TWENTY-SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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HONG KONG

MEMORANDUM FOR CLAIMANT

ON BEHALF OF

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INDEX OF ABBREVIATIONS

&	And
Art. / Arts.	Article / Articles
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	CLAIMANT
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC Arbitration Rules	Hong Kong International Arbitration Centre's Administered Arbitration Rules
ICC	International Chamber of Commerce
UNIDROIT	International Institute for the Unification of Private Law
No.	Number
p., pp.	Page, Pages
¶ / ¶¶	Paragraph / Paragraphs
Pro.	Procedural
Res.	RESPONDENT
§ / §§	Section / Sections
ULIS	Uniform Law on the International Sale of Goods
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
UNCITRAL	United Nations Commission on International Trade Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
USD	United States Dollars
US	United States of America
v.	Versus

INDEX OF AUTHORITIES

Borisova, Bojidara. *Remarks on the Manner in Which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG.* Pace Law School Institute of International Commercial Law, December 2004. ¶ 59	*Borisova, p. [#]*
Convention Relating to a Uniform Law on the International Sale of Goods, 1964, 834 UNTS 107, art 3 (ULIS). ¶¶ 17, 62	*Convention*
CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, 12 October 2007. Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. ¶ 61	*CISG-AC Opinion, No. 7*
CLOUT case No. 142, RUSSIA Arbitration Award case No. 123/1992, (17 October 1995). ¶ 60	*CLOUT case No. 142*
CLOUT case No. 277, GERMANY Oberlandesgericht, Appellate Court, Hamburg (28 February 1997). ¶ 60	CLOUT case No. 277
Ferrari, Franco. *Defining the Sphere of Application of the 1994 UNIDROIT Principles of International Commercial Contracts*, 69 Tul. L. Rev. 1225, 1228 (1995); ¶ 64	*Ferrari, p. [#]*
E. Allan Farnsworth, *The Interpretation of International Contracts and the Use of Preambles*, 3 Int'l Bus. L.J. 271 (2002). ¶ 44	*Farnsworth, p. [#]*
Garro, Alejandro M. *The Gap-filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 Tul. L. Rev. 1149, 1152 (1995). ¶ 64	*Garro, p. [#]*
Henderson, Alastair. *Lex Arbitri, Procedural Law and the Seat of Arbitration*, 26 SAcLJ 886, 2014. ¶ ¶ 2, 3	*Henderson, p. [#]*

STATEMENT OF FACTS

CLAIMANT, Phar Lap Allevamento, was contacted by RESPONDENT, Black Beauty Equestrian, on 21 March 2017 about purchasing the frozen semen of one of CLAIMANT'S star stallions, Nijinsky III. [*Cl. Notice of Arb. ¶ 5, p.5*]. RESPONDENT asked CLAIMANT to extend an offer of 100 doses of frozen semen from Nijinsky III according to CLAIMANT's terms and conditions. [*Cl. Ex. 1, p. 9*]. This contact occurred shortly after a temporary lift on artificial insemination of racehorses in Equatoriana was announced. [*Cl. Notice of Arb. ¶ 5, p.5*]. RESPONDENT used the lift, in addition to the fact that all doses obtained during the temporary lift could be used even after the ban was reinstated, to justify its desire for such a large number of doses. [*Cl. Ex. 1 ¶ 1, p. 9*].

CLAIMANT extended an offer to RESPONDENT via email on 24 March 2017 and RESPONDENT submitted a counteroffer on 28 March 2017 in which RESPONDENT specifically requested that DDP delivery of the doses due to CLAIMANT's superior experience shipping frozen semen and that the Law of Mediterraneo should apply. [*Cl. Ex. 3 ¶ ¶ 2 – 3, p. 11*]. CLAIMANT then proposed in its 31 March 2017 email that DDP delivery terms and a hardship clause addressing unforeseeable health and safety requirements should be included within the final agreement. [*Cl. Ex. 4, p. 12*].The final agreement between the parties was memorialized in the 6 May 2017 Frozen Semen Sales Agreement. [*Cl. Ex. 5, p. 13 – 14*].

In the Frozen Semen Sales Agreement, CLAIMANT agreed to provide RESPONDENT 100 doses of frozen semen from Nijinsky III to be used to inseminate the three mares – Azeri, Ta Wee, and Zenyatta – and no other mares, unless CLAIMANT gave explicit authorization. [*Cl. Ex. 5, p. 13*]. CLAIMANT was to ship the doses in three installments and RESPONDENT agreed to a price of USD 100.000 per insemination dose. [*Cl. Ex. 5, p. 13 – 14*]. RESPONDENT was to pay USD 5.000.000 USD by 18 May 2017 and USD 5.000.000 by 21 January 2018. [*Cl. Ex. 5 ¶ 6, p. 14*]. RESPONDENT explicitly agreed that no semen would be shipped until the relevant fees were paid. [*Cl. Ex. 5 ¶ 5, p. 14*]. CLAIMANT was not responsible for insuring the frozen semen during shipment, but RESPONDENT had the option to purchase insurance through FedEx. [*Cl. Ex. 5 ¶ 13, p. 14*]. The mandatory arbitration clause, indistinguishable from the other fourteen paragraphs, either by title, heading, or placement within the contract, provides that "[a]ny dispute arising out of this contract, including the existence, validity, interpretation,

performance, breach or termination thereof" is to be resolved in accordance with the HKIAC Arbitration Rules by a three-person arbitration panel held in Danubia. [*Cl. Ex. 5 ¶ 15, p. 14*].

This Frozen Semen Sales Agreement – of undisputed validity – is to be governed by the law of Mediterraneo. [*Cl. Ex. 5 ¶ 14, p. 14*]. Mediterraneo, in addition to Danubia and Equatoriana, are signatories to the CISG, which Mediterraneo has adopted verbatim. [*Proc. Order No 1, ¶ 4*]. Mediterraneo – along with Equatoriana – has adopted the UNIDROIT Principles on International Commercial Arbitration verbatim. [*Procedural Order No 1, ¶ 4*]. Danubia adopted the UNIDROIT Principles but with two major exceptions: (1) Art. 4.3 is replaced with the four corners rule, and (2) Art. 6.2.3(4)(b) grants the power "to adapt the contract" to the court "only if authorized." [*Proc. Order No 2, ¶ 45*]. Mediterraneo, along with both Equatoriana and Danubia, adopted the Hague Principles on Choice of Law in International Commercial Contracts. [*Proc. Order No 2, ¶ 43*].

The first two shipments of semen to RESPONDENT were without issue, but the 23 January 2018 shipment became problematic. [*Cl. Notice of Arb. ¶ 9, p.6*]. Two months before the last shipment was due, the President of Mediterraneo – CLAIMANT's location – placed a 25 percent tariff on agricultural products from Equatoriana, RESPONDENT's location. [*Cl. Notice of Arb. ¶ 9, p.6*]. Shortly after, the president of Equatoriana placed a retaliatory tariff on agricultural products – including semen – coming from Mediterraneo. [*Cl. Notice of Arb. ¶ 10, p.6*]. CLAIMANT contacted RESPONDENT via email on 20 January 2018, after not being able to reach RESPONDENT over the phone, notifying RESPONDENT that the shipment was on hold until the parties could find a solution in light of the new 30 percent tariff. [*Cl. Ex. 7, p. 16*].

Both CLAIMANT and RESPONDENT were surprised by the tariffs, that frozen semen was included under the new tariffs-regime, and that it applied to racehorse semen. [*Cl. Notice of Arb. ¶ 11, p. 6*]. CLAIMANT and RESPONDENT immediately started negotiations of a price adjustment for the frozen semen, and RESPONDENT made clear during this negotiation that timely delivery was extremely important. [*Cl. Notice of. Arb. ¶ 12, p. 6*]. RESPONDENT appeared to generally accept the need for a price increase. [*Cl. Notice of. Arb. ¶ 12, p. 6*]. CLAIMANT relied on this impression; that RESPONDENT accepted the general need for a price adaptation. Thus, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached. [*Cl. Notice of Arb. ¶ 13, p. 6*].

On 30 May 2018, CLAIMANT was made aware of another arbitration involving RESPONDENT from Mr. Kieron Velazquez while CLAIMANT was attending an annual breeder conference. [*Proc. Order No. 2, ¶ 40*]. Mr. Velazquez knew of the other arbitration because he was working for the RESPONDENT's customer, who was in a dispute with RESPONDENT regarding potential price modification of a sales contract due to the imposition of the tariffs. [*Proc. Order No. 2, ¶ 40*]. Mr. Velazquez was not involved in the arbitration, but he was aware of the main issues in dispute and communicated them to CLAIMANT. [*Proc. Order No. 2, ¶ 40*].

On 31 July 2018 and pursuant to the mandatory arbitration clause within the agreement, CLAIMANT submitted its Notice of Arbitration because of RESPONDENT's failure to pay CLAIMANT the price which CLAIMANT is owed. [*Cl. Notice of Arb., p. 7*]. On 2 October 2018, this Tribunal was alerted by CLAIMANT's lawyer of the aforementioned other arbitration which concerned the sale of a promising mare to Mediterraneo. [*Letter by Langweiler, p. 49*]. Like the frozen semen sale currently at issue, that sale had also been affected by the unforeseen tariff of 30 percent, but contrary to its position here, RESPONDENT asked for a price adaptation due to the unforeseeable change in circumstance caused by the tariff. CLAIMANT seeks to admit both a copy of the award and other relevant submissions in RESPONDENT's prior arbitration pertaining to this almost identical issue. [*Id.*]. CLAIMANT is open to joining the other party in RESPONDENT's prior arbitration to the current proceedings.

SUMMARY OF ARGUMENT

Procedure

This Tribunal has the right under the HKAIC rules to make a self-determination about its jurisdiction to hear this price dispute and has the power under the arbitration agreement to make an adaptation to the contract in order to restore the equilibrium to the parties. The law of Mediterraneo should be applied by this Tribunal when making interpretations about the arbitration agreement. Alternatively, it may be recognized by this Tribunal that contract adaptation is not required in the present situation; therefore the Tribunal should make an interim decision to force RESPONDENT to fulfill its duty to negotiate under the hardship clause or award damages to CLAIMANT on this basis.

This Tribunal should further allow the admittance of a copy of the award in RESPONDENT's prior arbitration pertaining to an almost identical issue in addition to the

relevant submission, because admissibility is not barred by any evidence rules specified within the contract, by the HKIAC Rules, any overarching generally applicable principles, or rules of international arbitration. CLAIMANT has not violated any HKIAC Rules by obtaining the evidence in question, nor has the CLAIMANT participated in any illegal means to obtain the evidence.

Merits

Both under Clause 12 and the CISG, the Tribunal is permitted to adapt the price of the contract to restore the equilibrium of the bargained for agreement pursuant to the intent of the parties. The 30 percent tariffs are of such magnitude that the commercial reasonableness of the deal is destroyed; thus, CLAIMANT is entitled to a minimum payment of USD 1.250.000, or 25 percent of the original contract price. The ambiguity in Clause 12 about the appropriate course of action in case of a hardship should be resolved pursuant to extrinsic evidence of subsequent communications and pursuant to the failure of the parties to exclude price modification as an appropriate course of action. Further, under the CISG, it should be understood that RESPONDENT effectively modified the contract during subsequent email communications and by accepting the third shipment. CLAIMANT is additionally entitled to recover for RESPONDENT's breach of the resale provision of the Frozen Semen Sales Agreement under Article 74 of the CISG.

Relief

CLAIMANT respectfully requests this Tribunal find it has jurisdiction to hear the dispute, the power to adapt the contract to restore equilibrium between the parties and is permitted to consider evidence of the other arbitration. CLAIMANT respectfully asks this Tribunal to grant CLAIMANT, at a minimum, USD 1.250.000 in addition to damages for RESPONDENT's breach of the resale provision. Lastly, CLAIMANT asks this Tribunal to order RESPONDENT to bear the costs of the Arbitration.

ARGUMENT

I. THE ARBITRAL TRIBUNAL HAS THE JURISDICTION TO HEAR THE PRICE DISPUTE IN GENERAL UNDER DANUBIA'S *LEX ARBITRI* AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

1. Concerning jurisdictional matters, this Tribunal must first consider whether it has the *jurisdiction* to hear this price dispute in general. Second, this Tribunal must consider – based on its interpretation of the parties' arbitration agreement – whether it has the *power* to adapt the contract. It will be found that [A] the Tribunal has jurisdiction to resolve the present price dispute between the parties under Danubia's *lex arbitri*; [B] law of Mediterraneo should be applied by the Tribunal to interpret the arbitration agreement to determine whether the Tribunal has the power to adapt the contract; [C] the Tribunal has the power to adapt the contract for the purpose of restoring equilibrium to the parties; and [D] alternatively, the if the Tribunal does not recognize the necessity to adapt the contract, it would be proper for the Tribunal to make the interim decision to force RESPONDENT to fulfill its duty to negotiate under the hardship clause or even to award damages to CLAIMANT on this basis.

A. The Tribunal has jurisdiction to resolve the present price dispute between the parties under Danubia's *lex arbitri*.

2. The decision of whether this Tribunal has the jurisdiction to hear this dispute is a procedural issue properly understood in light of Danubia's *lex arbitri*. A country's *lex arbitri* provides a basic framework for arbitration, to include: internal procedures, external relationships with courts, and "the broader external relationship between arbitrations and the public policies of that place, which includes matters such as arbitrability." [*Henderson, pp. 887-88*]. As Danubia has adopted the UNCITRAL Model Law, the Model Law is the relevant law of the seat of arbitration in the present case. [*Redfern & Hunter, § 3.02*]. Per the Model Law, parties may agree in either a clause within a contract or a separate agreement "to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not." [*Model Law Art. 7, p. 4 – 5*]. Further, the arbitration agreement is deemed to include any arbitration rules referred to in the agreement. [*Model Law Art. 2(e), p. 2*]. Arbitral tribunals are additionally empowered by the Model Law to determine whether they have jurisdiction to hear particular cases. [*Model Law Art. 16.1, p. 8*]. Although a tribunal may view an arbitration clause as a separate agreement independent of the

other terms of the contract, it may only do so when there is a valid arbitration agreement over which the arbitral tribunal may exercise jurisdiction. [*Model Law Art. 16.1, p. 8*]. It is *not* appropriate for an arbitral tribunal to view the arbitration clause as a separate and independent agreement from the other terms of the contract merely for purposes of interpreting the arbitration agreement. [*UNCITRAL Model Law, Art. 7 Commentary, p. 259*].

3. In this case, the parties included an arbitration clause as the last of fifteen total paragraphs within their contracts. [*Cl. Ex. C5*]. This clause reads:

> *15. Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
>
> *The seat of arbitration shall be Vindobona, Danubia.*
>
> *The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English.*

[*Cl. Ex. C5, ¶ 15*]. This clause comports with the UNCITRAL Model Law because the parties (1) agreed to submit any disputes with respect to their legal, contractual relationship to arbitration; (2) made the agreement via an arbitration clause, as is proper; and (3) the agreement referred to and incorporated the HKIAC Administered Arbitration Rules for the arbitral tribunal to follow as supplementary rules. Danubia's *lex arbitri* – the UNCITRAL Model Law – permits the use of supplementary procedural rules such as the HKIAC Administered Arbitration Rules. [*Model Law Art. 2(e), p. 2*]. This "hands off philosophy" regarding the use of supplementary procedural rules is consistent with the "widespread modern consensus that national laws should be permissive . . . [and] respectful of the parties' autonomy wherever possible." *[Henderson, p. 896]*. Further, it is consistent with the modern trend in international arbitration orthodoxy toward a transnationalist approach, whereby "the process should be detached from the parochialism of national laws and regulated instead by the agreement of the parties and a supportive transnational legal order reflecting international norms." [*Henderson, p. 893*].

4. As under the UNCITRAL Model Rules, the HKIAC Rules permit the arbitral tribunal to make a self-determination about its jurisdiction. [*HKIAC Rules Art. 19, pp. 25-26*]. Under the HKIAC Rules, the tribunal may make a ruling on its own jurisdiction in circumstances when a party has objected to the scope of an arbitration. [*HKIAC Rules Art. 19, pp. 25-26*]. Once the

jurisdictional question has been decided, the tribunal is then permitted to proceed to deciding the question of merit for the arbitration. [*HKIAC Rules Art. 19, pp. 25-26*]. In the present case, the RESPONDENT has objected to the scope of the arbitration. Specifically, the RESPONDENT objects to the jurisdiction of this Tribunal to adapt the contract. Under both the *lex arbitri* and the HKIAC Rules, this Tribunal may rightly decide whether it has jurisdiction to adapt the contract.

5. The ultimate issue presented to this Tribunal is whether an unexpected tariff constitutes hardship under the contract's hardship clause, and, if so, whether RESPONDENT breached its corresponding duty to renegotiate the contract price on that basis. RESPONDENT argues that this Tribunal does not have jurisdiction to hear this case because CLAIMANT asks the Tribunal to resolve the dispute in a manner that RESPONDENT claims is beyond the Tribunal's powers. [*Res. Answer to Notice of Arb. ¶ 12, p. 31*]. The essence of the disagreement between the parties is how a clause within the parties' contract is meant to operate. Accordingly, this Tribunal will need to ultimately interpret the contract in order to resolve the dispute. Therefore, this is clearly a dispute arising directly out of the contract and this Tribunal has jurisdiction to resolve that particular question.

B. The law of Mediterraneo should be applied by the Tribunal to interpret the Arbitration Agreement to determine whether the Tribunal has the power to adapt the contract.

6. As this Tribunal can find that it has jurisdiction to resolve this dispute arising out of the parties' contract, the next appropriate issue to decide is whether this Tribunal has the *power* to adapt the contract. This determination must be made through analysis and interpretation of the arbitration agreement. Prior to conducting the analysis of the arbitration, the Tribunal must first identify which law to apply when interpreting the agreement. The Arbitration Agreement found in the last paragraph of the Frozen Semen Sale Agreement does not *expressly* state which law applies to govern the interpretation of the Arbitration Agreement. [*Cl. Ex. C5, ¶ 15*]. When an arbitration agreement does not expressly or impliedly state the law that should govern interpretation of the arbitration agreement itself, "the principal choice lies between the law of the seat of the arbitration and the law that governs the contract as a whole." [*Redfern & Hunter, § 3.11]*. Additionally, French courts have adopted a third approach, whereby "the existence and scope of the arbitration agreement is determined exclusively by reference to the parties' discernible common interests." [*Redfern & Hunter, § 3.33*]. In deciding which law to apply, the

Hague Principles on Choice of Law in International Commercial Contracts is not authoritative here, even though all relevant countries follow the law. This body of law is not authoritative in the present case because it does not apply to arbitration agreements. [*Hague COL Art. I, 3(b)*].

7. This Tribunal should determine whether the contract *impliedly* authorizes it to apply certain law to interpret the arbitration agreement. If the Tribunal does not find that there is *implied authorization*, it should follow the prevailing view that when an arbitration clause is silent with respect to the law governing the arbitration agreement, the agreement should be interpreted according to the substantive law of the contract. Applying this view will fulfill the intent of the parties, which was to enable modification in the event of hardship. The Tribunal could also consider the French approach, whose focus is on the parties' common interests. This analysis would produce the same result: that law of Mediterraneo should be applied.

i. A prevailing view is that when the arbitration clause is silent with respect to the law governing the arbitration agreement, the law of the contract governs.

8. When an arbitration agreement is silent as to which law governs its interpretation, the law governing the substantive agreement also governs the arbitration agreement contained therein. [*Redfern & Hunter, § 3.12*]. Some understand there to be an *implied* agreement between the parties for the law governing the substantive agreement to also apply to the arbitration clause. [*Redfern & Hunter, § 3.12*]. Others understand it to be an *express* choice by the parties that the law governing the substantive agreement also governs the arbitration agreement, reasoning that the arbitration clause is "simply one of the rights and obligations assumed by the parties in their contract, to be governed by the law which governs that contract." [*Redfern & Hunter, § 3.12*]. The English Court of Appeals in *Sulamerica* reasoned that, although it is perfectly allowable for an arbitration agreement to be governed by different law than the contract as a whole, "it is probably fair to start from the presumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by this system of law." *[Sulamerica, p. 11]*.

9. The common law approach the *Sulamerica* Court utilized in analyzing which law to apply to an arbitration clause was as follows:

> (1) If the parties made an express choice of law to govern the arbitration agreement, that choice would be effective, regardless of the law applicable to the contract as a whole.
> (2) Where the parties failed expressly to specify the law of the arbitration agreement, it was necessary to consider whether the parties had made an implied choice of law.

> (3) Where it was not possible to establish the law of the arbitration agreement by implication, it was necessary to consider what would be the law with the "closest and most real connection" with the arbitration agreement.

[*Redfern & Hunter, § 3.19*]. In *Sulamerica*, the parties had not made an express choice of law to govern the arbitration agreement specifically, and the court found that there was no implied choice of law. Thus, the *Sulamerica* Court jumped to the third prong of the analysis. When working through the third prong, the court started from a rebuttable presumption that, "in absence of any contrary indication," the parties intended for the substantive law of the contract to govern the whole of the contract, including the arbitration agreement. [*Redfern & Hunter, § 3.20*]. However, ultimately the court found that the presumption could be rebutted in light of an evaluation of the intent of the parties, based on all relevant facts. [*Redfern & Hunter, § 3.22*]. When considering the relevant facts, the court found not only contrary indications to applying the substantive law of the contract, but it discovered that "there was a serious risk that a choice of [the substantive law] would entirely undermine the arbitration agreement." [*Redfern & Hunter, § 3.22*].

10. This Tribunal should embrace this widely adopted view that the law governing the substantive agreement also governs an arbitration agreement contained therein. Similar to the analysis in *Sulamerica*, this Tribunal should utilize the three-prong analysis, starting at the third prong, and beginning from the presumption that the law governing the contract was intended to govern all aspects of the contract, including the arbitration agreement. When the Tribunal examines facts relevant to determining the intent of the parties, the Tribunal should recognize that there are *not* contrary indications that overcome this presumption, and there is certainly not a serious risk that a choice of the substantive law would undermine the arbitration agreement in any way. Rather, the law of the contract – the law of Mediterraneo – should govern because that is the law that has the "closest and most real connection to the contract."

11. This Tribunal is not attempting to enforce an arbitration agreement on a party asserting its invalidity. Thus, despite RESPONDENT's assertion in its Answer, the doctrine of separability is inapposite to the Tribunal's determination whether to apply the substantive law of the contract to govern interpretation of the arbitration agreement. [*Res. Answer to Notice of Arb., ¶ 17*]. If the doctrine of separability is applicable to a situation, the arbitration clause would be treated "as a separate agreement subject to separate law." [*Redfern & Hunter, § 3.25*]. This doctrine applies to cases where "parties had agreed to arbitrate disputes, but when the time came to do so, one

party sought to renege on that agreement." [*Redfern & Hunter, § 3.27*]. Conversely, the doctrine of severability does *not* apply in cases such as the present one where parties do not seek to renege on an arbitration agreement when a dispute arises.

> ii. The parties intended for the contract to be modified in the event of hardship. Consequently, applying an alternate view that *lex arbitri* governs interpretation of the arbitration agreement would violate both party autonomy and the intent of the parties.

12. It is evident that the parties contemplated the possibility of hardship and intended for an arbitral tribunal to resolve a hardship dispute, in the event that the parties could not agree. The contract demonstrates the parties agreed on two critical grounds: (1) that the laws of Mediterraneo and the CISG would govern the contract; and (2) to include an express hardship provision in their agreement. [*Cl. Ex. C5, ¶¶ 12, 14*]. First, both of the laws adopted by the parties provide for hardship and enable an arbitral tribunal to resolve disputes arising out of hardship. Second, the act of inserting the hardship and arbitration clauses serves as a manifestation of the parties' intent to allow an arbitral tribunal to resolve disputes over hardship.

13. To elaborate more on the parties' choice of law, the UNIDROIT and CISG are the relevant bodies of law. Mediterraneo has adopted the UNIDROIT Principles on International Commercial Contracts verbatim; thus, those principles govern the contract. [*Procedural Order No 1, ¶ 4*]. Per UNIDROIT, a hardship is defined as any event which **"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."** [*UNIDROIT Art. 6.2.2*]. When there is a hardship, the disadvantaged party is further entitled under UNIDROIT to request negotiations. [*UNIDROIT 6.2.3*]. If parties cannot reach an agreement during these negotiations, UNIDROIT then authorizes adaptation of the contract for the purpose of restoring equilibrium. [*UNIDROIT 6.2.3*]. The parties also agreed that the CISG would govern the contract. The CISG imposes a duty on parties to respond to hardship due to change in circumstances by negotiating under a duty of good faith and fair dealing. [*PECL Article 6:111*]. The CISG further gives a court the authority to adapt the contract or award damages for breaching these duties. [*PECL Article 6:111*].

14. By contrast, if the law of Danubia had been the choice of law to govern the contract, then the legal scheme the parties were to operate under would be significantly different. Like Mediterraneo, Danubia has adopted both the UNIDROIT Principles and the CISG. However,

Danubia did not adopt the UNIDROIT principles verbatim; it limited the scope of application for the CISG. Danubia made two significant exceptions the UNIDROIT principles. First, Danubia does *not* consider extrinsic evidence when interpreting an arbitration agreement. [*Procedural Order No 2, ¶ 45*]. Second, Danubia does not permit contract adaptation, unless explicitly authorized. [*Procedural Order No 2, ¶ 45*]. In summary, Danubia limits the scope of the CISG so that it does not apply to the interpretation of arbitration agreements. [*Procedural Order No 2, ¶ 45*].

15. The Tribunal should readily determine that the legal scheme set up under Danubian contract law is inconsistent with the intent of the parties in the present case. It defies common sense to determine that two contracting parties acting in good faith during contract formation, who have both stipulated to the CISG, and who both adopt exactly the same substantive contract law would intend to forego their rights and responsibilities under their adopted laws. The lack of an explicit choice of law within the arbitration clause itself cannot reasonably be understood to completely overcome the autonomy and intent of the parties. It simply cannot be contorted for that purpose. Silence within the arbitration clause is not demonstrative of intent to replace the parties' identical, stipulated laws with the substantially different laws of another country. For these reasons, this Tribunal should *not* apply the law of Danubia to interpret the arbitration agreement.

16. This Tribunal is tasked at this stage with selecting which law applies to the interpretation of the arbitration agreement in order to determine whether it has power to adapt the contract. Arbitral tribunals are urged by scholars to be purposeful in keeping the procedural and substantive issues distinct and separate. [*Berger pp. 8-11*]. The UNICITRAL Model Law, the *lex arbitri* of Danubia, further admonishes arbitral tribunals not to conflate the procedural law with the substantive law that the parties have chosen to govern the contract. [*Model Law Art. 39, p. 33*]. Per the UNCITRAL Model Law, arbitral tribunals are to decide disputes "in accordance with the rules of law chosen by the parties [thus] grant[ing] the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize the right." [*Model Law Art. 39, p. 33*].

17. The power of the parties is further highlighted by UNCITRAL's decision to refer to the parties' choice of "rules of law" as opposed to simply "law." [*Model Law Art. 39, p. 33*]. By referring to "rules of law," the Model Law "broadens the range of options available to the parties

as regards to the designation of the law applicable to the substance of the dispute." [*Model Law Art. 39, p. 33*]. This allows parties to choose an instrument, such as the CISG, "without having to refer to the national law of any State party to that Convention." [*Model Law Art. 39, p. 33*]. However, the arbitral tribunal must apply the appropriate national law, as determined by the applicable conflict-of-laws rules, when parties neglect to select the applicable law. [*Model Law Art. 39, p. 33*]. It would be improper for this Tribunal to apply Danubia's substantive contract law in the present situation. However, even if Danubia's substantive contract law were to be applied to decide whether or not adapt the contract, the authority to adapt the contract can still be implied from the mere presence of the hardship clause and for the reasons described above.

C. The Tribunal has the power to adapt the contract for the purpose of restoring equilibrium to the parties.

18. As is often the case, this Tribunal was not explicitly conferred the power to adapt or fill gaps in the Frozen Semen Sales Agreement or any component thereof, such as the Arbitration Agreement. [*Cl. Ex. C5, ¶ 15*]. However, no explicit provision is needed to confer that power. It is established above that this Tribunal should apply the law of Mediterraneo to interpret the arbitration agreement, *generally*. However, in order for the Tribunal to adapt the contract, it must also verify that it has the powers to adapt the contract, *specifically*. This Tribunal has the power to adapt the contract, and the Tribunal should do so in order to restore equilibrium to the parties.

19. The power to adapt or fill gaps in a contract may "be derived from the significance and purpose of the agreement." [*Berger p. 5*]. For example, implied authorization may be derived from a hardship clause within an agreement. [*Berger p. 8*]. In this case, the parties deliberately inserted an express hardship provision into the *force majeure* clause in Paragraph 12 of the Frozen Semen Sales Agreement. [*Cl. Ex. C5, ¶ 12*]. The purpose, as evident in this clause, was to enable an arbitrator to make subsequent changes to the contract terms or required performance, as a result of unexpected hardship. Thus, this Tribunal should conclude that it has implied authorization to adapt the contract.

20. If both express and implied authorization for contract adaptation is lacking, the Tribunal may look for legal authority to intervene either in the arbitration law or in the substantive law of the contract. [*Berger p. 5*]. Accordingly, only if there were no implied authorization to adapt the contract would this Tribunal need to proceed to the next step of choosing between the *lex arbitri*

(Danubian arbitration law) or the substantive law of the contract (Mediterranean contract law). Therefore, in the event that the Tribunal disagrees with CLAIMANT's assertion that the Tribunal has implied authorization to adapt the contract under the hardship clause, the Tribunal would proceed to choose between Danubian arbitration law and Mediterranean contract law.

21. Danubia's *lex arbitri* is the UNCITRAL Model Law. [*Procedural Order No 1, ¶ 4*]. The drafters of the Model Law chose not to insert a provision for adapting and supplementing contracts, because they found it challenging to separate questions pertaining to procedural and substantive law, noting that the Model Law is a set of procedural rules and "should not contain rules which might touch upon substantive rights of the parties." [*Berger p. 7*]. The substantive law of the contract, or the *lex causae*, is Mediterraneo's adopted contract law, the UNIDROIT Principles on Commercial International Contracts, and the stipulated CISG. [*Cl. Ex. C5, ¶ 14*]. These laws provide for adaptation of the contract. [*UNIDROIT 6.2.3*]; [*CISG Art. X*]. The well-established framework above does not call upon the Tribunal to consider Danubian contract law, at all. But, as explained in Part B, even if this Tribunal were to misapply this framework by considering the substantive Danubian contract law, that analysis would only affirm that the Tribunal has the power to adapt the contract. Danubian contract law does allow for contract adaptation, if authorized. [*Procedural Order No 1*]. As previously explained, authorization is implied. Here, we can observe this on the face of the contract, without even having to violate the four corners rule embraced under Danubian contract law.

22. Substantive standards required for adapting the contract are governed by the *lex causae*, or the law applicable to the substance of the dispute. [*Berger p. 11*]. It is the substantive law that must be consulted to determine "the adaptation standards agreed upon by the parties . . . and the methods of adaptation to be applied by the arbitrators if the contract does not contain specific instructions for the tribunal." [*Berger p. 11*]. Also, the *lex loci contractus* becomes important because the "[t]he contract terms established by the arbitral tribunal in adapting or supplementing the contract may not violate the mandatory rules of the law applicable to the contract." [*Berger p. 11*]. Consistent with the prevailing view described in Part B, with respect to the arbitral Tribunal's jurisdiction to interpret the arbitration agreement, generally, the Swiss Supreme Court has held that "[a]s long as the arbitration agreement does not contain any express restrictions, it must be assumed that the parties intended to confer upon the tribunal an all-

embracing jurisdiction, including the power to fill gaps and amend the contract." [*Swiss Supreme Court, Decision 4P.114/2001*].

23. Determining the power of the Tribunal to adapt a contract requires the simultaneous reference "to three different legal sources: the arbitration agreement, the law applicable to the arbitration, and the law applicable to the substance of the dispute." [*Berger p. 8*]. The arbitrator is acting within a legal vacuum when contract modification is allowed by the applicable arbitration law but not the *lex causae*. [*Berger p. 12*]. On the opposing extreme, "the provisions on contract adaptation and supplementation contained in the *lex causae* remain without effect if the applicable arbitration law does not contain a corresponding procedural authority for the arbitrator." [*Berger p. 12*]. The facts of this case do not fall within the range of either of the opposing extremes. This Tribunal is not pressed to decide this issue in the "vacuum" that Berger describes.

24. Both the substantive law that the parties chose to govern the contract and Danubia's *lex arbitri* allow adaptation of a contract by an arbitral tribunal. Furthermore, in practice, *lex arbitri* has substantially reduced significance, and arbitral tribunals focus "more on the law applicable to the substance of the dispute in order to determine the basis and scope" of their power to adapt and supplement contracts. [*Berger p. 12*]. This Tribunal should apply Mediterranean law to interpret the arbitration and to conclude that it has the power to adapt the contract. This would fulfill the intent of the parties and would restore equilibrium to the contract.

D. Alternatively, if the Tribunal does not recognize the necessity to adapt the contract, it would be proper for the Tribunal to make the interim decision to force RESPONDENT to fulfill its duty to negotiate under the hardship clause or even to award damages to the CLAIMANT on this basis.

25. This Tribunal may avoid the adaptation question altogether by recognizing that the scenario in this case is one in which "no special authorization is required to invest the arbitrators with a decision-making power." [*Berger p. 6*]. Instead, the issue presented in this case is merely part—albeit an integral part—of the dispute between the parties. The issue is actually *not* one of adaptation of a contract at all but is a traditional dispute over a legal issue in which "an incidental decision is required from the arbitral tribunal with respect to the validity, meaning, scope or effect of a hardship or other adaptation clause . . . [or when] an arbitrator is called upon to decide whether a party has violated its duty to renegotiate the contract under a hardship or renegotiation clause and is thus liable for damages." [*Berger p. 6*]. The Tribunal has the ability to resolve this

issue under its general authority under the arbitration agreement. [*Berger p. 6*]. As such, resolution of this dispute merely requires the arbitrator to make a decision as an interim step in the process of deciding the case and to make a final award.

CONCLUSION OF ARGUMENT I

26. This Tribunal has the jurisdiction to resolve the present price dispute between the parties under Danubia's *lex arbitri* and further has the specific power to adapt the Frozen Semen Sales Agreement. The source of this power of contract adaptation is an analysis of the arbitration clause through the lens of the law of Mediterraneo. The Tribunal can subsequently adapt the contract for the purpose of restoring equilibrium to the parties. Lastly, CLAIMANT advances an alternative argument that should contract adaptation not be necessary to resolve the dispute, the Tribunal could force RESPONDENT to fulfill its duty to negotiate under the hardship clause.

II. CLAIMANT SHOULD BE ALLOWED TO SUBMIT EVIDENCE FROM RESPONDENT'S PRIOR ARBITRATION PERTAINING TO AN ALMOST IDENTICAL ISSUE.

27. CLAIMANT should be allowed to submit evidence from the other arbitration proceedings. [**A**] There are no evidence rules specified in the contract or within the HKIAC Rules that bar its admissibility; [**B**] there are no overarching principles or rules generally applicable to international arbitration that would exclude this evidence; [**C**] CLAIMANT has not violated any HKIAC Confidentiality Rules by obtaining this evidence; and [**D**] the evidence should be admissible regardless whether it was obtained by illegal means, because the CLAIMANT did not participate in any illegal acts, and the evidence is relevant and material to the disputed issue.

A. There are no Rules of Evidence specified within the contract or within the HKIAC-Rules that bar admissibility of evidence from the other arbitration.

28. Neither CLAIMANT nor RESPONDENT identified specific evidence rules that would apply in a dispute arising out of the contract. [*Sales Agreement, p. 13-14*]. Admissibility of evidence is a matter of procedure; therefore, it is subject to the law governing the arbitration. [*Lew*, p. 561]. The parties specified that the arbitration would be conducted under HKIAC Rules; thus, any rules of evidence applicable to this arbitration are within these HKIAC Rules. Per the HKIAC Rules, arbitral tribunals "shall determine the admissibility, relevance, materiality and

weight of the evidence, including whether to apply strict rules of evidence." [*HKIAC Rules, Art. 22.2, p. 27*]. Rather than specifying mandatory evidence rules, the HKIAC Rules leave the topic of admissibility of evidence completely to the discretion of the arbitral tribunal. Given the absence of any mandatory rules barring their admissibility, CLAIMANT should be allowed to submit the evidence of the other arbitration proceeding, due to the overwhelming relevance of the copy of the award and relevant submissions in RESPONDENT's other arbitration, regarding the price modification in response to the unexpected hardship of the 25 percent tariff.

B. There are no overarching principles or rules of evidence generally applicable to international arbitration that would exclude this evidence.

29. For outside evidentiary rules to be binding on an arbitration, the parties must both specify the outside evidentiary rules and agree to those rules for the rules to be binding. [*Lew, p. 554*]. The parties neglected to specify any outside evidentiary rules; thus, none are binding on the present situation. Even had outside evidentiary rules been considered, there are very few general rules or principles on the taking of evidence, and "[h]ardly any of these rules are mandatory." [*Lew, p. 554*]. Of those principles which address the admissibility of evidence, none weigh against admissibility of CLAIMANT's evidence.

i. <u>International Arbitration favors admissibility over exclusion</u>.

30. The historic development of international arbitration partially stemmed from the desire of parties to have a more flexible evidentiary process and is characterized today "by an absence of restrictive rules governing the form, submission, and admissibility of evidence." [*Petrowski, p. 373;* Lew, *p. 554*]. Accordingly, evidence that is relevant is generally admissible in international arbitration unless otherwise provided by mandatory rules or an agreement by the parties. [*Pilkov, p. 148*]. This policy of general admissibility reflects the focus on establishing facts necessary to determine the truth of the matter, without being burdened by technicalities. [Redfern & Hunter, *p 377*]. When evaluating whether to consider a piece of evidence, arbitration tribunals assess the weight of that evidence, rather than the general admissibility of that evidence. [Lew, *p.* 565].

31. Consequently, CLAIMANT's only obstacle to admissibility in the present case is to demonstrate that the evidence is relevant. After CLAIMANT establishes relevance, the evidence can then adequately be weighed by the Tribunal, and unlike jurors, "the members of the tribunal, being jurists trained in the sifting of evidence, are competent to appreciate the evidence

according to its intrinsic and relative value." [*Sandifer, at 176*]. In other words, RESPONDENT's concerns with this evidence can be adequately considered by the Tribunal when they determine the weight of the evidence. Excluding this evidence altogether would be inappropriate in light of the focus of international arbitration on hindering the fact-finding process with evidentiary technicalities.

ii. The evidence of the other arbitration is relevant to the present dispute.

32. When seeking to have evidence admitted, the majority rule among arbitration rules is that the evidence must be both relevant, or relate to the issue at hand, and have the potential to materially affect the outcome. [*Pilkov, p. 148*]. However, in the absence of any specific evidentiary rules – such as in the present situation – the international community treats the question of relevancy of evidence as one of common sense. [*Pilkov, p. 148*]. The copy of award and relevant submissions regarding RESPONDENT's prior arbitration on the issue of contract modification in response to the unforeseen 25 percent tariff is overwhelmingly relevant.

33. This evidence is overwhelmingly relevant because, in the other arbitration, RESPONDENT sought the exact outcome which CLAIMANT is seeking in the present arbitration— adaptation of a contract under a hardship clause due to an unforeseen tariff of great magnitude destroying the commercial reality of RESPONDENT's deal by its obliteration of all profits and forcing RESPONDENT, if not corrected, to absorb the extreme loss. The only explanation for RESPONDENT's inconsistent arguments about the ability to modify or adapt a sales contract due to this tariff scheme is that in the prior arbitration, RESPONDENT was negatively impacted by the modification in price. The documentation from the previous arbitration, then, is not only relevant for the light it sheds on the legal issue but also for its impeachment of RESPONDENT's credibility. The evidence also carries with it the strong potential to affect a material outcome of the case because it weighs in favor of this Tribunal finding that the unforeseen tariffs *do* constitute unforeseeable changes that warrant contract adaptation, given RESPONDENT's willingness to make this argument in another arbitration.

34. In the prior arbitration, RESPONDENT made the exact same argument that CLAIMANT now makes against RESPONDENT in this Arbitration. It is true that in the second arbitration, RESPONDENT was addressing the 25 percent tariffs imposed by Mediterraneo on Equatoriana and that this Arbitration addresses the 30 percent tariffs imposed by Equatoriana on Mediterraneo. However, those two tariffs share a nucleus of common fact, as they stem from the

same political situation. The two arbitrations also share identical questions: (1) whether the political situation prompting the tariffs was foreseeable; and (2) whether the new tariffs warrant a contract adaptation regarding the price. In this situation, this Tribunal should admit the evidence from the other arbitration due to its overwhelming relevance and ability "to assist the tribunal in determining the truth as to disputed issues of fact." [*Pietrowski, p. 373*]. Exclusion of this evidence would serve no other purpose but to hinder the truth-finding process of this Tribunal.

B. CLAIMANT has *not* violated any HKIAC Confidentiality Rules in obtaining the copy of the award and relevant submissions from the other arbitration.

35. CLAIMANT received reliable information at the annual breeder's conference regarding the other arbitration and has been promised a copy of the award and the relevant submissions. By accepting this information, CLAIMANT is not in violation of any of the HKIAC Confidentiality Rules, which require that *no* parties or representatives of those parties "publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration." [*HKIAC Rules, Art. 45.1, p. 54*]. CLAIMANT has not – nor intends – to publish, disclose, or communicate any information regarding this arbitration as it relates to the arbitration clause within the Frozen Semen Sales Agreement unless necessary in relation to the proper joinder of a third party in accordance with HKIAC Rule 45.3(d). No representative of the CLAIMANT has – nor intends – to publish, disclose, or communicate any information regarding this arbitration as it relates to the arbitration clause within the Frozen Semen Sales Agreement unless necessary in relation to the proper joinder of a third party in accordance with HKIAC Rule 45.3(d). Therefore, the confidentiality of RESPONDENT's information is not, and will not be, at risk due to any action of the CLAIMANT or any representative of the CLAIMANT.

36. Confidentiality, though important, is no longer an *essential* attribute of private arbitration. [*Redfern & Hunter, p. 134*]. In the absence of an applicable rule on confidentiality, or a contract term dictating as much, most countries have no binding obligation of confidentiality in arbitration. [*Lew p. 177*]. This modern trend demonstrates that confidentiality is no longer absolute. [*Redfern & Hunter, p. 134*]. Society stands to benefit from the increased transparency of arbitrations. For example, the publication of arbitration awards would promote the establishment of precedent, develop a body of jurisprudence, and assist scholars in not only understanding but teaching the subject [*Lew, p. 660*]. Increased transparency further serves to

"inspire confidence in the arbitration process" and to promote the usefulness of alternative dispute resolution, thus decreasing the burden on courts worldwide. [*Lew, p. 660*].

37. This modern trend towards transparency is additionally evidenced by the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. Although this is not the type of arbitration at issue, these rules are illustrative of the general attitude of transparency in the international community. The UNCITRAL Rules on Transparency makes essentially all documents from the arbitration available to the public. [*UNCITRAL Transparency Rules, Art. 3*]. Some of these documents include: the notice of arbitration, the responses, the statement of the claim, statement of the defense, a table listing exhibits, expert reports and witness statements, orders, decisions, and awards. [*UNCITRAL Transparency Rules, Art. 3*].

38. Alternatively, the documentation from the other arbitration can be admitted under the HKIAC Rules if CLAIMANT joins RESPONDENT's customer as a party to the present dispute. If it comes to this, CLAIMANT is prepared to follow the proper joinder procedure under HKIAC Rule 27.6. Joinder is considered proper where (1) the additional party is bound by the same rules giving rise to this arbitration; or (2) where all parties expressly agree. [*HKIAC Rules, Art. 27.1, p. 32*]. The request for joinder is required to include information regarding the other arbitration, including a statement of facts supporting the request, the points at issue, a legal argument supporting the request, and any relief or remedy sought. [*HKIAC Rules, Art. 27.6, p. 33*]. In its answer to the request, under 27.7(e), the additional party shall include "details of any claims by the additional party against any other party to the arbitration." [*HKIAC Rules, Art. 27.6, p. 33*].

39. Due to the strong likelihood of a successful joinder, the CLAIMANT will more than likely be able to admit the evidence of the other arbitration even should the Tribunal not find the documentation overwhelmingly relevant and strongly material to the question at hand: whether post-contractual tariffs constitute an unforeseeable circumstance, warranting adaptation of a sales contract. The fact that this evidence, if rendered inadmissible initially due to evidentiary technicalities, will be brought in alternatively through joinder weighs in favor of this Tribunal admitting this evidence initially. Either way, the evidence will be admitted.

C. The evidence should be admissible regardless of whether it was obtained by illegal means.

40. CLAIMANT did not obtain the documentation of the other arbitration using illegal means of any sort. Therefore, even on the slim chance that this Tribunal believes that the evidence was initially obtained illegally by others, that conclusion would be irrelevant here, because CLAIMANT did not participate in procuring it. Although it is difficult to discern a standard used to approach "fruit of the poisonous tree" issues in international arbitration, there are cases that demonstrate that the "manner in which evidence is obtained [does] not always justify excluding the evidence." [*Boykin & Havalic, p. 32*]. In the most prominent arbitration on the issue, *Methanex,* evidence sought to be admitted included "documentation [that] was obtained by successive and multiple acts of trespass committed by Methanex over five and a half months in order to obtain an unfair advantage over the USA as a disputing party to these pending arbitration proceedings." [*Methanex, Part II, Chap. I, ¶ 59*]. The evidence was excluded, and the tribunal was critical of the claimant for its trespassing, but the tribunal didn't stop there: it analyzed the materiality of the evidence as well. The tribunal, in its reasoning for excluding the evidence, described the illegally obtained documents as having "only marginal evidential significance in support of Methanex's case." [*Boykin & Havalic, p. 33*]. This determination of materiality implicitly acknowledges that the manner in which the evidence was obtained is not an absolute bar to admissibility. [*Boykin & Havalic, p. 33*].

41. In a more recent arbitration, the *Yukos Majority Awards*, the tribunal relied upon WikiLeaks's illegal publication of confidential diplomatic cables to resolve a dispute about why Yukos's auditor chose to withdraw its audit reports from 1995 to 2004. [*Boykin & Havalic, p. 2*]. There, illegally obtained evidence was admitted and relied upon, unlike in *Methanex*. The notable distinction between *Methanex* and *Yukos Majority Awards* is that *neither party* participated in the unlawful actions. [*Boykin & Havalic, p. 7*]. WikiLeaks received the confidential cables from a third party, Private Bradley Manning, who was convicted on various charges for his actions in 2013. [*Boykin & Havalic, p. 2*]. Similarly, in the present case, no participant to this arbitration utilized illegal means to obtain the documentation about the other arbitration. Further, the materiality of the evidence can outweigh the need for exclusion due to illegal acquisition for evidence. This is illustrated in the dissent of the *ConocoPhillips* decision, in which it was argued that the illegally obtained evidence submitted to the tribunal changed "the ground or case for reconsideration . . . radically in dimension and importance." [*ConocoPhillips, Dissenting Opinion of George Abi-Saab, ¶ 24*]. Regardless of the procurement method of the

documents from the other arbitration, the information contained within those documents affects the present arbitration "radically in [both] dimension and importance." [*ConocoPhillips, Dissenting Opinion of George Abi-Saab, ¶ 24*]. Therefore, it would be unjust for CLAIMANT to be precluded from submitting the evidence in question

CONCLUSION OF ARGUMENT II

42. The Tribunal is simply being asked to maintain the uniformity of international law. Evidence of the other arbitration should be admissible in the present arbitration. The evidence at issue is relevant, not subject to any mandatory rules of evidence, not excluded by any overarching principles of evidence, and has material weight that outweighs any concerns that the evidence was illegally obtained by an unaffiliated third party. Additionally, the growing trend towards transparency in international arbitration encourages this Tribunal to utilize all the information available to learn the truth through the facts, in order to best determine an accurate, consistent, and logical award.

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF AT LEAST USD 1.250.000 FROM AN ADAPTATION OF THE CONTACT UNDER CLAUSE 12 BECAUSE THE CONTRACT LANGUAGE PERMITS IT AND THE INTENT OF THE PARTIES WAS TO PROVIDE FOR AN ADAPTATION OF THE CONTRACT UNDER FORSEEABLE HARDSHIP.

43. This Tribunal should adapt the contract price under the Frozen Semen Sales Agreement by an addition of at least USD 1.250.000 to ensure that the commercial basis of the deal is not destroyed. This price adaptation not only is within the bounds of the language of the specially negotiated hardship clause within the contract, it is further compliant with the intention of the parties to provide for an adaptation of the contract in situations of unforeseeable hardship.

A. The contract language expressly entitles CLAIMANT to a payment of at least USD 1.250.000 resulting from an adaptation under Clause 12.

44. The parties specifically included language within the Frozen Semen Sales Agreement applicable in case of hardship. The question then becomes how to interpret this specifically contracted-for language within the agreement. When interpreting language within "a completely integrated contract, common law courts generally agree that they may consider extrinsic evidence as to matters prior to the making of the contract if the contract is not sufficiently clear – if the meaning of the language is not plain." [*Farnsworth, p. 275*]. In other words, when there is

ambiguity within the contract, the court may utilize extrinsic evidence to decipher between "two reasonable meanings" of the contract language in question. [*Farnsworth, p. 275*]. The hardship language within the Frozen Semen Sales Agreement builds upon the concept of hardship as defined within the UNIDROIT Principles: "the fundamental alteration of the equilibrium of the contract." [*Uribe, p. 148*].

45. Because there is ambiguity within Clause 12 of the contract, consideration of extrinsic evidence is proper. The ambiguity within Clause 12 is whether the Tribunal is empowered to adapt the price of the contract in event of a hardship. Due to this ambiguity, it is proper for the Tribunal to consider external evidence about pre-contract negotiations to aid in its interpretation of Clause 12. Further, commentators on persuasive authorities – such as the Draft Common Frame of Reference which was created by the Study Group on a European Civil Code – reason that contracting parties are certainly free to explicitly prohibit adjustment upon a finding a hardship without the consent of the parties. [*Uribe, p. 247*]. Here the parties did not include an express provision prohibiting the arbitral tribunal from adapting the contract price as a result of hardship. As there is no prohibition of adaptation, the most reasonable interpretation of the purpose for including the hardship provision is that future price modifications will be allowed.

46. The tariff situation faced by the parties fulfills the definition of hardship contained within Clause 12 of the contract:

> Seller 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.

[*Cl. Ex. 5, p. 13*]. Clause 12 expressly states that hardship arises when an event is (1) *unforeseeable* and (2) makes the contract more *onerous*. The foreseeability of an event should be understood as "not only related to the nature of the event, but also to its magnitude or consequences concerning the obligations of the parties." [*Uribe, p. 251*]. To understand the effect of a potential hardship on the equilibrium of the contract necessitates a "comparison between the counter performances . . . to determine whether the economic balance of the contract has been fundamentally altered as was intended by the parties upon its conclusion." [*Uribe, p. 250*].

47. The unique cross-tariff political situation between Danubia and Mediterraneo fulfills the two hardship prongs denoted in the contract. First, the nature of the tariffs was unforeseeable by

all affected, including the parties to the Frozen Semen Sales Agreement. Equatoriana was known as, and usually behaved as, an "ardent supporter of free trade" who "resolved international trade differences in an amicable manner." [*Notice of Arbitration,¶10*]. Similarly, the magnitude of the effect of the tariffs on the agreement of the parties was not anticipated. Prior to the imposition of the tariffs, CLAIMANT stood to make a 5 percent profit from the sale of frozen semen to RESPONDENT. [*Notice of Arbitration,¶18*]. Due to the magnitude of the tariff's impact, CLAIMANT now stands to make a loss of over 25 percent on the business deal. [*Notice of Arbitration,¶10*]. The tariff does not simply result in a minor reduction to the profitability of this deal to CLAIMANT. It completely destroys the profitability and, if gone uncorrected, forces CLAIMANT to absorb a loss that it should not be required to absorb.

48. Concerning the second hardship prong, the financial impact the tariff has on the bargained-for exchange between the parties not only makes the contract more onerous, it completely destroys the commercial reality of the deal. It does not make any commercial sense for a party to enter into a contract knowing that an arbitrary and uncontrollable variable might destroy the benefit of the party's bargain. This was the exact reason for the inclusion of a hardship clause. It would undermine the power of contract within the community as it suggests that specifically negotiated hardship clauses do not hold water unless the parties specifically delineate all events to which the clause will be applicable. Requiring specific enumeration of hardships would increase transaction costs as it would necessitate parties to account for countless hypothetical mishaps in order to gain any benefit from the hardship clause sought to be included. Rather than going down a path of specific enumeration, hardship clauses should be liberally construed. Parties wishing to taper the effects of the clause should be required to include explicit narrowing language.

49. Furthermore, construing the hardship clause against the CLAIMANT would result in the RESPONDENT unfairly profiting from opportunistic behavior at the expense of the CLAIMANT. This would discourage businesses from entering into international commercial transactions, as they would rightly fear that despite the inclusion of a hardship clause to account for unforeseeable hardships incidental to international commercial transactions, companies may nonetheless remain open to bearing debilitating costs and risks. CLAIMANT's willingness to engage in international trade, coupled with CLAIMANT's commercial foresight to include a

hardship clause, does not merit a refusal of adaptation of the contract. Instead, CLAIMANT should be allowed to recover under Clause 12.

50. RESPONDENT's acquisition of Nijinsky III's frozen semen from CLAIMANT and RESPONDENT's breach of the contract through the resale of this semen to other breeders further damages the commercial aspects of CLAIMANT's business. [*Pro. Ord. No. 2, ¶ 20*]. CLAIMANT now loses out on potential sales and profits [*Pro. Ord. No. 2, ¶ 20*]. RESPONDENT's conduct demonstrates a clear intent not to restore the equilibrium of the deal and a lack of good faith. Per the CISG, the Tribunal is permitted to require adaptation in order to promote good faith in international trade. [*CISG Art. 7(1)*]. CLAIMANT went out on a limb in breaking from its policy not to sell such a large quantity of racehorse semen and RESPONDENT has taken advantage of that. RESPONDENT should not benefit from the unforeseen hardship, especially when CLAIMANT is relying on RESPONDENT'S good faith and RESPONDENT's purported desire to enter into a long-term relationship with CLAIMANT for future transactions. Relationships are about trust, and RESPONDENT has taken advantage of CLAIMANT's trust in this case. While it is not the Tribunal's responsibility to question the business judgment of CLAIMANT, it is the Tribunal's responsibility to apply the contract terms, to adapt the contract under Clause 12, and to hold RESPONDENT to the terms to which it willingly consented.

51. In an exercise of due diligence, the parties made the decision to specifically modify the ICC model hardship clause to best protect the parties in the case of unforeseen events that, rather than making the contract impossible to perform, met the low burden of simply making the contract more onerous. The tariffs clearly meet this burden and the contract should be adapted pursuant to the interests sought to be protected by this hardship clause.

B. It was the intent of the parties to provide for contract adaptation in case of unforeseeable hardship making the contract more onerous to perform.

52. Should the Tribunal find that there is an ambiguity in the hardship clause, the Tribunal is permitted under the CISG to consider extrinsic evidence demonstrating the intent and conduct of the parties during pre-contractual negotiations, in order to resolve the ambiguity. [*CISG Art. 8*]. Furthermore, where the evidence is silent, the Tribunal is able to consider what a reasonable person under the circumstances would have believed about the particular intent and conduct of parties [*CISG Art. 8(2)*]. In the present case, the relevant extrinsic evidence for the tribunal to consider is the extensive pre-contractual negotiations. Throughout these negotiations, the issue of

burden of risk was contemplated by CLAIMANT and RESPONDENT, with CLAIMANT disclaiming the burden of risk associated with the DDP delivery term. In fact, RESPONDENT's rationale for including a DDP delivery term was because of the "urgency of the delivery" and CLAIMANT's "much greater experience in the shipment of frozen semen." [*Cl. Ex. C 3, p. 11*]. RESPONDENT never mentioned anything about intending that the burden of risk rest with CLAIMANT.

53. In CLAIMANT's response to RESPONDENT'S request for a DDP delivery term, CLAIMANT explained the following to RESPONDENT:

> Furthermore, we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions. As we both know from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal. At minimum, a hardship clause should be included into the contract to address such subsequent changes.

[*Cl. Ex. C 4, p. 12*]. This statement clearly expresses CLAIMANT's intent not to accept the burden of risk and the costs associated with the same, as well as the intent to protect the commercial basis of the deal through the inclusion of a hardship clause. These negotiations directly resulted in the inclusion of Clause 12 in the Frozen Semen Sales Agreement, thus manifesting CLAIMANT's intent to protect the commercial basis of the deal and to ensure that the burden of risk for hardship was not assumed by CLAIMANT.

54. Furthermore, the very reason that RESPONDENT requested the DDP delivery term was to capitalize on CLAIMANT's experience and to ensure speedy delivery, as the shipment was explained to be "urgent" by RESPONDENT at all relevant times. [*Cl. Ex. C 3, p. 11*]. CLAIMANT never assumed the risk despite accepting a modified DDP delivery term. The intention of the parties was that CLAIMANT would agree to the DDP term for the limited purpose of seeking out commercially reasonable transit, as CLAIMANT was more knowledgeable in the field than RESPONDENT. CLAIMANT's intent was never to assume the burden of the risk, and the pre-contractual negotiations as mentioned above make that clear.

55. In fact, the pre-contractual negotiations demonstrated CLAIMANT's clear intent that it would not accept the burden of risk associated with the DDP term as it related to customs and regulatory measures. This point was made clear with CLAIMANT's resulting contract that included a hardship clause, wherein CLAIMANT expressly disclaimed any risks associated with

unforeseeable hardship. The position not to assume the risks associated with hardship had been taken by CLAIMANT from the very beginning, and at no point did CLAIMANT ever express any willingness to take on the burden of risk. Moreover, when RESPONDENT sought to include a DDP delivery term, CLAIMANT immediately informed RESPONDENT that CLAIMANT would not be willing to accept the burden of risk associated with a DDP delivery term but would instead be willing to utilize its knowledge of commercial transit so long as RESPONDENT accepted the burden of risk. The result of these negotiations was an understanding that Clause 12 of the Frozen Sales Agreement would account for any unanticipated hardships.

56. Unfortunately, the representatives of both CLAIMANT and RESPONDENT corporations who were initially charged with negotiating the agreement were tragically involved in an automobile accident, which resulted in both individuals being hospitalized and unable to continue in the negotiating process. [*Notice of Arbitration*, ¶ *8*]. In order to keep the deal moving forward, new individuals who had not previously been a part of the discussion attempted to pick up where the previous individuals had left off. These new individuals entered into the agreement, and the resulting Frozen Semen Sales Agreement should be construed with that understanding. While a more articulate contract that accounted for every specific instance of potential mishap would have been preferred, such an agreement would have been impossible in the face of the commercial realities and special circumstances of this case.

CONCLUSION OF ARGUMENT III

57. A plain reading of the heavily contemplated contractual language agreed to by the parties permits CLAIMANT to be awarded a minimum of USD 1.250.000 due to the unforeseen tariffs. Lastly, the external evidence of the communications between the parties during the negotiations demonstrates an intent to provide for an adaptation of the contract in the event of unforeseen hardship.

IV. CLAIMANT IS FURTHER ENTITLED TO AT LEAST USD 1.250.000 BECAUSE THIS TRIBUNAL HAS THE AUTHORITY TO ADAPT THIS CONTRACT UNDER THE CISG.

58. CLAIMANT is authorized to collect, at minimum, USD 1.250.000 pursuant to the CISG. The right to collect is rooted in: [A] the explicit intent of the parties, as expressed in the contract,

that the CISG to govern the contract; [B] the proper application of UNIDROIT Principles to fill in the hardship gap in the CISG and to further support contract adaptation by this Tribunal; [C] RESPONDENT's modification of the contract as a result of subsequent email communications and by accepting the third shipment in addition to CLAIMANT's subsequent detrimental reliance on this modification; and [D] RESPONDENT's breach of the resale provision entitling CLAIMANT to further recovery under CISG Article 74.

A. The explicit intent of the parties, as expressed in the Frozen Semen Sales Agreement, was for the CISG to govern the contract.

59. There is a gap in the CISG regarding hardship. Therefore, this Tribunal should apply general international principles to maintain uniformity in its application of international law to the present case. Under Article 6 of the CISG, the parties may exclude the application of the CISG or, subject to Article 12, derogate from or vary the effect of any of its provisions. [CISG Art. 6]. Nothing in Article 6 requires the exclusion of the CISG be explicit. CISG's diplomatic history allows the exclusion to be either express or implied. [*CISG Art. 6, UNCITRAL Digest of Art. 6*]. A tribunal should determine the parties' intent when deciding whether the parties opted out of the CISG. Here, however, the parties explicitly incorporated the CISG into the contract. [*Cl. Ex. C 5, ¶ 5*]. Further, the hardship clause within the sales agreement does not preclude the application of the CISG. No CISG exclusion from the hardship clause may be implied. Scenarios delineated as suggesting an implied exclusion of the CISG include: when contracting parties have negotiated contract terms that are totally inconsistent with the regulations of the uniform law, when the choice of law is that of a non-contracting state and refers to the domestic law of the state, as well as other scenarios. [*Borisova, UNIDROIT Art. 1.5*]. Based on the actions of the parties, as well as the express inclusion of the application of the CISG into the sales agreement, there is not an implied exclusion of the CISG.

60. It is incorrectly alleged by RESPONDENT that the inclusion of the *force majeure* and hardship clauses into the contract constitutes a derogation of Article 79 in the sense of Article 6. [*Res. Response to Arb ¶ 20, p 32*]. Previous decisions construed Article 79 in tandem with *force majeure* clauses in the parties' contract. In one decision, a tribunal denied a buyer's claim to exemption because the parties' contract contained an exhaustive listing of *force majeure* situations, and the circumstances of the case did not fall under the listing. [*CLOUT case No. 142*]. In another decision, a seller was not exempt for failing to deliver goods under article 79 or

under the *force majeure* clause, thereby suggesting that the parties had not preempted Article 79 of the CISG by agreeing to the contractual provision. [CLOUT case No. 277]. The parties have demonstrated a clear intent to have the CISG govern their contract, and there is a lack of evidence of intent for the *force majeure* or the hardship clause to derogate the CISG. In the present case, the parties have not provided an exhaustive listing, therefore Article 79 has not been derogated.

61. Further, the Tribunal should find, contrary to RESPONDENT's assertion, that Article 79 of the CISG does encompass hardships and allows for increase of the price. [*Res. Answer to Notice of Arb. ¶ 21, p. 32*]. The inclusion of hardship under Article 79 has been a historically divisive problem. For several years, there was a split in authority on whether Article 79 applies to liability regarding *force majeure* and hardship. [*Kofod*]. This split in authority is due to the lack of the express inclusion of the term "hardship" within Article 79. [*CISG Art. 79, Kofod*]. Many scholars have argued that the vagueness and impreciseness of Article 79 allows for the interpretation that the article covers hardship though not expressly stated. [*Rimke, Kofod*]. The modern trend is to interpret Article 79 in the light that "[a] change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ('hardship'), may qualify as an 'impediment' under Article 79(1)." [*CISG-AC Opinion, No. 7]*. This trend suggests that the term "impediment" includes scenarios that are not impossible but may be considered to be a hardship. [*Kofod, CISG-AC Opinion, No. 7*].

62. The rule of Article 79 has been found to be applicable to both situations of total impossibility and situations where performance has become severely burdensome. Thus, it would be unreasonable from a practical, although not technical, point of view to expect performance where such an extreme burden in performing under the contract amounts to impossibility. [*Honnold & Fletcher, p. 628; Lando p. 299*]. In light of good faith, Article 79 cannot impose upon the affected party an obligation to take on extraordinary responsibilities in order to perform. [*Honnold & Fletcher, p. 628; Lando p. 299*]. Therefore, economic difficulties can be considered as impediments in the context of Article 79, if they are sufficiently extreme. Article 79(5) provides that "nothing in this article prevents either party from exercising any right other than to claim damages under this Convention." Thus, the party affected by hardship may require the avoidance of the contract, a reduction of the contract price, or a similar result. A

tribunal can thereby distribute the losses resulting from the disruptive event affecting the parties and adapt the contract to the changed conditions. [*CISG-AC Op. No. 7, Comment 40*].

63. The hallmark case for the interpretation of when CISG Article 79 is applicable, on which this Tribunal should rely, is *Scafom*. This case addressed issues regarding the CISG's mechanism for gap filling and the inclusion of hardship as an excuse. [*Scafom*]. Hardship as an excuse is available to the parties in an international sales contract, in particular with regard to the effect of price fluctuations on the obligations of the parties. In the *Scafom* case, the parties had contracted for the delivery of steel tubes. The price of steel unforeseeably increased by 70 percent, and the contract did not contain any price adaptation clause. The Belgian Supreme Court concluded that unforeseen circumstances that resulted in a serious disturbance of the contractual equilibrium amounted to an impediment in the context of Article 79 of the CISG, and, considering there was a gap in the contract on this subject, that gap should be filled by the general principles of the law of international trade. [*CISG Art. 7.2*]. The court added that under those principles, in particular those incorporated in the PICC, the party affected by a change of circumstances that fundamentally disturb the contractual balance is entitled to request the renegotiation of the contract. The court implied that the "general principles" mentioned in Article 7(2) are not only those contained in the CISG itself but also those that may be deduced from international commercial law.

B. This Tribunal should apply UNIDROIT Principles to fill in the hardship gap in the CISG and to support contract adaptation by this Tribunal.

64. Article 79 of the CISG deals with the circumstances in which the buyer or seller may be excused from performance of their contractual obligations because of an extraneous event that is judged sufficiently important to warrant the excuse. Article 7(1) of the CISG provides that in the interpretation of the CISG, one should pay attention to the CISG's international character and the need to promote uniformity in its application. Therefore, the potential use of UNIDROIT principles as a means of interpreting and supplementing the CISG must be examined in light of Article 7 of the CISG. [*Garro, p. 1155-56*]. Where the parties agree that their contract shall be governed by the UNIDROIT Principles, the Principles are undoubtedly applicable because they are incorporated into the contract like any other contractual clause. [*Ferrari, p. 1229*]. When there is a dispute that falls within the scope of the CISG but is not expressly settled by its text, then the dispute should be settled in conformity with the general principles on which the CISG is

based. The purpose of the CISG is to provide a modern, uniform, and fair regime for contracts for the international sale of goods. Applying the UNIDROIT Principles to fill the gaps will ensure this purpose is met. In the present case, the general contract laws of Equatoriana and Mediterraneo are verbatim adoptions of the UNIDROIT Principles on International Commercial Contracts. Therefore, this Tribunal should apply the UNIDROIT Principles to fill the "gaps" of the CISG.

65. Under 6.2.2 of the UNIDROIT Principles, "[t]here 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 and (a) the events occur or become known to the disadvantaged party after conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risks of was not assumed by the disadvantaged party."

66. Fundamental alteration may be characterized in two ways: either there is an increase in the cost of the disadvantaged party's performance or a decrease in the value of what it must receive. The substantial increase may be due to a dramatic rise in the price of raw materials necessary for the production of goods, the rendering of the services, or to the introduction of new safety regulations requiring far more expensive production procedures. Here, the 30 percent tariff is a substantial increase in the cost of CLAIMANT's performance. CLAIMANT is now experiencing a 25 percent loss on the third shipment because of the surprise tariff. The equilibrium of the contract has been fundamentally altered.

67. The 30 percent tariff upon all agricultural goods from Mediterraneo was announced on 19 December 2017. [*Cl. Ex. 6]*. The Frozen Semen Sales Agreement was signed on 6 May 2017. [*Cl. Ex. 5*]. Therefore, the hardship occurred after the conclusion of the contract, and the first prong of hardship under 6.2.2 of the UNIDROIT Principles is satisfied. "The retaliation as well as the size of the tariffs came as a big surprise even to informed circles. Equatoriana has always been one of the biggest supporters of the existing system of free trade". [*Cl. Ex. 6*]. Previous restrictions imposed by other countries have never result in direct retaliatory measures by Equatoriana. [*Cl. Ex. 6*]. In addition, both CLAIMANT and RESPONDENT were astonished that that animal semen was included in this tariff because normally racehorse breeding falls

under a different category. [*Cl. Notice of Arb. ¶ 11, p 6*]. CLAIMANT could not reasonably have taken into account the potential of tariffs from Equatoriana because Equatoriana had not previously imposed retaliatory tariffs, and generally racehorse breeding has not been included in the category of animal products. [*Cl. Notice of Arb. ¶ 11, p 6*]. CLAIMANT has no ability to control governmental tariffs, so the tariff was beyond the control of CLAIMANT.

68. CLAIMANT did not assume the risk of the tariffs. The sales agreement includes a DDP provision, which normally would mean that the seller is required bear the risks and costs including duties, taxes, and other charges of delivering the goods. However, the email exchange prior to the sales agreement and the language of paragraph 12 of the sales agreement demonstrate both parties' intent to modify the DDP term. CLAIMANT said, "[w]e are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions." [*Cl. Ex. 4, p 12*]. In the sales agreement, CLAIMAINT renounced responsibility for hardship such as additional health and safety requirements or comparable unforeseen events that would make the contract more onerous. [*Cl. Ex. 5, p 14]*. In the past, the health and safety requirements amounted to 40 percent of the sales price, which is only a 10 percent difference from the tariff in the current situation. [*Cl. Ex. 4, p 12*]. Therefore, the 30 percent tariff falls under a "comparable unforeseen event" and is not an obligation of CLAIMANT. Thus, the contract needs to be rebalanced in response.

69. Per the UNIDROIT Principles, disadvantaged parties are "entitled to request renegotiations" in case of hardships. [*Article 6.2.3*]. Such requests must include the grounds upon which the hardship is based and must be "made without undue delay." [*Article 6.2.3*]. Renegotiation on account of hardship is not precluded even if an adaption clause is included in a contract, as long as the clause did not contemplate the events giving rise to hardship. [*Article 6.2.3, Comment 2 and 3]*. The renegotiations are subject to good faith and fair dealing and to the duty of cooperation. [*Article 1.7 and 5.1.3*]. If the parties cannot reach an agreement as a result of renegotiations "within a reasonable time" the parties may take the matter to court. [*Article 6.2.3*]. The court is then permitted, if it finds that there is in fact hardship, to either "terminate the contract at a date and on terms to be fixed or . . . adapt the contract with a view to restoring its equilibrium." [*Article 6.2.3*]. Although the disadvantaged parties are entitled to request renegotiations, the opposing party is by no means entitled to withhold performance. [*Article 6.2.3*].

70. CLAIMANT made a request for renegotiations as soon as it determined that horse semen was included in the tariff. [*Cl. Ex. 7, p 16*]. The parties attempted to negotiate a new price, but RESPONDENT eventually stopped the negotiations and refused to pay any additional amount. [*Cl. Ex. 8*]. While RESPONDENT breached the resale prohibition under the contract, CLAIMANT has acted in good faith and followed the proper procedure from the UNIDROIT Principles. Therefore, this Tribunal should adapt the contract and restore the contract to its equilibrium, so CLAIMANT is not harmed by this hardship. CLAIMANT is asking for USD 1.250.000, which is 25 percent of the third shipment. This 25 percent will put CLAIMANT back at zero profit for the third shipment. RESPONDENT will not be financially encumbered by paying this equitable amount.

71. In the spirit of developing uniform international law and decisions, this Tribunal should adapt this contract if it finds that CLAIMANT has experienced hardship. RESPONDENT has asked for a renegotiation of the price of another contract under the ICC Hardship Clause 2003 and Article 6.2.3. of the Mediterranean Contract Law due to the 25 percent tariff imposed by the president of Mediterraneo. [*Langweiler Email, p. 49*]. The 25 percent tariff was more predictable than Equatoriana's 30 percent retaliatory tariff because of Equatoriana's tariff history. RESPONDENT is alleging that the less predictable tariff does not warrant an adaptation. The Tribunal in the other case has confirmed its power to adapt the contract should the tariff result in a loss for RESPONDENT, so this Tribunal should doing the same in favor of CLAIMANT.

C. Respondent modified the contract during subsequent email communications and by RESPONDENT's actions of accepting the third shipment.

72. Should this Tribunal determine that it cannot adapt the contract under Article 79 of the CISG or the hardship clause, then RESPONDENT should be held in breach after having modified the contract. Under Article 29 of the CISG, a contract may be modified or terminated by the mere agreement of the parties. CLAIMANT sent the third shipment based on the impression that RESPONDENT accepted the position that RESPONDENT should bear the bulk of the additional costs due to the tariffs and needing the doses urgently. [*Cl. Ex. 7, p 16*]. Ms. Napravnik was communicating with Mr. Shoemaker, who had been introduced as the person responsible for the racehorse breeding program, including all questions concerning the Frozen Semen Sales Agreement. [*Pro. Order. No. 2, p. 59*]. Ms. Napravnik had been clear about her intent from her 20 January email that the parties needed to renegotiate. Even if Mr. Shoemaker

did not explicitly agree to any change, he knew that the last shipment was conditional on the agreement to renegotiate. Therefore, when RESPONDENT accepted the third shipment, RESPONDENT accepted the proposed modification from CLAIMANT.

73. Should this Tribunal find that there is insufficient evidence to support a claim for modification of the contract, then this Tribunal should look to reliance under Article 16 of the CISG. Under Article 16(2)(b), an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree acted in reliance on the offer. Here, Mr. Shoemaker was aware of CLAIMANT's intent to renegotiate; he was introduced as the person responsible for all questions concerning the Frozen Semen Sales Agreement; and he stated, "if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price". [*Res. Ex. 4, p 36]*. The hardship clause of the contract clearly provided for an adaptation of price , and Mr. Shoemaker was represented as being the lead person for the racehorse program. Therefore, CLAIMANT was reasonable in acting on Mr. Shoemaker's statement. When CLAIMANT shipped the third shipment, it was acting in reliance on Mr. Shoemaker's statement. Further, CLAIMANT has been harmed by this reliance. Therefore, this Tribunal should restore the parties to equilibrium by enforcing the modified agreement.

D. RESPONDENT's breach of the resale provisions of the Frozen Semen Sales Agreement entitles CLAIMANT to further recover under CISG Article 74.

74. The Tribunal should find that CLAIMANT is entitled to other damages for breach of the sales agreement by RESPONDENT resale of the frozen semen. Under Article 74 of the CISG, damages for breach of contract by one party consist of a sum equal to the loss, including the loss of profit, suffered by the other party as a consequence of the breach. These damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. RESPONDENT breached the resale prohibition under the contract when RESPONDENT resold the doses to other parties. [*Langweiler Email, p. 49*].

75. In the sales agreement, it says "the semen is to be used for the following mares: (*and others after information of the Seller*)". [*Cl. Ex. 5, p 13*]. This contractual language indicates that RESPONDENT had an obligation to inform Seller of any plans to use the doses for other mares. In addition, CLAIMANT clearly stated that the frozen semen may not be resold to third parties without its express written consent. [*Cl Ex. 2, p. 10*]. Additionally, CLAIMANT had made it

very clear in the parties' prior correspondence that CLAIMANT must be informed of the use of every dose. [*Cl. Ex. 2 p. 10*]. Within the email correspondence, CLAIMANT made RESPONDENT aware that the frozen semen "may not be re-sold to third parties without our express written consent." [*Cl. Ex. 2 p. 10*]. Therefore, based on the express contract language as well as previous correspondence, a condition of the contract was that the RESPONDENT would not resell the frozen semen without the permission of the CLAIMANT. RESPONDENT was aware of the resale condition, and CLAIMANT'S intent, and RESPONDENT still intentionally breached the contract.

76. RESPONDENT breached this condition of the sales agreement by selling the frozen semen to third parties without the permission of the CLAIMANT. [*Cl. Ex. 8 p. 18*]. Here, this breach is detrimental, as it has the potential to lower the cost of the Nijinsky III sperm by creating unsuccessful offspring. [*Pro. Or. No. 2*]. CLAIMANT has currently been charging fees with a profit margin of about 15 percent for natural coverings by Nijinsky III, which is above the ordinary profit margin of 10 percent of other stallions. [*Pro. Or. No. 2*]. Therefore, the CLAIMANT is entitled to damages as calculated under Article 74 of the CISG. The calculation for damages for breach of contract is a "sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." [*CISG Art. 74*]. The CLAIMANT suggests that the calculation of the damages could include the cost of each dose that the RESPONDENT resold, multiplied by the 15 percent profit margin that Nijinsky's natural covering was producing. Therefore, CLAIMANT asks this Tribunal for at least USD 16.500 per dose that was resold, as this was the expected profit margin for the natural coverings by Nijinsky III. CLAIMANT also asks this Tribunal to award reasonable damages as it sees fit, because CLAIMANT has been harmed since it has not been able to control the mares who received Nijinsky III's doses and ensure they may meet certain pedigree requirements.

CONCLUSION TO ISSUE IV

77. In conclusion, CLAIMANT contends that this Tribunal has the ability to adapt the contract under the Sales Agreement's hardship clause and under Article 79 of the CISG. The UNIDROIT Principles should be used as gap fillers to define hardship for the present case. CLAIMANT has experienced hardship and has acted in good faith throughout the entire course of dealing. CLAIMANT attempted to renegotiate the contract, but it was RESPONDENT who

refused to return the contract back to equilibrium. Accordingly, this Tribunal should return the contract to equilibrium and relieve CLAIMANT of its hardship. Even if this Tribunal finds that it cannot apply the hardship provisions of the UNIDROIT Principles, RESPONDENT modified the contract and should be held in breach for reselling the doses and for failing to renegotiate the contract as promised.

REQUEST FOR RELIEF

For the foregoing reasons, CLAIMANT asks the Tribunal:

1. To exercise its right to make self-determinations about the presence of its jurisdiction to hear the dispute and find it has proper jurisdiction to hear the dispute;
2. To find that the arbitration clause is to be governed by the laws of Mediterraneo and the CISG rather than by the laws of Danubia;
3. To find that it is within its power to modify the contract to restore equilibrium between the parties;
4. To allow evidence of the other arbitration to be admitted for purposes of this arbitration;
5. To order RESPONDENT to pay CLAIMANT an additional 25 percent of the price for the third delivery of semen, which is an additional USD 1,250,000;
6. To award CLAIMANT costs incurred from RESPONDENT breaching resale provision;
7. To order RESPONDENT to bear the costs of arbitration; and
8. To award further damages as this Tribunal deems appropriate.

Signed,

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Certificate and Choice of Forum

I **Sarah Skinner**, on behalf of the Team for **Norman Adrian Wiggins School of Law, Campbell University** 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.

☒ 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 **Norman Adrian Wiggins School of Law, Campbell University**

Name **Sarah Skinner**

Signature