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WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT
MARCH 31 – APRIL 7, 2019
HONG KONG

UNIVERSITY OF WISCONSIN

MEMORANDUM FOR RESPONDENT

PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

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

COUNSEL FOR RESPONDENT

MARIA BUCCI • HANNAH CLAYSHULTE

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ABBREVIATION	CITATION	CITED IN
Art./Artt.	Article/Articles	***In passim***
CISG	United Nations Convention on the International Sale of Goods (1980)	***In passim***
DDP	Delivery Duty Paid	***In passim***
HKIAC	Hong Kong International Arbitration Centre	***In passim***
IBA	International Bar Association	***In passim***
UNIDROIT	UNIDROIT Principles for International Commercial Contracts (2016)	***In passim***
UNCITRAL	United Nations Commission on International Trade Law	***In passim***

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STATEMENT OF FACTS

1. **Phar Lap Allevamento ("CLAIMANT")** is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport. It has 300 horses including its own mare herd, offspring and stallion depot, and additionally offers frozen semen of its champion stallions for artificial insemination. Lastly, CLAIMANT is particularly known for its breeding success regarding racehorses. The star among CLAIMANT's stallions is Nijinsky III, the most sought-after stallion for breeding.
2. **Black Beauty Equestrian ("RESPONDENT")** based in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.
3. **21 March 2017** RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III for its newly started breeding program.
4. **28 March 2017** RESPONDENT accepted CLAIMANT'S general terms and conditions in exchange for 100 doses of Nijinsky III's frozen semen. RESPONDENT requested that CLAIMANT accept a delivery DDP given CLAIMANT'S experience in the shipment of frozen semen and the time demands. RESPONDENT was willing to accept the application of the Law of Mediterraneo if Equatorianan courts had jurisdiction.
5. **6 May 2017** The Parties signed the final contract, agreeing that CLAIMANT would ship the semen pursuant to a delivery DDP.
6. **20 May 2017** CLAIMANT sent the first shipment of 25 doses. The second shipment was due on 3 October 2017.
7. Two months before the last shipment of 50 doses was due, Mediterraneo's newly elected President, Ian Bouckaert, announced 25% tariffs on agricultural products from Equatoriana. Frozen semen was included on the list of products that fell under the new tariff.
8. **23 January 2018** CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses.
9. **31 July 2018** CLAIMANT is now requesting that the original delivery agreement be disregarded. CLAIMANT requests that RESPONDENT be forced to pay 25 percent of the price for the third delivery of semen.

SUMMARY OF THE ARGUMENT

ISSUE 1(A): THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO ADAPT THE CONTRACT

10. CLAIMANT is asking for an award that goes beyond the interpretation of the contract. Because the seat of arbitration is Danubia, the procedural rules of Danubia apply to the interpretation of the arbitration agreement. The law of Danubia "recognizes that arbitrators may adapt contracts but requires an express empowerment" to do so. (*RESPONDENT'S Answer*, ¶ 13). The arbitration agreement between the parties omits HKIAC Model Clause language empowering the tribunal to adapt the contract. The parties intentionally excluded any contract adaptation language from the arbitration agreement. The Tariff Hike is not covered by the hardship clause because it was forseeable. Because the sales agreement designates all shipments of goods to be delivered DDP, CLAIMANT assumed all risks associated with the shipments. The *UNIDROIT* Principles and the CISG do not allow for contract adaptation where performance becomes more onerous for the seller.

ISSUE 1(B): THE ARBITRATION AGREEMENT AND ITS INTERPRETATION ARE GOVERNED BY THE LAW OF DANUBIA

11. The Tribunal must hold that the arbitration agreement and its interpretation are governed by the law of Danubia, a neutral law to both parties. Under the doctrine of separability, the arbitration agreement is not governed by the law of the sales contract, but is subject to its own choice of law analysis. Throughout the negotiation process, RESPONDENT communicated its intent that the seat of arbitration, the neutral state of Danubia, be the governing law of the arbiration agreement. Furthermore, under the closest connection test and the implicit choice analysis, Danubia is the governing law of the arbitration agreement.

ISSUE 2: THE PARTIAL INTERIM AWARD SHOULD NOT BE ADMITTED AS EVIDENCE

12. This Tribunal should exercise its discretion and exclude the evidence of the Partial Interim Award. Art. 22.2 of the HKIAC Rules gives this Tribunal broad discretion to determine evidentiary issues, and the discretionary guideposts of the IBA Rules support excluding the evidence. First, CLAIMANT has received the information regarding the Partial Interim Award out of context, and has failed to show the Tribunal that this evidence is truly relevant to the current proceeding. Second, CLAIMANT'S purchase of the evidence from an illegal source violates fairness and equity principles rooted in both the IBA Rules and international arbitration. The Partial Interim Award is confidential information that, despite the computer hack and

confidentiality breach, has not been made available to the public. CLAIMANT would be exposing this information to the public domain if allowed to admit the evidence. CLAIMANT is also acting in bad faith by knowingly paying the party that obtained the evidence illegally. This Tribunal should deny the evidence to discourage parties from paying for illegally sourced evidence in the future.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO AN ADAPTION OF THE CONTRACT PRICE.

13. CLAIMANT is not entitled to a price adaptation resulting from hardship regardless of the governing law. Clause 12 of the contract is limited in scope and does not provide for contractual adaptation in the case of economic changes. CLAIMANT has also assumed the risk associated with the tariffs by accepting a full Incoterm DDP delivery with no limiting provision in the contract. Furthermore, Art. 79 of the CISG does not apply to this case because it is not a hardship provision. However, even if the CISG or Mediterranean law were to be applied to the circumstances, the same conclusion would be reached: the circumstances do not support the Tribunal adapting the contract price.

ARGUMENT

ISSUE 1(A): THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO ADAPT THE CONTRACT.

14. The arbitral tribunal lacks jurisdiction to adapt the contract. CLAIMANT is asking for an award that goes beyond the interpretation of the contract, meaning the tribunal would have to adapt the contract to satisfy CLAIMANT'S claim. The law of the seat of arbitration governs the procedural rules that apply to the interpretation of the agreement. Because the seat of arbitration is Danubia, the procedural rules of Danubia apply to the interpretation of the arbitration agreement. The law of Danubia "recognizes that arbitrators may adapt contracts but requires an express empowerment" to do so. (*RESPONDENT'S Answer*, ¶ 13). The arbitration agreement between the parties does not contain any reference to an empowerment for contract adaption.

I. The arbitration agreement between the parties omits HKIAC Model Clause language empowering the tribunal to adapt the contract.

15. Unlike the HKIAC model arbitration clause, the arbitration clause between the parties excludes any reference which could be interpreted as an empowerment for contract adaptation. The arbitration agreement between the parties does not include the vital part of the HKIAC model clause which can be interpreted as empowerment for contract adaptation, which covers "any dispute regarding non-contractual obligations arising out of or relating to it (the agreement)." (HKIAC Model Clause). The parties' arbitration agreement does not contain any equivalent statement that gives the tribunal the authority to address non-contractual obligations. The agreement between the parties covers "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof." (*Ex. C 5*).
16. The parties intentionally chose for any future disputes to be arbitrated under the HKIAC framework. When drafting the arbitration agreement, the parties relied on the model clause suggested by HKIAC. In the arbitration agreement draft sent by RESPONDENT on April 10, 2017, Chris Antley stated "Our draft is largely based on the model clause suggested by the HKIAC." (*Ex. R 1*). When drafting the agreement, the parties intentionally decided to exclude the language from the HKIAC model clause giving the tribunal authority to adapt the contract: "The proposal has narrowed down and streamlined a little the fairly broad wording of the clause." (*Ex. R 1*). CLAIMANT'S draft proposed in response to the April 10 draft did not include the HKIAC model clause language covering non-contractual obligations. (*Ex. R 2)*.

II. The parties intentionally excluded any contract adaptation language from the arbitration agreement.

17. The contract between the parties precludes CLAIMANT from claiming hardship for changes in tariff rates. UNIDROIT Principle 6.2.2 establishes that hardship cannot be invoked if the change of circumstances was foreseeable. A common principle of international business is that there is always a risk that import/export prices will fluctuate; therefore, a change in tariff price was not unforseeable and CLAIMANT is precluded from asserting hardship. Moreover, the parties agreed that all shipments would be sent DDP, meaning CLAIMANT, as the seller, assumes all risks associated with the goods reaching the buyer.

A. The Tariff hike is not covered by the hardship clause because it was foreseeable.

18. The language covering non-contractual obligations was never in dispute by the parties and was not included in any of the proposed drafts of the arbitration agreement. The parties intentionally decided to exclude any language that would allow a tribunal to adapt a contract to cover non-contractual obligations. CLAIMANT'S demand for payment reflecting the change in tariff prices is not covered anywhere in the agreement, and therefore is outside the obligations described in the contract and outside the scope of the arbitration agreement.
19. Art. 12 of the contract, the hardship clause, states that the Seller will not be responsible for "acts of God neither by hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." (Contract ¶ 12). The parties considered the possibility of a tariff hike from additional health and safety requirements and explicitly stated in the contract that in the event of such tariffs, the contract shall not be adapted.
20. Unidroit Art. 6.2.2, definition of hardship, contains four requirements in order for a party to invoke hardship. Art. 6.2.2(b) requires that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract." (*Art. 6.2.2(b) UNIDROIT Principles 2016*). A party is not entitled to invoke hardship if the change in circumstances affecting the equilibrium of the contract was not unforeseeable. (*Art. 6.2.2 UNIDROIT Principles 2016*). In the current case, the tribunal does not have the authority to adapt the contract because the tariff hike was not unforeseeable. In their contract, the parties

explicitly stated there would be no price adjustment for "hardship, caused by additional health and safety requirements or comparable unforeseen events." (*Ex. C 5, ¶ 12*).

21. Hardship clauses cover unforeseeable events "which render(s) the performance of the contract temporarily or finally impossible."(*Peter*, pg. 235). In the current case, the performance of the contract is concluded-CLAIMANT sent all the agreed upon shipments and RESPONDENT paid the agreed upon price. Furthermore, tariff adjustments are not unforeseeable, but are a known risk in business dealings.

B. Because the sales agreement designates all shipments of goods to be delivered DDP, CLAIMANT assumed all risks associated with the shipments.

22. RESPONDENT never agreed to any contract adaptation following CLAIMANT'S request in January 2018. Mr. Shoemaker explicitly made clear to CLAIMANT that it was his understanding that DDP meant that all risks had to be borne by CLAIMANT. (*Ex. R 4*). Furthermore, Mr. Shoemaker never committed to any price adaptation and did not have the authority to do so. Mr. Shoemaker only said, "*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." (*Ex. R 4*). Mr. Shoemaker's comment to find a price agreement relied on the contract containing language that would allow for a price adaptation, which it does not. RESPONDENT therefore did not agree to a price adaptation unless it was contained in the original sales contract.
23. The sales contract between the parties states that each of the three instalments of frozen semen will be shipped Delivered Duty Paid (DDP). (*Ex. C 5*, ¶ 8). Under DDP, the seller "bears all the costs and risks involved in bringing the goods to the place of destination."(*Freight Hub).* The seller is obliged to "take care of all export clearance formalities at the origin including *any and all* export permits, quotas, special documentation, etc., relating to the cargo."(*Freight Hub,* emphasis added). The buyer's obligations under DDP are minimal: the buyer must only cover themselves "for any risk and insurance past the agreed place of delivery" and take care of "any further movement from the agreed place of delivery."(*Freight Hub*). The seller is "liable for *all* costs and risks till the agreed place of delivery." (*Freignt Hub,* emphasis added).
24. When CLAIMANT agreed to all the shipments to be delivered DDP, CLAIMANT agreed to cover all costs and risks, including the cost and risk of a higher tariff hike. RESPONDENT is not liable for any additional costs CLAIMANT may have incurred when delivering the shipments to the agreed

upon location. By adopting DDP, the parties intended that CLAIMANT take care of all costs and risks associated with delivering the goods. Therefore, RESPONDENT cannot be held liable for any costs incurred in the process of delivery to the contractually agreed place.

25. CLAIMANT argues that it had made clear that it was not willing to bear all the other risks associated with the delivery terms. (*Notice of Arbitration*, ¶ 19). However, that is exactly what CLAIMANT agreed to when it signed the sales contract designating all shipments to be delivered DDP. Despite CLAIMANT'S own "intentions" that it did not intend to bear all the risks associated with delivery, it signaled to RESPONDENT it in fact was willing to bear all the risks when CLAIMANT agreed to deliver all the shipments DDP. That is what DDP means. The contractual language is clear – CLAIMANT cannot escape its contractual obligations by claiming hidden intentions contrary to the contractual language. If the tribunal adapts the contract, it would be in direct opposition to the contractual language and the intent of the parties when they signed the sales agreement.

III. The UNIDROIT Principles and the CISG do not allow for contract adaptation where performance becomes more onerous for the seller.

26. UNIDROIT Art. 6.2.1 requires a contract to be observed even if it imposes an undue burden on the performing party: "where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations." CLAIMANT argues that the contract should be adapted because of CLAIMANT'S supposed lost profits. However, commentary on UNIDROIT Art. 6.2.1 states that lost profits do not amount to contract adaptation. "Even if a party experiences heavy losses instead of the expected profits . . . the terms of the contract must nevertheless be respected." (*Art. 6.2.1 UNIDROIT Principles 2016, Official Commentary*). Unidroit provides a case illustration to demonstrate the importance of the binding character of the contract:

> Under the contract B is bound to ship certain goods from country X to country Y at a fixed rate, on a monthly basis throughout the two-year period. Two years later, alleging a substantial increase in the price of fuel in the aftermath of a political crisis in the region, B requests a five per cent increase in the rate. B is not entitled to such an increase because B bears the risk of its performance becoming more onerous. (Art. 6.2.1 *UNIDROIT* Principles 2016, Official Commentary).

27. CLAIMANT is not entitled to a contract adaptation because of a sudden price difference in tariff rates reflecting a political crisis in the region. The price of doing business may have become more expensive for CLAIMANT, but CLAIMANT took on that risk, especially because the parties contractually agreed that CLAIMANT would ship the goods DDP.
28. The CISG deliberately omits any required contract adaptations in the event of hardship. The CISG "does not explicitly authorize a party facing a dramatic increase in the costs of performance or a dramatic loss of value to request renegotiation or seek a court-ordered adaptation or the termination of the contract." (*Azerdo Da Silveira*, pg. 328). Under the theory of *silence qualifié*, the CISG's silence on the issue of hardship is a deliberate omission and means that "no relief is available to a party affected by subsequent changes in market conditions that alter the contractual equilibrium but do not satisfy the conditions of Article 79."(*Azerdo Da Silveira,* pg. 329). A party who suffers a dramatic loss in profitability but still is able to perform on the original sales contract is therefore not entitled to any relief under the CISG. (*Azerdo Da Silveira,* pg. 329).
29. Art. 79 of the CISG provides exemptions from party liability "for a failure to perform any of his obligations because of an impedement beyond his control." (*Guide to CISG Art. 79, Secretariat Commentary*, ¶ 1). In addition to proving the impedement was beyond his control, a party seeking to avoid liability for performance failure must prove either that "he could not have taken the impedement into account at the time of the conclusion of the contract or to have avoided or overcome its consequences." (*Annotated Text of CISG, Art. 79*). The nonperforming party bears a heavy burden of proving exemption from liability. As such, Art. 79 "reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance." (*Guide to CISG Art. 79, Secretariat Commentary Commentary*, ¶ 7).
30. In a 1993 case from the Tribunale Civili di Monza, the court held that Art. 79 of the CISG did not apply to "excessive onerousness."(*Azerdo Da Silveira,* pg. 329). In the dispute between an Italian seller and a Swedish buyer, the seller failed to deliver the goods and claimed "supervening excessive onerousness" to render the original contract void because of a 30% increase in the price of the goods. (*Azerdo Da Silveira,* pg. 329). The court stated that Art. 79 of the CISG concerning exceptions to liability in the event a party fails to adhere to his contractual obligations only applies to situations where performance is *impossible.* Although the rise in the

price of goods may have created an "onerous" situation for the seller, meaning the loss of profits, the seller was still required to adhere to his contractual obligations because performance was only difficult and not impossible.

31. The CISG emphasizes the importance of the binding quality of the sales contract between the parties. Both parties are expected to perform their obligations under the contract, even if those obligations are difficult. Specifically, a seller "must adhere to the terms of the contract as agreed upon by the parties." (*Butler*, § 4.03) Even if a contract fails to specify the seller's obligations, under the CISG the seller "has the obligation to transfer the property in the goods and to deliver the goods."(*Butler,* § 4.03).
32. Market fluctuations are "common affairs of business."(*Ahmad Tajudin,* pg. 216). An experienced commercial actor should reasonably have knowledge that price fluctuations are a foreseeable factor in doing business, especially in potentially volatile political environments. For this very reason, lots of sales contracts between commercial actors include contract adaptation provisions in the very foreseeable case that the price of the goods dramatically changes.

CONCLUSION TO ISSUE 1(A)

33. The tribunal does not have the power/jurisdiction to adapt the contract. The parties intentionally omitted any language allowing contract adaptation in the event of a rise in tariff percentages. The parties knowingly adopted the HKIAC model arbitration clause and intentionally decided to exclude the recommended language that would grant the tribunal authority to adapt the contract. Art. 6.2.2 of the *UNIDROIT* Principles allows for contract adaptation only if the circumstance was not reasonably foreseeable to the parties at the time the sales contract was adapted. As both parties are experienced commercial entities, they reasonably knew that business arrangements are foreseeably subject to the fluctuations of markets. Moreover, CLAIMANT assumed all risks of shipment when it agreed to ship the goods DDP. Under both the UNIDROIT Principles and the CISG, CLAIMANT cannot escape its contractual obligations because of a shift in tariff percentages.

ISSUE 1(B): THE ARBITRATION AGREEMENT AND ITS INTERPRETATION ARE GOVERNED BY THE LAW OF DANUBIA.

34. The arbitration agreement is governed by the law of Danubia. Under the doctrine of separability, the arbitration agreement must be treated as a separate agreement and subject to an individual

choice of law analysis. By not including the HKIAC recommended choice of law clause governing the arbitration agreement, the parties intended the arbitration agreement to be governed by the seat of arbitration. The law of Danubia applies to the arbitration agreement both under the closest connection test and the implied choice analysis.

I. Under the doctrine of separability, the arbitration agreement is not governed by the law of the sales contract.

35. The presumption of the doctrine of separability is a "cornerstone" of international arbitration (*Born,* pg. 350). The doctrine of separability means that "[T]he characteristics of an arbitration agreement . . . are in one sense independent of the underlying or substantive contract [and] have often led to the characterization of an arbitration agreement as a 'separate counteract.' (*Born,* pg. 350*).* International scholars divide international contracts into three subparts- "(1) the matrix contract, (2) the arbitration clause or arbitration agreement within the matrix contract, and (3) the conduct of the arbitration."(*Glick & Vankatesan,* pg. 131). Each separate area of law requires its own conflict of laws analysis.
36. Although CLAIMANT argues that the arbitration clause is subject to the law of Mediterraneo because the arbitration clause "forms part of this Frozen Semen Sales Agreement." (*Cl. Brief par.* 19), this is not how tribunals and courts treat arbitration clauses. As a separate agreement, "the arbitration agreement, concluded separately or in the legal act to which it is *related,* always has . . . complete juridical autonomy." *(International Arbitration Agreements and Separability Presumption*, § 3.01). Because the arbitration clause is a separate contract from the sales agreement, the choice of law chosen for one cannot simply apply to the other; they cannot be lumped together as one agreement. Instead, "a separate conflict of laws analysis *must* be performed with regard to that separate agreement." (*Born,* pg. 464).
37. Contrary to CLAIMANT'S argument, the separability presumption is not solely used to protect the arbitration agreement from a potentially invalid contract. As a separate agreement, the separability presumption "means that an arbitration agreement can be governed by a different national law from that (or those) applicable to the parties' underlying contract." (*Born,* pg. 464). The sales contract and the arbitration agreement are "two separate agreements of differing characters" and as such may be "governed by two different national legal regimes." (*Born,* pg. 464). International law scholars Ian Glick and Niranjan Venkatesan argue that the argument that

the doctrine of separability may only be used to determine validity of the matrix contract is in conflict with the doctrine of dépeçage, "the possibility that different parts of a single contract may be governed by different laws." (*Glick & Vankatesan,* pg. 132). The doctrine of dépeçage negates any argument that the doctrine of separability only applies to determine contract validity. Under the doctrine of dépeçage, any part of the matrix contract, including the arbitration agreement, may be "split" from the original contract and treated as a separate agreement with a separate set of law.

II. The Parties intended the law of Danubia to govern the arbitration agreement.

A. The Parties intended the law of the seat of arbitration to govern the arbitration agreement.

38. As the contractually designated seat of Arbitration, the law of Danubia applies. The contract only mandates the law governing the sales agreement, not the arbitration agreement. As such, "in the absence of a choice of law, the law of the governing country where the award was made, that is, the law of the place of arbitration, governs the arbitration agreement."(*Schramm et al.,* pg. 54-55). Because the arbitration agreement lacks a choice of law clause, the law governing the arbitration agreement is the seat of the arbitration – Danubia.
39. CLAIMANT misinterprets the implications of relies heavily on *BCY v. BCZ.* The court in *BCY* distinguished freestanding arbitration agreements from arbitration agreements that form part of the main contract when conducting a choice of law analysis. (*Singh, Kabir, Kartikey M. & Andrew Foo*). For arbitration agreements that are embedded in the main sales contract, "the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement *unless there are indications to the contrary.*" *(Singh, Kabir, Kartikey M. & Andrew Foo, emphasis added).* The court also stated that "anything which suggests the parties may not have intended to have their arbitration agreement governed by the same law as the main contract would still be a factor to consider." (*Singh, Kabir, Kartikey M. & Andrew Foo).*
40. There is clear evidence that RESPONDENT intended the governing law of the arbitration agreement to be the law of Danubia and never agreed to the governing law to be the law of Mediterraneo. The drafting history of the agreement indicates that RESPONDENT always intended the governing law of the arbitration agreement to be the law of a neutral country like Danubia. First, Mr. Antley, the first and main negotiator for RESPONDENT, as is his habit, left a note

detailing the list of issues for further negotiations after his meeting with Ms. Napravnik on April 11, including the choice of law for the arbitration clause. Mr. Antley's first noted point for further negotiations was listed as "Clarify in arbitration clause that neutral venue and applicable law." (*Ex. R* 3).

41. "Applicable law," like "neutral venue," refers to the arbitration clause, the only noun in the sentence. If Mr. Antley had meant to further negotiate the law of the sales contract, he would have stated "Clarify in arbitration clause in neutral venue and in sales agreement applicable law." Therefore, Mr. Antley intended, as his first and most important point of future negotiations, to discuss the applicable law of the arbitration clause. As indicated by Mr. Antley's note, the law of arbitration was not settled between the parties and RESPONDENT intended the governing law of the arbitration agreement to be the law of a neutral venue.
42. RESPONDENT'S intent for the governing law of the arbitration agreement to be that of a neutral state is further evidenced by Mr. Julian Krone's testimony. Mr. Krone testified that "Had I known at the time that Mr. Antley was referring to the law applicable to the arbitration instead of the law of the contract I would have definitely included an express reference to the law of Danubia into the arbitration agreement." (*Ex. R 3*).

B. RESPONDENT clearly communicated to CLAIMANT that it intended the arbitration agreement to be governed by the law of a neutral state.

43. RESPONDENT explicitly stated several times in email communications with CLAIMANT that it intended arbitration to take place in a neutral state under a neutral law. On March 28, 2017, RESPONDENT sent an email to CLAIMANT stating, "Given the desirability of a long-term relationship for the mutual benefit of both parties we consider it not appropriate that your law applies, and your courts have jurisdiction." (*Ex. C 3*). In an email sent by RESPONDENT on April 10, 2017, RESPONDENT proposed an arbitration clause that included the seat of arbitration shall be Equatoriana and the law of the arbitration clause shall be the law of Equitoriana. (*Ex. R 1*). CLAIMANT responded with an arbitration clause that stated the seat of the arbitration shall be Danubia but did not include any choice of law clause. (*Ex. R 2*). Under the proposed arbitration clause, CLAIMANT stated "That offer is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo." (*Ex. R 2*).

44. That statement is specific to the sales agreement – nowhere in that statement is the arbitration clause mentioned at all. Because CLAIMANT remained silent on RESPONDENT'S offer of the seat and law of the arbitration to be Equitoriana, and instead responded with the seat to be Danubia, remaining silent on the choice of law, RESPONDENT assumed, like in the previously drafted arbitration clause, that the seat of the arbitration and the law governing the proceeding would be the same. CLAIMANT changed the place of arbitration, but never rejected RESPONDENT'S proposal that the seat and law of arbitration be the same.
45. Art. 8 of the CISG, interpretation of contract, analyzes whether any of the parties' exchanges indicate a desire to provide a different law to govern the arbitration agreement. Art. 8(1) provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." As demonstrated above, RESPONDENT made clear several times in email communications their intent to have the law of the seat of the arbitration be the governing law of the arbitration clause. CLAIMANT could not have been unaware of RESPONDENT'S intent for the law of the arbitration clause to not be the law of Mediterraneo. The March 28 email from RESPONDENT bluntly states, "we consider it not appropriate that your law applies." That is an express rejection of the law of Mediterraneo applying to the arbitration clause.

C. Under the closest connection test, Danubia is the governing law of the arbitration agreement.

46. International law scholars Ian Glick and Niranjan Venkatesan argue that where the matrix contract does contain an express choice of law but a different seat of arbitration, "the arbitration agreement is generally governed by the law of the seat."(*Glick & Venkatesan,* pg. 132*)*. Glick and Venkatesan frame their analysis by using the English choice of law test, or the "closest and most real connection." First, it must be asked whether the parties expressly or impliedly made a choice of law. If not, then the court determines "which system of law the contract has its 'closest and most real connection.' (*Glick & Venkatesan,* pg. 132). The *Sulamerica* court extended the closest connection test to apply to arbitration agreements as well as underlying sales contracts.
47. In *Sulamerica*, the court of appeals determined that before applying the closest connection test, the court must first determine if the parties expressly or implicitly chose a particular law for the arbitration clause. The underlying agreement in Sulamerica, an insurance policy, expressly

choose Brazilian law. The court stated the express choice of law for the insurance policy was "a strong pointer towards an implied choice of law of Brazil;" however, the court determined Brazilian law did not apply because of two factors that "suggested it was not intended to be an implied choice of law for the arbitration agreement." (*Glick & Venkatesan*, pg. 134). The first factor contrary to the implied choice of law was that the parties had chosen London as the seat of arbitration. The second was a Brazilian domestic law that would have undermined the original agreement. The court also noted another important factor in determining if there was an implied choice of law is any evidence to the contrary. The court, finding no express or implied choice of law, applied the closest connection test, and found that English law applied because "an arbitration agreement is generally more closely connected to the law of the seat than to the proper law of the matrix contract."(*Glick & Venkatesan,* pg. 134).

48. While English choice of law uses the closest connection test to reach the conclusion that the law of the seat of arbitration applies to the arbitration agreement when there is no express or implied choice of law, other countries reach this conclusion on the basis of implied choice. (*Glick & Venkatesan,* pg. 142). The house of lords in *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation* held that "a choice of seat is ordinarily also a choice of law." (*Glick & Venkatesan,* pg. 143). Lord Morris stated that "the circumstance that parties agree that any differences are to be settled by arbitration in a certain country may and very likely will lead to an inference that they intend the law of that country to apply." Instead of relying on the closest connection test, some courts believe that when parties agree on the seat of arbitration they are also implicitly agreeing that the law of the seat will apply to the arbitration agreement. This is primarily so because "the consequence of choosing a seat is that many aspects of the arbitration agreement – and not merely the arbitration procedure – will be governed by the law of the seat in any event, regardless of the law which applies to the matrix contract." (*Glick & Venkatesan,* pg. 142).
49. China also uses an implicit choice of law analysis. Art. 18 of Law of the People's Republic of China on Application of Laws to Foreign Related Civil Relations states "Parties concerned may agree upon the laws applicable to an arbitration agreement. Where the parties have made no such choice, laws of the domicile of the arbitration institution, or laws of the place of arbitration shall apply." (*Dong).* Scholars note that this analysis "is widely recognized by the international

arbitration practice" (*Dong)* in the absence of an express choice of law provision in the arbitration clause.

50. In the current case, the law of Danubia governs the arbitration agreement under both the closest connection test and implied choice. First, applying the English court's closest connection test, the parties did not expressly choose a law to govern the arbitration agreement. There is no choice of law clause in the arbitration agreement. The parties argued over email back and forth over the seat and law of arbitration, finally agreeing on the seat of arbitration to be Danubia. However, the parties never agreed or displayed any intent to agree on the law governing the law of the arbitration clause-the choice of law was simply excluded from the arbitration agreement.
51. As noted in Mr. Antley's notes, the choice of law for the arbitration clause in a neutral venue was still a matter that needed to be discussed in further negotiations, which was never addressed due to the car accident. Taking all of the email evidence into account where RESPONDENT repeatedly emphasized their concern over using Mediterraneo law to govern the arbitration clause and their insistence on the seat of arbitration to be the same as the governing law, it cannot be said that the parties expressly agreed to the law of Mediterraneo to govern the arbitration clause.
52. Because the parties did not expressly choose a specific law to govern the arbitration clause, the analysis next applies part two of the closest connection test. Like the Sulamerica court concluded, the law of Danubia, as the chosen seat of arbitration, has the closest connection to the arbitration clause. The parties failed to put a choice of law clause but intended chose the seat of arbitration to be Danubia.
53. The law of Danubia also applies under the implicit choice analysis. The parties, after several email communications back and forth, never agreed on the law to apply to the arbitration clause. After RESPONDENT suggested the seat of arbitration be Equitoriana and the governing law be that of Equitoriana, CLAIMANT replied proposing simply the seat of Danubia. Because CLAIMANT did not include a different governing law, it was assumed that the seat and law of arbitration would be the same – that of Danubia. By agreeing on the seat of arbitration, the parties implicitly agreed that the law of Danubia would apply to the arbitration agreement.
54. Choosing the seat of arbitration to be Danubia is "equivalent to, or shorthand for, saying in the terms that the arbitration agreement" is governed by the law of Danubia. (*Glick & Venkatesan,* pg. 144). The parties intended the venue and the applicable law to be neutral. As is common practice in international arbitration, "the purpose of choosing a neutral seat of arbitration, as

parties often do, is generally to insulate the dispute resolution mechanism from the national law of either party." (*Glick & Venkatesan,* pg. 145). The parties, as two commercial agents, implicitly chose the law of Danubia to apply because it would allow the parties to arbitrate the dispute neutrally, separated both from the laws of Mediterraneo and Equitoriana.

D. The arbitration agreement does not include the recommended choice of law provision in the HKIAC Model Clause.

55. The parties chose to adopt the HKIAC model arbitration clause, excluding only the choice of law provision. The HKIAC Model arbitration clause includes both the seat of arbitration and the law of the arbitration. HKIAC warns that the law of the arbitration clause should be included "particularly where the law of the substantive contract and the law of the seat are different." (*HKIAC Model Clause*). Choosing not to include the choice of law clause, therefore, can be interpreted as the parties intending the seat of arbitration and the law of arbitration to be the same. If the parties intend the seat of arbitration and the governing law to be different, they must include a choice of law provision along with the seat of arbitration. Because the parties only included the seat of arbitration, they did not intend the governing law to be different.
56. In 2014, HKIAC followed the international practice trend and updated its model arbitration clause to include the law governing the arbitration agreement. The parties deliberately chose HKIAC – its rules, procedures, and recommendations-to govern arbitration. The recommended choice of law clause "is one of the distinguishing features of the selected institution," (*Answer to the notice of arbitration*, ¶15). Because the parties deliberately chose HKIAC, they were aware of all recommendations while writing the arbitration agreement, and still choose not to include a choice of law clause. Therefore, the parties intended the seat of the arbitration and the governing law to be the same. Had they intended a different law to govern the arbitration proceedings, the parties would have followed HKIAC's recommendations and included an explicit reference to the law governing the arbitration agreement.

CONCLUSION TO ISSUE 1(B)

57. The arbitration agreement and its interpretation are governed by the law of Danubia. Under the Doctrine of Separability, the arbitration agreement is a separate contract, and as such must be subject to its own choice of law analysis. The parties intended the law of Danubia, as the chosen seat of arbitration, to govern the arbitration agreement. Multiple jurisdictions use the closest

connection test and the implied choice test to find that the chosen seat of arbitration is the governing law of the arbitration agreement. Had the parties intended the law governing the arbitration agreement to differ from the seat of arbitration, they would have included a choice of law provision in the arbitration agreement, as is recommended by HKIAC.

ISSUE 2: THE PARTIAL INTERIM AWARD SHOULD NOT BE ADMITTED AS EVIDENCE.

58. RESPONDENT respectfully asks the Tribunal to deny CLAIMANT's request to submit the Partial Interim Award as evidence. The Tribunal has broad discretion when deciding whether to admit evidence, and there are several reasons for why the Partial Interim Award should be inadmissible under the IBA Rules. First, the Partial Interim Award is from an unrelated proceeding in which RESPONDENT is a party, and is irrelevant to this arbitral proceeding. Second, admitting the evidence would violate the fairness and equity principles enumerated in the IBA Rules.

I. The Tribunal has broad discretion to deny evidence.

59. The Tribunal has full discretion to deny or admit evidence under Art. 22.2 of the HKIAC Rules. [*Art. 22.2 HKIAC Rules*]. In the absence of an evidentiary agreement from the Parties, tribunals may reference the IBA Rules as discretionary guidelines. [*Mittal*; *Ross*]. These guidelines lay down general standards of procedural fairness and equity emphasized throughout international commercial arbitration. [*Mittal*; *Ross*]. The IBA rules are non-binding, and tribunals frequently consider the IBA rules in conjunction with policy and precedent concerns when determining whether to admit evidence. [*Mittal*].
60. The Parties did not include an evidentiary clause in the contract. When determining whether to admit the Partial Interim Award, the Tribunal is therefore able to exercise full discretion pursuant to Art. 22.2 of the HKIAC Rules. [*Art. 22.2 HKIAC Rules*]. The Tribunal should refer to the IBA Rules to assess the fairness and equity of admitting the Partial Interim Award.

II. The IBA Rules do not support admitting the Partial Interim Award.

61. Art. 9.2 of the IBA Rules provides grounds for when evidentiary exclusions apply. If the Tribunal finds even one of the evidentiary exclusions under Art. 9.2 applies, then the evidence should be deemed inadmissible. The Partial Interim Award is inadmissible for several reasons under the IBA rules. The Partial Interim Award is irrelevant to the outcome of the case under Art

9.2(a). Furthermore, the document is not available to the public, and its admission into evidence would breach confidentiality standards under Art. 9.2(e). Finally, CLAIMANT'S method of obtaining the evidence would result in a breach of procedural equality under Art. 9.2(g) and an overall breach of their duty to act in good faith.

A. The Partial Interim Award is irrelevant to this case.

62. Art. 9.2 (a) excludes evidence if there is a "lack of sufficient relevance to the case or materiality to its outcome[.]" [*Art. 9.2(a) of the IBA Rules*]. Evidentiary relevance is such a core concept of the IBA Rules that it is not only included as an exclusion under Art. 9.2(a), but it is also listed as an evidentiary requirement under Art. 3.3(b). [*Art. 3.3(b) of the IBA Rules*; *mitola*, p. 48]. The standard for relevance requires that it "be more likely than not that a document is required to allow the complete consideration of factual issues from which legal conclusions are drawn." [*Marghitola*, p. 54].
63. When determining if evidence is relevant to the case, the requesting party has the burden of proving that this element is satisfied. [*Kankkunen*, p. 36]. Tribunals carry out this rule in practice for both fairness and efficiency concerns, and a tribunal can deny evidence requests when Parties too willingly admit evidence that might only possibly be deemed relevant in later proceedings. [*Id.*].
64. Evidence of whether RESPONDENT considered a 30% tariff increase to constitute hardship is irrelevant to whether RESPONDENT intended for Clause 12 of the contract to be a hardship provision. The tribunal is being asked to interpret the contract provisions and the parties' intentions when drafting and agreeing to the provisions. Evidence of the Partial Interim Award showing that RESPONDENT asked for hardship to apply when faced with a 25% tariff increase has no bearing on whether RESPONDENT intended to include a hardship provision in this contract. At issue is the specific wording of Clause 12 in the contract, and a different contract RESPONDENT entered into with an unrelated party is irrelevant to determining RESPONDENT'S intentions in this case.
65. Furthermore, CLAIMANT has not accurately shown that the document is required to further their claim. [*Letter Fasttrack*, p. 50]. RESPONDENT stated that the allegations by CLAIMANT "do not reflect reality and are taken out of context"; a statement that even RESPONDENT'S opponent in the

other arbitral proceeding acknowledges. [*Letter Fasttrack*, p. 50]. CLAIMANT has failed to truthfully attest to the document's relevant nature.

66. Therefore, CLAIMANT cannot use the document to prove RESPONDENT'S understanding of the hardship burden. CLAIMANT has failed to prove the Partial Interim Award's relevance to the core issue facing the Tribunal, and it should subsequently be deemed inadmissible under Art. 3.3(b) and Art. 9.2(a) of the IBA Rules.

B. Obtaining the evidence would violate fairness and equality under the IBA Rules.

67. The Partial Interim Award is inadmissible regardless of whether it was obtained by RESPONDENT'S Former Employees or from an alleged computer hack. The fact that the evidence was obtained illegally is not necessarily enough on its own to justify its exclusion, but it is one factor to be considered along with relevant factors the Tribunal must weigh when determining whether fairness outweighs a Party's right to present its case.
68. Under IBA Rule 9.2(g), the Tribunal may exclude evidence due to "considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling." [*Art. 9.2(g) of the IBA Rules*]. Evidence will likely be deemed inadmissible if it was obtained in bad faith or it results in procedural unfairness, and tribunals have broad discretion to determine whether fairness principles have been violated. [*Sicard-Mirabel*].
69. Admitting the evidence would result in a violation of Art. 9.2(g) of the IBA Rules. The Partial Interim Award is not the public domain, and CLAIMANT is obtaining the document by questionable means.

1. The document should remain confidential because the Partial Interim Award is not in the public domain.

70. The confidential evidence should be excluded because it is not in the public domain. Tribunals regularly take into consideration whether confidential information submitted as evidence is already in the public domain. In the decision of *Caratube*, the Tribunal held that whether or not leaked confidential information was available to the public was a critical factor in determining whether it could be admitted as evidence. [*Caratube*, p. 3]. Since the otherwise confidential information was already "lawfully available to the public," this tipped the scales in favor of the Tribunal admitting the leaked information. [*Id.*]

71. Where confidential information has merely been obtained but not yet made public, there are policy reasons for preserving the privacy of confidential information. Tribunals have regularly stated the importance of preserving confidential arbitral proceedings in an effort to adhere to arbitration rules. [*Libananco*, para. 80]. Tribunals also have an interest in promoting parties to engage in arbitration, which is more likely to occur if parties believe in the fairness of the arbitration process. *Id.*
72. The Partial Interim Award is not available to the public. CLAIMANT is only able to obtain the document of the Partial Interim Award by purchasing it from the company, which further supports the fact that the document is not easily accessible information to the general public. The document still remains confidential, but the confidentiality of the document would end once CLAIMANT submits the Partial Interim Award as evidence. The admitting of this evidence would hinder confidentiality efforts entirely.Therefore, this Tribunal should exclude the confidential Partial Interim Award since it is not in the public domain.

2. CLAIMANT is violating equity standards by paying the party that obtained the evidence illegally.

73. The Partial Interim Award should be excluded because CLAIMANT is buying it from the Party that obtained it illegally. In doing so, CLAIMANT is violating the fairness and equity principles supported by the IBA rules. By purchasing the Partial Interim Award from the party that obtained the evidence illegally, CLAIMANT is acting in bad faith, and supporting illegal evidentiary standards.

a. CLAIMANT is acting in bad faith by purchasing the evidence.

74. The party admitting the evidence does not have to be the one that illegally obtained the evidence for a tribunal to exclude it. If the evidence was at all obtained in a questionable manner by the pparty admitting it, this alone has given tribunals reason to deem evidence inadmissible. The fact that the evidence was obtained illegally is just one factor that contribute to an overall tipping of the scales in favor of the evidence being too procedurally unfair to admit.
75. In the case of *Libananco Holdings*, the tribunal weighed the evidentiary value of communications obtained through questionable intercepts. [*Libananco Holdings*]. The evidence was not obtained illegally, but the tribunal weighed the importance of the confidentiality of the

information, along with the need for the parties to act in good faith, and excluded it from the proceedings. [*Id.*]. Parties do not have to directly obtain evidence in an illegal manner for a tribunal to find that the evidence has been obtained in bad faith.

76. CLAIMANT does not currently possess the document with evidence of the Partial Interim Award, and the only way for CLAIMANT to obtain it is to pay a company that "has a doubtful reputation as to where it gets its information from." [*PO2*, para. 41]. The company with the document obtained it either from the computer hackers themselves, or from RESPONDENT'S former employees who breached their duty of confidentiality agreement. [*PO2*, para. 41]. CLAIMANT is acting in bad faith by capitalizing on RESPONDENT'S security breach, regardless of whether CLAIMANT directly obtained the evidence illegally. CLAIMANT is acting in bad faith by knowingly purchasing the Partial Interim Award from the company that obtained the evidence illegally.

b. This Tribunal should ont support parties purchasing illegal evidence.

77. If this Tribunal finds the Partial Interim Award to be admissible, this will encourage parties to purchase illegally obtained evidence. Tribunals should take policy concerns into consideration when determining how cases will influence future arbitration activity. [*Libananco*, para. 80]. For example, one policy consideration with keeping arbitration information confidential is to encourage parties to engage in settlement efforts. [*Id.*] If tribunals start admitting all confidential settlement information, this would lead to parties being more hesitant to engage in settlement discussions; a result tribunals are keen on avoiding. [*Id*.] Therefore, the impact of tribunals' evidentiary rulings on parties' future conduct must be weighed against the benefit of admitting the evidence.

78. The Tribunal should exclude the Partial Interim Award to prevent CLAIMANT from economically rewarding the party that obtained the evidence illegally. Regardless of how the document was obtained, CLAIMANT will be supporting the party that illegally obtained the document by paying the company US$1000. [*Letter Fasttrack*, p. 50].

79. To admit this document would encourage the illegal siphoning of evidence in exchange for money; a precedent for which there are many policy arguments against. The IBA Rules mandate good faith dealing between parties, and an allowance of purchased illegal evidence to be admitted would contradict this core value of international arbitration. [*Art. 9.2(g) of the IBA*

Rules]. Therefore, the Tribunal should exclude this evidence because admitting it will encourage evidence to be obtained illegally in the future.

CONCLUSION TO ISSUE 2

80. This Tribunal should exercise its discretion and exclude the evidence of the Partial Interim Award. Art. 22.2 of the HKIAC Rules gives this Tribunal broad discretion to determine evidentiary issues, and the discretionary guideposts of the IBA Rules support excluding the evidence. First, CLAIMANT has received the information regarding the Partial Interim Award out of context, and has failed to show the Tribunal that this evidence is truly relevant to the current proceeding. Second, CLAIMANT'S purchase of the evidence from an illegal source violates fairness and equity principles rooted in both the IBA Rules and international arbitration. The Partial Interim Award is confidential information that, despite the computer hack and confidentiality breach, has not been made available to the public. CLAIMANT would be exposing this information to the public domain if allowed to admit the evidence. CLAIMANT is also acting in bad faith by knowingly paying the party that obtained the evidence illegally. This Tribunal should deny the evidence to discourage parties from paying for illegally sourced evidence in the future. Thus, RESPONDENT respectfully asks this Tribunal to exclude the Award from evidence.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE CONTRACT PRICE.

81. RESPONDENT respectfully asks the Tribunal to adhere to the contractual terms the Parties agreed upon and decline to adapt the contract price. Neither the Sales Agreement nor the CISG provide for an adaptation of the contract price. Therefore, CLAIMANT is not entitled to payment in the amount of US$1,250,000.

I. CLAIMANT is required to pay the tariffs due to the DDP delivery term.

82. The tariffs do not qualify as a hardship event under the Adaption Clause, and therefore CLAIMANT is not entitled to a price adaptation. CLAIMANT'S argument that the Parties intended for Clause 12 to apply hardship in this case is misplaced under the "four corner rule" of Danubian Contract Law. The "four corner rule" states that tribunals must exclude all extraneous evidence when interpreting contracts. [*PO1, p. 51*]. Therefore, the inclusion of a DDP delivery in the contract dictates that CLAIMANT pay the increased cost of delivery.

83. CLAIMANT assumed a DDP delivery under Clause 8 of the contract, and is therefore responsible for the delivery of all three shipments to RESPONDENT. [*Ex. C5, p. 13*]. Clause 8 dictates that the contract will be completed when the seller shipped "3 installments DDP." [*Ex. C5, p. 13*]. Under Danubian contract law Art. 28(3), the Tribunal is bound to examine only the physical contract between parties. [*UNCITRAL Model Law, Art. 28(3)*].
84. Delivery Incoterms provide a shorthand method for assigning each of the parties' various responsibilities relating to shipment or transportation of the goods. [*Incoterms Rules 2010*]. The Incoterm DDP stands for Delivery Duty Paid, and places the maximum obligation on the seller. [*Id*]. The International Chamber of Commerce states 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 custom formalities." [*Id*].
85. CLAIMANT owns and operates Mediterraneo's oldest stud farm, housing 300 horses for various equestrian sports. [*Notice of Arb., p. 4*]. CLAIMANT has utilized their renowned stud farm to offer frozen semen from their champion stallions for years. [*Id*]. CLAIMANT is a well versed in the business of trading, and therefore, they cannot argue they were unfamiliar with the obligations and responsibilities that are associated with accepting a DDP delivery. CLAIMANT is therefore not entitled to additional money for the tariffs due to their assumption of risks associated with a DDP delivery.

II. Even if the Tribunal applies Mediterraneo law, CLAIMANT is still not entitled to a price adaptation.

86. Clause 12 of the contract states: "[s]eller shall not be responsible for lost semen shipments or delays in delivery not within the control of the seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Ex. C5, p. 13*]. The tariffs do not qualify as a hardship event under the provisions of Clause 12, and CLAIMANT is therefore not entitled to a price adaptation.

A. The tariffs are not comparable to the events referred to in Clause 12.

87. The tariffs do not fit under the "additional health and safety requirements" needed under Clause 12 for hardship to apply. Clause 12 does not mention tariffs or any term specifically related to economic hardship. It is true that the phrase "comparable unforeseen events" illustrates that the hardship examples enumerated do not amount to an exhaustive list, however, the word "comparable" limits future events to those related to those being, at a minimum, related to "health and safety requirements." [*Ex. C5, para. 12*].
88. The wording of Clause 12 is itself indicative of the Parties' subjective intent of contract interpretation under Art. 8(1) CISG. However, the inclusion of the 2010 Incoterm "Delivered Duty Paid" ["DDP delivery"] further indicates that the imposition of the tariffs was not meant to qualify as a hardship event under Clause 12. The Parties adopted a full DDP delivery, and there is no language in the contract that limits the risks that CLAIMANT adopted with the DDP delivery.
89. The absence of any language in Clause 12 allowing the hardship exemption to apply following a change in delivery price is further indicative of the Parties' intent. After CLAIMANT accepted the DDP delivery, the Parties negotiated back and forth about the risks associated with a DDP delivery. [*Ex. C4, p. 12*]. Despite CLAIMANT'S initial desire to refuse accepting any risk associated with a change in delivery terms, CLAIMANT still accepted the contract terms without any language limiting their risks associated with a DDP delivery. [*Ex. C4, p. 12; Ex. C5, p. 14*]. The language of Clause 12, along CLAIMANT'S acceptance of the DDP delivery terms, lead to the conclusion that the tariffs are not included under "comparable unforeseen events."

B. A 30% increase in cost of delivery does not constitute hardship.

90. A mere 30% cost of delivery does not rise to the level of making the contract onerous to perform. Tribunals have regularly assessed cost increases of less than 100% to be insufficient to warrant contract adaptation. Tribunals "generally feel that, in international commerce, the price is subject to constant change and the parties accept that risk." [*Kuster*, *p. 10*]. Therefore, in cases where prices increased to even 200% or higher, tribunals have been reluctant to adapt the contractual terms. [*Schwenzer, p. 715; Fucci*].
91. Parties can set a different hardship threshold in the contract, or can consequently also assume increased risks above what would be allocated in the absence of a contract. [*Schwenzer, p. 715*]. "Primarily, it is up to the parties to define their respective spheres of risk in the contract." [*Id.*]. If

parties wish to lessen their burden of hardship, they must clearly specify in the contract. If the contract is at all ambiguous, the hardship burden will not be lowered in favor of contract adaptation. [*Brunner, p. 220*].

92. The newly imposed tariffs create a 30% price increase, which does not rise to the level of being hardship. The Parties included a hardship provision, and, despite there being correspondence showing that the Parties discussed delivery costs, no mention of increased delivery costs was included in the hardship provision. Furthermore, CLAIMANT specifically assumed the risk of increased delivery costs by accepting the DDP delivery terms. Due to the relatively low delivery price increase and CLAIMANT'S acceptance of a DDP delivery, the tariffs do not make the result in making the contract terms too onerous for CLAIMANT to perform.

C. The retaliatory tariffs were not unforeseeable.

1. Unexpected economic changes do not constitute unforeseeable circumstances.

93. Following the idea that contract adaptation should only occur in truly exceptional circumstances, unexpected economic difficulties are usually not considered unprecedented events that invoke the hardship exemption. [*Fucci; ICC Case No. 8486*]. Due to the uncertain nature of international commerce in general, tribunals regularly find that "price fluctuations are not unforeseeable." [*Kuster, p. 11*]. Tribunals have even found that parties located in countries plagued by an unexpected economic crisis should have contemplated the fact that economic factors outside the parties' control occur, and tribunals should not interfere when parties fail to account for economic changes in the contract. [*Himpurna, p. 207*]. The tariffs' purely economic nature make them unqualified to be considered an unforeseen event, regardless of their unprecedented nature.

2. Retaliatory tariffs have occurred in the past.

94. Events that have occurred even just once in the past are not considered unprecedented when they occur again. For an event to be truly considered unprecedented, it must have been "entirely uncontemplated and unforeseeable" by the parties. [*Qurashi, p. 282*]. Parties involved in international economic contracts are expected to account for the unstable legal and political framework of transborder contracts. [*Brunner, p. 1*; *Fucci*]. Therefore, tribunals typically apply a high threshold for what events constitute unexpected circumstances, and there are only very rare

exceptions where tribunals have found political economic circumstances to qualify as unexpected [*Id.*]. Unexpected events do not need to have affected the party directly for them to be considered foreseeable; if the economic circumstances have occurred at any time in a country's history, the parties should be aware that history can repeat itself [*Fucci*; *Himpurna]*.

95. Direct retaliatory measures resulting in increased tariffs have been imposed once in the past, and it was therefore not out of the realm of possibilities that this would occur again. [*Ex. C6*]. Although the tariff was unexpected, political circumstances were uncertain with Mediterraneo's newly elected President, Ian Bouckaert, taking office. [*Ex. C6*]. Thus, the newly imposed tariffs do not constitute unforeseeable circumstances warranting the invocation of the hardship exemption.

III. Art. 79 CISG does not provide for an adaptation of the contract price.

A. Art. 79 CISG is not a hardship provision.

96. There are many cases that firmly hold Art. 79 CISG is not a hardship provision. Art. 79 CISG encompasses force majeure cases and sets forth an "impossibility" standard as a prerequisite threshold for contract adaptation to be permissible. [*Oberlandesgericht, 1 U 143/95*; *Vital Berry Marketing NV*; *Oberlandesgericht, 1 U 167/95*; *Nuova Fucinati].* There is no direct language in the CISG that Art. 79 CISG is not meant to act as a hardship provision, but "the functional outcome of the application is that hardship is in fact not covered by Art. 79 CISG." [*Kuster, p. 3*]. In practice, tribunals set the Art. 79 CISG threshold high to account for the inherent risk of fluctuations associated with international commerce. [*Kuster, p. 6*].

97. The newly imposed tariffs make contract performance more difficult for CLAIMANT, but not impossible. This is evidenced by the fact that CLAIMANT was able to proceed with sending the last shipment to RESPONDENT, even with the increased delivery cost. Therefore, Art. 79 CISG does not warrant an adaptation of the contract price in the absence of a force majeure event.

B. Regardless of whether Art. 79 CISG is a hardship provision, CLAIMANT has not satisfied the requirements of Art. 79 CISG.

98. Even if Art. 79 CISG was found to be a hardship provision, all requirements of Art. 79 CISG must be satisfied before contractual adaptation can occur. The relevant portion of Art. 79 CISG states that a party is liable for failure to perform if the failure was "due to an impediment beyond

his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract." [*Art. 79 CISG, para. 1*].

99. An impediment is considered a hardship if it results in making contract performance excessively onerous. [*Bund, p. 389*; *Audit, p. 174*; *Schwenzer, p. 714*]. When considering whether the contract has been fundamentally altered, as is required for the performance to become excessively onerous, the aggrieved party must not have assumed the risk associated with the impediment. [*Schwenzer, p. 714*].

100. CLAIMANT accepted a full Incoterm DDP delivery, and the Parties did not limit CLAIMANT'S assumption of risk in the contract [*Ex. C5, p. 13*]. Furthermore, the fact that CLAIMANT was able to proceed with delivering the third shipment to RESPONDENT means that performance was not impossible. Therefore, the tariffs did not result in an impediment warranting contract adaptation under Art. 79 CISG.

CONCLUSION TO ISSUE 3

101. CLAIMANT is not entitled to a price adaptation resulting from hardship regardless of the governing law. Clause 12 of the contract is limited in scope and does not provide for contractual adaptation in the case of economic changes. CLAIMANT has also assumed the risk associated with the tariffs by accepting a full Incoterm DDP delivery with no limiting provision in the contract. Therefore, not only has CLAIMANT contractually assumed the increased delivery costs, but the delivery cost increase is relatively minor. This, along with the fact that changed economic circumstances rarely constitute unexpected events, do not support a price adaptation under Clause 12. Furthermore, Art. 79 of the CISG does not apply to this case because it is not a hardship provision. However, even if the CISG or Mediterranean law were to be applied to the circumstances, the same conclusion would be reached: the circumstances do not support the Tribunal adapting the contract price.

PRAYER FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully submits that the Arbitral Tribunal should:

(1) Dismiss the claim as inadmissible for a lack of jurisdiction and powers;

(2) Reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;

(3) Order CLAIMANT to pay RESPONDENT'S costs incurred in this arbitration.

23 January, 2019

Respectfully Submitted,
Maria Bucci and Hannah Clayshulte