SIXTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 7 APRIL 2019

HONG KONG

THE CHINESE UNIVERSITY OF HONG KONG

MEMORANDUM FOR RESPONDENT

Case No.: HKIAC/A18128

ON BEHALF OF:	**AGAINST:**
Black Beauty Equestrian	Phar Lap Allevamento
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	**CLAIMANT**

ALEX CHAN • BOBO CHAN • JASMINE CHAN • ESTHER HO

VANESSA HUNG • AARON KWONG • SHARON LEE • BEN POON

NICOLE XIAO • TRICIA YU • YUKI YUNG • JENNY Y. ZHANG

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INDEX OF ABBREVIATIONS

ABBREVIATION	CITATION
%	Per cent
§ / §§	Paragraph / Paragraphs
ANA	RESPONDENT's Answer to the Notice of Arbitration dated 24 August 2018
Arbitration Clause	Clause 15 of the Contract
Art. / Arts.	Article / Articles
Award	The Partial Interim Award dated 29 June 2018, and rendered in the Other Arbitration
c. / cc.	Clause / Clauses
CE	CLAIMANT'S Exhibit
ch.	Chapter
CLAIMANT	Phar Lap Allevamento
C.Memo	CLAIMANT's Memorandum
Clause 12	Clause 12 of the Contract
Contract	Frozen Semen Sales Contract dated 6 May 2017
Danubian Arbitration Law	A largely verbatim adoption of the Model Law
Danubian Contract Law	A largely verbatim adoption of the UNIDROIT Principles with two exceptions
Danubian Law	Law of Danubia
DDP	Delivered duty paid
Ed.	Edition
Equatorianian Law	Law of Equatoriana
Equatorianian Courts	Courts in Equatoriana
Evidence	Copies of the relevant award and submission from the Other Arbitration
EXW	Ex Works
Fasttrack Email	Email of Counsel for RESPONDENT to the Tribunal on 3 October 2018
Four Corners Rule	The "*four corners rule*" from Danubian Contract Law
HKIAC	Hong Kong International Arbitration Centre
HKIAC Model Clause	Model clause of HKIAC for arbitrations under HKIAC Rules

ICC	International Chamber of Commerce
Incoterms	Incoterms® Rules 2010 - International Chamber of Commerce
Langweiler Email	Email of Counsel for CLAIMANT to the Tribunal on 2 October 2018
Ltd.	Limited
Meeting	The Parties' meeting on 12 February 2018
Mediterranean Contract Law	General contract law of Mediterraneo
Mediterranean Courts	Courts in Mediterraneo
Mediterranean Law	Law of Mediterraneo, including the CISG
Mr. / Ms.	Mister / Miss
NA	CLAIMANT's Notice of Arbitration dated 31 July 2018
No.	Number
Oral Negotiation	Mr. Antley's conversations with Ms. Napravnik in the morning of 12 April 2017
p. / pp.	Page / Pages
Parties	CLAIMANT and RESPONDENT
PO1	Procedural Order No.1 dated 5 October 2018
PO2	Procedural Order No.2 dated 2 November 2018
r. / rr.	Rule / Rules
RE	RESPONDENT'S Exhibit
RESPONDENT	Black Beauty Equestrian
s. / ss.	Section / Sections
Supra	See above
Tariff	The 30% retaliatory tariffs imposed by Equatoriana
Other Arbitration	The other arbitration conducted under HKIAC Rules which RESPONDENT had with one of its customers
Tribunal	The arbitral tribunal constituted as at 31 July 2018
US$	U.S. Dollar
UNIDROIT	International Institute for the Unification of Private Law
v.	*Versus* (against)
Vol.	Volume

WTO	World Trade Organisation

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Orient Shipping	Final Award *Orient Shipping Rotterdam BV v. Sealift Inc.* SMA No. 3309 7 October 1996 Cite in §64

STATUTES, RULES AND TREATIES

ABBREVIATION	CITATION
CISG	United Nations Convention on Contracts for the International Sale of Goods as adopted on 11 April 1980
HKIAC Rules 2013	Administered Arbitration Rules of the Hong Kong International Arbitration Centre as adopted on 1 November 2013
HKIAC Rules 2018	Administered Arbitration Rules of the Hong Kong International Arbitration Centre as adopted on 1 November 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration as adopted on 29 May 2010
Incoterms 2010	Incoterms® Rules 2010 published by International Chamber of Commerce effective on 1 January 2011
Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration as adopted on 16 December 2013
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts as adopted on 18-20 May 2016

STATEMENT OF FACTS

1. **Black Beauty Equestrian** (RESPONDENT) is an Equatorianian owner of broodmare lines and a racehorse stable. **Phar Lap Allevamento** (CLAIMANT) operates Mediterranean stud farm.

2. In **2014**, as Danubia imposed health and safety requirements, CLAIMANT incurred significant costs for long quarantine time and expensive tests for its sale of three mares to farms in Danubia.

3. On **21 March 2017**, Mr. Antley (for RESPONDENT) contacted Ms. Napravnik (for CLAIMANT) to enquire if CLAIMANT would provide Nijinsky III's frozen semen for RESPONDENT's new breeding programme.

4. On **24 March 2017**, CLAIMANT offered to sell 100 doses of Nijinsky III's frozen semen to RESPONDENT at US$99,500 each.

5. On **28 March 2017**, RESPONDENT told CLAIMANT Equatorianian Courts must have jurisdiction for Mediterranean Law to govern the Arbitration Clause. It also insisted on standard DDP.

6. On **31 March 2017**, CLAIMANT refused to submit to Equatorianian Courts' jurisdiction. CLAIMANT accepted DDP while asking for a raise in price. CLAIMANT also suggested including a hardship reference in the Contract based on its past experience in 2014.

7. On **10 April 2017**, RESPONDENT narrowed down and streamlined the broad wording of HKIAC Model Clause. Under this draft, Equatorianian Courts would have jurisdiction.

8. On **11 April 2017**, CLAIMANT amended that draft. CLAIMANT again refused to submit to Equatorianian Courts' jurisdiction, by changing the arbitral seat to Danubia. CLAIMANT also deleted the paragraph that specifies Equatoriana as the law governing the Arbitration Clause.

9. On **12 April 2017**, Mr. Antley and Ms. Napravnik, the Parties' negotiators, had an accident and were severely injured. This resulted in Mr. Antley being in a coma for four weeks. The Parties then replaced them with Mr. Krone (for RESPONDENT) and Mr. Ferguson (for CLAIMANT). Mr. Krone continued the negotiation for RESPONDENT with the pre-existing files left by Mr. Antley.

10. On **25 April 2017,** the incumbent Mediterranean president, who declared a protectionist approach to international trade particularly for agricultural products, was elected.

11. On **5 May 2017**, Mediterranean president appointed an ardent critic of free trade as his superminister for agriculture, trade, and economics.

12. On **6 May 2017**, Mr. Ferguson and Mr. Krone signed the Contract. Both Parties agreed on a narrow hardship reference based on CLAIMANT's past experience in 2014.

13. On **20 May 2017** and **3 October 2017**, CLAIMANT delivered the first and second shipments, each consisting of 25 doses of frozen semen, to RESPONDENT.

14. On **15 November 2017**, Mediterraneo imposed 25% tariffs on agricultural products from Equatoriana.

15. On **19 December 2017**, Equatoriana retaliated by imposing the Tariff on agricultural products from Mediterraneo.

16. On **20 January 2018**, one month after the announcement of the Tariff but two days before the third shipment, CLAIMANT notified RESPONDENT that the Tariff applied to the third shipment.

17. On **21 January 2018**, RESPONDENT paid the second instalment of US$5,000,000.

18. On **23 January 2018**, CLAIMANT delivered the third shipment to RESPONDENT.

19. On **12 February 2018**, the Parties attended the Meeting, in which CLAIMANT accused RESPONDENT of an issue irrelevant to this arbitration.

20. On **30 May 2018**, CLAIMANT learnt about the Other Arbitration, which involves RESPONDENT and a third party in a different transaction, from Mr. Velazquez, an employee of that third party.

21. On **29 June 2018**, an Award was rendered in the Other Arbitration.

22. On **31 July 2018**, CLAIMANT filed the Notice of Arbitration.

23. On **24 August 2018**, RESPONDENT filed the Answer to Notice of Arbitration, and objected to the Tribunal's jurisdiction to adapt the Contract.

24. On **2 October 2018**, CLAIMANT requested the Tribunal to admit the Award, which Mr. Velazquez referred CLAIMANT to purchase from an intelligence company.

25. On **3 October 2018**, RESPONDENT objected to the Evidence's admissibility, and informed the Tribunal and CLAIMANT of an illegal hack or a confidentiality breach attached to the Evidence.

26. On **5 October 2018**, PO1 was issued.

27. On **2 November 2018**, PO2 was issued.

SUMMARY OF ARGUMENTS

28. The Parties entered into the Contract for the sale of frozen semen. Under the Contract, CLAIMANT assumed all risks regarding customs formalities. When those risks emerged in the form of the Tariff, CLAIMANT went back on its contractual undertakings to avoid its own financial distress. In advancing its unwarranted demands for Contract adaptation, CLAIMANT is asking the Tribunal to deviate from the Contract's terms and to rewrite the Parties' agreement.

29. However, party autonomy is the cornerstone of arbitration. The Parties deliberately chose Danubia as the arbitral seat, intending both Danubian Arbitration Law and Danubian Contract Law to govern the Arbitration Clause and its interpretation. As such, the Tribunal cannot adapt the Contract in the absence of the Parties' express authorisation. An interpretation within the "*four corners*" of the narrowly worded Arbitration Clause shows that the Parties have not empowered the Tribunal to adapt the Contract. Yet, by wagering that the Tribunal might act outside its mandate, CLAIMANT perverted the Arbitration Clause's clear meaning and misinterpreted the Parties' intent. Therefore, the Tribunal should respect party autonomy, hold the Parties to their promises, and find that it has no jurisdiction to adapt the Contract [**Issue 1**].

30. Further, procedural fairness and arbitral integrity underpin every arbitration. In asking the Tribunal to go beyond its jurisdiction, CLAIMANT also attempts to adduce the Award from the Other Arbitration as the Evidence. However, the Evidence is wholly irrelevant as the two arbitrations concern materially different factual matrices. Worse still, CLAIMANT disregards the confidentiality and illegality attached to the Evidence. To preserve procedural fairness and safeguard arbitral integrity, the Tribunal should not admit the Evidence [**Issue 2**].

31. Even if the Tribunal has jurisdiction, CLAIMANT's request for Contract adaptation is unfounded. Commercial contracts are by nature profit-making, and risks must follow profits. As a business, CLAIMANT must have weighed its profits against risks under the Contract. It eventually made an informed decision to undertake DDP obligations in delivering the frozen semen, including the risks of changes in import tariffs, in return for RESPONDENT paying a higher price. The Tariff, which was foreseeable, was imposed and it increased CLAIMANT's performance costs. While CLAIMANT claims that it is not liable for the Tariff, it nonetheless unilaterally paid the Tariff cost before agreeing on a solution with RESPONDENT. Being a sore loser, CLAIMANT attempts to rely on its own financial crisis caused by its previous lousy management to hold RESPONDENT liable for the risks in its commercial decision, and claims Contract adaptation. As such, it would be unfair to adapt the Contract and the Tribunal should reject CLAIMANT's claim [**Issue 3**].

JURISDICTION ARGUMENTS

ISSUE 1: THE TRIBUNAL HAS NO JURISDICTION UNDER THE ARBITRATION CLAUSE TO ADAPT THE CONTRACT

32. The Tribunal has no jurisdiction under the Arbitration Clause to adapt the Contract. A tribunal's jurisdiction to adapt contracts is dependent on two issues: first, if the parties can empower it to adapt contracts; and secondly, if they have done so [*Kröll, p.3*]. The first issue is determined by the arbitral seat's procedural law [*Berger I, p.85; Brunner, p.493; Kröll, p.3; Lew/Mistellis/Kröll, pp.107,121,418,419*]. Danubia is the arbitral seat [*CE5, p.14, c.15*]. Under Danubian Arbitration Law, the Tribunal has no jurisdiction to adapt the Contract unless the Parties expressly authorise so [**I**]. The second issue is determined by the law governing the interpretation of the arbitration agreement [*Kröll, p.3*]. The Tribunal should interpret the Arbitration Clause under Danubian Contract Law, under which the Parties have not empowered the Tribunal to adapt the Contract [**II**]. Even if the Tribunal interprets the Arbitration Clause under Mediterranean Contract Law, the Parties still have not done so [**III**].

I. UNDER DANUBIAN ARBITRATION LAW, THE TRIBUNAL HAS NO JURISDICTION TO ADAPT THE CONTRACT UNLESS THE PARTIES EXPRESSLY AUTHORISE SO

33. Under Danubian Arbitration Law, the Tribunal has no jurisdiction to adapt the Contract unless the Parties expressly authorise so. A tribunal should, in principle, follow the arbitral seat's jurisprudence on procedural matters [*Lew/Mistellis/Kröll, p.107; Waincymer, p.168*]. It should not adapt a contract if it cannot do so under the arbitral seat's procedural law, otherwise any arbitral award is likely unenforceable [*Art.36(1)(a)(iii) Model Law; Brunner, p.493*]. As such, the Tribunal must follow Danubian Arbitration Law's jurisprudence on Contract adaptation. Under such jurisprudence, the Tribunal can adapt the Contract only if the Parties adhered to Art.28(3) Danubian Arbitration Law, which requires "*an express conferral of powers*" by the parties [*PO2, p.60, §36*]. An express conferral is necessary because contract adaptation severely alters the parties' contractual obligations [*Berger I, pp.82,85; Horn/Kröll, p.458*]. Therefore, the Tribunal cannot adapt the Contract unless the Parties expressly authorise so.

II. THE PARTIES HAVE NOT EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT UNDER DANUBIAN CONTRACT LAW

34. The Parties have not empowered the Tribunal to adapt the Contract under Danubian Contract Law. Danubian Law governs the Arbitration Clause and its interpretation [**A**]. Under Danubian Contract Law, the Parties have not empowered the Tribunal to adapt the Contract [**B**].

A. DANUBIAN LAW GOVERNS THE ARBITRATION CLAUSE AND ITS INTERPRETATION

35. Contrary to CLAIMANT's submission that the law of the Contract is a "*strong indicator*" that it is the law of the Arbitration Clause [*C.Memo, §§36-39*], that Mediterranean Law governs the Contract is not decisive in determining which law governs the Arbitration Clause [**1**]. Instead, Danubian Law governs the Arbitration Clause and its interpretation because the Parties impliedly chose Danubian Law [**2**] and, alternatively, because the Arbitration Clause is most closely connected to Danubian Law [**3**].

1. That Mediterranean Law governs the Contract is not decisive in determining which law governs the Arbitration Clause

36. That Mediterranean Law governs the Contract is not decisive in determining which law governs the Arbitration Clause due to the separability presumption. In determining which law governs the Arbitration Clause, the Tribunal should consider the separability presumption. Contrary to CLAIMANT's submission that the same law governs the Arbitration Clause and the Contract as "*CLAIMANT has never said it wants to be separate*" and "*it [did] not write about separation*" [*C.Memo, §41*], the separability presumption applies. If the parties "*conscious[ly]*" chose an arbitral seat, the seat's procedural law "*automatically*" governs their arbitration agreement [*Blackaby/Partasides, pp.183,187; Henderson, pp.890,891, Lew/Mistellis/Kröll, p.28; Waincymer, p.130*]. As the Parties consciously chose Danubia to be the arbitral seat [*RE2, p.34, §§2,3; PO2, p.57, §14*], Danubia's procedural law governs the Arbitration Clause automatically. Danubia adopted the Model Law as its procedural law [*PO1, p.53, §III(4)*]. Art.16(1) Model Law provides for the separability presumption [*Holtzmann/Neuhaus, p.480*], which applies unless the parties agree to derogate from it [*Born, p.396*]. As CLAIMANT "*[did] not write about separation*" in the Contract [*C.Memo, §41*], the Parties could not have derogated from the separability presumption. Therefore, the separability presumption applies.

37. The separability presumption permits the arbitration agreement and the contract to be governed by different laws [*ICC 7453; ICC 16655; XL Insurance; Born, pp.395,479,480,517,583; Lew/Mistellis/Kröll, p.107; Waincymer, p.135*]. As such, a tribunal should separately determine which laws govern the arbitration agreement and the contract [*ICC 4131; Insurance; Berger I, p.158; Born, p.464; Collins/Harris, p.834; Gaillard/Savage, pp.212,222,223; Lew/Mistellis/Kröll, p.107*]. Although Mediterranean Law governs the Contract [*CE5, p.14, c.14*], the Tribunal should separately determine which laws govern the Arbitration Clause and the Contract. Thus, Mediterranean Law does not automatically govern the Arbitration Clause.

2. The Parties impliedly chose Danubian Law to govern the Arbitration Clause and its interpretation

38. Contrary to CLAIMANT's submission that "*the parties did not agree on*" the law governing the Arbitration Clause [*C.Memo, §§32,39*], the Parties impliedly chose Danubian Law to govern the Arbitration Clause and its interpretation. The parties' implied choice governs the arbitration agreement [*BCY; Sulamérica; Blackaby/Partasides, pp.219,220*], and its interpretation [*Gatoil; Insurance; Born, pp.635,1397,1398; Gaillard/Savage, p.255*]. Danubian Law presumptively governs the Arbitration Clause and its interpretation as the Parties' implied choice of law [**a**]. This presumption is not rebutted because the Parties intended Danubian Law to apply [**b**].

a. Danubian Law presumptively governs the Arbitration Clause and its interpretation as the Parties' implied choice of law

39. Danubian Law presumptively governs the Arbitration Clause and its interpretation as the Parties' implied choice of law. The prevailing view of the law presumes that the parties impliedly chose the law of the arbitral seat to govern their arbitration agreement [*Bangladesh; C v. D; ICC 5505; ICC 6149; Berger I, p.159; Blackaby/Partasides, pp.168,169; Born, pp.511,514,519,585; Gaillard/Savage, p.226; Jan, p.174*]. This is so even if the parties expressly chose the law of the contract [*ICC 1507; ICC 5294; ICC 6162; XL Insurance; Gaillard/Savage, p.223; Ma/Kaplan, p.143*]. In contrast, the presumption that the law of the contract governs an arbitration agreement has often been rejected [*Born, pp.583-585*; *Gaillard/Savage, pp.222-224*], especially if the parties chose a neutral arbitral seat [*Gaillard/Savage, p.223*]. Danubia, the chosen arbitral seat, is neutral to the Parties [*RE2, p.34, §§2,3; RE3, p.35, §3*]. As such, the Parties presumptively chose Danubian Law to govern the Arbitration Clause even if they expressly chose Mediterranean Law as the law of the Contract [*CE5, p.15, c.14*]. Therefore, the Parties' presumed choice of Danubian Law governs the Arbitration Clause and its interpretation.

b. The presumption that Danubian Law governs the Arbitration Clause and its interpretation is not rebutted

40. The presumption that Danubian Law governs the Arbitration Clause and its interpretation is not rebutted, because the Parties intended Danubian Law to apply. The presumption is not rebutted, unless "*some very strong pointer*" shows the parties intend to apply a law different from the law of the arbitral seat to their arbitration agreement [*C v. D; Channel; Berger I, p.159*]. A tribunal may look at the parties' words and acts to ascertain their intent [*Lew/Mistellis/Kröll, p.415*].

41. CLAIMANT did not intend to apply Mediterranean Law to the Arbitration Clause. RESPONDENT told CLAIMANT it "*could accept the application of the Law of Mediterraneo*" to the Arbitration

Clause on the condition that "*the courts of Equatoriana have jurisdiction*" [*CE3, p.11, §3*]. CLAIMANT refused to submit to Equatorianian Courts' jurisdiction [*CE4, p.12, §5*]. RESPONDENT then re-proposed the same [*RE1, p.33, §1*], which CLAIMANT again refused [*RE2, p.34, §2*]. The Parties did not submit to Equatorianian Courts' jurisdiction [*CE5, p.14, c.15*]. As CLAIMANT knew, Mediterranean Law's application is conditional upon Equatorianian Courts having jurisdiction. By rejecting RESPONDENT's proposal twice, CLAIMANT relinquished any possibility of Mediterranean Law applying to the Arbitration Clause.

42. In contrast, CLAIMANT intended to apply Danubian Law to the Arbitration Clause. By refusing to submit to Equatorianian Courts' jurisdiction [*Supra, §41*] and to apply Equatorianian Law to the Arbitration Clause [*RE1, p.33, §1; RE2, p.34, §3*], CLAIMANT was well aware that Mediterranean Law and Equatorianian Law could not apply to the Arbitration Clause. Thus, when CLAIMANT offered Danubia for the arbitral seat [*RE2, p.34, §3*], the only law that could possibly govern the Arbitration Clause was Danubian Law. As such, CLAIMANT must have intended to apply Danubian Law to the Arbitration Clause. Although the Parties then replaced their negotiators [*CE8, p.17, §2; RE3, p.35, §§1,4*], Danubia remained their chosen arbitral seat [*CE5, p.14, c.15*]. Hence, CLAIMANT's intent remained unchanged. Therefore, the presumption that Danubian Law governs the Arbitration Clause and its interpretation is not rebutted.

3. The Arbitration Clause is most closely connected to Danubian Law

43. Alternatively, Danubian Law governs the Arbitration Clause and its interpretation because the Arbitration Clause is most closely connected to Danubian Law. If a tribunal finds no parties' choice of law to govern their arbitration agreement, the law most closely connected to the arbitration agreement, not to the contract, governs it [*C v. D; ICC 4367; Sulamérica; Born, p.518; Gaillard/Savage, pp.222-224; Kaplan/Moser, pp.135,142; Lew/Mistellis/Kröll, p.121*]. This law should be the law of the seat because the arbitration agreement and any arbitral award are performed and rendered in the arbitral seat [*ICC 6149; Owerri; Sulamérica; XL Insurance; Lew/Mistellis/Kröll, pp.119-125*]. This is also due to the arbitration agreement's "*separable*" nature [*Bulgarian; C v. D; Lew/Mistellis/Kröll, p.107*]. This law should also be the law of the seat, if the parties chose the law of a party's home state to govern the contract, but they "*deliberately*" chose a neutral arbitral seat [*C v. D; Born, p.518; Gaillard/Savage, pp.225-228*].

44. Danubian Law, as the law of the arbitral seat [*CE5, p.14, c.15*], is most closely connected to the Arbitration Clause. This is especially so, because the Parties chose Mediterranean Law, the law of CLAIMANT's home state [*NA, p.4, §1*], as the law of the Contract [*CE5, p.14, c.14*], but

deliberately chose Danubia as the arbitral seat [*PO2, p.57, §14; RE2, p.34, §§2,3*]. Danubia is neutral to the Parties [*Supra, §39*]. As such, the Arbitration Clause is most closely connected to Danubian Law. Thus, Danubian Law governs the Arbitration Clause and its interpretation.

B. THE PARTIES HAVE NOT EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT UNDER DANUBIAN CONTRACT LAW

45. The Parties have not empowered the Tribunal to adapt the Contract under Danubian Contract Law. Danubian Law governs the Arbitration Clause and its interpretation [*Supra, §§33-44*]. Danubia adopted UNIDROIT Principles as its contract law with two exceptions: first, Art.6.2.3(4)(b) Danubian Contract Law is worded differently, allowing a tribunal to adapt contracts <u>only</u> "*if authorized*"; secondly, Art.4.3 Danubian Contract Law contains the Four Corners Rule [*PO2, p.61, §45*]. As "*Parties agreed*", under the Four Corners Rule, "*Danubian Law interpreted arbitration agreements narrowly*" and "*there is a high likelihood … the arbitration agreement would not be interpreted as authorizing a contract adaptation*" [*PO1, p.52, §II*]. Thus, the Tribunal should construe the Arbitration Clause narrowly. The Parties have not empowered the Tribunal to adapt the Contract by the Arbitration Clause's wording [**1**], or by construing the Contract as a whole [**2**]. Further, the Parties have not empowered the Tribunal to adapt the Contract regardless of whether the Tribunal considers external evidence [**3**].

1. The Parties have not empowered the Tribunal to adapt the Contract by the Arbitration Clause's wording under Art.4.3 Danubian Contract Law

46. The Parties have not empowered the Tribunal to adapt the Contract by the Arbitration Clause's wording under Art.4.3 Danubian Contract Law. Under Art.4.3, the Four Corners Rule confines the four corners to the "*contract*" [*PO1, p.52, §II*], which is the Arbitration Clause. A tribunal should construe an arbitration clause's scope objectively based on its "*wording*" to ascertain the parties' common intent [*Astro; Insigma; Born, p.1321*]. The Parties have not empowered the Tribunal to adapt the Contract by the expression "*any dispute arising out of this contract*" [**a**]. Also, they have not done so because they modified the HKIAC Model Clause [**b**].

a. The Parties have not empowered the Tribunal to adapt the Contract by the general expression in the Arbitration Clause

47. Contrary to CLAIMANT's submission [*C.Memo, §65*], the Parties have not empowered the Tribunal to adapt the Contract by the general expression in the Arbitration Clause. A general arbitration clause by which "*all the disputes related to an agreement will be settled by tribunal*" does not empower a tribunal to adapt contracts [*Berger II, pp.8,9; Ferrario, p.128*]. A tribunal has the power to adapt contracts "*only*" if the parties have expressly empowered it to do so in

the arbitration agreement "*in addition to*" the general arbitration clause [*Blackaby/Partasides, pp.525,526; Berger II, pp.8,9; Ferrario, p.128; Horn/Kröll, p.457; Waincymer, p.1056*]. An example of such express provision is where the tribunal can "*act as amiable compositeur*" [*Intrafor; Berger II, p.2*]. Otherwise, the tribunal should not "*substitute itself for the parties*" to "*make good a missing segment*" of their contract [*Kuwait*]. The Arbitration Clause provides: "*Any dispute arising out of this contract…, including the existence, validity, interpretation, performance, breach or termination…shall be referred to…HKIAC*". It is a general arbitration clause and does not contain any express provision that empowers the Tribunal to "*act as amiable compositeur*". Thus, the Parties have not empowered the Tribunal to adapt the Contract.

b. The Parties have not empowered the Tribunal to adapt the Contract because they modified the HKIAC Model Clause

48. The Parties have not empowered the Tribunal to adapt the Contract because they modified the HKIAC Model Clause. "*Any dispute*" only includes conflicts regarding existing rights and obligations, whereas contract adaptation creates "*content of future relationship*" and is thus not covered [*Klausegger/Klein II, p.84*]. Further, as CLAIMANT also admits [*C.Memo, §54*], "*relating to this contract*" covers a *broad* scope of disputes, rendering an arbitration clause a "*broad clause*" [*Born, pp.1349,1350*]. Omitting "*relating to this contract*" means the parties intended the arbitration clause to cover a *narrower* scope of disputes [*Kinoshita; Michele*]. Where an arbitration clause is *narrowly* drafted, a matter not "*within the purview of this clause*" but only "*connected to*" the contract is beyond its scope [*Hornbeck; United Steelworkers*].

49. The Parties based the Arbitration Clause on the HKIAC Model Clause [*RE1, p.33, §1*]. RESPONDENT deliberately deleted "*controversy, difference or claim*" from the HKIAC Model Clause [*RE1, p.33, §1*] and retained only "*any dispute*" in the Arbitration Clause [*CE5, p.14, c.15*]. However, "*any dispute*" does not cover Contract adaptation. Further, RESPONDENT deliberately deleted "*relating to this contract*" [*RE1, p.33, §1*]. As such, the Parties intended the Arbitration Clause to cover a *narrower* range of disputes, rendering it a *narrow* clause. As Contract adaptation is not within the purview of "*any dispute*", it is beyond the Arbitration Clause's scope. Therefore, the Parties have not empowered the Tribunal to adapt the Contract.

2. The Parties have not empowered the Tribunal to adapt the Contract when the Contract is construed as a whole under Art.4.4 Danubian Contract Law

50. The Parties have not empowered the Tribunal to adapt the Contract when the Contract is construed as a whole under Art.4.4 Danubian Contract Law. Under Art.4.4, a tribunal should

interpret terms "*in light of the whole contract…in which they appear*". Without a separate adaptation clause, tribunals tend not to adapt the contract because the disadvantaged party is presumed to have accepted the risk of hardship [*Berger I, p.93; Bernardini, p.521; Ferrario, p.138; Horn/Kröll, pp.456,457*]. However, a party is not "*entitled*" to request contract adaptation, unless the hardship clause contains an express reference to renegotiation such as "*upon failure to reach [a]greement…, party may resort to…arbitration*" [*Lemire; Fontaine/De Ly, p.432; Horn/Kröll, pp.456,457*]. The Arbitration Clause appears in the Contract [*CE5, p.14, c.15*], so they must be construed as a whole. The Contract has no adaptation clause. Further, Clause 12 does not contain any reference to renegotiation. Therefore, the Parties have not empowered the Tribunal to adapt the Contract.

3. The Parties have not empowered the Tribunal to adapt the Contract regardless of whether the Tribunal considers external evidence

51. The Parties have not empowered the Tribunal to adapt the Contract regardless of whether the Tribunal considers the external evidence. CLAIMANT relies on Mr. Antley's oral negotiation with Ms. Napravnik on 12 April 2017, to submit that "*the arbitrators should adapt the contract*" [*C.Memo, §49; NA, p.7, §16*]. However, the Tribunal should not consider this external evidence to supplement the Contract under the Four Corners Rule [**a**]. If the Tribunal does consider it, the Parties have not empowered the Tribunal to adapt the Contract [**b**].

a. The Tribunal should not consider the external evidence on which CLAIMANT relies to supplement the Contract under the Four Corners Rule

52. The Tribunal should not consider the external evidence on which CLAIMANT relies to supplement the Contract under the Four Corners Rule. The effect of the Four Corners Rule resembles that of a merger clause under Art.2.1.17 UNIDROIT Principles [*PO2, p.61, §45*]: external evidence can be used only to interpret, not supplement, a contract term [*Vogenauer, p.372*]. External evidence includes the parties' oral negotiations [*Vogenauer, p.373*]. If the "*wording of a clause*" "*clearly*" does not cover a matter, a party cannot rely on external evidence to supplement the contract [*Vogenauer, p.373*]. As CLAIMANT concedes, the Parties ultimately did not include an "*express reference*" for adaptation in the Contract [*CE8, p.17, §5*]. As such, the Contract's wording clearly does not cover Contract adaptation [*Supra, §§47-50*]. The Tribunal should not permit CLAIMANT to rely on the Oral Negotiation as external evidence to supplement any Contract term. Thus, the Tribunal should not consider the external evidence. Since the Contract is clear to show the Parties have not empowered the Tribunal on Contract adaptation [*Supra, §§47-50*], the Parties have not empowered the Tribunal to adapt the Contract.

b. If the Tribunal does consider the external evidence, it shows that the Parties have not empowered the Tribunal to adapt the Contract

53. If the Tribunal does consider the external evidence CLAIMANT relies on, it shows that the Parties have not empowered the Tribunal to adapt the Contract. CLAIMANT alleges that Mr. Antley agreed to Contract adaptation [*C.Memo, §49*]. However, despite CLAIMANT's suggestion to "*include an express reference [for Contract adaptation] into the hardship clause or the arbitration clause*", RESPONDENT never "*c[a]me back with a proposal*" [*CE8, p.17, §4*]. Further, in response to this suggestion, Mr. Antley noted this "*connection of hardship clause with arbitration clause*" as an "*open*" issue which RESPONDENT "*had to address in the next round*" [*RE3, p.35, §2*]. As such, the Parties never agreed to authorise Contract adaptation by the Contract's wording. Thus, the Parties have not empowered the Tribunal to adapt the Contract.

III. THE PARTIES HAVE NOT EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT UNDER MEDITERRANEAN CONTRACT LAW

54. Alternatively, if the Tribunal interprets the Arbitration Clause under Mediterranean Contract Law, the Parties have not empowered the Tribunal to adapt the Contract. Mediterraneo is CISG's Contracting State and adopted UNIDROIT Principles as its contract law [*PO1, p.54, §III(4)*]. Contrary to CLAIMANT's submission that CISG applies to the interpretation of the Arbitration Clause [*C.Memo, §§43-58*], CISG does not apply. Danubian Arbitration Law's separability presumption governs the Arbitration Clause [*PO2, p.60, §36; Supra, §37*]. Under this separability presumption, CISG does not govern procedural contracts [*PO2, p.60, §36*]. As arbitration agreements are "*procedural*" contracts [*Born, p.512; Blackaby/Partasides, p.104; Flecke-Glammarca/Grimm, p.35*], CISG does not govern the Arbitration Clause. Thus, the Tribunal should interpret the Arbitration Clause under UNIDROIT Principles as Mediterranean Contract Law. The Parties have not empowered the Tribunal to adapt the Contract under Mediterranean Contract Law [**A**]. Alternatively, the Parties have not empowered the Tribunal to adapt the Contract as the Arbitration Clause is not a standard arbitration agreement [**B**].

A. THE PARTIES HAVE NOT EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT UNDER MEDITERRANEAN CONTRACT LAW

55. The Parties have not empowered the Tribunal to adapt the Contract under Mediterranean Contract Law. The Tribunal should not consider the Oral Negotiation under Art.2.2.3(1) Mediterranean Contract Law [**1**]. Even if it does, the Parties' common intent was not to empower the Tribunal to adapt the Contract under Art.4.1(1) Mediterranean Contract Law [**2**]. The Parties have not objectively intended so under Art.4.1(2) Mediterranean Contract Law [**3**].

1. The Tribunal should not consider the Oral Negotiation under Art.2.2.3(1) Mediterranean Contract Law

56. The Tribunal should not consider the Oral Negotiation under Art.2.2.3(1) Mediterranean Contract Law, as Mr. Antley's knowledge was not imputed to RESPONDENT. Under Art.2.2.3(1), when an agency is disclosed, the agent's communications are imputed to the principal [*Off. Cmt., Art.2.2.3(1), §2*]. However, imputation is context-specific [*Jetivia; Singularis*]. It is a "*fallacy*" to assume the principal "*know[s] at all times*" and "*for all purposes*" what his agents know [*Jetivia; Reynolds/Watts/Bowstead, p.524*]. The Oral Negotiation happened right before a car accident that resulted in Mr. Antley falling into a coma for four weeks [*CE8, p.17, §4*]. It was impossible for Mr. Antley to communicate the Oral Negotiation on Contract adaptation to RESPONDENT before the Contract's conclusion. In this context, as RESPONDENT should not be deemed to know about the Oral Negotiation, the Tribunal should not look at it.

2. Alternatively, the Parties' common intent was not to empower the Tribunal to adapt the Contract under Art.4.1(1) Mediterranean Contract Law

57. If the Tribunal considers the Oral Negotiation, the Parties's common intent was not to empower the Tribunal to adapt the Contract under Art.4.1(1) Mediterranean Contract Law. Art.4.1(1) is used to interpret contracts pursuant to the parties' common intent at the time of contracting [*Vogenauer, pp.575,576*]. A tribunal should consider all relevant circumstances including preliminary negotiations when applying Art.4.1(1) [*Art.4.3 UNIDROIT Principles; Vogenauer, p.576*]. CLAIMANT submits that "*both parties agreed it is the task for arbitrators to adapt the Contract*" based on Mr. Antley's statement [*C.Memo, §47*]. However, RESPONDENT never agreed to Contract adaptation [*Supra, §53*]. Therefore, it was never the Parties' common intent to empower the Tribunal to adapt the Contract.

3. The Parties have not objectively intended to empower the Tribunal to adapt the Contract under Art.4.1(2) Mediterranean Contract Law

58. The Parties also have not objectively intended to empower the Tribunal to adapt the Contract under Art.4.1(2) Mediterranean Contract Law. Art.4.1(2) is used to interpret a contract pursuant to a reasonable person's understanding [*Vogenauer, p.576*]. The standard of reasonableness is "*individualized and contextualized*" [*Brödermann, p.111; Vogenauer, p.577*]. A reasonable person would have asked for legal advice and had the "*linguistic knowledge*" and "*technical skill*" of the parties [*Off. Cmt., Art.4.1, §2; Vogenauer, pp.576,577*]. A tribunal should consider all relevant circumstances including preliminary negotiations when applying Art.4.1(2) [*Art.4.3 UNIDROIT Principles*]. In determining if the parties empowered a tribunal to adapt contracts,

the tribunal should interpret their arbitration agreement with any hardship clause in the contract [*ICC 1990; Gaillard/Savage, p.28; Horn, p.189*]. If the hardship clause requires the parties to renegotiate, the parties have not empowered the tribunal to adapt the contract [*Supra, §50*].

59. CLAIMANT has a legal department [*CE8, p.17, §1*]. A reasonable person in CLAIMANT's position would thus have a competent lawyer's linguistic knowledge and technical skill. Contrary to CLAIMANT's submission that the Arbitration Clause is broad [*C.Memo, §52*], RESPONDENT had "*narrowed down*" the HKIAC Model Clause's "*broad wording*" in arriving at the Arbitration Clause [*RE1, p.33, §1; Supra, §§48,49*]. Further, CLAIMANT suggested incorporating in the Contract the ICC Hardship Clause [*RE2, p.34, §5*], which requires the parties to renegotiate [*ICC Website*]. However, RESPONDENT regarded the ICC Hardship Clause to be "*too broad*" [*RE3, p.35, §2*]. As a result, the Parties agreed to draft Clause 12 narrowly [*PO2, p.56, §12*], leaving no express reference to bind the Parties to renegotiate. Thus, a reasonable person in CLAIMANT's position would understand the intentionally narrowed wording of the Arbitration Clause and Clause 12 as not objectively intending to empower the Tribunal to adapt the Contract.

B. THE PARTIES HAVE NOT EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT AS THE ARBITRATION CLAUSE IS NOT A STANDARD ARBITRATION AGREEMENT

60. The Arbitration Clause is not a standard arbitration agreement. A "*standard arbitration agreement*" empowers a tribunal to adapt contracts under Mediterranean jurisprudence [*PO2, p.60, §39*]. It is the one the parties' chosen institution advocates [*Blackaby/Partasides, p.110; Bond, p.69*]. Despite basing the Arbitration Clause on the HKIAC Model Clause [*RE1, p.33, §1*], the Parties deliberately deleted its "*broad wording*" in arriving at the Arbitration Clause [*Supra, §§48,49*]. The Arbitration Clause is never a standard arbitration agreement in both form and substance. Thus, the Parties have not empowered the Tribunal to adapt the Contract.

61. **Issue 1 Conclusion**: Danubian Arbitration Law requires the Tribunal be expressly empowered to adapt the Contract. The Parties' choice and the closest connection test indicate the Tribunal should interpret the Arbitration Clause under Danubian Contract Law. As such, the Parties failed to empower the Tribunal to adapt the Contract. If Mediterranean Contract Law applies, the Parties also failed to do so. Therefore, the Tribunal has no jurisdiction to adapt the Contract.

ISSUE 2: THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE

62. The Tribunal should not admit the Evidence. This arbitration is administered under HKIAC Rules 2018 [*PO1, p.52, §II*]. Under Art.22.2 HKIAC Rules 2018, a tribunal "*shall determine*

the admissibility, relevance, materiality and weight of the evidence". Despite the tribunal's discretion in admitting evidence [*Moser/Bao, p.191*], it should not make evidentiary decisions "*based on its own whims*" and should "*always*" consider established rules of evidence [*Moser/Bao, p.191*]. As IBA Rules are "*well-formulated*" and preserve "*fairness and equality*", they are "*commonly adopted or referred to in HKIAC arbitration*" [*Born, p.2212; Ma/Brock, pp.507,508; Moser/Bao, p.191; O'Malley, p.9*]. Thus, the Tribunal should consider IBA Rules. The Tribunal should not admit the Evidence as it is irrelevant [**I**]. Alternatively, the Tribunal should not admit the Evidence, as the Evidence was obtained either in breach of confidentiality obligation [**II**], or illegally [**III**].

I. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE AS IT IS IRRELEVANT

63. The Tribunal should not admit the Evidence as it is irrelevant. Evidence must be "*relevant to the case*" to be admissible [*Art.22.3 HKIAC Rules 2018; ICSID ARB/01/02; Born, pp.2357,2362; O'Malley, p.296; Pilkov, p.148*], otherwise it should be excluded [*Art.9.2(a) IBA Rules; ICC 12761; ICC 12990*]. The Evidence is irrelevant as the two arbitrations arose from materially different factual matrices [**A**]. Accordingly, not admitting the Evidence would not erode CLAIMANT's full opportunity to present its case under Art.13.1 HKIAC Rules 2018 [**B**].

A. THE EVIDENCE IS IRRELEVANT AS THE TWO ARBITRATIONS AROSE FROM MATERIALLY DIFFERENT FACTUAL MATRICES

64. The Evidence is irrelevant as the two arbitrations arose from materially different factual matrices. Evidence is relevant if it has a "*direct connection*" to the parties' claims [*Generica; O'Malley, p.270; Waincymer, p.858*]. Two contracts that contain some identical provisions and involve the same parties may still be irrelevant to one another, because the parties' intent behind one contract "*could not be directly transposed to another*" [*ICSID ARB/07/5; Orient Shipping*].

65. The arbitration clauses giving rise to the two arbitrations are materially different. First, while Danubia is the Parties' chosen arbitral seat [*CE5, p.14, c.15*], the Other Arbitration was seated in Mediterraneo [*PO2, p.60, §39*]. Secondly, while the Parties deliberately deleted an express reference for the governing law of the Arbitration Clause [*Supra, §42*], the parties in the Other Arbitration explicitly subjected their arbitration agreement to Mediterranean Law [*PO2, p.60, §39*]. Thirdly, while the Parties explicitly "*narrowed down and streamlined*" the "*broad wording*" of the HKIAC Model Clause in arriving at the Arbitration Clause [*Supra, §§48,49*], the parties in the Other Arbitration adopted the HKIAC Model Clause without modification [*PO2, p.60, §39*]. Thus, the arbitration clauses are substantially different.

66. Further, the underlying contracts in the two arbitrations are materially different. First, while the Contract concerns the sale of frozen semen [*CE5, p.13*], the contract in the Other Arbitration concerns that of horses [*PO2, p.60, §39*]. Secondly, while the Parties refused to include the ICC Hardship Clause in the Contract and instead agreed to draft Clause 12 narrowly [*Supra, §50*], the parties in the Other Arbitration incorporated the ICC Hardship Clause in their contract [*PO2, p.60, §39*]. Thus, the contractual intents behind the respective contracts are completely different.

67. Most importantly, while RESPONDENT was the buyer under the Contract, it was the seller under the contract in the Other Arbitration. It was RESPONDENT which bore much more onerous obligations under DDP in the Other Arbitration. As such, in concluding the two contracts, RESPONDENT had vastly different contractual intents and business considerations. Collectively, the different factual matrices indicate that there can be no connection between the Evidence and CLAIMANT's claims. Therefore, the Tribunal should not admit the Evidence as it is irrelevant.

B. NOT ADMITTING THE EVIDENCE WOULD NOT ERODE CLAIMANT'S FULL OPPORTUNITY TO PRESENT ITS CASE UNDER ART.13.1 HKIAC RULES 2018

68. CLAIMANT may argue that not admitting the Evidence would erode its full opportunity to present its case under Art.13.1 HKIAC Rules 2018. However, a tribunal's refusal to admit a party's evidence does not erode the party's opportunity to present its case, if the evidence is irrelevant [*4P_196/2003; Waincymer, p.793*]. The Evidence is irrelevant [*Supra, §§64-67*]. Therefore, not admitting the Evidence would not erode CLAIMANT's full opportunity to present its case.

II. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE AS IT WAS OBTAINED IN BREACH OF CONFIDENTIALITY OBLIGATION

69. Contrary to CLAIMANT's submission [*C.Memo, §§89-94*], the Evidence should not be admitted as it was obtained in breach of confidentiality obligation. It is "*inherent*" in arbitration that all information and awards should be kept confidential [*Ali; Dolling; Hassneh; Born, p.2780; Waincymer, p.798*]. Specifically, HKIAC Rules provide "*greater confidentiality protections*" than most arbitration rules [*Lazarev, §3; Smeureanu/Lew, p.74*]. The Tribunal should not admit the Evidence as compelling grounds of confidentiality exist [**A**] and as the rules on transparency do not apply [**B**]. Further, the Tribunal should not admit the Evidence through joinder [**C**].

A. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE AS THERE ARE COMPELLING GROUNDS OF CONFIDENTIALITY

70. The Tribunal should not admit the Evidence as the grounds of confidentiality are compelling. A tribunal should attribute "*great importance*" to confidentiality and not admit an evidence

when there are compelling grounds of confidentiality [*Art.9.2(e) IBA Rules; ICSID ARB/06/8; IBA Working Party*]. The grounds are compelling if the evidence is protected by a confidentiality obligation owed by the party introducing it [*ICC 13133; ICSID UNCT/07/1; O'Malley, pp.302,303*]. The Tribunal should not admit the Evidence because CLAIMANT is under an implied confidentiality obligation [**1**]. CLAIMANT's confidentiality obligation has not been terminated because the Award is not in the public domain [**2**].

1. The Tribunal should not admit the Evidence because CLAIMANT is under an implied confidentiality obligation

71. The Tribunal should not admit the Evidence as CLAIMANT is under an implied confidentiality obligation. HKIAC Rules 2013 impose on the parties, including witnesses, an express confidentiality obligation not to disclose, or communicate, arbitral awards [*Arts.42.1,42.2 HKIAC Rules 2013; Moser/Bao, p.282*]. Further, a third party owes an implied confidentiality obligation if it receives information knowing that the information is confidential [*Campbell; Observer; Susan Thomas*]. Since CLAIMANT knew that the Other Arbitration is subject to HKIAC Rules 2013 [*Fasttrack Email, p.51, §3*], it knew RESPONDENT's two former employees, as witnesses in the Other Arbitration, are under an express confidentiality obligation [*PO2, p.61, §41*]. As such, when these employees passed the Award to the intelligence company [*PO2, p.61, §41*], CLAIMANT knew they did so in breach of their express confidentiality obligations. Hence, when CLAIMANT obtains the Award from the intelligence company, CLAIMANT will owe an implied confidentiality obligation not to disclose the Award, rendering the grounds of confidentiality compelling. Thus, the Tribunal should not admit the Evidence.

2. CLAIMANT's confidentiality obligation has not been terminated because the Award is not in the public domain

72. Contrary to CLAIMANT's submission [*C.Memo, §156*], the Award is not in the public domain and thus, CLAIMANT's confidentiality obligation has not been terminated. An arbitral award may lose confidentiality if it comes into the public domain [*ICSID ARB/07/5; Symbion*]. This is when, at the time the parties rely on it, it is "*officially released to the general public*" and becomes the "*common knowledge*" [*Lee; STM; ICO, p.8; Waincymer, p.79*]. Under Art.42.5 HKIAC Rules 2013, HKIAC can officially publish its arbitral awards only with the parties' consent. Information available "*only to a limited number of persons*" is not in the public domain [*Moscow; Smeureanu/Lew, p.58*]. Selling an information does not destroy its confidential status if, as a result, it does not become "*generally available*" [*Aplin/Bently, pp.155,156*].

73. HKIAC never released the Award. CLAIMANT only learned about the Award's existence through a private conversation with an employee of the other party in the Other Arbitration [*PO2, p.60, §40*]. CLAIMANT could not purchase a copy of the Award from an intelligence company without the employee's referral and the company's promise [*PO2, p.61, §41*]. The company's proposed sale of the Award did not make the Award generally available to the public. Apart from the parties in the Other Arbitration, the Award is now available only to CLAIMANT, the intelligence company, the hackers, and the two employees [*PO2, p.61, §41*]. The Award's existence was never part of the general public's common knowledge. As such, the Award never came into the public domain. Therefore, the Tribunal should not admit the Award.

B. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE AS THE RULES ON TRANSPARENCY DO NOT APPLY

74. Contrary to CLAIMANT's submission [*C.Memo, §§97-114; Langweiler Email, p.50, §3*], the Tribunal should not admit the Evidence as the rules on transparency do not apply. UNCITRAL Transparency Rules [**1**] and the general principles of transparency [**2**] are inapplicable.

1. UNCITRAL Transparency Rules are inapplicable

75. UNCITRAL Transparency Rules are inapplicable. Under Art.3.1 UNCITRAL Transparency Rules, arbitral awards must be made public. However, UNCITRAL Transparency Rules apply "*only in treaty-based investor-state arbitration*", but "*not in traditional commercial arbitration*" [*Art.1.1 UNCITRAL Transparency Rules; Johnson/Bernasconi-Osterwalder, p.11; Loken, p.1300*]. The Other Arbitration is not a *treaty-based* investor-state arbitration, as it concerns a commercial dispute arising out of a contract between two private entities [*PO2, p.60, §39*]. Therefore, UNCITRAL Transparency Rules do not apply.

2. The general principles of transparency are inapplicable

76. The general principles of transparency are inapplicable. CLAIMANT submits that the general principles of transparency apply as public interest is at stake [*C.Memo, §§102-108*]. However, public interest necessitates transparency in an arbitration *only* if its outcome would affect the general public, and thus, require public knowledge [*Esso; Buys, p.135; Tweeddale, p.61*]. An arbitration carries public interest if a party is a state party, a public actor, or a private company providing public resources [*Pongracic-Speier, p.9; Poorooye/Feehily, p.312; Ruscalla, pp.8,9*]. The two disputes are between private commercial entities, concern sales of frozen semen and mares, and do not involve state party, public actor, or public resource [*CE5, p.13; PO2, p.60,*

§39]. The outcomes of whether a specific contract can be adapted and which party should bear the tariff cost do not affect the general public. As such, no public interest is at stake.

77. Further, CLAIMANT submits that the general principles of transparency apply as they make arbitral awards concerning "*similar future disputes*" more consistent [*C.Memo, §§109-111*]. However, there are "*no binding*" arbitral precedents [*Waincymer, p.798*]. Transparency in arbitration is to avoid inconsistent resolution of disputes as regards the "*same business transaction*" [*Malatesta/Sali, pp.xxiv,xxv*]. As the two arbitrations arose out of materially different factual matrices [*Supra, §§64-67*], there is no need to maintain consistency. Hence, as the general principles of transparency do not apply, the Tribunal should not admit the Evidence.

C. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE THROUGH THE JOINDER MECHANISM UNDER ART.27 HKIAC RULES 2018

78. CLAIMANT submits that the Tribunal should join the other party in the Other Arbitration under Arts.45.3(d) HKIAC Rules 2018, so that the Evidence can be admitted [*C.Memo, §§128-138; Langweiler Email, p.50, §3*]. However, joinder does not apply. Under Art.27.1 HKIAC Rules 2018, a tribunal can only join a third party, if the party "*is bound by an arbitration agreement giving rise to the arbitration*", or if "*all parties… expressly agree*" [*Moser/Bao, pp.212,213*]. Otherwise, the tribunal has "*no power*" to order "*forced joinder*" [*PT First; Moser/Bao, p.210*]. The Arbitration Clause only binds the Parties, not the other party in the Other Arbitration. Further, no fact suggests that the other party and RESPONDENT have ever agreed to CLAIMANT's joinder request. Therefore, the Tribunal should not admit the Evidence through joinder.

III. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE AS IT WAS OBTAINED ILLEGALLY

79. Contrary to CLAIMANT's submission [*C.Memo, §§142-162*], the Tribunal should not admit the Evidence as it was obtained by illegal hacking [*PO2, p.61, §41*]. It is "*completely within the competence*" of a tribunal to refuse admitting illegally obtained evidence [*4A_448/2013; ICSID ARB/07/30; Methanex; Klausegger/Klein I, p.358*]. The Tribunal should not admit the Evidence in order to uphold good faith between the Parties [**A**]. Further, not admitting the Evidence would not violate the Tribunal's interest in pursuing the truth [**B**].

A. THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE IN ORDER TO UPHOLD GOOD FAITH BETWEEN THE PARTIES

80. The Tribunal should not admit the Evidence in order to uphold good faith between the Parties. Good faith is a "*central tenet*" and "*universal principle*" in all evidentiary procedures [*Hofmann/Oetiker, p.180; O'Malley, p.10*]. A tribunal has the power to exclude evidence in

order to uphold good faith between the parties [*Arts.9.2(g),9.7 IBA Rules; Methanex*]. A party does not act in good faith, if it introduces illegally obtained evidence [*ICSID ARB/05/13; Methanex; Boykin/Havalic, pp.250,252; Waincymer, p.797*], and it does so with "*reckless disregard*" of whether the evidence was obtained illegally [*Methanex; O'Malley, p.321*].

81. Although no fact suggests CLAIMANT was involved in the illegal hacking, CLAIMANT knew that the Evidence may have been obtained by a hack into RESPONDENT's computer system [*Fasttrack Email, p.51, §3*]. Yet, CLAIMANT actively arranged to purchase and adduce the Evidence [*PO2, p.61, §41*], without inquiring into whether the Evidence was obtained illegally. As such, CLAIMANT acted with reckless disregard of the possible illegality attached to the Evidence. To uphold good faith between the Parties, the Tribunal should not admit the Evidence.

B. NOT ADMITTING THE EVIDENCE WOULD NOT VIOLATE THE TRIBUNAL'S INTEREST IN PURSUING THE TRUTH

82. Not admitting the Evidence would not violate the Tribunal's interest in pursuing the truth. In deciding whether to admit an illegally obtained evidence, a tribunal should balance the illegality against the importance of pursuing the truth [*4A_362/2013; 4A_448/2013*]. The tribunal should not admit such evidence, if it is <u>not</u> "*the only and crucial piece of evidence*", or if it carries merely "*marginal evidential significance*" in proving a party's claims [*Methanex; Peiris, p.342; Von Segesser/Leimbacher/Bell, §16*]. The Evidence is not the only evidence, as CLAIMANT was able to advance its claims by relying on a range of other evidence [*NA, pp.4-8*]. The Evidence is not crucial, as the two arbitrations arose from materially different factual matrices [*Supra, §§64-67*]. As such, the Evidence bears no evidential significance in proving CLAIMANT's claims. Thus, not admitting the Evidence would not violate the Tribunal's interest in pursuing the truth.

83. **Issue 2 Conclusion**: The Tribunal should not admit the Evidence as it is irrelevant, or alternatively, as it was obtained either in breach of confidentiality obligation or illegally.

MERITS ARGUMENTS

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE EXTRA SUM OF US$1,250,000 IF THE TRIBUNAL HAS JURISDICTION TO ADAPT THE CONTRACT

84. CLAIMANT claims an extra sum of US$1,250,000 by Contract adaptation [*C.Memo, §§164,259*]. However, if the Tribunal has jurisdiction to adapt the Contract, under the Contract [**I**], or CISG [**II**], it should not adapt the Contract. Even if it decides to adapt the Contract, it should only award CLAIMANT a sum of no more than US$250,000 [**III**].

I. UNDER THE CONTRACT, THE TRIBUNAL SHOULD NOT ADAPT THE CONTRACT

85. Under the Contract, the Tribunal should not adapt the Contract. CLAIMANT is liable for import tariffs [**A**]. CLAIMANT is not entitled to relieve itself from liability for the retaliatory tariffs imposed by Equatoriana (the "**Tariff**") by invoking Clause 12 [**B**]. If the Tribunal finds that Clause 12 is invoked, CLAIMANT is still not entitled to Contract adaptation [**C**]. In any event, CLAIMANT is not entitled to damages [**D**]. Therefore, the Tribunal should not adapt the Contract.

A. CLAIMANT IS LIABLE FOR IMPORT TARIFFS

86. CLAIMANT is liable for import tariffs. The parties can only modify DDP if they have "*expressly agreed*" to do so [*C.Memo, §§165,166; Incoterms Guide, p.19*]. The intended effects of such a modification should be "*extremely clear*" in the contract [*Incoterms 2010, p.9*]. CLAIMANT is liable for import tariffs under DDP [**1**]. Clause 12 does not shift liability to RESPONDENT [**2**].

1. CLAIMANT is liable for import tariffs under DDP

87. CLAIMANT is liable for import tariffs under DDP. Art.8 CISG governs a contract's interpretation [*Schlechtriem/Schwenzer, p.144*]. Art.8(1) CISG looks at the parties' subjective intent, which the other party knew or could not have been unaware [*Schlechtriem/Schwenzer, p.149*]. If the declaring party's subjective intent is unclear, a tribunal should interpret the parties' objective intent according to a reasonable person's understanding under Art.8(2) CISG [*Huber/Mullis, p.12; Schlechtriem/Schwenzer, pp.292,293*]. The reasonable person would have the "*same knowledge*" of the party on "*technical language*" [*Ferrari/Flechtner/Brand, p.180*]. The tribunal should consider all relevant circumstances including pre-contractual negotiations when using Arts.8(1) and (2) [*Art.8(3) CISG; CISG-AC Opinion No.3, §2.2*]. In doing so, it should give "*priority*" to the contract's wording [*Chemical Products; Schlechtriem/Schwenzer, p.154*].

88. Under Art.8(1) CISG, CLAIMANT may submit that RESPONDENT knew or could not have been unaware of CLAIMANT's intent not to assume "*any further risks*" [*CE4, p.12, §4*]. Yet, Art.8(1) is not applicable due to the inconsistencies between CLAIMANT's statement and conduct. While CLAIMANT claimed that it was "*not willing*" to assume "*any further risks*" associated with DDP [*CE4, p.12, §4*], it still agreed to switch from EXW to DDP at a higher price [*PO2, p.58, §8*]. It agreed so even though DDP was more onerous: EXW imposes "*minimum obligation*", whereas DDP imposes "*maximum obligation*", on sellers, including the risks and costs of export and import tariffs [*Incoterms Guide, pp.32,149,150*]. Given CLAIMANT's unclear subjective intent, the Tribunal should ascertain the Parties' objective intent under Art.8(2) CISG.

89. Under Art.8(2) CISG, the Parties objectively intended CLAIMANT to bear all risks and costs for import tariffs under DDP. The Parties adopted DDP of "*INCOTERMS 2010 edition*" in the Contract [*CE5, p.14, c.8; PO2, p.56, §10*]. As CLAIMANT accepts, DDP provides that a seller must carry out all customs formalities, including import tariffs, "*at its own risk and expense*" [*C.Memo, §165; Incoterms Guide, pp.150,152,153; WTO Glossary*]. To give priority to the wording of DDP terms, the Tribunal should find CLAIMANT liable for import tariffs under DDP.

90. Further, a reasonable person would understand that CLAIMANT has assumed the risks of import tariffs. CLAIMANT may submit that the price increase for switching from EXW to DDP was insufficient to cover the Tariff cost [*PO2, p.56, §8*]. However, DDP requires a seller to perform all obligations "*at its own risk and expense*" regardless of the cost [*Incoterms Guide, p.150*]. A seller intending to exclude the costs of import duties should include "*DDP [import duties] unpaid*" or "*exclusive of duty*" in the contract [*Incoterms Guide, pp.61,150*]. Alternatively, it should insist to use DAP which requires no import obligations, and specify any extra obligations it intends to undertake [*Incoterms Guide, pp.138-149*]. CLAIMANT has a legal department [*Supra, §59*], and agreed to DDP without qualification [*CE5, p.14, c.8*]. A reasonable person with CLAIMANT's legal expertise would understand CLAIMANT has assumed the risks of import duties regardless of the price increase. Thus, CLAIMANT is liable for import tariffs under the Contract.

2. Clause 12 does not shift liability to RESPONDENT

91. Clause 12 does not shift liability to RESPONDENT. First, Clause 12 relieves CLAIMANT's liability for hardship caused by "*additional health and safety requirements*" or "*comparable unforeseen events*" only. The parties can only modify DDP if they have "*expressly agreed*" to do so and made the intended effects "*extremely clear*" [*Supra, §86*]. Art.8 CISG should be used to ascertain such intent [*Schlechtriem/Schwenzer, p.150*]. CLAIMANT submits that, under Art.8(1) CISG, RESPONDENT "*knew*" CLAIMANT intended to avoid "*excessively high costs*" arising out of "*a govern[ment] regulation*" [*C.Memo, §172*]. However, CLAIMANT only wanted to avoid such costs arising out of "*highly expensive tests*". As CLAIMANT admits [*C.Memo, §174*], "*additional health and safety requirements*" in Clause 12 was drafted in response to the past experience CLAIMANT told RESPONDENT of, in which Danubia imposed highly expensive tests as a result of an epidemic [*PO2, p.58, §21*]. In communicating that past experience, CLAIMANT only mentioned a *specific* government regulation which required "*highly expensive tests*" [*CE4, p.12, §4*]. Thus, RESPONDENT could only be aware that "*additional health and safety requirements*" refers to "*highly expensive tests*", but not of CLAIMANT's subjective intent.

92. If the Tribunal finds CLAIMANT's subjective intent unclear, under Art.8(2) CISG, the Parties objectively intended Clause 12 to relieve CLAIMANT's liability for hardship caused by "*additional health and safety requirements*" or "*comparable unforeseen event*". The Parties included a "*narrow hardship reference*" in Clause 12 to address changes in health and safety requirements, in response to CLAIMANT's past experience on "*highly expensive tests*" [*Supra, §91; CE4, p.12, §4; RE3, p.35, §4*]. Thus, a reasonable person would understand that "*additional health and safety requirements*" refers to "*highly expensive tests*". The Parties objectively intended Clause 12 to relieve CLAIMANT's liability only for hardship caused by "*additional health and safety requirements*" or "*comparable unforeseen events*".

93. Secondly, Clause 12 does not impose any liability on RESPONDENT. Under Art.8(2) CISG, in interpreting Clause 12, the Tribunal should give "*priority*" to its wording [*Chemical Products*]. The effect of the phrase "*shall not be responsible*" is usually to relieve the party invoking a clause of liability for damages or other remedies for breach of contract [*Cordero-Moss, pp.123-125; Fontaine/De Ly, p.424*]. Clause 12, which provides that "*Seller shall not be responsible…*" [*CE5, p.14, c.12*], merely relieves CLAIMANT of its liability for the specified matters, rather than imposes liability on RESPONDENT. If the Parties intended to shift the risks originally on CLAIMANT under DDP to RESPONDENT, they would have used "*Buyer is responsible for…*" instead [*CE5, p.14, c.10*]. Thus, Clause 12 does not impose any liability on RESPONDENT.

B. CLAIMANT IS NOT ENTITLED TO RELIEVE ITSELF FROM ITS LIABILITY FOR THE TARIFF COST BY INVOKING CLAUSE 12

94. CLAIMANT is not entitled to relieve itself from liability for the Tariff cost by invoking Clause 12. The Parties only intended to have a "*narrow hardship reference*" in Clause 12 as they rejected ICC hardship clause for being "*too broad*" [*RE3, p.35, §§2,4; PO2, p.56, §12*]. The Tribunal should interpret Clause 12 narrowly under Art.8(2) CISG: The Tariff was not an "*additional health and safety requirement*" or a "*comparable*" event [**1**]; the Tariff was not "*unforeseen*" [**2**]; and the Tariff has not caused CLAIMANT "*hardship*" by making the Contract "*more onerous*" [**3**]. As CLAIMANT fails to satisfy all requirements, it cannot invoke Clause 12.

1. The Tariff was not an "*additional health and safety requirement*" and was not "*comparable*" to "*additional health and safety requirement*"

95. The Tariff was not an "*additional health and safety requirement*", and was not a "*comparable*" event under Clause 12. "*[A]dditional health and safety requirements*" refers to "*highly expensive tests*" [*Supra, §§91,92*]. The Tariff, as import tariffs, is a "*trade barrier*" [*McDorman,*

p.119], not "*tests*". As CLAIMANT accepts, to invoke Clause 12, it must show that the Tariff was "*comparable*" to "*additional health and safety requirements*" [*C.Memo, §§168-175*]. CLAIMANT submits the Tariff was "*comparable*", as the Tariff and CLAIMANT's past experience were both "*govern[ment] regulation[s]*" making CLAIMANT *"bear excessively high costs*" [*C.Memo, §§174,175,193*]. However, the Tariff was not "c*omparable*", both in terms of its *nature* and *degree* because: in *nature* it was not a public health regulatory measure [**a**], and in *degree* it did not increase CLAIMANT's cost by more than 40% of the total price [**b**].

a. The Tariff was not a "comparable" event in nature as it was not a public health regulatory measure

96. CLAIMANT submits that any kind of "*govern[ment] regulation*" is "*comparable*" [*C.Memo, §174*]. However, the Parties objectively intended *only* public health regulatory measures to be "*comparable*" under Clause 12. CLAIMANT refers "*additional health and safety requirements*" to its past experience on "*highly expensive tests*" as a result of an epidemic [*Supra, §91*]. As CLAIMANT only told RESPONDENT of that experience [*CE4, p.12, §4*], the Parties objectively intended a "*comparable*" event under Clause 12 must be a public health regulatory measure in *nature*. Import tariffs are trade restrictions [*McDorman, p.119*]. The Tariff is a trade restriction but not a public regulatory measure. Thus, the Tariff is not "*comparable*" in *nature*.

b. The Tariff was not a "comparable" event in degree as it did not increase CLAIMANT's cost by more than 40% of the total price

97. Secondly, the Parties objectively intended that the events have to be comparable in *degree*: increasing the cost by more than 40% of the total price. To assess the "*required degree of hardship*" in an instalment contract, a tribunal should refer to the party's "*entire undertaking*" under the contract [*Brunner, p.462*]. CLAIMANT submits that it had to bear a 40% increase in *costs* in its past experience [*C.Memo, §173*]. However, it was 40% of the *total contract price* [*PO2, p.58, §21*]. Here, the Tariff was only 30% of the last of three shipments [*CE7, p.16, §1*]. It was only 15% of the total Contract price [*Figure 1*]. As such, the Tariff is substantially lower in *degree* than the past experience and thus they are not comparable.

$$\frac{\text{US\$100,000 (price per dose)}\times\text{50 (no.of doses in the third shipment)}\times\text{30\% (the Tariff)}}{\text{US\$10,000,000 (total Contract price)}} = 15\%$$

Figure 1

98. CLAIMANT relies on its past experience which allegedly nearly resulted in its insolvency [*C.Memo, §173*]. CLAIMANT may submit that the Tariff cost also made it difficult for CLAIMANT to negotiate a new credit line, similarly placing it at risk of insolvency. Thus, the Tariff is an

event "*comparable*" in terms of *effect* on CLAIMANT under Clause 12. However, the "*deterioration of a party's financial situation*" is, in principle, that party's "*own problem*" [*Brunner, p.436*]. Therefore, the Tribunal should not consider CLAIMANT's financial situation and the Tariff cost's effect on it in determining if the Tariff is "*comparable*" under Clause 12.

2. The Tariff was not an "*unforeseen*" event

99. The Tariff was not an "*unforeseen*" event under Clause 12. The Parties objectively intended that an event is "*unforeseen*" if it is "*unforeseeable*" at the time of contracting [*CE4, p.12, §4*]. A tribunal should decide if an event is unforeseeable, objectively and "*strictly*" according to what a "*very vigilant person*" would have foreseen [*ICC 4462; Elcin, p.579*]. In submitting that "*it was impossible to expect the imposition of the Tariff*", CLAIMANT attempts to rely on the post-Contract events [*C.Memo, §§176-178*]. However, a tribunal should only decide if an event is unforeseeable "*at the time the contract was concluded*" [*Zaccaria, p.150*].

100. CLAIMANT submits that the retaliatory Tariff imposed by Equatoriana were unforeseeable, relying on its allegation that the Mediterranean tariffs were unforeseeable [*C.Memo, §§181-184*]. Contrary to CLAIMANT's submission, both tariffs were foreseeable. Before Contract conclusion, the Mediterranean President declared a "*protectionist approach*" to international trade, particularly for "*agricultural products*" [*CE6, p.15, §2*]. He also appointed an "*ardent critic of free trade*" who advocates "*limiting the access of foreign agricultural products*" as his "*superminister*" [*PO2, p.58, §23*]. Thus, a very vigilant person would have foreseen that, given the change of political situation, Mediterraneo would likely impose protectionist measures, such as tariffs, on Equatorianian agricultural products. By its submission that the Mediterranean tariffs "*far exceeded the worst situation most analysts had anticipated*" [*C.Memo, §§181,182; CE6, p.15, §2*], CLAIMANT accepts that the Mediterranean tariffs were "*anticipated*", and thus foreseeable. It cannot assert otherwise to submit that the Tariff was unforeseeable.

101. Regardless of whether the Mediterranean tariffs were foreseeable, the Tariff was foreseeable. CLAIMANT submits that the Tariff was unforeseeable as trade disputes with Equatoriana are "*always*" resolved "*amicably*" [*C.Memo, §§183,184*]. Contrary to CLAIMANT's submission, these facts do not render the Tariff unforeseeable. Amicable settlement of trade disputes is not Equatoriana's only possible response to any tariff against Equatoriana. Bypassing the WTO mechanisms has always been open to Equatoriana. As CLAIMANT was aware, Equatoriana has already engaged in direct retaliatory measures in the past [*NA, p.7, §19; CE6, p.15, §2*]. As the Mediterranean tariffs were "*extraordinary*" in "*breadth*", "*amount*", and "*speed*" [*PO2, p.58,*

§2], a very vigilant person would have foreseen that Equatoriana may respond with "*severe retaliation*" [*CE6, p.15, §2*]. As such, the Tariff was not "*unforeseen*" under Clause 12.

102. CLAIMANT relies on the fact that Equatoriana has not previously imposed tariffs on agricultural goods or frozen semen to submit that all Equatorianian tariffs would be unforeseeable [*C.Memo, §185*]. The fact that Equatoriana has never imposed tariffs on agricultural products does not make any such imposition impossible and unforeseeable. Thus, the Tariff was not "*unforeseen*".

3. The Tariff cost did not make the Contract "*more onerous*" and did not cause "*hardship*" to CLAIMANT

103. The Tariff cost did not make the Contract "*more onerous*" and did not cause "*hardship*" to CLAIMANT. CLAIMANT submits that it would suffer hardship if it bears any additional financial burden [*C.Memo, §§187,196*]. Contrary to CLAIMANT's submission, under Art.8(2) CISG, the Parties objectively intended that only an event that destroys the Contract's commercial basis would make the Contract "*more onerous*" and cause "*hardship*". CLAIMANT expressed a 40% increase in the total price (i.e. US$3,200,000) in its past experience would "*destroy the commercial basis of the deal*" [*CE4, p.12, §4; PO2, p.58, §21*]. The Tariff was only 15% of the total price (i.e. US$1,500,000) [*Supra, §97*]. The Tariff did not destroy the Contract's commercial basis. Thus, it did not make the Contract "*more onerous*" or cause "*hardship*".

104. CLAIMANT may submit that an event which places CLAIMANT at risk of insolvency makes the Contract "*more onerous*" and thus causes "*hardship*" to CLAIMANT. However, the deterioration of a party's financial situation is "*that party's own problem*" [*Brunner, p.436*]. Thus, CLAIMANT's strained financial situation was its own problem which the Tribunal should not consider. In any event, CLAIMANT may submit that the Tariff cost caused "*hardship*", as it almost resulted in CLAIMANT's insolvency. However, the Tariff did not place CLAIMANT at risk of insolvency, because CLAIMANT may obtain capital by selling its "*dressage part*" to a ready buyer [*PO2, p.59, §29*]. Therefore, the Tariff did not cause "*hardship*" under Clause 12.

C. CLAIMANT IS STILL NOT ENTITLED TO THE REMEDY OF CONTRACT ADAPTATION EVEN IF THE TRIBUNAL FINDS THAT CLAIMANT CAN INVOKE CLAUSE 12

105. CLAIMANT is still not entitled to the remedy of contract adaptation if the Tribunal finds that CLAIMANT can invoke Clause 12. The Parties did not subjectively intend Clause 12 to provide for Contract adaptation by the Tribunal under Art.8(1) CISG, nor did they objectively intend the same under Art. 8(2) CISG. The Parties did not subjectively intend Clause 12 to provide for Contract adaptation by the Tribunal. The Parties did not agree on an adaptation mechanism

[*Supra, §53*]. Hence, in drafting Clause 12, RESPONDENT could not be aware that CLAIMANT intended to provide for contract adaptation. Thus, the Parties did not subjectively intend Clause 12 to provide for Contract adaptation by the Tribunal.

106. The Parties did not objectively intend Clause 12 to provide for Contract adaptation by the Tribunal under Art.8(2) CISG. A tribunal should give "*priority*" to a clause's wording [*Chemical Products*]. A hardship clause should normally provide for the consequences when a hardship event occurs, such as renegotiation and contract termination [*Cordero-Moss, pp.122,123; Fontaine/De Ly, p.460*]. By giving priority to Clause 12's wording, the Tribunal should find that the Parties only agreed on CLAIMANT's relief from liability as the legal consequence under Clause 12 [*Supra, §§91-93*]. With CLAIMANT's legal expertise, it nonetheless paid the Tariff. As such, the Parties did not objectively intend Clause 12 to provide for adaptation by the Tribunal under Art.8(2). Thus, CLAIMANT is still not entitled to the relief of Contract adaptation even if the Tribunal finds that CLAIMANT can invoke Clause 12.

D. IN ANY CASE, CLAIMANT CANNOT CLAIM ANY DAMAGES

107. In any case, CLAIMANT cannot claim any damages. CLAIMANT submits that it is entitled to damages under Arts.7(1), 61, and 74 CISG. However, the Tribunal has directed the Parties to address whether CLAIMANT is entitled to an extra sum "*resulting from an adaptation of the price*" only [*PO1, p.53, §III(1)*]. It expressly directed that "*No further questions…should be addressed*" [*PO1, p.53, §III(1)*]. As such, the Tribunal should disregard such claim now.

II. CLAIMANT IS NOT ENTITLED TO HAVE THE CONTRACT ADAPTED UNDER CISG

108. CLAIMANT is not entitled to have the Contract adapted under CISG. RESPONDENT performed all its obligations under Art.60 CISG [**A**]. CLAIMANT cannot rely on Art.79 CISG as it does not apply [**B**]. Alternatively, if the Tribunal finds that Art.79 applies, the Tariff cost still fails to satisfy all Art.79 requirements [**C**]. Even if the Tribunal finds all requirements under Art.79 are satisfied, it still should not adapt the Contract under CISG [**D**]. If there is a gap on hardship or adaptation in Art.79, the Tribunal should apply Arts.6.2.2-6.2.3 UNIDROIT Principles under Art.7(2) CISG [**E**]. CLAIMANT still fails to satisfy all Arts.6.2.2-6.2.3 requirements [**F**].

A. RESPONDENT PERFORMED ITS OBLIGATIONS AS A BUYER UNDER ART.60 CISG

109. RESPONDENT performed its obligations as a buyer under Art.60 CISG. Contrary to CLAIMANT's submission [*C.Memo, §§222-226*], RESPONDENT did not breach Art.60. Art.60 requires a buyer to take reasonable steps to enable delivery, including "*inform[ing] the seller of any specific*

circumstances" in the buyer's country [*C.Memo, §§220,221*]. As CLAIMANT knew of the Tariff before delivery [*CE7, p.16, §1*], RESPONDENT could not have informed CLAIMANT of anything about the Tariff. Since RESPONDENT took delivery, it did not breach Art.60. Thus, CLAIMANT is not entitled to rely on Art.62 CISG, which provides for remedies for breach of Art.60.

B. ART.79 CISG DOES NOT APPLY

110. CLAIMANT relies on Art.79 CISG to claim for Contract adaptation [*C.Memo, §§228-235*], yet Art.79 does not apply. The Parties have derogated from Art.79(1) CISG [**1**]. Even if the Parties have not effectively derogated from Art.79(1), Art.79 still does not apply because Art.79 does not govern hardship [**2**] and there is no failure to perform on CLAIMANT's part [**3**].

1. The Parties have derogated from Art.79(1) CISG

111. The Parties have derogated from Art.79(1) CISG. Under Art.6 CISG, the parties may implicitly derogate from Art.79 [*Bridge, p.60; Honnold I, p.104; Kröll/Mistellis/Viscasillas, pp.103,105*; *Schlechtriem/Schwenzer, pp.102,105,115; UNCITRAL Digest, Art.79, §23*]. A tribunal should use Art.8 CISG to ascertain any of the parties' intent to derogate [*Lookofsky I, p.88*]. Contract terms prevail over CISG articles when they govern the same matter [*ICAC 174/2003*]. The Parties intended that when an event amounts to an impediment under Art.79(1), and at the same time falls under the scope of Clause 12, Clause 12 prevails. As such, under Art.8(2) CISG, the Parties objectively intended to derogate from Art.79(1) implicitly.

2. Art.79 does not govern hardship

112. Even if the Parties did not effectively derogate from Art.79 CISG, Art.79 does not govern hardship. CISG drafters used "*impediment*" to ensure a "*narrow and objective*" understanding of the basis for exemption [*Schlechtriem/Schwenzer, p.1133*]. Art.79 does not govern hardship events which make performance excessively onerous, but *force majeure* events which make performance impossible [*Nuova; Bianca/Bonell, p.578; Bund, p.387; Honnold I, p.626; Kessedjian, p.418*]. Therefore, Art.79 does not govern hardship.

113. There is no gap in CISG if the Tribunal agrees with RESPONDENT that Art.79 CISG does not govern hardship. A gap in CISG arises when CISG does not "*expressly settle*" questions concerning matters governed by CISG [*Art.7(2) CISG; Lookofsky II, p.38; Schlechtriem/Schwenzer, p.27*]. CISG's silence on an issue does not necessarily mean that there is a gap [*Steensgaard, p.43*]. Art.79's drafting history indicates that, by "*deliberately omit[ting]*" any hardship provision, Art.79 "*excludes the possibility*" that an "*unstated*" hardship provision

"*exist[s]*" under CISG [*Azeredo da Silveira, pp.331,332*; *Flambouras, §2; Honnold II, pp.349,350; Rimke, pp.219,220*]. Therefore, there is no gap in CISG.

3. There is no failure to perform on CLAIMANT's part

114. There is no failure to perform on CLAIMANT's part. Art.79 CISG's purpose is to exempt a *non-performing* party's liability due to an event satisfying all requirements under Art.79(1) CISG [*Honnold I, p.613; Nagy, p.8; Rimke, p.223; Schlechtriem/Schwenzer, p.1133*]. CLAIMANT may submit that the Tribunal should interpret Art.79 expansively. However, the Tribunal should not do so. Adopting an expansive approach would lead to "*diverse*" interpretations and "*homeward trend*", resulting in "*uncertainties*" [*Felemegas, ch.3, §6; Hartnell, p.7; Honnold III, p.3; Janssen/Meyer, p.70; Keily, §2.6*]. This undermines CISG's "*express goal*" to establish "*harmonised law*" for international trade with certainty and predictability [*Blair, p.271; Janssen/Meyer, p.61; Kröll/Mistellis/Viscasillas, pp.19,20; Steensgaard, pp.41,42*].

115. A tribunal should adhere to a literal interpretation of a CISG provision when its language is "*plain*" and has only one ordinary meaning [*DiMatteo/Janssen, p.57; Janssen/Meyer, p.61*]. Art.79 CISG exempts a party's liability for a "*failure to perform*" [*Art.79(1) CISG*]. Such wording is plain and has only one ordinary meaning: The invoking party must have failed to perform. There was no failure to perform on CLAIMANT's part, as it delivered the third shipment on time [*NA, p.6, §13*]. Therefore, Art.79 does not apply.

C. ALTERNATIVELY, THE TARIFF SATISFIES NONE OF THE REQUIREMENTS UNDER ART.79 CISG

116. If the Tribunal finds that Art.79 CISG applies, the Tariff satisfies none of the requirements under Art.79. The invoking party must show that an event satisfies all of the requirements under Art.79(1) CISG [*CISG-AC Opinion No.7, §1*]: The Tariff is not "*an impediment beyond control*" [**1**]; CLAIMANT could reasonably be expected to have taken the Tariff into account at the time of contracting [**2**]; CLAIMANT could have reasonably avoided or overcome the Tariff and its consequences [**3**]. Further, CLAIMANT failed to give RESPONDENT notice of the Tariff within a reasonable time under Art.79(4) CISG [**4**]. Thus, CLAIMANT cannot rely on Art.79.

1. The Tariff is not "*an impediment beyond control*"

117. Contrary to CLAIMANT's submission [*C.Memo, §229*], the Tariff is not "*an impediment beyond control*". Only *force majeure* events may be an impediment [*Supra, §112*]. Even if a hardship event may be an impediment, the Tariff is not one. Only hardship event amounting to an

economic impossibility can be an impediment under Art.79 CISG [*Berger III, p.482; Schlechtriem, p.102*]. The threshold for a hardship event to amount to an economic impossibility is high [*Honnold I, p.627; Schlechtriem/Schwenzer, p.1142*]. To determine such threshold, a tribunal should disregard a party's financial difficulties [*Supra, §104*]. The general rule is that only events raising costs of performance by "*approximately 100% of the contract price*" can amount to an economic impossibility [*Publicker Industries; Brunner, p.429; Doudko, p.496*]. The Tariff only raised the costs by 15% of the total Contract price [*Supra, §97*], which is far below 100%. Further, requiring CLAIMANT to bear the Tariff cost does not lead to its insolvency [*Supra, §104*]. Therefore, the Tariff is not "*an impediment beyond control*".

2. At the time of contracting, CLAIMANT could reasonably be expected to have taken the Tariff into account

118. Contrary to CLAIMANT's submission that it did not expect the Tariff at the time of contracting [*C.Memo, §§230,231*], CLAIMANT could reasonably be expected to have taken it into account. A reasonable person could foresee the Mediterranean tariff as well as the Tariff as a retaliatory measure by Equatoriana [*Supra, §§99-102*]. Therefore, CLAIMANT could reasonably be expected to have taken the Tariff into account at the time of contracting.

3. CLAIMANT could have reasonably overcome the Tariff and its consequences

119. CLAIMANT submits that it could not have avoided or overcome the Tariff [*C.Memo, §232*]. A party can reasonably overcome an impediment if a reasonable person in its position can timely perform its obligations [*Kröll/Mistellis/Viscasillas, p.1060*]. CLAIMANT overcame the Tariff by paying the Tariff cost and delivering the third shipment on time [*CE8, p.17, §7*]. Further, CLAIMANT could have reasonably overcome the Tariff's consequences, which is the Tariff cost, without going into insolvency [*Supra, §104*]. Therefore, CLAIMANT could reasonably and did overcome the Tariff and its consequences.

4. CLAIMANT failed to give notice of the Tariff within a reasonable time

120. CLAIMANT failed to give RESPONDENT notice of the Tariff within a reasonable time. Under Art.79(4) CISG, a party seeking to rely on Art.79 CISG must notify the other party of the *impediment* and the *effect* on its ability to perform [*Schlechtriem/Schwenzer, p.1147*]. It must do so within a reasonable time after it should have known of the impediment [*Kröll/Mistellis/Viscasillas, p.1077; Schlechtriem/Schwenzer, p.1147*]. "*Reasonable time*" should be understood by a reasonable person in the promisor's position under Art.8(2) CISG [*Magnus, §5(b)(5)*]. CLAIMANT should have known of the Tariff when it was announced. Yet,

only until one month later, but two days before the third shipment was due, did CLAIMANT notify RESPONDENT of the Tariff [*CE7, p.16, §3; PO2, p.58, §25*]. As the Contract's total duration is only about 8 months [*CE5, p.14, c.8*], a reasonable person would consider the lapse of more than 1 month as significant. Such delay and short notice are unreasonable. Thus, CLAIMANT did not give notice to RESPONDENT within a reasonable time.

D. EVEN IF THE TRIBUNAL FINDS THAT THE TARIFF SATISFIES ALL REQUIREMENTS UNDER ART.79 CISG, IT SHOULD NOT ADAPT THE CONTRACT UNDER CISG

121. Even if the Tribunal finds that the Tariff satisfies Art.79 CISG requirements, it should not adapt the Contract under CISG. Art.79 CISG does not provide for contract adaptation [**1**]. The lack of provisions on contract adaptation in Art.79 is not a gap in CISG [**2**]. Therefore, the Tribunal should not adapt the Contract under CISG.

1. Art.79 CISG does not provide for contract adaptation

122. Art.79 CISG does not provide for contract adaptation. In interpreting CISG provisions, a tribunal should start with a literal interpretation [*DiMatteo/Janssen, p.57*]. Art.79(5) CISG's wording only provides for exemption from liability for damages [*Huber/Millis, p.264; Schwenzer, p.722*]. Thus, a literal interpretation of Art.79 does not provide for adaptation.

123. If the Tribunal finds that Art.79 CISG provides for more than one "*ordinary meaning*" and thus, more than one possible legal consequence, it may depart from a literal interpretation [*Supra*, *§*115]. Accordingly, a tribunal should resort to CISG's drafting history to decide if CISG provides for contract adaptation [*Janssen/Meyer, p.64; Schlechtriem/Schwenzer, p.102*]. Art.79's drafting history indicates that it does not provide for any legal consequence "*deriv[ing] from*" hardship, such as contract adaptation [*Berger III, pp.486,487,489; Bianca/Bonell, p.591; Flambouras, §278*]. CISG drafters specifically "*rejected*" adaptation as a remedy due to its "*excessive difficulties*" in practice [*Honnold II, p.350; Nagy, p.34*]. Therefore, the Tribunal should not interpret Art.79 as providing for contract adaptation.

124. Further, under Art.7(1) CISG, a tribunal should interpret CISG provisions to "*promote uniformity*", as CISG's purpose is to adopt "*uniform rules*" to govern international trade [*CISG-AC Opinion No.7, §35; Ferrari, p.211; Flambouras, §2; Huber/Mullis, pp.7,8; Lookofsky I, p.37; Schlechtriem/Schwenzer, pp.121,122*]. Since contract adaptation is not "*universally accepted*", introducing it as a remedy under Art.79(5) CISG would be "*counter-productive*" to CISG's purpose and "*harm the very uniformity it seeks to preserve*" [*Nagy, p.35; Rimke, p.198*]. As such, the Tribunal should not interpret Art.79 CISG as providing for contract adaptation.

2. The lack of provisions on adaptation in Art.79 CISG is not a gap in CISG

125. The lack of provisions on contract adaptation in Art.79 CISG is not a gap in CISG. Art.7(2) CISG provides that a tribunal should use CISG's general principles to fill in any gaps in CISG. A gap only arises when a matter governed by CISG is not expressly settled [*Supra, §113*]. The lack of contract adaptation as a legal consequence for Art.79 "*does not create a gap in the Convention*" [*Flechtner, p.93*]. Rather, it reflects "*the Convention's rejection of the adaptation remedy*" and that hardship under CISG "*merely excuse[s] for non-performance*" [*Berger IV, p.146; Flechtner, p.93*]. CISG drafters "*expressly settled*" the matter by "*deliberate omission*" of provisions providing for remedies other than exemption of liability [*Azeredo da Silveira, p.329*]. Thus, there is no gap on contract adaptation and the Tribunal need not apply Art.7(2).

E. IF THERE IS A GAP ON HARDSHIP OR ADAPTATION IN ART.79 CISG, THE TRIBUNAL SHOULD APPLY ARTS.6.2.2-6.2.3 UNIDROIT PRINCIPLES UNDER ART.7(2) CISG

126. If the Tribunal finds a gap on hardship or adaptation in Art.79 CISG, it should apply Arts.6.2.2-6.2.3 UNIDROIT Principles under Art.7(2) CISG. A tribunal should "*look for a solution within the 'Four Corners' of the CISG*" as far as possible when filling a gap [*Zeller, ch.6, s.1*]. If CISG itself does not provide a solution, the tribunal should fill the gap by applying CISG's general principles [*Art.7(2) CISG; Honnold I, p.96; Lookofsky I, p.51; Schlechtriem/Schwenzer, p.132*]. Under Art.7(2), UNIDROIT Principles are CISG's general principles when they govern the same matter, and thus may be used to supplement CISG [*Bianca/Bonell, p.233; Garro, p.1156; Magnus, §6(b)*]. Assuming there is a gap on hardship or adaptation, the Tribunal should use Arts.6.2.2-6.2.3 to fill the gap as they both govern hardship and its legal consequences.

F. CLAIMANT IS NOT ENTITLED TO CONTRACT ADAPTATION AS NOT ALL ARTS.6.2.2-6.2.3 UNIDROIT PRINCIPLES REQUIREMENTS ARE SATISFIED

127. CLAIMANT is not entitled to Contract adaptation as not all Arts.6.2.2-6.2.3 UNIDROIT Principles requirements are satisfied. For CLAIMANT to claim adaptation, the Tariff must satisfy all Arts.6.2.2(a)-(d) requirements and "*fundamentally alter the equilibrium of the Contract*" [*C.Memo, §§236,248*]. Further, CLAIMANT must satisfy all Art.6.2.3 requirements [*C.Memo, §§254-259*]. However, the Tariff fails to satisfy all Art.6.2.2 requirements [**1**]. In any event, CLAIMANT fails to satisfy all Art.6.2.3 requirements [**2**]. CLAIMANT is not entitled to adaptation.

1. The Tariff fails to satisfy all Art.6.2.2 UNIDROIT Principles requirements

128. The Tariff fails to satisfy all Art.6.2.2 UNIDROIT Principles requirements. Contrary to CLAIMANT's submission [*C.Memo, §§247-253*], the Tariff did not fundamentally alter the

Contract equilibrium. An alteration in equilibrium must relate to obligations not yet performed when a hardship event occurs [*C.Memo, §253; Off. Cmt., Art.6.2.2, §4*]. An increase in performance cost may alter equilibrium [*Off. Cmt., Art.6.2.2, §2*]. Under Art.6.2.2, an alteration in equilibrium must be "*fundamental*", which depends on the particular "*facts and circumstances*" [*C.Memo, §§248,249; Vogenauer, pp.815,816*]. Determining if equilibrium is fundamentally altered requires an "*objective approach*" [*Doudko, p.495; Maskow, p.662; Yıldırım, p.98*]. A 50% threshold was considered "*too low*" and deleted from UNIDROIT Principles and thus, a cost alteration of "*less than 50[%]*" is not fundamental [*Nuova; ICC 6281; Brunner, p.427; Béraudo, p.190; Sec.Memo, p.16; Vogenauer, p.816*]. CLAIMANT's remaining obligation was to deliver the third shipment [*CE5, p.14, c.8; CE6, p.15, §1*]. Under an objective approach, CLAIMANT's financial position [*C.Memo, §§250-253*] is irrelevant in considering if equilibrium was altered. The Tariff only altered the cost by 15% [*Supra, §97*], well below the 50% threshold. Thus, the Tariff did not fundamentally alter the Contract equilibrium.

129. Arts.6.2.2(a) and (c) are satisfied. However, contrary to CLAIMANT's submission [*C.Memo, §§239,240*], Art.6.2.2(b) is not satisfied as it could have "*reasonably taken into account*" the Tariff at Contract conclusion [*Supra, §§99-102*]. CLAIMANT also submits that under Art.6.2.2(d), it did not "*assume*" the "*risk*" of the Tariff cost as Clause 12 allocates such risk to RESPONDENT [*C.Memo, §§243-246*]. The assumption of risk can be inferred from the "*nature*" of the contract [*C.Memo, §244; Off. Cmt., Art.6.2.2, §3*]. However, as the Parties expressly allocated the Tariff cost to CLAIMANT [*CE4, p.14, c.8; Supra, §§87-90*], there is no need to infer such risk from the Contract's nature. CLAIMANT assumed the risk of the Tariff cost and thus Art.6.2.2(d) is not satisfied. Therefore, the Tariff has not satisfied all Art.6.2.2 requirements.

2. CLAIMANT fails to satisfy all Art.6.2.3 UNIDROIT Principles requirements

130. Even if the Tribunal finds that all requirements under Art.79 CISG or Art.6.2.2 UNIDROIT Principles are satisfied, CLAIMANT still fails to satisfy all Art.6.2.3 UNIDROIT Principles requirements. CLAIMANT failed to request renegotiations without undue delay under Art.6.2.3(1) [**a**]. Even if the Tribunal finds that there were timely renegotiations, CLAIMANT did not renegotiate in good faith [**b**]. Further, the Parties have not failed to reach an agreement [**c**].

a. CLAIMANT failed to request renegotiations without undue delay under Art.6.2.3(1) UNIDROIT Principles

131. Contrary to CLAIMANT's submission [*C.Memo, §255*], it failed to request renegotiations without undue delay under Art.6.2.3(1) UNIDROIT Principles. The disadvantaged party should request

renegotiations without undue delay [*C.Memo, §254; Vogenauer, p.819*]. The Parties had a phone conversation before the third shipment was due [*CE8, p.18, §8; RE4, p.36, §3*]. In that phone conversation, CLAIMANT only wished to "*find a solution*" [*C.Memo, §255*]. However, it never requested renegotiations in that phone conversation regarding Contract adaptation.

132. If the Tribunal finds that CLAIMANT requested renegotiations in the phone conversation, CLAIMANT failed to do so without undue delay. "*Without undue delay*" means "*as quickly as possible*", having regard to the contract length and whether the hardship event is continuous [*Brödermann, p.180; Vogenauer, p.820*]. A "*long-term contract*" is one that takes "*many years to perform*" [*Brunner, p.438*]. The disadvantaged party should give "*sufficient information*" without undue delay to enable the other party to decide whether the former is entitled to make requests for renegotiations [*C.Memo, §256; Off. Cmt., Art.6.2.3, §3*]. Here, the Contract period was only about 8 months [*CE5, p.14, c.8*], so it is not a long-term contract. The Tariff was not continuous, but a one-off retaliatory measure [*NA, p.6, §10; CE6, p.15, §1*]. Thus, CLAIMANT should have requested renegotiations *once* it knew that the Tariff was imposed, but only after one month did CLAIMANT do so [*PO2, p.58, §26*]. Further, CLAIMANT did not give RESPONDENT sufficient information in that conversation, such as the Tariff's impact on CLAIMANT's financial situation. As such, RESPONDENT could not decide if CLAIMANT was entitled to request renegotiations. Therefore, in any case, CLAIMANT failed to request renegotiations without undue delay. Accordingly, any CLAIMANT's subsequent requests for renegotiations at the 12 February 2018 meeting ("**Meeting**") would be out of time [*CE8, p.18, §10; PO2, p.60, §35*].

b. CLAIMANT did not renegotiate in good faith

133. CLAIMANT did not renegotiate in good faith. Both the request and the parties' conduct during renegotiation are subject to good faith and fair dealing [*Art.1.7 UNIDROIT Principles; Off. Cmt., Art.6.2.3, §5; Wolfgang, p.247*]. A party acting inconsistently is in breach of good faith [*Arts.1.7,1.8 UNIDROIT Principles; Jose; STS 8594/2011; Brödermann, p.179*]. The parties should renegotiate in a "*constructive*" manner by "*refraining from…obstruction*" and "*providing all the necessary information*" without "*coercion*" [*Continental Shelf; Off. Cmt., Art.6.2.3, §5; Schwenzer, p.723*].

134. Regardless of whether the Tribunal finds that the Parties renegotiated during the phone conversation or at the Meeting, CLAIMANT still did not renegotiate in good faith. During the phone conversation, CLAIMANT "*threaten[ed] to stop delivery*" [*ANA, p.30, §10*] and did not provide "*all the necessary information*" [*Supra, §132*]. Despite initiating the Meeting to "*solve*

the issue of adaptation" [*CE8, p.18, §10; PO2, p.60, §35*], CLAIMANT prevented the Parties from renegotiating constructively by alleging that RESPONDENT breached the resale prohibition [*CE8, p.18, §10*]. However, it was irrelevant to "*the issue of adaptation*", obstructing the renegotiation. Further, CLAIMANT acted inconsistently. It could have attempted to invoke Clause 12 or Art.79 CISG to relieve from its liability of the Tariff cost. It nonetheless paid the Tariff cost [*CE8, p,18, §9*]. CLAIMANT chose not to be relieved from its liability of the Tariff cost but now asks RESPONDENT to bear the bulk of it. Thus, CLAIMANT did not renegotiate in good faith.

c. The Parties did not fail to reach an agreement

135. The Parties did not fail to reach an agreement. A party is entitled to adaptation only if the parties fail to reach an agreement [*Art.6.2.3(3) UNIDROIT Principles*]: either because the non-disadvantaged party "*completely ignored*" the request for renegotiations; or the renegotiations conducted in good faith did not have a "*positive outcome*" [*Off. Cmt., Art.6.2.3, §6*]. RESPONDENT did not ignore the request for renegotiations and attended the Meeting to "*solve the issue of adaptation*" [*CE8, p.18, §10; PO2, p.60, §35*]. RESPONDENT stopped the renegotiation, not because it was not willing to renegotiate on the issue of adaptation, but it was merely a response to CLAIMANT's irrelevant allegation [*CE8, p.18, §10; ANA, p.31, §11*]. There is yet to be an outcome. Therefore, the Parties did not fail to reach an agreement.

III. IN ANY CASE, CLAIMANT IS ONLY ENTITLED TO NO MORE THAN US$250,000 UNDER THE THIRD SHIPMENT BY CONTRACT ADAPTATION

136. Even if CLAIMANT is entitled to adaptation under Art.6.2.3 UNIDROIT Principles, it is entitled to no more than US$250,000. Art.6.2.3 requires a tribunal to adapt contracts "*with a view to restoring its equilibrium*". It need "*not strictly restore the original equilibrium*" as long as it "*make[s] a fair distribution of losses*" [*Brunner, p.499; Off. Cmt., Art.6.2.3, §7*], which "*need not be equal*" [*Vogenauer, p.821*]. It should adapt a contract based on good faith: "*fairness and reasonableness*" [*Ferrario, pp.73,81,113*]. It is "*commercially unreasonable*" for a party to undertake a cost exceeding its profits, making the deal "*unprofitable*" [*BOC; Berger IV, p.8*].

137. CLAIMANT did not act in good faith. First, CLAIMANT acted commercially unreasonably. CLAIMANT has a profit of US$250,000 under the third shipment [US$5,000 (profit per dose) × 50 (no. of dose sold)] [*PO2, p.59, §31*]. CLAIMANT paying the Tariff cost, which exceeds its profits by US$1,250,000, rendered the deal unprofitable, and is thus commercially unreasonable. A reasonable person would not have taken extra costs exceeding its profits. Secondly, CLAIMANT paid the Tariff cost despite knowing RESPONDENT did not authorise adaptation.

CLAIMANT submits that it paid the Tariff cost due to RESPONDENT's statements and alleges that RESPONDENT acted inconsistently [*C.Memo, §§257-259*]. However, Mr. Shoemaker never agreed to Contract adaptation [*RE4, p.36, §4*]. CLAIMANT also acknowledged that Mr. Shoemaker could not authorise adaptation [*CE8, p.18, §8*]. As such, CLAIMANT should not have unreasonably paid the Tariff cost based on his statements. Thirdly, CLAIMANT acted inconsistently by paying the Tariff cost, despite knowing RESPONDENT did not authorise adaptation, and now seeking adaptation.

138. CLAIMANT is only entitled to no more than US$250,000 by Contract adaptation. CLAIMANT's loss resulting from the Tariff is US$1,250,000. RESPONDENT should not be held liable for CLAIMANT's unreasonable act which was in breach of good faith. As CLAIMANT's profits were US$250,000 under the third shipment, this amount would be the maximum extra costs it should have *reasonably* taken. As such, it is only "*fair*" to distribute no more than US$250,000 to RESPONDENT. Meanwhile, CLAIMANT should bear the US$1,000,000 it *unreasonably* took up. Therefore, the Tribunal should adapt the Contract by US$250,000.

139. **Issue 3 conclusion**: CLAIMANT is not entitled to the extra sum of US$1,250,000 under the Contract and CISG. The Tribunal should not adapt the Contract. Even if the Tribunal adapts the Contract, it should only adapt it by no more than US$250,000.

REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT respectfully request the Tribunal to:

(a) DECLARE CLAIMANT's claim inadmissible as the Tribunal lacks jurisdiction and power;

(b) REJECT CLAIMANT's claim for the extra sum of US$1,250,000; and

(c) ORDER CLAIMANT to bear all costs of this arbitration.

Respectfully signed and submitted by Counsel on behalf of Black Beauty Equestrian on 23 January 2019:

/s/ Alex CHAN	/s/ Bobo CHAN	/s/ Jasmine CHAN	/s/ Esther HO
/s/ Vanessa HUNG	/s/ Aaron KWONG	/s/ Sharon LEE	/s/ Ben POON
/s/ Nicole XIAO	/s/ Tricia YU	/s/ Yuki YUNG	/s/ Jenny Y. ZHANG

Certificate and Choice of Forum

To be attached to each Memorandum

I, Peter Rhodes, on behalf of the Team for The Chinese University of Hong Kong hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for The Chinese University of Hong Kong

Name: Peter Rhodes

Signature: Peter F. Rhodes