16TH ANNUAL WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On Behalf Of:	Against:
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
Rue Frankel 1 Capital City Mediterraneo	2 Seabiscuit Drive Oceanside Equatoriana
CLAIMANT	RESPONDENT

KARIM IBRAHIM.CASSANDRA KNIGHT-GRULL
LAUREN MEATH .PAUL SUTTON .ARTEMIS WILKINSON

Index of Abbreviations

Abbreviation	*Explanation*
AA	Arbitration Agreement (i.e. the agreement contained in clause 15 of the SA)
Art. / Arts.	Article / Articles
Cl. Ex.	CLAIMANT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
No.	Number
p. / pp.	Page / Pages
para. / paras.	Paragraph / Paragraphs
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
q. / qq.	Question / Questions
Resp. Ex.	RESPONDENT's Exhibit
RS	RESPONDENT's Submission (i.e. the submission made by RESPONDENT in the other arbitration)
USD	United States Dollar
SA	Frozen Semen Sales Agreement

INDEX OF AUTHORITIES

STATUTES AND RULES

ABBREVIATION	CITATION
CISG	United Nations Convention on the International Sale of Goods
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC Rules	2018 Hong Kong Administered Arbitration Rules
IBA Rules	2010 International Bar Association Rules on the Taking of Evidence in international Arbitration
Incoterms® Rules	International Chamber of Commerce, Incoterms 2010 Rules
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

COMMENTARY

ABBREVIATION	CITATION	CITED IN

Berger 1993	Berger, K.P., 1993. *International Economic Arbitration*. Kluwer Law and Taxation Publishers.	Para. 23.
Berger 2010	Berger, K.P., 2010. T*he Creeping Codification of the New Lex Mercatoria*. 2nd edition. Kluwer Law International.	Para. 54.
Berger/Arntz 2016	Berger, K.P. and T. Arntz. (2016) 'Good Faith as an "Organizing Principle" of Common Law'. *Arbitration International,* 32.	Para. 54.
Bermann 2017	Bermann, G., 2017. *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts.* Springer.	Para. 29.
Blair/Gojkovic 2018	Blair, C and E.V. Gojkovic. (2018). 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence'. *ICSID Review*, 33(1), pp. 235–259.	Para. 116.
Born 2014	Born, G. 2014. *International Commercial Arbitration.* 2nd edition. Kluwer Law International.	Para. 18, 52.
Born 2015	Born, G. 2015. *International Arbitration: Law and Practice,* 2nd edition. Kluwer Law International.	Paras. 11, 26.
Brunner 2009	Brunner, C. 2009. *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration.* Kluwer Law International.	Para. 164.
Girsberger/ Zapolskis 2012	Girsberger, D and P Zapolskis. (2012). 'Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption'. *Jurisprudencija Jurisprudence,* 19(1).	Para. 136.
Goldman 1980	Goldman, B. (1980) 'La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives'. *Travaux du Comité français de droit international privé*.	Para. 26.
Hilgard/Bruder 2014	Hilgard, M, and A Bruder. (2014). 'Unauthorised Amiable Compositeur?'. *Dispute Resolution International*, 8(1), pp. 51-62.	Para. 74.
Lookofsky 2012	Lookofsky, J. 2012. *Convention on Contracts for the International Sale of Goods (CISG)*. Kluwer Law International.	
Mehren/Salomon 2003	Mehren, G and C Salomon. (2003). 'Submitting Evidence in an International Arbitration: The Common Lawyers Guide'. *Journal of International Arbitration,* 20(3).	Para. 92.
Miller/Perry 2013	Miller, A.D. and R Perry. (2013). 'Good faith performance'. *Iowa Law Review*, 98, pp. 689-744.	Para. 181.

Mustill/Boyd 2001	Mustill, M and S Crauford Boyd. 2001. *Commercial Arbitration.* 2nd edition, LexisNexis.	Para. 52.
Pilkov 2014	Pilkov, K. (2014). 'Evidence in International Arbitration: Criteria for Admission and Evaluation'. *Arbitration,* 80(2).	Paras. 92, 112.
Poudret/Beson 2007	Poudret, J and S Besson. 2007. *Comparative Law of International Arbitration.* Sweet & Maxwell.	Para. 17.
Primrose 2017	Primrose, B. (2017) 'Separability and stage one of the Sulamérica inquiry'. *Arbitration International*, 33(1).	Paras. 22, 68.
Redfern/Hunter	Redfern, A and M Hunter. 2004. *Law and Practice of International Commercial Arbitration.* Sweet & Maxwell.	Para. 20.
Reisman/Freedman 1982	Reisman, M and E Freedman. (1982). 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication'. *American Journal of International Law*, 76(4).	Para. 93.
Schlaepfer/Bärtsch 2010	Schlaepfer, A.V. and P Bärtsch. (2010). 'A Few Reflections on the Assessment of Evidence by International Arbitrators'. *International Business Law Journal,* 3.	Para. 84.
Schlechtriem 1986	Schlechtriem, P. 1986. *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods.* Manz.	Paras. 164, 171.
Schwenzer 2008	Schwenzer, I. (2008). 'Force Majeure and Hardship in International Sales Contracts'. *Victoria University Wellington Law Review,* 39, pp. 709-726.	Para. 136, 180.
Schwenzer 2010	Schwenzer, I. 2010. 'Part III Chapter V: Common Obligations of Seller and Buyer' In SCHWENZER, I. (ed.) *Commentary on the UN Convention on the International Sale of Goods (CISG).* Oxford University Press.	Paras. 164, 166, 178.
Schwenzer/Hachem2010	Schwenzer, I. and P Hachem. 2010. 'Part I: Sphere of application and General Provisions' In SCHWENZER, I. (ed.) *Commentary on the UN Convention on the International Sale of Goods (CISG).* Oxford University Press.	Para. 182.
Susler 2013	Susler, O. (2013). 'The English Approach to Compétence-Compétence'. *Pepperdine Dispute Resolution Law Journal*, 13(1), pp. 427-452.	Para. 10

Trakman 2008	Trakman, L. (2008). '*Ex Aequo et Bono*: Demystifying an Ancient Concept'. *Chicago Journal of International Law*, 8(2), pp. 621-642.	Para. 74.
Uçaryilmaz 2013	UÇARYILMAZ, T. 2013. 'Equitable Estoppel And CISG'. *Hacettepe Hukuk Fak Derg,* 3, pp. 161-178.	Paras. 171, 172, 178, 182.
Viscasillas 2011	Viscasillas, P. 2011. 'Chapter II: General Provisions' In Kröll, S., Mistelis, L. and P Viscasillas (eds.) *UN Convention on Contracts for the Sale of Goods (CISG) [Commentary]*. Verlag C. H. Beck oHG.	Para. 188.
Waincymer 2012	Waincymer, J. 2012. *Procedure and Evidence in International Arbitration*. Aspen Publishers.	Paras. 91, 110.

ARBITRAL AWARDS

ABBREVIATION	CITATION	CITED IN
AES Corporation v Argentine Republic 2017	*AES Corporation v Argentine Republic* 2017, ICSID Case No. ARB/02/17.	Para. 96.
Ahongalu Fusimalohi v. FIFA 2012	*Ahongalu Fusimalohi v FIFA* 2012, CAS 2011/A/2425.	Para. 115.
Caratube v. Kazakhstan 2012	*Caratube International Oil Company LLP v. The Republic of Kazakhstan* 2012, ICSID Case No. ARB/08/12.	Para. 116.
EDF v Romania 2013	*EDF (Services) Limited v Republic of Romania*, ICSID Case No ARB/05/13	Para. 115.
Giovanna a Beccara v Argentine Republic 2007	*Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* 2007, ICSID Case No. ARB/07/5.	Paras. 90, 102.
Methanex v United States 2005	*Methanex Corporation v United States* 2005, *Final Award on Jurisdiction and Merits,* 44 ILM 1345.	Para. 115.
Libananco v Turkey 2008	*Libananco Holdings Co. Limited v. Republic of Turkey* 2008, ICSID Case No. ARB/06/8.	Para. 115.

RosInvestCo UK v Russian Federation 2010	*RosInvestCo UK Ltd. v. The Russian Federation* 2010*,* SCC Case No. V079/2005.	Para. 115.
United Kingdom v Albania 1949	*Corfu Channel, United Kingdom v Albania* 1949*,* Judgment on Merits, ICJ GL No 1.	Para. 115.

COURT DECISIONS

ABBREVIATION	CITATION	CITED IN
AIB Group (UK) Ltd v Martin [2002]	*AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94 (United Kingdom)	Para. 75.
ALCOA v Essex Group, Inc, [1980]	*Aluminum Co. of America v. Essex Group, Inc.,* 499 F. Supp. 53 (W.D. Pa. 1980) (United States of America)	Para. 135.
Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings [2012]	*Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm)(United Kingdom)	Para. 19.
Associated Electric & Gas v European Reinsurance Co of Zurich 2003	*Associated Electric and Gas Insurance Services Limited v European Reinsurance Company of Zurich* DMC/SandT/03/06 (United Kingdom)	Para. 107.
BCY v BCZ [2016]	*BCY v BCZ* [2016] SGHC 249 (Singapore)	Para. 19.
Broadcasters Case 2008	OLG Celle (04.12.2008, 8 Sch 13/07), IPRspr 2008/207, 658	Para. 29.
Scafom International BV v Lorraine Tubes 2009	*Scafom International BV v Lorraine Tubes S.A.S* (C.07.0289.N) (Belgium)(2009)	Para. 59.
Sulamerica CIA Nacional de Seguros v Enesa Engenharia SA and others, 2012	*Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638 (United Kingdom)	Para. 22, 68.

Summary of Arguments

CLAIMANT has prepared this submission in accordance with the Arbitral Tribunal's orders in PO1 and presents its pleadings on the issues requested by the Tribunal in both procedural and substantive law. CLAIMANT contends that:

1. **The Tribunal has the jurisdiction and power to adapt the contract.**
    a. The Tribunal has the jurisdiction and power to hear and resolve this dispute by express conferral of the PARTIES in the SA under the HKIAC Rules.
    b. Mediterraneo law applies to this contract and under the law of Mediterraneo the Tribunal has clear power to adapt the contract. In the alternative, the Tribunal still holds the power to adapt the contract under the law of Danubia even when the AA is interpreted narrowly.
2. **CLAIMANT is entitled to submit evidence from RESPONDENT's other arbitration proceedings.**
    a. The Tribunal has the exclusive power to decide on the admissibility of evidence and the Tribunal should admit the evidence. The evidence is highly relevant to this proceeding and material to its outcome and there are no decisive or overriding grounds on the basis of which the evidence should be excluded.
3. **The Tribunal should adapt the contract and order payment to CLAIMANT of US$ 1,250,000.**
    a. CLAIMANT is entitled to this adaptation under both the terms of the SA itself and under the CISG. The unforeseen 30% tariff constitutes hardship; therefore, the SA hardship clause applies to it. DDP has been derogated from in the SA and does not include the tariff.
    b. Adaptation is also available to CLAIMANT via Art 79(5) CISG. Alternatively, an agreement to negotiate has been breached by RESPONDENT, and the PARTIES have not reached a successful conclusion to negotiations, it is therefore incumbent on the Tribunal to adapt the contract. RESPONDENT have also breached the Convention under Art 7(1) CISG. Further breaches by RESPONDENT entitle claimant under Art 61 CISG to seek adaptation as a remedy under Art 62 CISG.

CLAIMANT will demonstrate the factual and legal bases for these claims in this submission.

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

Introduction

1. Both PARTIES recognise the Arbitral Tribunal's jurisdiction to hear this dispute and have demonstrated a clear intention to submit disputes arising under the SA to an Arbitral Tribunal under the HKIAC Rules (*PO2 p. 61, para. 48*).
2. CLAIMANT argues that the Tribunal also has the power under the AA (clause 15 of the SA) and applicable principles of international law to resolve the dispute. With this power, the Tribunal can act to adapt the SA, to account for CLAIMANT's entitlement to an increase in purchase price to account for the hardship CLAIMANT suffered when it alone bore a 30% tariff on the final delivery of frozen semen.
3. The Tribunal's power to adapt is affirmed through application of either the law of Mediterraneo or the law of Danubia.
4. CLAIMANT submits three key arguments in support of this position.
5. First, that the SA and AA are governed and to be interpreted by the law of Mediterraneo. This is supported by the terms in the SA itself, and the contractual history including the drafting history of the SA between the PARTIES. An examination of these factors demonstrates that the law of Mediterraneo applies as:
    a. an implied choice between the parties to the SA;
    b. an implied choice in the pre-contractual negotiations; and
    c. the law which is most appropriate to the dispute.
6. Second, that under Mediterranean law, the Tribunal has clear power to adapt the contract under the UNIDROIT Principles and the CISG.
7. Third, that even if the Tribunal entertains RESPONDENT's argument that the law of Danubia governs the AA, the Tribunal still has the power to adapt the contract. This power is demonstrated through the SA itself, in line with the four corners rule, recognising that:
    a. The AA is not isolated from the SA. It must be interpreted with the contract as a whole;
    b. The Tribunal is expressly authorised under the AA to adapt the contract.

1. The Tribunal has the jurisdiction to hear and decide the dispute

8. Both PARTIES recognise the Arbitral Tribunal's jurisdiction to hear this dispute (*PO2 p. 61, para. 48*). What is in contention is whether the Tribunal holds the jurisdiction to decide the dispute (*Answer to the Notice p. 31, para. 12*) and the power to adapt the contract.
9. CLAIMANT submits that the Tribunal has clear jurisdiction to hear and decide on this dispute.
10. The compétence-compétence doctrine is recognised as a foundational principle of the modern law of arbitration (Susler 2013, p. 428). The rationale behind this doctrine is that the arbitral tribunal has the authority to determine its own jurisdiction to hear and decide on disputes. Article 19.1 of the HKIAC Rules, under which the PARTIES are bound, reflects the compétence-compétence doctrine, stating:

> *'The arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement.'*

11. Clause 15 of the SA reads that 'any dispute' arising out of the contract shall be referred to and finally resolved by the Hong Kong International Arbitration Centre. The term 'any dispute' is to be applied widely and extends to all disputes having any plausible factual or legal relation to the agreement made by the PARTIES (Born 2015, p. 92). The inclusion of this specific language in the clause provides the Tribunal with the jurisdiction to hear and decide on any arising out of the contract, including disputes of hardship.
12. Hereafter, CLAIMANT's submission that the Tribunal has the power to adapt the SA carries with it an implied understanding that the Tribunal has the jurisdiction to decide this dispute.

2. The law of Mediterraneo applies to the Arbitration Agreement

13. The law of Mediterraneo applies to the AA. Under this law the Tribunal has the power to adapt the contract to allow for an increase of the purchase price.
14. CLAIMANT and RESPONDENT both accept that no express choice of law was included in the AA itself (*Notice of Arbitration p. 7, para. 16*; *Answer to the Notice of Arbitration para. 14*). However, this does not equate to there being no choice of law to govern the AA.

a. The law of Mediterraneo, as it applies to the sales component of the Sales Agreement, is an implicit choice of law governing the Arbitration Agreement

15. The only clear law chosen by the PARTIES to govern the Sales Contract (clauses 1-14 of the SA) was the law of Mediterraneo. Therefore, it is to be implied that the law of Mediterraneo also governs the arbitration clause.
16. CLAIMANT submits three grounds in support of this:
    i. in the absence of an express provision, the law of sales agreements can be extended to the AA as an implied choice of law;
    ii. the doctrine of separability does not isolate the AA from this implied choice of law; and
    iii. the seat of arbitration is not an indication of the AA's governing law.

i. The law of the Sales Agreement is an implied choice of law that governs the interpretation of the Arbitration Agreement

17. The Tribunal should regard the choice of law for the Sales Contract as equally applicable to the AA (Poudret/Beson 2007, para. 178). Clause 14 of the SA states that the agreement 'shall be governed by the law of Mediterraneo'. There is no other express mention to governing law in the contract.
18. The implication from this should be that the express choice of law provision of clause 14 extends to the AA as the implied choice of law (Born 2014, pp. 535-538). Increasingly, this has been the approach of contemporary authorities based on the understanding that businesses are entitled to expect that the law they select to govern a contract shall also govern a dispute unless a separate law is explicitly expressed (Born 2014, p. 580).
19. Courts in both England and Singapore have recently affirmed this approach, ruling that the governing law of the overall contract is the strongest indicator of PARTIES' intentions regarding law governing arbitration agreements (*Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings,* [2012] at [22]; *BCY v BCZ* [2016] at [59]).
20. Where the SA states that the law of Mediterraneo applies to 'this sales agreement' in clause 14, CLAIMANT is entitled to expect that as the only law explicitly chosen by both PARTIES to govern the sales agreement, this law also implicitly governs an attaching arbitration clause (Redfern and Hunter 2004).

ii. The doctrine of separability does not isolate the Arbitration Agreement

21. Both Danubian and Mediterranean Arbitration Law explicitly acknowledge the doctrine of separability (*Answer to the Notice of Arbitration, p. 14, para 14*). However, contrary to RESPONDENT's application of the doctrine (*Answer to the Notice of Arbitration, para.*

14, p.31), this principle does not isolate the AA from the sales part of the contract. The law of Mediterraneo remains as an implicit choice of law governing the AA.

22. A complete separation of the AA from the Sales Contract is a misinterpretation of the purpose of the doctrine of separability (*Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012]; Primrose 2017, p. 142).
23. The doctrine of separability is confined to protect arbitration clauses from the effect of invalidity of a substantive contract. Its purpose is to reflect a presumed intention that procedures for the resolution of disputes should remain available even in circumstances where the substantive contract is ineffective (Berger 1993, p. 120; *ICC Rules of Conciliation and Arbitration* (Art. 6(9) and in Art 16. of UNCITRAL).
24. The Sales Contract is not invalid or ineffective and the AA is not isolated from the substantive contract. Under clause 14 of the SA, the PARTIES' express choice that the agreement 'shall be governed by the law of Mediterraneo' stands as an implied choice of law for the AA.

iii. The seat of arbitration is not an indication of choice of law that governs the Arbitration Agreement

25. Reference in clause 15 of the SA to Danubia as the seat of arbitration is not an indication that PARTIES have selected Danubia as the law governing the AA.
26. Presumptions that arbitrators should apply the law of the seat to arbitral clauses have been significantly eroded over the past decades with widespread rejection of the 'arbitral seat rule' (Born 2015, 13.02(D)(1)). As early as 1979, commentators have described an 'almost total abandonment of the application' (Goldman 1979, p. 475). In this environment there can be no reason for the PARTIES to have presumed that naming Danubia as the seat of arbitration was also a designation of Danubian law as the law that governs the AA.
27. This position is strengthened when assessing the HKIAC Rules as nominated by both PARTIES as applying to the resolution of any dispute. The HKIAC Rules refers to the 'seat' of arbitration as meaning 'the place' of arbitration (Art. 2.14 of the HKIAC Rules as defined by Art. 20.1 of UNCITRAL). It does not refer to the seat of arbitration as being 'the law' of the arbitration. Both PARTIES have nominated these rules to govern disputes and their intentions must be determined in light of the definitions of the HKIAC Rules.
28. Whilst Art. V(1)(a) of the New York Convention does set out the premise that the law of the seat may be selected by the Tribunal as the choice of law it is not applicable in these

circumstances. Instead, this article would only apply 'failing any indication' by the PARTIES themselves (Art. V(1)(a)).

29. In this agreement, the PARTIES have expressly indicated that the HKIAC Rules and its definitions govern any dispute and have implicitly chosen the law of Mediterraneo as the governing law of the AA. Art. V(1)(a) of the New York Convention does not impact this stance. This approach has been clearly accepted in a number of Courts, where choice of law clauses have been held to refer to both the substantive contract and the arbitration agreement ('Broadcasters Case, 2008 at [24]; Bermann 2017, at [3.1.2]).

b. It is to be implied from the pre-contractual negotiations that the law of Mediterraneo governs the interpretation of the Arbitration Agreement

30. The intentions of the PARTIES designate the law of Mediterraneo as the implied governing law for the AA.
31. The PARTIES' intentions are an essential facet of the principle of good faith in international trade (CISG Art. 7.1). It should be asked what a reasonable person would understand the PARTIES to mean in their interpretation of the contract. Art. 8.3 of the CISG highlights that when determining the PARTIES' intentions consideration must be given to 'all relevant circumstances of the case including the negotiations'.
32. RESPONDENT argues that the drafting history of the arbitration clause shows an explicit choice of law to be in favour of Equatoriana. Further, that it was forgotten by RESPONDENT to include such a provision in the final version (*Answer to the Notice of Arbitration p. 3, para. 15*).
33. CLAIMANT submits that contrary to this position, the drafting history of the SA shows that there is a clear implied choice that the law of Mediterraneo governs the interpretation of the AA. Article 8.3 of the CISG allows the Tribunal to take into account this drafting history in establishing that the law of Mediterraneo is an implied choice of law.

i. The drafting history of the arbitration clause implies a choice of law in favour of Mediterraneo

34. Mr Antley's email dated 28 March 2017 clearly highlights the PARTIES' intentions in the pre-contractual negotiations regarding choice of law (*Cl. Ex. C3 p. 11*). In this email, there is a sub-heading that reads 'Applicable Law and Dispute Resolution'.
35. Under this sub-heading, Mr Antley states 'we could accept the application of the Law of Mediterraneo if the Courts of Equatoriana have jurisdiction' (*Cl. Ex. C 3 p. 11*). The

condition proposed by Mr Antley was a means to advance RESPONDENT's main strategy regarding contractual negotiations, which was to ensure that disputes were not resolved under the jurisdiction of the Courts of Mediterraneo (*Resp. Ex. R3 p. 35*).

36. A proposed first draft of the AA on 10 April 2017 (*Resp. Ex. R1 p. 33*) prepared by Mr Antley suggested the law of the arbitration clause and the seat of arbitration as being the law of Equatoriana. Ms Napravnik amended the draft agreement, deleting reference to the law of Equatoriana and changing the seat of arbitration to Danubia (*Resp. Ex. R2 p. 34*).
37. Importantly, the first draft of the AA was amended by Ms Napravnik on 11 April 2017 to accommodate RESPONDENT's wish not to be submitted to the jurisdiction of the Courts of Mediterraneo (*Resp. Ex. R2 p. 34*). In doing this, Ms Napravnik stressed that the 'offer' was conditional on the law governing the sales agreements remaining as the law of Mediterraneo. Ms Napravnik's use of the word 'agreements' rather than 'agreement' implies that her intention was that the law of Mediterraneo covers both agreements relating to the Sales Contract of the SA and the AA.
38. Clause 15 of the SA is a verbatim adoption of the draft clause proposed by Ms Napravnik on 11 April 2015 (*Resp. Ex. R2 p. 34*). CLAIMANT submits that in line with Art. 8.1 of the CISG, clause 15 of the SA must be constructed according to the intent of Ms Napravnik. It is reasonable to assume that RESPONDENT could not have been unaware of Ms Napravnik's intent in altering the drafted version of this clause.
39. The assertion by RESPONDENT that it was 'merely forgotten' to include the provision regarding the law of Equatoriana in the final contract (*Answer to the Notice of Arbitration p. 31, para. 15*) does not accord with the available evidence.
40. Contrary to RESPONDENT's assertions, the Tribunal must have regard to the fact that the negotiators who replaced Mr Antley following his accident had access to the chain of emails between Ms Napravnik and Mr Antley during contractual negotiations (*PO2 p. 55, para. 5*).
41. Per Art. 8.2 of the CISG, even if RESPONDENT argues that it could not have been aware of Ms Napravnik's intent, the drafting history must be interpreted to the understanding a reasonable person would have in the circumstances. It is reasonable to assume that the inclusion of Ms Napravnik's draft clause is also an acceptance that the law of Mediterraneo governs the SA in its entirety, including the AA (CISG Art. 8.2). This was the express condition on which CLAIMANT implicitly agreed to arbitrate in a neutral country (*Resp. Ex. R2 p. 34; Cl. Ex. C8 p. 17*).

ii. The PARTIES did not contemplate that the seat of arbitration was a designation of law

42. It is further made clear from the pre-contractual negotiations that selecting Danubia as the seat of arbitration does not imply that the PARTIES had any intention to select Danubia as the governing law of the AA.
43. Referring to Ms Napravnik's proposed amendment to RESPONDENT's first draft of the AA, emphasis must be placed on the purpose of such an amendment being to the 'place of arbitration' (*Resp. Ex. R 2 p. 34*).
44. There can be no question that the language used by Ms Napravnik in her email to Mr Antley regarding the amendment to the first draft of the AA is in line with the HKIAC Rules definition of 'seat' (see paras. 25-29 above). Ms Napravnik directly refers to the seat of arbitration as to the 'place of arbitration' in her correspondence (*Resp. Ex. R2 p. 34*). The reference to the seat of arbitration in the AA is clearly not a selection or indication of a choice of law to govern the AA.
45. Paragraphs 43 and 44 are significant factors that assert that it was not intended that the seat of Danubia designate that the law of Danubia govern the AA.
46. Julian Krone, head of the legal department at Black Beauty, has asserted for RESPONDENT that he did not understand a negotiation file written by Mr Antley dated 12 April 2017 (*Resp. Ex. R3, p. 35*).
47. Mr Krone has stated his belief that Mr Antley was referring to the law applicable to the arbitration instead of the law applicable to the contract, and Mr Krone suggested that had he been privy to that knowledge that he would have 'definitively' included an express reference to the law of Danubia into the AA (*Resp. Ex. R3, p. 35*).
48. CLAIMANT submits that this interpretation would be inconsistent with the material facts set out above in paragraphs 34-39. When Mr Antley's reference to 'applicable law' in his negotiation file is read with his email of 28 March 2017 and the subheading 'Applicable Law and Dispute Resolution', a reasonable person is more likely to conclude that Mr Antley was referring to the application of the Law of Mediterraneo (CISG Art. 7.3; UNIDROIT Principles Art. 4.3).
49. The pre-contractual negotiations between the PARTIES strongly suggests the law of Mediterraneo is an implicit choice of law and the law that reflects the clearest intentions of the PARTIES.

c. Mediterraneo is the most appropriate choice of law

50. Even if the Tribunal rules that there is no implied choice that the AA is governed by the law of Mediterraneo, Mediterraneo is still the most appropriate law to govern the arbitration as:
    i. The state with the closest and most significant relationship to the dispute;
    ii. The law of Mediterraneo will better promote the principle of good faith.

i. Mediterraneo is the state with the closest and most significant relationship to the dispute

51. Article 36.1 of the HKIAC Rules states that in the absence of a clear conferral of a choice of law by the PARTIES, the Tribunal 'shall apply the rules of law which it determines to be appropriate'.
52. In this arbitration, the most appropriate rules should be the substantive law of the state with the closest connection to the dispute and most significant relationship (Born 2014, pp. 2653–54). This is an established means for Courts and Tribunals to determine the applicable law where the PARTIES' express choice of law and implied choice are unable to be determined (Mustill and Boyd 2001, p. 63).
53. CLAIMANT, a company wholly within Mediterraneo, submitted this dispute for arbitration. The SA was based on the *Mediterraneo Guidelines for Semen Production and Quality Standards* (*Cl. Ex C2 p. 10*). Payment was made to the Mediterraneo State Bank (*Cl. Ex. C5 p. 13*). The SA as a whole is governed by the laws of Mediterraneo. Therefore, it is the state of Mediterraneo that has the closest and most significant relationship to the dispute, and as such the laws of Mediterraneo should apply to the AA.

ii. The law of Mediterraneo will better promote the principle of good faith

54. The general principle of good faith is well recognised in commercial trade and should be considered as an established concept of transnational commercial law (Berger 2010, p. 277). Good faith is pertinent to questions of procedural law and has been argued as being a required 'standard' for the efficient and effective running of arbitrations for the benefit of both PARTIES (Berger/Arntz 2016, p. 168).
55. The law of Mediterraneo better enforces the principle of good faith as it is a verbatim adoption of the UNIDROIT Principles. **'**Good faith and fair dealing' are fundamental notions underlying the UNIDROIT Principles (Art. 1.7). Danubian law on international commercial arbitration is also to be interpreted with regard to the observance of good faith in international trade (UNCITRAL, Art. 7). However, concepts of good faith are far more fundamental to the UNIDROIT Principles than to UNCITRAL with the mandatory nature

of good faith ingrained throughout its text. This makes the UNIDROIT Principles the more appropriate choice for the Tribunal.

3. The Tribunal has the power to adapt the Sales Agreement given that the law of Mediterraneo governs the interpretation of the Arbitration Agreement

56. Under Article 19 of the HKIAC Rules the Tribunal has the power to determine the scope of the AA, including the right to adapt the contract under the applicable law as determined by the Tribunal.

57. If the law of Mediterraneo governs the interpretation of the AA, Mediterraneo is a contracting state to the CISG and its contract law is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (*PO1 p. 53, para. 4*). Accordingly, CLAIMANT argues that the Tribunal has the power under:

    a. Art. 6.2.3 of the UNIDROIT Principles;
    b. CISG

a. The Tribunal has the power under the CISG

58. Under Article 79 of the CISG, hardship is a ground for adaptation of the contract. The effect of clauses 12 and 15 of the Sales Agreement is that a hardship clause has been expressly included into contract. To this end, the PARTIES have given the Tribunal clear power to adapt the contract under CISG.

59. Economic change such as the imposition of tariffs has been recognised as a form of hardship in in decisions such as the 2009 Belgium Supreme Court case *Scafom International BV v Lorraine Tubes S.A.S* (C.07.0289.N) which relied on concepts of hardship under Article 79 of the CISG to adapt contractual agreements. Further, Art. 61 of the CISG provides that where a buyer (RESPONDENT) has breached their contractual obligations contracts Art. 62 of the CISG makes clear that the adaptation may occur so that the buyer is required to pay the additional price. RESPONDENT has breached their obligations by on-selling the frozen semen to third parties against the express agreement of the parties (Cl. Ex. 18). This second provision further allows the Tribunal to adapt the SA.

60. Where the Tribunal finds that a change of circumstances such as the 30% Tariff makes performance of the Contract more onerous to either PARTIES, the Equilibrium of the Contract must be restored through adaptation.

b. Alternatively, the Tribunal has the power under Art. 6.2.3 of the UNIDROIT Principles

61. Adaptation by the Tribunal is also justified with reference to the UNIDROIT Principles. Hardship is defined at Article 6.2.2 of UNIDROIT Principles and reads as follows:

'There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.'

62. The unexpected economic burden imposed by the 30% tariff has fundamentally altered the contractual equilibrium of the agreement and placed an onerous burden on CLAIMANT. Hardship as defined by the UNIDROIT Principles can be demonstrated, leaving it open to the Tribunal to find hardship in this dispute. Under Article 6.2.3, when hardship is shown, the disadvantaged party is entitled to request renegotiations. Further, where PARTIES fail to reach an agreement to renegotiate within a reasonable time either may submit the dispute to a Court or, as in these circumstances, to arbitration. Despite meeting on 12 February 2018 to begin negotiations (*Cl. Ex. C8 p. 17; PO2 p. 60, para. 35*), PARTIES have been able to reach a new agreement creating impetus for the Tribunal to intervene. Where the Tribunal finds hardship, it has the power to adapt the contract to restore its equilibrium. 6.2.3(4)(b).

4. Alternatively, the Tribunal has the power to adapt the Sales Agreement if the law of Danubia governs the interpretation of the Arbitration Agreement

63. In the alternative, even if the law of Danubia governs the AA, the Tribunal still has the power to adapt.

64. Recognising that the four corners rule applies, CLAIMANT argues that:

a. The AA must be read in conjunction with the hardship clause;
b. Reading the AA and the hardship clause together provides an express conferral of power to the Tribunal to adapt the contract.

65. The AA does not exist in a vacuum. Positioning it as REPONDENT does (*Answer to Notice p. 32. para. 17*) is to misunderstand the appropriate application of the doctrine of separability and the four corners rule under Danubian law.

a. The arbitration clause must be read in conjunction with the Sales Agreement as a whole

66. The doctrine of separability does not separate the AA from the SA as a whole. Nor does it allow for the four corners rule to be applied in a way that entirely isolates a single clause in the contract.
67. RESPONDENT has argued that under Danubian interpretation of the four corners rule, the AA is limited to its wording and the doctrine of separability separates the AA from the Sales Contract.
68. CLAIMANT has laid out, clearly in paragraphs 21-24 above, that the purpose of the doctrine of separability is to protect the right to arbitration from the effect of invalidity in a substantive contract (*Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012]; Primrose 2017, p. 142). The validity of the SA in its entirety means that the doctrine of separability cannot be applied to the AA in this dispute even under Danubian law. Instead the AA must be read in conjunction with the contract as a whole.
69. Further, clause 15 does not state that the AA is to be separated from the SA as a whole. Nor does it indicate that the AA should be read as self-contained.
70. Article 36.3 of the HKIAC Rules allows the Tribunal to take into account the whole of the contract when interpreting its terms. Article 36.3 of the HKIAC Rules reads as follows:

    'In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s)'
71. Emphasis must be placed on the terms 'all cases', 'shall decide' and 'with the terms of the relevant contract(s)' as this provision clearly allows the Tribunal to read the AA in light of the hardship clause. This would also be consistent with the four corners rule, as the Tribunal is interpreting the whole of the contract, limited to its wording.

b. The Tribunal is expressly authorised by the PARTIES to adapt the Sales Agreement

72. A clear conferral of powers for the Tribunal to adapt is present when the AA is read in conjunction with the hardship clause.
73. Under Danubian law, there must be an express empowerment to allow the Tribunal to adapt the contract. Article 28(3) of the Danubian Arbitration Law (UNCITRAL) states:

    'The arbitral tribunal shall decide ex aequo et bono *or as* amiable compositeur *only if the parties have expressly authorized it to do so.'*
74. Deciding a case *ex aequo et bono* may mean to decide according to an arbitral tribunal's own idea of justice (Hilgard and Bruder 2014, p. 52). Essentially this principle holds that

adjudicators should decide disputes according to that which is 'fair' and in 'good conscience' (Trakman 2008, p. 621)).

75. The Tribunal's ability power to make a final determination on 'any dispute' is fundamental to its power as expressly authorised by the PARTIES within the four corners of the contract. The intention of the PARTIES is to be ascertained from the words used in the contract (*AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94).
76. Paragraphs 66-71 above illustrate that the AA is to be read in conjunction with the hardship clause. Upon reading the hardship clause there was clearly a contemplation by the PARTIES that in the event that a dispute was to arise regarding hardship, that CLAIMANT would not be responsible for that hardship. The AA provides the Tribunal with the responsibility and the power with making a 'final' determination on this dispute. When the terms of the AA are read with the hardship clause, it is clear that the intention of the PARTIES was that the Tribunal would have the power to decide on any dispute, including disputes of hardship that require a fair determination made in good conscience.
77. Furthermore, under this interpretation of the SA, the Tribunal is expressly authorised to decide *ex aequo et bono* on the grounds that:
    - the unexpected 30% tariff has resulted in considerable losses for CLAIMANT (*Notice of Arbitration p. 7, para. 18*) and RESPONDENT was aware of the impact of the tariff on CLAIMANT's financial situation (*PO2 p. 59, q. 28*); and
    - CLAIMANT performed their contractual obligations despite the burden of the 30% tariff (*Notice of Arbitration p. 6, para. 13*).
78. CLAIMANT asserts that the Tribunal is expressly authorised to adapt the contract under Danubian law in light of these factual and legal claims. When the hardship clause is read with the AA the Tribunal has clear power to adapt the Sales Agreement.

Conclusion to Issue A

79. The Tribunal has the jurisdiction and power to adapt the contract as it is the law of Mediterraneo that governs the interpretation of the AA. The Tribunal's power to adapt the contract is found under Art. 79 of the CISG, or alternatively Art. 6.2.3 of the UNIDROIT Principles.

80. In the event that the Tribunal finds that the law of Danubia applies to the AA, the Tribunal still has the power to adapt the contract upon an interpretation of the hardship clause in accordance with the arbitration clause.

ISSUE B: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION

81. CLAIMANT requests that the Tribunal admit into evidence the RESPONDENT's submission from an arbitration currently underway involving RESPONDENT and a third party.
82. This evidence must be admitted. The Tribunal has the discretion to admit any evidence (Art. 22.3 HKIAC Rules), and it should do so for three reasons: it is highly relevant and material, there is insufficient basis for exclusion, and admission presents a negligible procedural burden. To do otherwise would be to deny CLAIMANT an opportunity to present its full case under Art. 13.1 HKIAC. Any concerns raised by RESPONDENT based on illegality

or confidentiality are unjustified as CLAIMANT is innocent of any misconduct related to the release of the information.

1. The Tribunal has the exclusive power to decide on the admissibility of evidence

83. This Tribunal is bound only to follow the HKIAC 2018 Rules (SA, Cl 15, p.15; PO1, p.51), which allow it a broad discretionary power to admit evidence.

84. First, contrary to RESPONDENT's claim (*Letter by Fastttrack 3 Ocotober 2018, p.50),* the HKIAC Rules expressly provide that the discretion of the Tribunal overrides any established rules of evidence. Art. 22.2 reads: 'The arbitral tribunal shall determine… whether to apply strict rules of evidence.' HKIAC Rules do not bind the Tribunal to exclude illegal or confidential information (Schlaepfer and Bartsch 2010, p. 211).

85. Second, the HKIAC Rules place no limit whatsoever on the Tribunal's capacity to include evidence. Instead, Art. 22.2 of the HKIAC rules, supported by UNCITRAL Model Law Art. 19(2) offers broad evidentiary discretion to the Tribunal. Art. 22.3 of the HKIAC Rules gives it 'the power to admit or exclude any documents, exhibits or other evidence.' On the contrary, the Tribunal is bound to consider principles of fairness and equality (Art. 13.1 HKIAC Rules) and good faith (Art. 2A(1) UNCITRAL Model Law; Art. 1.7 UNIDROIT Principles) in all matters, including the admission of material evidence.

86. The sole evidence rule that does bind the Tribunal views admissibility as just one of four separate evidentiary elements (Art. 22.2 HKIAC Rules). The admission of evidence is governed by only two of these criteria: materiality and relevance. Art. 22.3 reads:

> *'At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome.'*

87. The broad wording demonstrates a clear intention for rules of evidence to be approached liberally. Not even time constraints limit the Tribunal's power, it is governed only by relevance and materiality.

2. RESPONDENT's submission from the other arbitration should be admitted as evidence before this Tribunal

88. The Tribunal must use its discretion in this case to admit the evidence. The high degree of relevance and materiality supersedes any grounds for exclusion suggested by RESPONDENT.

a. There are firm and overriding grounds for the admission of this evidence

i. The Tribunal has a legal and ethical duty to admit evidence that is relevant and material

89. This evidence must be admitted in fulfilment of the principles of fairness and justice required by both HKIAC Rules and other international legal instruments.
90. First, under Art. 13.1 HKIAC the Tribunal must grant both parties a 'reasonable opportunity to present their case' and must ensure their 'equal treatment'. In response to one party's request to admit evidence from a previous arbitration, the Tribunal in *Giovanna a Beccara v Argentine Republic 2007* at [143] found that the process for determining admissibility required the balancing of 'Respondent's right of defence', with two other factors: 'Claimants' right to equality of arms and the general interest of ensuring the integrity of the procedure and in particular the finding of the truth'.
91. Second, under the HKIAC Rules Art. 2.2, arbitration decisions are final with no avenue for appeal. This fact alone places a fundamental obligation on the tribunal to ensure that the evidence used in deliberations is as comprehensive and exhaustive as possible to obtain the truth and achieve a just outcome (Waincymer 2012, p. 793). In these circumstances, the Tribunal must take a generous approach to the admission of evidence.
92. Excluding highly relevant and material evidence will result in a breach of Art. 13.1 of the HKIAC Rules but will also open the door to a challenge on the basis of UNCITRAL Model Law Art. 34(2)(a)(ii). The Tribunal also has a duty to ensure awards are valid (Art. 13.10). Excluding material evidence may render any award unenforceable by National Courts if it is deemed that CLAIMANT was '*otherwise unable to present their case'* under the New York Convention Art. V(1)(b) (Mehren and Salomon 2003, p. 290). Commentators have noted that UNCITRAL-based arbitrations, which share the same broad discretionary powers as the HKIAC Rules, are rarely overturned on the basis of poor assessment of the weight of admitted evidence, but far more frequently overturned in cases of excluded evidence (Pilkov 2014, p. 148).
93. As such, this Tribunal must be guided by the standards of relevance and materiality that drive evidence admissibility in both the HKIAC Rules and the UNCITRAL Model Law Art. 18 (Reisman and Freedman 1982, p. 470).

ii. This evidence is highly relevant to the case and material to its outcome

94. The Tribunal has a discernible duty to admit evidence that is fundamental to CLAIMANT's case. The RS will clearly demonstrate three examples of the bad faith and inconsistent behaviour so far practiced by RESPONDENT yet prohibited by Arts. 1.7 and 1.8 UNIDROIT Principles and Mediterranean Contract Law.
95. First, the RS will demonstrate that RESPONDENT continues to act in bad faith by denying CLAIMANT's reasonable request for renegotiation. These arbitrations are factually similar; both sales agreements are based on Mediterranean law, including an application of the CISG, and both disputes argue a right of adaptation under Mediterranean law due the hardship imposed by the same series of tariffs. However, in the other arbitration, RESPONDENT was not only willing to adapt but in fact pushed for adaptation under the Mediterranean Law/UNIDROIT Principles and by extension, the CISG, as the ideal solution (*PO2 p.60, para. 39*). In this arbitration, based on the same set of tariffs with the same substantive law, RESPONDENT denies that this remedy is available only because it is disadvantaged (*Answer to Notice of Arbitration p.32, para. 21).*
96. CLAIMANT submits that conventions regarding approbation and reprobation (*AES Corporation v Argentine Republic* 2017) should apply to arbitrations that are not only hosted at the same institution but are identical in virtually all matters except the goods to be sold. RESPONDENT continues to act in bad faith by denying CLAIMANT's right to renegotiate under Art. 6.2.3 of the UNIDROIT Principles. RS makes clear that they not only understand but have acceded to the existence of such a right in exactly these circumstances.
97. Second**,** in its *Answer to the Notice of Arbitration* (*p.32, para. 20)* RESPONDENT states that CLAIMANT is unable to use Art. 79 of the CISG in a hardship claim because the contract has its own hardship clause: '*the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art 79 CISG'*. However, in the other arbitration in almost identical circumstances, RESPONDENT has requested a renegotiation of the contract price on the basis of both its contractual hardship clause and under Art. 6.2.3 of the UNIDROIT Principles/Mediterranean Contract Law (*PO2 p.60, para. 39).* RESPONDENT is clearly aware that the existence of a hardship clause does not negate a party's rights under the CISG.
98. Finally**,** the existence of the other arbitration highlights that the unfair pressure placed on CLAIMANT to perform on January 21, 2018 was motivated by bad faith (Art. 1.7 UNIDROIT Principles) and is an example of inconsistent behaviour (Art. 1.8 UNIDROIT Principles).

99. It is not in dispute that on 21 January RESPONDENT put pressure on CLAIMANT to perform as they wanted immediate delivery (*Resp. Ex R4 p.36*). However, CLAIMANT now knows that at the time of the phone call between Ms Napravnik and Mr Shoemaker on that date, RESPONDENT had for several months been pursuing adaptation for tariff-based hardship against another party under the UNIDROIT Principles (*PO2 p.58, para. 23).* Represented by the same counsel in both arbitrations *(PO2 p.60, para. 38),* RESPONDENT likely had significant knowledge of the process of claiming hardship under the UNIDROIT Principles and the CISG. It then placed undue pressure onto CLAIMANT in full knowledge that under Art. 6.2.3.4 of the UNIDROIT Principles any claim of hardship becomes significantly more difficult after performance has occurred.

100. In light of this, RESPONDENT's decision to push for performance must be seen not merely as a party seeking its benefits under the contract, but as a party attempting to prevent the other from accessing its right to adapt for hardship. Not only did CLAIMANT adhere to its performance obligations to its significant detriment, it did so at the explicit request of RESPONDENT on the understanding that its right to renegotiation under Art. 6.2.3 was recognised and would be respected. Despite acting at all times in good faith, CLAIMANT now faces additional difficulties in accessing its rights under Art. 79 of the CISG because of the actions of RESPONDENT.

3. There are no decisive or overriding grounds for the exclusion of this evidence

101. There are no grounds for exclusion that are sufficient to override the probative value of this evidence. RESPONDENT has submitted that the evidence should be excluded if it was obtained by a breach of confidentiality by former employees, or by an illegal hack by a third party (Letter by Fasttrack 3 October 2018, p.50). However, the method by which the information was obtained is irrelevant. Even if it were relevant, neither confidentiality nor illegality of the evidence render it inadmissible in the particular circumstances of this case.

a. Confidentiality does not bind the Tribunal to exclude this evidence

102. Far from being a decisive ground for exclusion, confidentiality forms just one of several factors the Tribunal may consider in deciding admissibility. For example, in Giovanna a Beccara, 2007 at [142] the Tribunal held that 'besides considerations of confidentiality, further considerations, such as the principle of equality of the Parties, must be taken into account when deciding on the admissibility of evidence'.

103. Though not binding on this Tribunal (IBA Guidelines, Introduction, p. 3, No. 5), even a consideration of broad evidentiary exclusion rules like Art. 9 of the IBA Rules will not render this evidence inadmissible. Three grounds for exclusion may be applicable: Art. 9(2)(b) for legal impediment or privilege; Art. 9(2)(c) for unreasonable burden; Art. 9(2)(e) for commercial or technical confidentiality. None of these provisions require the exclusion of this evidence.

i. There is no legal impediment or protection requiring exclusion of evidence under the HKIAC Rules

104. There are no pressing public policy reasons for exclusion on the basis of privilege, including under Art. 9(2)(b) of the IBA Rules. Unlike arbitral confidentiality, protection of privilege is immutable in international arbitration (Shaughnessy 2007, p. 468). However, RESPONDENT makes no claim of legal privilege. Even if confidentiality was a form of 'legal impediment' under Art. 9(2)(b), RESPONDENT cannot rely on Art. 45 of the HKIAC Rules to impede the admission of this evidence.

105. First, Art. 45 is entirely irrelevant to the question of admissibility. Art. 45 binds the parties and other related members of an arbitration, including HKIAC, from publishing, disclosing or communicating information related to that arbitration (Art. 45.1). CLAIMANT is not a party to the other arbitration and is not bound by this provision. If CLAIMANT has obtained a copy of the relevant submissions, Art. 45 does not limit how they may subsequently use that evidence nor prevent them from further distributing it. Art. 45 has neither the power nor the intention to prevent exposed information from ever being admissible in another equally confidential arbitration by the same institution.

106. Second, while HKIAC does have an obligation not to publish, disclose or communicate arbitral information under Art. 45.2, admitting the RS will not amount to it being published, disclosed or communicated by HKIAC. It will serve only to expose it to the Tribunal itself, who are fully bound to maintain the confidentiality of the documents. As such, Art. 45 provides ample protection for any informational sensitivity (O'Malley 2012, p.303). As such, HKIAC confidentiality rules do not require exclusion as an Art. 9(2)(b) 'legal impediment'.

i. Any confidentiality in the other arbitration has already been compromised

107. As the confidentiality in the other arbitration has been compromised several times, the Tribunal's discretionary evaluation must tip in favour of admission. CLAIMANT only requests admission of the RS from the other arbitration (CLAIMANT Letter of 2 October 2018 p.49). At the outset, arbitral submissions do not attract the same expectation of confidentiality as, for example, business documents submitted as evidence during the arbitration (Associated Electric & Gas v European Reinsurance Co of Zurich 2003 at [20]; UNCITRAL Transparency Rules Art. 3). Regardless, given that the RS is now accessible to non-parties, the Tribunal's obligation to equality (Art. 13.1 HKIAC Rules) in the present arbitration must be paramount.

108. Confidentiality was first broken when details of the other arbitration were offered unsolicited to CLAIMANT at the Annual Breeder's conference (PO2 p.60, para. 40). This occurred again when a private company obtained access to a copy of the Partial Interim Award and RS from the other arbitration (PO2 pp.60-61, para. 41).

109. Any breach of confidentiality has already occurred, and there is no longer an exclusive confidentiality requiring the protection of the Tribunal. To exclude material evidence in the name of protecting a non-existent confidentiality would unfairly constrain CLAIMANT's ability to fulfil its evidentiary burden under Art. 22.1 of the HKIAC Rules. Disadvantaging CLAIMANT based on the actions of a third-party would furthermore amount to a breach of principles of fairness and equality under Art. 13.1 of the HKIAC Rules. In light of the existing confidentiality breach, the Tribunal's obligation to Art. 13.1 must trump a duty to preserve a now illusory confidentiality.

b. Any burden on the Tribunal and RESPONDENT is minimal and proportional to the evidentiary benefit

110. The Tribunal must balance evidential relevance and materiality with the procedural burden associated with admission (Pietrowski 2006, p.378; Waincymer 2012, p.866), but exclusion of the grounds of a 'burden' under Art. 9(2)(c) does not apply here. The burden on all parties is minimal and in proportion to its strong material basis.

111. First, CLAIMANT places no burden on the Tribunal to order production, nor on RESPONDENT to produce this evidence. The RS is a pertinent piece of evidence which will greatly assist the Tribunal in its duty to establish the facts of this case. Admitting CLAIMANT's copy of the documents will avoid unnecessary expense associated with ordering production, pursuant to the Tribunal's obligation under Art. 13.1 of the HKIAC Rules to 'avoid unnecessary delay or expense'.

112. Second, RESPONDENT is in no way procedurally disadvantaged (Pilkov 2014, p.147). Not only do they have prior knowledge of and access to the document, the entire contents of the RS were written by RESPONDENT and are currently being argued by RESPONDENT in the other arbitration.

113. The burden imposed by admitting this evidence is negligible on RESPONDENT, yet CLAIMANT will be severely disadvantaged if denied the opportunity to present its full case.

c. Unlawfulness does not bind the Tribunal to exclude evidence

114. In the alternative, even if the evidence was unlawfully obtained, CLAIMANT remains entitled to submit it on two bases: unlawfulness is not a conclusive discretionary factor against admissibility, and CLAIMANT has clean hands in the release of the arbitral evidence.

115. First, unlawfulness alone is an insufficient ground to deny admission and forms just one of many discretionary factors: 'the admissibility of unlawfully obtained evidence is to be evaluated in the light of the particular circumstances of the case' (EDF v Romania 2008, Procedural Order No 3, at [47]). International arbitrations that address the admissibility of unlawfully obtained evidence continue to find that other factors hold more weight; for example, the guilt of the submitting party (Methanex v United States 2005, at [59]; Libananco v Turkey 2008, at [44]-[48]), materiality and relevance (*RosInvestCo UK v Russian Federation* 2010; United Kingdom v Albania 1949), demonstration of good faith or transparency (*Ahongalu Fusimalohi v. FIFA 2012*).

116. Second, the crucial factor guiding the admissibility of illegally obtained evidence is the 'clean hands' doctrine (Blair and Gojkovic 2018, p.256). Unlawfulness is far from decisive and is severely tempered in cases such as the present where the information is already public, and the submitting party is innocent of the breach (Caratube v Kazakhstan 2012).

117. CLAIMANT remains entitled to submit this evidence given that it played no role in the release of the information. CLAIMANT was approached at an event unrelated to this arbitration by Mr Velazquez who furnished details of the other arbitration (PO2 p.60, para. 40). CLAIMANT later discovered that documents from the other arbitration were also accessible to non-parties (PO2 p.60, para. 41). CLAIMANT did not direct Mr Valazquez to reveal these details. CLAIMANT did not solicit this information (PO2 p.60, para. 40). As such, CLAIMANT is entirely innocent of any unconscionable conduct and must be allowed to admit this highly relevant and material evidence.

5.

6. Conclusion to Issue B

118. The Tribunal should admit the RS on two bases: evidence admission is dictated only by Tribunal discretion, and that discretion must be exercised in favour of admission. The relevance and materiality of the evidence are paramount grounds for admission, and they neutralise any potential grounds for exclusion.

ISSUE C: TO PREVENT HARDSHIP, THE RESPONDENT MUST PAY CLAIMANT $1,250,000 AS THE RESULT OF AN ADAPTATION OF THE PRICE

1. An unforeseen tariff will result in the financial ruin of the CLAIMANT

119. An unforeseen tariff of 30% has been levied by Equatoriana, affecting the last of three deliveries required by the SA. CLAIMANT alone bore the cost of this tariff. The consequence of the tariff on the CLAIMANT is that it will either suffer bankruptcy or it will be broken up and sold off.

b. The unforeseen 30% tariff

120. The governments of Equatoriana and Mediterraneo have long histories of adhering to the principles of free trade (*Cl. Ex. C 6*).

121. On or about 20 January 2018, the PARTIES were informed about an unforeseen 30% tariff (**the tariff**) on agricultural products imported into Equatoriana (*CL. Ex. C 7, C 8*). To their surprise, Equatoriana customs authorities advised the PARTIES that the tariff applied to frozen horse semen (*CL. Ex. C 7, C 8. Resp. Ex. R 4. PO2 Q 26*).

122. The tariff had been announced by the government of Equatoriana on 19 December 2017 (*Cl Ex. C 6*). It applied to all imports considered agricultural products from 15 January 2018 (*PO2 Q 25*).

123. The tariff was unforeseen by the PARTIES at the time they concluded the SA on 6 May 2017. It only became known to the PARTIES some 8 months after the conclusion of the SA and only affected the last of three deliveries (*Cl Ex. C 7, C 8*).

c. Responsibility for the 30% tariff amount to CLAIMANTS financial ruin

124. The effect of the tariff on the CLAIMANT's finances has imperilled its future. In the absence of a profit in this financial year, CLAIMANT will be in breach of a debt

repayment agreement and either bankrupted or broken up with a substantial part of this company sold off by its debtor (*PO2, Q 29*).

125. The tariff has destroyed any chance that CLAIMANT will make a profit this financial year. The imposition of the tariff and the subsequent refusal of the RESPONDENT to negotiate a new price have placed CLAIMANT's future in jeopardy (*PO2 Q 29*).

126. If forced to bear the burden of Equatoriana's tariff alone, the oldest and most successful stud farm in Mediterraneo will face financial ruin.

d. CLAIMENT is entitled to an adaptation of the Sales Agreement in these circumstances

127. Due to its unforeseen and unanticipated nature of the tariff and the severe financial consequences this has had for CLAIMANT, the tariff is hardship under the terms of the SA and under the CISG and fundamental principles of international law.

128. Under the applicable law and terms of the SA, the tariff constitutes hardship. Under the hardship clause in the SA, CLAIMANT is not responsible for the tariff. Full responsibility for DDP delivery has been derogated from CLAIMANT under the SA and CLAIMANTS responsibilities under DDP does not include the tariff.

2. The tariff is a form of hardship under the terms of the Sales Agreement

129. Under the applicable law of the SA, CLAIMANT has suffered hardship as defined by UNIDROIT Art. 6.2.2. (*SA Cl. 14. PO1* para. 4). Four arguments support this claim:

a) CLAIMANT's cost of performance has increased;

b) The equilibrium of the contract has been fundamentally altered;

c) CLAIMANT only became aware of the tariff after the conclusion of the SA;

d) CLAIMANT could not reasonably take the tariff into account when concluding the SA;

e) CLAIMANT had not assumed the risk of the tariff.

a. CLAIMANT's cost of performance has increased

130. The original cost of $100,000USD per dose contained a $200USD amount which signified CLAIMANT's cost of complying with delivery DDP (*PO2 Q 8*). The initial cost of DDP on 50 doses was $10,000USD. A 30% tariff on a $100,000USD product equals a charge of $30,000USD. When the tariff was levied on the delivery of 50 doses,

CLAIMANT had to pay $1,500,000USD to ensure the delivery cleared customs in Equatoriana.

131. As made clear by Ms Napravnik to RESPONDENT on 20 January 2018, the tariff increased the cost of performance by 30% (*Cl. Ex. C 7*). RESPONDENT recognised this as 'a high additional tariff' (*Resp. Ex. R 4*). The contract had a 5% profit margin in it (*PO2, Q 31*). That is, $5,000USD of the cost of each dose was profit (*PO2, Q 31*). On the final shipment, CLAIMANT made a loss of $1,250,000USD.

132. The cost of transport and delivery was $200USD per dose (*PO2 Q 8*). A $30,000USD tariff increases the cost of transport and DDP by 15,000%. This is a significant increase in the cost of transport and delivery DDP.

133. Due to the tariff's 15,000% increase to the cost of delivery and its 30% increase in the overall cost of performance, CLAIMANT's cost of performance has increased significantly.

a. The equilibrium of the contract has been fundamentally altered

134. The 15,000% increase in the cost of delivery has fundamentally altered the equilibrium of the SA. In the alternative, in light of imminent ruin of the CLAIMANT, the 30% increase in the cost of performance has fundamentally altered the equilibrium of the SA.

i. The 15,000% increase in the cost of delivery DDP has fundamentally altered the equilibrium of the SA

135. The cost component of CLAIMANT's delivery and transport has increased by 15,000% due to the imposition of the tariff. In the US case of *Aluminium Company of America (ALCOA) v Essex Group, Inc* (1980), non-labour costs of producing aluminium rose 600% and an adaptation of contract was granted. If a cost component increase of 600% has resulted in a adaptation of contract in the US, then a 15,000% increase in a cost component justifies the adaption of the SA.

ii. In the alternative, in light of imminent ruin of the CLAIMANT, the 30% increase in the cost of performance has fundamentally altered the equilibrium of the SA

136. A company's financial position may reduce the threshold for hardship (Schwenzer, 2008, p. 719). As submitted in paragraphs 124 to 125 above, due to financial ruin caused by the tariff, CLAIMANT will cease to exist as currently constituted. Girsberger and

Zapolskis state that financial difficulties will not usually constitute a fundamental alteration of the contract, but financial ruin is a possible circumstance where a fundamental alteration of the contact can be made out (2012, p. 131). In light of the financial ruin facing CLAIMANT as the result of the 30% increase in the cost of performance, the fundamental equilibrium of the contract has been altered and amounts to hardship.

a. CLAIMANT only became aware of the tariff after the conclusion of the SA

137. The SA was negotiated between March and May 2017 and was agreed and signed on 6 May 2017 (*Cl. Ex. C 5*). The 30% tariff was announced on 19 December 2017 (*Cl. Ex. C 6*). The tariff took effect from 15 January 2018 (*PO2 Q 25*). CLAIMANT only became aware that the tariff applied to frozen horse semen on or about 20 January 2018 (*Cl. Ex. C 7 & C 8, PO2 para. 26)*.

a. CLAIMANT could not reasonably take the tariff into account when concluding the SA

138. Given the long history of Equatoriana adhering to the principles of free trade (*Cl. Ex. C 6*), and given the surprise decision that frozen horse semen was included under the banner 'agricultural products' (*Cl. Ex. C 7 and C 8*; *Resp. Ex. R 4*; *PO2 Q 26*), the CLAIMANT could not reasonably have taken the tariff into account when concluding the negotiations for SA on 6 May 2017. Further, as an act of a sovereign government, the tariff was beyond CLAIMANT's control.

a. CLAIMANT had not assumed the risk of the tariff

139. In line with submissions below, due to the operation of the hardship clause in the SA, CLAIMANT had not assumed the risk of the tariff.

7.

3. Under the Sales Agreement hardship clause the CLAIMANT is not responsible for the tariff

140. The SA includes a force majeure/hardship clause (*SA Cl 12, Cl Ex. C 8, Resp. Ex. R 3*). The force majeure elements of the clause are not agitated here. In relation to hardship, the SA provides: "The seller is not responsible…for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" (the hardship clause).

141. Under UNIDROIT Arts. 4.1, 4.2 and 4.3(a), PARTIES preliminary negotiations can assist the Tribunal to interpret the contract according to the common intention of the parties. The contractual phrase "additional health and safety requirements or comparable unforeseen events" needs to be interpreted in light of Ms Napravnik's statement to RESPONDENT, during the preliminary negotiations, that CLAIMANT was 'not willing to take over any further risks associated with [DDP], in particular not those associated with changes in customs regulation or import restrictions' (*Cl Ex. C 4*). A tariff is a change in customs regulation and it is a restriction on imports.

142. The additional health and safety requirements example used by CLAIMANT when requesting the hardship clause was of a testing and quarantine process that added 40% to the cost price (*Cl. Ex. C 4*; *PO2 Q 21*). The tariff is comparable to the additional health and safety requirements example given during negotiations because the cost impost is similar to the 40% example used during negotiations and because it is a change in customs regulation affecting delivery.

143. CLAIMANT submits that on the basis of these claims, the tariff is a comparable unforeseen event and thereby enlivens the hardship clause. Under the hardship clause RESPONDENT should pay $1,250,000 (**a**). In the alternative, under UNIDROIT, RESPONDENT should pay $1,250,000 (**b**).

a. Under the hardship clause the Sales Agreement should be adapted

144. As submitted, the Tribunal has the power to adapt the SA under the terms of the SA.

145. The hardship clause states that the 'seller [CLAIMANT] will not be responsible for' hardship. UNIDROIT Art. 5.1.1, RESPONDENT's obligation to pay the tariff is implicit in the phrase 'seller will not be responsible for' hardship. The refusal to negotiate means that RESPONDENT has breached UNIDROIT Art. 5.1.3 – the duty to cooperate for the performance of duties under the contract.

146. To ensure CLAIMANT is not responsible for the tariff in line with the hardship clause, the Tribunal must adapt the sale price.

b. In the alternative, under UNIDROIT the RESPONDENT should pay $1,250,000

147. CLAIMANT has not withheld performance (*Cl Ex. C8 p. 17*).

148. Instead, CLAIMANT sought to open negotiations to adapt the sale price immediately upon becoming aware of the tariff (*Cl. Ex. C7 p. 16*). Ms Napravnik's email, dated 20

January 2018, and the phone call with Mr. Shoemaker on 21 January 2018, explained the grounds on which the renegotiation was sought (*Cl. Ex. C7 p. 16; Cl. Ex. C8 p. 17; PO2 p. 59, para. 28*).

149. RESPONDENT induced performance with a promise of negotiations on price (*Cl. Ex. C8 p. 17*). When confronted with its breach of the SA based on its use of Ninjinsky III's semen, RESPONDENT withdrew from post-tariff sale price adaptation negotiations (*Cl. Ex. C8 p. 17*).

150. The additional burden of $1,250,000 will ruin CLAIMANT. However, the RESPONDENT will not face financial ruin if it pays the $1,250,000USD (*PO2 p. 59, para. 30*).

151. For the above reasons, it is reasonable for the Tribunal to exercise its discretion under UNIDROIT 6.2.3(4)(b) and order the SA to adapt the sale price.

4. DDP has been derogated from CLAIMANT in the Sales Agreement and does not include the tariff

152. Usually DDP means that 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® Rules 2010*).

153. In the SA, it is RESPONDENT who is responsible for: tank rental and handling fees associated with the delivery (*SA Cl 10*); obtaining insurance for the frozen semen while it is in transit (*SA Cl 13*); hardship caused by additional health and safety requirements (*SA Cl 12*). These terms clearly derogate from DDP as defined by the Incoterms Rules and therefore, under the SA, the PARTIES did not agree to DDP but instead agreed to a limited form of DDP delivery.

154. Under Mediterraneo law, the Tribunal must interpret the SA in accordance with the common intention of the PARTIES (UNIDROIT Art 4.1). The common intention of the PARTIES may be ascertained by having regard to all the circumstances including the preliminary negotiations between the PARTIES (UNIDROIT Art 4.3).

155. In her email dated 31 March 2017, Ms. Napravnik the initial lead negotiator for CLAIMANT, stated that CLAIMANT was not prepared to "take over any further risks" arising out of the change to delivery DDP (*Cl. Ex. C4 p. 12*). During the final negotiation between Mr Krone (RESPONDENT) and Mr Ferguson (CLAIMANT), Mr Krone suggested wording based on the risks mentioned by Ms Napravnik in her email dated 31

March 2017 (*PO2 p. 56, para. 12*). Further, Mr Antley the initial lead negotiator for the RESPONDENT, stated in his email of 28 March 2017, that DDP delivery was sought to speed up delivery and take advantage of the CLAIMANT's experience and knowledge in the export/import and transport of frozen semen (*Cl. Ex. C3 p. 11*). Finally, in her witness statement, Ms. Napravnik confirms it was clear to the PARTIES that CLAIMANT was not bearing all the risks usually taken with DDP and it had been agreed to in order to allow swifter delivery because of CLAIMANT's experience in shipping frozen semen (*Cl. Ex. C8 p. 17*).

156. Having regard to clauses 10, 12 and 13 of the SA and the evidence of the intent of the PARTIES, the Tribunal can find that the PARTIES did not agree to DDP as usually understood. When interpreting and applying the hardship clause, the Tribunal must take into account that RESPONDENT sought to take advantage of CLAIMANTs expertise to speed up the delivery process. It must also take into account the fact that CLAIMANT sought to ensure it would not be out of pocket if unexpected changes – such as an unforeseen tariff – occurred that would affect DDP.

1. Article 79 CISG should be interpreted broadly to include 30% tariff

a. Reliance on the exemption from non-performance is irrelevant

163. CLAIMANT is not seeking to have the tariff admitted as an exempting impediment in the strict textual sense of Art 79 CISG. It is acknowledged that 'scholarly opinions are divided on whether this situation of hardship, short of impossibility, is governed by Article 79' (CISG-AC 2007, para. 26). Regardless, as exemption from non-performance is irrelevant because the contract has been performed, Art 79 CISG instead is required to incorporate a broad understanding of 'impediment' existing under and alongside other Articles of the CISG.

b. A general provision for force majeure and hardship under Art 79 CISG is appropriate

164. CLAIMANT submits that Art 79 CISG should not be narrowly interpreted so that 'impediment' means only changed circumstances that definitively bar performance, but instead includes circumstances of 'unaffordability' (Schlechtriem 1986, p. 102).

165. The inclusion of hardship, as opposed to exclusively *force majeure*, under Art 79 CISG is by reason of the conceptual dissolving of a previously held distinction between those two categories. The dissolution of this distinction has been described by various scholars (Brunner 2009; Schwenzer 2009) and is supported by the description in para. 6 of the comment in Art 6.2.2 UNIDROIT principles.

165. Although 'fluctuations of price in the commodity trade generally will not give rise to an acknowledgment of hardship' (Schwenzer 2009, p. 716), the unexpected 30% tariff imposed cannot be compared to market fluctuations in price. Comparable state interventions or *faits du prince*, such as the UN embargo against former Yugoslavia, have previously been considered as constituting an impediment under CISG (Schwenzer 2010, p. 1071; *Magyar Kereskedelmi És Iparkamara v Választottbíróság* 1996).

c. Art 79 CISG maintains justice by limiting the principle of strict liability

166. A broader understanding of Art 79 CISG as a necessary limitation of the principle of strict liability applies. That is, the strict principle of *pacta sunt servanda* requires tempering in the face of hardship to maintain other general principles of justice (Schwenzer 2010, p. 1063). It is in this capacity that Art 79 CISG should be applied to the hardship suffered by CLAIMANT.

a. As hardship can be demonstrated, adaptation is available to CLAIMANT under Art 79(5) CISG

167. Furthermore, the Tribunal is able to rely on Art 79(5) CISG to determine what is owed in order to restore equilibrium, which can be achieved via adaptation of the contract to the changed circumstances (CISG-AC 2007, para. 40).

a. Art 6 CISG does not apply

168. Finally, RESPONDENT's argument that clause 12 constitutes a derogation from Art 79 CISG relies on the assumption that the threshold of 'more onerous' is equivalent to the threshold required for impediment under Art 79. As there is a significant difference in the parameters of 'more onerous' and hardship or *force majeure*, the derogation cannot be found in the SA, and Art 6 CISG does not apply.

8. RESPONDENT has neglected their duty to renegotiate

a. CLAIMANT acted on representation by RESPONDENT that negotiation would occur

169. CLAIMANT undertook to perform the contract despite the 30% tariff only on the understanding that RESPONDENT would renegotiate the price. Regardless of Mr Shoemaker's stipulation that he needed to confirm with his supervisors as to whether adaptation could occur, and declaration that he made no commitment to negotiation, he admits that his primary concern was to ensure delivery (*R. Ex. R 4*). So in fact, RESPONDENT represented that renegotiation would occur only in order to ensure delivery of the final shipment.

170. Several provisions of the CISG reflect the 'idea of the protection of reliance and the prohibition of contradiction' (Uçaryılmaz 2013, p.162). Under Art 8(1) CISG 'the meaning of the statements or other legally relevant conduct of the parties is to be determined by their actual intent' (Schlechtriem 1986, p.39). Mr Shoemaker also admits to knowing that CLAIMANT would not make delivery if the request to renegotiate had been rejected outright. RESPONDENT thereby mislead CLAIMANT to perform the contract and be denied an entitlement under Art 79 CISG to exemption for non-performance.

171. CLAIMANT should be protected from the harm suffered as a result of RESPONDENT's 'contradictory deeds, statements or promises.' (Uçaryılmaz, 2013, p.161).

172. An initial agreement to renegotiate is clearly evidenced by Ms Napravnik's email of 20 January (*CL. Ex. C 7*) outlining her concern with regards to the imposed 30% tariff, and her declaration that a solution would need to be found before the shipment could be sent. As per Art 6.2.3(2) UNIDROIT, such a request does not in itself entitle the disadvantaged party to withhold performance. Consequently, on the representation by Mr Shoemaker that renegotiations would occur, CLAIMANT did not withhold performance.

a. An agreement to renegotiate existed between the PARTIES

173. In their telephone call of 21 January, Mr Shoemaker assured Ms Napravnik that 'he was certain that a solution would be found through negotiation' (*CL. Ex. C 7*). He also urged Ms Napravnik to send the final shipment and emphasised RESPONDENT's interest in continuing a cooperative and mutually beneficial relationship including the future plans to buy more semen from another of CLAIMANT's stallions.

174. These representations must be interpreted, as per Art 8 CISG, as constituting a clear intention to renegotiate the price on the part of RESPONDENT. Ms Napravnik would never have authorised the third shipment without that understanding. As per Ms Napravnik's

witness statement, CLAIMANT paid the 30% tariff and authorised delivery, 'relying on RESPONDENT's promise that a solution would be found' (*CL. Ex. C 7*). Together, these facts prove the existence of an agreement by both PARTIES to renegotiate.

a. The Tribunal is required to assist in restoring equilibrium as the PARTIES have not successfully reached a negotiation

175. As the parties have failed to reach an agreement within reasonable time, (as required by Art 6.2.3(3) UNIDROIT), CLAIMANT is entitled to resort to the Tribunal for an adaptation to the contract. The failure to reach an agreement is clearly evidenced in Ms Espinoza's refusal to further negotiate or cooperate with CLAIMANT at the meeting of 12 February 2018. It is then for the Tribunal, as outlined under 6.2.3(4)(b), to adapt the contract with a view to restoring its equilibrium.

9. RESPONDENT should not be rewarded for negligence and CLAIMANT should not be penalised for performance

176. The notion that the RESPONDENT should not be rewarded for their conduct that neglects a duty to act in good faith and fair dealing, and the CLAIMANT should not be penalised for their performance of the contract (Schwenzer 2010, p. 1066) is underpinned by general principles of the CISG and international trade law (Uçaryılmaz 2013). Regardless of whether the Tribunal finds that Art 79 CISG applies to the circumstances, under Art 7(2) CISG, matters governed by CISG but not expressly settled in it, must be settled either in conformity with the general principles on which it is based (i.e. good faith and fair dealing).

177. RESPONDENT has unjustly forced CLAIMANT not only to suffer financial detriment as a result of the 30% tariff but is also seeking to deny CLAIMANT the right to claim a just remedy for hardship suffered. RESPONDENT denied CLAIMANT the access to exemption from breach of the contract under Art 79, however, in order to seek remedy CLAIMANT can rely on other articles of CISG and the underlying principles that guide its interpretation.

a. RESPONDENT have neglected their duty under the doctrine of good faith and fair dealing in Art 7(1) CISG

178. The obligation to interpret the CISG according to the principle of good faith and fair dealing under Art 7(1) infers a duty on the PARTIES to renegotiate in order to restore the equilibrium of the contract (CISG-AC 2007, para. 40). In fact, the duty to renegotiate is predominantly 'based on a general duty to act in good faith' (Schwenzer 2009, 721).

RESPONDENT, in neglecting their duty to negotiate, has therefore also neglected a duty to act in good faith and fair dealing.

179. The submission made under Art 79 CISG must be considered with regard to the overall, cumulative effect of RESPONDENT's neglect of their duties to negotiate and to act in good faith and fair dealing. The doctrine of good faith is to be applied intuitively via a contextualist approach to contract interpretation (Miller/Perry 2013, p. 697). Accordingly, 'the requirement of good faith may incorporate standards of decency, fairness, and reasonableness that depart from express contractual provisions, or restrict contractual powers' (ibid).

180. CLAIMANT acted in good faith and continuance of the contract in sending the final shipment, despite the available exemption from non-performance under Art 79 CISG. The general principle to uphold contracts (*favour contractus*) (Schwenzer/Hachem 2010, p. 138) further supports the fact that CLAIMANT should not be penalised for their performance of the contract. It is unjust to withhold remedy, when the general principles underpinning international contract law aim to prevent harming the disadvantaged party and to prevent rewarding negligence or breach (Uçaryılmaz 2013). To exclude an ability to claim relief from the Tribunal for hardship, because CLAIMANT has performed their obligations under the contract also contradicts the principle to uphold the contract.

10. 1. CLAIMANT is entitled to remedy to injustice

181. It is therefore incumbent on the Tribunal, acting in furtherance of these underlying principles, to remedy the disadvantage suffered by CLAIMANT as a result of RESPONDENT's conduct in breaching both the contract and the CISG. This remedy should be achieved via adaptation of the price to restore the equilibrium.

182.RESPONDENT's breaches under Art 61 CISG entitle CLAIMANT to remedy

183. Art 61 CISG provides for remedies for breach by the buyer both under the contract or the Convention.

a. RESPONDENT's breach under the SA

184. RESPONDENT has breached the contract under both clause 12 of the SA, and by breaching the resale prohibition under the contract (*Cl. Ex. C 8*). By on-selling semen without authority or information to CLAIMANT, as per requirements both under written contract and in verbal negotiations prior to contract finalisation, RESPONDENT is clearly in breach of the SA.

a. RESPONDENT's breach under the Art 7(1) CISG

185. Even under a generous reading of the facts, the cumulative effect of the multiple breaches by RESPONDENT demonstrate a fundamental breach of the requirement to act in good faith and fair dealing. RESPONDENT's breaches of the general duty to act in good faith and fair dealing, is demonstrated not only by their breach of the SA, but as outlined above, in the misleading representations and refusal to negotiate.

186. The importance of this breach stems from the fact that the 'principle of good faith permeates the whole text on the Convention' (Viscasillas 2011, p. 121), and it 'is also a substantive provision and not only a mere interpretative principle of the CISG' (ibid, p. 122). It should also be noted, therefore, that CLAIMANT is entitled to remedy as a result of RESPONDENT's breach under the CISG.

a. CLAIMANT is entitled to remedy

187. Breaches under Art 61 CISG entitle the CLAIMANT to adaptation under Art 62 CISG.

5. The Sales Agreement price should be adapted to increase it by $1,250,000

157. The total cost of the tariff on the affected shipment was $1,500,000USD.

158. With a profit of $5,000 per doses, the CLAIMANT stood to make a profit of $250,000USD from the final shipment of 50 doses. In a demonstration of its continued good faith, CLAIMANT does not seek to make a profit out of the adaptation of the contract.

159. It will not financially endanger RESPONDENT to pay $1,250,000USD towards the cost of the tariff (*PO2 p. 59, para. 30*).

160. RESPONDENT has demonstrated a lack of observance of good faith in international trade in its dealings with CLAIMANT for the following reasons.

a. RESPONDENT induced the CLAIMANT to send the delivery and, on the evidence, the promiser knew he was not able to make the promise he made (*Cl. Ex. C8 p. 17*; *Resp. Ex. R4 p. 36*);

b. RESPONDENT refused to negotiate a change in price despite knowing the affect of the tariff on the CLAIMANT (*Cl. Ex. C 8*, *PO2 p. 59, para. 28*).

c. RESPONDENT on-sold doses of Ninjinsky III's semen despite knowing that CLAIMANT only sold the semen on the condition that it would not be on-sold by the RESPONDENT without CLAIMANT's consent (*Cl. Ex. C2 p. 10*);

d. RESPONDENT induced the final delivery of the semen to ensure it could meet its commitment to on-sell semen to other breeders in breach of the SA (*PO2 p. 59, para. 33*);

e. There is evidence from the other arbitration that RESPONDENT seeks to argue that a 25% tariff constitutes hardship (*PO2 p. 60, para. 39*). However, in this arbitration it seeks to argue that a 30% tariff is not hardship. Given that the tariff in this case is greater than the tariff in the other arbitration, it is difficult to understand how RESPONDENT can, in good faith, maintain its argument in this case.

161. Adaptation is a discretionary power (UNIDROIT Art. 6.2.3(4)). Under Art 8(3) of the CISG, determination of intent requires due consideration of all the relevant circumstances includes consideration of any subsequent conduct of the parties. CLAIMANT's statement that the SA must be adapted to increase the sale price by $1,250,000 must be interpreted in light of RESPONDENT's conduct since the conclusion of the SA.

162. In line with the objects of the CISG, knowing the imminent financial ruin of CLAIMANT, and understanding RESPONDENT's dubious and contradictory behaviour, the Tribunal should increase the sale price in the SA by $1,250,000 to redress the hardship suffered by CLAIMANT.

Conclusion to Issue C

188. In summary, RESPONDENT is required to comply with obligations under CISG, and the contract. This includes a duty to act in good faith under Art 7 in the performance of its obligations. And to adapt the price for hardship under clause 12 of the contract. The obligations of good faith and fair dealing require RESPONDNET to abide the promise that it made that it would pay for the cost of the tariff if it was required to do so under the contract.

189. The representation made by the RESPONDENT induced the CLAIMANT to abandon its rights under Art 79 CISG to not perform the SA and thereby take full advantage of the exemptions allowed under that Art. The RESPONDENT should not be permitted to assert that Art 79 does not apply due to the performance by the CLAIMANT of the SA as it would not have performed its obligations in making the third delivery but for that representation. RESPONDENT should not be in a better position by reason of its representation which it made in order to induce the delivery of the third shipment.

190. Finally, CLAIMANT is entitled to adaptation relying on Art 62 CISG.

Certificate and Choice of Forum

To be attached to each Memorandum

I Artemis Elizabeth Aickin Wilkinson, on behalf of the Team for

RMIT University, Australia, hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☑ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☐ Our School is competing in both Vis East Moot and Vienna Vis Moot.

- ☐ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

- ☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)
  - ☐ Vis East Moot in Hong Kong, or
  - ☐ Vienna Vis Moot

Authorised Representative of the Team for (RMIT University) _____

Name Artemis E.A. Wilkinson

Signature _____ (06.12.2018)