SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH 2019 – 7 APRIL 2019 – HONG KONG

UNIVERSITEIT VAN AMSTERDAM

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	**AGAINST**
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
2 SEABISCUIT DRIVE	RUE FRANKEL 1
OCEANSIDE	CAPITAL CITY
EQUATORIANA	MEDITERRANEO
RESPONDENT	**CLAIMANT**

WESSEL BREUKELAAR – CAROLINE GROEFSEMA – FLORENCE HAVERHALS
FREEK VAN LEEUWEN – STIJN WILBERS

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TABLE OF ABBREVIATIONS

AppGer	Appellationsgericht (Appellate Court Switzerland)
AUS	Australia
BEL	Belgium
BGH	Bundesgerichtshof (Supreme Court Germany)
CA	Court of Appeal
CdA	Corte d'Appello (Appellate Court Italy)
CdC	Cour de Cassation (Supreme Court France)
CE	CLAIMANT's Exhibit
CH	Switzerland
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Arbitration Law of Danubia
DCL	Contract Law of Danubia
DDP	Delivery Duty Paid
ECL	Equatorianian Contract Law
EWCA	Court of Appeals of England and Wales
EWHC	High Court of Justice of England and Wales
FRA	France
GER	Germany
HCA	High Court of Australia
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce

ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
IN	India
ITA	Italy
LbF	Letter by Julia Clara Fasttrack from 3 October 2018
LbHKIAC	Letter by the HKIAC from 31 July 2018
LbL	Letter by Joseph Langweiler from 2 October 2018
MCL	Contract Law of Mediterraneo
No.	Number
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OLG	Oberlandesgericht (Higher Regional Court Germany)
p./pp.	page/pages
par.	paragraph
PIA	Partial Interim Award
PO	Procedural Order
RE	RESPONDENT's Exhibit
RNoA	Response to Notice of Arbitration
RUS	The Russian Federation
SC	Supreme Court of India
SGCA	Court of Appeal of The Republic of Singapore
SGHC	High Court of The Republic of Singapore
SWE	Sweden
TC	Tribunale Civile (Civil Court Italy)

TdC	Tribunal de Commerce (Commercial Court Belgium)
UK	The United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	International Institute for the Unification of Private Law Principles of International Commercial Contracts (2010)
USA	The United States of America
v.	Versus
YCA	Yearbook Commercial Arbitration

LIST OF DEFINITIONS

Arbitration Agreement	Clause 15 of the sales agreement on the sale of frozen horse semen between CLAIMANT and RESPONDENT
Black Beauty	Black Beauty Equestrian
Claim	The claim of USD 1,250,000
CLAIMANT	Phar Lap Allevamento
Contract	The sales agreement on the sale of frozen horse semen between CLAIMANT and RESPONDENT
Evidence	Evidence CLAIMANT aims to introduce in the current proceedings from the other proceedings
Model Law	UNCITRAL Model Law
Parties	CLAIMANT and RESPONDENT
Phar Lap	Phar Lap Allevamento
RESPONDENT	Black Beauty Equestrian
Tariff	Retaliation tariff imposed by the Government of Equatoriana on 19 December 2017
Tribunal	The arbitral tribunal in the present proceedings

LEGAL SOURCES AND MATERIALS

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CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules (2018)
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)
INCOTERMS	International Chamber of Commerce International Commercial Terms (2010)
New York Convention	United Nations Convention on contracts for the International Sale of Goods (1958)
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with amendments (2006)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules with new Article 1, paragraph 4 (2013)
UNIDROIT Principles	International Institute for the Unification of Private Law Principles of International Commercial Contracts (2010)

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STATEMENT OF FACTS

The parties to this arbitration are Black Beauty Equestrian ("**RESPONDENT**") and Phar Lap Allevamento ("**CLAIMANT**"; collectively "**Parties**"). RESPONDENT, famously known for its broodmare lines, established a racehorse stable three years ago. CLAIMANT is a renown Mediterranean stud farm.

Parties initiated negotiations on the sale of frozen horse semen of Nijinsky III on **21 March 2017**. CLAIMANT offered to sell 100 doses of the frozen horse semen on **24 March 2017**. On **28 March 2017**, RESPONDENT requested that the frozen horse semen would be delivered Delivery Duty Paid ("**DDP**"). In its reply on **31 March 2017**, CLAIMANT offered DDP delivery under the condition that all risks associated with health and safety requirements remained with RESPONDENT and that the initial sales price, which was already much higher than RESPONDENT expected, would be increased by USD 1,000 per dose. CLAIMANT further suggested to submit disputes arising out of the Contract to arbitration in Danubia. On **5 May 2017,** a new protectionist Mediterranean Minister for Agriculture was appointed. On **6 May 2017**, Parties concluded the sales agreement for of 100 doses of frozen horse semen (the "**Contract**").

On **15 November 2017**, a Mediterranean tariff of 25 percent on agricultural products from Equatoriana came into effect. On **19 December 2017** the Equatorianian government announced a tariff of 30 percent as a retaliatory measure on agricultural products from Mediterraneo ("**Tariff**"), including horse semen. On **20 January 2018**, CLAIMANT noticed that the Tariff applied to the shipment. CLAIMANT called RESPONDENT to discuss the matter who should be responsible for the costs of the Tariff. However, no agreement was reached. CLAIMANT paid the Tariff on **21 January 2018.** Subsequently, CLAIMANT performed by sending the final shipment on **23 January 2018**. Despite the fact that the contractual obligations were fulfilled, CLAIMANT initiated arbitral proceedings by sending its Notice of Arbitration ("**NoA**") on **31 July 2018**, in which it requested an adaptation of the Contract through an additional payment in remuneration for the Tariff (the "**Claim**"). RESPONDENT submitted its Response to Notice of Arbitration ("**RNoA**") on **24 August 2018**. On **2 October 2018**, CLAIMANT announced that it wanted to submit a Partial Interim Award ("**PIA**"), which involved RESPONDENT and a third party. CLAIMANT bought the PIA from a company with a doubtful reputation. On **3 October 2018**, RESPONDENT objected to the submission of the PIA.

SUMMARY OF ARGUMENTS

The Contract Parties concluded enabled RESPONDENT to build its race horse breeding programme and provided CLAIMANT an excellent opportunity to make a large profit. The Contract promised the start of a fruitful relationship between Countries. While RESPONDENT trusted that CLAIMANT would respect Parties' agreement, CLAIMANT now tries to burden RESPONDENT with the risks concerning delivery such as import tariffs CLAIMANT had agreed to bear.

Parties chose DDP as the delivery term. CLAIMANT's attempt to shift the costs of the Tariff forms a neglect of its contractual obligations. Parties made an equitable division of the risks. CLAIMANT would bear all risks associated with the delivery, thus the Tariff, and RESPONDENT would bear the fertility risk, risks regarding health and safety requirements and similar risks. CLAIMANT is an experienced party and in fact has particular experience with the risks it assumed when it accepted DDP. It knowingly assumed these risks in return for the benefits of the profit it expected to make. RESPONDENT on the other hand, bore the critical risk of the use of the semen.

While it is unfortunate that CLAIMANT faces financial difficulties, these difficulties do not provide any ground for RESPONDENT to bear the Tariff. There is no ground for the Claim in either the Contract (**ISSUE 3**), the United Nations Convention on the International Sale of Goods ("**CISG**") or the UNIDROIT Principles of International Commercial Contracts ("**UPICC**") (**ISSUE 4**).

Even CLAIMANT's request that the Tribunal adapts the Contract forms another contravention of the agreement between Parties. Parties have specifically agreed not to adapt the Contract. The Tribunal lacks both the jurisdiction to hear the Claim and the procedural power to adapt the Contract (**ISSUE 1**). Furthermore, the PIA that CLAIMANT intends to submit as alleged evidence does not provide any support to the Claim and has even been obtained illegally. Therefore, the Tribunal cannot admit the PIA on the basis of the HKIAC Rules in the current proceedings (**ISSUE 2**).

ISSUE I: THE TRIBUNAL NEITHER HAS JURISDICTION TO HEAR THE CLAIM NOR THE POWER TO ADAPT THE CONTRACT

1. Parties agreed to submit certain disputes to arbitration by including an arbitration agreement in the Contract ("**Arbitration Agreement**") [*CE5, p. 14, Clause 15*]. Furthermore, Parties agreed to submit arbitral proceedings to the HKIAC Administered Rules 2018 ("**HKIAC Rules**") [*PO1, p. 52*]. Parties chose Danubia as the seat of the arbitration. Therefore, the *lex arbitri* is the Danubian Arbitration Law ("**DAL**"), which is an adoption of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 ("**Model Law**") [*PO1, p. 53, §4*].

2. Parties are in dispute as to whether the Tribunal has jurisdiction to hear the Claim and the power to adapt the Contract. CLAIMANT incorrectly asserts that an interpretation based on the Mediterranean Contract Law ("**MCL**") should be applied and that such interpretation leads to the conclusion that the Tribunal has jurisdiction [*MfC, p. 1, §2*]. Contrary to CLAIMANT's assertions, the Danubian Contract Law ("**DCL**") is the law applicable to the Arbitration Agreement. Parties are only bound to arbitrate those issues that they have consented to arbitrate by clear language [*Born, p. 1339*]. Although RESPONDENT is fully committed to resolve a wide array of disputes through arbitration, adaptation of the Contract falls outside the scope of the Arbitration Agreement. Interpretation of the Arbitration Agreement in accordance with the DCL leads to the conclusion that the Tribunal does not have jurisdiction to hear the Claim. Furthermore, an arbitration agreement in conjunction with the *lex arbitri* and the applicable arbitration rules govern the procedural powers of a tribunal [*Blackaby et al., p. 18*]. Based on the applicable arbitration rules and the *lex arbitri*, the Tribunal does not have the power to adapt the Contract.

3. The Tribunal does not have jurisdiction to hear the Claim (**1.1**). Even if the Tribunal has jurisdiction to hear the Claim, it lacks the procedural power to adapt the Contract (**1.2**). In any case, the Tribunal lacks the power to decide *ex aequo et bono* or as *amiable compositeur* (**1.3**).

1.1 The Tribunal does not have jurisdiction to hear the Claim

4. In order to hear the Claim, the Tribunal must have jurisdiction. A tribunal has jurisdiction if the dispute a party wishes to arbitrate falls within the scope of an arbitration agreement [*Born, p. 1346*]. CLAIMANT incorrectly asserts that the Tribunal has jurisdiction to hear

the claim as it alleges that a presumption that "*one-stop dispute resolution should be presumptively preferred by any sound businessman*" should lead to a broad interpretation of the Arbitration Agreement [*MfC, p. §32*]. Contrary to CLAIMANT's assertions, the Tribunal does not have jurisdiction to hear the Claim. As a preliminary point, the DCL is the law applicable to the Arbitration Agreement (**1.1.1**). A narrow interpretation of the Arbitration Agreement in accordance with the DCL leads to the conclusion that the Tribunal does not have jurisdiction (**1.1.2**). Even if the MCL would be the law applicable to the Arbitration Agreement, the Tribunal still does not have jurisdiction (**1.1.3**).

1.1.1 The DCL is applicable to the Arbitration Agreement

5. Neither the Arbitration Agreement nor the Contract contains any express choice of law applicable to the Arbitration Agreement [*CE5, pp. 13-14*]. One of the optional provisions of the HKIAC Model Clause, specifies the law applicable to an arbitration agreement. Parties did not include this provision in the Arbitration Agreement [*CE5, p. 14, Clause 15*]. Furthermore, the HKIAC Rules do not contain a choice-of-law rule for the law applicable to an arbitration agreement. However, a choice-of-law rule does follow from the DAL. As Parties agreed to arbitrate in Danubia, this rule must be used to determine the law applicable to the Arbitration Agreement.

6. The choice-of-law rule that follows from the Model Law, and thus the DAL, is that the law of the seat is applicable to the arbitration agreement if no express or implied choice of law was made [*Born, p. 526*]. This rule follows from the relevant articles on setting-aside and enforcement proceedings of the DAL. Article 34(2)(a)(i) DAL prescribes that "*an arbitral award may be set aside (...) if (…) the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State*". Similarly, Article 36(1)(a)(i) DAL provides that recognition or enforcement of an award may be refused, if "*the said agreement is not valid under the law to which the parties have subjected it or (…) under the law of the country where the award was made*". These articles regarding setting aside and enforcement proceedings are equally relevant for the interpretation of arbitration agreements. In the context of such proceedings, the rule concerning the law applicable to the arbitration agreement applies for the issue of validity of the arbitration agreement. It would be impractical to use different choice-of-law rules for interpretation and validity as this could lead to a different applicable law for the two procedural issues. Therefore, the choice-of-law rule for validity should also be applied to the interpretation of arbitration agreements [*Born, pp. 473*, *635*].

7. The choice-of-law rule that follows from the DAL is supported by the *travaux préparatoires* of the Model Law. A court in a setting-aside or enforcement procedure should decide on the "*validity of the arbitration agreement (…) according to the law determined pursuant to the rules contained in Article 34(2)(a)(i)*" [*UNCITRAL Model Law Digest, Art. 16, p. 78; A/CN.9-264, p. 38*]. Notably, the *travaux préparatoires* of the Model Law prescribe that a tribunal should use the same choice-of-law rule for the determination of the law applicable to the arbitration agreement for its decision on jurisdiction [*Binder, p. 145*].

8. Hence, it follows from the choice-of-law rule of the DAL that the Tribunal should first determine whether Parties explicitly chose the law applicable to the Arbitration Agreement. CLAIMANT asserts that "*Parties **explicitly** chose the law of Mediterraneo, including CISG to govern the arbitration agreement*" (emphasis added) [*MfC, p. 1, §5*]. CLAIMANT reaches this conclusion based on an interpretation of Clause 14 in conjunction with Article 8 CISG [*MfC, p. 2, §6*]. Contrary to CLAIMANT's assertion, there could in the present case only be such an express choice when "*the arbitration provisions (…) include choice-of-law clauses that are drafted to apply specifically to the arbitration agreement.*"[*Born, p. 491*]. CLAIMANT's reasoning that an express choice can be established through interpretation of the agreement is thus not possible. In the current proceedings Parties have not explicitly chosen the law applicable to the Arbitration Agreement. On the contrary, the Tribunal should find that the DCL is applicable to the Arbitration Agreement based on Parties' implied choice for the law of the seat that follows from their selection of Danubia as a neutral venue (**1.1.1.1**). If the Tribunal would find that Parties did not impliedly select the DCL as the law applicable to the Arbitration Agreement, the DCL applies to the Arbitration Agreement pursuant to the default position as prescribed by the DAL (**1.1.1.2**).

1.1.1.1 Parties made an implied choice for the DCL through their selection of Danubia as a neutral venue

9. Parties impliedly chose the DCL as the law applicable to the Arbitration Agreement through their selection of Danubia as a neutral venue for the arbitration. The drafting history of the Contract demonstrates Parties' implied choice for the DCL. RESPONDENT objected to the simultaneous applicability of Mediterranean law and the jurisdiction of Mediterranean courts [*CE3, p. 11*]. CLAIMANT suggested arbitration as an alternative to court proceedings [*CE4, p. 12*]. RESPONDENT agreed to arbitration and stated its wish that the Arbitration Agreement would be governed by the law of the seat and not the law of the Contract. Accordingly, RESPONDENT suggested that the

agreement "*provides for arbitration in Equatoriana and also submits the arbitration clause to the law of Equatoriana*" [*RE1, p. 33*]. CLAIMANT objected to this draft agreement as RESPONDENT's home country Equatoriana would be the seat of the arbitration. Consequently, CLAIMANT suggested Danubia as a neutral seat of the arbitration [*RE2, p. 34*]. CLAIMANT only proposed an "*amendment as to the* ***place*** *of arbitration*" (emphasis added) [*RE2, p. 34*]. Thus, CLAIMANT tacitly accepted that the law of the seat and not the law of the Contract would be applicable to the Arbitration Agreement.

10. Moreover, Parties' choice for Danubia demonstrates a desire for neutrality in the resolution of their disputes. This view is confirmed by the High Court of Singapore, which is a Model Law jurisdiction just like Danubia. The court reached the conclusion that "*when parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore*" [*SGHC (SG), 19 June 2014*]. Such a choice for a neutral venue comes with an implicit selection of the law of this neutral forum as the law applicable to the arbitration agreement [*SGHC (SG), 19 June 2014*]. In general, the court stated it would be rare for the law applicable to the arbitration agreement to be different from the law of the seat as "*the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace parties' intention to have the law of the seat be the proper law of the arbitration agreement*" [*SGHC (SG), 19 June 2014, §14*]. In the current proceedings, Parties' choice for Danubia as a neutral venue can be seen as an implied choice for the DCL as the law applicable to the Arbitration Agreement.

11. CLAIMANT alleges that the separability doctrine "*does not address choice-of-law issues*" [*MfC, p. 6, §24*] and that the separability doctrine should solely be applied when "*the general choice-of-law clause would invalidate the arbitration agreement.*" [*MfC, p. 7, §27*]. The separability doctrine stipulates that an arbitration agreement forms a separate and distinct agreement, which is contained in a larger contract [*Born, p. 475*]. This is also laid down in Article 16(1) DAL. This principle, represented by the separability doctrine, is also relevant for the determination of the law applicable to the arbitration agreement, as it must be determined separately from the law applicable to the main contract [*Born, p. 475; Dicey, p. 832*]. Contrary to CLAIMANT's assertions, it follows that the separability doctrine is relevant for the case at hand.

12. Moreover, CLAIMANT incorrectly asserts that the choice for the law governing the Contract in Clause 14 is either an express or implied choice for the MCL as the law applicable to the arbitration agreement [*MfC, p. 5, §22*]. However, the choice of law for the main contract "*may not be held to apply to the arbitration agreement where there are* […] *contrary*

indications in favour of the law of the seat" [*Dicey, p. 836*]. In the current proceedings, such indications in favour of the law of the seat are present. As established, RESPONDENT wanted that the Arbitration Agreement would be governed by the law of the seat of arbitration [*RE1, p. 33*]. CLAIMANT did not object to this and only suggested a different seat of arbitration [*RE2, p. 33*]. The choice for the seat is such a contrary indication, "*as […] the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country will apply*" [*EWCA (EW), 16 May 2012*; *EWHC (EW), 28 July 1999*] Thus, it follows that the choice for the MCL as the law applicable to the main Contract is not an implied choice for its applicability to the Arbitration Agreement.

13. Furthermore, CLAIMANT incorrectly asserts that the silence on the applicable law in the arbitration clause is an implied choice that "*suggests the application of the law of Mediterraneo*" [*MfC, p. 4, §16*]. As previously established, one of the optional provisions of the HKIAC Model Clause refers to the law applicable to the arbitration agreement [*HKIAC Model Clause*]. However, a misunderstanding following the car accident of the negotiators is the sole reason that no express reference regarding the applicable law is made in the Arbitration Agreement [*RE3, p. 35*]. Mr Antley had left a note, which stated that in the Arbitration Agreement the neutral venue and the law applicable had to be clarified [*RE3, p. 35*]. Had Mr Krone properly understood this note, "*he would definitively have included an express reference to the law of Danubia into the arbitration agreement*" [*RE3, p. 35*]. The fact that no express reference regarding the law applicable to the Arbitration Agreement was included was thus merely caused by a misunderstanding following the car accident. In any case, the lack of an express reference is not an implied choice for the applicability of the MCL to the Arbitration Agreement.

1.1.1.2 If the Tribunal finds that no choice was made regarding the law applicable to the Arbitration Agreement, the DCL applies pursuant to the default rule from the DAL

14. If the Tribunal concludes that no implicit or explicit choice regarding the law applicable to the Arbitration Agreement was made, it should find that the default position of the law of the seat applies to the Arbitration Agreement. The default position of the law of the seat follows from both the DAL and the NYC. Article 34 and 36 DAL both state the same requirement as to the "(…) *law to which the parties [subjected] it or, failing any indication thereon, under the law of this State*" (**par. 6**). This means that the DCL is the law applicable to the Arbitration Agreement. The NYC further supports that the law of the seat is the default position in the absence of any indicators regarding the applicable law. It is generally held

that Article V(1)(a) NYC provides a choice-of-law rule similar to the DAL, stating that the law of the seat is the law applicable to the arbitration agreement if no choice was made [*Born, p. 478; Dicey, p. 835; Wilske/Fox in: Wolff et al., p. 275; Lew et al., pp 121-123*]. As the text of Articles 34 and 36 DAL parallels Article V(1)(a) NYC "*the same analysis that applies under Articles II and V of the Convention (…) applies equally under the Model Law*" [*Born, p. 527; Lew/et al., p. 121*]. The choice-of-law rule that can be derived from the NYC "*has been applied in numerous international arbitral awards, is favored by international arbitral doctrine and has been accepted by domestic courts*" [*Berger II, p. 316; Born, p. 494*; *CdA Genoa (IT) 3 February 1990; TdC Brussels (BEL) 20 September 1999*].

15. CLAIMANT's position as to which law applies when no express or implied choice of law was made, is founded on an incorrect legal basis. CLAIMANT states that "*the applicable law for the arbitration agreement shall be examined by a three-step test*" as developed in *Sulamérica*. The *Sulamérica* method is not relevant because it concerns the English Arbitration Act 1996 and not the DAL. Contrary to CLAIMANT's assertions [*MfC, p. 6*], application of this method would however lead to the conclusion that the DCL is the law applicable to the Arbitration Agreement.

16. The *Sulamérica* method suggests that, if Parties made no express choice, the Tribunal should determine whether Parties made an implied choice of law to be applicable to the Arbitration Agreement. CLAIMANT asserts that Clause 14 constitutes an implied choice for the MCL as the law applicable to the Arbitration Agreement. However, it follows from the drafting history of the Contract that if Parties made an implied choice, it is for the applicability of the DCL (**1.1.1.1**). If the Tribunal finds that no implied choice was made, the *Sulamérica* method suggests that the law with the closest and most real connection to the Arbitration Agreement should be applied. A number of jurisdictions apply some variation of this "*most significant relation*" or "*closest connection*" standard in the selection of the law applicable to the arbitration agreement [*Born, p. 506*]. The system of law with the closest and most real connection is the law of the country of the seat, as the seat is the place where the arbitration is held and therefore exercises the supervisory jurisdiction necessary to ensure that the procedure is effective [*EWHC (EW), 26 January 2012; ; EWHC (EW), 5 December 2007; SC (IN), 20 April 2009*]. The DCL has the closest connection with the Arbitration Agreement as Parties chose Danubia as the seat of arbitration.

17. Thus, if the Tribunal would find that there are no indications pointing towards a choice, it should find that the DCL is the law applicable to the Arbitration Agreement on the

basis of the default rule that follows from the DAL. Alternatively, application of the "*closest connection*"-standard will also lead to the applicability of the DCL.

1.1.2 A narrow interpretation of the Arbitration Agreement pursuant to the DCL leads to the conclusion that the Tribunal does not have jurisdiction to hear the Claim

18. Interpretation of the Arbitration Agreement in accordance with the DCL leads to the conclusion that the Tribunal does not have jurisdiction to hear the Claim. Even CLAIMANT agrees that the applicability of the DCL and the four corners rule contained therein would create "*a high likelihood that that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal*" [*PO1, p. 52*]. The relevant part of the Arbitration Agreements reads: "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration* […]." [*CE5, p. 14, Clause 15*].

19. Article 4.3 DCL requires that agreements are interpreted in accordance with the four corners rule. The four corners rule largely has the same effect as a merger clause under Article 2.1.17 UPICC [*PO2, p. 61, §45*], although no extraneous evidence may be used for the interpretation of contracts [*PO1, p. 52*]. It follows that the interpretation should be based solely on the wording of the Arbitration Agreement rather than on any prior statements. Contrary to CLAIMANT's assertions [*MfC, p. 9, §41*], the statement of Mr Antley can thus not be used for the interpretation of the Arbitration Agreement.

20. Parties have not agreed to arbitrate any adaptation of the Contract. The Arbitration Agreement includes the general description of "*any dispute arising out of*" the Contract and six specific disputes that may arise out of the Contract, being "*the existence, validity, interpretation, performance, breach or termination* [of the Contract]." [*CE5, p. 14, Clause 15*]. Adaptation of the Contract is not one of the specific disputes. Moreover, adaptation of the Contract is neither encompassed by the general issue which Parties have agreed to arbitrate, which is *any dispute arising out of* the Contract. An arbitration agreement that only refers to disputes *arising out of* a contract and omits a reference to disputes *relating to* a contract, is considered to be narrow and only encompasses the interpretation and performance of a contract [*8th Cir. (USA), 16 June 1999*; *9th Cir. (USA), 19 December 1994*]. Additionally, all specifically named disputes arising out of the Contract require only the adjudication of existing rights by the Tribunal. This supports the view that the wording *arising out of* indeed only refers to the adjudication of existing rights. This stands in contrast with the adaptation of contracts, which is not an adjudication of existing rights but rather

the creation of new rights [*Kröll, p. 10; Beisteiner in: Klausegger/Klein et al., pp. 78, 89*]. It follows that the Tribunal has no jurisdiction to hear the Claim as the wording of the agreement does not encompass a claim for contract adaptation.

21. Any decision to assume jurisdiction to adapt the Contract may lead to the award's unenforceability pursuant to Article V(1)(c) NYC as it would contain "*decisions beyond the scope of the submission to arbitration*". Moreover, it could lead to the setting aside of the award pursuant to Article 34(2)(a)(iii) DAL.

1.1.3 Even if the MCL would apply the Tribunal should find that it does not have jurisdiction to hear the Claim

22. CLAIMANT alleges that the MCL applies to the Arbitration Agreement and that the interpretation of the Arbitration Agreement in accordance with the MCL leads to the conclusion that the Tribunal has jurisdiction to hear the Claim [*MfC, p. 10, §43*]. However, even interpretation in accordance with the MCL would not yield the conclusion that the Tribunal has jurisdiction to hear the Claim.

23. If the MCL were to apply, as CLAIMANT asserts [*MfC, p. 1, §5*], the Arbitration Agreement should be interpreted in accordance with the CISG [*PO1, p. 53, §4*]. Article 8(1) CISG requires that a contract is interpreted in accordance with the intent of parties [*CISG Advisory Op. No. 3, §2.2*]. If the intent of parties cannot be determined, Article 8(2) CISG requires that a contract is interpreted in accordance with the reasonable understanding a third party would have had [*CISG Advisory Op. No. 3, §2.2*]. It follows from Article 8(3) CISG that all relevant circumstances should be considered for the application of Article 8(1) and Article 8(2) CISG [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 153, §21; OLG Dresden (GER), 27 December 1999*]. While the writing of an agreement is not the only relevant factor for its interpretation, it should receive special consideration and priority over other factors under the CISG [*CISG Advisory Op. No. 3*, §2.7; *Schlechtriem in: Schlechtriem/Schwenzer, p. 210, §15; OLG Dresden (GER), 27 December 1999*]. A tribunal should in most cases even give a "*controlling effect to detailed written agreements*." [*Honnold/Flechtner, p. 121, §110*]. This is based on the general presumption of competence of professional parties to lay down their full agreement in a contract [*Berger II, p. 9*].

24. Interpretation of the Arbitration Agreement leads to the conclusion that the Claim falls outside the scope of the agreement and that the Tribunal therefore does not have jurisdiction to hear the claim. The Tribunal should find that Parties did not intend to grant the Tribunal jurisdiction to hear the Claim (**1.1.3.1**). If the Tribunal is unable to establish

the intention of Parties, it should find that a reasonable third person would understand that Parties have not granted the Tribunal jurisdiction to hear the Claim (**1.1.3.2**).

1.1.3.1 Parties did not intend that the Tribunal would have jurisdiction to hear the Claim

25. The Tribunal should find that Parties did not intend that it has jurisdiction to hear the Claim. Article 8(1) CISG requires that a tribunal interprets an agreement in accordance with parties' common intent. CLAIMANT asserts that the witness statement by its own representative Ms Napravnik regarding Mr Antley's alleged statement on contract adaptation demonstrates RESPONDENT's intent to grant the Tribunal jurisdiction [*MfC, p. 9, §41*]. According to Ms Napravnik, Mr Antley stated "*that it should* ***probably*** *be the task of the arbitrators to adapt the contract if the Parties could not agree.*" (emphasis added) [*CE8, p. 17*]. However, this alleged statement by Mr Antley is not sufficiently unequivocal to show RESPONDENT's intent. It merely shows that adaptation formed part of the ongoing discussions between Parties, and as shown by the witness statement of Ms Napravnik [*CE8, p. 17*], Parties never reached any final agreement on the issue. This is underlined by the lack of any reference to contract adaptation in their final Arbitration Agreement [*CE5, p. 14, Clause 15*]. As special consideration and even a controlling effect should be given to the wording of the agreement, the equivocal statement of Mr Antley during the ongoing discussions is outweighed by the lack of any reference to adaptation in the final agreement between parties. Therefore, the Tribunal should find that Parties did not intend that it would have jurisdiction.

1.1.3.2 A reasonable third person would understand that the Tribunal does not have jurisdiction to hear the Claim

26. If a tribunal is not able to establish the subjective intent of parties, Article 8(2) CISG stipulates that it should interpret an agreement in accordance with the understanding a reasonable third person would have had [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 153, §20*]. Pursuant to Article 8(3) CISG, a tribunal should consider all relevant circumstances, but afford particular consideration to the wording of the agreement [*CISG Advisory Op. No. 3*, *§2.7*; *Schlechtriem in: Schlechtriem/Schwenzer, p. 210, §15*]. The Tribunal should conclude that a reasonable third person would understand that the Tribunal does not have jurisdiction to hear the Claim.

27. CLAIMANT states that the HKIAC Model Clause on which Parties have based the Arbitration Agreement applies to all disputes relating to a contract and therefore forms

an indication that the Arbitration Agreement has a broad meaning [*MfC, p. 9, §40*]. However, Parties have specifically narrowed the Arbitration Agreement by removing wording with a broader scope from the HKIAC Model Clause. Firstly, the words "*controversy, difference or claim*" have been deleted. Secondly, the words "*or relating to*" have been deleted – leaving merely "*any disputes arising out of this contract*" to be resolved by the Tribunal [*CE5, p. 14, Clause 15*]. The changes narrow the scope of the Arbitration Agreement and indeed show that Parties did not wish to cover any potential dispute within the scope of the agreement – particularly not disputes concerning contract adaptation.

28. To determine the effect of the changes Parties made to the HKIAC Model Clause, the Tribunal should consider the meaning given in international commercial contracts to this deleted and remaining wording. An arbitration agreement that only refers to disputes *arising out of* the contract, and omits a reference to disputes *relating to* the contract, is considered to be narrow and only encompasses the interpretation and performance of the contract [*9th Cir. (USA), 19 December 1994*]. Contract adaptation constitutes the re-writing of a contract [*Beisteiner in: Klausegger/Klein et al., p. 78*]. It thus forms the formation of a new contract rather than the adjudication of a dispute concerning the current contract.

29. Furthermore, the wording of the rest of the Arbitration Agreement demonstrates that Parties understand *disputes arising out of* the Contract to refer to the adjudication of disputes concerning the current contract. All specific disputes arising out of the Contract that Parties have included, concern the adjudication of existing rights rather than the formation of a new contract (**par. 20**). It follows that a third person would understand from Parties' choice for this more narrow wording that the Tribunal does not have jurisdiction to hear the Claim.

1.2 Even if the Tribunal has jurisdiction to hear the Claim, it lacks the power to adapt the Contract

30. The issue of jurisdiction determines whether parties are allowed to resort to arbitration for a particular dispute. Even if parties have validly agreed to arbitrate a particular dispute, the arbitration procedure is still governed by a set of rules, which are laid down in the *lex arbitri* and the rules of procedure chosen by the parties. The procedural powers of a tribunal are one of the issues that are governed by the procedural rules. As a preliminary point, the DAL requires that the Tribunal is expressly authorised to adapt the Contract (**1.2.1**). Neither the Arbitration Agreement nor the Contract contain any express

authorisation of the Tribunal to adapt the Contract (**1.2.2**). It follows that even if the Tribunal has jurisdiction to hear the Claim, it still lacks the power to adapt the Contract.

1.2.1 The DAL requires that the Tribunal is expressly empowered to adapt the Contract

31. While the basic authorisation of a tribunal to adapt a contract is provided by the arbitration agreement, the *lex arbitri* determines whether a tribunal is procedurally authorised to adapt a contract [*Berger I, p. 10*]. Article 28(3) DAL stipulates that a tribunal may only decide *ex aequo et bono* or as *amiable compositeur* if parties have expressly authorised it to do so. Furthermore, Article 28(3) DAL is considered to contain a general standard of express authorisation for the conferral of exceptional powers to arbitral tribunals, including the procedural power to adapt a contract [*PO2, p. 60, §36*]. It follows that the Tribunal may only adapt the Contract if Parties have expressly authorised it to do so.

32. The authorisation required by Article 28(3) DAL is an expression of the generally held view that such authorisation is necessary for contract adaptation [*Blackaby et al., p. 525*; *Al Faruque, p. 155*; *Waincymer, p. 1056; Berger I, p. 10*]. Contract adaptation by a tribunal amounts to the re-writing of the contract [*Beisteiner in: Klausegger/Klein et al., p. 78*]. In light of the far-reaching nature of contract adaptation, the tribunal in *Aminoil* confirmed the need for express authorisation by Parties by considering that "[…] *a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or by the express consent of the parties*." [*Aminoil, §74*]. Absent such express consent, tribunals are reluctant to sacrifice the cardinal principle of *pacta sunt servanda* [*Berger I, p. 9*]. It follows that the authorisation required by Article 28(3) DAL is an expression of the widely held view that express authorisation by parties is of critical importance for adaptation by a tribunal.

1.2.2 Neither the Arbitration Agreement nor the Contract contain any express authorisation of the Tribunal to adapt the Contract

33. While parties can expressly authorise a tribunal to adapt a contract in the arbitration agreement, they may also do so in a different part of the contract, such as a contract adaptation clause [*Beisteiner in: Klausegger/Klein et al., p. 109; Berger I, p. 8*]. In addition to the Arbitration Agreement, the Tribunal should therefore also consider the main Contract. CLAIMANT relies on Clause 12 for its claim to adapt the Contract, but Clause 12 does not contain any express authorisation to adapt the Contract. Furthermore, none of the other clauses in the main Contract contain an express authorisation by Parties to adapt

the Contract. It follows that the Tribunal cannot find that any clause of the main Contract contains the requisite express authorisation for contract adaptation.

34. Moreover, the Arbitration Agreement does not contain an express authorisation to adapt the Contract either. Article 28(3) DAL requires that Parties' authorisation of the Tribunal to adapt the Contract must be express. This means that it must be clearly and unmistakably communicated or directly stated, as opposed to being implied [*Black Law's Dictionary, "express"*]. An example of such express authorisation is an agreement between parties to arbitrate *"all disputes* […] *including a change of the contract itself"* [*ICC Case No. 7544 (1999)*]. Contrary to this example, the Arbitration Agreement does not contain any explicit authorisation of the Tribunal to exercise such powers. This is also confirmed by CLAIMANT's representative Ms Napravnik in her witness statement: "*our successors in finalizing the contract did not include such an express reference either in the arbitration agreement or the hardship clause they finally negotiated.*" [*CE8, p. 17*]. As the Arbitration Agreement does not contain the requisite express authorisation of the Tribunal to adapt the Contract, the Tribunal lacks the power to do so.

35. As the Tribunal would not have the power to render the required decision to adapt the Contract, it would exceed its mandate if it were to render such a decision. This would form a ground for the setting aside of the award, pursuant to Article 34(2)(a)(iii) DAL. Furthermore, recognition of any award in which the Tribunal would grant CLAIMANT's request can be refused on the basis of Article V(1)(c) NYC and Article 36(1)(a)(iii) DAL.

1.3 If the Tribunal finds that no explicit authorisation is required for Contract adaptation, it lacks the power to decide *ex aequo et bono* or as *amiable compositeur*

36. If the Tribunal finds that no explicit authorisation is required for Contract adaptation, it would still require an express authorisation to render a decision *ex aequo et bono* or equivalently as *amiable compositeur* pursuant to Article 28(3) DAL. A decision rendered on the basis of equity rather than on any contractual or legal basis qualifies as a decision made *ex aequo et bono* or as *amiable compositeur* [*Yu, p. 82; Blackaby et al., p. 218*]. An adaptation of the Contract by the Tribunal would not have any contractual or legal basis (**ISSUE 3** and **4**). The Tribunal could therefore only adapt the Contract if it makes its decision on the basis of equity. Neither the arbitration agreement nor the Contract contains any express authorisation of the Tribunal to make such a decision. It follows that the Tribunal lacks the required authorisation to make its decision on the basis of equity

and would therefore not be able to grant the Claim. This would expose the award to setting-aside proceedings and refusal of recognition on similar grounds as contract adaptation without express authorisation (**par. 41**).

1.4 Conclusion

37. The Claim for contract adaptation does not fall within the scope of the Arbitration Agreement and Parties have not expressly authorised the Tribunal to adapt the Contract. Furthermore, the Tribunal could only grant the Claim on the basis of equity. Therefore, the Tribunal neither has jurisdiction to hear the Claim, nor the power to adapt the Contract or the authorisation to render the decision on the basis of equity.

ISSUE II: THE TRIBUNAL SHOULD FIND THE EVIDENCE CLAIMANT SEEKS TO INTRODUCE INADMISSABLE

38. CLAIMANT seeks to submit the PIA rendered in another HKIAC arbitration involving RESPONDENT as evidence in the current proceedings ("**Evidence**"). However, the PIA cannot serve as evidence as it is merely foreign case law to which the Tribunal is not bound as it does not apply to the current proceedings. In the other proceedings, RESPONDENT allegedly argued that the imposition of a tariff constituted an unforeseeable change of circumstance justifying adaptation of the contract [*LbL, p. 50*]. CLAIMANT asserts that the PIA shows that RESPONDENT considered adaptation of the contract possible in those circumstances and that RESPONDENT thus takes contradictory positions in similar disputes [*LbL, p. 50; MfC, p. 12, §51*].

39. In its letter of 2 October 2018, CLAIMANT stated that it has been promised a copy of the PIA and expressed its intent to submit this copy as evidence to support its Claim [*LbL, p. 50*]. An investigation by RESPONDENT has shown CLAIMANT could only have been aware of both the existence of the PIA and its content by means of illegal conduct [*LbL, p. 50; PO2, p. 60, §41*]. The source of disclosure of the PIA could either have been two former employees of RESPONDENT or a hack of its computer system [*LbF, p. 51*]. Either way, CLAIMANT has obtained the Evidence illegally.

40. The Tribunal should find Evidence inadmissible under the applicable procedural rules due to its irrelevance and immateriality (**2.1**). In any case, CLAIMANT is not entitled to submit the Evidence and the Tribunal should find it inadmissible (**2.2**).

2.1 The Evidence is not relevant to the case or material to its outcome

41. CLAIMANT asserts that tribunals generally admit any evidence [*MfC, p. 17, §73*]. However, the broad discretion of tribunals to assess evidence is limited by the procedural rules [*Marghitola, p. 139*]. Pursuant to Article 19(1) DAL, "[*t*]*he parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*". In the present case, Parties have agreed on the applicability of the HKIAC Rules [*CE5, p. 14, Clause 15*]. Specifically, pursuant to Article 22.2 HKIAC Rules, "[*t*]*he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.*" Thus, the Tribunal has to establish whether the Evidence qualifies as relevant and material to determine its admissibility under the HKIAC Rules [*Moser/Bao, §9.162*]. Contrary to CLAIMANT's suggestion [*MfC, p. 12, §49*], a *prima facie* standard does not suffice for this examination. Thus, further examination of the relevance and materiality of the Evidence is needed.

42. The requirements of relevance and materiality under the HKIAC Rules are similar to the IBA Rules [*Moser/Bao, §9.160*]. As CLAIMANT rightfully points out, the Tribunal may therefore adopt the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") as guidance [*MfC, p. 11, §46*]. This is confirmed by the fact that the IBA Rules are commonly adopted or referred to in HKIAC arbitrations [*Moser/Bao, §9.155*].

43. The Evidence CLAIMANT wishes to introduce is both irrelevant to the case (**2.1.1**) and immaterial to its outcome (**2.1.2**). Furthermore, the Evidence is also inadmissible as its admission would violate the standard of fairness (**2.1.3**).

2.1.1 The Evidence is not relevant to the case

44. The Evidence is not relevant to the case in accordance with Article 22.2 HKIAC Rules. To qualify as relevant pursuant to Article 22.2 HKIAC Rules, a document must be useful for establishing the truth of the factual allegations on which a party bases its legal conclusions [*Moser/Bao, §9.160*]. The same requirement follows from the IBA Rules [*Marghitola, p. 49*]. The Tribunal has to take a reasonability approach in its assessment [*Raeschke-Kessler, §11.1*]. Thus, evidence is inadmissible if it does not reasonably prove the disputed facts [*Grenig/Scanza, p. 81; Pilkov, p. 149*].

45. The PIA cannot serve to establish the truth of CLAIMANT's factual allegations as the facts in the other proceedings fundamentally differ from the current proceedings.

Contrary to CLAIMANT assertions [*MfC, p.12, §49*], RESPONDENT's position in the other proceedings was not "*similar*" to CLAIMANT's position in the current proceedings.

46. Firstly, the contract in the other proceedings contained an ICC Hardship Clause [*PO2, p. 60, §39*]. In contrast, Parties specifically chose not to include an ICC Hardship Clause in the current Contract as they considered it too broad [*RE3, p. 35*]. Furthermore, Parties did not agree on any hardship clause but merely added hardship wording to the force majeure clause (**3.2.2.2**). The ICC Hardship Clause contains a duty to renegotiate in case of hardship and grants a right to terminate a contract in case of failure of such renegotiations. In the other proceedings RESPONDENT was therefore entitled to renegotiations and a possible termination of the contract. This is fundamentally different from the case at hand in which no ICC Hardship Clause or in fact any hardship clause was included in the Contract.

47. Secondly, in the other proceedings RESPONDENT had not yet fully performed [*PO2, p. 60, §39*]. In contrast, in the current proceedings CLAIMANT has already fully performed [*CE5, p. 14, Clause 6*]. Thus, CLAIMANT does not find itself in a similar position as RESPONDENT in the other proceedings. The PIA is therefore not useful to support CLAIMANT's arguments.

48. Thirdly, the Contract contains a narrowed version of a HKIAC Model Clause (**par. 28**). In contrast, an unaltered and broad version of such a clause formed the authorisation for contract adaptation in the other proceedings [*PO2, p. 60, §39*]. Thus, the PIA cannot serve to show that CLAIMANT would be able to adapt the Contract in the current proceedings.

49. Lastly, for evidence to be relevant there has to be a connection between the evidence offered and the rule on which a party relies [*Grenig/Scanza, p. 81*]. The PIA does not establish this connection. The provision on which the tribunal considered itself empowered to adapt the contract was Article 6.2.3(4)b MCL [*PO2, p. 60, §39*]. Contrary to Article 6.2.3(4)b DCL, which is applicable to the current proceedings, the MCL does not prescribe an express authorisation to adapt a contract.

50. Thus, the PIA cannot reasonably serve to prove the facts in accordance with CLAIMANT's arguments. It follows that the Evidence is irrelevant to the case.

2.1.2 The Evidence is not material to the outcome of the case

51. Furthermore, the Evidence is not material to the outcome of the case either. Materiality pursuant to both Article 22.2 HKIAC Rules and Article 9.1 IBA Rules means that

evidence must serve to allow complete consideration of the truth of a factual allegation [*Moser/Bao, §9.160; Marghitola, p. 52*]. Evidence is thus immaterial if the case can be presented optimally without it [*Waincymer, p. 859*]. Moreover, documents that concern legal rather than factual issues are generally not material [*Marghitola, p. 52*]. The PIA itself is case law and mainly refers to case law to which the Tribunal is not bound to [*PO2, p. 60, §39*]. The present case can thus be presented optimally without the PIA.

52. CLAIMANT furthermore states that the Evidence would show that RESPONDENT regarded the Tariff as an unforeseeable event [*MfC, p. 12, §51*]. However, the Tariff is not comparable to the tariff in the other proceedings (**3.2.2.1**). Thus, it cannot serve to determine the foreseeability of the Tariff in the current proceedings and the Tribunal can therefore reach its conclusion on the foreseeability of the Tariff without any reference to the tariff in the PIA. Consequently, the PIA does not meet the requirement of materiality either. Thus, the Evidence is inadmissible.

2.1.3 Additionally, admission of the Evidence would violate the standard of fairness

53. Fairness is another relevant consideration for the assessment of the admissibility of the Evidence. Article 18 Model Law is a mandatory provision that demands that a tribunal takes fairness as the overarching standard in its conduct of the proceedings [*Salomon/Friedrich, p. 559; Holtzmann/Neuhaus, p. 550*]. Fairness means that the tribunal must not accommodate unreasonable procedural demands by a party with respect to evidence [*Holtzmann/Neuhaus, p. 551*]. In accordance with Article 9.2(g) IBA Rules, the tribunal may refuse evidence on the basis of fairness [*Born, p. 2311; Marghitola, p. 37*].

54. CLAIMANT has violated the standard of fairness by submitting Evidence while the other party in the other proceedings already declared that CLAIMANT's allegations on the basis of the PIA do not reflect any reality [*LbF, p. 51*]. Accommodation such a submission would violate the principle of fairness as the Evidence is obtained illegally (**2.2**). Thus, the Evidence should be held inadmissible as admission would violate the standard of fairness.

2.2 Alternatively, the Evidence is inadmissible as it was illegally procured

55. Alternatively, even if the Tribunal considers the Evidence relevant to the case and material to its outcome, the Tribunal should still find the Evidence inadmissible. RESPONDENT found that the Evidence could only have been obtained through a hack of RESPONDENT's computer system or through procurement by two former employees bound by confidentiality obligations in relation to RESPONDENT [*LbF, p. 51;*

PO2, p. 61, §41]. CLAIMANT paid a company USD 1,000 to procure the Evidence, which refuses to disclose how it procured the Evidence [*PO2, p. 61, §41*]. CLAIMANT nevertheless seeks to submit the Evidence [*LbL, p. 50*].

56. The Tribunal should exclude the Evidence. The *clean hands*-doctrine requires that the Tribunal excludes the Evidence as it has been obtained illegally (**2.2.1**). Moreover, RESPONDENT's interest in the confidentiality of the PIA prevails over CLAIMANT's interest in its submission (**2.2.2**). In any case, the Evidence should be excluded as CLAIMANT violated its duty of good faith (**2.2.3**).

2.2.1 CLAIMANT illegal procurement of the Evidence violates the *clean hands*-doctrine

57. The Evidence is inadmissible as it has been obtained illegally. CLAIMANT argues it was not in any way involved in the procurement of the Evidence [*MfC, p. 24, §57*]. The Tribunal should however find that the Evidence is inadmissible, regardless of whether CLAIMANT was involved in the procurement of the Evidence.

58. CLAIMANT acknowledges that the *clean hands*-doctrine is the applicable framework [*MfC, p. 12, §56*]. The *clean hands*-doctrine prescribes that evidence can be inadmissible if a party seeking benefit from that simply relied on the product of a third party's illegal activity [*Blair/Gojković, p. 256; Boykin/Havalic, pp. 33-34*]. The *fruit of the poisonous tree*-approach contained within the *clean hands*-doctrine stipulates that evidence is inadmissible even if the party seeking submission of the evidence was not in any way involved in its the illegal procurement [*Boykin/Havalic, p. 35; Sussman, p. 20*]. Even if CLAIMANT was at no fault in obtaining the Evidence because it could not have been aware of the hacking activities or the confidentiality obligations of RESPONDENT's former employees, CLAIMANT was aware of the company's doubtful reputation as to how it obtains its information when it arranged this opportunity [*PO2, p. 60, §39*]. The mere fact that CLAIMANT was not involved in the unlawful procurement of the Evidence does not alter the fact that it cannot have been unaware of the unlawful procurement. It is therefore not admissible as its admission would violate the *fruit of the poisonous tree*-approach.

59. CLAIMANT refers to case law in which the *fruit of the poisonous tree*-approach was supposedly rejected [*MfC, p. 14, §58*]. However, this case law does not concern the approach to evidence in arbitration proceedings, but merely in court proceedings in civil law jurisdictions [*BGH (GER), 1 March 2006, §22; BGer (CH), 27 March 2014, §3.2*].

60. Moreover, in case evidence is immaterial or even has only marginal evidential significance, no grounds exist to consider the evidence admissible when it is procured unlawfully [*Methanex, §56*; *Blair/Gojković, p. 251; Sussman, p. 8; Boykin/Havalic, p. 34*]. As previously shown, the Evidence is irrelevant to the case and immaterial to its outcome (**2.1.1** and **2.1.2** respectively).

61. The presumption of inadmissibility is even stronger when this unlawful conduct occurred during the course of an arbitration [*Boykin/Havalic, p. 34*]. In the current proceedings, CLAIMANT received information about the other proceedings on 2 October 2018 [*LbL, p. 50*], after the arbitration had commenced on 31 July 2018 [*LbHKIAC, p. 19*]. Furthermore, the graveness of the unlawful conduct is another relevant circumstance for the inadmissibility of the evidence [*Boykin/Havalic, p. 34*]. The Evidence can only have been obtained through an infringement of RESPONDENT's private business environment. Such an infringement constitutes gravely unlawful conduct.

62. Thus, as CLAIMANT has violated the *clean hands*-doctrine, the Evidence is inadmissible.

2.2.2 RESPONDENT's interest in the confidentiality of the PIA should prevail over CLAIMANT's interest in its submission

63. CLAIMANT argues it can submit the PIA as it is not bound to confidentiality [*MfC, p. 16, §67*]. However, RESPONDENT's interests in the confidentiality of the PIA should prevail over CLAIMANT's interest in its submission.

64. As CLAIMANT acknowledges, the PIA is expressly protected by confidentiality [*MfC, p. 16, §66*]. The other proceedings were conducted under the 2013 HKIAC Rules [*LbF, p. 51*]. Article 42.1(b) 2013 HKIAC Rules stipulates that the PIA should be kept confidential.

65. As shown, the PIA does not support CLAIMANT's arguments due to its irrelevance and immateriality. It follows that in those cases the protection of evidence by confidentiality remains the general rule [*Noussia, p. 130*]. Furthermore, confidentiality is one of the major advantages for parties in arbitration as to protect the private nature of arbitral proceedings [*Gaillard/Savage, p. 612; Young/Chapman, p. 39; Henkel, p. 1059*]. Thus, RESPONDENT has a legitimate interest to keep the PIA confidential while CLAIMANT has no legitimate interest in submitting it, the Evidence is inadmissible.

66. Contrary to CLAIMANT's assertions [*LbL, p. 50*], principles of transparency do neither apply nor prevail in the case at hand. CLAIMANT asserts that a trend towards

transparency in commercial arbitration should lead to the conclusion that the Evidence is admissible [*MfC, p. 16, §§68-71*]. According to Article 1.1 UNCITRAL Rules on Transparency, the principles of transparency exclusively apply in investor-State arbitration. As these principles do not apply, they can consequently not form any relevant basis to support an alleged trend in commercial arbitration. In fact, in commercial arbitration confidentiality and party autonomy are the most prominent features and these would collide with transparency [*Yg Ong, p. 169; Poorooye/Feehily, p. 277*]. Transparency has only prevailed over these features whenever a state entity was involved in the commercial arbitration proceedings [*HCA (AUS), 7 April 1995, §8; Cremades/Cortés, p. 30; Hwang/Chung, p. 617*]. Therefore, the principle of transparency does not prevail over RESPONDENT's interest in the confidentiality of the PIA.

2.2.3 CLAIMANT violated its duty of procedural good faith

67. Additionally, the Tribunal should find the Evidence inadmissible as CLAIMANT would breach its duty of good faith by submitting it.

68. Firstly, the duty of good faith as for example expressed by the IBA Rules [*IBA Rules, p. 4*], imposes the obligation on the parties to conduct their case without improper means [*Veeder in: Giovannini/Mourre, p. 322*]. Illegal procurement of evidence is constitutes a violation of a party's duty of good faith [*Methanex, §§54, 59; Libananco v. Turkey, §78*]. As shown, the PIA has been obtained through improper means (**2.2.1**). Consequently, CLAIMANT has breached its duty of good faith. Secondly, the PIA is protected by confidentiality (**2.2.2)**. A violation of confidentiality qualifies as an infringement of the duty of good faith [*SCA (SWE), 30 March 1999, §7; Poudret/Besson, p. 318; Brown, p. 986*].

69. Consequently, the inadmissibility of the Evidence also follows from CLAIMANT's breach of the duty of good faith.

2.3 Conclusion

70. The Evidence is neither relevant nor material. Furthermore, it has been obtained illegally and in violation of good faith as well as standards of fairness. Moreover, the PIA remains protected by confidentiality. Based on all of the above the Tribunal should conclude that the Evidence is inadmissible and thus prohibit CLAIMANT from submitting the PIA.

ISSUE III: CLAIMANT BEARS THE RISK OF THE TARIFF PURSUANT TO CLAUSE 12

71. CLAIMANT asserts that the risk of the Tariff is allocated to RESPONDENT through Clause 12 [*MfC, p. 17, §76*]. However, CLAIMANT's assertions have no basis in the Contract. Parties' choice for DDP places the risk of the Tariff with CLAIMANT (**3.1**). Moreover, Clause 12 does not transfer the risk of the Tariff to RESPONDENT (**3.2**).

3.1 Parties' choice for DDP places the risk of the Tariff with CLAIMANT

72. CLAIMANT asserts that it is entitled to USD 1,250,000 on the basis of Clause 12 [*MfC, p. 17, §76*]. However, CLAIMANT disregards the fact that Parties have agreed on the Delivery Duty Paid ("**DDP**") and even fails to mention DDP. DDP stipulates that "*the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.*" [*International Chamber of Commerce I, p. 69*]. The Tariff at hand is an import duty and therefore falls within the scope of DDP.

73. Parties agreed on DDP as the applicable delivery term. RESPONDENT suggested DDP [*CE3, p. 11*]. CLAIMANT accepted DDP and mentioned "*it was not willing to take over **any further risks** associated with such a change in the delivery terms*" [*CE4, p. 12*] (emphasis added). Parties have clarified in Clause 12 that CLAIMANT does not take over risks related to health and safety requirements or comparable unforeseen events. Other than these risks, CLAIMANT accepted the transfer of risks normally associated with DDP. Consequently, Parties have explicitly agreed on DDP in Clause 8 of the Contract [*CE5, p. 14, Clause 8*].

74. Thus, as Parties placed the risk of import duties with CLAIMANT through the inclusion of DDP, the risk of the Tariff has to be borne by CLAIMANT.

3.2 Clause 12 does not transfer the risk of the Tariff to RESPONDENT

75. In any case, contrary to CLAIMANT's assertions [*MfC, p. 18, §77*], Clause 12 does not transfer the risk of the Tariff to RESPONDENT. Parties disagree on the meaning of Clause 12. Interpretation pursuant to Article 8 CISG is required if there is a misunderstanding between parties [*Zeller, p. 631*]. Article 8 CISG applies to the interpretation of contracts [*Schlechtriem/Schwenzer, p. 145, §3; UNCITRAL Digest, p. 54, §§1-3; Lookofsky, p. 43*]. Article 8(1) CISG requires that a contract is interpreted in accordance with the common intent of parties [*CISG Advisory Op. No. 3, §2.2; Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 154, §22*]. If a Tribunal is not able to determine

the common intent, Article 8(2) CISG requires that it interprets a contract in accordance with the understanding of a reasonable third person [*Schlechtriem/Butler, p. 56; CISG Advisory Op. No. 3 §2.2; AppGer Basel-Stadt (CH), 26 September 2008*]. It follows from Article 8(3) CISG that all relevant circumstances need to be considered for the application of Articles 8(1) and 8(2) CISG [*Schmidt-Kessel in: Schlechtriem/Schwenzer, §21, p. 153*; *Magnus in: Staudinger, p. 168, §24; OLG Dresden (GER), 27 December 1999*]. The writing of an agreement should receive special consideration and priority over other factors for interpretation in accordance with the CISG (**par. 23**).

76. Interpretation in accordance with Article 8(1) CISG shows that Parties intended that Clause 12 does not transfer the risk of the Tariff to RESPONDENT (**3.2.1**). Alternatively, if the Tribunal should find itself unable to determine the intent of Parties, it should find that a reasonable third person would understand that Clause 12 does not transfer the risk of the Tariff to RESPONDENT (**3.2.2**).

3.2.1 Parties did not intend that Clause 12 would transfer the risk of the Tariff to RESPONDENT

77. Article 8(1) CISG requires that a tribunal should interpret a contract in accordance with the common intent of parties (**par. 75**). Pursuant to Article 8(3) CISG, the negotiations are a relevant factor for the interpretation. Parties intended that Clause 12 would ensure that CLAIMANT does not bear the risk for health and safety requirements or comparable unforeseen events on the side of RESPONDENT. It follows that Parties did not intend that Clause 12 would transfer the risk of import duties to RESPONDENT.

78. CLAIMANT argues that the intent of Parties was that Clause 12 would apply to an unforeseen tariff increase [*MfC, p. 19, §81*]. However, this was not Parties' intent. CLAIMANT's representative Ms Napravnik requested the inclusion of a hardship clause to ensure it would not take over the risk of health and safety requirements or comparable unforeseen events [*CE4, p. 12*]. CLAIMANT suggested the inclusion of the ICC Hardship Clause, but RESPONDENT rejected this proposal as it wanted to solely address the events mentioned by CLAIMANT. Accordingly, RESPONDENT added the final hardship wording with specific reference to the risks mentioned by Ms Napravnik [*PO2, p. 56, §12*]. CLAIMANT agreed with this wording as evidenced by its inclusion in the Contract [*CE5, p. 14, Clause 12*]. Parties' common intent was that the hardship wording would only concern the specific risks of health and safety requirements or comparable unforeseen events mentioned by Ms Napravnik.

79. Thus, Parties' intent was not that Clause 12 would transfer the risk of the Tariff to RESPONDENT.

3.2.2 A reasonable third person would understand that Clause 12 does not transfer the responsibility for the payment of the Tariff to RESPONDENT

80. If a tribunal cannot determine the common intent, Article 8(2) CISG requires that it interprets a contract in accordance with the understanding of a reasonable third person [*Schlechtriem/Butler, p. 56; CISG Advisory Op. No. 3, §2.2; AppGer Basel-Stadt (CH), 26 September 2008*]. The writing of an agreement should receive special consideration and priority over other factors (**par. 23**). A reasonable third person would understand that the Tariff falls outside the scope of Clause 12 (**3.2.2.1**). Moreover, a reasonable third person would understand that Clause 12 does not provide the requested remedy (**3.2.2.2**).

3.2.2.1 The Tariff falls outside the scope of Clause 12

81. Contrary to CLAIMANT's assertions [*MfC, p. 19, §81*], the Tariff falls outside the scope of Clause 12. Clause 12 covers "[…] *hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" [*CE5, p. 14, Clause 12*].

82. Firstly, the Tariff itself is not a health and safety requirement. Moreover, the Tariff is not comparable to such requirements as it differs both in aim and nature. Whereas health and safety requirements are aimed at the protection of the health and safety of a country's own population, the Tariff is a retaliatory import duty which aims to "*pressure another country into removing its own tariffs or making trade concessions.*" [*Black's Law Dictionary*]. In addition, the nature of the additional costs is different. The cost increase of import duties is caused by a levy collected by the government, whereas the cost increase of health and safety requirements is caused by the measures a party itself needs to take to comply with those additional requirements. It follows that a reasonable third person would understand that the Tariff is neither a health and safety requirement nor comparable to such requirements.

83. Secondly, contrary to CLAIMANT's assertions that the Tariff was unforeseen as it alleges that Parties were unaware and could not reasonably have been aware of the Tariff at the time of the conclusion of the Contract [*MfC, p. 19, §81*], the Tariff is not unforeseen. In international sales, the risk of intervention in the performance process through a state action is relatively high [*Atamer in: Kröll et al., p. 1067*]. In January 2017, President Bouckaert of Mediteranneo had already announced a preference for a more protectionist approach in relation to agricultural products [*CE6, p. 15*]. President Bouckaert had

appointed Ms Frankel, one of the most ardent critics of free trade, as "*superminister*" for agriculture, trade and economy one day before the conclusion of the Contract. She has been an outspoken protectionist for years who advocated for limitation of the access of foreign agricultural products to the Mediterranean market [*PO2, p. 58, §23*]. Thus, the tariff of Mediteranneo could not have been regarded as unexpected. The Tariff at hand was extraordinary in the amount of goods and countries it covered, and in the speed with which it had been imposed [*PO2, p. 58, §23*]. Because of the extraordinary nature of the Tariff, it was to be expected that Equatoriana would retaliate. Moreover, several countries followed the approach of Equatoriana [*CE6, p. 15*]. These facts provided ample reason at that time to expect the Mediterranean tariff and a subsequent Tariff. It follows that import duties in general and the Tariff in the current proceedings are not unforeseen.

84. Thirdly, the Tariff does not qualify as onerous in the context of hardship. A fundamental distinction must be made between situations where performance of the contract has become excessively onerous and situations where performance has become merely onerous [*Brunner, p. 397*]. In hardship situations, it is a question of degree as to whether performance of the contract has become excessively onerous [*Brunner, p. 393*]. In the majority of legal systems a fundamental alteration of the equilibrium of the contract is needed in order to qualify for hardship, similarly for the UPICC [*Brunner, pp. 392-397*]. Article 6.2.2 UPICC establishes the standard for hardship as a fundamental alteration of the equilibrium of the contract [*Fucci, p. 22*]. The consequences of the Tariff do not constitute a fundamental alteration of the equilibrium of the Contract (**par. 120**). It follows that the Tariff does not qualify as onerous in the context of the hardship.

85. In any case, the PIA does not support CLAIMANT's assertion that the Tariff falls within the scope of Clause 12. CLAIMANT bases this assertion on its view that "*that case is quite similar to the present case.*" [*MfC, p. 19, §84*]. Besides the fact that the PIA is inadmissible (**ISSUE 2**), the PIA is fundamentally different from the case at hand. Parties have specifically not included the ICC Hardship Clause in the Contract, but merely added narrow hardship wording [*MfC, p. 56, §39*]. The ICC Hardship Clause formed the very basis for the contract adaptation in the PIA [*MfC, p. 60, §39*]. The lack thereof in the Contract renders the PIA useless as a support for CLAIMANT's position that the Tariff falls within the scope of Clause 12.

86. In conclusion, the Tariff is not a health and safety requirement or comparable to such requirements. Furthermore the Tariff is not unforeseen or onerous. Therefore, a

reasonable third person would understand that the Tariff falls outside the scope of Clause 12.

3.2.2.2 Even if the requirements of Clause 12 would be met, it does not provide the requested remedy

87. In any case, contrary to CLAIMANT's allegations [*MfC, p. 27, §91*], Clause 12 does not provide a basis for adaptation of the price in the event of hardship. Clause 12 stipulates that "*Seller shall not be responsible for* […]" force majeure and specific forms of hardship suffered by RESPONDENT. It does not contain any reference to contract adaptation. This also follows from the fact that RESPONDENT rejected CLAIMANT's request to include the ICC Hardship Clause because it found the clause too broad [*RE3, p. 35; RNoA, p. 30, §4*]. CLAIMANT alleges that RESPONDENT consented to the inclusion of a hardship clause in the Contract [*MfC, p. 18, §80*]. However, Parties have merely added hardship wording to the existing force majeure clause. The ICC Hardship Clause includes a right to terminate and enables a party to renegotiate in case of an unexpected event beyond its control that makes performance more onerous. This can form a basis for contract adaptation [*International Chamber of Commerce II, p. 15, §§2-3*]. A reasonable third person would understand from the rejection of the ICC Hardship Clause and the broad remedies contained therein that Parties excluded the remedy of contract adaptation.

88. Furthermore, Clause 12 only ensures that CLAIMANT is exempted from liability for force majeure or hardship suffered by RESPONDENT. A reasonable third person would understand that Clause 12 does not ensure that RESPONDENT bears the responsibility for damage suffered by CLAIMANT.

89. Thus, a reasonable third person would understand that Clause 12 provides no basis for the requested remedy of contract adaptation.

3.3 In any case, RESPONDENT should not be estopped from requesting that CLAIMANT complies with its contractual obligations

90. CLAIMANT suggests that it immediately contacted RESPONDENT and asked for adaptation of the price after it discovered the applicability of the Tariff to the final shipment [*MfC, p. 21, §91*]. However, CLAIMANT's communication regarding the discovery of the applicability of the Tariff can only be seen a proposal to discuss the Tariff. This is evidenced by the language used by CLAIMANT, which stated that "*you will understand that we have to find a solution in that regard* [referring to the Tariff]" [*CE7, p. 16*].

RESPONDENT's statements could only have formed an agreement if they had been a response to an offer made by CLAIMANT.

91. Moreover, CLAIMANT argues that RESPONDENT's representative Mr Shoemaker agreed to adapt the Contract [*MfC, p. 21, §91*]. However, RESPONDENT did not at any time agree to adapt the Contract. Mr Shoemaker "*never committed to any adaptation of the price and would also not have had the required authority to do so.*" [*RE4, p. 36*]. He merely stated 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.*" [*RE4, p. 36*]. He did however indicate that to his understanding DPP meant that all risks had to be borne by CLAIMANT. It follows that Mr Shoemakers statements cannot be seen as an agreement to adapt the Contract.

92. Furthermore, Mr Shoemaker emphasised that he was not a lawyer, that he had not been involved in the discussion of the Contract and that he would need to confirm with his supervisors whether the Contract provided a basis for adaptation of the price [*RE4, p. 36*]. Ms Napravnik has acknowledged that she was aware that Mr Shoemaker could in any case not make any valid commitments on RESPONDENT's behalf, as she states "*he* [Mr Shoemaker] […] *could not directly authorise any additional payment.*" [*CE8, p. 18*]. Therefore, even if Mr Shoemaker's statements could be seen as concession to adapt the Contract, his statements cannot constitute a valid commitment on RESPONDENT's behalf.

93. Thus, Mr Shoemaker did not commit to an adaptation of the Contract. It follows that RESPONDENT should not be estopped from requesting that CLAIMANT complies with its contractual obligations.

3.4 Conclusion

94. Thus, CLAIMANT bears the risk of the Tariff. Parties' choice for DDP places the risk of the Tariff with CLAIMANT and Clause 12 does not transfer the risk of the Tariff to RESPONDENT. The Tribunal should therefore reject the Claim as CLAIMANT bears the risk of the Tariff.

ISSUE IV: CLAIMANT IS NOT ENTITLED TO ANY ADDITIONAL PAYMENT ON THE BASIS OF THE CISG

95. In addition to Clause 12, CLAIMANT bases its Claim on the CISG. CLAIMANT relies on Article 79 CISG and alternatively on Articles 7(2) and 9(2) CISG for its position that the Contract should be adapted [*MfC, p. 29, §§101-129*]. However, the CISG does not allow for contract adaptation.

96. First of all, CLAIMANT cannot rely on Article 79 CISG as Parties derogated from this provision through the inclusion of Clause 12 in the Contract (**4.1**). Even if the Tribunal would find that Article 79 CISG is applicable, the Contract cannot be adapted on the basis of the CISG (**4.2**). In any event, adaptation of the Contract is not possible under the applicable domestic law (**4.3**).

4.1 Parties derogated from the CISG through the inclusion of Clause 12

97. CLAIMANT bases its Claim on Article 79 CISG. This article stipulates that a party can under specific conditions be exempted from paying damages for its non-performance. Parties disagree on the applicability of Article 79 CISG. CLAIMANT asserts that Parties did not derogate from Article 79 CISG because an explicit derogation is required. In addition, it states that Parties did not intend to derogate from Article 79 CISG by including Clause 12 [*MfC, pp. 22-23, §§99-100*]. However, CLAIMANT's understanding of the requirements for derogation is incorrect. Parties derogated from Article 79 CISG by including Clause 12 in their Contract.

98. Article 6 CISG provides that parties can derogate from provisions of the CISG by mutual agreement, which can be implicit [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 105, §9; p. 102, §3*]. If the contractual agreement governs the same matter as a provision of the CISG, this agreement takes priority over the CISG provision [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 105, §§8, 27; Honnold II, p. 475; Atamer in: Kröll et al., p. 1076, §92*]. Parties can derogate from Article 79 CISG by including either a force majeure and/or a hardship clause [*Schwenzer in: Schlechtriem/Schenzer, pp. 1152-1153, §58; ICAC (RUS), 17 October 1995*]. If such a clause is narrower than Article 79 CISG, it constitutes a derogation under Article 6 CISG [*Davies/Snyder, p. 327; Gilette/Walt, p. 336*]. Such derogating provisions are to be interpreted in accordance with Article 8 CISG [*CISG-AC Op. No. 7, §3.6*]. In accordance with Article 8(1) CISG, an agreement should be interpreted according to the common intent of parties [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 154, §22*]. A statement of one party is sufficient to determine the common intent of parties if the other party knew or could not have been unaware of that intent [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 154, §§22, 24*]. If the intent of parties cannot be established, Article 8(2) stipulates that the agreement should be interpreted according to the reasonable understanding that a third person would have had [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 154, §20*].

99. Clause 12 constitutes a derogation from Article 79 CISG as Parties intended Clause 12 to be narrower than Article 79 CISG. In addition, a reasonable third person would reach the same conclusion. Article 79 CISG applies when a party is confronted with "*an impediment beyond his control* [...]". Thus, Article 79 CISG extends to an undefined range of events. CLAIMANT could not have been unaware that RESPONDENT intended to include hardship wording that solely extends to a limited set of events. CLAIMANT suggested to include the ICC Hardship Clause in the Contract [*RE2, p. 34*]. RESPONDENT objected to this as it considered the ICC Hardship Clause too broad [*RE3, p. 35; RNoA, p. 30, §4*]. The ICC Hardship Clause applies when a party is confronted with "[...] *an* ***event*** *beyond its reasonable control* [...]." (emphasis added). Thus, the ICC Hardship Clause applies to any type of event, while RESPONDENT solely wanted to address health and safety requirements or comparable events as mentioned by CLAIMANT [*PO2, p. 56, §12*]. Therefore, RESPONDENT stated that it found the ICC Hardship Clause too broad and accordingly suggested the final hardship wording which is limited to these specific events [*PO2, p. 56, §12*]. In addition, a reasonable third person would conclude that Clause 12 is narrower than Article 79 CISG. Clause 12 limits the hardship for which CLAIMANT shall not bear responsibility to specific events, namely for "*hardship,* ***caused by*** *additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added) [*CE5, p. 14, §12*].

100. According to CLAIMANT, Clause 12 "*specifies certain risks which are not explicitly stipulated in Article 79 CISG*" and therefore supplements Article 79 CISG [*MfC, p. 23, §101*]. However, the specific events mentioned in Clause 12 are encompassed by the broad range of events covered by Article 79 CISG. The fact that Clause 12 specifies certain risks supports the conclusion that Clause 12 is narrower than Article 79 CISG rather than the position that it supplements the latter. Moreover, CLAIMANT's assertion that Clause 12 does not provide a remedy on RESPONDENT's side [*MfC, p. 23, §102*] further supports that Clause 12 is narrower than Article 79 CISG.

101. As Clause 12 is intended to be narrower than Article 79 CISG and a reasonable third person would similarly understand the clause, it forms a derogation from Article 79 CISG.

4.2 The Contract cannot be adapted on the basis of the CISG

102. Even if the Tribunal would find that Parties did not derogate from Article 79 CISG, the Contract cannot be adapted. CLAIMANT asserts that Article 79 CISG applies to the dispute and that consequently the Contract can be adapted on the basis of Article 79 CISG

or alternatively Article 7(2) or 9(2) CISG [*MfC, p. 22, §96*]. However, this assertion is meritless. Firstly, CLAIMANT cannot invoke Article 79 CISG in this dispute (**4.2.1**). Secondly, the imposition of the Tariff does not qualify as an impediment under Article 79 CISG (**4.2.2**). In any event, CLAIMANT is not entitled to an additional payment as the CISG does not provide the remedy of contract adaptation (**4.2.3**).

4.2.1 CLAIMANT performed and is therefore not entitled to invoke Article 79 CISG

103. CLAIMANT performed in accordance with its contractual obligations by delivering the agreed amount of horse semen from Nijinsky III [*CE8, p. 18*]. Article 79 CISG does not apply to this situation as this article only exempts a party from paying damages if that party has failed to perform its contractual duties. This is evident from the wording of Article 79 CISG, which stipulates that "*a party is not liable for a* ***failure to perform*** *any of its obligations* [...]" (emphasis added). There is no literature or case law known or mentioned by CLAIMANT which allows Article 79 CISG to be invoked by a party who has performed its contractual obligations. Thus, CLAIMANT cannot invoke Article 79 CISG in the current proceedings.

4.2.2 The Tariff does not qualify as an impediment under Article 79 CISG

104. CLAIMANT asserts that the imposition of the Tariff constitutes an impediment under Article 79 CISG [*MfC, p. 23, §104*]. However, it is disputed whether Article 79 CISG even applies to situations of economic impossibility to perform [*Honnold I, pp. 542-544; Gilette/Walt, p. 312; Bund, p. 387; TdC Hasselt (BEL), 20 October 1998; TC Monza (ITA), 14 January 1993*]. Regardless of whether Article 79 CISG would apply to situations of economic impossibility, the conditions that would apply are very difficult to meet.

105. The basic premise under Article 79 CISG is that the obligor has to bear the risk of performance that has become more burdensome, even if this could not reasonably have been foreseen at the time of the conclusion of the contract [*Brunner, p. 214; Schlechtriem, p. 101; Schwenzer in: Schlechtriem/Schwenzer, p. 1135, §15*]. In case of economic impossibility to perform, exemption under Article 79 CISG is only possible when the "*ultimate limit of sacrifice*" has been exceeded [*Garro in: Felemegas, p. 245; CISG-AC Op. No. 7, §§31, 38; Schwenzer in: Schlechtriem/Schwenzer, p. 1142, §31; Rimke, p. 224*]. This is the case when the cost of performance increases by 100 percent, or even by 150-200 percent [*Schwenzer in: Schlechtriem/Schwenzer, p. 1143, §31; Schwenzer, p. 717; Brunner, p. 431*].

106. The ultimate limit of sacrifice has not been exceeded. CLAIMANT's cost of performance falls short of the required increase of 100 percent, much less meets the threshold of 150 to 200 percent. CLAIMANT's expected costs for the entire Contract were USD 9,500,000 and this was increased to USD 11,000,000 by the imposition of the USD 1,500,000 Tariff. Thus, CLAIMANT's cost of performance for the entire Contract has increased by 16 percent which does not meet the abovementioned threshold. Even if the cost of performance would be calculated only with regard to the last shipment, this threshold would still not be met. The original cost of performance of the third shipment was USD 4,750,000, which was increased to USD 6,250,000 by the imposition of the Tariff. The cost increase for the third shipment would therefore merely be 31 percent, which is not sufficient to meet the required threshold either.

107. Furthermore, situations of economic impossibility to perform generally do not meet the requirements of Article 79 CISG that the aggrieved party could reasonably neither have overcome the impediment nor taken it into account [*Lookofsky, p. 141; Brunner, p. 218*]. This is due to the fact that professional parties in international trade are assumed to take the risk of economic impossibility to perform into account if they have not protected themselves from such impossibility in the contract [*Atamer in: Kröll et al., pp. 1070-1071, §78; CDC (FR), 30 June 2004; Schwenzer/Spagnolo, §3.3*]. As CLAIMANT has not protected itself from the risk of the Tariff, it can be assumed that it has taken this risk into account.

108. In the current proceedings, CLAIMANT could reasonably be expected to have taken the imposition of the Tariff into account. This prerequisite means that the impediment must have been unforeseeable for the aggrieved party, which is examined through the standard of a reasonable third person [*Schwenzer in: Schlechtriem/Schwenzer, p. 1134, §14*]. As previously established (**par. 83**), the imposition of the Tariff was reasonably foreseeable for CLAIMANT.

109. CLAIMANT can also reasonably be expected to avoid or overcome the consequences of the Tariff. The nature of the efforts which can be expected from the obligor requires an examination of the contractual allocation of risks [*Schwenzer in: Schlechtriem/Schwenzer, p. 1135, §15*]. The risk of the imposition of tariffs lays with CLAIMANT due to the choice for DDP (**3.1**). Furthermore, the aforementioned 'limit of sacrifice'-standard applies [*Schwenzer, p. 716; Brunner, p. 432*]. As previously established (**par. 106**), the increase of CLAIMANT's cost of performance falls short of the required threshold.

110. CLAIMANT asserts that it cannot reasonably be expected to avoid or overcome the imposition of the Tariff because bearing the Tariff "*will not only destroy CLAIMANT's margin but also made its financial situation worse off*" [*MfC, p. 24, §108*]. However, a promisor can be expected to overcome an impediment to perform, even when it greatly increases its costs and creates a loss [*Schwenzer in: Schlechtriem/Schwenzer, p. 1135, §15*]. The basic premise in situations of economic impossibility to perform is that "*a deterioration of a party's financial situation is that party's own problem, which it cannot shift to other parties*" [*Brunner, p. 436*]. The fact that CLAIMANT finds itself in financial difficulties does not justify the conclusion that it cannot overcome the imposition of the Tariff. CLAIMANT has been making losses since 2014 and was bound to a strict restructuring plan by its creditors [*PO2, p. 59, §29*]. While this financial situation is unfortunate, it has not primarily been caused by the Tariff. In any case there is no ground to hold RESPONDENT responsible for the unfortunate financial situation in which CLAIMANT finds itself.

111. In view of the above, the imposition of the Tariff does not qualify as an impediment on the basis of Article 79 CISG.

4.2.3 In any event, the Contract cannot be adapted on the basis of the CISG

112. Even if the Tribunal would find that the Tariff constitutes an impediment under Article 79 CISG, CLAIMANT is still not entitled to any additional payment. CLAIMANT asserts that Article 79 CISG provides for contract adaptation [*MfC, p. 24-25, §109*]. Alternatively, it bases its claim for contract adaptation on Section 6.2 UPICC by means of Article 7(2) and 9(2) CISG [*MfC, p. 26-27, §117*]. However, the aforementioned articles do not provide for the remedy of contract adaptation.

113. The parts of Article 79 CISG that concern remedies can be found in paragraphs 1 and 5 of this article. Article 79(1) CISG solely provides the obligor with an exemption from liability for damages of its non-performance. Article 79(5) CISG provides that the remedies of the other party remain unaffected. As these remedies do not include contract adaptation, it follows that contract adaptation is not one of the remedies provided for within Article 79 CISG [*Honnold I, p. 445; Flechtner, p. 86; Garro in: Felemegas, p. 240; McKendrick in: Vogenauer/Kleinheisterkamp, p. 712, §4*].

114. According to CLAIMANT, Article 79 CISG can provide the remedy of contract adaptation on the basis of the principle of good faith under Article 7(1) CISG and the CISG's legislative aim of "*making a contract alive*" [*MfC, pp. 24-25, §109*]. Firstly, the predominant view is that the principle of good faith cannot provide grounds for contract

adaptation, as this would circumvent the aforementioned set of remedies provided within Article 79 CISG [*Rimke, p. 224-225; Tallon in: Bianca/Bonell, p. 594*]. Even if contract adaptation on the basis of good faith would be possible, there is no ground for such adaptation in the current proceedings. CLAIMANT asserts that it has performed in reliance on statements by Mr Shoemaker [*MfC, p. 25-26, §112*]. However, as previously established (**3.3**), Mr Shoemaker merely made a non-committal observation regarding the Contract. Secondly, the legislative aim of keeping a contract alive means that the remedy of avoidance of the Contract can only be used as a last resort and does not mean that a contract has to be adapted [*Huber, §2.2*]. In any event, the legislative aim of keeping a contract alive does not apply as both Parties have fulfilled their contractual obligations.

115. Furthermore, CLAIMANT asserts that on the basis of Article 7(2) CISG, Section 6.2 UPICC can be resorted to and consequently the Contract can be adapted [*MfC, p. 26-27, §117*]. However, the Contract cannot be adapted on the basis of Article 7(2) CISG. Matters which are governed but not expressly settled in the CISG constitute an 'internal gap' within the CISG [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 132, §37*]. Article 7(2) CISG stipulates that this internal gap must primarily be filled with the general principles on which the CISG is based. The UPICC are not considered to be general principles of the CISG, but rather to form external soft law which is not related to the CISG [*Schwenzer et al., §7.4*]. Therefore, the UPICC can only be used to support an already existing general principle of the CISG [*Veneziano, p. 141; Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 138, §36*]. The general principles of the CISG do not provide the remedy of contract adaptation [*Garro in: Felemegas, pp. 245-246; Gilette/Walt, pp. 307, 313*]. As contract adaptation is not recognised in the common law tradition, a proposal to include the remedy of contract adaptation in the CISG was explicitly rejected [*Honnold I, p. 350; Flechtner, p. 99; Slater, pp. 259-260*]. The predominant view is thus that the scope and effect of Article 79 CISG cannot be widened through application of Section 6.2 of the UPICC [*McKendrick in: Vogenauer/Kleinheisterkamp, p. 713, §5; Rimke, p. 240*]. The case CLAIMANT relies on [*MfC, p. 27, §118*] is heavily criticised and can therefore not lead to a different conclusion [*Flechtner, p. 94; Lookofsky, p. 168; DiMatteo, pp. 284-285; Atamer in: Kröll et al., p. 73, §84; Gilette/Walt, pp. 309-314*].

116. Moreover, CLAIMANT asserts that the UPICC are trade usages under Article 9(2) CISG and therefore Section 6.2 UPICC may be resorted to [*MfC, p. 27, §119*]. However, it is rejected that the hardship provisions of Section 6.2 UPICC are international trade usages, as there are crucial differences between countries regarding the concept of hardship

[*Brunner, p. 219; Azeredo, p. 338; ICC Case No. 12446*]. If Parties wished to apply the hardship provisions of the Equatorianian Contract Law, MCL or of the UPICC to their Contract, they would have done so by including a specific reference to those provisions. However, Parties chose the CISG as the law applicable to their Contract and made no such reference to the UPICC [*CE5, p. 14, Clause 14*].

4.3 In any event, an adaptation of the Contract is not possible under the applicable domestic law

117. If the Tribunal would find that the matter at hand is governed but not settled within the CISG, resort must be made to domestic law pursuant to Article 7(2) CISG. On the basis of the applicable domestic law, contract adaptation is not possible in the current proceedings.

118. In case of arbitral proceedings, the arbitration rules determine which law applies as domestic law [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 141, §42*]. Pursuant to Article 36(1) HKIAC Rules and Article 28(1) DAL, the applicable domestic law is the law that parties have chosen, which is the MCL [*CE5, p. 14, §15*]. The MCL is a verbatim adoption of the UPICC [*PO1, p. 53, §4*]. CLAIMANT asserts that the Contract may be adapted on the basis of Article 6.2.3(4)(b) UPICC [*MfC, p. 29 §127*], thus Article 6.2.3(4)(b) MCL. However, the conditions of Section 6.2 MCL have not been met.

119. Article 6.2.1 MCL covers the basic premise that *"even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected.*" [*UPICC 2016 OC Comment 1 to Art. 6.2.1, p. 217*]. Therefore, tribunals generally deny claims based on the hardship provisions under Section 6.2 UPICC [*McKendrick in: Vogenauer/Kleinheisterkamp, p. 716, §4*]. Article 6.2.2 MCL requires that the equilibrium of the contract is fundamentally altered because of an increase of the cost of a party's performance. Furthermore, Article 6.2.2 MCL contains four additional cumulative conditions [*McKendrick in: Vogenauer/Kleinheisterkamp, p. 717, §1*]. In the current proceedings, the requirements of Article 6.2.2 MCL have not been met.

120. Firstly, the Tariff has not fundamentally altered the equilibrium of the Contract. An increase of the cost of performance of 100 percent applies as a general rule [*Brunner, p. 431*]. Furthermore, an alteration less than 50 percent is in any case not fundamental [*McKendrick in: Vogenauer/Kleinheisterkamp, p. 719, §8*]. As previously established, the alteration of CLAIMANT's cost of performance is 16 percent (**par. 106**). It follows that neither of the established thresholds for the increased cost of performance

have been met and that the Tariff therefore does not constitute a fundamental alteration of the equilibrium of the Contract.

121. Secondly, Article 6.2.2(b) MCL requires that the disadvantaged party could not reasonably have taken the event into account. As established before (**par. 83**), CLAIMANT could reasonably have taken the imposition of the Tariff into account as its imposition was reasonably foreseeable when the Contract was concluded.

122. Thirdly, Article 6.2.2(d) MCL stipulates that the risk of the event must not have been assumed by the disadvantaged party. CLAIMANT asserts that the Tariff is not a "*normal risk associated with* [*these*] *kind of contract*[*s*]" [*MfC, p. 28; ∫124*]. Import duties are one of the regular risks covered by DDP, which is the delivery term Parties chose [*CE5, p. 14, Clause 8*]. Therefore, CLAIMANT has assumed the risk by agreeing to DDP.

123. In view of the above, as the requirements of Section 6.2 MCL have not been met, adaptation of the Contract is not possible under the applicable domestic law.

4.4 Conclusion

124. Based on the foregoing, CLAIMANT is not entitled to any additional payment on the basis of the CISG or the UPICC and the Tribunal should therefore reject the Claim.

REQUEST FOR RELIEF

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

(I) the Tribunal neither has jurisdiction nor the power to adapt the Contract;

(II) the evidence from the other arbitral proceedings is inadmissible;

(III) CLAIMANT is not entitled to payment of USD 1,250,000 under the Contract or under the CISG; and

(IV) to order CLAIMANT to bear all the costs arising from this arbitration.

Respectfully submitted,

Amsterdam, 24 January 2019,

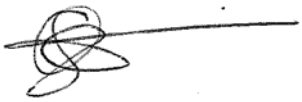
Wessel Breukelaar – Caroline Groefsema – Florence Haverhals –
Freek van Leeuwen – Stijn Wilbers

CERTIFICATE

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

Amsterdam, 24 January 2019

WESSEL BREUKELAAR



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