidentiary byproduct of an illegal action should not be heard in court because a lawful action would not have revealed that information. It is seen as a way to vindicate the rights and protections offered by the law. This same "exclusionary rule" is used in Canada, where the Supreme Court of Canada consistently denies evidence obtained in violation of the law. (*See* Skinnider.)

57. If the strong stance on the national level is any indication of its seriousness, the national courts' treatment of illegal evidence should persuade this Tribunal of the proper course to follow.

3. The Information is Not in the Public Domain

58. CLAIMANT argued that it is entitled to submit the evidence because the evidence is already in the public domain. (Cl. Br. at ¶ 49, p. 17; IBA Rules, Art. 3.) This is not the case with RESPONDENT's Partial Interim Award because the information is not universally available. (*See* Merriam-Webster, "Public domain" means "property rights that belong to the community at large, are unprotected . . . and are subject to appropriation by anyone.") The information began in private hands and, for the moment, remains in the private (unclean) hands of the intelligence company.

59. This is unlike the case in *Caratube* where the contested evidence was already available to the general public on the internet via Wikileaks, where anyone could access it. Whereas here, the intelligence company is not interested in reporting information to the public at large and will only sell the confidential information to the highest bidder. The information remains in its possession until a client pays them for it.

60. Since this information has not been released to the public at large, it has not become a public document or part of the public domain and there is no reason why the Tribunal should let it come to light here.

4. Policy Considerations In An Increasingly Digital World Call For Excluding Evidence Obtained Though Hacking Or Some Other Illegal Transfer

61. This Tribunal should not be seen as encouraging parties to gather evidence through illegal channels, such as hacking, in order to build its case.

62. Scholars have warned that "international tribunal[s] must be very sensitive to the provocativeness of an unlawful gathering of evidence and the consequences it may precipitate." (Reisman & Freedman at 738.) Hearing such evidence could be seen as a "[r]etroactive validation" that "could encourage many more interventions." (*Id.* at 752; *see also* Peiris.)

63. Data security is already an issue in international arbitration, where so much of the interactions between parties, counsel, and members of the tribunal happen on the digital plane. Because of the risks of exposing a party's confidential information through these online interactions are so high, practitioners have begun to develop guidelines for digital safeguards. (*See* ICCA-NYC.) These practitioners warn that "[a]rbitration proceedings are not immune to increasingly pervasive cyberattacks against businesses, law firms, governmental actors . . . and other custodians of large electronic information repositories" such as arbitral institutions. (Draft Cybersecurity Protocol for International Arbitration at 3).

64. If the award really was disclosed as a result of the illegal hack, this Tribunal should not be seen as turning a blind eye to unlawful data collection. By admitting the stolen information into evidence this Tribunal could be setting a dangerous president that puts more parties, institutions, and tribunal at risk that their proceedings will be used as a target for digital highwaymen that will steal information and then sell it to the highest bidder to be used against those parties in other proceedings. The use of illegal evidence should not be taken lightly and this Tribunal can set an example of zero tolerance for illegal data collection from a concurrent commercial proceeding.

5. Excluding the Evidence Does Not Deprive CLAIMANT Of Its Opportunity to Present Its Case

65. CLAIMANT contends that not admitting the evidence "would take the opportunity of presenting the case appropriately away from [CLAIMANT] and violate his right to access justice." (Cl. Br. at ¶ 103, p. 29.) It is true that the lex arbitri ensures that "each party shall be given a full opportunity to present its case." (UNCITRAL Model Law, Art.

18). But to allow one party to use illegal means to steal information from an opponent goes far beyond a reasonable "opportunity" to present a legitimate case.

66. Admitting the illegally obtained evidence would cast an unnecessary shroud over these proceedings, and it would give CLAIMANT beyond a full opportunity to present its case. This Tribunal should not take the chance and risk the enforceability of the award for set aside by allowing such an imbalance in the presentation of evidence. Thus, for procedural fairness and for the enforceability of the final award, the illegally obtained evidence must not be admitted.

III. CLAIMANT IS NOT ENTITLED TO AN ADAPTION UNDER CLAUSE 12 OR CISG ARTICLE 79

A. CLAIMANT may not obtain an adaptation of the contract under Clause 12 of the contract

67. Clause 12 of the contract states that the "[s]eller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." (R. at 14.) For the following reasons, CLAIMANT is not entitled to an adaption under this clause.

1. The Imposition of the Equatorianian tariffs do not constitute a hardship

68. CLAIMANT argues that it is entitled to an adaptation because the Equatoriana's imposition of tariffs constitutes a hardship which falls under the last clause of Clause 12 of the contract. (Cl. Br. at 23). However, the imposition of the tariffs do not fall within the meaning of Clause 12 because they do not constitute a hardship and were foreseeable due to commonplace CLAIMANT's expertise and commonplace economics.

a. a. CLAIMANT'S shipping and delivery expertise in the industry leads a reasonable person to believe it could foresee tariffs and take necessary precautions

69. Furthermore, CLAIMANT accepted DDP delivery on the basis that they were more experienced in the shipping and delivering of frozen semen and in import and export documentation. (R. at 11-12.) If CLAIMANT is so knowledgable in this industry, then it is only reasonable to assume that it knows the commonality of the imposition of tariffs.

70. Tariffs and other non-tarrif trade barriers are becoming more commonplace but suppliers can respond in numerous ways to protect themselves. (BakerMackenzie.) Some of the recommended ways are through tariff classification review, careful contract drafting, force majeure clauses, or hardship clauses. (BakerMackenzie.) In terms of the hardship clauses, "[b]usinesses should consider expanding the scope of a hardship clause to allow for higher tariffs." (BakerMackenzie.) CLAIMANT, despite its supposed expertise, took none of these precautions although all were readily available to them.

71. CLAIMANT had the opportunity to expressly state that it did not want to be responsible by simply expanding the scope of Clause 12 of the contract. However, regardless of foreseeability, it did not expressly add tariffs into the clause. (R. at 14.) In international agreements, it is "worth being highly specific in the change in certain circumstances." (EuroJuris at 3.) For instance, in England and France, a "hardship clause simply makes the position clearer and spells out in advance what will happen if an unforeseeable situation arises." (EuroJuris at 2.) Here, CLAIMANT did not expressly provide for imposition of tariffs and therefore, no adaptation is required.

b. Tariffs and market fluctuations are commonplace and foreseeable

72. Much of the recent case law also provides that circumstances like these are foreseeable. Tribunals have rejected all of the following as circumstances that do not constitute hardship and are instead deemed foreseeable: "dramatic changes in market prices for products; unfavorable general economic circumstances in a country; currency fluctuations, even severe; failure of a central bank to grant authorization to pay in foreign currency when foreign exchange control regulations were in place at the time of contracting; and armed hostilities between countries with a history of antagonism." (FUCCI at 18.)

73. The tribunal in the "Himpurna case suggest[ed] strongly that the economic crisis in Indonesia beginning in 1997 was not unforeseeable." (FUCCI at 18.) Like the Himpurna case, the economic changes here, regardless of what they were a result of, were foreseeable.

74. In the CMS Gas case, there was "supposed to be a general adjustment of tariffs every five years for the purpose of maintaining the real dollar value of the tariff." (FUCCI at 13.) However, during the life of a contract between an American investor and the

Argentine government, these adjustments did not take place. In rejecting Argentina's hardship argument, [the tribunal] was in fact endorsing the view that the risk of events was assumed by the Government." (FUCCI at 14.) one of the exceptions to the applicability of hardship articulated in the UNIDROIT Principle. Further, "the tribunal also found that the events that had occurred in Argentina were foreseeable, meaning that the unforseeability condition of the application of the doctrine was not met." (FUCCI at14.) Similarly here, the changing economic conditions were foreseeable.

c. CLAIMANT foresaw government action could create fluctuations n price of performance that far exceeded the cost of this tariff

75. First, occurrences like Equatoriana's tariff that increase a seller's costs of performance are entirely foreseeable. This was demonstrated by CLAIMANT's own experience. CLAIMANT, in an effort to avoid certain situations that had previously hurt its farm, sought to limit its liability. (R. at C4.) The reason CLAIMANT wanted this protection is because of a past deal where a "strict new health and safety requirement" was instituted and caused CLAIMANT to increase spending by 40% of the sales price for further testing. (R. at 58.) These costs were health and safety related and as such, CLAIMANT wished to avoid future such costs. Respondent argues that the tariffs had a purported safety justification which could technically fall under "health and safety requirements." (R. at 14.) Even so, the 30% increase in price does not come close to reaching the level of 40% which was set by CLAIMANT itself and therefore, no adaptation is required.

76. However, this tariff was not a health and safety requirement like the one mentioned before. It was clearly a retaliatory tariff instituted by Equatoriana as a response to Mediterranean tariff. While Mediterraneo's tariff may have had a health or safety justification, this tariff was simply in response and had no health and safety basis.

2. Clause 12 does not allow for an adaptation of the contract

77. CLAIMANT argues the Latin maxim Clausula rebus sic stantibus applies here. (Cl. Br. at 28.) However, this maxim is not dispositive for two reasons. First, "rebus sic stantibus is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts." (FUCCI at 21.) This theory ought to be construed narrowly as to avoid applying it to cases without a compelling reason to do so. Second, "[c]aution is especially called for, moreover, in international transactions where it is generally much less likely that the parties have

been unaware of the risk of a remote contingency or unable to formulate it precisely. (FUCCI at 21.)

78. Here, there is no compelling reason to adapt the contract under this theory because the parties expressly listed the reasons for possible adaptations and this foreseeable change was not one of them. (R. at 14.) Although CLAIMANT argues that the it was the intent of the parties to include an express adaptation, one was not included in the final version of the contract even though both parties had access to all of the previous drafting documents and conversations. (R. at 55.)

3. CLAIMANT assumed responsibility by accepting the terms of a DDP delivery

79. CLAIMANT accepted the responsibility associated with a DDP delivery because it claimed that more expertise and knowledge than RESPONDENT to carry out this delivery successfully. (R. at 11-12.) "'Delivered Duty Paid' means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination." (INCOTERMS.)

80. Furthermore, "The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities." (INCOTERMS.) This means that CLAIMANT bears the risks associated with a full and complete delivery. Here, that included import tariffs. While CLAIMANT stated that it was not willing to bear further risks, this intent was not placed in the final contract. (R. at 12, 14.) Further, this intent was further explained to refer to health and safety regulations such as testing on animals due to disease. (R. at 12, 58.)

81. CLAIMANT could have also contracted out of this liability by using a different form of delivery. For instance, DAP ("Delivered at Pace") would have limited CLAIMANT's obligations. "DDP is essentially the same as DAP, but with the added obligation for the seller to obtain all official authorizations, carry out all customs formalities and pay all duties, taxes and other charges payable upon import, including VAT. The term represents the maximum obligation for the seller." (Malfliet at 167.) Even the guidance notes for DDP advise sellers not to use DDP if it (1) "directly or indirectly to obtain import clearance" or (2) wishes for the buyer to "bear all risks and costs of import clearance." (Malfliet at 167-168.) Therefore, here, CLAIMANT knowingly bore

the risks associated with a DDP delivery and it did not attempt to contract out of the foreseeable risk of international tariffs.

82. Because the tariffs were not only foreseeable but did not constitute a hardship under clause 12 of the contract, CLAIMANT is not entitled to $125 million USD or an adaptation of the contract. Further, because CLAIMANT willingly bore the risks associated with a DDP delivery, RESPONDENT is not responsible for the 30% increase or for adapting the contract.

B. CLAIMANT may not obtain an adaptation of the contract under Article 79 of the CISG

83. Article 79 states that "[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." (CISG, Art. 79(1).) However, for the reasons laid out below, Article 79 cannot provide relief here.

84. Firstly, the parties' agreement to include Clause 12 in the contract constitutes a derogation from the application of the CISG in matters relating to hardship. (R. at 14.) Consequently, CLAIMANT may not now invoke the protections of Article 79 simply because CLAIMANT cannot satisfy the requirements of Clause 12. Even if Article 79 were applicable here, it is an extraordinary remedy for which these circumstances do not qualify. Further, CLAIMANT's attempt to use the UNIDROIT Principles to inject the right to adapt contracts into Article 79 fails: under the law of Danubia, which governs the interpretation of the arbitration agreement and the arbitrators' powers, contract adaptations are permissible only "if authorized." (R. at 61.) Because the contract contains no such authorization, and because these circumstances do not qualify as a hardship under UNIDROIT Principle Article 6.2.2, reference to the UNDROIT Principles does not allow CLAIMANT to obtain relief under Article 79.

85. CISG Articles 28, 50, and 62 are inapplicable under these circumstances, and the principle of good faith and fair dealing does not require RESPONDENT to agree to unreasonable modifications that cut against its self-interest. Lastly, evidence of RESPONDENT's legal positions in a separate arbitration, involving a different party and unique factual circumstances, is entirely irrelevant to the current proceedings and

cannot bind RESPONDENT in this dispute. Thus, CLAIMANT is not entitled to $1,250,000, or any other amount under an adaptation of the contract, and this tribunal should order CLAIMANT to pay RESPONDENT's arbitration costs.

1. Clause 12 constitutes a derogation that precludes the application of Article 79

86. Under Article 6 of the CISG, "[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." (CISG, Art. 6.) CLAIMANT argues that the inclusion of Clause 12 was not a derogation because there was no express mutual agreement to exclude Article 79. (Cl. Br. at 24-25.) CLAIMANT's position is at odds with both scholarship and case law.

87. First, parties' ability to derogate under Article 6 has "virtually no limitation" and "is to be taken literally" (Winship at 1-32.) "Article 79 is not excepted from the rule in [A]rticle 6 empowering the parties to 'derogate from or vary the effect of' provisions of the Convention. Further, tribunals have rejected CLAIMANT's argument that the inclusion of Clause 12, a clause covering hardship and force majeure, was insufficient to show mutual agreement to exclude Article 79. (Cl. Br. at 24-25.) Multiple decisions have "construed [A]rticle 79 in tandem with force majeure clauses in the parties' contract" and found that the inclusion of the clause was a derogation under Article 6. (UNCITRAL Digest.)

88. For example, in a 2012 case before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, a seller sought relief under Article 79 from failure to deliver four shipments of corn due to a change in domestic legislation that rendered it unable to obtain the required export license. (*Corn Case*.) The tribunal "found that Article 79 CISG has the character of a force majeure clause", but that the parties also had included a force majeure clause in their contract. (*Corn Case*.) Applying Article 6's rule on derogations, the tribunal "noted that the provisions of the contract should prevail over Article 79(1)." Similarly, in the *Automatic Diffractameter* case, the tribunal found that, where the parties had a force majeure clause, Article 79 was unavailable, and the parties were limited to the circumstances listed in the clause. (*Automatic Diffractameter*) Similarly here, the inclusion of Clause 12 excludes application of Article 79. (R. at 14.)

89. Whether the intention to derogate from the CISG must be express or may be implied has been debated, but general agreement is that the parties' intent to derogate is to be

determined using the standards of Article 8. (Winship at 1-34.) CISG Article 8 provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was" and that "[i]n determining the intent of a party . . . due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." (CISG, Art. 8.)

90. Here, the parties' mutual intent to derogate was both express and implied. The decision to include Clause 12, which covers hardship and force majeure situations and was requested by CLAIMANT, in a contract already governed by the provisions of the CISG, was an express derogation from the general language of Article 79 in favor of the specific provisions of Clause 12. (R. at 12, 14.) Even if this tribunal finds that this was not an express derogation, the intent to derogate can nonetheless be implied by the inclusion of Clause 12, a clause covering the same hardship subject matter as Article 79, but with terms diverging from Article 79. (R. at 14.)

2. Even if there was no derogation, Article 79 does not provide relief under these circumstances

a. Article 79 is a rarely-applied exception to the pacta sunt servanda principle and the price increase was an ordinary market fluctuation that does not qualify as an "impediment" beyond a party's control

91. First, it must be noted that Article 79 is an extraordinary remedy: CISG Advisory Council Opinion No. 7 says that "[a]t the time this opinion is issued, Article 79 has been invoked in litigation and arbitration by sellers and buyers with limited success . . . [and] no court has exempted a party from liability on the grounds of economic hardship." (CISG-AC Opinion no. 7, cmt. 31.) Indeed, the principle of pacta sunt servanda, that "agreements must be kept," while not explicitly mentioned anywhere in the CISG, is so pervasive throughout not only the CISG, but international contract law generally, that scholars have said it is not so much a rule of lex mercatoria, but "the fundamental principle of the entire system." (Mustill.) The CISG Advisory Council itself states that the legislative history of Article 79 provides "ample support for the proposition that the Convention does not favor an easy exemption from nonperformance."

92. Courts and tribunals have been unequivocal that the seller bears the risk of performance, even if performance becomes more onerous. In the Chinese Goods case, the tribunal held that actions by third parties that increase the cost of performance "are not an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility, or excessive onerousness" and that "the risk . . . is to be borne by the seller, also if the circumstances become more onerous." (*Chinese Goods*.)

93. Regarding changes affecting the profitability of performance, the CISG Advisory Council cautions that "[i]n most cases market fluctuations are not to be considered an 'impediment' under CISG Article 79, because such fluctuations are a normal risk of commercial transactions in general." (CISG-AC Opinion no. 7, cmt. 31, 39.) Parties also assume the risk that they may suffer an unexpected economic loss in a transaction, as shown in Vital Berry Marketing v. Dira-Frost. In that case, the court held that a large price drop in the raspberry market did not exempt the buyer under Article 79 because "[f]luctuations of prices are foreseeable events in international trade and far from rendering the performance impossible, they result in economic loss well included in the normal risk of commercial activities." (*Vital Berry*.) Similarly, in the *Steel Ropes* case, the buyer tried to invoke Article 79 to avoid a contract when the market for steel ropes worsened, the U.S. dollar value increased, and the construction business declined. (*Steel Ropes*.) The tribunal held that these circumstances "present part of the commercial risk that is carried by each party to the contract" and "do not correspond to the requirements outlined in Article 79 of the CISG." (*Steel Ropes*.)

94. While CLAIMANT argues that an increased cost of performance qualifies it for relief under Article 79, it has not shown that this is anything other than a "normal risk" of such commercial transactions, which it should have anticipated and planned for. (Cl. Br. at 26.) RESPONDENT made clear from the start of negotiations that it was new to the practice of artificial coverage and was relying on CLAIMANT's "much greater experience in the shipment of frozen semen": RESPONDENT was willing to pay for the more expensive delivery DDP in order to capitalize on CLAIMANT's expertise. (R. at 9, 11.) The evidence shows that such a tariff imposition, while unlikely, was not without precedent. The article "The end of open markets?" by Peak Business News notes Mediterranean President Bouckaert indicated his intentions for a "protectionist approach" to foreign agricultural products during his election campaign and that Equatoriana has in the past used direct retaliatory measures in response to such tariffs. (R. at 15.) RESPONDENT was counting on CLAIMANT, an experienced market

participant, to foresee and account for such possibilities during the price negotiations. CLAIMANT has not explained how the tariff falls outside the normal, foreseeable risk of a commercial loss it assumed upon entering into the transaction.

b. A market fluctuation of 30% is not an "insurmountable obstacle" entitling CLAIMANT to relief under Article 79

95. Even if the tariff imposition was unforeseeable to CLAIMANT, it is not a large enough price increase to qualify as an impediment under Article 79. The CISG Advisory Council stated that only an "insurmountable obstacle" qualifies as an "impediment" within Article 79. (CISG-AC Opinion no. 7, cmt. 28.) When the Council hypothesized about a "what type of factual scenario . . . would merit relief," it proposed an 80% devaluation in a transaction's applicable currency. (CISG-AC Opinion no. 7, cmt. 33.)

96. The relevant case law also supports the view that the 30% price increase here falls far short of the Article 79 threshold. In Scafom International BV v. Lorraine Tubes S.A.S,. one of the only cases where a court has granted relief under Article 79 due to a market change, the price of steel unexpectedly rose by 70%. (*Scafom*.) But the court in the Iron Molybdenum case held that even a 300% increase in the market price for the alloy was insufficient to apply Article 79. (*Iron Molybdenum*.) Perhaps most on-point, in the Chinese "FeMo" Alloy case, a price increase of 30% was inadequate to constitute a "hardship" under Article 79. (*"FeMo" Alloy*.) CLAIMANT quite simply cannot point to any authority for its contention that a 30% price increase merits application of Article 79.

3. The tariff is not a hardship under Article 6.2.2 of the UNIDROIT Principles because CLAIMANT could have reasonably taken the possibility of such a tariff into account, and even if it were, the tribunal may not adapt the contract under UNIDROIT Article 6.2.3 because there has been no express empowerment as required by Danubian law

97. CLAIMANT argues that it is entitled to an adaptation because the tariff imposition is a hardship under the UNIDROIT Principles. (Cl. Br. at 34-35.) In order for events to constitute a hardship, Article 6.2.2 of the UNIDROIT Principles requires that the events in question "could not have reasonably been taken into account by the disadvantaged party at the time of the conclusion of the contract." (UNIDROIT, Art. 6.2.2.) As discussed previously, the pro-protectionist stance of Mediterranean presidential candidate Bouckaert regarding agricultural products was well-known, and Equatoriana

had enacted a retaliatory tariff previously. (R. at 15.) RESPONDENT was paying a higher shipment fee in order to capitalize on CLAIMANT's extensive experience with the shipment of frozen semen and foreknowledge of the accompanying risks, and a reasonable party with CLAIMANT's experience and in CLAIMANT's position would have taken the possibility of such tariffs into account. (R. at 11.) Because CLAIMANT did not do so, the Equatorianan tariff is not a hardship under Article 6.2.2.

98. But even were these circumstances to qualify as a hardship under Article 6.2.2, this tribunal still could not adapt the contract under Article 79 and has no authority to invoke Article 6.2.3 as demanded by CLAIMANT. (Cl Br. at 35-36.) CLAIMANT cites no authority for its contention that "Art. 79 CISG itself presupposes . . . that a judge can adapt a contract" by applying the 'reasonable person' standard", and the applicable scholarship does not support that assumption. (Cl. Br. at 28.)

99. Additionally, as explained above, Danubian law governs the interpretation of the arbitration agreement and the accompanying powers of the arbitrators. (R. at 31.) Danubian law contains an important exception in its adoption of UNIDROIT 6.2.3: it requires an express empowerment in order for arbitrators to adapt a contract that is the subject of the dispute. (R. at 31, 60.) Because RESPONDENT wanted to avoid even the appearance of such an empowerment, it purposefully modified the "broad wording" of the HKIAC Model Clause, removing any reference that could be viewed as an empowerment. (R. at 31, 33.) Accordingly, as there has been no express empowerment, this tribunal has no power to adapt the contract.

4. CLAIMANT misapplies Articles 50, 28, and 62, and a party's claim in a still-pending separate case involving different parties and circumstances cannot bind that party in a separate dispute

100. CLAIMANT argues that the increased cost of performance caused by the tariff entitles it to a "price adjustment" under CISG Article 50. (Cl. Br. at 28-29.) Article 50, however, gives the buyer the remedy of a price reduction when non-conforming goods have been delivered: it does not give the seller any kind of remedy whatsoever, and does not apply where, as here, no party contests that non-conforming goods were received. (CISG, Art. 50.) Although CLAIMANT argues that the theory behind Article 50 "can be extended as a general principle to provide a remedy for the Seller as well", it lists no case where a court has done so. (Cl. Br. at 29.) Further, RESPONDENT agreed to the applicability of the CISG as it is to the sales agreement, not to a hypothetical version entitling each party to a price renegotiation every time there is a market change. No

party would ever have fair warning of their obligations and liabilities under CLAIMANT's amorphous view of the CISG.

101. CLAIMANT also argues that CISG Article 28 "requires" this tribunal to order a price increase as specific performance. (Cl. Br. at 30.) Although CLAIMANT states that "Article 28 allows for specific performance", Article 28 actually says that "[i]f, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." (CISG, Art. 28.) CLAIMANT has simply not shown that either Clause 12 or Art. 79 entitle CLAIMANT to a price adaptation. RESPONDENT rendered timely payment for the three shipments: its performance, required under the contract, is complete. (R. at 20.) Further, the specific performance CLAIMANT seeks is an order to adapt the contract. (Cl. Br. at 30.) Article 28 expressly says a court does not have to do this unless it would do it under its own law. (CISG, Art. 28.) The law of the seat is Danubia, which, due to the lack of an express empowerment authorizing adaptation, would not allow such an order. (R. at 31, 60.) Thus, by its own terms, Article 28 is inapplicable here.

102. CLAIMANT finally argues that Article 62 provides relief because it gives C the right to "require the buyer to perform its obligations, of which the obligation to pay the price is most important." (Cl. Br. at 31.) However, RESPONDENT has paid the purchase price as agreed upon under the contract. (R. at 20.) CLAIMANT argues that because Ms. Napravnik "got the impression" after the phone call with Mr. Shoemaker that R had agreed to a price increase, Article 62 is applicable. (Cl. Br. at 32.) However, Mr. Shoemaker, a veterinarian in charge of RESPONDENT's racehorse breeding program, expressly stated that he did not have the authority to agree to a price adaptation, and that any such change was dependent upon whether the parties' contract authorized it. (R. at 36.) Ms. Napravnik's "impression" to the contrary was unreasonable and irrelevant: no adaptation was agreed upon, RESPONDENT has paid the contractual price, and Article 62 is also inapplicable here.

103. CLAIMANT could have argued that the RESPONDENT's position in the separate arbitration, namely that it was entitled to a price adaptation due to the imposition of Mediterranean tariffs, means it could not make a potentially contradictory argument here, under theories of either estoppel or the prohibition of inconsistent behavior. (R.

at 60.) However, even if the evidence from the separate arbitration were to be deemed admissible here, this argument would fail because both theories require that the other proceeding involve the same parties or their privies in order to bind a party to a particular position or set of facts. RESPONDENT's legal claims with respect to a different contract for a sale of different goods (a mare, not horse semen doses) with a different party are quite simply irrelevant to this current proceeding under any theory.

104. The prohibition of inconsistent behavior provides that "[a] party cannot set itself in contradiction to its previous conduct vis--à-vis another party if that latter party has acted in reasonable reliance on such conduct, when the conduct of one party has led to raise legitimate expectations on the part of the other party, the first party is barred from changing its course of action to the detriment of the second party." (Neumann.) But in order for that principle to be applicable to the present dispute, RESPONDENT would have had to claim in the other arbitration that it was entitled to an adaptation "vis-à-vis" CLAIMANT, and CLAIMANT must have acted in "reasonable reliance" on that conduct. Yet RESPONDENT made no claims whatsoever regarding CLAIMANT in the other arbitration because CLAIMANT was not a party. (R. at 60.) Further, RESPONDENT had every reason to believe those proceedings were confidential, and so CLAIMANT could not have reasonably relied in the present dispute on any position taken by RESPONDENT in the other arbitration. (R. at 61.)

105. Regarding estoppel, that doctrine has two generally accepted variations: res judicata and collateral estoppel. "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." (*Parklane Hosiery*.) Collateral estoppel also requires that a party from the first proceeding assert a claim against the same party or a party in privity. (*Parklane Hosiery*.) RESPONDENT here is not bound by res judicata, both because there has been no judgment on the merits in the prior arbitration and because the current arbitration does not involve "the same parties or their privies" (CLAIMANT makes no claim or argument that it is in privity with the party in the prior arbitration). (R. at 60.) CLAIMANT likewise cannot claim collateral estoppel here because, again, CLAIMANT was not a party or privy of the party in the prior arbitration and there has been no final judgment on the merits. (R. at 60.) Without a final judgment, there was no

determination of whether the issue of RESPONDENT's right to a contract adaptation under UNIDROIT 6.2.3 was actually litigated and necessary to the outcome of the prior arbitration. In any event, the claims relate to different contracts for the sale of different goods in different countries with different parties: CLAIMANT's strained view of the legal principles involved cannot bind RESPONDENT here.

106. Even were the same contract to be the subject of both arbitrations, tribunals have been reluctant to apply estoppel where the proceedings occur in different countries and in different legal contexts. In *Hoechst GmbH v. Genentech, Inc.*, Genentech claimed that co-Claimant (and Hoechst affiliate company) Sanofi Deutschland was estopped from contending in that arbitration that it was not entitled to use inventions covered by two U.S. patents, while in separate litigation in the United States Sanofi Deutschland claimed that it was so entitled. (*Hoechst GmbH*.) The sole arbitrator found that he "need not decide whether there is indeed inconsistency between Sanofi Deutschland's positions in the arbitration and in the patent litigation" because he was "solely concerned with the arbitration" and "the alleged inconsistent behavior is the behavior . . . in a different legal context and under a different applicable law." (*Hoechst GmbH.*) Applying that reasoning here, the fact that the prior arbitration occurred in Mediterraneo and under Mediterranean law argues against any application of estoppel to the present arbitration occurring in Danubia, where Danubian law covers interpretation of the arbitration agreement. (R. at 60.)

5. The principle of good faith and fair dealing does not require a party to make commercially unreasonable concessions unsupported by the parties' contract

107. CLAIMANT could also that argued that "good faith and fair dealing" require RESPONDENT to agree to an adaptation that redistributes this loss. Yet "[g]ood faith does not require the abandoning of self-interest as the governing motive in contractual relations." (Keily.) Nor does good faith and fair dealing impose upon a party a duty to renegotiate a contract every time a market price fluctuates, or a party fails to plan for a change in the cost of performance. "[I]n cases of hardship a duty to renegotiate should not be advocated" because renegotiation "has to be based on willingness and trust" and "cannot be forced upon the parties by coercion." (Schwnezer.) Additionally, "[c]ases of hardship involve such complex fact situations and evaluations that it can hardly be determined whether a party refusing or breaking off negotiations acted in bad faith." (Schwenzer.)

108. While debates about the precise meaning of "good faith" abound, "[t]he duty of good faith can be defined as an expectation and obligation to act honestly and fairly in the performance of one's contractual duties." (Powers.) It does not compel RESPONDENT to relieve CLAIMANT from ordinary market risks: if it did, no party would have any incentive to exercise prudent business judgment and all parties might soon find themselves in as dire financial straits as CLAIMANT. (R. at 17.) RESPONDENT made timely payment and acceptance of the dose shipments. (R. at 5-6.) It has performed its contractual obligations and has no further duty to CLAIMANT.

IV. STATEMENT OF RELIEF SOUGHT

In light of the above RESPONDENT requests the Arbitral to:

1) dismiss CLAIMANT's claim as inadmissible for a lack of jurisdiction and powers;
2) reject CLAIMANT's claim for additional remuneration in the amount of US$ 1,250,000;
2) order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

(signed)

/S/	/S/	/S/	/S/
CARSON BENNETT	ALEXIA CHAPMAN	RYAN FULLER	ASHLEY GEBICKE
/S/	/S/	/S/	/S/
GINSEY KRAMARCZYK	ALLISON MATHER	CLAIRE SCHALIN	TRACY SMITH