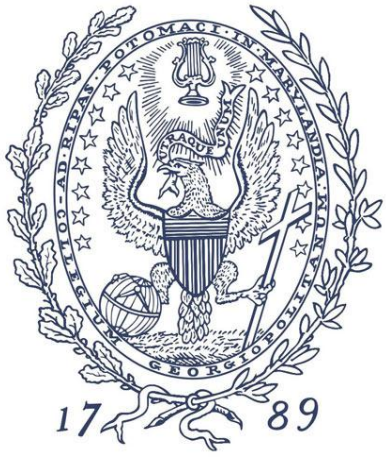
TWENTY-SIXTH ANNUAL

WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
Hong Kong / Vienna
2019

MEMORANDUM FOR CLAIMANT



GEORGETOWN UNIVERSITY

GEORGETOWN UNIVERSITY LAW CENTER

On behalf of:	**Against**:
CLAIMANT	RESPONDENT
Phar Lap Allevamento	**Black Beauty Equestrian**
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TABLE OF ABBREVIATIONS

Abbreviation	**Original Phrase/Explanation**
A fortiori	With stronger reason
Art./Arts.	Article/Articles
CISG	United Nations Conventions on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
€	Euro
ed./eds.	Editor/Editors
HKIAC	Hong Kong International Arbitration Centre
i.e.	*id est* (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
in casu	In the case at hand
infra	Below
Inter alia	Among other things
Mr.	Mister
No.	Number
p./pp.	Page/Pages
Sales Agreement	Claimant's Exhibit C 5 (Sales Agreement 6 May 2017)

Supra	Above
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollars
v.	Versus
&	And
§/§§	Paragraph/Paragraphs

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HKIAC Rules	Hong Kong International Arbitration Centre Arbitration Rules (2018) Cited in: §§3, 11, 12, 13, 15, 21, 22, 51, 52, 53, 54, 55, 56, 59, 65, 66, 67, 68, 69, 70, 75, 76, 77, 96
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IBA Rules	International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (2010) Cited as: IBA Rules Cited in: §§51, 76, 77, 79, 82, 83, 84, 96
Uniform Law on the International Sale of Goods	Convention Relating to a Uniform Law on the International Sale of Goods (1964) Cited as: Uniform Law on the International Sale of Goods Cited in: § 107
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts Cited in: §§100, 101, 103, 105, 138, 139, 140, 141, 143, 145
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STATEMENT OF FACTS

1 Phar Lap Allevamento (CLAIMANT) is a renowned Mediterraneo stud farm, located in Capital City, Mediterraneo. Due to financial struggles in recent years, CLAIMANT was able to stay in business only through extensive restructuring and considerable cuts to its workforce. All future credit lines were conditioned on CLAIMANT's ability to post profits in both 2017 and 2018. Black Beauty Equestrian (RESPONDENT) is an Equatorianian horse breeder famous for its mares, and decided to start breeding racehorses in 2016.

2 On 21 March 2017 RESPONDENT contacted CLAIMANT with an offer to buy frozen semen from CLAIMANT's star racehorse Nijinsky III.

3 After extensive negotiations, RESPONDENT and CLAIMANT (the Parties) agreed on a contract including an arbitration clause and a hardship clause. According to a note for the final negotiations made by RESPONDENT's prime negotiator, Mr. Antley, he intended to "[c]larify in arbitration clause that neutral venue and applicable law." During the negotiations, Mr. Antley agreed with CLAIMANT's negotiator that the arbitrators should be able to "adapt the contract if the Parties could not agree." On the morning of the final negotiations, both negotiators were involved in a car accident which rendered them comatose. Neither was able to attend the final negotiations, and the final text of the Sales Agreement was completed in a rush, by stand-ins who were not entirely up-to-date on the previous discussions.

4 On 6 May 2017 the Parties agreed on the final text of the Sales Agreement. It provides for the sale of 100 doses of frozen horse semen, delivered in three installments over the course of nine months. The Sales Agreement is governed by Mediterraneo law and includes a DDP delivery upon RESPONDENT's insistence, which was agreed to because RESPONDENT cited the "urgency of the delivery" and CLAIMANT's "much greater experience in the shipment of frozen semen including the necessary export and import documentation." CLAIMANT agreed in exchange for the inclusion of a hardship clause limiting its liability for any further risks associated with changes in customs regulation or import restrictions, as well as "additional health and safety requirements or comparable unforeseen events making the contract more onerous." RESPONDENT agreed that CLAIMANT should not bear all risks associated with the delivery, except transportation, but insisted that in return for such limited responsibility by CLAIMANT, RESPONDENT should get a lower overall price.

5 The Sales Agreement also provides for arbitration under the HKIAC Rules, seated in Vindobona, Danubia, but does not stipulate the law governing the arbitration clause.

6 In November 2017, after the second shipment, but before the final shipment of frozen semen, the newly elected government of Mediterraneo imposed a 25% tariff on all Equatorianian

agricultural products, claiming the necessity to protect Mediterraneo national security. Such drastic action is unprecedented for Mediterraneo's international trade policy and exceeded the expectations of much of the international community. There was no indication of such measures either in the new President's election platform or any government strategy papers.

7 In December 2017, Equatoriana retaliated with an even more shocking 30% tariff on agricultural products imported from Mediteranneo. Equatoriana had been internationally known as an ardent supporter of free trade, and the country had retaliated to trade restrictions only once in its entire history, preferring to settle disputes amicably or via the World Trade Organization. The retaliatory tariffs came as a big surprise even to informed circles.

8 On 20 January 2018, as CLAIMANT was about to deliver the final shipment, it discovered that the tariff applied to frozen horse semen, making the shipment 30% more expensive than anticipated. This increase destroyed CLAIMANT's profit margin of 5% from the transaction.

9 CLAIMANT immediately contacted Mr. Shoemaker, who was introduced as being responsible for all questions concerning the Sales Agreement. The Parties were surprised to discover that the tariff applied to the shipment because products related to horse racing were typically not considered agricultural products. Mr. Shoemaker urged CLAIMANT to authorize the shipment, stating that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price."

10 Upon Mr. Shoemaker's insistence, CLAIMANT paid the additional 30% and sent the shipment without a revised agreement.

11 On 31 July 2018**,** after it became clear that RESPONDENT would not reimburse CLAIMANT for the additional payment of 30%, CLAIMANT initiated arbitration proceedings, seeking reimbursement for at least 25%, meaning it would be selling the product at cost. RESPONDENT objected to the jurisdiction of the Tribunal claiming that the Tribunal does not have jurisdiction to adapt the price.

12 After this arbitration began, CLAIMANT was informed that RESPONDENT is engaged in a separate HKIAC arbitration with a buyer from Mediterraneo. That arbitration involves a sale subject to Mediterraneo law that was also affected by the unforeseen Mediterraneo tariffs. There, RESPONDENT claimed that, as the seller, it is entitled to a price adaptation because the 25% tariffs were an unforeseen change of circumstances. CLAIMANT wants to submit a copy of the Partial Interim Award from that arbitration in support of its position that under Mediterraneo law, as the seller, it is entitled to a price adaptation due to the unforeseeable Equatorianian tariffs. The evidence is sold by a company and is presumed to have come through one of two sources: from RESPONDENT's former employees or through a hack of RESPONDENT's system, which was vulnerable to cyber-attacks due to the outdated firewall.

SUMMARY OF ARGUMENTS

1 International business transactions can sometimes turn into a runaway horse. *In casu*, CLAIMANT was mid-way through performance of its Sales Agreement obligations when Customs Authorities imposed tariffs rendering the shipment 30% more expensive. Already having agreed to shoulder the costs of transporting the goods, RESPONDENT agreed to bear these additional tariffs costs. In an act of bad faith, RESPONDENT's position suddenly changed after receipt of the goods, endeavoring to avoid the tariff charges. RESPONDENT is now attempting to impede CLAIMANT's access to justice through dilatory tactics such as arguments that the Tribunal lacks jurisdiction or that key evidence may not be entered.

2 With regard to the procedural issues, the Sales Agreement signed by CLAIMANT and RESPONDENT did not include a separate reference to the law governing the arbitration clause. The Parties did, however, discuss choice of law on multiple occasions throughout negotiations and ultimately agreed on their intention for the whole of their Sales Agreement to be governed by the same system of law. Even if the Tribunal does not find that this constitutes an explicit choice, Mediterraneo law still governs, as the Parties implicitly chose Mediterraneo law during their negotiations and because Mediterraneo law has the closest connection to their Sales Agreement. Alternatively, the claim for adaptation of the contract is within the language of the arbitration agreement due to the purposefully broad wording of the arbitration clause that the Parties agreed upon and the widely-accepted presumption that arbitration clauses should be interpreted broadly **(PART 1)**.

3 There is no bar to the admission of the Partial Interim Award in either the binding HKIAC Rules or *lex arbitri*. The Partial Interim Award is evidence relevant to the case as it shows RESPONDENT's original position on the application of the law of Mediterraneo to the tariffs. The Partial Interim Award is also material to the outcome of the case, because it supports CLAIMANT's position that as the seller, it is entitled to reimbursement of the additional 30%. Consequently, the Partial Interim Award meets the admissibility test under the HKIAC Rules. Admitting it will not prejudice any of RESPONDENT's rights or the fairness of the proceedings, guaranteed by the *lex arbitri*. The fact that the circumstances do not meet any of the grounds for exclusion of evidence under the authoritative IBA Rules on the Taking of Evidence in International Arbitration only further demonstrates that CLAIMANT is entitled to submit the Partial Interim Award **(PART 2)**.

4 With regard to substantive issues, CLAIMANT is entitled to the payment of US$ 1,250,000 or any amount resulting from an adaption of the price under Clause 12 of the Sales Agreement. The Government of Equatoriana's tariff change falls within the scope of hardship under Clause

12 of the Sales Agreement. The Parties mutually intended for RESPONDENT to bear the risk of the tariff change, and a reasonable person would determine that RESPONDENT bears the risk of tariff change **(PART 3 (I))**.

5 Alternatively, CLAIMANT is also entitled to repayment of US$ 1,250,000 under the CISG. Art. 79 of the CISG applies to the Sales Agreement because there was no implicit agreement to derogate from Art. 79 provisions. Under Art. 79, Equatoriana's tariff presented an impediment beyond CLAIMANT's control that CLAIMANT could not have reasonably taken into account at the time the Sales Agreement was signed, and which CLAIMANT could not have reasonably avoided or overcome. Because Art. 79 CISG does not directly provide a remedy for this type of impediment, under Art. 7 CISG the Tribunal should look to Art. 6.2.3 UNIDROIT Principles to find adaptation of the Sales Agreement is necessary to restore equilibrium between the Parties, and require RESPONDENT repay CLAIMANT US$ 1,250,000 **(PART 3 (II))**.

ARGUMENT

PART 1: THIS TRIBUNAL HAS JURISDICTION TO DECIDE UPON THE GOVERNING LAW OF THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

6 The principle of party autonomy states that the parties to an international commercial contract may choose the law applicable to their contract [*Hague Principles on Choice of Law, Art. 2(1); Blackaby/Partasides/Redfern/Hunter, §3.97*]. Pursuant to the principle of separability, an arbitration clause is considered a separate agreement [*ICC Case No. 8938 (1996); Fouchard/Gaillard/Goldman, §425*]. Therefore, parties may choose the same or a different law to govern a contract's arbitration clause [*Flecks-Giammarco/Grimm, p. 42; Born I, p. 59*]. The parties can choose this law expressly or implicitly.

7 This Tribunal has jurisdiction to hear this dispute **(I)**. Correspondingly, this Tribunal has the jurisdiction to determine the law applicable to the agreement to arbitrate and the Parties have chosen the law of Mediterraneo to govern the arbitration clause in their Sales Agreement **(II)**. Alternatively, a claim for contract adaptation is also within the scope of the Parties' arbitration agreement **(III)**.

I. THIS TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE.

8 The jurisdiction of the Tribunal to hear this dispute is unchallenged [*Procedural Order No. 2, p. 60, §43*].

II. THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

9 CLAIMANT will demonstrate that this Tribunal can determine which law governs the arbitration agreement **(A)**; the law of the seat of the arbitration does not govern the arbitration agreement **(B)**; the law governing the Sales Agreement also governs the arbitration clause in that agreement **(C)**.

A. The HKIAC Rules governing the proceedings permit the tribunal to determine the law governing the arbitration clause.

10 There is no doubt that the Parties agreed for the rules governing the arbitral proceedings to be the HKIAC 2018 Rules, as written in Clause 15 of the Sales Agreement [*CLAIMANT's Exhibit C 5, p. 14, Clause 15*]. The Parties agreed that "any dispute arising out of this contract" should be "finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC)" [*CLAIMANT's Exhibit C 5, p. 14, Clause 15*].

11 The HKIAC rules state that "[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the

arbitration agreement." [*HKIAC Rules, Art. 19.1*]. This is an application of the almost universally accepted *Kompetenz-Kompetenz* doctrine under which the arbitral tribunal possesses jurisdiction to consider and decide on its own jurisdiction [*Born I, p. 52, §2.05*].

12 The law of an arbitration clause governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause [*HKIAC Rules p. 3*].

13 In addition, Art. 36 of the HKIAC Rules allow this Tribunal broad discretion in the determination of the applicable law absent a choice of law by the parties. When the parties do not designate the applicable law, the arbitral tribunal shall apply the rules of law which it determines to be appropriate [*HKIAC Rules, Art. 36*].

14 Therefore, this Tribunal has the discretion to decide upon the law governing the arbitration clause of the Sales Agreement.

B. The law of the seat of the arbitration is not automatically the law that governs the arbitration agreement.

15 As with most institutional arbitration rules, the HKIAC Rules do not specifically address the question of the law applicable to the Parties' arbitration agreement. *A fortiori*, the HKIAC Rules do not constitute a rule in favor of the law of the seat. More precisely, there is no rule that the law of the seat of the arbitration shall also be the law governing the arbitration clause.

16 The HKIAC Rules recommend including an express provision with a separate reference to the law of the arbitration clause [*HKIAC Rules, Suggested Clauses, pp. 2-3*]. This provision should be included *particularly* where the law of the substantive contract and the law of the seat are different [*HKIAC Rules 2013, Suggested Clauses, p. 3*]. Clearly, the law of the seat of the arbitration can be different than the law governing the arbitration clause.

17 The Sales Agreement signed by both parties did not include a separate reference to the law of the arbitration clause in the clause itself, but the Sales Agreement indicates that the law of Mediterraneo governs the Sales Agreement [*CLAIMANT's Exhibit C 5, pp. 13-14*]. The Sales Agreement includes the arbitration clause [*CLAIMANT's Exhibit C 5, p. 14, Clause 15*].

18 RESPONDENT is aware of this as shown in their email of 10 April 2017 in which it proposes a first draft of the dispute resolution clause [*RESPONDENT's Exhibit R 1, p. 33*]. By including both the law governing the seat of the arbitration and law of the arbitration clause in its first draft for the dispute resolution clause, RESPONDENT also recognized that these are two separate laws that govern the arbitration, and that the law of the seat of the arbitration will not automatically govern the arbitration agreement.

C. The law governing the Sales Agreement is also the law governing the arbitration clause.

19 The law governing the Sales Agreement is also the law governing the arbitration clause because the separability of the arbitration clause does not prevent the law governing the underlying contract from also governing the arbitration clause **(1)** and all approaches of the widely-followed *Sulamérica* test demonstrate that the law of Mediterraneao is the law governing the arbitration agreement **(2)**.

(1) The separability of the arbitration clause does not prevent the assumption that the law governing the underlying contract is also the law governing the arbitration clause.

20 Contrary to RESPONDENT's allegations, this Tribunal can interpret the arbitration clause in accordance with the law of Mediterraneo.

21 The Parties have expressly chosen that the Sales Agreement shall be governed by the law of Mediterraneo [*CLAIMANT's Exhibit C 5, p. 14, Clause 14*]. The Sales Agreement *as a whole, i.e.* every clause of the Sales Agreement, will be governed by this law, including the arbitration clause in Clause 15 of the Sales Agreement. The arbitration clause is one of the many clauses in this contract and therefore, the arbitration clause is governed by the same law as the underlying Sales Agreement [*Blackaby/Partasides/Redfern/Hunter, p. 158, §3.13*]. There is a strong presumption in favor of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement [*Lew, p. 109, §6-26*].

22 The separability presumption provides that arbitration agreements are separable or severable from the contract within which they are found [*Born I, p. 55; Lew, p. 109, §§6-9*]. The separability doctrine is adopted in Art. 19.2 HKIAC Rules [*HKIAC Rules, Art. 19.2*].

23 The autonomy of the arbitration clause and the principal contract does not, however, mean they are totally independent. By accepting the contract, the Parties also accept the arbitration clause is proof therein [*Sicard-Mirabal/Derains, pp. 16-17*]. This idea is widely accepted among academic writers: for example, Goldman concluded that although the arbitration agreement could be governed by a different law than the underlying contract, "practically speaking, in most cases they are both governed by the same law, not because of their interdependence – which is denied – but because their juridical 'location' is, in fact, most often the same." [*Goldman, §§59*].

24 The rationale for the separability presumption is supported by the practical justification to insulate the arbitration agreement and the arbitrators' jurisdiction from challenges to the underlying contract [*Born I, p. 50*]. The validity of the Sales Agreement is not challenged by the Parties and therefore the separability doctrine is not considered relevant in this case.

25 This analysis was also adopted in an often-cited English judicial decision *BVI v. Ferrell International Ltd* [*BVI Case*]. The Court observed that "where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract." [*Id.*].

(2) Each approach of the widely-followed *Sulamérica* test leads to the conclusion that the law of Mediterraneo is the law governing the arbitration agreement.

26 If the legal test from *Sulamérica* is followed, this Tribunal will reach the conclusion that the law of Mediterraneo governs the arbitration clause.

27 In *Sulamérica*, the English Court of Appeal held that the law of the arbitration agreement is determined by application of a three-stage enquiry [*Sulamérica, §17*]. The first step is to determine whether the Parties have made an express choice of law to govern the arbitration agreement. If so, that choice is effective. Second, where the Parties failed to expressly specify the law of the arbitration agreement, the implied choice of law is considered. Third, if the law of the arbitration agreement is not understood by implication, then the law with the 'closest and most real connection' to the arbitration agreement governs [*Blackaby/Partasides/Redfern/Hunter, p. 160*].

28 Each of the three approaches lead to the conclusion that the law of Mediterraneo governs the arbitration agreement.

29 First, an express choice of law made by the Parties to govern the arbitration agreement is effective. As stated above, the Parties expressly chose the law of Mediterraneo to govern their Sales Agreement. The Parties also agreed upon an acceptable choice of law and arbitration clause, but due to the accident in which the two main negotiators were involved, this agreed-upon express reference was not included in the final contract [*Notice of Arbitration, p. 5, §8*]. The CISG can apply to an arbitration clause within a contract since the CISG sets uniform rules on the formation of international sales contracts. In this regard, Art. 8 CISG provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was." [*CISG, Art. 8.1*]. In determining this intent of a party, due consideration is to be given to all relevant circumstances of the case, including the negotiations [*CISG, Art. 8.3*]. Though no reference is made in the actual arbitration clause, the Parties intended to choose the Law of Mediterraneo as the law governing the agreement to arbitrate during their negotiations. This choice of law made orally during negotiations should be considered an express choice of law.

30 Second, if this Tribunal is unconvinced regarding an express choice of law, the Parties have also implicitly chosen for the law of Mediterraneo to govern the arbitration clause. It is fair to assume that, in absence of any contrary indication, the Parties intended the whole of their relationship to be governed by the same system of law. The natural inference is that the Parties intended that the law chosen to govern the substantive contract also to govern the agreement to arbitrate.

31 More precisely, the Judge in *Sulamérica* distinguished between two scenarios under this second approach. "If there was a 'free-standing agreement to arbitrate' containing no express choice of law, it is unlikely that there would be sufficient basis for finding an implied choice of law and it would be necessary to identify the law with which the arbitration agreement had the closest and most real connection. […] If, however, the arbitration agreement formed part of a substantive contract, the express choice of proper law governing the substantive contract would be a "strong indication of the parties' intentions in relation to the agreement to arbitrate," resulting in the implied choice of law for the arbitration agreement likely being the same as the expressly chosen law of the substantive contract. This conclusion might be displaced by the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract [*Sulamérica*, *§26*].

32 Since the arbitration agreement is part of the Sales Agreement, Clause 14 of this contract indicates the law of Mediterraneo as both the law of the governing contract and entails an implied choice for the law of Mediterraneo as law governing the arbitration agreement [*CLAIMANT's Exhibit C 5, p. 14, Clause 14*].

33 Third, if this Tribunal finds that it was not possible to establish the law of the arbitration agreement by implication, the law of Mediterraneo is also the law with the closest and most real connection with the arbitration agreement. The law of Mediterraneo is the law under which CLAIMANT is registered [*Notice of Arbitration, p. 4, §1*]. Mediterraneo is the place where the frozen semen of Nijinsky III was produced and the place where the doses sent to RESPONDENT were sent from [*Notice of Arbitration, pp. 4-5, §§2-3*]. There is no such connection with the law of Danubia; neither Party is registered here and no part of the performance of the agreement took place in Danubia. Moreover, this seat was chosen exactly because none of the Parties have a connection with this law: CLAIMANT proposed Danubia as seat for the arbitral proceedings because the Parties considered this a neutral location [*RESPONDENT's Exhibit R 2, p. 34*]. In addition, Mr. Antley's short note in his negotiation file also refers to a neutral venue in the arbitration clause [*RESPONDENT's Exhibit R 3, p. 35*]. Thus, there is a closer connection to the law of Mediterraneo, than to the law of the neutral place of Danubia.

34 The Singapore High Court relied upon the approach adopted in *Sulamérica* in the *BCY v. BCZ* decision [*BCY v. BCZ Case, §§42-46*]. The judge found "that the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract." [*BCY v. BCZ Case, §44*]. This presumption is supported by the weight of authority (i.e., the Judge in *Sulamérica*) and is, in any event, "preferable as a matter of principle." [*BCY v. BCZ Case, §46*]. Applying this principle to the case at hand, Clause 14 of the Sales Agreement entails an implied choice for the law of Mediterraneo to govern the arbitration clause.

III. ALTERNATIVELY, EVEN IF MEDITERRANEO LAW DOES NOT GOVERN THE CONTRACT, A CLAIM FOR CONTRACT ADAPTATION IS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

35 Concerning the claim for adaptation, there is a presumption that the scope of arbitration agreements should be interpreted widely **(A)**. Additionally, the wording of the arbitration clause agreed upon by the Parties covers a claim for adaptation **(B)**. Finally, the negotiating parties drew the language of the arbitration clause such that it is broad in scope and the Parties intended for it to be interpreted broadly **(C)**.

A. The language "any dispute arising out of this contract" from the arbitration clause is universally presumed to be construed as broad in scope.

36 To determine whether a given dispute falls within the scope of a contractual arbitration provision, courts first determine whether the arbitration clause is broad or narrow.

37 Case law establishes that once the existence of the arbitration agreement is found, there is a presumption of arbitrability and its scope must be interpreted liberally [*X v. AY BY*]. There is no reason to interpret an arbitration clause restrictively; instead it must be assumed that the Parties wanted broad jurisdiction of this Tribunal [*X v. AY BY*].

38 In the well-known *Fiona Trust* case, the House of Lords held that the construction of an arbitration clause should start from the presumption that the parties likely intended "any dispute arising out of the relationship into which they have entered" to be decided by the same tribunal unless the language makes it clear otherwise [*Fiona Trust Case; Delaney/Lewis*].

39 The court in *Fiona Trust* held that "ordinary businessmen would be surprised at the… time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words… If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so." [*Fiona Trust Case; Blackaby/Partasides/Redfern/Hunter, §2.69*].

40 In so doing, the *Fiona Trust* court firmly rejected the technical distinctions drawn in earlier cases on the wording of arbitration clauses. If any businessman intended to exclude disputes about the validity of a contract, he would have done so explicitly [*Fiona Trust Case*].

41 Similarly, if CLAIMANT and RESPONDENT did not intend for the arbitration clause to be widely interpreted, their agreement would have stated this explicitly, regardless of who signed the final contract.

B. The dispute in this arbitration proceeding referring to the sale of frozen racehorse semen is covered by the wording of the arbitration clause.

42 Turning to the construction of the arbitration agreement, arbitration clauses which cover *"any disputes arising out of a contract"* apply to claims such as the one here.

43 Unlike language such as disputes "under" or "arising under" the agreement, in which tribunals are split in their interpretation of its scope, the wording "disputes arising out of" extends the scope of the arbitration provision beyond the claims under the contract [*Cape Flattery Case; Cook Case*].

44 Similarly, arbitration clauses which include disputes "in connection with" or "in relation to" the underlying contract are read as calling for a wide reading of the arbitration clause [*St John Sutton, 2-078*]. Linking words such as the *"arising out of"* language used in the contract are crucial to understanding the scope of an arbitration agreement [*KNM Process Case*].

45 Furthermore, the claim for adaptation due to a change in tariffs is closely connected to the contract which contains the arbitration clause, namely, RESPONDENT's delivery obligations under this contract for the sale of goods. The arbitration clause chosen by both Parties makes explicit reference to disputes relating to "performance" and "breach," indicating that the Parties intended this claim to be included within the scope of any potential arbitration [*CLAIMANT's Exhibit C 5, p. 14, Clause 15*].

46 Therefore, even if this Tribunal chooses to interpret this clause against the widely-accepted presumption that arbitration clauses be broadly interpreted as rationalized above, this Tribunal should nevertheless find that the issue in dispute is on its face within the purview of the clause.

C. The Parties carefully considered the foreseeable implications of the arbitration clause during negotiations, intending for the scope of application to be widely interpreted.

47 As RESPONDENT directly refers to the drafting history of the arbitration clause [*Answer to Notice of Arbitration, p. 31 §15*], CLAIMANT also urges this Tribunal to examine the drafting history of this clause. *Inter alia*, this drafting history demonstrates that the Parties fully

intended to clarify the existing provisions to include a direct reference to the arbitration clause [*CLAIMANT's Exhibit C 8, pp. 17-18*].

48 In fact, RESPONDENT's negotiator, Mr. Antley, planned to return for the final negotiations with a proposal regarding the arbitration clause, even writing a note himself stating, "clarify in arbitration clause that neutral venue and applicable law" [*CLAIMANT's Exhibit C 8, pp. 17-18*; *RESPONDENT's Exhibit R 3, p. 35*]. At this point in their negotiations, CLAIMANT had already discussed with RESPONDENT that although it was not legally necessary, CLAIMANT preferred to insert an express reference to the arbitration clause to avoid any confusion [*CLAIMANT's Exhibit C 8, pp. 17-18*]. Mr. Antley also explicitly stated that the arbitrators should adapt the contract in the event that the Parties could not agree [*CLAIMANT's Exhibit C 8, pp. 17-18*]. These clear endorsements by RESPONDENT demonstrate the broad scope of the arbitration clause and the intent of the Parties that the clause be construed broadly.

CONCLUSION OF PART 1

49 In conclusion, this Tribunal has the jurisdiction and the power to interpret this contract. The law governing the arbitration agreement is the law of Mediterraneo due to the implied choice of the Parties and the closest connection theory from *Sulamérica*.

50 Even if, against all odds, this Tribunal finds that the law governing the arbitration agreement is not the law of Mediterraneo, the claim for adaptation of the contract is within the language of the arbitration clause. The language "any dispute arising out this contract" is well aligned with the presumption from *Fiona Trust* that arbitration clauses be widely interpreted. Furthermore, this arbitration language agreed upon by the Parties clearly covers this dispute over RESPONDENT's failure to fulfill its delivery obligations, and the negotiation history of the Parties demonstrates that a claim for adaptation is well within the purview of the clause.

PART 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION PROCEEDINGS EVEN IF IT WAS OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

51 CLAIMANT is entitled to submit the Partial Interim Award from the other arbitration proceedings under the HKIAC Rules and the *lex arbitri* even if it was obtained through someone else's illegal actions **(I)**. The admissibility is reaffirmed by the fact that all grounds for exclusion of evidence in the authoritative IBA Rules on the Taking of Evidence are inapplicable to the current circumstances **(II)**.

I. THE PARTIAL INTERIM AWARD IS ADMISSIBLE UNDER THE HKIAC RULES AND THE LEX ARBITRI.

52 The Partial Interim Award which CLAIMANT wants to submit is admissible under the 2018 HKIAC Rules because there is no bar for illegally obtained evidence and it meets the requirements for admissibility **(A)**. Admitting the Partial Interim Award is consistent with the *lex arbitri* – Danubian Arbitration Law, because there is no bar to admission of illegally obtained evidence and it will not prejudice RESPONDENT's right to be heard **(B)**.

A. The Partial Interim Award is admissible under the HKIAC Rules, because there is no bar and it meets the admissibility test.

53 The Parties have not made any provisions in their arbitration agreement limiting this Tribunal's power to admit evidence in their arbitration agreement. Therefore, the applicable provisions concerning the admission of evidence are the HKIAC Rules [*CLAIMANT's Exhibit C 5, p. 14, Clause 15*].

54 The provisions regarding admissibility of evidence in the applicable 2018 HKIAC Rules are the same provisions as the HKIAC Rules 2013 which were in force when the Parties concluded the contract. Therefore, the current language of the provision which gives this Tribunal complete discretion to admit any evidence, as long as it is relevant and material to the outcome of the dispute existed when the Parties agreed to resolve their dispute under the HKIAC Rules. If the Parties wanted to limit the admissible evidence in any way, they could have included a specific provision to that effect. The Parties did not include any provision to this effect, indicating their mutual consent with the broad admissibility standard of the HKIAC Rules.

55 This Tribunal has the power to determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence, without imposing any limitations [*HKIAC Rules, Art. 22.2*]. At any time, this Tribunal can allow or require a party to produce documents, exhibits or other evidence that it determines to be relevant to the case and material to its outcome [*HKIAC Rules, Art. 22.3*]. This Tribunal can also admit or exclude any documents, exhibits or other evidence [*HKIAC Rules, Art. 22.3*]. When the Parties chose to arbitrate under the HKIAC Rules, they gave this Tribunal wide discretion in the taking of evidence [*HKIAC Guide, §9.156*].

56 There is no general rule for excluding illegally obtained evidence [*Waincymer, p. 797*]. The HKIAC Rules do not contain any provisions barring CLAIMANT from submitting any kind of evidence, even if it had been obtained through a hack or a breach of a confidentiality agreement. Therefore, even if the Partial Interim Award from RESPONDENT's other arbitration

was obtained through improper methods, the only requirements for its admissibility are that it be relevant to the case at hand and material to its outcome [*HKIAC Rules, Art. 22.3*].

57 In any event, RESPONDENT is wrong in insisting that the evidence should be excluded because CLAIMANT itself was not involved in the illegal activity [*Letter by Fasttrack, p. 51*]. Tribunals have concluded that evidence can been admitted when the submitting party did not perform any illegal activity and did not cheat the other side in order to obtain it [*Caratube Award, §156; Adamu Award, p. 37*], and when the party did not observe the law when collecting the evidence [*Valverde Award, §136*]. In the present case CLAIMANT did not do anything illegal to obtain the evidence. Consequently, and on the basis of good faith, this Tribunal should not refuse to admit the evidence.

58 The Partial Interim Award is both relevant to the dispute before this Tribunal **(1)** and material to the outcome of the case **(2)**. Further, its admission is not barred by any duty of confidentiality **(3)**. Therefore, CLAIMANT can submit it.

(1) The Partial Interim Award is relevant to the current dispute, because it shows RESPONDENT's original position on virtually the same issue as the one at hand.

59 As established by the guide to the HKIAC Rules 2013, evidence is relevant when it is useful to establish the truth of the submitting party's factual allegations, on which its legal conclusions are based [*HKIAC Guide, §9.161*]. There is no newer official commentary on the 2018 HKIAC Rules, and as noted, the provisions on admissibility have remained the same since the HKIAC Rules 2013. The Partial Interim Award is relevant, because it shows this Tribunal RESPONDENT is in agreement with CLAIMANT over a key factual understanding, namely, that pursuant to the application of the law of Mediterraneo to the consequences of the tariffs the seller is entitled to reimbursement for the tariffs [*Notice of Arbitration, p. 8*].

60 The Partial Interim Award will show RESPONDENT's position on the application of same laws to virtually the same set of facts as the facts in the present dispute.

61 First, both the present dispute and the dispute in the other arbitration are between RESPONDENT and a party from Mediterraneo [*Procedural Order No. 2, p. 60, §39; Notice of Arbitration, p. 4, §1*]. Both contracts were for the sale of animal products: horses in the first arbitration [*Procedural Order No. 2, p. 60, §39*] and frozen horse semen in this case. Both horses and horse semen fell under the agricultural products affected by the same tariff imposed by Mediterraneo [*Procedural Order No. 2, p. 60, §39*]. Both contracts provide for DDP delivery Mediterraneo (INCOTERMS 2010) [*Procedural Order No. 2, p. 60, §39*]. The contract in the other arbitration contained an ICC Hardship Clause 2003 [*Procedural Order No. 2, p. 60, §39*], and Clause 12 in the Sales Agreement is based on the ICC Hardship Clause

2003 [*RESPONDENT's Exhibit R 2, p. 34*]. Both contracts included a choice of law clause in favor of the law of Mediterraneo [*CLAIMANT's Exhibit C 5, p. 14, Clause 14*]. Both contracts provide for arbitration by three arbitrators under the HKIAC Arbitration Rules [*CLAIMANT's Exhibit C 5, p. 14, Clause 14; Procedural Order No. 2, p. 60, §. 39*].

62 Most importantly, in the Partial Interim Award the arbitrator addressed the power of a tribunal to adapt the contract due to the hardship resulting from the tariffs. This is the exact issue in the current arbitration [*Procedural Order No. 2, p. 60, §39*], therefore, the analysis should be taken into consideration by this Tribunal in the present proceedings. If the evidence is admitted, it will support CLAIMANT's position that under Mediterraneo law the additional payments resulting from the tariffs must be borne by the buyer, here RESPONDENT.

63 The Partial Interim Award will help CLAIMANT to establish the basis of its legal position that RESPONDENT agreed that the buyer should pay for the tariffs, until RESPONDENT was the buyer who had to pay. Therefore the Partial Interim Award is relevant.

(2) The Partial Interim Award is material to the outcome of the dispute, because it will show that RESPONDENT is in agreement with CLAIMANT that under Mediterraneo law the additional payments must be borne by the buyer.

64 Second, the evidence is material to the outcome of the dispute when the arbitral tribunal considers the document is needed as an element to allow complete consideration as to whether a factual allegation is true [*HKIAC Guide, §9.161*]. The evidence demonstrates that both CLAIMANT and RESPONDENT believe that the additional payments due to the unforeseen tariffs should be borne by the seller. If the evidence demonstrates to this Tribunal that the Parties agree that RESPONDENT, as the seller, should bear the additional payments, it should decide the dispute in favor of CLAIMANT. Therefore, the admission of the Partial Interim Award is material to the outcome of the dispute.

65 The Partial Interim Award meets both criteria for admissibility established by the HKIAC Rules and therefore CLAIMANT is allowed to submit it.

(3) Admitting the Partial Interim Award is not precluded by the confidentiality provisions of the HKIAC Rules because CLAIMANT is not bound by them.

66 RESPONDENT's argument that the Partial Interim Award cannot be admitted due to the confidentiality provisions of the HKIAC Rules governing the other arbitration has no merit [*Letter by Fasttrack, p. 51*].

67 First, CLAIMANT is not a party to the other arbitration, therefore it has no obligation under the HKIAC Rules to keep information related to that arbitration confidential [*Blackaby/Partasides/Redfern/Hunter, §1.04*]. Thus, CLAIMANT is not breaching any

obligation by submitting the resulting Partial Interim Award. Second, this Tribunal's obligation under the HKIAC Rules is not to publish, disclose, or communicate any information relating to the other arbitration [*HKIAC Rules, Art. 45.1*]. However, here the Tribunal is not disclosing any information, it is simply admitting it as evidence. Most importantly, all relevant information about the arbitration has already been disclosed publicly. The individual who told CLAIMANT all about it had worked until recently for the Mediterraneo buyer in the other arbitration and disclosed the information willingly. Therefore, this Tribunal should not refuse the admission of information due to confidentiality where the information has already been disseminated publicly.

68 Not only is there no legal bar to admitting the Partial Interim Award, but there is also no practical reason to exclude it for the sake of preserving its confidentiality. If the Partial Interim Award is admitted, it will be disclosed only to the parties in the dispute. First, the Partial Interim Award has already been leaked, and CLAIMANT will obtain it even if the Tribunal does not admit it. Second, as a signatory to the arbitration agreement, CLAIMANT has agreed to preserve all information related to the arbitration confidential, including the Partial Interim Award [*HKIAC Rules, Art. 45.1*]. The Tribunal is also under the same obligation to preserve the confidentiality of all information relating to the arbitration or the award [*HKIAC Rules, Art. 45*]. Therefore, admitting the Partial Interim Award does not seriously prejudice the confidentiality of the other arbitration. Additionally, HKIAC already has the Partial Interim Award, because the other arbitration is also conducted under its auspices [*Procedural Order No. 2, p. 60, §39*]. Thus, admitting the Partial Interim Award does not threaten the confidentiality of any relevant information.

69 In any case, this Tribunal has the power under Art. 22.3 HKIAC Rules to admit evidence even if it would otherwise be inadmissible [*HKIAC Guide, §9.162*]. Therefore, even if the Partial Interim Award is not directly relevant or critical to the outcome of the dispute, this Tribunal should still admit it in order to be in possession of all relevant information and ensure the transparency of the proceedings.

70 In conclusion, CLAIMANT is entitled to submit the Partial Interim Award. It meets both requirements for admissibility contained in the HKIAC Rules and is not barred by the duty of confidentiality. Even if one of the elements is not met, this Tribunal should still admit the evidence in order to guarantee that RESPONDENT is not gaining any advantage from its duplicity.

B. CLAIMANT's right to submit the Partial Interim Award is consistent with the lex arbitri because it does not bar illegally obtained evidence.

71 The Parties chose Danubia as the seat of the arbitration, therefore the applicable *lex arbitri* is the Danubian Arbitration law, a verbatim adoption of the UNCITRAL Model Law [*CLAIMANT's Exhibit C 5, p. 14, Clause 15*]. The law contains no provisions on the admissibility of evidence, and therefore no bar to the admission of evidence obtained illegally or from breach of confidentiality. On the contrary, it explicitly affirms this Tribunal's power to determine the admissibility, relevance, materiality and weight of any evidence [*DAL, Art. 19(2)*]. Consequently, CLAIMANT can submit the Partial Interim Award.

72 Admitting the Partial Interim Award will not violate RESPONDENT's right to be treated with equality and be given a full opportunity of presenting his case [*DAL, Art. 18*]. Even if the illegally obtained Partial Interim Award is admitted, RESPONDENT's right to be heard will not be violated as long as the evidence is assessed on a case-by-case basis taking the interests at stake into consideration [*X v. Football Federation of Ukraine, §§3.2.1-3.2.2.*]. In the present proceedings, RESPONDENT's interest is to preserve the confidentiality of the other arbitration. The countervailing interests are allowing CLAIMANT to present its case, ensuring the transparency of the proceedings, and a just resolution of the dispute. This conflict has been resolved by past tribunals in favor of ensuring transparency and justice by admitting government documents despite a state's objections [*Caratube Award, §15; Libananco Holdings, para. 80*]. This Tribunal should follow the same approach, prioritizing the interest in finding the truth by admitting the Partial Interim Award.

73 Finally, RESPONDENT's argument that the principles of transparency established in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are inapplicable to the current proceedings is irrelevant [*Letter by Fasttrack, p. 51*]. CLAIMANT agrees that the UNCITRAL Rules on Transparency are not binding in either arbitration. That is why its submissions are based on the applicable arbitral rules and law. However, the UNCITRAL Rules are a testament to the importance of promoting such transparency in arbitration proceedings.

74 With regard to these reasons, admitting the Partial Interim Award is consistent with the *lex arbitri* and this Tribunal should admit it.

75 In conclusion, CLAIMANT is entitled to submit the Partial Interim Award even if it was obtained through a breach of a confidentiality agreement or an illegal computer hack. Neither the HKIAC Rules, nor the *lex arbitri* contain any bar to the admission of evidence acquired through such means. The only requirements for admissibility are that the Partial Interim Award

must be both relevant and material to the outcome of the dispute. The Partial Interim Award is relevant because it will be useful to demonstrate RESPONDENT's original position on the application of Mediterraneo law to the tariffs. The Partial Interim Award is also material to the outcome because it demonstrates that RESPONDENT agrees with CLAIMANT that the additional payments at issue must be borne by the buyer. Therefore, CLAIMANT should prevail in the present dispute.

II. THE PARTIAL INTERIM AWARD SHOULD BE ADMITTED IF TRIBUNAL APPLIES THE IBA RULES ON THE TAKING OF EVIDENCE.

76 Since the arbitration agreement, the HKIAC Rules, and the *lex arbitri* do not deal in detail with issues of evidence, this Tribunal can also look for guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration ('The IBA Rules'). The IBA Rules are authoritative and are often applied by tribunals when deciding on issues of evidence, even when they are not binding by virtue of the arbitration agreement [I*CC Case 17272, §276; ICC Case 13225, §3; ICC Case 12206, §8; ICC Case 12296, §1; ICC Case 12169, §13; St. Petersburg UNCITRAL Case, p. 66; Czech Republic UNICTRAL Case, §43; Born II, p. 2334; Turner/Mohtashami, §6.31;Webster/Buhler, p. viii; Moses, p. 45*]. None of the grounds of the IBA Rules for exclusion of evidence apply to the case at hand, demonstrating that admission of the Partial Interim Award is in the interest of justice.

A. The relevance requirement of the IBA Rules favors admission of the documents.

77 As already established, the Partial Interim Award shows that RESPONDENT is in agreement with CLAIMANT over a key factual understanding, namely, the application of the law of Mediterraneo to the consequences of the tariffs [*supra §§58-62*]. Both the HKIAC Rules and the IBA Rules provide that this Tribunal has flexibility when determining "the admissibility, relevance, materiality and weight of evidence" [*HKIAC Rules, Art. 22.2; IBA Rules on the Taking of Evidence, Art. 9(1); Commentary on the IBA Rules on the Taking of Evidence*]. As such the arguments for relevance under both the arbitration rules are the IBA Rules are the same and the Partial Interim Award is relevant under both frameworks. However, the IBA Rules provide a list of grounds which may justify the exclusion of evidence [*IBA Rules on the Taking of Evidence, Art. 9*]. None of those grounds can justify the exclusion of the Partial Interim Award in this case.

B. There is no privilege or legal impediment as contemplated under Art. 9(2)(b) IBA Rules which would prevent admission of the Partial Interim Award.

78 There is neither a legal impediment nor a legal or ethical privilege applicable to RESPONDENT's prior arbitration to prevent its consideration by the tribunal.

79 Previous tribunals have placed great value on the rights of parties to enter evidence necessary to bring claims to the tribunal so long as the entering party was not involved in the illegal acquisition, especially when the illegal evidence is critical to a party's claim, so long as the party was not the one that illegally obtained the evidence [*Caratube Award, §156; Adamu Award, p. 37; Yukos, §1187*]. In *Caratube* and *Adamu,* the tribunal admitted the controversial evidence noting the clean hands of both parties. Even in Yukos, where the Russian Federation strongly argued the stolen documents were "grounds of special political . . . sensitivity" under IBA Rules Art. 9(2)(f), the Tribunal worked around the restriction by not entering the documents while still citing to them in the award [*Yukos, §1187*]. RESPONDENT has no such strong privilege to justify its exclusion.

80 Neither Party in the case at hand is alleging that CLAIMANT carried out the illegal breach of RESPONDENT's computer systems, nor are the Parties alleging that CLAIMANT induced the disgruntled employees to steal the documents from RESPONDENT's premises. Indeed there is no claim that CLAIMANT acted in anything other than good faith during the Arbitration. As such, there is no basis for this Tribunal to exclude the Partial Interim Award based on any legal impediment relating to the illegality of the acquisition of the Partial Interim Award [*Methanex Case, §58*]. The evidence should be admitted because partial awards are not subject to settlement privilege **(1)** and because RESPONDENT waived any privileges it could have had **(2)**.

(1) Settlement privilege under Art. 9(2)(b) and Art. 9(3)(b) does not encompass the Partial Interim Award because partial awards are not covered by without prejudice privilege.

81 Art. 9(3)(b) elaborates on Art. 9(2)(b)'s general restrictions on privileged materials by attaching privilege to "a Document created . . . made . . . for the purpose of settlement negotiations" [*IBA Rules on the Taking of Evidence, Art. 9(3)(b)*]. This is an attempt by the IBA to integrate the theory of 'without prejudice' privilege into the Rules [*Commentary on IBA Rules, p. 25*]. As the creator of the binding arbitration rules, the HKIAC describes 'without prejudice' privilege as protecting "communications between made between the parties to a dispute . . . in attempting to reach a settlement of a dispute" [*Moser/Cheng, §72*] and this understanding is shared by the ICC [*ICC Case 13176, §27*]. However, in these cases the evidence disclosed were communications between the parties, not the settlement document itself [*ICC Case 13176, §26*]. The goal of the privilege is to protect genuine attempts by parties to settle issues in the process of the negotiation, not the outcome itself [*Moser/Cheng, §32*]. Allowing admission of the Partial Interim Award into evidence does not limit the negotiating freedoms of the Parties as the Partial Interim Award is not related to negotiations between the Parties.

82 For these reasons, Art. 9(3)(b) of the IBA Rules does not apply to the Partial Interim Award and cannot be used to exclude it.

(2) Waiver under Art. 9(3)(d) applies to the Partial Interim Award as RESPONDENT has constructively waived privilege to the leaked documents.

83 Art. 9(3)(d) of the IBA rules allows the Tribunal to take into account "any possible waiver of any applicable legal impediment or privilege by virtue of . . . earlier disclosure, or otherwise" [*IBA Rules on the Taking of Evidence, Art. 9(3)(d)*].

84 The IBA Rules do not specify when privilege is constructively waived by disclosure. To fill in this gap in the rules, the IBA recommends the arbitration tribunal "interpret them according to their purpose and in the manner most appropriate for the particular arbitration" [*IBA Rules on the Taking of Evidence, Art. 1.4*]; the Commentary to the IBA rules further elaborates that the parties should select a set of institutional or ad hoc rules to supplement the procedural framework of the arbitration [*IBA Rules on Taking Evidence Commentary, p. 3, §4*]. While the IBA has not determined when privilege is constructively waived for stolen evidence, both NAFTA and UNCRITAL tribunals have established an extensive test to determine whether similar inadvertent disclosures of information count as a waiver [*St. Mary's NAFTA Case*]. Theft is, in itself, an inadvertent disclosure by a party by not reasonably securing evidence, as such this analogy is apt to describe the waiver in this case [*Id.*]. The UNCITRAL/NAFTA test considers: (a) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (b) the number of inadvertent disclosures; (c) the extent of the disclosure; (d) any delay and measures taken to rectify the disclosure; and (e) whether the overriding interests of justice would or would not be served by relieving the party of its error [*Id.*].

85 While CLAIMANT is not aware of any precautions taken to prevent inadvertent disclosure of the partial arbitration agreement, RESPONDENT has indicated several potential sources for the leaked agreement, including two disgruntled employees and a hack of RESPONDENT's computer system [*Fasttrack Letter, p. 50*]. The fact that multiple disgruntled employees had access to the agreement and could remove it from RESPONDENT's premises speaks to a lack of precautions to prevent disclosure of the agreement [*Fasttrack Letter, p. 50*].

86 RESPONDENT themselves characterized the extent of the data breach as being "considerable," indicating that the hackers had access to an extensive amount of confidential information [*Fasttrack Letter, p. 50*]. However, RESPONDENT itself exposed its system to such a breach by using outdated firewall protection [*Procedural Order No. 2, p. 61, §42*].

87 The disclosure was extensive. It covered many documents related to the prior arbitration that were sensitive to both RESPONDENT and the other party to the final agreement [*Procedural Order No. 2, p. 61, §42*].

88 As far as CLAIMANT is aware, RESPONDENT took no action to rectify the disclosure of the documents. This serves as yet another indication that RESPONDENT was not concerned with the confidentiality of the evidence.

89 The overriding interests of justice would not be served by relieving RESPONDENT of its error. If it did not exert care to protect the information as confidential, it is unlikely that its desire to exclude the Partial Interim Award as evidence in this arbitration comes from concerns about its secrecy instead of its desire to avoid the necessary liability.

90 Under NAFTA and the UNCRITAL rules RESPONDENT effectively waived privilege in an analogous situation. Given a dearth of evidence regarding waivers for stolen documents, the framework for inadvertent disclosures provides a helpful guide for considerations of the Tribunal in determining whether a RESPONDENT made a constructive waiver when documents were stolen.

C. Admission of the Partial Interim Award guarantees both fairness and equality in the negotiations because it ensures the truthfulness of both parties in the negotiations and allows CLAIMANT to fully argue its position.

91 Under "considerations of . . . fairness or equality of the parties" CLAIMANT is entitled to enter the Partial Interim Award into evidence as admitting this evidence will ensure a fair and truthful arbitration [*IBA Rules on the Taking of Evidence, Art. 9(2)(g)*].

92 The Partial Interim Award outlines how RESPONDENT's prior understanding of the hardship clause in a factually identical case materially differs from the understanding they are alleging in the current arbitration [*Fasttrack Letter, p. 50*]. In fact, they previously argued that the hardship clause should be interpreted as CLAIMANT interprets it in the current arbitration [*Langweiler Letter, p. 49*].

93 Arbitrators have previously held that confidentiality should not be extended to prior statements made by a witness that were "materially different" from statements being made in a current arbitration for the "interests of individual litigants involved and in the public interest" [*London & Leeds Estates v. Paribas*]. While the Tribunal in *Paribas* did not address this limitation in relation to statements made by parties, both the CLAIMANT's interests and the public interest in entering in evidence of materially different statements by parties is logically the same [*Id.*]. Admission would ensure that arbitrating parties make consistent statements regarding their understanding of key contractual provisions and limit nakedly self-serving claims brought before tribunals by parties seeking both the benefit and the exclusion of key contractual

provisions [*Id.*]. Exclusion of this evidence would shield RESPONDENT from valid inquiries into the materially different positions taken in two identical cases, allowing for dishonesty to go unquestioned.

94 Further, this evidence is essential for CLAIMANT to argue this critical point. Previous arbitrations have understood the importance of allowing a side to fully argue its position, and have placed special emphasis on critical evidence that would allow a side to make a material claim [*Caratube Award, §156*]. CLAIMANT will not be able to argue that RESPONDENT agrees with their interpretation of the hardship clause without the Partial Interim Award. Thus it would be both unfair and inequitable to prevent CLAIMANT from entering this evidence, as it prevents this argument from being considered by the Tribunal.

95 Admitting the Partial Interim Award would ensure that both parties are fully capable of presenting their claims to this Tribunal without unduly limiting the scope.

CONCLUSION OF PART 2

96 CLAIMANT is entitled to submit the Partial Interim Award from RESPONDENT's other proceedings, even if it had been obtained through another's illegal actions. The evidence is admissible under the binding HKIAC Rules and *lex arbitri*, as well as the authoritative IBA Rules on the Taking of Evidence. There is no bar in either the binding HKIAC Rules or the *lex arbitri* to the admission of illegally obtained evidence. The Partial Interim Award meets the test for admissibility under the HKIAC Rules. It is both relevant to the dispute and material to its outcome because it will show to this Tribunal that RESPONDENT originally agreed with CLAIMANT that under the circumstances the buyer must bear the additional payments. The admissibility of the evidence is reaffirmed by the fact that none of the grounds for its exclusion under the IBA Rules are applicable. Therefore, CLAIMANT should be allowed to submit the Partial Interim Award as evidence to support its position.

PART 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT OR UNDER CISG.

97 CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount due to an adaption of the price under Clause 12 of the Sales Agreement **(I)**. Even if CLAIMANT was not entitled to an adaption of the price under the Sales Agreement, CLAIMANT has a right to repayment under CISG **(II)**.

I. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY AMOUNT RESULTING FROM AN ADAPTION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT.

98 CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaption of the price under Clause 12 of the Sales Agreement, because from the literal sense of the language of the Sales Agreement, the Equatorianian tariffs fall within the scope of hardship under Clause 12 of the Sales Agreement **(A)**. The Parties mutually intended for RESPONDENT to bear the risk of a tariff change **(B)**. A reasonable person would determine that RESPONDENT bears the risk of tariff change **(C)**.

A. From the literal sense of the language of the Sales Agreement, the Equatorianian tariff falls within the scope of hardship under Clause 12 of the Sales Agreement.

99 Clause 12 provides that "[S]eller shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*CLAIMANT's Exhibit C 5, p. 14, Clause 12*]. As with the imposition of additional health and safety requirements, change of tariff regime is within the power reserved by Equatorianian government, which cannot be foreseen by CLAIMANT. Furthermore, Equatoriana is a contracting party to the World Trade Organization [*Procedural Order No. 2, p. 61, §47*] and has always been one of the biggest supporters of the existing system of free trade. Equatoriana's retaliation as well as the size of the tariffs came as a big surprise even to informed circles [*CLAIMANT's Exhibit C 6, p. 15*]. Thus, the Parties could not have foreseen that Equatoriana would change its tariff in such a fashion. In addition, CLAIMANT had a profit margin of only 5% for the transaction and had to pay 30% tariff due to the newly adopted tariff regime by Equatoriana, which makes the contract more onerous [*CLAIMANT's Exhibit C 8, p. 17*]. The imposition of a 30% tariff by Equatoriana falls within the scope of hardship under Clause 12 of the Sales Agreement. Thus, RESPONDENT shall be responsible for such tariff change and pay at least US$ 1,250,000 to CLAIMANT.

B. The Parties mutually intended for RESPONDENT to bear the risk of a tariff change.

100 Both the CISG and the UNIDROIT Principles hold that a contract should be interpreted according to the common intention of the parties. Art. 8 CISG provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was [*CISG, Art. 8.1*]. This provision requires an inquiry into the subjective intent of the party making the statement. Although Art. 8 applies to the Parties' statements and conduct, the provision also governs the interpretation of Sales Agreements" [*Schlechtriem/Schwenzer, p. 147*].

101 Similar to Art. 8.1 CISG, Paragraph 1 of Art. 4.1 UNIDROIT Principles provides that "a Sales Agreement shall be interpreted according to the common intention of the parties" [*UNIDROIT Principles, Art. 4.1*]. A sales agreement term may be given a meaning which differs from the plain meaning of the language used, provided that such a different understanding was common to the parties at the time of the conclusion of the Sales Agreement [*UNIDROIT Principles Commentary, Art. 4.1*].

102 RESPONDENT proposed DDP delivery because of its "urgency of the delivery" and CLAIMANT's "much greater experience in the shipment of frozen semen including the necessary export and import documentation" [*CLAIMANT's Exhibit C 3, p. 11*]. In response to RESPONDENT's proposal, CLAIMANT said it was not willing to take over any further risks associated with changes in customs regulation or import restrictions, explicitly indicating that unforeseeable additional health and safety requirements would increase the cost by up to 40% *[CLAIMANT's Exhibit C 4, p. 12*]. RESPONDENT did not expressly object to CLAIMANT's unwillingness to take risks associated with changes in customs regulation or import restrictions. Instead, RESPONDENT requested a lower price in exchange for the removal of certain risks normally associated with a DDP delivery obligation [*Procedural Order No. 2, p. 56, §8*]. Both Parties acknowledged that CLAIMANT should not bear all risks associated with such a delivery except transportation [*CLAIMANT's Exhibit C 8, p. 17*]. Thus, it was the mutual intention between Parties that RESPONDENT bear the risk associated with customs regulation or import restrictions, including the tariff change. Therefore, RESPONDENT shall cover the increase of tariff and pay at least US$ 1,250,000 to CLAIMANT.

C. Even if the mutual intention of the Parties is not determinable, a reasonable person would determine that RESPONDENT bears the risk of tariff change.

103 In accordance with Art. 8.2 CISG, if a mutual intention cannot be determined, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*CISG, Art. 8.2*]. Where this common intent cannot be ascertained, the interpreter must apply the "hypothetical understanding of a reasonable third person" involved in the same type of business as the Parties [*Schlechtriem/Schwenzer, p. 155*]. Pursuant to Art. 4.2 UNIDROIT Principles, if a common intent cannot be established, the meaning must be the same as a "reasonable person of the same kind as the parties would give to it in the same circumstances" [*UNIDROIT Principles, Art. 4.2*].

104 In this case, in response to RESPONDENT's proposal, CLAIMANT said it was not willing to take over any further risks associated with changes in customs regulation or import restrictions,

explicitly indicating that unforeseeable additional health and safety requirements would increase the cost by up to 40% [*CLAIMANT's Exhibit C 4, p. 12*]. However, the Parties finalized the price by increasing approximately 0.5% of the original price proposed by CLAIMANT [*CLAIMANT's Exhibit C 5, p. 13, Clause 2*]. In this scenario, a reasonable person would not understand that CLAIMANT bore the risk associated with changes in customs regulation or import restrictions, because it would destroy the commercial basis of the Sales Agreement. Thus, RESPONDENT is responsible for the change in tariff and shall pay US$ 1,250,000 or more to CLAIMANT.

II. EVEN IF CLAIMANT DOES NOT HAVE A RIGHT TO REPAYMENT UNDER THE CLAUSE 12 OF THE SALES AGREEMENT, CLAIMANT IS ENTITLED TO REPAYMENT OF US$ 1,250,000 UNDER THE CISG.

105 The Tribunal should adapt the Sales Agreement to require RESPONDENT to repay US$ 1,250,000 to CLAIMANT. This is because there was no derogation from the application of Art. 79 CISG and thus it still applies **(A)**, and the government of Equatoriana's 30% tariff presented an impediment to CLAIMANT's performance under Art. 79 **(B)**. Here, because Art. 79 does not instruct how to remedy impediment such as this, under Art. 7 CISG the tribunal should look to Art. 6.2.3 UNIDROIT Principles to find that adaptation of the Sales Agreement to provide for repayment of US$ 1,250,000 is necessary to re-balance the equilibrium of the Sales Agreement **(C)**.

A. The inclusion of the force majeure and hardship clauses was not a derogation under Art. 6 CISG, and thus Art. 79 CISG still applies to the Sales Agreement.

106 Art. 79(1) CISG provides: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." [CISG, *Art. 79(1)*]. Art. 6 CISG provides that "[t]he parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions." [*CISG, Art. 6*]. This provision is intended to preserve parties' freedom of contract, and to shape their rights and obligations under the contract to best serve their contractual relationship. [*Schlechtriem/Schwenzer Art. 6 §§10, 24*]. Derogations are governed only by the rules of the CISG, specifically by Art. 29(1), which states, "[a] contract may be modified or terminated by the mere agreement of the parties" [*CISG, Art. 29(1); Schlechtriem/Schwenzer Art. 6 §24*].

107 The agreement to derogate can be made either explicitly or implicitly [*Schlechtriem/Schwenzer Art. 6 §§2, 3*]. However, generally a finding of implicit derogation is to be disfavored; where

the comparable provision in the Uniform Law on the International Sale of Goods, the predecessor to the CISG, explicitly provided for findings of implicit derogations, this language was removed from the CISG for fear that such findings would become routine [*Dokter, p. 433; Schlechtriem/Schwenzer Art. 6 §3*].

108 In this case, there is no explicit derogation, as nothing in the Sales Agreement explicitly excludes the application of the CISG. Conversely, Clause 14 of the Sales Agreement explicitly states "This Sales Agreement shall be governed by the law of Mediterraneo, including the [CISG]" [*CLAIMANT's Exhibit C 5, p. 14, Clause 14*]. Given the preference for explicit derogations, this explicit agreement that the CISG *does* govern the contract should override any assumption of implicit agreement that portions of the CISG do not apply.

109 Furthermore, this Tribunal should not find that the inclusion of Clause 12, the combined force majeure and hardship clause, in the Sales Agreement is an implicit derogation under Art. 6 CISG because Clause 12 does not cover the full scope of impediments covered under Art. 79. RESPONDENT argues that the hardship clause is too "narrowly worded" to apply to the present impediment [*Answer to the Notice of Arbitration, §19*]. Put another way, RESPONDENT argues that where Art. 79 CISG's provisions apply to a certain set of impediments, Clause 12 of the Sales Agreement only applies to a certain sub-set of those impediments. This is contradictory to RESPONDENT's argument in favor of finding derogation, specifically, the argument that the Parties have "provided for a special regulation of the problem of changed circumstances" [*Answer to the Notice of Arbitration, §20*]. If Clause 12 does not cover the entire scope of impediments outlined under Art. 79 CISG, then CLAIMANT could not have impliedly agreed to derogate from Art. 79's application to the remaining types of impediments to covered under Art. 79.

110 Because there was explicit agreement that the CISG applies to the Sales Agreement without making any explicit exceptions, and because a finding that Clause 12 does not apply to the impediment experienced here, the Tribunal should find that the Parties did not implicitly agree to derogate under Art. 6, and that Art. 79 CISG still applies to the Sales Agreement.

B. Equatoriana's 30% tariff on CLAIMANT's horse semen was an impediment under Art. 79 CISG, and thus CLAIMANT's performance of delivering the final portion of goods should have been exempted.

111 This Tribunal should find that, had CLAIMANT not performed, CLAIMANT would have been exempt from liability under Art. 79 CISG by not shipping the goods subject to the tariff because the tariff presented an economic impediment beyond CLAIMANT's control **(1)**, which

CLAIMANT could not reasonably have been expected to take into account at the time the Sales Agreement was signed **(2)**, and CLAIMANT could not possibly have avoided or overcome it **(3)**.

(1) The tariff presented an impediment beyond CLAIMANT'S control.

112 This Tribunal should find the Equatorianian government's imposition of the 30% tariff on CLAIMANT's goods was an impediment because it was substantial enough to exceed the limit of sacrifice, making it unreasonable for CLAIMANT to perform **(a)** and the tariff was entirely outside of CLAIMANT's sphere of control **(b)**.

(a) The Equatorianian tariff exceeded the limit of sacrifice, making it unreasonable for CLAIMANT to perform.

113 This Tribunal should consider the relatively short time frame of the contract, the low margin of profit CLAIMANT expected to receive, the non-speculative nature of the goods in question, and the threat the tariff poses to CLAIMANT's financial viability to determine that the tariff exceeded the reasonable limit of sacrifice, and was thus an impediment under Art. 79 CISG.

114 An impediment need not be something that makes performance of a contractual obligation literally impossible [*Honnold §423; CISG-AC 7 Opinion 3.1]*. Scholars of the CISG agree that Art. 79 includes the concept of "economic impediment," referring to an economic change in circumstances of large enough magnitude to cause a seller to incur unreasonable costs in relation to the contract price. [*Schlechtriem/Schwenzer Art. 79 §31; CISG-AC 7 Comment 26; Schlechtriem, pp. 101-102*; *Schlechtriem/Butler §291*].

115 Whether a change in economic circumstances is sufficient to rise to the level of an Art. 79 CISG impediment is determined by analyzing whether the change exceeds the "limit of sacrifice," beyond which it would be unreasonable to require a party to perform [*CISG-AC 7 §38*; *Schlechtriem/Schwenzer §31*]. This "limit of sacrifice" must be analyzed on a case-by-case basis [*Schwenzer, p. 716*]. It may depend on the length of the contract (longer contracts suggest the parties impliedly accepted the risk that market prices may shift over time) [*Brunner, pp. 438-441*]. It may also depend on the typical profit margin in the respective trade sector; profit margins that are higher than the norm weigh against increasing the threshold of the "limit of sacrifice" [*cf. Schwenzer p. 716*]. However, the threshold for finding economic hardship should be lowered where the change threatens the financial viability of a party [*Schwenzer p. 716; cf. Brunner pp. 438-439*].

116 In the *Iron Molybdenum Case*, the tribunal found an increase in costs to the seller of 300% was not an economic impediment because the parties knew they were dealing in an extremely speculative market where such price fluctuations were common [*Iron Molybdenum Case*]. In contrast, in the *Scafom Case*, the court found that just a 70% increase in cost was an

impediment where the contract was for goods (steel pipes) which were not based on as much of a speculative value and for which a 70% change in the cost of materials (the underlying steel) was an unusually large change [*Scafom Case*].

117 Here, CLAIMANT may have only suffered a 30% increase in cost, but this increase is quite large considering there was no speculative change based on market fluctuations to be expected. Horse semen is neither a speculative good like iron molybdenum, nor is it fungible and subject to short-term market fluctuations like steel. CLAIMANT's profit margin on frozen semen was only 5%, suggesting it did not intend to take on any substantial speculative market risk [*Notice of Arbitration, Clause 18*]. Further, the calculation of this profit margin suggests that typically CLAIMANT's operations are exposed to very little speculative market risk [*Procedural Order No. 2*]. Under these conditions, a price increase of 30% is extremely high in comparison to a transaction such as the *Scafom Case*, and thus similarly constitutes an impediment.

118 Furthermore, this Tribunal should consider not just the magnitude of the change, but its nominal value. In the *Scafom Case*, the 70% increase in the price of steel resulted in an unforeseeable cost to the seller of € 450,000 or about US$ 508,000 using the average exchange rate for 2017 [*Scafom Case*]. Here, while the tariff only increased costs to CLAIMANT by 30%, as a result CLAIMANT suffered an increase in price of US$ 1,500,000, nearly triple the value from the *Scafom Case*. This extremely high nominal value weighs further in favor of finding the tariff to be an impediment.

119 Finally, this Tribunal should find the tariff was an impediment because the additional cost of US$ 1,500,000 has endangered CLAIMANT's financial viability. CLAIMANT has struggled financially in recent years and was only able to stay in business through extensive restructuring and considerable cuts to its work force [*CLAIMANT's Exhibit C 8, pp. 17-18*]. The continuance of its credit lines was conditioned on its ability to post profits in both 2017 and 2018, something which it would be able to do but for the imposition of this US$ 1,500,000 cost [*Procedural Order No. 2, p. 59, §29*]. At a minimum, this cost will force CLAIMANT to divest significant parts of its business just to stay alive [*Procedural Order No. 2, p. 59, §29*]. If unsuccessful in its divestiture, CLAIMANT will likely lose access to its current credit lines, which will seriously endanger its financial viability [*Procedural Order No. 2, p. 59, §29*].

(b) The tariff was an impediment under Art. 79 CISG because it was entirely outside of CLAIMANT's sphere of control.

120 The Tribunal should find that the tariff was outside of CLAIMANT's sphere of control because it is unrelated to the CLAIMANT's own business operations.

121 A party's inherent "sphere of control" is limited only to those directly related to its own business operations [*cf. Schlechtriem/Schwenzer Art. 79 §12*]. Thus, internal factors such as the party's own financial capacity, personal circumstances, procurement risk, utility risk, and liability for personnel, cannot form the basis for an impediment [*Schlechtriem/Schwenzer Art. 79 §12*].

122 In the *Air Conditioners Case*, a French manufacturer of air-conditioners for automobiles contracted to purchase 20,000 crankcases over 8 years from a Swiss producer for eventual incorporation into the French manufacturer's client's automobiles [*Air Conditioners Case*]. After delivering 8,000 of crankcases under the contract, the manufacturer's client changed its terms of purchase, such that it would only pay 50% of the previous price for the air conditioners (a price lower than the cost to produce the air conditioners) [*Id.*]. Even though this change was beyond the manufacturer's control in the sense that it could not force its client to purchase the air conditioners at a certain price, the court found that the manufacturer's sales channels were within its sphere of control; maintenance of sales channels is inherent to a party's business operations, and thus it was incumbent upon the manufacturer to ensure it had sufficient outlets and sales contracts to justify the contracts it entered into itself [*Air Conditioners Case*]. Thus, the court found this was not an impediment beyond the manufacturer's control under Art. 79 [*Air Conditioners Case*].

123 In contrast to the *Air Conditioners Case*, the Equatorianian tariff is outside of CLAIMANT's ability to control, as the tariffs are entirely unrelated to a party's business operations. Tariffs are a type of state intervention imposed by governments according to policies over which CLAIMANT cannot be reasonably expected to be able to wield any kind of control [*Schlechtriem/Schwenzer Art. 79 §18*].

124 In conclusion, because the Equitorianan tariff both exceeded the reasonable "limit of sacrifice" and was beyond CLAIMANT's "sphere of control," the Tribunal should find that it was an impediment beyond CLAIMANT's control.

(2) At the time the Sales Agreement was signed, CLAIMANT could not reasonably have been expected to take Equatoriana's future application of a tariff on its frozen horse semen into account.

125 Art. 79 CISG does not require an impediment to be "unforeseeable," but rather that the impediment be of such a nature that a party "could not reasonably have been expected to have taken [it] into account" [*CISG, Art. 79(1)*]. Thus, the Tribunal must determine whether "under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices, [CLAIMANT] *ought to have foreseen* the impediment's initial or subsequent existence" [*Schlechtriem/Schwenzer Art. 79 §14(b) (emphasis added)*].

126 It is unreasonable to require contracting parties predict state interventions where such intervention has never, or only very rarely, occurred before [*Caviar Case*; *Schlechtriem/Schwenzer Art. 79 §14(b)*]. In the *Caviar Case*, the parties concluded a contract for the purchase of caviar to be sent from Hungary to the former Yugoslavia on 21 May 1992 [*Caviar Case*]. The seller shipped the caviar on 28 May, and it cleared customs on 29 May [*Caviar Case*]. On 30 May, before the seller could make payment, the United Nations Security Council imposed Resolution 757, restricting Yugoslavian businesses' access to international financial payment mechanisms [*Caviar Case; UNSC Res. 757*]. Here, despite the fact that tensions had been rising in the region, the court found that the UN embargo was an impediment because it was not in place at the time of contract conclusion, making it unreasonable for the Parties to have foreseen it would occur before the buyer was required to perform [*Caviar Case*; *Schlechtriem/Schwenzer Art. 79 §14(b)*].

127 In contrast, in the *Russian Export License Case*, a buyer was unable to pay for equipment it contracted from a German company because the Bank of Russia refused to provide a license required for payments in foreign currency for imported goods [*Russian Export License Case*]. Although this still constituted state intervention, the tribunal found no impediment because the regulations requiring the license existed before the contract was completed [*Russian Export License Case*]. The Tribunal held that the buyer ought to have foreseen that to complete the contract it would need a license, the denial of which was a possibility [*Russian Export License Case*].

128 Here, the tariff imposed by Equatoriana is more akin to the type of state intervention in the *Caviar Case* than the *Russian Export License Case*. It is unreasonable to expect that at the time of the conclusion of the Sales Agreement on May 6, 2017, CLAIMANT should have been able to predict that Mediterraneo would impose its 25% tariff on all Equatorianian agricultural products in November of that year and Equatoriana would retaliate in December [*Notice of Arbitration, §§9-10*]. This is especially true given that Mediterraneo had never imposed such a tariff before, and Equatoriana had been a heretofore ardent supporter of free trade and had only directly retaliated to trade restrictions on one occasion in its history [*Procedural Order No. 2, p. 58, §23; CLAIMANT's Exhibit C 6, p. 15*].

129 One might argue that CLAIMANT should have taken the possibility of trade frictions into account when the President of Mediterraneo appointed Ms. Cecil Frankel, a free trade critic who was outspoken that trade protections should be raised for Mediterraneo farmers, as "superminister" for agriculture, trade, and economics on May 5, 2017, one day before the contract was concluded [*Procedural Order No. 2, p. 58, §23*]. Still, it would be unreasonable to expect CLAIMANT to have expected this set of circumstances to have unfolded, particularly

given that horse semen is typically not categorized as an agricultural good [*Notice of Arbitration, §11*].

(3) CLAIMANT could not reasonably have been expected to have avoided or overcome Equatoriana's tariff.

130 This Tribunal should find that CLAIMANT could not reasonably have been expected to have avoided or overcome the Equatorianian tariff because CLAIMANT could not have been exempted from the tariff, and because CLAIMANT acted reasonably in expecting that the Equatorianian government's tariff on "agricultural goods" would not apply to CLAIMANT's frozen horse semen.

131 It is not in dispute whether CLAIMANT could have somehow been exempted from or obtained a reduction in the tariff; by its nature, a tariff is indiscriminately imposed on all goods to which it applies [*Procedural Order No. 2, p. 58, §27*].

132 CLAIMANT acted reasonably in expecting that its product, frozen horse semen for breeding racehorses, would not be affected when the Equatorianian tariff on "agricultural goods" was announced on December 19, 2017 [*CLAIMANT's Exhibit C 6, p. 15*]. At no point in its history had Equatoriana ever applied a tariff on imported frozen horse semen [*Procedural Order No. 2, p. 58, §25*]. Thus, CLAIMANT would not have any reason to suspect the status quo would change without some kind of international dispute directly related to the international horse racing industry.

133 Furthermore, CLAIMANT acted reasonably in believing that the government of Equatoriana would not change the status quo of zero tariffs as applied to racehorse semen because it had only just legalized artificial insemination on a temporary basis [*CLAIMANT's Exhibit C 1, p. 9*]. The inception of the Sales Agreement between CLAIMANT and RESPONDENT was based on Equatoriana's temporary lifting of its strict ban on the use of artificial insemination in racehorse breeding [*CLAIMANT's Exhibit C 1, p. 9*]. Thus, it naturally did not cross either CLAIMANT and RESPONDENT's minds that in crafting its "agricultural products" tariff, Equatoriana intended to impede the ability of businesses to engage in artificial insemination by increasing the costs of obtaining such frozen semen in the international market during the short period in which Equatoriana had temporarily made this activity legal [*Procedural Order No. 2, p. 58, §25*].

134 Finally, racehorse breeding is more associated with the entertainment industry than the food and materials production industries which come to mind when one thinks of "agricultural products." Here, CLAIMANT reasonably relied on its past experience in the racehorse breeding industry to understand that racehorse breeding is usually categorized differently under tariff

schedules than pigs, sheep, and cattle, all of which are considered "agricultural products" [*Notice of Arbitration, §11*].

135 For these reasons, CLAIMANT could not have reasonably been expected to avoid or overcome Equatoriana's tariff.

C. Under Art. 7 CISG, to resolve the gap in the CISG regarding how to remedy an impediment of this nature, the Tribunal should look to Art. 6.2.3 of the UNIDROIT Principles to adapt the Sales Agreement to restore equilibrium.

136 Art. 79's text only exempts a party from liability for a failure to perform an obligation [CISG, *Art. 79(1)*]. Here, CLAIMANT did not fail to perform its obligations, but rather followed through on performing in the interest of preserving the contract. However, this good faith adherence to preserve the contract should not be held against CLAIMANT where, as explained above, an impediment existed, and CLAIMANT relied on the information it received from RESPONDENT's employee to trust that a resolution would be negotiated [*CLAIMANT's Exhibit C 8, pp. 17-18*].

137 The lack of appropriate remedy should be considered a gap which the CISG does not cover. Such a gap is properly filled according to Art. 7(2) CISG, which outlines two methods by which gaps in the CISG may be filled. First, to the greatest extent possible, a gap should be "settled in conformity with the general principles on which [the CISG] is based" [CISG, *Art. 7(2)*]. However, if no such principles apply, then the gap should be settled "in conformity with the law applicable by virtue of the rules of private international law" [CISG, *Art. 7(2)*].

(1) Under Art. 7(2) CISG, the Tribunal should look to the UNIDROIT Principles as a general set of principles that can help fill the gap in the CISG to determine that adaptation of the contract is necessary to restore equilibrium between the Parties.

138 The UNIDROIT Principles are a general set of principles that can be used as guidance to fill gaps in the CISG such as the absence of an appropriate remedy. In the *Scafom Case*, the court was faced with a similar situation where a remedy was lacking, and thus looked to UNIDROIT Principles Art. 6.2.2 to require the parties negotiate an outcome in order to resolve the hardship experienced there [*Scafom Case; supra §§115-117*].

139 UNIDROIT Principles Art. 6.2.2 provides that hardship exists where an event occurs which fundamentally alters the equilibrium of the contract, increasing the cost of performance to one of the parties [*UNIDROIT Principles, Art. 6.2.2*]. A finding of hardship also requires that (1) the event occurred after the conclusion of the contact, (2) the event could not have reasonably been taken into account at the conclusion of the contract, (3) the event must be beyond the control of the disadvantaged party, and (4) the risk of the event was not assumed by the

disadvantaged party [*UNIDROIT Principles, Art. 6.2.2*]. Because these elements are substantively the same as those required to find impediment under Art. 79 CISG, the Tribunal should find that the tariffs presented a hardship under the UNIDROIT Principles for the same reasons that they presented an impediment under Art. 79 CISG [*supra §§110-134*].

140 UNIDROIT Principles Art. 6.2.3 entitles a party that has experienced hardship to first request renegotiation of the contract. [*UNIDROIT Principles, Art. 6.2.3(1)*]. Here, CLAIMANT has already done all it could to negotiate a mutually acceptable resolution with RESPONDENT, including meeting with RESPONDENT's CEO on 12 February 2018 [*CLAIMANT's Exhibit C 8, pp. 17-18*]. However, RESPONDENT refused to proactively find such a resolution, and stopped negotiations thereafter [*CLAIMANT's Exhibit C 8, pp. 17-18*].

141 Where negotiations fail, the UNIDROIT Principles direct parties to resort to arbitration and if the arbitration panel finds hardship "it may, if reasonable . . . adapt the contract with a view to restoring its equilibrium" [*UNIDROIT Principles, Art. 6.2.3(4)*]. Here, an adaptation requiring repayment of US$ 1,250,000 is the fairest way to restore equilibrium. By adapting in this manner, CLAIMANT would make 0% profit from the transaction, but would also no longer be at risk of losing its credit lines [*Procedural Order No. 2, p. 59, §31*]. Also, the imposition of US$ 1,250,000 on RESPONDENT would not necessarily mean RESPONDENT would make a loss on the transaction. The value of the transaction from RESPONDENT's point of view is dependent on how many doses of Nijinsky III's semen will produce offspring, and the success those offspring achieve in their careers. Furthermore, RESPONDENT will not be financially endangered if it bore the cost of this adaptation [*Procedural Order No. 2, p. 59, §31*].

(2) If the UNIDROIT Principles are not used as a general set of principles to fill this gap in the CISG, then under Art. 7(2), the UNIDROIT Principles still control because an application of the rules of private international law would inevitably lead to application of the UNIDROIT Principles.

142 Where a gap in the CISG cannot be filled by referring to general principles on which it is based, the rules of private international law require the tribunal to determine which country's domestic law controls the contract [CISG, *Art. 7(2)*]. Typically, this procedure requires the Tribunal to analyze which country's domestic law, Equatoriana or Mediterraneo, should control the contract where the CISG does not touch on the issue at hand [*Schlechtriem/Schwenzer Art. 7 §42*].

143 Here, this analysis is unnecessary, because the general contract law of both Equatoriana and Mediterraneo are verbatim adoptions of the UNIDROIT Principles [*Procedural Order No. 1, p. 54, §4*]. Thus, the tribunal need not decide which country's law controls, as either choice

would lead to the same conclusion. The application of the UNIDROIT Principles should lead the Tribunal to adapt the Sales Agreement to balance the equilibrium between the Parties [*supra §§137-140*].

CONCLUSION OF PART 3

144 CLAIMANT is entitled to the payment of US$ 1,250,000 or any amount resulting from an adaption of the price under Clause 12 of the Sales Agreement. The tariff change by the Government of Equatoriana falls within the scope of hardship under Clause 12 of the Sales Agreement. The Parties mutually intended for RESPONDENT to bear the risk of tariff change, and a reasonable person would determine that RESPONDENT bears the risk of tariff change.

145 Under the CISG, CLAIMANT is also entitled to repayment of US$ 1,250,000. Art. 79 CISG applies to the Sales Agreement because there was no implicit agreement to derogate from the Art. 79 provisions. Under Art. 79 CISG, Equatoriana's tariff presented an impediment beyond CLAIMANT's control that CLAIMANT could not have reasonably taken into account at the time the Sales Agreement was concluded, and which CLAIMANT could not have reasonably avoided or overcome. As Art. 79 CISG does not directly provide a remedy for this type of impediment, under Art. 7 CISG the Tribunal should look to Art. 6.2.3 UNIDROIT Principles to find that an adaptation of the Sales Agreement is necessary to restore equilibrium between the Parties, and require that RESPONDENT repay CLAIMANT US$ 1,250,00.

REQUEST FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Tribunal to find that:

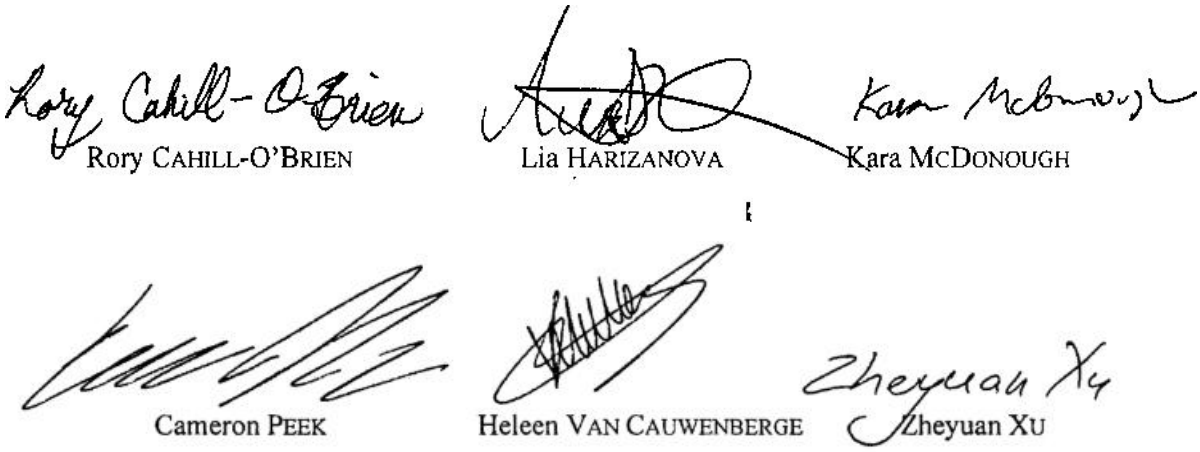
1) The arbitration agreement and its interpretation are governed by the law of Mediterraneo, which results in this Tribunal having the jurisdiction and/or the powers to adapt the contract.
2) CLAIMANT is entitled to submit evidence from the other arbitration proceedings even if the evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system.
3) CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Clause 12 of the Sales Agreement or under the CISG.

CLAIMANT reserves the right to amend its prayer for relief as may be required.

CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Washington, D.C., 6 December 2018,



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