TWENTY SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

MEMORANDUM FOR RESPONDENT

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

MATHEW CASTELINO | JAMES FORD

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DAL	Danubian Arbitration Law	¶¶ 4, 36, 37, 43, 57
DCL	Danubian Contract Law	¶ 44, 45, 46, 47, 65,
HKIAC Rules	Hong Kong International Arbitration Centre 2018	¶¶ 11, 12, 37, 57, 58, 61, 63, 68, 69, 70, 71, 72, 73, 76, 81, 82, 83, 84
IBA Rules	International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, Council of the International Bar Association, 29 May 2010	¶¶ 59, 60, 61, 63, 67, 69, 70, 71, 72, 73, 74, 77, 78, 81, 88,

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IV. Index of Abbreviations

&	And
Art. /Arts.	Article/Articles
Answer	Respondent's Answer to the Notice of Arbitration dated 24 August 2018
CISG	United Nations Convention on Contracts for the International Sale of Goods [2010]
Cl.	Clause
Clm.	Claimant
Clm. Memo	Memorandum for Claimant
Comm.	Commentary
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
Et seq.	Et sequentes (and the following)
Clm. Ex. C1	Claimant's Exhibit Number 1 [*Numbers interchangeable*]
Resp. Ex. R1	Respondent's Exhibit Number 1 [*Numbers interchangeable*]
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018
Ibid.	Ibidem
IBA	International Bar Association
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
LF	Letter from Fasttrack dated 3 October 2018

LL	Letter by Langweiler dated 2 October 2018
Ltd	Limited
MCL	Mediterraneo Contract Law
No.	Number
Notice	Claimant's Notice of Arbitration dated 31 July 2018
¶ / ¶¶	Paragraph/Paragraphs (Internal, within this Memorandum)
Para. /Paras.	Paragraph/Paragraphs (External Document)
Parties	Claimant and Respondent
PO No. 1	Procedural Order No. 1 dated 5 October 2018
PO No. 2	Procedural Order No. 2 dated 2 November 2018
Resp.	Respondent
Sales Agreement	Frozen Semen Sales Agreement dated 06 May 2017 (Claimant's Exhibit C5)
Sec.	Section
Tribunal	The Arbitral Tribunal for this arbitration, including Dr. Calvin de Souza Presiding Arbitrator; Ms. Wantha Davis; and Dr. Francesca Dettorie
TP	Travaux Préparatoires UNCITRAL Model Law on International Commercial Arbitration (1985).

TP Working Group	Travaux Préparatoires Working Group on International Contract Practices.
UNCITRAL	United Nations Commission on International Trade Law.
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010).
UNIDROIT	UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts (2016)
v.	Versus
VAT	Value Added Tax

STATEMENT OF FACTS

- Phar Lap Allevamento ("**Claimant**") is a renowned stud farm operator, registered and located in Mediterraneo. Black Beauty Equestrian ("**Respondent**") is a well-known equestrian dressage company, incorporated in Equatoriana.
- Until 2017 presidential elections of Mediterraneo, both Mediterraneo and Equatoriana, were ardent supporters of free trade.
- In **January 2017**, one of the presidential candidates of Mediterraneo, Mr. Bouckaert, during his election campaign, announced certain preference for a more protectionist approach to international trade, in particular in relation to agricultural products.
- From **March to April 2017**, Respondent engaged in negotiations with Claimant for the purchase of 100 doses of frozen semen of Nijinsky III, one of the most successful racehorses in history.
- On 31 March 2017, Claimant proposed a price of USD 99,500 per insemination dose of the frozen semen and USD 1,000 per dose for delivery to be **DDP (Delivered Duty Paid)**.
- In the meantime, Presidential elections concluded in Mediterraneo and Mr. Bouckaert got elected as the new President of Mediterraneo, on **25 April 2017**.
- On **6 May 2017**, Claimant and Respondent executed the Frozen Semen Sales Agreement ("**Sales Agreement**"). Under the Sales Agreement, Claimant eventually agreed for a DDP delivery of 100 doses of frozen semen from Nijinski III at the rate of USD 100,000 per insemination dose. The Sales Agreement also provided the payment to be made in two equal instalments of USD 5,000,000.
- The Sales Agreement contained information of three mares for whom the semen may be used followed by a provision, wherein, the semen may be used for other mares after information of the Claimant.
- In conformance with the Sales Agreement, Respondent released first payment of USD 5,000,000 on **18 May 2017** and subsequently, Claimant shipped first 25 doses on **20 May 2017,** followed by another shipment of 25 doses on **3 October 2017.**
- From **15 November 2017**, Mr. Bouckaert, the President of Mediterraneo, had made effective the imposition of 25% tariff, on import of agricultural products. The tarifs were announced few days in advance but were in line with his announcement made during the election campaign.

- On **19 December 2017**, in retaliation to the import duty imposed by the Government of Mediterraneo, the Government of Equatoriana imposed a similar tariff of 30%, on all agricultural goods from Mediterraneo which was to come into effect from **15 January 2018**
- **On 20 January 2018**, Claimant notified Respondent, through an email, that the newly imposed 30% tariff also applies on the frozen semen. In the email, Claimant also made it firm that the final shipment would be placed on hold unless a solution to the additional 30% tariffs was found by the evening of **21 January 2018**.
- On **21 January 2018**, Respondent telephoned Claimant and clarified that under the Sales Agreement, the frozen semen is to be delivered duty paid, which meant all risk had to be borne by Claimant. Nevertheless, Respondent agreed to have a further discussion to clarify the legal situation with the drafters of the Sales Agreement but insisted on delivering the last batch of doses with the intent that a solution can be worked out depending on what the Contract allowed for.
- After having the telephonic discussion, Respondent, released the remaining payment to the tune of USD 5,000,000, on the very same day as required by the Sales Agreement. Subsequently, Claimant after paying the duty, shipped the remaining 50 doses on **23 January 2017.**
- Post-delivery of the whole shipment, in a meeting on **12 February 2018**, Claimant confronted Respondent with regards to the resale of the semen doses an extra-contractual issue and simultaneously initiated negotiations for compensation towards the additional 30% import duty imposed by the Government of Equatoriana. To which, Respondent expressed its refusal to pay any additional amount for the tariffs.
- On **31 July 2018**, Claimant submitted its Notice of Arbitration ("**Notice**") to the Hong Kong International Arbitration Centre ("**HKIAC**") with a copy to Respondent.
- On **24 August 2018**, Respondent submitted its Answer to the **Notice** to **HKIAC** with a copy to Claimant.

SUMMARY OF ARGUMENTS

Issue 1

- Contrary to the Claimant's assertions, Respondent clearly shows that the Arbitration Agreement is governed by the Law of Danubia, and that under the Law of Danubia, the Tribunal does not have the power to adapt the Sales Agreement. On this basis, the Tribunal is respectfully requested to reject the submissions in ¶¶ 13-47 of Claimant's Memorandum in their entirety.

Issue 2

- Respondent asserts that it would be prudent and appropriate for the Tribunal to refer to the internationally recognized IBA Rules on the Taking of Evidence in International Arbitration, 2010, when considering upon the admissibility of the evidence from the Other Arbitration.
- Respondent refutes Claimant's allegation of contradictory behaviour on the basis that the evidence from the Other Arbitration does not meet the admissibility criteria of relevance and materiality due to the distinct contractual differences between the two arbitrations.
- Respondent asserts that admission of the evidence from the Other Arbitration would contravene and violate contractual, institutional and implied confidentiality obligations.
- Respondent affirms that if the evidence from the Other Arbitration was sourced illegally it should be deemed inadmissible by this Tribunal.

Issue 3

- Claimant is not entitled to additional payment under cl. 12 of the Sales Agreement because of its narrow interpretation under Art. 8 CISG and even otherwise, the present circumstance doesn't fall under hardship category as per substantive law of the Sales Agreement.
- Claimant is also not entitled to additional payment under Art. 79 CISG because the Parties, by inclusion of a specific force majeure and hardship clause in the Sales Agreement, have agreed to the exclusion of application of Art. 79 of CISG and based on the applicable law, the present circumstances do not fall under the category of hardship.
- Tribunal, therefore is respectfully requested to reject the Claimant's submission for the additional payment.

ISSUE 1. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE SALES AGREEMENT UNDER THE ARBITRATION AGREEMENT.

A. The Arbitration Agreement is governed by the Law of Danubia.

1. Contrary to Claimant's submissions [*Clm. Memo,* ¶ 14], Respondent submits that the arbitration agreement is governed by the Law of Danubia, because **(i)** the separability principle is one of the cornerstones of international arbitration, whose application as such is not only restricted to issues of validity, and **(**Error! Reference source not found.**)** the proper characterisation of the arbitration agreement requires the Tribunal to carry out a choice-of-law analysis. On this basis, the Tribunal should conclude that the law applicable to the arbitration agreement is the law of Danubia.

i. The Arbitration Agreement is legally separate from the Sales Agreement

2. The separability principle establishes that the arbitration agreement, as concluded by the parties in Cl. 12 of the Sales Agreement, is legally separate from the remainder of the Sales Agreement, as it applies irrespective of the validity, existence or effectiveness of the main contract Error! Reference source not found., it is a secondary contract, separate from the Sales Agreement Error! Reference source not found., and it may be governed by a law different from the substantive law Error! Reference source not found..

(a) The principle of separability applies to the arbitration agreement irrespective of the validity, existence or effectiveness of the main contract

3. Claimant's main assertion seems to be that the separability doctrine only applies when the main contract is void or invalid, and accordingly should not be applied to the determination of the law governing the arbitration agreement [*Clm. Memo,* ¶ 14]. It further argues that "Art. 16(1) of the UNCITRAL Model Law… carefully limits the doctrine [of separability] to disputes about validity" [*ibid*, ¶ 16].

4. Claimant appears to be misunderstanding the separability principle and its application, as embodied by Art. 16(1) of the Danubian Arbitration Law (DAL). Article 16(1) of the DAL incorporates the widely-accepted "competence-competence" principle, which grants the Tribunal the power to rule on its own jurisdiction [*UNCITRAL Analytical Commentary*, p. 37; *UNCITRAL Digest,* p. 75]. The article further incorporates a second principle, that of separability, which compliments the Tribunal's power to rule on its jurisdiction by allowing it to treat the arbitration agreement separately from the remainder of the contract [*UNCITRAL Analytical Commentary*, p. 37; *Fung Sang Trading* ¶57].

5. In other words, Art. 16(1) of the DAL incorporates the general principle of the separability of the arbitration agreement, and deals with its application to issues of validity. It is not the sole source of the principle, which is recognised as one of the "conceptual and practical cornerstones of international arbitration" [*Born,* p. 350]. Respondent submits it has correctly asserted that Art. 16 of the DAL clearly recognises, and therefore gives effect to, the doctrine of separability [*Answer*, ¶ 14].

6. In conclusion, nothing prevents Tribunal from relying on Art. 16(1) of the DAL to establish that the arbitration agreement is separable from the underlying contract and thus capable of being governed by a law is different from the substantive law. Accordingly, the Tribunal is requested to reject the arguments in ¶ 16 of Claimant's Memorandum entirely.

(b) The separability principle recognises that the arbitration agreement is a secondary contract, separate from the Sales Agreement.

7. Claimant contends that there is no clear reason for concluding that the arbitration agreement is separate from the main contract as a result of the separability principle [*Clm. Memo,* ¶¶ 13, 17 et seq]. Respondent respectfully disagrees.

8. Contrary to Claimant's arguments, authorities from both common law and civil law traditions have expressed their support for the doctrine of separability. The arbitration agreement has been characterised as a "separate contract… ancillary to the underlying contract" [*Westacre Case*]. The secondary contract, in the form of the arbitration agreement, may or may not come into operation. However, once it does, it forms the basis for the resolution of disputes under the main contract through arbitration [*Redfern*, ¶ 2.103]. Similarly, French authorities have held that the arbitration agreement always has "complete juridical autonomy" [*Gosset Case*, ¶ 405].

9. The separability presumption is further supported by Articles II and V of the New York Convention. Article II(1) of the New York Convention defines an arbitration agreement as "*an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen...*" Article II(2) states that "*the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement.*" The text of Article II is based on the implicit assumption that the arbitration agreement is a separate, secondary contract [*Born*, p. 356]. Similarly, in the context of the recognition and enforcement of arbitral awards, Article V(1)(a) of the New York Convention rests on the presumption that arbitration agreements are separate contracts, capable of being governed by a law different from that of the main contract [*ibid*].

10. Finally, the separability presumption is supported by the HKIAC Rules, under which the parties have agreed to submit their disputes [*PO No. 1,* ¶ I]. Article 19.2 of the HKIAC Rules states that:

"*The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part. For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract.*"

11. Therefore, while it can be argued that one of the effects or consequences of the principle of separability is the validation of the parties' arbitration agreement despite the possible non-existence, invalidity or illegality of the main contract [*Born*, p. 401], the conceptual basis of the principle is that the arbitration agreement is a secondary, collateral contract between the parties which came into existence when the parties entered into the main contract. The separability of the arbitration agreement is further recognised by the New York Convention and the Model Law, as demonostrated above, as well as the HKIAC Rules.

12. In conclusion, the Tribunal should find that the arbitration agreement concluded by the parties in Cl. 15 is separate from the remainder of the Sales Agreement, and should accordingly reject Claimant's submissions on this issue in their entirety.

(c) The arbitration agreement can be governed by a law different than the Sales Agreement

13. Contrary to Claimant's assertions [*Clm. Memo*, ¶¶ 20 et seq.], the separability principle is directly relevant to the determination of the law governing the arbitration clause.

14. Indeed, the principle that an arbitration agreement can be governed by a law that is different from the main contract is one of the most direct consequences of the separability presumption [*Born*, p. 475]. Prominent English cases have held that the law governing the interpretation of the arbitration agreement may differ from the substantive law governing the rights and duties of the parties [*Channel Tunnel Group Case*, p. 357], and that contracts that include an arbitration agreement may include three different systems of law – the law governing the substantive contract, the law governing the arbitration agreement, and the law governing the conduct of the arbitration [*Naviera Amazonica Peruana Case*, p. 119]. Decisions from the United States have similarly ruled that international arbitration agreements may be

ruled by laws which differ from the law applicable to the underling contract [*Bridas SAPIC Case*].

15. The UNCITRAL Model Law, on which the DAL is directly based [*PO No. 1*, ¶ 4], also incorporates the same presumption. Article 34(2)(a)(i) and Art. 36(1)(a) provide for the annulment or non-recognition of an arbitral award in cases where the "arbitration agreement… is not valid under the law to which the parties have subjected it." As with Articles II and V of the New York Convention, discussed above, the approach of the UNCITRAL Model Law Arts. 34(2)(a)(i) and 36(1)(a) rests on the presumption that the arbitration agreement is separable for choice-of-law purposes [*Born*, p. 479].

16. It is submitted that the Tribunal should not disregard the application of the separability principle in determining the law applicable to the arbitration agreement, and accordingly, the submissions in ¶¶ 20-24 of Claimant's Memorandum should be rejected.

ii. Proper interpretation of the Arbitration Agreement requires the Tribunal to carry out a choice-of-law analysis.

17. The parties did not expressly designate the law applicable to the arbitration agreement. Respondent did not intend, either expressly or impliedly, for the law governing the Sales Agreement to apply to the arbitration clause Error! Reference source not found.. Where parties have failed to designate the law applicable to the arbitration agreement, the Tribunal should apply the law of the seat of the arbitration Error! Reference source not found.. The presumption that the parties intended that the law of the underlying contract should apply to the arbitration agreement as well should be rejected Error! Reference source not found..

(a) Respondent never intended, expressly or impliedly, that the Arbitration Agreement should be governed by the law of the Sales Agreement

18. Contrary to Claimant's assertions [*Clm. Memo*, ¶ 24 et seq.], Respondent never intended, expressly or impliedly, for the arbitration agreement to be governed by the law of the Sales Agreement.

19. Respondent's express desire to arbitrate "in a neutral country" can clearly be seen in its e-mail of 11 April 2017 [*Ex. R 2*]. In that e-mail, Claimant stated its desire not to be subject to the jurisdiction of the courts in Mediterraneo. In reply, Respondent proposed an amendment to the arbitration clause under which the seat of the arbitration would be Danubia [*ibid*]. Therefore, Respondent's express desire to subject the whole arbitration process to the law and jurisdiction of the neutral country – that of Danubia – is clear.

20. Accordingly, the Tribunal should reject Claimant's assertions that the parties had an implied intention to submit the arbitration agreement to the law governing the Sales Agreement.

(b) Where parties have failed to designate the law applicable to the arbitration agreement, the Tribunal should apply the law of the seat.

21. As the parties have failed to expressly designate the law applicable to the arbitration agreement, the Tribunal should carry out a choice-of-law analysis. The default rule for the determination of the law applicable to the arbitration agreement is the separability principle, as embodied by Art. V of the New York Convention [*Born*, p. 478]. Article V(1)(a) states that recognition and enforcement of arbitral award may be refused in cases where:

"*...the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."*

22. Article V(1)(a) of the New York Convention establishes the default two-pronged approach to the determination of the law applicable to the arbitration agreement. It seeks to validate the arbitral award by upholding any express or implied choice of law made by the parties (first prong). Failing any indication of an express or implied choice of law, it prescribes the default rule – the application of the law of the arbitral seat [*Born*, p. 526; *Fouchard et al*, p. 226]. The default two-pronged approach is further supported by the Arts. 34(2)(a)(i) and 36(1)(a) of the UNCITRAL Model Law, which mirror the provisions of Art. V(1)(a) of the New York Convention, as well as Art. VI(2) of the European Convention. There is a strong argument in favour of applying the same criteria for the determination of the law governing the arbitration agreement to the pre-award stage as the post-award stage [*Lew et al,* ¶ 6-55].

23. The application of the law of seat to the arbitration agreement is supported by a substantial number of authorities from various jurisdictions. In *C v D*, an English case in which the arbitral seat was designated as London, while the contract was subject to the "internal laws of New York," the court applied the law of the seat, holding that "*the agreement to arbitrate will normally have a closer and more real connection with the place where the parties chosen to arbitrate than with the place of the law of the underlying contract"* [*C v D*, ¶ 26].

24. Similarly, in *Citation Infowares*, a case in which the law governing the contract was designated as the law of California, USA, the Supreme Court of India held that there is, "*in the absence of any contrary intention, a presumption that the parties have intended that the proper law of the law of contract as well as the law governing arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held*" [*Citation Infowares,* ¶ 15].

25. In the *Bulbank Case*, in which the parties designated Austrian law to govern the contract, the Supreme Court of Sweden determined that when parties have failed to indicate the law applicable to the arbitration agreement, "*...the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place, that is to say, Swedish law*" [*Bulbank Case,* p. 293].

26. The same line of reasoning applies to the present case. The parties have failed to expressly designate the law applicable to the arbitration agreement, and there is equally no evidence that the parties impliedly intended the law of the Sales Agreement to apply to the arbitration agreement as well. The Tribunal should therefore apply the default approach adopted by the New York Convention, UNCITRAL Model Law and the authorities outlined above, according to which the arbitration agreement should be governed by the law of the expressly designated seat of Danubia, as the law having the closest and most real connection to place where the arbitration is to be held.

(c) The presumption that the parties intended that the law of Mediterraneo to apply to the arbitration agreement as well should be rejected

27. Contrary to Claimant's arguments [*Clm. Memo*, ¶¶ 24, 26 et seq.], the presumption that the parties intended the law of the underlying contract to apply to the arbitration agreement should be rejected.

28. Claimant emphatically relies on the three-stage approach established by the English Court of Appeal in *Sulamérica* to support its assertions [*Clm. Memo*, ¶¶ 26-28]. However, Claimant seems to be misinterpreting the court's decision. In *Sulamérica,* the court held that while an express choice of the substantive law would be a strong indication of the parties' intentions in relation to the arbitration agreement [*Sulamérica,* ¶ 26], an equally strong presumption pointing in the opposite direction would be the express designation of the law of the seat. Applying the decision in *C v D*, the court held that "*it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely the law of England*" [*Sulamérica,* ¶ 15].

29. The court's decision in Sulamérica was further strengthened by the fact that the application of the law of the underlying contract, the law of Brazil, would have rendered the arbitration agreement unworkable, as it would only have been enforceable with the consent of one of the parties [*Sulamérica,* ¶¶ 29-30].

30. Unlike in Sulamérica, no issues of the validity or enforceability arise as a result of the choice of either the law of Mediterraneo or the law of Danubia. Respondent submits, therefore, that under the proper application of the *Sulamérica* test, the Tribunal should find that

a) the parties impledly chose the law of Danubia to govern the arbitration agreement by expressly choosing Danubia as the neutral seat for the arbitration (second stage of the test), and

b) the law with the "*closest and most real connection*" with the arbitration agreement is the law of the seat (third stage of the test).

31. While it is true that a general presumption exists that parties intended the whole of their agreement to be governed by the expressly designated law [*Born*, p. 581], prominent commentators equally recognise that parties in reality only rarely give thought to the law applicable to the arbitration agreement, and accordingly it would be "going too far" to apply such a presumption [*Fouchard*, p. 222].

32. It has been recognised that the automatic application of the presumption ignores the legal effects of the doctrine of separability [*Berger,* p. 319]. Such an automatic extension of the substantive law also runs contrary to the default choice-of-law mechanism embodied in Art. V(1)(a) of the New York Convention, and Arts. 34(2)(a)(i) and 36(1)(a) of the UNCITRAL Model Law, as discussed above [*Born 2014*, p. 832].

33. Accordingly, the Tribunal should find that the parties demonstrated an implied intention to have the arbitration agreement governed by the law of Danubia, or, in the alternative, that under the default choice-of-law mechanism established in the New York Convention, the Model Law and considerable authorities, the Tribunal should apply the law of the seat of the arbitration, being the law with the closest and most real connection to the arbitration agreement.

B. Under the Law of Danubia, the Arbitral Tribunal does not have the power to adapt the Sales Agreement

34. Contrary to Claimant's submissions [Clm. Memo, ¶¶ 41-47], the arbitration agreement does not give the Tribunal the power to adapt the Sales Agreement. Under the applicable Danubian Arbitration Law, the Tribunal does not have the power to adapt the Sales Agreement, as the express authorisation of the parties is required **(i)**. The Tribunal should

interpret the arbitration agreement narrowly in accordance with the interpretation provisions of the Danubian Contract Law **(ii)**.

i. The Tribunal does not have the power to adapt the Sales Agreement under the Danubian Arbitration Law, as the express authorisation of the parties is required.

35. Contrary to Claimant's assertions, the arbitration agreement is governed by Danbian law, as demonstrated above. Under the applicable Danubian Arbitration Law, the Tribunal can only adapt the Sales Agreement with the express authorisation of the parties **(a)**. The arbitration agreement does not expressly authorise the Tribunal to adapt the Sales Agreement **(b).**

(a) Under Article 28(3) of the DAL, the Tribunal can only adapt the Sales Agreement with the express authorisation of the parties.

36. Contrary to Claimant's assertions, the arbitration agreement concluded by the parties is governed by the laws of Danubia. Under Art. 28(1) of the DAL, the Tribunal has an obligation to decide the dispute "in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." Similarly, Art. 28(4) of the DAL obliges the Tribunal to "decide in accordance with the terms of the contract."

37. In that context, Art. 28(3) of the DAL represents a waiver of the parties' right to have their dispute resolved in strict accordance with the law [Hilgard & Bruder, p. 54; Kiffer, p. 626]. Article 28(3) of the DAL states that the "*arbitral tribunal shall decide* ex aequo et bono *or as* amiable compositeur *only if the parties have expressly authorised it to do so.*" In other words, the parties expressly authorise the Tribunal to depart from the requirements of deciding strictly in accordance with the law and the terms of the contract, allowing it to resolve the dispute on the basis of principles of equity and fairness [*ibid*]. Article 36.2 of the HKIAC Rules, to which the parties have submitted this arbitration, contains the same requirement for an "express agreement" between the parties to grant such powers to the Tribunal.

38. Thus, the paramount condition for the granting of such powers to the Tribunal is that the arbitration agreement must contain an "express" authorisation, which must be clear, understandable, unambiguous and absolutely certain [*Belohlavek*, ¶ 2.27; *Kiffer*, p. 56]. In *ICC Arbitration Award No. 3380*, the contract had a hand-written arbitration clause stating "Arbitration shall be held at Geneva and shall judge according to the general principles of law and justice." The original text of the arbitration agreement allowing arbitrators to decide ex aequo et bono had been crossed out. The Tribunal in that case held that it was ambiguous

whether the parties had actually agreed to empower the Tribunal to decide as amiable compositeurs.

39. Similarly, in *ICC Case No. 17397*, the Tribunal considered the wording of the arbitration clause, which required it to decide "in accordance with the principles of law." The Tribunal held that the provision was ambiguous and could not be construed broadly to grant the Tribunal the power to decide according to the principles of equity. It concluded that the arbitration agreement must make it clear that the parties have expressly and consciously decided to grant it such a power.

(b) The arbitration agreement does not expressly authorise the Tribunal to adapt the Sales Agreement

40. Contrary to Claimant's assertion [*Clm. Memo*, ¶ 41], the arbitration agreement does not expressly authorise the Tribunal to adapt the Sales Agreement. The arbitration agreement, as included in Cl. 15 of the Sales Agreement, provides the following:

> *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.*

41. It is clear that the arbitration agreement does not contain anything which could even remotely be interpreted as a clear, unambiguous or certain expression of the parties' intention to authorise the Tribunal to decide *ex aequo et bono* or as *amiable compositeur*. It makes no references to principles of justice, equity, fairness etc. Even if the Tribunal were to interpret the wording of Cl. 15 extremely broadly, it would be impossible to conclude that the parties had the intention to grant it the power to decide on any basis other than the law.

42. It is clear that the arbitration agreement does not contain anything which could even remotely be interpreted as a clear, unambiguous or certain expression of the parties' intention to authorise the Tribunal to decide *ex aequo et bono* or as *amiable compositeur*. It makes no references to principles of justice, equity, fairness etc. Even if the Tribunal were to interpret the wording of Cl. 15 extremely broadly, it would be impossible to conclude that the parties had the intention to grant it the power to decide on any basis other than the law.

43. Accordingly, the Tribunal should find that the express granting of the power to decide ex *aequo et bono* or as *amiable compositeur* was lacking, and that the parties therefore did not grant the Tribunal the power to adapt the contract in accordance with Art. 28(3) of the DAL.

ii. The Tribunal should interpret the arbitration agreement narrowly, in accordance with the Danubian Contract Law.

44. Contrary to Claimant's assertions [*Clm. Memo*, ¶ 42], the Tribunal should interpret the arbitration agreement narrowly. The interpretation of the arbitration agreement is governed by Articles 4.1 – 4.3 of the Danubian Contract Law **(a)**. The four corners rule in Art. 4.3 of the DCL prevents parties from relying on external evidence to supplement contractual terms **(b)**.

(a) The interpretation of the arbitration agreement is governed by Arts. 4.1 – 4.3 of the Danubian Contract Law.

45. The Tribunal's analysis of the arbitration agreement and the parties' intentions at the time it was concluded is guided by Arts. 4.1 – 4.3 of the Danubian Contract Law. Article 4.1(1) of the DCL states that "a contract shall be interpreted according to the common intentions of the parties." If such common intentions can not be established, Art. 4.1(2) requires the Tribunal to interpret the contract *"according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."*

46. Regardless of whether the Tribunal applies the subjective test to determine the intentions of the parties (Art. 4.1(1) of the DCL) or the "reasonable" or objective test (Art. 4.1(2) of the DCL), the Tribunal is ordinarily still required to give regard to all of the relevant circumstances listed in Art. 4.3 (under the standard, unamended UNIDRIOT Principles) [*Bonell*, p. 232].

(b) The four corners rule in Art. 4.3 of the DCL prevents parties from relying on external evidence to supplement contractual terms

47. In the version of the UNIDROIT Principles adopted by Danubia, Art. 4.3 is replaced by the "four corners" rule, whose effect is largely the same as a merger clause under Art. 2.1.17 of the DCL [P.O. No. 2, ¶ 42]. Article 2.1.17 of the DCL provides,

> *A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.*

48. In *ICC Arbitral Award No. 9117*, the tribunal held that the effect of merger clauses under Art. 2.1.17 of the UNIDROIT Principles is the same as Art. 29(2) of the CISG, according to which a party may not rely on any kind of verbal promises or assurances, or any kind of written references which were not included in an amendment or supplement to the contract.

49. In ICSID Award No. ARB/06/18, the tribunal provided useful guidance on the interpretation of merger clauses. It held that the effect of reading Arts. 2.1.17, 4.1 and 4.3 of the UNIDROIT Principles together is that "*expectations raised during the negotiations of the Agreement must be reflected in the text of the Agreement. The fact that an obligation had been discussed, or even orally agreed to during the negotiations, was not enough*" [ICSID Award No. ARB/06/18, ¶ 115].

50. In an Italian arbitral award with facts similar to the present case, the tribunal considered the meaning of a price adjustment clause in the contract [*Italian Price Adjustment Award*]. While one party argued that the meaning of the clause should be determined in accordance with the common intent of the parties, i.e. their prior conducts or agreements; the other party invoked a merger clause and argued that the price adjustment clause reflected the entirety of the parties' agreement.

51. The tribunal held that the effect of merger clauses is that there are no binding agreements between the parties, other than those which were included in the contract. External statements or evidence can only be of use in interpreting the written document.

52. The Tribunal should apply similar reasoning to the present case. It is clear that when read together, the effect of Arts. 2.1.17, 4.1 and 4.3 of the DCL are that the discussions between Ms. Napravnik and Mr. Antley of 12 April 2017 [*Ex. R 3*], including the note from Mr. Antley's "negotiation file," cannot be relied on to supplement the arbitration agreement concluded finally under Cl. 15 of the Sales Agreement. Despite the facts that various iterations of the arbitration agreement had been discussed, the final version of Cl. 15 represents the entirety of the parties' agreement. Accordingly, the Tribunal should interpret the arbitration agreement narrowly and solely on its own terms, and should therefore find that the parties did not expressly grant the Tribunal extraordinary powers to decide *ex aequo et bono* or as *amiable compositeur*.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS

BACKGROUND TO ISSUE 2

53. Claimant alleges that Respondent's stance in another HKIAC administered arbitration is totally contrary to the position argued by Respondent in this arbitration, with regards to the respective Tribunal's authority to adapt the contract as a result of hardship. Claimant intends to submit to evidence details of the Partial Award and relevant submissions from the Other Arbitration to this arbitration. Claimant also alleges that the other Party from the Other Arbitration maybe joined to the proceedings of this arbitration and that this would be in line with the prevailing principles of transparency evidenced in the Transparency Rules of UNCITRAL [LL ¶¶ 1-3].

54. Respondent strongly objects to Claimant's malicious, false and misleading allegation of contradictory behavior as well as the announced submission of materials from the Other Arbitration [LF ¶ 1]. Respondent will demonstrate to this Tribunal why allegations of contradictory behavior are both misleading and without grounding.

55. Respondent avers that the evidence from the Other Arbitration was obtained either through a breach of confidentiality agreement or through an illegal hack of Respondent's Computer system [LF ¶ 3]. Claimant considers that no matter how the evidence has been obtained, the arbitral tribunal should allow Claimant to submit it [Clm. Memo ¶ 48].

56. Respondent will demonstrate that it would be inappropriate and incongruent with existing authority for this Tribunal to admit the evidence from the Other Arbitration due to the breach in confidentiality and / or illegal hack of Respondent's computer system.

i. Respondent asserts that it would be prudent and appropriate for the Tribunal to refer to the internationally recognized IBA Rules on the Taking of Evidence in International Arbitration, 2010, when considering the admissibility of the evidence from the Other Arbitration.

57. Respondent respects that this Tribunal has a broad authority to "determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" as prescribed within Art 22.2 of HKIAC 2018 Administered Arbitration Rules and as mirrored within the law of the forum (viz. the DAL / Model Law Art 19(2)).

58. Claimant correctly notes that HKIAC Art 22.2 does not provide a standard or any type of guidance to a Tribunal for the purposes of determining the admissibility of evidence from the Other Arbitration [Clm. Memo ¶ 49]. Respondent confirms that the DAL is also silent in this regard.

59. In the absence of express guidance Respondent asserts that this Tribunal may choose to refer to the internationally recognised IBA Rules on the Taking of Evidence in International Arbitration, 2010, which provides *"the principles by which the arbitral tribunal should determine what evidence it should properly consider and how it should assess the evidence that is properly before it"* [IBA Commentary p.25].

60. Claimants reference to the IBA Rules [Clm. Memo ¶ 49] insinuates that they concur with the premise set in the previous paragraph.

61. Respondent notes that Art 9.2 of the IBA Rules provides for the limitations on admissible evidence, whether oral or written. Such limitations also apply to the production of documents pursuant to Article 3 of the IBA Rules (see also HKIAC Art 22.3).

62. The limitations on admissible evidence set out in Art 9.2 of the IBA Rules covers evidence that is not sufficiently relevant to the case or material to its outcome and evidence that is procured illegally or by contravention of a confidentiality obligation.

63. Respondent therefore proposes the application of the IBA Rules to the Tribunal, in conjunction with other authority, to ascertain the admissibility of the evidence from the Other Arbitration. Respondent makes this recommendation due to the frequency in which other arbitral tribunals refer to the IBA Rules in similar circumstances [Mavrogordato, p.3] and the comprehensive nature of their coverage which provides direction to the Tribunal on all the salient issues raised by both Claimant and Respondent.

i. Respondent refutes Claimant's allegation of contradictory behaviour on the basis that the evidence from the Other Arbitration does not meet the admissibility criteria of relevance and materiality due to the distinct contractual differences between the two arbitrations.

64. In support of their allegation of contradictory behavior the Claimant incorrectly asserts that "the only difference to the present case (in comparison with the Other Arbitration) seems to be that in the other case Respondent has been negatively affected by the tariffs" [LL¶ 2].

65. In reality, Respondent asserts that the differences between the two arbitrations are significantly more stark and ensure that the evidence from the Other Arbitration is not

relevant to the outcome of this arbitration [PO No. 2, 39]. The differences are summarised as follows:

a) The Other Arbitration included express reference to an ICC Hardship Clause 2003. There is no such provision within the Sales Agreement that is the subject of this arbitration;

b) In the Other Arbitration the Arbitration Agreement was a verbatim copy of the Model HKIAC Arbitration Clause with all additions. In this Arbitration, Respondent expressly amended the wording of the Model HKIAC Arbitration Clause to reduce their exposure from *"any dispute regarding non – contractual obligations arising out of or relating to it"* [extracted HKIAC Model Clause].

c) In the Other Arbitration the Arbitration Agreement expressly referred to the law of Mediterraneo as being the law applicable to the Arbitration Agreement. In this arbitration Respondent argues that the correct law of the Arbitration Agreement is aligned with the seat of the Arbitration, namely Danubia. Danubian Contract Law has amended the standard UNIDROIT principles to include the parole evidence rule and to confirm that express authorisation is required to adapt the contract pursuant to Article 6.2.3 (4) (b). No such express authorisation has been given therefore Respondent argues that the contract should not be adapted. Conversely, in the Other Arbitration there is consistent jurisprudence in Mediterraneo in the context of Art 6.2.3 (4) (b) that a Tribunal would confirm their powers to adapt the contract should the tariff result in hardship for Respondent.

66. Respondent notes that for evidence to be admissible it must be both relevant and material to the outcome of the case. Respondent further notes that *"the term "relevant evidence" in common law generally means evidence having a tendency to make the existence of any fact that is of consequence in the case more probable or less probable than it would be without the evidence….having that in mind we would tend to define the relevance of evidence in international arbitration as having a logical connection with what the evidence purports to prove in the case"* [Pilkov, 3].

67. As a consequence of the foregoing and as a result of the significant differences in the contractual arrangements of the two arbitrations (including the differences in the respective Tribunals authority to adapt the contract as a result of hardship) Respondent avers that the evidence from the Other Arbitration has no relevance to the particular issues in dispute within this arbitration.

68. Respondent asserts that as a result of the lack of relevance, the admission of the evidence from the Other Arbitration is not material to the outcome of this Arbitration and on such grounds the Tribunal should deem the evidence to be inadmissible.

69. Respondent refers the Tribunal to Art 9.2(a) of the IBA Rules which states the simple proposition that the arbitral tribunal shall exclude evidence that is not sufficiently relevant to the case or material to its outcome. Respondent avers that this limitation alone should ensure that the Tribunal deems the evidence from the Other Arbitration to be inadmissible even prior to assessing the illegal nature in which the evidence was likely procured.

70. Further, Respondent avers that all salient facts pertaining to this arbitration and the evidence required to evaluate such facts are already available to the Tribunal for review. There is no requirement to either admit the irrelevant evidence or to issue an instruction to produce the evidence in accordance with HKIAC Art 22.3.

ii. Respondent asserts that admission of the evidence from the Other Arbitration would contravene and violate contractual, institutional and implied confidentiality obligations.

71. Art 42.1 of the HKIAC 2013 Rules confirms that "unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: a) the arbitration under the arbitration agreement(s) or (b) an award made in the arbitration". The Other Arbitration is subject to the HKIAC 2013 Rules whereas this arbitration is subject to the HKIAC 2018 Rules (wherein the same confidentiality requirement is included at Art 45.1).

72. The two former employees of Respondent both acted as witnesses in the Other Arbitration proceedings and are therefore likely to have executed confidentiality agreements. As such they shall be bound by confidentiality under HKIAC 2013 [PO NO. 2 ¶ 41, Art 42(1-2) HKIAC 2013]. Hence, in the event the evidence was sourced through the former employees there is no doubt that it constitutes a breach of confidentiality.

73. In addition, Respondent notes that the home of the Institutional rules governing both Arbitrations, namely Hong Kong, is one of the few jurisdictions in the world to provide for a statutory duty for confidentiality in arbitration. The Hong Kong Arbitration Ordinance (Cap. 609) refers to confidentiality under s. 18(1) of the Ordinance and effectively repeats verbatim Art 42.1 or Art 45.1 of HKIAC 2013 or HKIAC 2018, respectively.

74. In the absence of express provision in the DAL Respondent asserts that the statutory duty for confidentiality in Hong Kong (the home of this arbitrations Institutional Rules) is at least

persuasive. Respondent therefore respectively requests that this Tribunal takes cognizance of this statutory duty in assessing the admissibility of the evidence on the grounds of there being a breach of confidentiality.

75. Respondent notes that in numerous other jurisdictions the duty of confidentiality is implied upon the parties to an international arbitration, rather than being issued under a statutory directive. For instance, in England there have been numerous landmark cases that have recognised the existence of an implied duty of confidentiality [Dolling Baker Case, Hassneh Case, John Forster Case]. In the John Forster case is was held *"that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration…. the obligation is not limited to commercially confidential information in the traditional sense".*

76. The position in Singapore which this Tribunal may consider to be even more persuasive given their adoption of the UNCITRAL Model Law is somewhat similar to that in England. Despite there being no statutory directive regarding confidentiality of international arbitration proceedings there is an implicit duty of confidentiality [Fesler, 4] incumbent on parties to an arbitration. This position has consistently been upheld in the Singaporean Courts [Myanma Case; International Coal Case].

77. The aforementioned IBA Rules provide clear guidance with regards to the exclusion of evidence that is deemed to be confidential. Art 9.2(b) confirms that *"the Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable".*

78. Respondent notes that further guidance in the application Art 9.2(b) of the IBA Rules is provided within Art 9.3.

79. In summary, Respondent considers that the admission of the evidence from the Other Arbitration would be a direct contravention of contractual, institutional, implied and perhaps even statutory confidentiality obligations as set out above.

80. Notwithstanding this, Respondent is fully aware that there are exceptions to the rules of confidentiality that are set out above. Respondent considers that it is important to address each of these exceptions in turn. Respondent is of the firm view that the exceptions are not applicable to the disclosure of the evidence from the Other Arbitration and will demonstrate to the Tribunal that they should not be considered applicable.

81. Art 3.13 of the IBA Rules identifies the aforementioned exceptions to the obligation of confidentiality. The exceptions to confidentiality noted by IBA are also largely mirrored in the *obiter* of several landmark cases [Ali Shipping Case; John Forster Case]. The instances wherein confidential information from another arbitration maybe disclosed are perhaps best set out in the John Forster Case. They are as follows: a) express or implied consent of the other party; b) order, or leave of the court; c) disclosure is 'reasonably necessary' for the protection of the legitimate interests of one of the parties; and d) the 'interest of justice' or the 'public interest' requires disclosure.

82. Respondent asserts that none of the conditions for exception noted above are satisfied in this case. There has been no express or implied consent of the parties to the Other Arbitration to disclose the evidence, no order or leave of the court has been given and disclosure is not 'reasonably necessary' for the protection of the legitimate interests of one of the parties. Respondent is not in need of protection and the Respondent has been "authorized by the opponent in the other arbitral proceedings to state that the allegations by Claimant do not reflect reality and are taken out if context" [LF ¶ 3]. It is therefore highly unlikely that the other party to the Other Arbitration would consider that disclosure is 'reasonably necessary' for the protection of their interests.

83. In their Memorandum, Claimant [Clm. Memo ¶ 48] refers to a three-stage approach to evaluate admissibility for unlawfully obtained evidence [Blair p 256 – 258]. The second and third limb of the three-stage approach relate to 'public interest' and 'interest of justice", respectively. As referenced in para 34 above these are the final exceptions that may allow disclosure contrary to a confidentiality obligation.

84. Claimant's argument regarding the admissibility of evidence in relation to 'public interest' [Clm. Memo ¶¶ 59 – 65] is largely incomprehensible to Respondent. Respondent asserts that paragraphs 58 – 62 bears little relevance to the issues at hand as they refer to exclusion of evidence due to 'special political or institutional sensitivity' and to Client – Attorney privilege. However, Respondent is in full agreement with Claimants statement in paragraph 63 which states as follows:

> *"If the (sic) confidentiality is not protected as public interest, the interest of confidentiality, which is one of the differences between arbitration as alternative dispute resolution and regular litigation. The interest of confidentiality is one of the main reasons why companies which are concerned with the protection of its secret information opt for arbitration (as alternative dispute resolution) instead of regular civil procedure.*

In other words, the interest of confidentiality is one of the most important characteristics of arbitration, being worth protecting as public interest."

85. Claimant's argument regarding the admissibility of evidence in relation to 'interest of justice' [Clm. Memo ¶¶ 73 - 81] seems to centre upon the similarities between the two arbitrations and the perceived injustice if Claimant is unable to present evidence which they consider to be similar in the Other Arbitration. Respondent affirms that no such similarity exists as is demonstrated Section [ii] above. As such there are no grounds to admit the evidence on the basis that justice has been curtailed.

86. Claimant also asserts that the obligation of confidentiality only applies to the parties to the arbitration and not to third parties, therefore the Claimant is not bound by confidentiality requirements [Clm. Memo ¶¶ 66 - 67]. Respondent refutes this assertion and considers that the evidentiary privilege afforded to confidential evidence and the ability to disclose such evidence to another arbitration applies to all interested parties and not just the parties to the arbitration.

87. In conclusion, Respondent asserts that the conditions leading to an exception to the general rule that confidential documents should be inadmissible are not present in this case, therefore the Tribunal should deem the evidence inadmissible.

iii. Respondent affirms that if the evidence from the Other Arbitration was sourced illegally it should be deemed inadmissible by this Tribunal.

88. Claimant considers that the evidence from the Other Arbitration should be admitted even if it were procured through an illegal hack of Respondent's computer system. Claimant promotes the adoption of a three-stage test [Clm. Memo ¶ 48] to evaluate the admissibility of unlawfully obtained evidence [Blair pp 256 – 258]. The first limb of the test asks the question *"has the evidence been obtained unlawfully by a party who seeks to benefit from it?"*.

89. Claimant makes reference to two landmark cases regarding the issue of illegally obtained evidence [Methanex Case; Corfu Channel Case] and to the 'clean hands' doctrine which effectively states that a *'party may not rely on evidence which was illegally obtained since it would run counter to the principle of a right cannot stem from a wrong'* [Clm. Memo ¶¶ 51– 54].

90. Respondent considers that reference to the Methanex Case is in fact in support of Respondent's view that the illegally procured evidence from the Other Arbitration should not be admissible. The Tribunal in Methanex stated that *"to allow Methanex to introduce this*

documentation into the proceedings would be a violation of its general duty of good faith and offend against the basic principles of justice and fairness required of all parties in very international arbitration" [O'Sullivan].

91. Respondent asserts that even if Claimant were not responsible for the illegal hack of Respondent's computer system their possible impropriety in sourcing the evidence from a website of dubious reputation, when such documents are not in the public realm, may lead the Tribunal to consider that they their hands are not clean in accordance with the clean hands doctrine and that they have not acted in good faith.

92. Consequently, Respondent also asserts that it would be appropriate for the Tribunal to deem the evidence inadmissible on the grounds that Claimant has not acted in good faith in procuring the evidence. The Tribunal may choose to apply Art 9.7 of the IBA Rules in order to do this.

93. Respondent refers the Tribunal to two other cases (Libananco Case; Caratube Case) where the courts assessed the admissibility of evidence that emanated from the hacking of a computer system and in the Caratube Case the publishing of such information on a website of dubious reputation. In both cases the Courts found that evidence that was subject to a confidentiality obligation or that was legally privileged was not admissible. As a result of the foregoing, Respondent considers that the confidential nature of the evidence from the Other Arbitration which Respondent repeats is not yet in the public realm would prohibit disclosure in this arbitration.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO ADDITIONAL PAYMENT- NEITHER UNDER CLAUSE 12 OF THE SALES AGREEMENT NOR UNDER THE CISG

A. Cl. 12 of the Sales Agreement does not allow for adapting the price for additional tariffs.

94. At the outset, the Tribunal does not have the power to adapt the Sales Agreement under the Arbitration Agreement included in the Sales Agreement *[supra Para. 1-**Error! Reference source not found.**]*. In addition, Cl. 12 of the Sales Agreement also does not allow for adapting the Price to include additional tariffs paid by the Claimant.

i. Cl. 12 must be interpreted narrowly and its application must be restricted to Health and Safety Regulations and comparable issues as per Art. 8(1) of CISG.

95. Respondent refutes Claimant's assertions [*Clm. Memo ¶ 85]* which rule out application of Art. 8(1) stating that the Parties' intent could not have been established in interpreting Cl. 12 of the Sales Agreement. In order to establish the Parties' intent, one must look into the statements that were expressed, what the Parties knew and what they could not be unaware of and their persuasive conduct prior to and after conclusion of the contract. The Claimant's and Respondent's submissions include detailed exchanges between the Parties leading to the final construction of Cl. 12, clearly establishing the Parties' subjective intent.

96. Tribunal's attention is drawn to the pre-contract exchanges wherein Respondent had requested Claimant to consider delivery on DDP terms in reliance on the Claimant's superior experience in handling shipment of frozen semen and knowledge of the necessary import and export documentation [*Ex. C 3*]. In response Claimant agreed to a DDP delivery with the exception that the risks related to such delivery terms were accounted for by a hardship clause with a special emphasis on health and safety related risks [*Ex. C 4*]. Claimant thereafter suggested reliance on the *ICC Hardship Clause* [*Ex. R 2*]. This was deemed "too broad" by the Respondent and an item for further negotiation as observed from Mr. Antley's notes [*Ex. R 3*]. Respondent's intent to have a narrow hardship clause is well exemplified until this point.

97. The final position as seen in the Sales Agreement [Clause 12, *Ex. C 5*] was one that did not include the "broad" *ICC hardship clause* but allow Claimant to exempt liability for risks attributed to changing health and safety regulations and comparable events. Clearly the Claimant knew of Respondent's reluctance to agree to a "broad" *ICC Hardship clause* and had acceded to it [*PO No. 2 ¶12*]. Claimant's assertion that the Respondent did not know about the hardship clause [*Clm. Memo ¶ 88*] or does not view Clause 12 as a hardship clause is incorrect; instead, Respondent's intention was to restrict application of the hardship clause

only to the kind of fears that the Claimant had expressed which were customs imposed onerous health and safety requirements leading to additional testing and longer quarantine periods and the likes [*Ex. C 4*; *PO No. 2 ¶¶ 12, 21*]. Claimant therefore ought to have known of Respondent's reluctance to agree to a broad application of the hardship clause.

98. Claimant was also aware of its obligation to carry out import clearance of the doses under the DDP delivery terms it had agreed to which it complied with [*Ex. C 8*] thus establishing conduct in support of the subjective intent [*Headgear Case*]. It should be noted that Claimant had never raised the issue of hardship or adaptation prior to the final delivery (performance) - Ms. Napravnik had merely requested Mr. Shoemaker for a solution to the increase in tariffs without reference to hardship or adaptation [*Ex. C 7*]. Clearly the current claim comes as an afterthought with an intent to exploit any remote ambiguities in the interpretation of Cl. 12.

99. Claimant had initially requested an additional sum of US$1000 per dose for a DDP delivery whereas the associated direct costs for DDP delivery and transportation was only US$200 per dose [*PO No. 2 ¶8*]. Claimant was thus charging an additional sum over and above the pre-negotiated sum of US $99,500 for the semen for the extra risks associated with a DDP delivery. This alludes to conduct in support of Claimant's intent and understanding that it was assuming the risks related to DDP delivery (after discounting health and safety risks which were exempted by the hardship clause).

100. In conclusion, the Tribunal will find that absent an explicit mention of tariffs and based on the statements expressed by the Parties, what the Parties knew and ought not to be unaware of, the intent behind the wording of Cl. 12 can be established as one that sought a narrow application of hardship: this did not envisage covering potential tariffs to be paid under the agreed DDP delivery term.

ii. Applying Art. 8(2) and 8(3) of the CISG, an objective and reasonable person will conclude that Hardship Wording in Cl. 12 does not entail a "wide" application.

101. If the Tribunal finds that Parties' intention with respect to Cl. 12 cannot be deduced by applying the subjective test laid out in Art. 8(1) an objective analysis of Cl. 12 as per Art. 8(2) of the CISG would clearly lead a reasonable, third person in the same circumstances to conclude that Respondent's intention was to reduce its exposure by narrowing the scope of the hardship clause to health and safety related events and the like which was accepted by the Claimant and reflected in the final wording.

102. In deciding on what such a reasonable person would conclude, the Tribunal is required to give due consideration to all relevant circumstances, in accordance with Art. 8(3) of the CISG, which includes both the negotiations, usages and subsequent conduct of the parties.

103. Respondent refutes Claimant's interpretation of Cl. 12 as to one that includes "all circumstances that are unforeseen" and "make performance of the Contract onerous" as qualifying for an adaptation of the Sales Agreement [*Clm. Memo* ¶*84*]. While post contract changes to customs related health and safety requirements and increase in tariffs are both risks that would ordinarily be borne by the seller in agreeing to a DDP delivery, barring the un-foreseeability aspect, the risks in themselves are fundamentally different in form, nature and purpose. While the tariffs did not preclude the Claimant from performing its obligations [*Notice of Arbitration* ¶*13*], its previous experience with health and safety related testing and quarantine had interfered with timely performance [*PO No. 2* ¶*21*].

104. Viewed objectively as a reasonable person, if indeed the intent of the Parties was to exclude seller's (i.e. Claimant's) liability for every unforeseeable risk emanating from a DDP delivery and to have a broad hardship clause in place, Cl. 12 would have been constructed differently. Simply put, there would have been no need to single out health and safety requirements and state "or comparable unforeseen events"; the exemption for liability could have been stated to apply to every unforeseeable event that would make performance more onerous.

105. As an expert in selling frozen equine semen and being involved in international trade, it is not unreasonable for the Claimant to have been familiar with trade usages such as IINCOTERMS and the underlying risks related to change in tariffs in agreeing to and offering delivery based on DDP terms. The *ICC Guide to Incoterms* suggests that if the seller intends to clear the goods for import without paying duties, it should use the term DDP with an additional phrase "exclusive of duty, VAT and other import charges". This was not the case here – therefore with respect to Claimant agreeing to deliver DDP, a reasonable buyer would ordinarily expect that import duties were to be included in the quoted price – in fact, Claimant had increased its price for a DDP delivery, not merely for "transportation" [*Ex. C 4*].

106. Contrary to Claimants assertions [*Clm. Memo* ¶*90]* , an objective approach to interpret the said hardship clause would take into account all the circumstances of the case – these would include Respondent's concerns on including the "broad" *ICC Hardship clause*, Claimant's previous experience with health and safety restrictions, the final wording of the hardship clause, the trade usage with respect to the term DDP and the Claimant charging an increased price for DDP delivery [*Fruit and vegetables case*]. Therefore, the Tribunal will find that, as

demonstrated above when viewed objectively as per Art. 8(2) and 8(3) of *CISG*, the hardship wording contained in Cl. 12 of the Sales Agreement is to be construed in a narrow sense and limited to health and safety requirements and the like, discounting tariffs that the Claimant is obliged to pay under the delivery terms of the Sales Agreement.

iii. Respondent never agreed to inclusion of ICC hardship clause in the Contract

107. Respondent strongly refutes Claimant's insinuations that the intent of the Respondent was to agree to an inclusion of the "broad" *ICC hardship clause* [*Clm. Memo, Para 90*]. Such a position is untenable as according to ICC's introductory note, the *ICC Hardship Clause* shall not apply to a contract unless incorporated expressly or by reference. Furthermore, Cl. 12 of the Sales Agreement which is an outcome of the Parties' agreement, makes no reference to the *ICC Hardship Clause.*

108. Notwithstanding the above, it is noted that in the present circumstances where Claimant has already rendered performance and received compensation as per the Sales Agreement, the *ICC Hardship clause* that it had been advocating, could not have provided for the requested remedy (viz. adaptation of the Sales Agreement by the Tribunal). Furthermore, hardship could have been invoked only if the rigorous tests in the clause's Para 2 were satisfied. Para 2a incorporates a more demanding phrase in respect of performance viz. "excessively onerous" in order to trigger negotiation of alternative contractual terms with the other party and not just "more onerous" as observed in the hardship wording in Cl. 12.

iv. Even if Cl. 12 is deemed to be broad enough to include tariffs, the conditions for Hardship are not met under Art.6.2.2 of the Substantive Law of the Sales Agreement.

109. It is common ground that the substantive law of the Sales Agreement, viz. the MCL is a verbatim adoption of the *UNIDROIT* Principles [*PO No. 1 ¶III(4)*]. Article 6.2.2 of the *UNIDROIT* Principles defines hardship as a situation where certain events alter the fundamental equilibrium of the contract provided those events meet all of the following four conditions: a) the events occur after conclusion of the contract, b) the events could not have reasonably taken into account at the time of conclusion of the contract, c) the events are beyond the control of the disadvantaged party and d) the risk of the events was not assumed by the disadvantaged party. A fundamental alteration may manifest itself in two forms (i.e. either through an increase in the cost of performance or through a diminution in value of the performance received by another party); however, whether the alteration is fundamental or not will depend on the circumstances.

110. Though the retaliatory tariffs were announced after conclusion of the Sales agreement, the initial tariffs by Mediterraneo were not entirely unforeseeable - there was some anticipation /build up through an election phase dating to January 2017 and through April 2017 [*Ex. C 6*]. The retaliatory tariffs by Equatoriana should not have been entirely ruled out either given they have on at least one previous occasion imposed retaliatory tariffs [*Ex. C 6*]. The retaliatory tariffs in question were declared effective 15th January 2018 but announced as early as 19th December 2017 [*PO No. 2 ¶25*]. It should be noted that had the 21st January 2018 delivery been preceded by around a week, Claimant would have bypassed the additional tariffs.

111. As an experienced and prudent seller, the Claimant could have prepared itself by pre-empting retaliatory tariffs from Equatoriana at least from the time the tariffs were announced by Mediterraneo which were a few days in advance of their effective date of 15th November 2017 [*PO No. 2 ¶23*]. Claimant could thus have bypassed the additional tariffs had it been diligent; however, it chose to approach the Equatoriana customs only two days before the scheduled delivery date (i.e. on 19th January). It can be thus concluded that the effect of the alleged unforeseen tariffs could have still been mitigated by the Claimant had they displayed diligence – therefore condition 6.2.2 (c) in respect of hardship is not met.

112. Based on the *Commentary* from *UNIDROIT,* under 6.2.2 (d), "there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. The word "assumption" makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract. In this case, whilst Claimant had excluded the risks emanating from health and safety and comparable issues along with risks in relation to transportation/shipping [insurance was to be procured by the Respondent from FedEx as per Clause 13 of the Contract, *Ex. C 5*]. The residual risks related to a DDP delivery in a trans-national contract which the Claimant had agreed to were therefore assumed by the Claimant for a price ranging from US$ 500 to US$ 1000 per dose [*PO No. 2 ¶8; Ex. C 5*]. Hence 6.2.2 (d) is also not satisfied in so far as hardship is concerned.

113. A mere increase in the cost of performance (i.e. 30% in this case as stated by Claimant [*Ex. C 7/C 8*] or a loss on a transaction, does not alter the fundamental equilibrium of the Sales Agreement. In the English case of *Davis Contractors*, the Courts held that an increase in constructor's costs by 23% of the contract price were within the ordinary range of commercial probability and not a good reason to discharge the contract. In the ICC *Lump Sugar Machine* case, as noted by *Bonnel [p. 633]*, the arbitral tribunal had dismissed the Turkish

buyer's plea for hardship exemption citing financial difficulties due to drop in market demand for lump sugar after conclusion of the contract. The tribunal stressed on the exceptional character of hardship to alter the fundamental equilibrium, not just a mere increase in cost of performance.

114. Prof. Brunner who is one of the leading commentators on hardship exemption, has championed a common threshold test as a general yardstick to determine the percentage of costs or value of performance that is likely to amount to a 'fundamental' alteration of the equilibrium of the contract [*Brunner, p.426*]. The official comment on the *UNIDROIT* Principles (1994 edition) explicitly stated that "… an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration." This statement was retracted in the 2004 edition as the 50% threshold came under criticism by academics and practitioners for being too low whilst noting that there were no arbitral awards known where hardship exemption was provided for a 50% alteration or less [*Brunner, p.428*].

115. Prof. Brunner goes on to cite examples where "cost increases of 13%, 30%, 44% or 25-50% were held to be insufficient to amount to a fundamental alteration of the equilibrium of the contract" by various arbitral tribunals [*Brunner p.427*] with some legal commentators on the CISG proposing that the required alteration should be at least 100% [*Brunner p.428*]. A comparative study of most civil and common law systems has led to setting a general reference point for the hardship test at 80-100% for the decrease in value received or corresponding increase in cost of performance excluding profit or a 100-125% increase in costs with a typical 20% profit [*Brunner, p.432*]. Given the above, it is fair to expect that Claimant as any other enterprise should expect to bear entrepreneurial risks. Therefore, based on the Claimant having assumed the risk of changing tariffs by virtue of agreeing to a DDP delivery, the 30% alteration claimed here-in falls well below the thresholds discussed above and hardship exemptions should be dismissed by this Tribunal. Any attempts at lowering the threshold based on Claimant's financial ruin [*Ex. C 8*] should be disregarded as the Claimant had the skills, experience, management and resources to execute this Contract.

116. Claimant in its attempt at invoking hardship, may have sought to allege bad faith on the part of the Respondent [*Ex. C 8*]. Respondent strongly refutes Claimant's bad faith allegations on the part of the Respondent whose conduct was to pay an increased price only if supported by the Sales Agreement but insist on performance (i.e. agreed delivery obligations) [*Ex. R 4;*

PO No. 2 ¶*34*]. In summary, the Tribunal shall find that the grounds for invoking hardship are not met as per the law of the Sales Agreement.

v. Each Party shall bear the cost of performance of their obligations as per the law of the Contract

117. Clause 6.1.11 of the *UNIDROIT* Principles requires that each party shall bear the cost of performance of its obligations. No arrangements were agreed by the Respondent as to taking on the obligations of paying tariffs, while the Claimant had an obligation to deliver the doses DDP. It is also common ground that the Parties had agreed on DDP, Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery and INCOTERMS 2010 edition [*PO No. 2* ¶*10*]. The term DDP in the Contract must be viewed within the meaning of DDP INCOTERM 2010 given that the courts have maintained that INCOTERM definitions should be applied to the contract despite the lack of explicit reference. [*CLOUT Case 447*]. Incoterms are deemed to be incorporated into the CISG as per Art. 9(2) of CISG [*CISG Digest, p.68,* ¶ *18*] given their wide recognition and observance as international trade usages.

118. DDP INCOTERM 2010 is defined by ICC as "Delivered Duty Paid" whereby "..the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities." [*Incoterms Rules 2010*]

119. Claimant being the seller in this instance carried the obligation to bear all costs and risks involved in delivering the doses inside Equatoriana. Though Claimant had initially rejected assuming any risk associated with a DDP delivery [*Ex. C 4*], it had subsequently agreed to assume such risks after having a hardship wording included in Cl. 12 of the Sales Agreement which catered to health and safety related custom regulations and by way of demanding an increased price per dose [*PO No. 2* ¶*8*].

120. In conclusion, Claimant had merely carried out its contractual obligation of a DDP delivery within the meaning of DDP INCOTERM 2010 and was the obligor of the risks associated with import duties (tariffs). Therefore, the Tribunal should determine that the Respondent is not obliged to pay the Claimant any sum beyond its payment obligation under the Sales Agreement [Clause 6 of Cl Ex -C5].

B. Claimant is not entitled to any additional payment even under Art. 79 CISG

i. The Parties, by inclusion of a specific *force majeure* and hardship clause in the Sales Agreement, have agreed to the exclusion of application of Art. 79 of CISG

121. CISG, by default, applies to the contracts of International Sale of Goods where both the parties are contracting states, as is in this case [*Art. 1 CISG*]. On the other hand, CISG also provides the parties to a contract, an autonomy, to either fully exclude the application of CISG or derogate from any of its provision subject to its mandatory provisions [*Art. 6 CISG*].

122. Respondent acknowledges that the Parties have not made any express exclusion of the provision of Art. 79 CISG. However, by inclusion of Cl. 12 under the Sales Agreement, Parties impliedly have agreed to exclude the provision of Art. 79 CISG.

123. The CISG Digest expressly states that Art. 79 is not excepted from the rule in Art. 6 of CISG that empowers the parties to "derogate from or vary the effect of" provisions of the Convention. Furthermore, the provisions of CISG can be excluded if the parties agree on terms that are incompatible with the Convention. The arbitral tribunal in the *Machine Case* expressly stated that "[w]hen a contractual clause governing a particular matter is in contradiction with the Convention, the presumption is that the parties intended to derogate from the Convention on that particular question. It does not affect the applicability of the Convention in general…." Respondent asserts that the force majeure clause drafted by the Claimant as a part of its standard terms and conditions is not compatible with Art. 79 (1) in that it seeks exemption for a restrictive set of impediments outside the affected party's control but without regard to the requirement that the said party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. Hence the Tribunal will find that Cl. 12 is a derogation from Art. 79(1) CISG.

124. In the *Foreign Exchange* case, the Courts denied a buyer's claim to exemption where the circumstances that the buyer argued constituted a force majeure were not found in an exhaustive listing of force majeure situations included in the parties' contract. In this case, the force majeure clause in Cl 12 caters to events related to loss of semen or transportation delays – clearly tariffs were not meant to be included in the list of the *force majeure* events. Hence no exemption under the force majeure section of Cl 12 should apply.

125. Cl. 12 of the Sales Agreement deals with certain circumstances of hardship and *force majeure* at the same time *[Cl. Ex. C5]*. Per the provisions of this clause, a party shall be excused of any liability if it fails to perform as a result of occurrence of such hardship or *force majeure*. On the other hand, Art. 79 CISG also provides, as remedy for failure to perform, to release the party who failed to perform of its liability under the contract. So, the question arises, then why then Parties intended to include Cl. 12 in the Sales Agreement.

126. What if we take off Cl. 12 from the Sales Agreement and see the impact? The impact would be an infinite increase in circumstances of impediments, where Claimant may ask for exemption from its liability arising out of any failure to perform.

127. So, had the parties intended to apply the provisions of Art. 79 CISG as is, they would have not at all incorporated Cl. 12 in the Sales Agreement. This implies that they intended to exclude Art. 79 CISG by incorporating Cl. 12 in the Sales Agreement. According to CISG Advisory Council Opinion, "…*in the absence of other evidence, the application of a high threshold for intent would generally result in the following:...(b) If the choice is only in relation to a limited issue (e.g., risk, anticipatory breach, payment of price) which is covered by the CISG, then the choice may amount to a derogation from the CISG in relation to those matters, but not a full exclusion*…" [*CISGAC Op. No. 16 No. 16, para 4.11*].

128. In this case the issue is limited to remedy in case of hardship and *force majeure* and for that the Parties have incorporated cl. 12 in their Sales Agreement. And the reason for inclusion was to narrow down the window of excuses for a party's failure to perform [*PO No. 2, para 12]*.

129. This implies that the Parties agreed to exclude the provisions of Art. 79 CISG while including a narrower clause for the circumstances of hardship and *force majeure.*

ii. Based on the applicable law, the present circumstances do not fall under the category of hardship

130. Claimant's reliance on Art. 79 CISG is based on a faulty premise that the present circumstances falls under the category of hardship.

131. The Claimant in its submission has asserted that the change in circumstances has led itself to the situation of 'hardship' *[Resp. Memo. ¶ 114]*. Just because the circumstances have been changed, one cannot say a situation of hardship has arisen.

132. Even though matter of hardship is not expressly covered under CISG but it still comes under the sphere of application of CISG. Therefore, one may resort to the provision of Art. 7(2) CISG to find out what rules of laws are applicable to hardship?

133. UNIDROIT Principles being the rules of Private international law and the accepted general contract law of both Equatoreana and Mediterraneo, per the provisions of Art. 7(2) *[supra Para 109]*, UNIDROIT can be used to settle the questions which are not expressly covered by CISG.

134. And, according to the definition of hardship provided under UNIDROIT Principles, the present situation does not fall under the category of hardship **(a)**.

135. Second, Art. 79 CISG neither covers the hardship nor it provides power to the Tribunal for adaption of the Contract **(b)** because it deals with the situation where the party has not performed, but not where party has performed.

136. Third, regardless of whether Art. 79 CISG may be considered for exemption in the event of hardship, the issue of tariffs does not qualify for an exemption under Art. 79 (c).

(a) The present situation does not fall under the category of hardship

137. In this case, the changed circumstance which Claimant has argued is the increased cost of performance *[see supra para 131]*. Now, this changed circumstance may be termed as hardship, only if it satisfies all the elements covered under the Art. 6.2.2 of UNIDROIT *[supra para. 109]*

138. Claimant in its submission has asserted that the additional payment of USD $1,250,000 made by Claimant for import of 50 doses of frozen semen has fundamentally altered the equilibrium of the contract *[Resp. Memo. ¶ 114]*. However, Claimant in its submission has not demonstrated why this change in cost causes a fundamental alteration of the contract.

139. The total cost impact to Claimant as a result of this additional payment made by Claimant for import of 50 doses of frozen semen amounts to 15% of total value of the Sales Agreement.

140. And, as demonstrated above *[supra paras 113-115],* it is definite that a mere 15% cost impact cannot be considered sufficient to have fundamentally alter the equilibrium of the Sales Agreement.

141. Second, Claimant has argued that the event which led itself to hardship is the imposition of 30% tariff by the Government of Equatoreana and it could not have been taken into account at the time of the conclusion of the contract*[Resp. Memo. ¶ 116]*.

142. However, Respondent is of the opinion that it was very much foreseeable, as the imposition of 30% tariff by the Government of Equatoreana was nothing but a retaliatory measure to the imposition of 25% tariff by the Government of Mediterraneo on 15 November 2017 and this was preceded by a series of events traced back to January 2017 *[PO No. 2, ¶ 23]*.

143. Until January 2017, both countries were ardent supporters of free trade *[Cl. Ex. C6]*. But in January 2017, Mr. Boackaert, during his Presidential election campaign, announced certain preference for a more protectionist approach to international trade, in particular in relation to agricultural products and eventually got elected on 25 April 2017*[Cl. Ex. 6]*. And, the Sales Agreement got executed on 6 May 2017 *[Cl. Ex. 5]*, i.e. 11 days after the winning of Mr. Boackaert.

144. In the past there had been few countries who imposed taxes on the imports to protect their farmers and the other affected countries retaliated the same way *[Cl. Ex. C6]*.

145. Claimant asserts that Government of Equatoriana had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by others *[Cl. Ex. C6]*.

146. Claimant in its assertion has conveniently left out two important facts, first, there had been an exception where the Government of Equatoriana resulted in a **direct** retaliatory measure and second, in other cases it wasn't a direct retaliatory measure but the Government of Equatoriana had certainly retaliated *[Cl. Ex. C6]*.

147. Trade war is a notorious fact. Many countries in the history have resorted to trade war for securing their one or the other interest.

148. A reasonable person dealing in international trade will always look out for the events which in future could become a risk to their business. And, considering Mr. Boackaert's protectionist approach, his winning of Presidential election is also a such event which could reasonably be perceived as risk to the free trade and one may expect new levy of taxes on imports. It is also noteworthy that it is Claimant's country who first initiated the trade war and he who fueled-up the fire should also be ready to feel the burn *[Cl. Ex. C6]*. Now, since this event took place 11 days prior to the execution of Sales Agreement, Claimant reasonably could be assumed to have taken into account this risk, while accepting the delivery DDP*[Cl. Ex. C5]*.

149. Third, as demonstrated above, Respondent firmly believes that Claimant assumed the risk associated with delivery DDP by accepting the terms of INCOTERMS 2010 edition *[supra Paras. 117- 120]*.

150. Considering the foregoing, the facts of the case falls short on three of the total six essentials of the hardship as defined under UNIDROIT Principles and therefore the present situation cannot be considered to have given rise to a state of hardship to Claimant.

(b) Art. 79 CISG neither covers it nor provides power to the Tribunal for adaption of the Contract

151. The remedy sought under Art. 79 CISG is that a party is excused of any liability arising out of a failure to perform any of its obligations. In other words, the party is excused of its liability of "obligation to perform". And, once the party has performed its obligation, he automatically gets released of any liability under the contact.

152. In this case, Claimant has already performed its obligation by delivering in time the 100 frozen semen of Nijinsky III while paying off all the applicable taxes and duties *[Notice, ¶ 9; Cl. Ex. C8]*. And Claimant thereby is said to have relieved itself of any liability under the Sales Agreement. So, if there is no liability, then what Claimant should be excused of under Art. 79 CISG.?

153. If one look into the drafting history of the provision of Art 79 CISG, it is found that "hardship" was intentionally excluded from the scope of CISG *[CISG-AC Op. No. 7]*:

> *"…Following the successive drafts preceding what finally became Article 79, the Working Group of UNCITRAL considered but rejected a proposal allowing a party to claim avoidance or adjustment of a contract whenever facing unexpected "excessive damages". Yet, a closer look at this passage reveals that after briefly setting out the arguments in support of the proposal, the report simply stated that it was not adopted, not reappearing in subsequent discussions."*

154. Nevertheless, Claimant while relying on Art. 79 CISG also acknowledges that Art. 79 does not cover hardship circumstance but at the same time has tried to create a relationship between Art. 6.2.3 of UNIDROIT Principles and Art. 79 CISG through application of Art. 7 CISG*[Cl. Memo. ¶ 96]*.

155. The fact is there is no relation between Art. 79 CISG and Art. 6.2.3 of UNIDROIT Principles. Art. 79 CISG deals with a party's failure to perform due to an impediment, whereas Art. 6.2.3 of UNIDROIT Principles provides in for relief to a party in case of a hardship. And, as established in the preceding para of this Memo, the present circumstances does not even fall into the category of hardship *[see supra para* ***Error! Reference source not found.****]*.

156. So, if the given circumstance is not even covered under Art 79 CISG, then how Art. 79 CISG can be said to provide power to the Tribunal to adapt the contract for such circumstance. The answer is: No, it cannot.

157. Therefore, it is concluded that Claimant's reliance on Art. 6.2.3 of UNIDROIT Principles also does not hold ground and therefore Tribunal shall right away reject its claim for the additional payment.

(c) Regardless of whether Art. 79 CISG may be considered for exemption in the event of hardship, the issue of tariffs does not qualify for an exemption under Art. 79.

158. Claimant asserts that Art. 79 is deemed to include hardship due to the use of a neutral term 'impediment" [Clm. Memo ¶95]. Tribunal will find that this is an academic discussion at best

and that Art. 79 is in the first place triggered by non-performance provided all the requirements of 'impediment' are met. Respondent finds Claimant's need to interpret 'impediment' using Art. 7(2) [Clm. Memo ¶97] as 'unnecessary' given the amount of case law and guidance provided in the *CISG Digest* in respect of application of Art.79 of the Convention. In the *Chinese Goods Case* it was held that an "impediment" must be "an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness".

159. Article 79(1) of CISG establishes six requirements that must be satisfied before a party that has failed to perform may claim exemption under the article: a) an impediment to performance must have arisen; b) the party's failure to perform must have been due to the impediment (causation); c) the impediment must have been beyond the control of the party claiming exemption; d) the impediment must be one that the party claiming exemption could not reasonably be expected to have taken into account at the time of the conclusion of the contract; e) the impediment must be such that the party claiming exemption could not reasonably be expected to have avoided it or its consequences, and, f) overcome it, or its consequences.

160. Respondent has already demonstrated that condition f) as described above is not met, as the consequences of the tariff could have been avoided by the Claimant through diligence [see Supra Paras. 110-111]. Furthermore, foreseeability cannot be entirely ruled out in light of the election campaign, its results and appointment of a hawkish minister [see supra Para. 110]. More importantly condition b) is not met, as the party did not fail to perform – moreover it could be reasonably inferred that the alleged "impediment" did not prevent the Claimant from discharging his obligation (performance) – hence it could not have been a cause for non-performance. Finally, the first requirement, condition a) is also not met as the tariffs and their impact were within normal entrepreneurial risks and could not be categorized as a case of economic impossibility.

161. In commenting on the un-foreseeability aspect of trade sanctions [an impediment on a larger scale than the 30% trade tariffs in the current case], Silveira maintained that "the circumstances of the obligor at the time of the conclusion of the contract must be taken into account….An impediment is reasonably foreseeable if there is a "realistic possibility" that it will occur" [*Silveira p.225*]A diligent merchant would have found the change in government policies and new appointments lead to trade wars and possible disruption in this case.

162. Claimant has also sought to rely on application of Cl 6.2.2 of the UNDROIT principles to invoke hardship through an application of Art 7(2) as a means of filling the gaps in Art 79(1) in accordance with the *Scafom Case* [Clm. Memo. ¶¶96-101]. Respondent has already demonstrated to the Tribunal that a hardship exemption should be denied base on Cl 6.2.2 of the UNIDROIT Principles [see supra Paras 109-116]. Claimant is also reminded that as per the general principles of CISG, Art 7(2), the Convention is based upon the principle pursuant to which "each party has to bear the costs of its obligation [*Machines, devices and replacement parts Case*].

163. Claimant is also reminded that in *Scafom Case*, the change in circumstances had caused an increase in the aggrieved party's costs to the tune of 70% whereas Claimant's claims fail to meet the generally acceptable thresholds [see supra Paras. 114- 115]. Furthermore, what triggered the proceedings was seller's insistence on non-performance contrary to the current circumstances.

164. The Scafom case has come under severe criticism – this is because of the fact that the CISG articles governing exemption in not authorizing a tribunal to adapt the contract, do not create a "gap" in the Convention but merely denote the Convention's rejection of adaptation as reflected in the *travaux preparatoires.* and to this extent has undermined the CISG and is likely to seriously increase non-uniformity in the application of the Convention. [*Fletchner pp 84-101*].

165. To conclude, the Tribunal will find that the Claimant's reliance on the Scafom Case or on Cl 6.2.2 of the UNIDRIOT Principles or Art. 79 of the CISG on its own will not entitle invoking a hardship exemption or an adaptation of the Sales Agreement, even whilst considering that the fact that performance was rendered by the Claimant.

REQUEST FOR RELIEF

For the foregoing submissions and prior written pleadings, Respondent respectfully requests the Arbitral Tribunal while dismissing all contrary request and submissions by Claimant,

TO ADJUDGE AND DECLARE that:

1. The claim brought forward by the Claimant is inadmissible for lack of jurisdiction and power;
2. Claimant is not entitled for any additional payment against the performance under the Sales Agreement.
3. Claimant shall pay Respondent's cost incurred in this Arbitration.

25 January 2019: (signed)

Marko Veselinovic

James Ford

Mathew Castelino

Ajay Ruhela