SIXTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

TULANE UNIVERSITY LAW SCHOOL

MEMORANDUM FOR RESPONDENT

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

Z. CARTER FIGUEROA • ELIZABETH GERSTNER • MARK HAMBLIN
NICHOLAS MITCHELL • ELIZABETH REED • BENJAMIN RUSSELL • MICHELLE SLOSS
JAMIE SPELLERBERG

TULANE UNIVERSITY LAW SCHOOL
NEW ORLEANS, LOUISIANA, UNITED STATES OF AMERICA

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&	and
§	Section
Apr	April
Art./Artt.	Article/Articles
BV	Besloten vennootschap
BVBA	Besloten vennootschap met Beperkte Aansprakelijkheid
CE	CLAIMANT's Exhibit
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLAIMANT	Phar Lap Allevamento
Cl. Memo	CLAIMANT Memorandum
Co.	Company
Corp.	Corporation
e.g.	*exempli gratia* (For example)

Ed.	Edition
ed./eds.	Editor/Editors
Feb	February
HKIAC	Hong Kong International Arbitration Centre
i.e.	*id est* (That is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	Immediately preceding cited authority
Inc.	Incorporated
Jan	January
Jul	July
Jun	June
LLC	Limited liability company
LLP	Limited liability partnership
Ltd.	Limited

Mar	March
No.	Number
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PARTIES	CLAIMANT and RESPONDENT
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
R.	Record
RE	RESPONDENT's Exhibit
RESPONDENT	Black Beauty Equestrian
Sales Agreement	Frozen Semen Sales Agreement
S.A.	Société Anonyme
See	Inferential step
Sep	September
S.p.A.	Società per azioni
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	United Nations International Institute for the Unification of Private Law
USD	United States Dollar(s)
v.	Against

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STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"; together the "**PARTIES**"). RESPONDENT is incorporated in Equatoriana and is famous for its broodmare lines. RESPONDENT established its racehorse stable three years ago. CLAIMANT is incorporated in Mediterraneo and is known for its success in breeding racehorses.

21 Mar 2017	RESPONDENT contacts CLAIMANT to inquire about the availability of Nijinsky III for its newly established breeding program. [*Notice of Arbitration*, p. 5; *CE 1*].
24 Mar 2017	RESPONDENT receives CLAIMANT's offer to sell for 100 dozes of Nijinsky III's frozen semen. [*Notice of Arbitration*, p. 5; *CE 2*].
28 Mar 2017	RESPONDENT's Mr. Antley proposes changes in the price, delivery terms, applicable law, and the dispute resolution clause to CLAIMANT's Ms. Napravnik via email. [*CE 3*].
31 Mar 2017	Ms. Napravnik accepts changes to delivery terms subject to an increased price, the introduction of a hardship clause, and the possibility of arbitration. [*CE 4*].
10 Apr 2017	Mr. Antley emails Ms. Napravnik a draft of the arbitration clause, providing that the arbitration agreement would be governed by the law of Equatoriana law as the seat of arbitration. [*RE 1*].
11 Apr 2017	Ms. Napravnik modifies Mr. Antley's draft arbitration clause by moving the seat of arbitration to Danubia and suggests an ICC hardship clause. [*RE 2*].
12 Apr 2017	Mr. Antley and Ms. Napravnik are severely injured in a car accident, resulting in Mr. Antley's coma and subsequent retirement from RESPONDENT company. [*Notice of Arbitration*, p. 5]. CLAIMANT's Mr. Ferguson and RESPONDENT's Mr. Krone replace Ms. Napravnik and Mr. Antley in the negotiation process. [*RE 3*].
25 Apr 2017	Mediterraneo elects its new President. [*CE 6*].
5 May 2017	Mediterraneo's newly elected President, Mr. Bouckaert, appoints Ms. Frankel as his "superminister" for agriculture, trade and economics. [*PO 2*, para. 23].

6 May 2017	The contract between the PARTIES is signed. [*CE 5*].
1 Nov 2017	RESPONDENT appoints Mr. Shoemaker as head of its racehorse breeding program. [*RE 4*].
23 Nov 2017	Mediterraneo's President announces twenty-five percent tariff on animal products, including frozen semen, from Mediterraneo. [*CE 6*].
19 Dec 2017	Equatoriana's government imposes a thirty percent tariff on animal products, including frozen semen, from Mediterraneo. [*CE* 6].
20 Jan 2018	Mr. Shoemaker receives an email from Ms. Napravnik discussing Equatoriana's new tariffs and requesting renegotiation of the contract price for the last shipment of semen, due to ship on 23 January 2018. [*CE 7*].
21 Jan 2018	Mr. Shoemaker calls Ms. Napravnik emphasizing the importance of the shipment of the last doses, informs her of RESPONDENT's interest in purchasing semen from another stud, and tells her of his hopes that a solution could be reached through negotiations regarding the increased contract price. [*CE 8*; *RE* 4].
23 Jan 2018	CLAIMANT delivers the last shipment of 50 doses of frozen semen.
12 Feb 2018	The PARTIES meet to begin negotiations regarding the increased price of delivery. [*CE 8*]. Unfortunately, negotiations failed after CLAIMANT's baseless allegations that RESPONDENT breached the Sales Agreement. [*Id.*].
6 Jul 2018	RESPONDENT fires the employees that potentially disclosed the other arbitration to CLAIMANT.
31 Jul 2018	CLAIMANT submits its Notice of Arbitration. [*Notice of Arbitration*, p. 1].
24 Aug 2018	RESPONDENT submits its Answer of the Notice of Arbitration. [*Answer to Notice of Arbitration*, p. 29].
2 Oct 2018	CLAIMANT wrongfully notifies the Arbitral Tribunal of RESPONDENT's other arbitration. [*Langweiler Letter*, p. 50].
3 Oct 2018	RESPONDENT responds to CLAIMANT's notification to the Arbitral Tribunal, objecting to the introduction of evidence from its other arbitration. [*Fasttrack Letter*, p. 51].

SUMMARY OF THE ARGUMENTS

2. The Arbitral Tribunal has neither the power nor jurisdiction to decide on the issue of adaptation of the contract, because the Arbitral Tribunal derives its powers from the PARTIES' arbitration agreement and can only consider the matters which the PARTIES have agreed to submit to arbitration. Here, the PARTIES did not agree to empower the Arbitral Tribunal the jurisdiction to adapt the contract in the arbitration clause. Additionally, the law that governs the arbitration agreement is that of Danubia because it has the closest and most real connection with the arbitration clause as the seat of arbitration. Moreover, even when considering the PARTIES' conduct and negotiation history to interpret the contract, these supplemental interpretations do not allow the Arbitral Tribunal to adapt the contract. **(ISSUE 1)**.
3. The evidence from RESPONDENT's other arbitration is inadmissible because the HKIAC rules provide clear requirements for confidentiality. Confidentiality is a pillar of arbitration and to allow information regarding a confidential arbitration into evidence in this arbitration would hinder the purpose of arbitration. Even if the Arbitral Tribunal finds that the evidence from the other arbitration is admissible, the evidence is neither material nor relevant to the current arbitration. Furthermore, the UNCITRAL Rules on Transparency do not apply to this arbitration because this arbitration involves private companies, not state parties. Therefore, the Arbitral Tribunal should not allow for the introduction of the evidence from the outside arbitration. **(ISSUE 2)**.
4. CLAIMANT is not entitled to an adaptation of the purchase price of USD 1.25 million due to the increased costs resulting from the imposition of tariffs. The contract language does not allow for adaptation of the price and does not even provide for a mechanism to adapt the contract. Further, CLAIMANT assumed the risk of delivery costs by agreeing to DDP delivery terms. CLAIMANT also cannot rely on estoppel because CLAIMANT could not reasonably rely on RESPONDENT to reach on an agreed increased price. Additionally, applicable law does not allow for the adaptation of contract price either. CISG Article 79 does not apply to this arbitration as the CISG does not provide for hardship and CISG legislator explicitly chose to not include a hardship provision. Even if the CISG discussed hardship, the impediment in this case was not sufficiently onerous to constitute a hardship and CLAIMANT could have foreseen the possibility of political tariffs. **(ISSUE 3)**.

ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL CANNOT DECIDE ON THE ISSUE OF THE ADAPTATION OF THE CONTRACT

5. The arbitral tribunal is a body of limited jurisdiction and is only empowered to decide on those issues which the parties agree to submit to arbitration. [*Fouchard/Goldman/Gaillard*, p. 394]. The arbitrators' jurisdiction is derived from the arbitration agreement and set out in the established rules under which the arbitration has been constituted. [*Redfern/Hunter*, p. 308]. Contrary to CLAIMANT's contention, the *lex arbitri* should only be considered for purposes of the tribunal's jurisdiction after contemplating the law governing the arbitration agreement. [*Cl. Memo*, para. 3; *Redfern/Hunter*, p. 308].

6. Therefore, in determining its jurisdiction, the Tribunal should first look to the arbitration agreement and its applicable rules, then the law governing the arbitration agreement, and finally the *lex arbitri*. [*Redfern/Hunter*, p. 308]. The Arbitral Tribunal is not empowered to adapt the contract under any of these relevant sources of law. **(A)**. Nor can the Arbitral Tribunal find this power in any supplementary interpretation of the contract. **(B)**.

A. The Arbitral Tribunal is not Allowed to Adapt the Contract Under Any Applicable Source of Law

7. CLAIMANT correctly explains that arbitral tribunals usually do not consider the applicable procedural law in deciding whether they have the power to adapt a contract and instead rely solely on the contractual provisions. [*Cl. Memo*, para. 5; *Ferrario*, p. 170]. However, ignoring this norm, CLAIMANT inexplicably begins its analysis of the tribunal's power under the *lex arbitri*.

8. Nevertheless, RESPONDENT will demonstrate that the Arbitral Tribunal does not have the power to adapt the contract because adaptation is neither contemplated by PARTIES in the negotiated language of the arbitration agreement itself **(I)**, nor under Danubian law which is both the law governing the arbitration agreement and the *lex arbitri* **(II)**.

I. The Arbitration Clause does not Confer Upon the Arbitral Tribunal Jurisdiction to Adapt the Contract

9. The arbitration clause does not grant the Tribunal the power to adapt the contract. The arbitration clause is governed by the law of Danubia **(1)**, because the parties impliedly chose Danubian law to govern the clause **(a)** and the law of Danubia has the closest and most real connection to arbitration clause. **(b)**. Interpreted under the law of Danubia, the arbitration

clause does not authorize the Arbitral Tribunal to adapt the contract. **(2)**. If the PARTIES intended to authorize the Arbitral Tribunal to adapt the contract, they would have included an adaptation clause. **(a)**. A reasonable person in RESPONDENT's position would not have concluded that the PARTIES empowered the Arbitral Tribunal to adapt the contract. **(b)**.

1. The Arbitration Clause is Governed by the Law of Danubia

10. In absence of the PARTIES' express choice of the law governing the arbitration clause, the law of Danubia should apply because the PARTIES impliedly chose Danubian law, and it has the closest and most real connection to the arbitration clause.

a. The PARTIES Impliedly Chose the Law of Danubia to Govern the Arbitration Clause

11. Contrary to what CLAIMANT asserts, interpretation of statements made by the PARTIES leading to the formation of the contract does not establish that the law governing the Sales Agreement also governs the arbitration clause. [*Cl. Memo*, para. 16]. It is also important to note that it is unclear whether the CISG applies to arbitration clauses at all as such clauses do not contracts for the sale of goods. [*Flecke-Giammaro/Grimm*, p. 46]. The arbitration clause should first and foremost be interpreted based on its explicit language. This particular clause in question does not explicitly state that the Tribunal has the power to adapt the contract. [*CE 5*]. Even if the CISG does apply, interpretation of this arbitration clause under CISG Article 8 does not result in empowering the Tribunal to adapt the contract. [*Id.*; *CISG Art. 8*].
12. By choosing Danubia as the seat of the arbitration, the PARTIES impliedly chose Danubian law to govern the arbitration clause. [*CE 5*]. Also, by choosing Danubia as the seat of the arbitration, the PARTIES must be understood to have agreed that proceedings on the award should be only those permitted by Danubian law. [*C v. D*].
13. Here, the PARTIES did not agree to the application of any other law in writing. The law applicable to the arbitration agreement and the arbitration should be the law of the seat of the arbitration, unless the parties have agreed otherwise in writing. [*London Court of Int'l Arbitration Rules*, Art. 16(4); *Redfern/Hunter*, p. 159]. Therefore, the law of the seat of arbitration, Danubia, is the law applicable to the arbitration agreement and this arbitration.
14. An English court found that the choice of London as the seat of arbitration triggered acceptance by the parties that English law would apply to the arbitration, which suggested that the parties intended English law to govern all aspects of the arbitration agreement. [*Sulamérica*; *Redfern/Hunter*, p. 161].

15. An applicable law clause will usually refer only to the substantive issues in dispute. [*Redfern/Hunter*, p. 158]. It will not usually refer in terms to disputes that might arise in relation to the arbitration agreement itself. [*Id*.]. Therefore, while the PARTIES did agree to Mediterraneo as the choice of law applicable to the Sales Agreement, such an agreement should not apply to the arbitration agreement as well. [*CE 5*].
16. RESPONDENT intended for Danubian Law to apply to the arbitration clause, as their proposal during negotiations made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the substantive contract. [*PO 2*; *RE 1*]. Such a clause was actually included in Mr. Antley's latest draft of the Sales Agreement dated 10 April 2017. [*Id*.] Mr. Antley proposed that if the seat of arbitration was Equatoriana, the law of the arbitration clause should remain consistent by also being the law of Equatoriana. [*Id*.]. This clause confirms that RESPONDENT intended to subject the arbitration to the law of the seat of the arbitration, and CLAIMANT was aware of this intention.
17. CLAIMANT alleges that it had the intention to subject the arbitration clause to the law of Mediterraneo, but RESPONDENT was not aware or could not have been reasonably aware of this alleged intent. [*CISG Art. 8(1)*]. Under CISG Article 8(2), "statements made by […] a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." [*CISG Art. 8(2)*]. Even if CLAIMANT intended to choose the law of Mediterraneo as applicable to the arbitration clause, this does not bind the PARTIES unless RESPONDENT was aware or could not have been unaware of that intent. [*CISG Art. 8(1)*]. As CLAIMANT asserted, a party cannot be aware of an unexpressed intention. [*Cl. Memo*, para. 22].

b. The Law of Danubia Has the Closest and Most Real Connection to the Arbitration Clause

18. The arbitration clause is considered separate from the other clauses in the agreement and should be taken to be autonomous. "It is this separability of an arbitration clause that opens the way for the possibility that it may be governed by a different law from that which governs the main agreement." [*Redfern/Hunter*, p. 159]. It is not unusual for the contract to be governed by a different law than the arbitration agreement. Where the arbitration agreement is separate, the court will turn to the parties' choice of seat in order to determine the law with which the arbitration agreement has its closest and most real connection. [*Redfern/Hunter*, p. 99].
19. The PARTIES' choice of the seat for the arbitration to be Danubia shows that they consciously affiliated the arbitration process with Danubia. An arbitration agreement will generally have a

closer and more real connection with the seat of arbitration rather than the law of the substantive contract. [*C v. D*]. If there is no express law of the arbitration agreement, the closest and most real connection is the law of the seat of arbitration. [*Id.*]. In the case at hand, it is clear that Danubian law has the closest and most real connection to Danubia.

20. Further, the New York Convention provides that when a choice of law provision is absent in an arbitration agreement, the seat of arbitration might be the strongest connecting factor in the arbitration agreement. [*Marghitola/Lew*, p. 123; *New York Convention Art. V(1)(a)*]. The location of the arbitration is where the existence of the agreement might be tested in setting aside procedures. [*Marghitola/Lew*, p. 123; *New York Convention Art. V(1)(a)*].

2. Interpreted Under the Law of Danubia, the Arbitration Clause does not Authorize the Arbitral Tribunal to Adapt the Contract

21. Because an arbitral tribunal derives all of its jurisdiction from the agreement of the parties, the tribunal may only act according to that agreement. The PARTIES' arbitration agreement here does not contemplate adaptation of the contract by the Honorable Tribunal. Therefore, this Tribunal lacks the jurisdiction to adapt the Sales Agreement.

a. If the PARTIES Intended to Authorize the Arbitral Tribunal to Adapt the Contract, They Would Have Included an Adaptation Clause

22. Under the four corners rule, the interpretation of arbitration agreements is limited to its wording and no external evidence may be relied upon. [*Answer to Notice of Arbitration*, para. 16]. Reliance on the drafting history and preceding communication is excluded if the wording of the contract is clear. [*Id.*]. The wording of the arbitration clause clearly does not include the adaptation of the contract by the Arbitral Tribunal. [*CE 5*]. Therefore, the PARTIES did not intend to authorize the arbitral tribunal to adapt the contract.

b. A Reasonable Person in RESPONDENT's Position would not Conclude that the PARTIES Empowered the Arbitral Tribunal to Adapt the Contract

23. Courts, not arbitral tribunals, should adapt contracts if necessary. The Tribunal's limited jurisdiction is outlined by the PARTIES' agreement. Under the New York Convention, an award made by a tribunal without jurisdiction is unenforceable. [*New York Convention Art. V(1)*]. The PARTIES' inclusion of a hardship clause that outlines very specific circumstances under which the contract may be changed shows that they intended for only those circumstances to allow for adaptation. [*CE 5*]. This Arbitral Tribunal therefore does not enjoy a general adaptation power.

II. Danubian Law Does not Allow the Arbitral Tribunal to Adapt the Contract

24. Danubian law as the governing law of the arbitration agreement does not allow the arbitral tribunal to adapt the contract because the UNICTRAL Model Law does not include such a power. [*UNCITRAL Model Law*]. Therefore, the *lex arbitri*, as it is also the law of Danubia, does not empower the Arbitral Tribunal to adapt the contract. **(1)**. In the absence of express authorization by the PARTIES, the Arbitral Tribunal does not have the power to adapt the contract. **(2)**.

1. The *lex arbitri* does not Empower the Arbitral Tribunal to Adapt the Contract

25. Contrary to what CLAIMANT asserts, the *lex arbitri* does not empower the Arbitral Tribunal to adapt a contract under any circumstances. [*Cl. Memo*, para. 8]. If the *lex arbitri* does not empower the Arbitral Tribunal to adapt a contract, it is doubtful such power exists under the substantive law. [*Brunner*, p. 493].
26. CLAIMANT correctly concedes that the UNCITRAL Model Law does not provide tribunals with an adaptation mechanism. [*Cl. Memo*, para. 6]. In fact, CLAIMANT points out that the Secretariat at the fourteenth session and the working group explicitly discussed a "gap-filling" authority, but ultimately did not include such a power in the Model Law. [*UNCITRAL Secretariat*, *§57,* p. 84; *Cl. Memo*, para. 6]. This conscious omission of an adaptation power shows that the Model Law does not empower tribunals to adapt contracts.
27. While Article 7(1) of the UNICTRAL Model Law discusses an arbitral tribunal's jurisdiction to decide a dispute, contract adaptation would be more involved than merely deciding a dispute. [*UNCITRAL Model Law Art. 7(1)*; *Brunner*, pp. 492-493]. "It has been argued that a dispute would only exist if the tribunal is asked to make a yes or no decision with respect to a party's non-performance." [*Brunner*, at 494].
28. Arbitration has been found to be incompatible with the creative nature of adaptation and gap filling decisions. [*Id.*]. "It is also suggested that the adaptation of contractual rights should be reserved for the Parties themselves, while courts and arbitral tribunals should be limited to adjudicate pre-existing rights." [*Id.*]. Therefore, adapting the contract in the present would be beyond the Arbitral Tribunal's rights.
29. Arbitral contract revision or adaptation should not take place in arbitration. For example, under traditional Australian views, in situations like this, any award rendered in arbitration that adapts the contract would be non-enforceable. [*Klausegger/Klein*, p. 85] In order for an award to be enforceable under the New York Convention on the Recognition and Enforcement of Arbitral Awards, an award has to be made by and arbitrator in a process qualifying as arbitration. [*Id.*;

New York Convention Art. V(1)]. Therefore, the enforcement of an award will only be granted if the award is considered proper in the country of origin, referring back to the concept of *lex arbitri*. Under the Danubian law, contract adaptation is not allowed in arbitration and therefore the award is likely to be considered invalid if the Arbitral Tribunal adapted the contract. [*Klausegger/Klein*, p. 86].

2. The Arbitral Tribunal does not Have the Power to Adapt the Contract in the Absence of an Express Authorization by the PARTIES

30. Under the law of Danubia, the Arbitral Tribunal does not have the power to adapt the contract in the absence of the PARTIES' explicit authorization. Danubian contract law Article 6.2.3 (4)(b) grants power to adapt the contract to the court only if so authorized by the contract. [*PO 2*]. Arbitrators' powers to modify or adapt contracts should be placed on equal footing with those of state court judges. [*Sanders*, p. 70]. Under the principle of synchronized competencies, parties should not be worse off in arbitration than they would be in court. [*Id.*]. Therefore, Danubian Contract Law also grants arbitral tribunals the power to adapt only if authorized by the contracting parties. [*PO 2*].
31. Here, the PARTIES did not explicitly authorize the Tribunal to adapt the contract. [*CE 5*]. The Arbitral Tribunal may not alter the PARTIES express and unambiguous terms without express authorization from the PARTIES. [*Redfern/Hunter*, p. 526]. If the Arbitral Tribunal were granted the power to adapt the contract, they would be altering the PARTIES' express and unambiguous price terms without express authorization from the PARTIES.
32. An arbitral tribunal does not generally have the power to create or adapt a contract between parties. [*Redfern/Hunter*, pp. 529-30]. The tribunal's role in a contractual dispute is usually to interpret the contract as signed by the parties. [*Id.*]. In this instance, by adapting the contract without the express authorization by the PARTIES, the Arbitral Tribunal would be inappropriately surpassing its role as contractually established by the PARTIES.
33. The PARTIES also used a standard-form arbitration clause with the wording "any dispute arising out of this contract." [*CE 5*]. "A standard-form arbitration clause that refers to 'disputes arising under the contract' is not wide enough to include a claim for adaptation." [*Redfern/Hunter*, p. 529]. Therefore, in no way did the PARTIES did not authorize the Arbitral Tribunal to adapt the contract.

B. Supplemental Contract Interpretation does not Provide the Arbitral Tribunal with Jurisdiction to Adapt the Contract

34. CLAIMANT correctly points out that arbitral tribunals are often called upon to interpret "open terms" within a contract and to resolve disputes arising from unforeseen circumstances. [*Cl. Memo*, para. 45]. However, this "supplementary interpretation" referred to by CLAIMANT is always subject to the PARTIES' intent. [*Wolfgang*, p. 254].
35. CLAIMANT argues that because the PARTIES did not expressly provide for a price revision in the case of a change in customs regulations, this Honorable Tribunal should interpret this absence as a "gap" to be filled in arbitral proceedings. [*Cl. Memo*, para. 46]. It is the noticeable absence of any such adaptation clause, however, that shows that the PARTIES lacked the intent for this tribunal to adapt the contract.
36. While arbitral tribunals may need to look to parties' "hypothetical intent" where parties did not agree on a contractual provision for a legal issue that needs to be resolved, price revision is not an issue which needs to be resolved by the tribunal because it lacks the jurisdiction to adapt the contract. [*Marghitola/Lew*, p. 141].
37. Here, the PARTIES specifically provided for "any dispute arising out of this contract," to be referred to arbitration. [*CE 5*]. The Tribunal's role is therefore limited to interpret the contract as signed by the PARTIES and does not include the power to adapt, create or write a new contract between the PARTIES. [*Redfern/Hunter*, p. 524].
38. The PARTIES' highly negotiated contract does not leave a "gap" requiring supplementary interpretation. Rather, the Tribunal clearly lacks a grant of power to this Tribunal to write new provisions in light of circumstances that happen to be unfavorable to CLAIMANT.

CONCLUSION OF ISSUE 1:

39. RESPONDENT respectfully requests that the Honorable Tribunal dismiss CLAIMANT's claims regarding price adaptation as the Tribunal lacks the proper jurisdiction to adapt the arbitration clause. Because the PARTIES did not expressly include a choice of law governing the arbitration agreement, it is governed by the law of the seat of arbitration: Danubia. Under Danubian law, arbitral tribunals are only empowered to adapt contracts if the parties expressly provide them with such power within the arbitration clause. Because the PARTIES have not done so here, the Honorable Tribunal lacks the jurisdiction to adapt the contract and therefore must dismiss CLAIMANT's request for price adaptation.

ISSUE 2: THE EVIDENCE FROM THE OTHER ARBITRATION IS NOT ADMISSIBLE DUE TO THE CONFIDENTIALITY OF THE AWARD IN THE OTHER ARBITRATION

40. Regardless of the origin or method in which CLAIMANT obtained the information about the award from RESPONDENT's other arbitration, the award is subject to confidentiality protection through HKIAC's Confidentiality Rules, which are binding upon the Arbitral Tribunal. **(A)**. Moreover, confidentiality is a cornerstone of international commercial arbitration and ought to be preserved by the Arbitral Tribunal. **(B)**. Additionally, the evidence from another arbitration is not material to the present arbitration and the UNCITRAL Transparency Rules are irrelevant to this private arbitration. **(C)**.

A. The Award from RESPONDENT's Other Arbitration is not Permitted to be Submitted Since It is Subject to Confidentiality Under Article 42 of the HKIAC 2013 Rules

41. CLAIMANT argues that it is not a party under Article 42 of the HKIAC 2013 Rules and thus not subject to any obligation of confidentiality. [*Cl. Memo*, para. 75]. While that may be true, Article 42 of the HKIAC 2013 Rules also extends the confidentiality requirement to the HKIAC itself. [*HKIAC 2013 Rules Art. 42.2*]. Thus, the Arbitral Tribunal, organized under the HKIAC, is subject to the requirement that "no party may publish, disclose, or communicate any information relating to… an award made in the arbitration." [*HKIAC 2013 Rules Art. 42.1*]. Even though CLAIMANT is not a party to the other arbitration and arguably not subject to the confidentiality requirement in Article 42 as it relates to the award from the other arbitration, the HKIAC is not permitted to publish the award. Therefore, there is more to consider than CLAIMANT's position in regard to the other arbitration. Thus, the argument that CLAIMANT is not a party to the other arbitration and thus not subject to the confidentiality requirements in Article 42 is not enough for CLAIMANT to establish that the award is not subject to further confidentiality protection.

42. There is no reason to inquire whether CLAIMANT, the company providing the information, the hackers, or the former employees are subject to Article 42 confidentiality since the HKIAC is very clearly and explicitly subject to maintaining confidentiality of the award. One distinguishing feature of the HKIAC Rules as it pertains to confidentiality is that the duty of confidentiality extends to cover both the Arbitral Tribunal and HKIAC. [*Moser/Bao*, p. 282]. By agreeing to arbitrate under the HKIAC Rules, the parties and the HKIAC are bound by an express duty of confidentiality contained in Article 42.1. [*HKIAC 2013 Rules Art. 42.1*]. Thus, it is immaterial that CLAIMANT was not a party to the other arbitration. The award cannot be admitted into the

arbitration because the HKIAC is subject to the confidentiality requirement in Article 42. [*HKIAC 2013 Rules Art. 42*].

43. RESPONDENT recognizes that the duty of confidentiality related to arbitral awards is not absolute. However, the exceptions to the duty of confidentiality outlined in the HKIAC 2013 Rules Article 42.3 do not apply to the current dispute. Article 42.3(a) provides that the duty of confidentiality does not prevent a party from instituting legal proceedings to (1) protect or pursue its legal interest; or (2) enforce or challenge the confidential award in legal proceedings before a court or others judicial authority. [*HKIAC 2013 Rules Art. 42.3*; *Moser/Bao*, p. 283].

44. Here, the disclosure of the confidential award itself is not necessary for CLAIMANT to institute legal proceedings (as evidenced by the fact that legal proceedings have already been instituted), and the award is not being challenged or enforced through a court or judicial authority. Thus, the exception in Article 42.3(a) does not apply to CLAIMANT's interest and the confidentiality requirement is not overcome. [*HKIAC 2013 Rules Art. 42.3(a)*]. Moreover, the remaining exceptions in Article 42.3 do not apply to this dispute in any arguable way. [*HKIAC 2013 Rules Art. 42.3*]. The exceptions listed in Article 42.3 relate to the obligation of a party to publish an award due to a government or regulatory requirement and disclosure to an expert, not disclosure for evidentiary purposes as the CLAIMANT is attempting to do here. [*HKIAC 2013 Rules Art. 42.3(b), (c)*].

45. Article 42.5(c) of the HKIAC 2013 Rules states that an award may be published only under the condition that no party objects to such publication—in the case of an objection, the award shall not be published. [*HKIAC 2013 Rules Art. 42.5*]. RESPONDENT objects to the publication of the award from the other arbitration. [*Langweiler Letter*, p. 50]. The HKIAC 2013 Rules compel the Arbitral Tribunal to refuse the submission of the other arbitration award as RESPONDENT objects to its submission. Moreover, CLAIMANT has not followed the proper procedure to permit the award to be subject to Article 45 exception. Article 45 requires that a party make a request for publication of an award to the HKIAC. [*HKIAC 2013 Rules Art. 42.5(a)*]. There has been no indication that CLAIMANT has or will request the HKIAC to publish the award; in fact, CLAIMANT has stated that they will obtain the award and submit it themselves via methods not authorized by HKIAC. [*Langweiler Letter*, p. 50]. Ultimately, the award is not subject to any exceptions to confidentiality provided in Article 42.3 or Article 42.5 and the HKIAC itself is still subject to confidentiality; therefore, the award may not be submitted to the Tribunal for review. [*HKIAC 2013 Rules Artt. 42.3, 42.5*].

46. Conclusively, even if CLAIMANT did not breach any confidentiality agreement, the award from the other arbitration is not permitted to be submitted as evidence since the HKIAC itself is subject to confidentiality provisions and there is no viable exception available to CLAIMANT to argue that the award should be submitted despite its confidentiality.

B. Confidentiality is a Cornerstone of International Commercial Arbitration and the Award cannot be Submitted in Adherence with this Principle

47. Confidentiality is an essential element of the arbitral process which assists in the effective, efficient resolution of international disputes; therefore, this element must be given legal and binding effect. [*Born*, p. 2780, ("[p]rivacy is a long-established hallmark of international commercial arbitration"); *Expert Report of Stephen Bond*, p. 273, ("users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration")].

48. Moreover, confidentiality is a fundamentally accepted element of international commercial arbitration. [*Himpurna Cal. Energy Ltd v. Repub. of Indonesia*, ("[I]t is improper for any party to probe the secrecy of deliberations. That confidentiality, a fundamental element of the arbitral process, is intended to ensure that each arbitrator is able to exercise his or her independent judgment in a collegial context free of any outside influence."]. The arbitration process is enhanced by its intrinsic deference to confidentiality. [*Hanotiau*, p. 90, ("arbitration has been stimulated by…its intrinsic qualities…its privacy and confidentiality")].

49. Parties are enticed to choose and agree to arbitration in many instances because of the advantages offered by the confidentiality feature; to take this feature away or diminish its strength would devalue the institution of arbitration itself. [*Knahr/Reinisch*, p. 109, ("[c]onfidentiality is generally regarded as one of the hallmarks of (commercial) arbitration and usually ranks high among the perceived main advantages of arbitration over other forms of dispute settlement.")]. Additionally, the strategic election of an arbitration agreement by the parties is motivated by the widely accepted theory that international commercial arbitration provides strict confidentiality to its participants.

50. Most parties enter arbitration with expectations of confidentiality; these expectations are generally perceived as one of the important advantages of international arbitration as a mode of dispute resolution. [*Trakman*, ("[a] strategic advantage of commercial arbitration is its ability to provide confidentiality to participants")]. This is evidenced in institutional arbitration rules

enhancing the confidentiality requirements on parties and arbitrators. [*Id.*; *LCIA Rules Art. 30*; *2012 Swiss Rules Art. 44(1)*; *2013 VIAC Rules Art. 16(2)*; *WIPO Rules Artt. 73-76*]. This reflects the expectations of users of international arbitration as well as the objectives that international arbitration seeks to achieve. [*Expert Report of Stephen Bond*, p. 273, ("users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration"); *UNCITRAL Notes on Organizing Arbitral Proceedings*, ¶31, ("[i]t is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration.")].

51. Moreover, there appears to be little legitimate reason for unrestricted publication of awards, even at the conclusion of arbitral proceedings—the better approach is to preclude disclosure of awards, absent an affirmative showing of a justification for doing so, which RESPONDENT has previously indicated that there is no justification for doing so. [*UNCITRAL Notes on Organizing Arbitral Proceedings*, p. 2820; *Langweiler Letter*, p. 50]. Confidentiality enables parties to present the relevant evidence and argument without concern that competitors or others will obtain confidential or sensitive information and use it in damaging ways against them. [*UNCITRAL Notes on Organizing Arbitral Proceedings*, p. 2820].

52. Thus, having considered that confidentiality is a hallmark of international arbitration, the Arbitral Tribunal ought to adhere to this well established and accepted hallmark and not permit the submission of the other award in the interests of promoting efficient arbitration.

C. The Evidence from the Other Arbitration is not Material and the UNCITRAL Transparency Rules are not Relevant to this Arbitration.

53. CLAIMANT argues that the award from the other arbitration is material and relevant to this arbitration. [*Langweiler Letter*, p. 50]. Article 22.3 of the HKIAC 2018 Rules only allows the arbitral tribunal to admit evidence that is "relevant to the case and material to its outcome." [*HKIAC 2018 Rules Art. 22.3*]. The terms "relevant" and "material" are similar but there are nuances in their respective meaning. Relevance suggests that the document must be useful for the line of evidence by the requesting party in order to establish the truth of its factual allegations, on which its legal conclusions are based. [*Raeschke-Kessler*]. Material, on the other hand, means that the Arbitral Tribunal must rule that the document is necessary as an element to allow complete consideration as to whether a factual allegation is true or not. [*Id.*].

54. Based on this definition, the award from the other arbitration is irrelevant in the present case. The disclosure of the award as evidence in this arbitration would do nothing to advance the

truth of the factual allegations that CLAIMANT makes on which its legal conclusions are based. The allegation that RESPONDENT is involved in another arbitration seeking the result that CLAIMANT seeks here does not establish or advance any legal argument that CLAIMANT personally makes to this Tribunal.

55. The award from the other arbitration is immaterial since the Arbitral Tribunal knows of the existence of the other arbitration. The award does not affect the outcome of this arbitration since the allegation made by CLAIMANT is not dispositive in deciding the issues before this Tribunal.

56. CLAIMANT cites the UNCITRAL Rules on Transparency as a guide to suggest that the Arbitral Tribunal shall be permitted to admit the evidence into this arbitration. [*Cl. Memo*, para. 83]. Not only do these Rules not apply to the current arbitration, but they clearly distinguish between the confidentiality requirements in traditional international commercial arbitration like this one and treaty arbitration which raises distinct transparency concerns in that it involves state actors. [*UNCITRAL Rules on Transparency Artt. 1.7, 7.1*].

57. CLAIMANT's arguments based on the UNCITRAL Rules on Transparency are ineffective. The UNCITRAL Rules on Transparency provide for open oral hearings, and publication of documents submitted in the arbitration, such as pleadings and the tribunal's decisions and awards, though arbitrators have discretion to keep some documents confidential. [*UNCITRAL Rules on Transparency Artt. 7.2, 7.3*]. The Rules also create an exception for confidential information, which need not be disclosed. [*Born*, p. 2827]. Confidentiality has historically played a less significant role in investor-state arbitration settings than in international commercial arbitrations. [*Id.*]. That is in large part because of perceptions that there are fewer reasons justifying confidentiality, and greater requirements for transparency, in investor-state arbitrations since it often involves the actions of government. [*Id.*].

58. Here, there is no compelling reason to justify comparable transparency as the present case in no way involves investor-state arbitration; this arbitration is a private commercial dispute between two companies. [*Buys*, p. 134; *Born/Shenkman*].

CONCLUSION OF ISSUE 2

59. RESPONDENT respectfully requests that the Arbitral Tribunal deny the submission of evidence from the other arbitration to which RESPONDENT is a party since the award from RESPONDENT's other arbitration is subject to confidentiality protection which the HKIAC is

obligated to enforce. Moreover, confidentiality is a fundamental principle of international commercial arbitration and that fundamental element of the process shall not be violated. Finally, the evidence from the other arbitration is not "material" to this arbitration to overcome confidentiality concerns and the argument that UNCITRAL Transparency Rules guide this non-investor-state arbitration is not relevant.

ISSUE 3: NEITHER THE CONTRACT NOR THE CISG OR OTHER APPLICABLE LAW ALLOW FOR AN ADAPTATION OF THE PARTIES' SALES AGREEMENT

60. CLAIMANT contends that the contract can be adapted for the increase in price due to the tariffs both under the contract language and under applicable law. [*Cl. Memo*, para. 91]. Contrary to this contention, the contract cannot be adapted. The language of the contract does not allow for an adaptation. **(A)**. Additionally, the applicable law such as the CISG and international contracting principles do not permit an adaptation. **(B)**.

A. RESPONDENT is not Liable for the Increase of Delivery Price as the Contract is Explicit and does not Provide an Adaptation Mechanism

61. RESPONDENT is not liable for the US $1,250,000 incurred by CLAIMANT as a result of the increase in customs duties which occurred due to a retaliatory tariff imposed on frozen semen in response to similar tariffs in CLAIMANT's country. CLAIMANT is responsible for costs associated with delivery, specifically, customs duties. **(I)**. There is no mechanism for price adaptation under the circumstances giving rise to this dispute and, therefore, no adaptation is available. **(II).** CLAIMANT could not have reasonably relied on RESPONDENT agreeing to adapt the contract. **(III)**.

I. RESPONDENT is not Liable for Additional Tariffs Associated with Delivery

62. Clause 12 of the Sales Agreement does not limit CLAIMANT's liability or provide for adaptation of the contract due to the tariff imposed on the importation of frozen semen. The contract for shipment DDP outlines CLAIMANT's obligations for delivery. **(1)**. Clause 12 of the contract does not apply to customs duties. **(2)**. The ambiguous terms of the contract cannot limit CLAIMANT's liability where the contract's terms explicitly provide a solution. **(3)**.

1. The Contract for Shipment DDP Explicitly Outlines CLAIMANT's Obligations for Delivery

63. The inclusion of the Incoterm "DDP" (Delivery Duty Paid) outlined the payment terms for shipping the frozen semen. CISG Article 9(1) states that parties are bound by any usage (DDP)

common or widely known to international trade to which they have agreed. [*CISG Art. 9(1)*]. CISG Article 9(2) additionally sets forth that the parties are considered to have made such usage applicable to the contract unless otherwise stated. [*CISG Art. 9(2)*; *Fiberglass Case*]. Here, since DDP was validly incorporated into the contract and the PARTIES are bound by its terms as the PARTIES did not explicitly agree otherwise in the contract. In this case, the evidence regarding negotiations shows that RESPONDENT and CLAIMANT agreed to DDP during negotiations because of CLAIMANT's expertise in storing, shipping and clearing frozen semen for customs. [*CE 3*; *CE 5*; *CE 8*]. In the negotiations prior to the conclusion of the contract, Mr. Antley expressly stated in an email to Ms. Napravnik that the change in delivery terms was in consideration of CLAIMANT's expertise in shipping the frozen semen. [*CE 3*]. Additionally, Ms. Napravnik confirmed the reason for the DDP delivery terms in her witness statement. [*CE 8*]. The PARTIES did not discuss nor expressly derogate from the obligation to pay duties associated with the DDP terms of the contract neither through negotiations nor through the language of the contract.

2. Clause 12 of the Sales Agreement does not Apply to Customs Duties

64. DDP applies to three separate obligations of delivery at a foreign port: clearance of the goods (required safety inspections and tests), tax/duty payment, and the carrying out of any customs formalities. [*ICC Incoterms 2010*]. Clause 12 of the Sales Agreement and the negotiation history between the PARTIES, such as when RESPONDENT requested DDP delivery because of CLAIMANT's expertise in storage, shipment and customs forms, suggest that the hardship provisions of Clause 12 only apply to the costs associated with the clearance of the goods. [*CE* 5]. The language "additional health and safety requirements or comparable unforeseen events" should not be read to broadly include *any* unforeseen event associated with delivery, but rather any unforeseen event *comparable* to additional health and safety requirements. [*Id.*]. Health and safety requirements are part of the "clearance of the goods" obligation, not the "payment of taxes/duties" obligation. [*Mekki-Kaddache/Nemsi*]. "Customs duties" is a narrow term and is separate from safety and security inspections and customs formalities. [*Id.*]. Hence, the new duty imposed on the frozen semen is not an event comparable to additional health and safety requirements as they relate to DDP delivery.

3. CLAIMANT cannot Rely on the Ambiguous Terms of the Sales Agreement to Assign Liability Where the Contract Already Provides Explicit Guidance for the Same Issue

65. The terms of Clause 12 are ambiguous in reference to "comparable unforeseen events," however, this phrase should not be read to include additional customs duties because responsibility for payment of such duties is already designated in the contract by the delivery terms. [*CE 5*; *Scafom International BV & Orion Metal BVBA v. Exma CPI SA*]. It is plain by the name of the Incoterm "Delivered Duty Paid" that the PARTIES agreed that the frozen semen would be delivered with any duties having been paid by CLAIMANT. [*CISG Art. 9(1)*]. Although Clause 12 would purportedly limit the risk of a sudden increase in the amount of duties required to be paid, CLAIMANT relies on an ambiguous and broad exculpatory clause to escape liability despite the contract's explicit provision that the frozen semen would be delivered by CLAIMANT, duty paid. [*CE 5*; *Cl. Memo*, para. 93].

II. No Adaptation Mechanism Should be Read into the Contract Where It is not Clear that the PARTIES Intended to Include One

66. The PARTIES failed to include a clear adaptation mechanism and as such the contract does not provide for adaptation under these circumstances. The PARTIES are bound to the terms of the contract where they are clear. **(1)**. Ambiguities within the contract should be construed against the CLAIMANT in accordance with the doctrine of *contra proferentum*. **(2)**. A solution to the dispute can be found within the contract without relying on ambiguous terms or the absence of an adaptation clause. **(3)**.

1. The PARTIES are Bound to the Terms of the Sales Agreement Where They are Clear

67. The PARTIES did not include a mechanism to adjust the price due to increased costs associated with delivery of the goods. During initial negotiations, CLAIMANT raised the price per dose to compensate for the increased costs associated with DDP delivery. However, the PARTIES did not suggest or include a method of adjusting the price to cover costs of additional tariffs. [*CE 5*; *PO* 2]. The contract should not be adapted where there is no clear mechanism or prior agreement to do so by the PARTIES. [*Scafom International BV & Orion Metal BVBA v. Exma CPI SA*]. The PARTIES only decided to negotiate a potential price adjustment in consideration of future business relations; the negotiations do not imply that there was agreement to a price adjustment under the terms of the current contract. [*CE 8*].

2. Ambiguities Within the Contract Should be Construed Against CLAIMANT

68. The Tribunal should read the contract to give it a reasonable meaning to harmonize all of its parts, avoiding interpretations that would render the provisions of the contract superfluous,

insignificant, useless, or void. [*Gould, Inc. v. United States*; *Thanet Corp. v. United States*]. Ambiguities or absences in the contract should be construed against the seller or the drafter of such contract provision in accordance with the doctrine of *contra proferentum*. [*Veit & Co. v. United States*]. CLAIMANT is the seller in this case and wanted an exculpatory clause included for certain circumstances. [*CE 2*; *CE 8*]. The contractual ambiguities at issue are due to CLAIMANT's failure to include more explicit provisions within the contract. [*CE 8*]. Instead of electing to implement an explicit adaptation clause in the contract, CLAIMANT allowed for Mr. Antley's drafted hardship provision, even after the unfortunate car accident. [*CE 8*].

3. A Solution can be Found Within the Four Corners of the Contract

69. The content of the contract as written and signed is sufficient to provide a solution without the need for adaptation of the price by the PARTIES or the Tribunal. [*Gould, Inc. v. United States*]. Because there is no positive provision for price adaptation nor a clear reference to customs duties within the hardship clause, the Tribunal should look to the rest of the contract for a solution before providing one in equity or admitting parol evidence to vary the contents of the contract. [*Veit & Co. v. United States]*. In this case, the contract establishes that CLAIMANT is responsible for the payment of customs duties through agreement on delivery terms DDP in Clause 6. [*CE 5*]. Such a straight-forward provision should not be ignored in favor of a more ambiguous provision of the contract. [*Veit & Co. v. United States*]. As discussed above, customs duties are a separate obligation from clearance of goods under DDP delivery and, as such, the contract provides a solution for payment of the increased customs duties due to the tariff. [*ICC Incoterms 2010*].

III. Estoppel is not Proper Because CLAIMANT could not Reasonably Rely on RESPONDENT Paying the Tariff

70. Estoppel is not a proper remedy under the circumstances of this dispute. CLAIMANT could not reasonably rely on negotiations to yield a favorable outcome so as to change position and claim estoppel. **(1)**. CLAIMANT assumed the risks of shipping the goods without an agreement on price adjustment. **(2)**.

1. CLAIMANT could not Reasonably Rely on Payment of the Duty Because of an Agreement to Negotiate

71. Detrimental reliance estoppel requires a representation by conduct or word, justifiable reliance on that representation, and a change in a party's position to that party's detriment because of the reliance. [*Allbritton v. Lincoln Heath Sys.; Drs. Bethea, Moustoukas and Weaver LLC. v. St. Paul*

Guardian Ins. Co.]. A party cannot reasonably rely on conditional promises or promises based on future events. [*Solow v. Northwest Airlines*]. In the present case, RESPONDENT did not promise to pay any part of the tariff when questioned by CLAIMANT. RESPONDENT suggested that the PARTIES may be able to find a solution and agreed to negotiate the issue. [*RE 4*; *CE 8*]. Negotiations, by their nature, are a conditional, future event that guarantee no certain result. [*Allbritton v. Lincoln Heath Sys.*]. CLAIMANT could not have reasonably believed that negotiations would yield any results in their favor. [*Id.*]. Therefore, equitable estoppel is not warranted here because CLAIMANT only changed its position by delivering the frozen semen in reasonable reliance upon RESPONDENT'S agreement to *negotiate* rather than an agreement to adapt. Additionally, in at least one jurisdiction, it is unreasonable, as a matter of law, to rely on a promise that is contrary to an unambiguous contract. [*Drs. Bethea*, *Moustoukas and Weaver LLC. v. St. Paul Guardian Ins. Co.*]. In this case, the terms of the contract are unambiguous in describing the payment of the duty, as discussed above. [*CE 5*]. Therefore, CLAIMANT's reliance on RESPONDENT paying the duty was unreasonable because the contract unambiguously states by the negotiated delivery terms that CLAIMANT is responsible for payment of any duties. [*Id.*].

2. CLAIMANT Changed its Position with Full Knowledge of the Risks of Paying the Duty and Shipping the Goods

72. CLAIMANT shipped the goods without any prior agreement on payment of the duty, forfeiting its bargaining chip where it knew RESPONDENT may be forced to pay if it refused to ship or at least agree to a favorable adjustment. [*CE 8*]. Additionally, the law could have provided an excuse for non-performance by CLAIMANT in the case of hardship. [*CISG Art. 79*]. In this case, CLAIMANT moved forward in the face of that excuse and opted to bet on a favorable outcome in negotiations with RESPONDENT. [*CE 8; Doss v. Cuevas*]. Had there been a promise to pay the duty by RESPONDENT, then CLAIMANT's change in position in reliance thereof would have been justified. However, CLAIMANT moved to pay the duties with knowledge that there was no guarantee that RESPONDENT would reimburse CLAIMANT for the duty paid and in consideration of a potential long-term business relationship between the PARTIES. [*CE 8; Suire v. Lafayette city-Parish Consol. Gov't*].

73. Detrimental reliance estoppel depends on an outcome detrimental to the moving party that is contrary to the prior acts and representations of the defending party. [*Suire v. Lafayette city-Parish Consol. Gov't*]. The facts suggest that CLAIMANT knew that there was no promise to pay by RESPONDENT because the PARTIES agreed to negotiate, which logically precludes a prior

agreement to pay. [*CE 8*]. Because there was reliance on a conditional event and the law could have provided a remedy had CLAIMANT chosen not to change position. CLAIMANT knew or should have known of this potential solution, estoppel is not a proper remedy. RESPONDENT did not take a position contrary to prior words or conduct by negotiating a solution, rather CLAIMANT moved forward in the face of a true representation and now implicates detrimental reliance to justify a poor business decision which yielded a detrimental outcome. [*Suire v. Lafayette city-Parish Consol. Gov't*].

B. Applicable Law does not Provide for an Adaptation for the Increased Contract Price Due to the Imposition of the Tariffs

74. CLAIMANT is not entitled to an adaptation of the Contract because Article 79 CISG does not apply to the imposition of tariffs **(I),** and the CISG principles do not provide for adaptation remedies in cases of hardship. **(II)**.

I. Article 79 CISG is not Applicable to the Imposition of Tariffs

75. CLAIMANT is not entitled to an adaptation of the Contract under the CISG because the occurrence of hardship, especially without failure to perform, does not fall under CISG Article 79. **(1)**. The CISG drafting history renders hardship as outside the sphere of CISG Article 79. **(2)**. Even if CISG Article 79 could apply, the PARTIES effectively derogated from its provisions by inserting a force majeure clause into the contract. **(3).**

1. Imposition of Tariffs does not Constitute Hardship Under Article 79 CISG

76. The tariffs at issue here do not constitute hardship under CISG Article 79 because they were not "sufficiently onerous," **(a)**, the tariff could have been reasonably foreseen by CLAIMANT, **(b)**, and CLAIMANT could have avoided the consequences of the tariff by not sending the shipment until a formal agreement was reached. **(c)**.

a. The "Impediment" is not Sufficiently Onerous

77. The threshold question of whether economic difficulties should even allow for price adaptation has been controversial in the realm of international commercial contracts. [*Schwenzer*, p. 712]. Although this question has been heavily discussed over the years, a set percentage increase in the cost of the goods in question has not been established or universally accepted.

78. For example, an ICC Tribunal has previously ruled that a thirteen percent increase in a good's market price did not rise to the level of exempting a party from its obligations under CISG Article 79. [*Rimke*; *Steel Bars Case*].

79. In 1994, the UNIDROIT's PICC attempted to set the bar at a fifty percent increase in price to be considered a "fundamental alteration;" however, it was considered "too low" and was not included in the later Official Comments. [*da Silveira*, p. 326; *Official Comment to PICC*]. Nevertheless, fifty percent is still used as a quasi-benchmark, and it is "possible to infer" that a price increase under fifty percent would not be considered a fundamental alteration. [*da Silveira*, p. 326; *Carlsen*]. For a price increase to be considered a fundamental alteration, the disparity in value and price must so great as to "shock the conscience of a reasonable person." [*da Silveira*, p. 326; *Official Comment to PICC*].
80. It is not enough for the impediment to merely be onerous, but it must be "excessively onerous" and the equilibrium of the contract must be "fundamentally altered." [*Schwenzer*, p. 715; *Brunner*, p. 476]. Some have suggested a threshold of 100% should be used in circumstances of price fluctuation; however, in general, courts rarely even allow claims of hardship in cases of price fluctuation. [*Schwenzer*, p. 716; *Brunner*, p. 476; *Steel Bars Case*; *Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*].
81. All court decisions analyzing hardship under CISG Article 79 have concluded that a price increase of more than 100% is still insufficient, and as such the bar has been considerably raised. [*Schwenzer*, p. 716; *Steel Bars* Case; *Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*]. Because the 100% benchmark figure is based on a consideration of domestic sales, it has been deemed more appropriate in international sales to only consider a 150-200% price increase sufficient. [*Schwenzer*, pp. 716-17].
82. An ICSID arbitration held that a tariff affecting the terms of the deal was an assumption of the risk by the parties, especially when there has not been "total economic and social collapse." [*Brunner*, p. 445; *CMS Gas Transmission Company v. The Argentine Republic*]. Even in an extreme case in which there was financial collapse, a loss of millions of jobs, and almost total loss of the value of a country's currency, an UNCITRAL Tribunal still determined that the parties assumed the risk. [*Brunner*, p. 446; *HCE v. Indonesia*].
83. In a case mirroring the present dispute a buyer attempted to invoke frustration when his importation was impeded by issuance of strict import regulations, but the court denied buyer's claim despite the transaction no longer being profitable. [*Brunner*, p. 476; *Swift Canadian Co. v. Banet*; *Herne Bay Steamboat Co. v. Hutton*].
84. Here, the contract price only rose twenty-five percent, which is well below any accepted international threshold for price adaptation based on legislative history and judicial precedent.

CLAIMANT's potential financial ruin merely lowers the threshold, and it is unlikely a price increase of twenty-five percent would rise to the level one would consider "shockingly onerous."

b. The Price Increase Could Have Been Reasonably Foreseen, and CLAIMANT Should Have Reasonably Expected the Impediment at the Time of the Conclusion of the Contract

85. Because almost every event is in some way foreseeable, only an event "so outside the bounds of probability that reasonable parties would not provide for it may lead to hardship." [*da Silveira*, p. 325; *Perillo*, pp. 128-29]. Courts have held that "an increased price is foreseeable for a company involved in international trade." [*Schwenzer*, p. 716; *Steel Ropes Case*; *Vital Berry Marketing v. Dira-Frost*; *Société Romay AG v. SARL Behr France*].

86. The party's intent is examined objectively when determining whether an impediment occurred outside the scope of the party's control; however, interpretation of the contract itself takes precedence. [*Schlectriem*, p. 604].

87. Even though Mediterraneo has never before imposed tariffs on horse semen before, other countries have imposed tariffs on agricultural products of a comparable size to protect their farmers. [*PO 2*]. Therefore, it is unlikely that such a tariff could have been entirely unforeseen, despite its great surprise. Similarly, Mediterranean President Bouckaert's appointment of Ms. Cecil Frankel, who ardently criticized free trade, as his "superminister" for agriculture and trade should have given CLAIMANT reasonable warning that Mediterraneo would take a course of action geared towards protecting its farmers and agriculturalists. [*PO 2*]. Because of Ms. Frankel's open advocacy for limiting access of foreign agricultural products in Mediterraneo, it is unlikely the tariffs could be deemed as "so outside the bounds of probability."

c. CLAIMANT Could Have Avoided the Consequences of the Impediment

88. A prerequisite for hardship is that a party could not have overcome the impediment or its consequences. [*Brunner*, p. 476]. It is a condition for the remedy of hardship that the party asking for relief attempted to overcome or avoid state intervention by following good faith or the established contractual terms. [*Schlectriem*, p. 611].

89. CISG Article 8(1) states that statements made by a party should be interpreted by his intent when the other party knew or could not have been unaware of what their intent was. [*CISG Art. 8(1)*]. Or, in situations where intent cannot be readily ascertainable, statements made by a party are interpreted using a reasonable person standard. [*CISG Art. 8(2)*].

90. The Tribunal should not reward CLAIMANT for acting against its best interests. In this case, CLAIMANT had an obligation to avoid the effects of the tariff imposed by waiting to send the shipment until an affirmative agreement was made between the PARTIES. CLAIMANT unreasonably relied on a conversation Ms. Napravnik had with Mr. Shoemaker in which he explicitly told her several times that he was not a lawyer and was not involved in negotiations himself. [*RE 4*]. Ms. Napravnik wrongfully assumed Mr. Shoemaker committed to an adaptation of the price, but he did not have the authority from RESPONDENT to do so. [*RE 4*]. Because Mr. Shoemaker properly disclaimed his authority multiple times by stating he had to discuss with his superiors before making any decisions, Ms. Napravnik was unreasonable in accepting his statements as conceding to an adaptation of the price. [*RE 4*]. Furthermore, Mr. Shoemaker's statement merely suggested that *if* the contract provided for an increase in price in cases of a high or unexpected tariff, they would find an agreement; however, the contract does not provide for this. [*RE 4*]. Instead, the contract covers "more onerous" situations, and based on case law and precedent, this tariff does not rise to the level needed to establish hardship under the contract. [*CE 5*].

2. The CISG Legislative History Renders Hardship as Outside the Sphere of Regulation of CISG Article 79

91. CISG Article 79 provides relief under certain conditions for failure to perform obligations under the contract. [*CISG Art. 79*; *Rimke*, p. 213]. However, neither party failed to perform any of its respective obligations in the case at hand.
92. The CISG primarily aims to provide uniformity in international contracts under Article 7(1), and Article 79's coverage of hardship leads to numerous interpretations, thereby destroying uniform application. [*CISG Artt. 7(1), 79*; *Rimke*, p. 210].
93. CISG drafters have considered the hardship issue in the past but have consciously omitted it from Article 79, suggesting hardship was not to be implicitly derived from the CISG. [*CISG Art. 79*; *Rimke*, p. 219].
94. In a case concerning hardship under Article 79, the Italian Tribunale Civile di Monza not only held that the CISG did not apply, but also held that even if it did apply, it would only release a party from the terms of the contract based on impossibility rather than excessive "onerousness." Dicta from that decision stated that a party would not be able to escape its contractual obligations because of a severe price increase without impossibility. [*Rimke*, pp. 224-25; *Carlsen*; *Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*].

95. Furthermore, contrary to force majeure, which has become a routine part of domestic and international contracts, "neither general civil law nor commercial law has been favourable to the concept of hardship." [*Schwenzer*, p. 710].

3. Even if CISG Article 79 were Found to Apply, the PARTIES Effectively Derogated from its Provisions by Inserting a Force Majeure Clause into the Contract

96. Force majeure has been extended beyond its original meaning of "Acts of God." [*Rimke*, p. 198]. An "Act of God" is an event that occurs outside human control that could not have reasonably been anticipated or avoided. [*Id.*].

97. Hardship occurs when an unforeseeable fundamental hardship that has arisen beyond the control of either contracting party. [*Rimke*, pp. 199-200]. Hardship and force majeure differ because hardship often occurs when a contract has become more "burdensome" while force majeure occurs when performance has become impossible. [*Rimke*, p. 200].

98. An English Court of Appeal held that a party could not rely on force majeure where the party was simply required to pay an amount greater than what the contract had initially considered. [*Rimke*; *Brauer & Co. v. James Clark*].

99. CLAIMANT contends that they suffered hardship; however, the terms in the contract specifically created a force majeure clause instead. [*Cl. Memo*, para. 20]. The PARTIES created a force majeure clause in the contract because the provision refers to "acts of God." [*CE 5*]. Because of this, CLAIMANT is only entitled to rely on the force majeure clause placed in the contract. Based on the principle of force majeure, CLAIMANT cannot make its case because performance was not rendered impossible in this case since CLAIMANT could still—and in fact, did—ship the goods as agreed upon by the PARTIES. [*CE 8*].

II. Adaptation cannot be Derived from General Principles of the CISG

100. CLAIMANT may not rely on the CISG to provide a remedy for hardship because the CISG general principles explicitly exclude hardship, **(1)**, CLAIMANT may not use the UNIDROIT Principles to fill the hardship gap in the Convention, **(2)**, and CLAIMANT may not rely on Mediterranean law to fill the hardship gap. **(3)**.

1. The CISG General Principles do not Provide for the Possibility of Adapting the Contract for Hardship

101. The principle of *Pacta Sunt Servanda* strongly suggests that a contract should not be modified without a compelling reason because the contract shows the agreed upon interests of both parties. [*Tarquinio*, p. 10].

102. Two different gap-filling frameworks exist to deal with interpreting the CISG. [*Sica*, p. 3]. If the scope of the CISG explicitly excludes certain issues, they are effectively not governed by the CISG and CISG Article 7(2) does not apply, and this is an *intra legem gap*. [*Sica*, p. 3]. *Intra legem gaps* cover issues that the CISG has excluded from its scope. [*Sica*, p. 3]. Contrarily, *praeter legem gaps* cover topics that the CISG intended to cover but left open gaps for interpretation. [*Sica*, p. 4].

103. The UNICTRAL and Diplomatic Conference materials suggest that there was a proposal to include hardship in the CISG, but it was rejected, which shows that hardship was not intended to be covered under CISG Article 79. [*Carlsen*].

2. UNIDROIT Principles May not be Applied as a Gap-Filler for CISG Article 79

104. The UNIDROIT Principles provide expansion on certain terms not well settled by the CISG. [*UNIDROIT Principles*; *Chandrasenan*].

105. There are three sources of thought by scholars for interpreting the CISG's silence on hardship. [*da Silveira*, p. 328]. The CISG's silence on hardship has been interpreted by courts as falling outside the scope of matters addressed by the Convention, and thus must be addressed by domestic law. [*da Silveira*, p. 328; *Bielloni Castello v. EGO SA*]. Other scholars interpret the silence as a "deliberate omission" which would mean no remedy would exist when the contract has become less profitable for one party. [*da Silveira*, pp. 329-30; *Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*]. Others argue there is an internal "*praeter legem*" gap in the CISG for hardship; however, arguably Article 79 "appears unsuited to situations of decreased profitability" because "there is not impediment in such situations." [*da Silveira*, p. 334].

106. The hardship provisions of the UNIDROIT Principles should not be applied as a gap-filler in situations when the CISG governs the contract. [*Carlsen*]. In the present case, the CISG takes precedence over the UNIDROIT Principles. [*Carlsen*]. If the UNIDROIT Principles were to apply, it would allow domestic law to also be applicable when the parties have not agreed to the UNIDROIT, which would in turn endanger uniformity of interpretation. [*Carlsen*].

3. Mediterranean Law Should not be Used to Fill the Hardship Gap Under the CISG

107. When domestic law is applied to fill a gap, there is a "danger that the CISG's system of liability will 'burst,' because domestic legal systems differ greatly from each other" in situations of hardship. [*Schlectriem*, p. 618; *Carlsen*]. Under CISG Article 7(1), a principle requirement of the

CISG is to promote uniformity and applying domestic law "jeopardizes" this goal. [*CISG Art. 7(1)*; *Carlsen*].

CONCLUSION OF ISSUE 3:

108. RESPONDENT respectfully requests that the Arbitral Tribunal deny CLAIMANT's request for an adaptation of the price. Based on the contract itself, CLAIMANT is entirely responsible for costs associated with delivery DDP, and the PARTIES never agreed upon a mechanism for price adaptation while drafting the contract. Furthermore, CLAIMANT could not have reasonably relied on RESPONDENT's apparent acquiescence to adapt the contract based on the provisions of the contract. Applicable law similarly suggests that CLAIMANT is not entitled to an adaptation. CISG Article 79 does not apply to the tariffs at issue since it is not sufficiently onerous, and it was reasonably foreseeable and avoidable. Additionally, the CISG principles do not provide for adaptation remedies in cases of hardship because drafters excluded hardship from its scope.

PRAYER FOR RELIEF

In light of the foregoing submissions RESPONDENT respectfully requests the Arbitral Tribunal to find that:

- The Arbitral Tribunal does not have the jurisdiction nor powers under the arbitration agreement to adapt the contract, and that Danubian law governs the arbitration agreement (**Issue 1**);
- CLAIMANT is not entitled to submit evidence from the other arbitration proceedings (**Issue 2**);
- Neither Clause 12 nor the CISG permits an adaptation of the contract, and CLAIMANT is not entitled to the payment of 1.25 USD (**Issue 3**).

New Orleans, 24 January 2019

CERTIFICATE

We hereby confirm that this Memorandum was written only by the person who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Z. CARTER FIGUEROA

ELIZABETH GERSTNER

MARK HAMBLIN

NICHOLAS MITCHELL

ELIZABETH REED

BENJAMIN RUSSELL

MICHELLE SLOSS

JAMIE SPELLERBERG

CHOICE OF FORUM

Certificate and Choice of Forum

To be attached to each Memorandum

I Elizabeth M. Reed, on behalf of the Team for (name of School) Tulane University Law School hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

Authorised Representative of the Team for (School name) Tulane University Law School

Name Elizabeth M. Reed

Signature EM Reed