UNIVERSITY OF VERSAILLES, PARIS-SACLAY

MEMORANDUM FOR RESPONDENT

CLAIMANT	v.	**RESPONDENT**
Phar Lap Allevamento		Black Beauty Equestrian
Rue Frankel 1, Capital City, Mediterraneo		2 Seabiscuit Drive, Oceanside, Equatoriana

COUNSEL

Inès Giauffret • Sarah Lasson • Pierre Nosewicz • Loïc Saint-Martin

Paisley Simonnet • Léane Thakrar • Léonard Vanvi • Fanny Vigier

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LIST OF ABREVIATIONS

Art./Arts.	Article/Articles
BCCI	Bulgarian Chamber of Commerce and Industry
CISG	United Nations Convention on Contracts for the International Sale of Goods of 1980
CLAIMANT	Phar Lap Allevamento
CLAIMANT'S MEMORANDUM	National Law Institute University, Bhopal Claimant Memorandum
Contract	Contract between Phar Lap Allevamento and Black Beauty Equestrian dated 6 May 2017
Ed.	Edition
et al.	*et alii* - and others
DDP	Delivered Duty Paid, Incoterms 2010
i.e.	*id est* - that is
IBA	International Bar Association
ibid.	*ibidem* - in the same place
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
infra	Below
HKIAC	Hong Kong International Arbitration Centre
Mr.	Mister
Ms.	Miss
No./Nos.	Number/Numbers
p./pp.	Page/Pages
In para. /paras.	Paragraph/Paragraphs of Memorandum for CLAIMANT
Parties	Phar Lap Allevamento and Black Beauty Equestrian
PO1	Procedural Order No. 1

PO2	Procedural Order No. 2
RESPONDENT	Black Beauty Equestrian
Schiedsgericht der Handelskammer	Hamburg Chamber of Commerce
supra	Above
UK	United Kingdom
UNCITRAL	United Nations Commissions on International Trade Law

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STATEMENT OF FACTS

1 Black Beauty Equestrian ("**RESPONDENT**") is a company registered and located in Oceanside, Equatoriana. It is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. RESPONDENT began establishing a racehorse stable by acquiring mares with excellent pedigree.

2 Phar Lap Allevamento ("**CLAIMANT**") is a company registered and located in Capital City, Mediterraneo, which operates a stud farm. It offers various services, such as training and professional development courses. It provides stallions for breeding and offers frozen semen of its stallions for artificial insemination.

3 CLAIMANT and RESPONDENT are together referred to as the Parties ("the **Parties**").

4 On **21 March 2017**, RESPONDENT expressed its interest in Nijinsky III, CLAIMANT's star stallion, to start a new breeding programme [*EXHIBIT C1, p. 9*]. At that time, while Equatoriana was usually facing serious restrictions on the transportation of all living animals, the ban on artificial insemination for racehorses had been temporarily lifted. In this context, RESPONDENT was interested in the availability of frozen semen of Nijinsky III.

5 By email of **24 March 2017**, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen as per its general conditions [*EXHIBIT C2, p. 10*]. CLAIMANT considered this number as a good opportunity to increase its revenues, given its economic difficulties at the time [*ibid.*].

6 Contrary to CLAIMANT's statement, RESPONDENT objected to the choice of law and the forum selection clauses in the offer and insisted on adding a DDP delivery [*INCOTERMS; EXHIBIT C3, p. 11; PO2, p. 56, ¶ 10*].

7 On **31 March 2017**, CLAIMANT accepted the DDP delivery in principle but requested to be protected against the risk of changing health and security requirements by a hardship clause [*EXHIBIT C4, p. 12*]. RESPONDENT could not accept the first option. Paying a much higher price without any counterpart was unbalanced for RESPONDENT. As for the hardship clause, RESPONDENT considered the ICC-hardship clause to be too broad and added a hardship wording to the existing force majeure clause. RESPONDENT's intention was to avoid any reference that could be interpreted as an empowerment for contract adaptation.

8 On **10 April 2017**, RESPONDENT clearly formulated its wish for an arbitration agreement governed by the law of the seat of arbitration, rather than by the law of the contract [*EXHIBIT R1, p. 33*].

9 In its presentation, CLAIMANT omitted to specify that, in response, it requested that the seat of arbitration be Danubia, yet without objecting to RESPONDENT's proposal that the law of the seat would govern the arbitration agreement [*EXHIBIT R2, p. 34*]. For RESPONDENT, this meant that the choice of law provision also had to be changed, to avoid any conflict over applicable law. Thus, Mr. Antley, RESPONDENT's representative, listed the choice of law governing the arbitration agreement as one of the key points to be addressed in the final Contract [*EXHIBIT R3, p. 35*].

10 On **12 April 2017**, Mr. Antley, and Ms. Napravnik, were involved in a severe car accident. From this day on, new negotiators dealt with the Contract [*EXHIBIT C8, p. 17*]. These new negotiators were left with nothing else than an unclear note written by Mr. Antley, listing a number of issues intended for further negotiations [*EXHIBIT R3, p. 35*]. The interruption of the negotiation caused by the car accident prevented the Parties from further discussing the issue of the choice of law provision.

11 On **6 May 2017**, the Parties signed the frozen semen sales agreement (the "**Contract**"). Under the Contract, CLAIMANT would sell 100 doses of Nijinsky III's frozen semen against payment by RESPONDENT of USD 99,500 per insemination. Contrary to CLAIMANT's allegations, the Contract does not contain any disposition prohibiting resale to third parties "*without express written consent*" [*CLAIMANT'S MEMORANDUM, p. 1*].

12 On **20 May 2017** and **3 October 2017**, CLAIMANT sent the first and second shipment of 25 doses to RESPONDENT.

13 In **November 2017**, Mediterraneo's newly elected President, Ian Bouckaert, announced a measure consisting in increasing tariffs on agricultural products imported from Equatoriana by twenty-five per cent. As a reaction to this increase, the Equatorianian Government retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo.

14 On **20 January 2018**, while the third shipment was supposed to go out two days later, as per the Parties' agreement, Ms. Napravnik complained about the newly imposed tariffs and informed RESPONDENT's veterinary, Mr. Shoemaker, that she had decided to put on hold the third shipment.

15 Contrary to CLAIMANT's allegations, RESPONDENT never assured that a solution would be found. First, Mr. Shoemaker is not a representative of RESPONDENT. He emphasized several times that he was not the person to whom CLAIMANT should address its concerns, since he had no power to make any commitments: "*I told Ms. Napravnik several times that I was not a lawyer and had not been involved in the negotiations of the contract*" [*EXHIBIT R4, p. 36*]. Second, he never committed to finding a solution.

16 On **23 January 2018**, CLAIMANT finally delivered the third shipment of 50 doses without settling with RESPONDENT on a new price [*EXHIBIT C8, p. 18*]. RESPONDENT undisputedly paid the contractual remuneration.

17 Disagreeing on the allocation of the newly imposed tariffs, CLAIMANT filed a Notice of Arbitration initiating the present proceeding on **31 July 2018** [*Notice of Arbitration, p. 4*].

18 On **2 October 2018**, CLAIMANT requested the Tribunal to join a third party to the proceedings in order to submit evidence supposedly useful for its claim. CLAIMANT omitted to specify that the evidence was obtained through illegal means [*Letter by Langweiler, p. 49*].

19 On **6 December 2018**, CLAIMANT submitted its Memorandum.

APPLICABLE LAW

20 The Contract is governed by the law of Mediterraneo, including the CISG [*EXHIBIT C5, p. 14, ¶ 14*]. It is undisputed that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG [*PO1, p. 52, ¶ III*].

21 Further, the law of the Contract is a verbatim adoption of the UNIDROIT Principles [*ibid.*]. Both the CISG and the UNIDROIT Principles are therefore applicable to the case at hand.

22 Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*PO1, p. 52, ¶ III*].

23 Finally, the arbitration agreement within the Contract provides for the applicability of HKIAC Rules 2013 [*Notice of Arbitration, p. 6, ¶ 14*]. However, both Parties have agreed to conduct the proceedings under HKIAC Rules 2018 [*PO1, p. 51, ¶ II*].

STATEMENT OF ARGUMENTS

24 The arbitration agreement is governed by the law of Danubia. Under the latter, the Tribunal does not have jurisdiction or the power to adapt the Contract. In the unlikely event the Tribunal would decide that the law of Mediterraneo should govern the arbitration agreement, it would still not have jurisdiction or power to adapt the Contract (**Issue 1.**).

25 The Tribunal has broad discretion in deciding on the relevance, materiality and weight of any evidence as to the outcome of the case. The evidence at hand has been obtained through illegal means, and there are clues according to which CLAIMANT could be involved. The doubtful origin of the evidence discredits the need for its submission. Finally, transparency is not a principle of commercial arbitration and considering the importance of confidentiality, the lack of interest of the public and the absence of precedent in arbitration, the admission of the evidence should not be allowed (**Issue 2.**).

26 Contrary to CLAIMANT's contention, no adaptation can occur under the Contract or under the CISG and the UNIDROIT Principles. An adaptation of the Contract can only occur in case of hardship. In the case at hand, RESPONDENT argues that the newly imposed tariffs do not constitute hardship as provided in Clause 12. Furthermore, there is no occurrence of disequilibrium justifying an adaptation of the price. CLAIMANT has therefore not provided sufficient elements for RESPONDENT to bear the additional costs imposed by the Government of Equatoriana (**Issue 3.**).

ARGUMENTS

Issue 1 The Tribunal does not have jurisdiction or the power to adapt the Contract

27 RESPONDENT disagrees with CLAIMANT on its distinction made between jurisdiction and the power of the Tribunal because "*jurisdiction refers to the power of the tribunal to hear the claim*" [*CLAIMANT'S MEMORANDUM, p. 2, ¶ 2; HWANG CHEN LIM, p. 266*].

28 Therefore, the lack of jurisdiction and power of the Tribunal will be demonstrated as a whole.

29 In the absence of express choice made by the Parties, the law of Danubia governs the arbitration agreement in the absence of express choice made by the Parties (**I.**). In accordance with this law and the Parties' intent, the arbitration agreement should be interpreted according

to the Parol Evidence Rule, also called the "*four corners rule*". Yet, the Contract does not expressly empower the Tribunal to proceed to its adaptation (**II.**).

I. The arbitration agreement is governed by the law of Danubia

30 The law of Danubia should govern the arbitration agreement under the presumption in favor of the law of the seat (**A.**) and per the application of the three-step test (**B.**).

A. The law of Danubia governs the arbitration agreement in accordance with the presumption in favor of the law of the seat

31 The arbitration agreement does not contain any express choice of law [*EXHIBIT C5, p. 14*]. CLAIMANT argues that, to avoid complexities [*CLAIMANT'S MEMORANDUM, p. 2, ¶ 5*], parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract [*CLAIMANT'S MEMORANDUM, p. 3, ¶ 13*].

32 Contrary to CLAIMANT's contention, it is rare *"for the law of the arbitration agreement to be different from the law of the seat of the arbitration*" [*C v. D*]. Therefore, CLAIMANT's allegation according to which the same law should govern both the arbitration agreement and the Contract is unfounded [*CLAIMANT'S MEMORANDUM, p. 3, ¶ 13*].

33 It is generally accepted that the agreement to arbitrate is completely autonomous and separable from the underlying contract [*Art. 16(1) MODEL LAW; Art. 16 LCIA Arbitration Rules; Art. 19 AL PRC; FOUCHARD, p. 197; Harbour v. Kansas*].

34 This principle, also called the "*separability doctrine*", provides that the regime of a contract and an arbitration clause that it contains should be independent [*BORN, pp. 464-465*]. CLAIMANT pretends that separability doctrine "*simply*" prevents a party from impugning the arbitration agreement by alleging that the main agreement is invalid [*CLAIMANT'S MEMORANDUM, p. 3, ¶ 14*]. However, the separability doctrine is not limited to this allegation. One of the most important consequences lies in the fact that, due to its autonomy from the underlying contract, the arbitration agreement may be governed by another law [*BORN, pp. 464-465; LEW, p. 107; Prima Paint Corp. v. Flood; BLACKABY ET. REDFERN, p. 159*]. By relying on this doctrine, there is a presumption in favor of the law of the seat when parties do not express a choice of law applicable to the arbitration agreement [*YIFEI, p. 78; BORN, pp. 476-477; FOUCHARD, p. 213*].

35 The seat is the "*most important variable in international arbitration*" and may determine the law applicable to the arbitration agreement [*MCILLWRATH, p. 21*]. In the absence of choice by the parties, the New York Convention as "*a fundamental source of international arbitration law and practice*", provides for a presumption in favor of the law of the seat [*MILES, p. 389*]. Although it is not a choice-of-law rule, Art. V(1)(a) of the New York Convention states that the seat is the default choice [*ibid.*].

36 It follows that by expressly choosing Danubia as the seat of their arbitration, the Parties intended to refer to the law of Danubia to govern their arbitration agreement.

37 Should the Tribunal not be satisfied that the law of the seat governs the arbitration agreement as per this presumption, the law of Danubia should alternatively be applied as per the three-step test.

B. The law of Danubia should apply to the arbitration agreement as per the three-step test

38 The Parties have decided to submit their dispute to the HKIAC Rules 2013, which do not provide any guidance to identify the law applicable to the arbitration agreement. These Rules merely provides that, "*the arbitral tribunal shall apply the rules of law which it determines to be appropriate*". To identify this "*appropriate*" law, a three-step test is generally used [*YIFEI, p. 79; CARTWRIGHT-FINCH, p. 831; Sulamérica v. Enesa*].

39 First, the arbitral tribunal should identify an express choice of law by the parties. In the absence of such a choice, the tribunal should then try to determine an implied choice. Failing to identify this implicit choice, the arbitration agreement is considered to be governed by the law involving the closest connection [*FOUCHARD, p. 222; BORN, p. 466; Sulamérica v. Enesa*]. In the case at hand, since there is no express choice of law by the Parties, the Tribunal should rely on the implicit choice made by them.

40 With respect to the implied choice of the parties, pre-contractual negotiations are often used to determine the real intention of the parties and their implicit willingness [*ICC Case No. 7920*]. To this extent, "*the designation of […] a neutral place of arbitration is a strong connecting factor to determine the implied choice of the parties as to the law governing the arbitration agreement*" [*HARISANKAR KS, p. 631*].

41 In the case at hand, during the negotiations, the Parties have extensively discussed the seat of arbitration. After receiving RESPONDENT's proposal [*EXHIBIT R1, p. 33*], CLAIMANT proposed

Danubia as the seat of arbitration, mainly because it is a neutral country [*EXHIBIT R2, p. 34*]. Considering that the Parties have not agreed upon an explicit choice of law but instead, chose Danubia as the seat of arbitration after deep negotiations, demonstrates their intention to refer to a neutral law such as the law of Danubia.

42 Nevertheless, if the Tribunal finds that there is no implied choice of the Parties, it should apply the law which has the closest connection with the arbitration agreement. In this respect, the seat of arbitration is generally considered as the most connected factor [*FOUCHARD, p. 224; HARISANKAR KS, p. 631; C v. D; Abuja v. Meridien*].

43 The seat of arbitration as chosen expressly by the Parties is Danubia [*CLAIMANT'S EXHIBIT C5, p. 14, ¶ 15*]. This is a presumption in favor of Danubia as the law applicable to the arbitration agreement. The Tribunal is invited to disregard CLAIMANT's unfounded assertions and apply the law of the seat as the law governing the arbitration agreement.

44 Yet, the law of Danubia does not allow the Tribunal to proceed to the Contract's adaptation.

II. The Tribunal cannot proceed with the Contract's adaptation

45 Danubian law prohibits the Tribunal to adapt the Contract (**A.**). In the unlikely event the Tribunal finds that the law of Mediterraneo should govern the arbitration agreement, it still does not have jurisdiction to adapt the Contract. That is referring to the scope of the arbitration agreement and the intent of the Parties (**B.**). In the further alternative, it would still be deprived from such jurisdiction by reference to the law of the seat (**C.**).

A. The law of Danubia prohibits the adaptation of the Contract

46 The law of Danubia requires an express agreement of the Parties to allow the Tribunal to adapt the Contract (**1.**). Besides, under the Parol Evidence Rule, contracts should be strictly interpreted (**2.**).

1. The law of Danubia requires an express agreement for the Tribunal to be allowed to adapt the Contract

47 Given the contractual nature of arbitration, arbitration proceedings on a dispute cannot exist without the consent of the parties [*LEW MISTELIS, pp. 99-100*]. The consent of the parties to arbitration should be determined in the light of the *lex arbitri*: the law of the seat of the arbitral tribunal where arbitration is to take place [*WAINCYMER, p. 130*].

48 For the Tribunal to have jurisdiction or the power to adapt the Contract, the law of Danubia requires "*an express conferral of powers*" by the parties [*PO2, p. 60, ¶ 36*]. This requirement arises from the necessity to protect the parties from the insecurity of adaptation by a tribunal, which would override the principles of parties' autonomy and binding effect arising from a contract [*FERRARIO, p. 74*].

49 To avoid the necessity of an express consent in the arbitration agreement, CLAIMANT argues that the adaptation is asked as a "*remedy*" against the downsides of a change of circumstances [*CLAIMANT'S MEMORANDUM, p. 10, ¶¶ 62-66; HOLTZMANN NEUHAUS, p. 1129*]. Deciding whether it is a remedy or not is an issue on the substance of the case and not on jurisdiction [*infra ¶ 173*].

50 However, such an argument could only succeed if a tribunal considers the adaption of the contract "*in the course of deciding a normal dispute regarding contractual obligations*", not if the tribunal is only constituted with the unique aim of adapting a contract [*HOLTZMANN NEUHAUS, p. 1116*].

51 The sole purpose of this proceeding is the adaption of the Contract. The absence of "*an express conferral of power*" demonstrates the Parties' lack of consent to allow the Tribunal to adapt the Contract, therefore CLAIMANT's argument remains unfounded [*PO2, p. 60, ¶ 36*].

2. <u>The scope of the arbitration agreement is limited to its written content in accordance with the Parol Evidence Rule</u>

52 CLAIMANT argues that according to the pro-arbitration principle, any doubt concerning the interpretation of the arbitration agreement should be resolved in favor of arbitration [*CLAIMANT'S MEMORANDUM, p. 6, ¶¶ 30-32*].

53 Nevertheless, the pro-arbitration presumption is not always recognized. A "*restrictive*" presumption also exists for some authorities [*BORN, pp. 252, 1338; FOUCHARD, p. 260; ICC Award No. 4392; ICC Award No. 2138*]. Where arbitration is considered as "*a derogation of national justice*", the exceptional powers of the arbitral tribunal must be interpreted narrowly [*FOUCHARD, p. 260; HOLTZMAN NEUHAUS, p. 1127*], which is the case in Danubia [*PO2, p. 60, ¶ 36*].

54 CLAIMANT contends that the Parties' intent should also be interpreted in the light of the CISG, by using it as a procedural rule [*CLAIMANT'S MEMORANDUM, p. 7, ¶¶ 40-45*]. It is constant

jurisprudence in Danubia that the CISG is purely applicable to the merits and cannot be used to interpret a procedural clause such as an arbitration agreement [*PO2, p. 60, ¶ 36*].

55 CLAIMANT further contends that, due to the ambiguity of the arbitration agreement, the latter should be interpreted extensively [*CLAIMANT'S MEMORANDUM, p. 5, ¶ 26*].

56 According to the prevailing doctrine, ambiguity is when it remains two "*reasonable alternative interpretations*" after an examination of the contract's terms [*WONG, p. 3; Judge Gale C.J.O in Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. cited in PERELL, p. 28*].

57 However, CLAIMANT does not establish the existence of any ambiguity that would require such a broad interpretation of the Parties' agreement. In the present case, the Parties have chosen to model their arbitration clause after the standard arbitration clause recommended by HKIAC Rules 2013 [*EXHIBIT C5, p. 13, ¶ 15*]. There is no doubt on the absence of an express agreement on the power for the Tribunal to adapt the Contract [*ibid.*]. The silence of the Parties on conferring specifics powers to the Tribunal is enough to determine that the Tribunal should not be able to adapt the Contract.

58 The Parol Evidence Rule is applicable in Danubia when there is no ambiguity [*PO1, p. 52, II*]. This allows limiting the scope of arbitration clauses by considering that the terms of the written contract are the final expression of the parties' will [*BARRON'S CANADIAN LAW DICTIONARY; W.W.W. Associates, Inc. v. Giancontieri*]. A written contract cannot be challenged by its pre-contractual stage of negotiations because its purpose is to protect "*certainty in contractual obligations*" and "*to hamper a party's ability to use unreliable evidence*" [*Judge ROTHSTEIN in Sattva Capital v. Creston Moly, cited in SWAN ADAMSKI NA, ¶ 8.171*]. This general principle precludes evidence of pre-contractual negotiations and subsequent conduct when interpreting a contract [*ROSENGREN, pp. 6-7; Globe Motors Inc. & Ors. v. TRW Lucas Varity Electric Steering Ltd. & Anor.*].

59 In the case at hand, due to the car accident of the two initial main negotiators, these terms were negotiated by a different representative of RESPONDENT. While the new negotiator tried to understand what his predecessor had agreed to, he did not fully understand his notes and CLAIMANT's negotiator did not try to shed light on the situation [*Answer to the Notice of Arbitration, p. 30, ¶ 8; EXHIBIT R3, p. 35*].

60 Consequently, the negotiations between the Parties are unreliable evidence. The written agreement concluded between the negotiators and finally signed by the Parties reflects their intent. The Parties were not willing to empower the Tribunal with contract adaptation.

61 Finally, the *lex arbitri,* as the law applicable to the arbitration agreement determines the power of the Tribunal to adapt or not the Contract [*BERGER, p. 10; PETER, pp. 250-251*]. In the silence of the *lex arbitri,* the Tribunal can find some guidance in the case law of national courts of the seat. If a national court has the power to adapt a contract, then an arbitral tribunal will have it too [*ibid.*]. Conversely, a Tribunal cannot have a wider competence than a national court since arbitration is considered as a derogation of national justice [*HOLTZMANN NEUHAUS, pp. 1130-1131*]. It is "*the main reason against allowing arbitral tribunals to assist parties by adapting contracts*" [*ibid.*].

62 As a matter of Danubian law, when applying the Parol Evidence Rule, national courts allow the adaptation of the contract only "*if authorized*" by the Parties [*PO2, p. 61, ¶ 45*].

63 Therefore, the Tribunal should not have a wider competence than the courts of Danubia. It should find that it does not have jurisdiction or the power to adapt the Contract.

B. Should the Tribunal find that the law of Mediterraneo governs the arbitration agreement, it still does not have jurisdiction to adapt the Contract

64 It is only in the unlikely event that the Tribunal finds the law of Mediterraneo should govern the arbitration agreement that the Parties' intention may be taken into consideration. Nevertheless, neither the arbitration agreement (**1.**) nor the Parties' intent and subsequent conduct (**2.**) provide for the Tribunal's jurisdiction to adapt the Contract.

1. Contractual adaptation does not fall within the scope of the arbitration agreement

65 CLAIMANT asserts that adaptation of the Contract in the case at hand falls within the jurisdiction of the Tribunal. In order to support this allegation, CLAIMANT refers to the "*wide meaning*" of the arbitration agreement, and contends that the situation at hand should "*fall within the ambit of the term dispute*" of the agreement [*CLAIMANT'S MEMORANDUM, p. 5, ¶¶ 27-29*].

66 Discrepancies may arise according to the settlement of certain disputes to arbitration, particularly when such disputes are specific [*BORN, p. 1348*]. Adaption of a contract has to be predefined by the arbitration agreement, as it is the main source defining a tribunal's jurisdiction [*DUNMORE, p. 178*]. In this extent, contractual adaptation is a specific dispute, because it implies

for the tribunal to create new binding obligations over the original ones contracted by the parties [*PRUJINER, p. 6; PAULSSON, p. 249; BOISSÉSON, pp. 185, 642; HOLTZMANN NEUHAUS, p. 1127*]. The decision of adapting a contract is made on the basis of an assessment of economic factors and not in direct application of substantive legal rules or trade usages [*HOLTZMANN NEUHAUS, p. 1131*].

67 For this reason, the tribunal cannot substitute itself to parties in order to complete a missing segment of their contractual relationship, or modify the contract itself unless it is conferred upon by their express consent [*BLACKABY ET. REDFERN, p. 80; WAINCYMER, p. 498; Aminoil Award*]. This is without regard to the arbitration agreement broad interpretation's principle [*BERGER, p. 5; UN DOC. PROPOSALS*].

68 Thus, when the dispute concerns contract adaption, a broadly-drafted arbitration agreement does not provide an all-encompassing jurisdiction if it has not expressly mentioned adaptation of the contract as being submitted to arbitration [*STALEV, p. 204*]. For instance, it is conferred when parties use the wording "*including a change of the contract itself*" in the arbitration agreement [*ICC Case No. 7544*].

69 In the case at hand, to "*adjust a specific term*" of the Contract [*CLAIMANT'S MEMORANDUM, p. 5, ¶ 28*] refers to its adaptation and therefore implies to alter obligations contained in such Contract. Consequently, a specific mention within the arbitration agreement is required.

70 However, the arbitration agreement does not refer at all to "*contract adaptation*" [*EXHIBIT C5, p. 14, ¶ 15*]. It follows that, contrary to CLAIMANT's argumentation, the claim aiming to "*adjust a specific term of the Contract in light of supervening events*" gravitates outside the scope of the arbitration agreement [*CLAIMANT'S MEMORANDUM, p. 5, ¶ 28*]. Consequently, the Tribunal does not have jurisdiction.

2. <u>The Parties' intent and their subsequent conduct leads the Tribunal to decline jurisdiction</u>

71 Even if the Tribunal interprets the Parties' intent arising out of the negotiations while drafting the arbitration agreement (**a.**) and their subsequent conduct (**b.**), it is still deprived from any power to adapt the Contract.

a. The true intent of the Parties was not to confer jurisdiction to the Tribunal

72 CLAIMANT attempts to demonstrate the Parties' intent to empower the Tribunal to adapt the Contract [*CLAIMANT'S MEMORANDUM, pp. 7-9, ¶¶ 46-61*].

73 As explained by RESPONDENT, the broad wording of the clause's scope has been expressly reduced by RESPONDENT to exclude the power of adaptation [*Answer to the Notice of Arbitration, p. 31, ¶ 13*].

74 In addition, it is only due to the car accident involving the Contract's original negotiators that this issue has not been dealt with. RESPONDENT's negotiator expressly declared that the clause conferring adaptation powers "*suggested by Claimant*" was "*too broad*". RESPONDENT's head of legal department, involved in the strategy in relation with the Contract's conclusion and negotiation, expressly stated that he "*would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion*" [*EXHIBIT R3, p. 35*].

75 At the time of the negotiations, RESPONDENT was strongly opposed to the possibility for the arbitrators to proceed to contractual adaptation. CLAIMANT's contention, according to which RESPONDENT's intent was "*hidden*", is incorrect [*CLAIMANT'S MEMORANDUM, p. 7, ¶ 43*]. Instead, Parties agreed "*on the inclusion of a narrow hardship reference*" [*EXHIBIT R3, p. 35*].

76 Therefore, contrary to CLAIMANT's assertion, RESPONDENT's intention may be relied upon because CLAIMANT was perfectly aware of its position, and the Parties' intent was not to confer upon the Tribunal power to adapt the Contract.

b. The Parties' subsequent conduct reveals the absence of any intent to confer jurisdiction to the Tribunal to adapt the Contract

77 CLAIMANT asserts that RESPONDENT had the intention to negotiate a pretence of the Contract's adaptation and seems to argue that this was upon RESPONDENT's initiative that the meeting was scheduled [*CLAIMANT'S MEMORANDUM, p. 9, ¶ 59*].

78 This is not correct. It was only upon CLAIMANT's initiative that such meeting was set-up [*PO2, p. 60, ¶ 35*]. The fact that RESPONDENT attended such meeting does not mean that it was planning to renegotiate the Contract. Quite to the contrary, RESPONDENT objected without hesitation to proceed on any contractual adaptation and excluded on purpose, from the terms of the Contract, any mechanism by which its adaptation would have been possible.

79 It follows that, contrary to CLAIMANT's contention, neither the Parties' negotiations nor their subsequent conduct may confer any power to the Tribunal in order to adapt the Contract.

C. <u>In the unlikely event the Tribunal should find that the law of Mediterraneo governs the arbitration agreement and allows for Contract's adaption, it lacks jurisdiction to do so under the law of the seat</u>

80 CLAIMANT's argumentation is based on the incomplete assertion that the law applicable to the arbitration agreement is the only relevant law to determine the Tribunal's powers [*CLAIMANT'S MEMORANDUM, p. 6, ¶ 36*].

81 The law applicable to the arbitration agreement is not the only source which determines the power to adapt a contract to a tribunal: there is also the procedural law [*BEISTEINER, pp. 77-79; BERGER, p. 10; FERRARIO; p. 75; HORN pp. 179-182; supra ¶ 61*]. To this extent, the procedural law cannot be ignored because "*it is not the arbitration agreement alone, but the agreement in its combined effect with the lex arbitri which conveys the necessary authority to the arbitral tribunal*" [*BERGER, p. 10*]. In addition, in the absence of an express agreement between the parties regarding the tribunal's power, the law of the arbitral seat is the source of the rules that defines such power [*BORN, pp. 3084-3085; DUNMORE, p. 178*].

82 In the case at hand, the law of Danubia is the law of the seat *i.e.* the *lex arbitri* [*EXHIBIT C5, p. 14, ¶ 15; supra ¶ 61*] and no power has been expressly attributed by the Parties [*supra ¶ 51*]. As demonstrated above [*supra ¶ 48*], the law of Danubia requires an express agreement between the Parties for the Tribunal to proceed to contractual adaptation [*PO2, p. 60, ¶ 36*].

83 In the present case, such attribution of power is lacking because there is no express reference to contractual adaptation in the arbitration agreement [*supra ¶ 51*]. Therefore, even if the substantive law provides for a broad interpretation of arbitration agreements, the Tribunal does not have jurisdiction to proceed to the Contract's adaptation pursuant to the procedural law [*Notice of Arbitration, p. 7, ¶ 16; CLAIMANT'S MEMORANDUM, p. 5, ¶¶ 25-26*].

84 In addition, CLAIMANT's attempt to demonstrate that the pro-arbitration principle is in favour of the Tribunal's jurisdiction is unfounded [*CLAIMANT'S MEMORANDUM, p. 5, ¶ 30*]. It is the *lex arbitri,* which determines if an award is enforceable or not [*VAN DEN BERG, p. 46*]. This is particularly accurate when the arbitral tribunal proceeds on a contract's adaptation [*ibid.*]. If no authority exists in the *lex arbitri,* which procedurally authorizes arbitrators "*to decide on the contract*

adaptation or supplementation" [*BERGER, p. 10*], the award is not enforceable "*since the question is decided not by the lex fori of the enforcement court but by the law applicable to the arbitral procedure*" [*ibid.*].

85 Pursuant to the *lex arbitri*, *i.e.* the law of Danubia, the Tribunal is not authorized to decide on the Contract's adaptation [*supra* ¶ *48*]. If the Tribunal proceeds to the Contract's adaptation according to the law governing the arbitration clause but violates the procedural law which precludes such possibility, the Tribunal's award may be set aside. Such award is not in favor of arbitration and does not respect the pro-arbitration principle.

86 Rendering an award while respecting the procedural law is fundamentally superior to the need to concentrate disputes "*before a unique tribunal*" as CLAIMANT argues [*CLAIMANT'S MEMORANDUM, p. 5, ¶¶ 30-32*]. Its assertion is therefore unfounded and the Tribunal should decline jurisdiction.

Conclusion of Issue 1

87 The arbitration clause is governed by the law of Danubia. Consequently, the Tribunal does not have jurisdiction or the power to proceed to the Contract's adaptation.

88 Even if the Tribunal finds that the law of Mediterraneo governs the arbitration agreement, the Tribunal does not have jurisdiction or the power to adapt the Contract.

Issue 2 Evidence from the other arbitration proceedings is not admissible

89 CLAIMANT should not be entitled to submit evidence from the other arbitration proceedings, for lack of relevancy and materiality (**I.**). This is consistent with due process of law (**II.**).

I. The evidence is not relevant nor material to the outcome of the case

90 The relevancy and materiality of the evidence that CLAIMANT wishes to submit cannot be characterized (**A.**). This is explained by the origin of the evidence provided (**B.**).

A. The Tribunal has the power to assess the relevance and the materiality of the evidence

91 It is undisputed that the Tribunal has the power to admit or exclude evidence to the proceedings [*CLAIMANT'S MEMORANDUM, p. 11, ¶ 72; Art. 22 HKIAC Rules 2018; Art. 9.1 IBA Rules*]. Arbitrators have broad discretion in deciding on the relevance, materiality and weight of any evidence [*CLAIMANT'S MEMORANDUM, p. 11, ¶ 73; Art. 19 (2) UNICTRAL; Art. 22 HKIAC Rules 2018; Art. 9.1 IBA Rules*].

92 The IBA Rules 2010 on the Taking of Evidence in International Arbitration set limits for the submission of evidence by installing an economical and fair process for the taking of evidence in commercial arbitration.

93 According to Art. 9.2 (a) of the IBA Rules 2010, the Tribunal should exclude evidence "*that would lack of sufficient relevance to the case or materiality to its outcome*" [*Art. 22.2 HKIAC Rules 2018*].

94 Regardless of CLAIMANT's attempt to make a distinction between "*materiality*" and "*relevancy*", the latter is superficial because it appears that in the case at hand the evidence does not fulfil either of these criterions [*CLAIMANT'S MEMORANDUM, p. 13, ¶ 85; PILKOV, p. 149; TURNER, p. 22*].

95 CLAIMANT argues that the submission of the evidence from the other proceeding would be relevant for the outcome of the case and would be sufficient to prove its claim [*CLAIMANT'S MEMORANDUM, p. 13, ¶ 87*]. However, the relevance of the evidence can be challenged for four reasons.

96 First, the principle of precedent does not apply in international arbitration [*FOUCHARD, p. 187*]. Arbitrators would not be bound to follow the same solution as the previous proceeding event though it is decided that the outcome would benefit to CLAIMANT. It would be an undue concern for confidentiality to promote the adoption of similar logic to other arbitral tribunals, since open recourse to other awards does not necessarily ensure consistency of reasoning [*WAINCYMER, p. 798*].

97 Second, not only does the above-mentioned principle not apply, but also the outcome of the pending proceeding itself has not yet been determined. CLAIMANT attempts to submit evidence from another proceeding to prove its point, without even knowing the result of the said pending proceeding. The "*Partial Interim Award*" rendered on 29 June 2018 confirmed the tribunal's power to adapt the contract should the tariff result in hardship for RESPONDENT [*PO2, p. 60, ¶ 39*]. As a matter of fact, it has not yet been decided whether the tariff resulted in hardship.

98 Third, the information CLAIMANT requires to succeed on the merits cannot be found in the "*Partial Interim Award*" but in other documents that led to it, for which disclosure is not allowed [*CLAIMANT'S MEMORANDUM, p. 13, ¶¶ 85-87; NEIL, p. 289; BORN, p. 2792*].

99 Fourth and finally, disclosure of parties' work rarely promotes the equitable administration of Justice, especially when evidence is sought for impeachment or credibility purposes [*MARTINEZ, p. 405*].

100 In the light of the above, the Tribunal should not be able to identify sufficient relevance and materiality as to the evidence brought by CLAIMANT, which means that the evidence should be inadmissible.

B. The source of information through which CLAIMANT obtained the evidence weakens its relevance and materiality

101 Relevancy of the evidence relied upon by CLAIMANT cannot be characterized due to its doubtful origin. Indeed, said evidence has been transmitted through hearsay, its relevance and weight may be undermined (**1.**). It can also be contested since it has been obtained through illegal means (**2.**).

1. The evidence should be disregarded because it was obtained through hearsay

102 The relevance of evidentiary documents depends on the source of its acquisition. Evidence obtained by hearsay is generally excluded because it is unreliable [*OXFORD JOURNAL, p. 405*]. This is why the credibility and admissibility of such evidence has to be analysed by the Tribunal [*TURNER, p. 22*]. Risks of hearsay evidence involve concerns about the declarant's veracity, perceptual ability, and memory, as well as the possible ambiguity of the declarant's statement [*REDMAYNE, p. 818*].

103 International arbitration rules and codes, such as the HKIAC Rules or the IBA Rules, do not include specific regulations as to the admission of hearsay evidence and the importance that should be given to it. However, the discretion to arbitral tribunals is not an open-ended grant of power allowing arbitrators to base their determinations on any piece of evidence [*OBLIN, pp. 210-211*].

104 It has been decided in one of the first cases addressing the weight of hearsay evidence in connection with an international arbitration, that hearsay evidence has very little value in the determination of the proceedings [*OBLIN, p. 210; Ireland Case*].

105 In the present case, CLAIMANT arranged an opportunity to acquire the "*Partial Interim Award*" from a company providing intelligence on the horseracing industry. The company has a

doubtful reputation as to where it gets its information from and has refused to disclose its sources [*PO2, pp. 60-61, ¶ 41*].

106 Further, it is not clear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT. It is interesting to note that both employees had been witnesses in the other arbitration before they were fired on 6 July 2018 [*PO2, pp. 60-61, ¶ 41*]. These circumstances create a reasonable doubt as to the objectivity of their declarations.

107 Common law systems place great emphasis on oral evidence and require it to be direct. This is the case of Danubia [*PO2, p. 61, ¶ 44*]. Direct evidence excludes hearsay evidence, since there would be no way the opposing party could discern or verify whether the witness is speaking the truth about what has happened. Its knowledge is limited to what was said about it [*SICARD DERAINS, p. 743*]. Indeed, it seems reasonably fair that when one party makes an allegation against another, the latter should be allowed to ask the first to justify its allegation before those who are judging them. It is a matter of common morality that a person should not be condemned on the basis of hearsay [*OXFORD JOURNAL, p. 406*].

108 The material facts that CLAIMANT alleges have been transmitted through different individuals, which means that it does not fulfil the requirements of direct evidence [*PO2, p. 60, ¶ 41*]. There is no witness that can verify the veracity of what happened. RESPONDENT is furthermore authorized by the opponent in the other arbitral proceedings to state that the allegations by CLAIMANT do not reflect reality and are taken out of context [*Letter from Fasttrack, p. 51*]. Doubts as to the credibility of the sources and witnesses who provided the information to CLAIMANT are founded.

109 In light of the above, the Tribunal should disregard it.

2. <u>The evidence should be disregarded because it was obtained through illegal actions</u>

110 Public policy may be a reason for excluding otherwise probative evidence, for example, privileged, confidential information, or illegally obtained evidence [*WAINCYMER, p. 793*].

111 In the *Methanex Case*, the tribunal declined to admit materials that had been obtained by "*successive and multiple acts of trespass committed by Methanex over five and half months*" into evidence. The tribunal explained that allowing Methanex to introduce this documentation into the proceedings would be a violation of its general duty of good faith, and would be inconsistent with "*the basic principles of justice and fairness required of all parties in every international arbitration*"

[*O'SULLIVAN; Methanex Case*]. It follows that CLAIMANT should not be allowed to introduce documentation obtained through a hack of RESPONDENT's computer system.

112 There is an implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration. This also applies to disclosure in any other way of evidence given by any witnesses in an arbitration, save with the consent of the other party [*Ali Shipping Case*]. Considering this implied obligation in arbitration proceedings, there are limitations to the means by which evidence can be obtained [*NEIL, p. 291; BORN, p. 2180*]. It would be controversial for the Tribunal to admit it, and it would encourage parties to resort to computer hacking.

II. The evidence is inadmissible in accordance with due process of law

113 The disclosure of evidence obtained through a breach of confidentiality or a hack of RESPONDENT's computer system would harm RESPONDENT's arbitral procedural rights (**A.**). It would be contrary to the fair conduct of arbitral proceedings to admit this evidence (**B.**).

A. CLAIMANT cannot use transparency in order to submit the evidence

114 CLAIMANT states that transparency permit disclosure despite confidentiality [*CLAIMANT'S MEMORANDUM, p. 15, III*]. There is no reason why RESPONDENT should be deprived from the confidentiality promoted by international commercial arbitration in favor of transparency (**1.**). There is no interest for the public that would justify the divulgation of this information either (**2.**).

1. The disclosure of evidence would harm RESPONDENT's right to confidentiality

115 On the one hand, transparency is not a principle of international commercial arbitration, contrary to what CLAIMANT states [*CLAIMANT'S MEMORANDUM, p. 15, ¶ 104*]. On the other hand, confidentiality is a major advantage in choosing commercial arbitration [*BLACKABY ET. REDFERN, p. 30; GARCIA DE LUIZI, p. 123; CREMADES CORTES p. 26; Art. 45.1 HKIAC Rules 2013*]. There is no reason that would justify why transparency, in favor of CLAIMANT, should prevail over confidentiality, in favor of RESPONDENT [*CLAIMANT'S MEMORANDUM, p. 15, III*]. By choosing international commercial arbitration, disputing parties measure the advantages that confidentiality can bring to them, such as limiting damages while continuing business relations, or avoiding adverse judicial precedents [*HENKEL, p. 1060; BALDWIN, p. 456*].

116 There is a clamor for increased transparency in international commercial arbitration, but no challenge to prevailing arbitral rules that expressly provide for closed, private hearings and case files [*ROGERS, pp. 1303-1310*].

117 States have established a broad interpretation of the principle of confidentiality. For instance, England has recognized the implicit confidential nature of the arbitral proceeding [*Dolling-Baker Case; Ali Shipping Case; Emmott Case*]. In the same way, the High Court of Singapore has established the implicit principle of confidentiality; its extent and application are determined depending on the circumstances of the case [*AAY v. AAZ*]. Combining the circumstances of the case at hand and the lack of relevance and materiality of the evidence [*supra* ¶¶ *104-108*], the Tribunal should preserve the implicit confidential nature of arbitration.

118 CLAIMANT argues that transparency avoids contradictory decisions on similar disputes [*CLAIMANT'S MEMORANDUM, p. 15,* ¶¶ *107-108*]. Again, precedent does not apply to arbitration, so even if the Tribunal would ignore previous decisions on similar facts, it would not violate due process of law [*CLAIMANT'S MEMORANDUM, p. 16,* ¶¶ *109-110*]. The promotion of consistency is not a fundamental principle of arbitration.

119 The only situation in which consistency could be put forward is in case of a joinder, to which CLAIMANT refers. It claims that the other party should be joined to the proceeding between CLAIMANT and RESPONDENT. Such a joinder would require RESPONDENT's consent [*Art. 27 HKIAC Rules 2018*]. Specifically, RESPONDENT strongly refuses the addition of a third party to its proceeding that would not have an objective point of view on the case [*PO2, p. 61,* ¶ *41*].

120 CLAIMANT cannot favor disclosure by using the principle of transparency, as there is no rule of precedent in international commercial arbitration, and no possible joinder in the case at hand.

2. The protection of the public interest is not a justification for disclosure of the "*Partial Interim Award*"

121 Although CLAIMANT considers that the public has an interest in arbitration becoming a legitimate system for resolution, operating fairly and coherently [*CLAIMANT'S MEMORANDUM, p. 16,* ¶¶ *111-112*], it appears that no consumer or businessman engaged in inter-country trade would be affected in any way in the case at hand [*Esso Australia resources Ltd. v. Sidney James Plowman*]. Instead, CLAIMANT states that admitting the award would lead to adapting the

Contract in its favour only [*CLAIMANT'S MEMORANDUM, p. 16, ¶ 112*]. Indeed, the other pending arbitration proceeding only concerns one specific transaction [*PO2, p. 60, ¶ 39*].

122 Whereas transparency is said to enhance the potential for monitoring decision makers, disclosure obligations are imposed to satisfy specific regulatory purposes, such as maintaining healthy capital markets, protecting the public against health and safety threats, and informing consumers [*ROGERS, p. 1308*]. Disclosure obligations focus on substantive information, whereas transparency rules focus on how that information is handled by a particular institution, without regard to the nature of the information involved [*ibid.*].

123 In the case at hand, there is no public institution involved or substantive information that must be disclosed regards to transparency. Even if the Tribunal was to consider that transparency is a principle of international commercial arbitration, none of the considerations that it is supposed to protect are concerned in either of the two proceedings. It is a private interest, *i.e.* CLAIMANT's interest, which is considered in the case at hand since the disclosure of the documentation would allegedly allow CLAIMANT, and only CLAIMANT to prove its assertions [*PO2, p. 60, ¶ 39*].

124 If the evidence happened to have fallen in the public domain, although it is unlikely that the Tribunal would decide so, the use of this evidence should not be accepted regards to its illegal obtaining and to the absence of public interest justifying its disclosure.

B. Submission of the evidence would not respect the fair conduct of the proceedings

125 In the present proceedings, the Parties have an obligation to arbitrate fairly and in good faith (**1.**). CLAIMANT's fair disposal of the action does not require the submission of the evidence (**2.**). Admitting these documents would have harmful consequences (**3.**).

1. CLAIMANT has violated its obligation to arbitrate fairly and in good faith

126 There is a principle being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with [*Art. 13.5 HKIAC Rules 2018; Chapter 5 MODEL LAW*].

127 If CLAIMANT has used, in any way, confidential information, the Tribunal should consider other remedies available apart from the exclusion of improperly obtained evidence or information [*Libananco v. Turkey*].

128 If the party presenting evidence can be said to be in breach of its good-faith obligations regards to the bringing of evidence, then there may be more justification for exclusion [*WAINCYMER, p. 797*].

129 CLAIMANT has arranged an opportunity to acquire the "*Partial Interim Award*" against payment of USD 1,000 from a company providing intelligence on the horseracing industry [*PO2, p. 61, ¶ 41*]. The company knew that CLAIMANT would be interested, although the other arbitration proceeding was confidential, indicating that CLAIMANT could be associated with the illegal obtaining. It is not clear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT. Although CLAIMANT was aware of this doubtful origin, it endorsed the means by which it was obtained.

130 The legal and policy elements which have to be taken into account when deciding admissibility of illegally obtained evidence include the evidence been obtained unlawfully by a party who seeks to benefit from it [*BLAIR GOJKOVIC, p. 25*]. Regardless of whether CLAIMANT has been involved in the fraudulent procuration of the information, illegally obtained evidence should never be accepted [*MEYER-HAUSER WIRZ, p. 145*]. As a result, the Tribunal should decline the introduction of said evidence into the proceedings. This joins the "*clean hands*" theory mentioned by CLAIMANT, according to which illegally obtained evidence may be more easily considered when the party that wishes to benefit from it is not implicated in the illegal process [*CLAIMANT'S MEMORANDUM, p. 12, ¶ 77*]. It is not possible to allow CLAIMANT to submit the evidence as it could be involved in the illegal process.

2. The submission of the evidence is not necessary for CLAIMANT's fair disposal of the action

131 Evidence from other proceedings might be tendered to show that the opposing party has made contradictory assertions in different proceedings or has been selective in evidence submission in one or both [*WAINCYMER, p. 789*]. According to CLAIMANT, this would be the case between the previous proceeding and the present case [*CLAIMANT'S MEMORANDUM, p. 11, ¶¶ 68-69*]. However, even if such evidence is admitted, it does not readily show which version is to be believed [*ibid.*].

132 In *Dolling-Baker Case*, the court held that the mere use of documents in arbitral proceedings could not alone bestow confidentiality on subsequent proceedings; it was necessary to identify "*other and possibly less costly ways of obtaining the information which does not involve any breach of the implied undertaking*" [*Dolling-Baker Case*]. All documents used, prepared, or produced in the course of the arbitration were confidential, except where the parties consented to reveal such materials

and when, in the absence of "*other and possibly less costly ways to obtain information, disclosures was needed by the court for a fair disposal of the action*" [*SMEUREANU, p. 34*].

133 In the present case, CLAIMANT uses evidence illegally obtained, which excludes fairness in the disposal of its action.

134 Some considerations in arbitration, as confidentiality, may be more important to a party than speed or cost considerations. Regards to the principle of time and cost efficiency in arbitral proceedings, often desired by one party, the Tribunal should not automatically privilege it if the opponent has other considerations to protect. RESPONDENT does not want its business conflicts spread with other customers, as those business relations are private and confidential [*Letter by Fasttrack, p. 51*].

3. Admitting the documents submitted by CLAIMANT into evidence would have harmful consequences

135 Danubia is a common law system [*supra* ¶ *107*]. Common law systems are concerned to exclude material of modest value where the prejudicial effect is likely to be significant [*WARD, p. 8*]. It is concerned by liberty rather than the truth [*WAINCYMER, p. 793*]. The non-admission of specific evidence is usually based on unreliability or because of a higher prejudice than probative value [*ibid.*]. Evidence is considered unduly prejudicial when, although relevant, its probative value is substantially outweighed by the danger of unfair prejudice [*WARD, p. 8*].

136 Not only would the admission of this evidence ruin RESPONDENT's business reputation, but it would also encourage other arbitrating parties to obtain evidence through illegal means. Disclosure would injure the corporate image of RESPONDENT, causing loss of business opportunities with future customers. Also, letting the Tribunal admit this evidence obtained through a hack of RESPONDENT's computer system could cause a "*snowball effect*" as to the integrity of the conduct of arbitration [*MERRIAM-WEBSTER DICTIONARY*].

137 This also reveals CLAIMANT's bad faith in wanting to cause damage to RESPONDENT by using evidence obtained from another party, which is not objective since it already has a legal dispute with RESPONDENT.

138 Further, the relevance of these documents to the outcome of the case can be debated. By balancing the probability that the damage would occur if the evidence was brought to the proceeding, and the propriety of these documents, the Tribunal should refuse them.

Conclusion of Issue 2

139 CLAIMANT alleges that it should be allowed to submit the "*Partial Interim Award*" from another proceeding as evidence in the present case. The relevance and materiality of such evidence can be debated because it has been obtained illegally, from doubtful sources and is not sufficient for CLAIMANT to prove its point. Since the principle of precedent does not apply in arbitration, disclosure cannot be justified by the promotion of consistency.

140 RESPONDENT has the right to benefit from the guarantee of confidentiality, which is promoted by international commercial arbitration. Nothing justifies admitting illegally obtained evidence, nor that RESPONDENT should be bound by any obligation of transparency, since there is no public interest to protect.

141 The revelation of documents would cause a prejudice to RESPONDENT and harm its business reputation. Finally, it would violate equal and fair proceedings that should somehow be paramount in arbitration proceedings.

Issue 3 CLAIMANT is not entitled to the payment of USD 1,250,000 or any other amount resulting from an adaptation of the price

142 CLAIMANT asserts that "*a change in government policies of Equatoriana at the time of delivery of the third and last shipment resulted in an unexpected rise in the cost of delivery causing hardship to Claimant and Respondent promised that a solution would be found*" [*CLAIMANT'S MEMORANDUM, p. 18, ¶ 124*]. However, there is no sufficient element in this case which could potentially define the newly imposed tariff as a hardship event, and RESPONDENT never committed itself to readapt the Contract.

143 Contrary to CLAIMANT's allegations, an adaptation of the Contract and an exemption of its contractual obligations cannot be justified, neither under the Contract itself (**I.**) nor under the CISG and the UNIDROIT Principles (**II.**).

I. The price of the goods as agreed between the Parties cannot be adapted under Clause 12 of the Contract

144 The newly imposed tariffs do not constitute a hardship situation such as provided by Clause 12 of the Contract (**A.**). Further, the Parties never agreed on a possible adaptation of the Contract, neither before, nor after the conclusion of the Contract (**B.**). Finally, the increase of

the price does not create a significant disequilibrium justifying re-negotiation of the Contract (**C.**).

A. The newly imposed tariffs do not constitute hardship such as provided in Clause 12

145 The newly imposed tariffs are not a health and safety requirement or a comparable unforeseen event constituting a hardship in accordance with Clause 12 (**1.**). RESPONDENT should not be responsible for bearing the additional cost caused by the newly imposed tariffs (**2.**).

1. The newly imposed tariffs are not a health and safety requirement or a comparable unforeseen event

146 The Parties ensured the Contract contained a hardship clause but a limited one as it can only be triggered in some particular situations.

147 Clause 12 provides that "*Seller 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*" [*EXHIBIT C5, p. 14, ¶ 12*]. Because the newly imposed tariffs are neither an unforeseen event (**a.**) nor a health and safety requirement or any comparable event (**b.**), they do not fall within the scope of Clause 12.

a. The newly imposed tariffs are not an unforeseen event

148 Unforeseeability can be defined as "*not able to be reasonably anticipated or expected, not foreseeable*" [*MERRIAM-WEBSTER DICTIONARY*]. Unforeseeable events refer to cases where it is too improbable and/or too little magnitude to warrant the expense of addressing it expressly [*WENNBERG in SOETEMAN, p. 135, ¶ 3*]. An impediment causing hardship must be such that it could not be reasonably expected for the seller to take it into consideration at the time the contract was concluded [*MAGGI, p. 277*; *BIANCA BONELL, pp. 753-761; STOLL GRUBER, pp. 10-24; BRUNNER, p. 156*].

149 Contrary to CLAIMANT's interpretation, the newly imposed tariffs were not unforeseeable at the time of the conclusion of the Contract, for three reasons.

150 First as a matter of fact, other restrictions had been previously imposed on imports from Equatoriana: "*Previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in direct retaliatory measures*" [*EXHIBIT C6, p. 15, ¶ 2; CLAIMANT'S MEMORANDUM, p. 19,*

¶¶ *135-138*]. Moreover, in previous situations, "*few countries had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size*" [*PO2, p. 58, ¶ 23*]. CLAIMANT itself mentioned past experiences of unforeseeable health and safety requirements imposing highly expensive tests destroying the commercial basis of their deal [*PO2, p. 58, ¶ 21*].

151 Second, CLAIMANT was not "*willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions*" [*EXHIBIT C4, p. 12, ¶ 4*]. CLAIMANT did not omit to point out that at least a hardship clause should be included into the Contract to address such subsequent changes [*EXHIBIT C4, p. 12, ¶ 23*]. If CLAIMANT was willing to limit its liabilities in that specific case, it knew that such an event could happen. CLAIMANT was aware of such possible contingencies.

152 Third, CLAIMANT further mentioned that "…*severity of the disruption*" [*CLAIMANT'S MEMORANDUM, p. 56, ¶ 141*]. However, if the event was so severe, CLAIMANT would not have been able to send the third shipment [*EXHIBIT C8, p. 18, ¶ 8*].

153 Therefore, the imposition of the new tariffs does not qualify as an "*unforeseen*" event.

b. The newly imposed tariffs do not constitute a health and safety requirement or a comparable event

154 Health and safety requirements can be defined as "*the laws, rules, and principles that are intended to keep people safe from injury or disease at work and in public places*" [*CAMBRIDGE ADVANCED LEARNER'S*]. A custom duty is clearly different from a regulation protecting people from injury or disease, as it protects the economy of the country and the country itself first [*DAVEY, pp. 399-403*].

155 Contrary to CLAIMANT's interpretation, the imposition of tariffs from Equatoriana cannot be considered as "*comparable*" events. As CLAIMANT stated, "*the Parties intended that the word "comparable" should be interpreted in the light of events of such similar nature*" [*CLAIMANT'S MEMORANDUM, p. 55, ¶ 136*]. However, custom duties affect imports but do not protect the people of Equatoriana or Mediterraneo from injury or disease and therefore cannot be compared to a safety or health requirement.

156 These measures are not the same nature as a health or safety requirement. If the tariffs were characterized as such, they would fall within the scope of the hardship clause. The nature of the event is determinant to know what falls within hardship and what does not.

157 Therefore, the newly imposed tariffs cannot be characterised as an unforeseen event, a health and safety requirement or a comparable event.

2. <u>Even if the newly imposed tariffs make the Contract more onerous, RESPONDENT should not be responsible for bearing such a cost</u>

158 The newly imposed tariffs make the Contract more onerous as it makes the shipment itself more expensive [*EXHIBIT C7, p. 16, ¶ 1*]. However, custom duties are included in the delivery terms [*DDP INCOTERMS*] and Parties expressly agreed to insert a DDP Clause within the Contract [*EXHIBIT C5, p. 14, ¶ 8*].

159 It is generally admitted that the contracting parties are best placed to organize the balance of rights and obligations in their contract. Balance must exist from the moment of conclusion of the contract and during all the period of performance. Contractual freedom allows the parties to assess the risks which might interfere in the performance of their contract. Therefore, if this assessment is not contained in their contract, the parties should be liable for the consequences of their silence [*BERCHI, ¶¶ I-IV*].

160 In the case at hand, as long as CLAIMANT assumed the risks of the occurrence of such circumstances (**a.**) and as long as the prohibition of the resale of goods has never been inserted in the final agreement (**b.**), the Parties must respect their contractual obligations and RESPONDENT should not be liable for bearing the consequences of the newly imposed tariffs.

a. CLAIMANT assumed the risks of the event and should be responsible for bearing the costs

161 When assessing particular risks such as the ones of a DDP delivery [*Incoterms Guide*], the seller will bear the costs arising from the delivery. The seller will not be excused from performing just because he relied on the initial tariff duty when contracting. As an illustration, the fact that an importer contracted to pay a certain price for goods on the assumption that they were subject to a three per cent duty does not excuse the importer from paying a twenty-five per cent duty if that rate is in effect when the goods are imported [*ETTINGER HILL HINES ALTMAN and BRUNEAU, ¶ 5*].

162 The resulting written contract reflects the terms agreed upon as a result of the arm's length negotiations and measured by the objective manifestation of intent by both parties [*LEONHARD, p. 18; Huge v. Overly; Caporale v. Mar Les, Inc.*]. Where negotiations are difficult, the parties' positions change and until the final document, though converging, are still divergent.

The evidence of the parties' negotiations is unhelpful as only the final document records a consensus [*Judge Wilbeforce in Prenn v. Simmonds*].

163 As CLAIMANT correctly points out, the thirty per cent-imposed tariffs necessarily make the Contract more onerous [*CLAIMANT'S MEMORANDUM, p. 56, ¶ b.*]. CLAIMANT's contractual obligations were to send the goods clear from taxes and duties [*EXHIBIT C5, pp. 13-14, ¶¶ 2, 8*]. RESPONDENT's obligations only consisted in paying for the goods CLAIMANT had delivered, for any fees for the subsequent registration of foals conceived, and for the handling fees associated with the delivery [*EXHIBIT C5, pp. 13-14, ¶¶ 5-6, 9, 10*]. By sending the last shipment, CLAIMANT performed its obligation and accepted to bear the thirty per cent additional tariffs [*EXHIBIT C8, p. 18, ¶ 8*].

164 When including a DDP delivery in the Contract, CLAIMANT assessed that the seller is responsible for all duties and taxes imports [*EXHIBIT C4, p. 12, ¶¶ 3-4; EXHIBIT C5, pp. 13-14, ¶ 12*]. Even if CLAIMANT was willing to limit such responsibilities during the negotiation process, RESPONDENT never intended to do so and the Contract must always prevail over the negotiation [*EXHIBIT C4, p. 12, ¶ 4*].

165 Therefore, when accepting the insertion of a DDP delivery, CLAIMANT assumed the risks of the event and should be responsible for bearing the additional cost.

b. RESPONDENT never breached any resale prohibition

166 CLAIMANT contends RESPONDENT has unlawfully earned profits by breaching the resale prohibition allegedly contained in the Contract [*CLAIMANT'S MEMORANDUM, p. 23, ¶¶ 168-170*]. CLAIMANT alleges that RESPONDENT "*breached the principle of good faith since it concluded the Contract with an intention to deceive and deprive CLAIMANT of its reasonable expectations*" [*CLAIMANT'S MEMORANDUM, p. 23, ¶ 170*]. CLAIMANT merely suggested RESPONDENT not to resell the frozen semen doses to any third-parties, at the early stage of the negotiations [*EXHIBIT C2, p. 10, ¶ 3*]. However, RESPONDENT never answered nor agreed to the inclusion of such a prohibition in the Contract.

167 Pursuant to Art. 18 (1) CISG, silence or inactivity following an offer does not in itself amount to acceptance [*OVIEDO ALBAN, ¶ 2.2*]. This principle was also confirmed by Art. 2.6 UNIDROIT Principles [*ibid.*]. However, silence may constitute an effective acceptance as understood between the parties only if one of the following factors is fulfilled: an express agreement of the parties, or when usages or practices are established between them [*UNCITRAL Digest of Case Law, pp. 67-68*].

168 The criteria to identify silence as acceptance are not fulfilled in the case at hand. Indeed, silence has never been a usage or a practice established between the Parties. They had only been in contact for a short time and wanted to promote a long-term beneficial relationship [*EXHIBIT C2, p. 10, ¶¶ 1-3; EXHIBIT C3, p. 11, ¶ 3*]. The Parties had never conducted any business before [*PO2, p. 55, ¶ 1*].

169 No breach of the resale prohibition can be invoked by CLAIMANT since it has not been included in the Contract [*CLAIMANT'S MEMORANDUM, p. 23, ¶ 169*].

170 As it has not been agreed neither under the Contract nor between the Parties, RESPONDENT is entitled to resell the frozen semen.

171 In any event, RESPONDENT's profit from the resale has no relation with the fact that CLAIMANT is not making any profit because of the tariff increase.

172 Thus, RESPONDENT cannot be responsible for the newly imposed tariffs and must not bear such costs.

B. The Parties did not intend for price adaptation of the Contract

173 As mentioned above, the Contract reflects the objective manifestation of intent by both Parties [*supra ¶ 162*]. The Contract does not provide any reference to an adaptation clause or an adaptation of the price in case of change of circumstances [*EXHIBIT C5, pp. 13-14*]. Yet, in the unlikely event that the Tribunal would to take into account the negotiations, RESPONDENT never intended to include any price adaptation. The negotiators never agreed to or promised an adaptation of the price (**1.**) and Mr. Shoemaker further maintained this position (**2.**).

1. The negotiators never agreed to or promised an adaptation of the price

174 CLAIMANT argues that the "*negotiations reflect that the Parties had agreed on an adaptation mechanism*" and draws the following conclusion that "*the agreement […] denotes an intention to provide for adaptation as a remedy for hardship*" [*CLAIMANT'S MEMORANDUM, p. 20, ¶ 149*].

175 This conclusion is incorrect. Ms. Napravnik and Mr. Antley, the two main negotiators during the negotiation process, discussed about a possible adaptation clause, and Mr. Antley merely "*promised that he would come back with a proposal the next morning*" and replied that the adaptation of the Contract "*should probably be the task of the arbitrators […] if the Parties could not agree*" [*EXHIBIT C8, p. 17, ¶ 4*].

176 Mr. Antley never guaranteed to insert an adaptation clause in the Contract. Thus, until the car accident, Ms. Napravnik and Mr. Antley only agreed on clauses 1 to 5, which never mentioned a possible adaptation of the price and "*had made the necessary additions to the template*" [*PO2, p. 55, ¶ 4*]. The two new negotiators, Mr. Ferguson and Mr. Krone exclusively followed and "*used the pre-existing file and merely made the necessary changes and additions to clauses 6 to 15 to reflect their agreement*" [*ibid.*].

177 Therefore, the Contract strictly reflects that the negotiators never intended to include an adaptation clause or to empower the Tribunal to do so [*supra ¶ 71*].

2. Mr. Shoemaker never promised for an adaptation of the Contract

178 CLAIMANT, contends that Mr. Shoemaker made a statement which was "*deemed to be an assurance to adapt the Contract*" and "*promised that a solution would be found*" [*CLAIMANT'S MEMORANDUM, pp. 18, 21, ¶¶ 124, 151*]. However, Mr. Shoemaker also justified to CLAIMANT 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*" [*EXHIBIT R4, p. 36, ¶ 4*]. As mentioned above, the Contract never provided for an adaptation clause or any other provision allowing the adaptation of the price [*supra ¶ 173*].

179 Furthermore, Mr. Shoemaker never had the authority or legal ability "*to consent to additional payments outside the contract without speaking to [his] management*" as he did not take part in the negotiation of the Contract [*EXHIBIT R4, p. 36, ¶ 4*]. Mr. Shoemaker was only in charge of the development of the racehorse breeding program since 1 November 2017 and never took part in the negotiations [*EXHIBIT R4, p. 36, ¶ 1*]. Ms. Napravnik was aware of Mr. Shoemaker's position within RESPONDENT's company but ignored what she was told [*EXHIBIT R4, p. 36, ¶ 4*]. Therefore, RESPONDENT should not be held responsible for Mr. Shoemaker's statement.

180 In any event, Mr. Shoemaker did not force or threat CLAIMANT to send the third shipment. Despite its "*difficult*" financial situation, CLAIMANT decided on its own will to send the last shipment and to fulfil its contractual obligations [*PO2, p. 57, ¶ 15*].

181 For all these reasons, Mr. Shoemaker never agreed or promised on an adaptation of the price and even if the Tribunal decides otherwise, he would never have the authority to do so.

C. <u>There is no significant disequilibrium of the contract justifying such an adaptation</u>

182 According to CLAIMANT, the most appropriate remedy to restore the Contract equilibrium would be an adaptation of the price [*CLAIMANT'S MEMORANDUM, p. 21, ¶¶ 153-156*]. However, CLAIMANT does not specify, at any time in its development the circumstances in which the equilibrium of the Contract could be affected.

183 Art. 6.2.2 UNIDROIT Principles provides that "*there is hardship where the occurrence of events <u>fundamentally alters the equilibrium</u> of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished*". It is only when the existence of such a disequilibrium can be proven that the parties can be allocated the responsibility to resolve it. Such a duty to renegotiate may occur when the specific performance is unreasonably burdensome or expensive [*Art. 6.2.2 UNIDROIT Principles; Art. 7.2.2(b) UNIDROIT Principles; DAWWAS, pp. 2-29*].

184 The definition of a "*fundamental*" change will strongly depend upon the circumstances of each individual case. The UNIDROIT Principles provide some guidance in order to understand the term "*fundamental*" [*Art. 6.2.2 UNIDROIT Principles; KEILHACK, p. 14*].

185 If the change of circumstances results in less than fifty per cent increase or decrease in value of the performance to be received, then the fundamental alteration of the equilibrium of the contract is not realized under Art. 6.2.2 UNIDROIT Principles [*MASKOW, pp. 1-3, ¶¶ 657-661; RIMKE, pp. 193, 238; JENKINS, p. 2027; PERILLO, pp. 21-28; DOUDKO, p. 495*]. Indeed, it has been argued that cost increases of thirteen-point six per cent, thirty per cent, forty-four per cent, or twenty-five to fifty per cent were not considered to be fundamental alterations of the equilibrium of the contract [*DOUDKO, p. 496; Nouva Fucinati S.p.A v. Fondmetall Int'l A.B Case*]. In contrast, if this percentage exceeds fifty, the fundamental alteration of the contract will likely be achieved [*MCKENDRICK, p. 719*].

186 In the case at hand, the newly imposed tariffs only increased the price to thirty per cent which does not constitute an unreasonable burden for CLAIMANT and is not sufficient to identify a "*fundamental disequilibrium*".

187 CLAIMANT also argued that the newly imposed tariffs worsen its financial situation and seriously endangers its restructuring plan by paying the extra customs tariffs [*CLAIMANT'S MEMORANDUM, p. 22, ¶ 159*].

188 However, CLAIMANT's financial situation is completely irrelevant to determine the disequilibrium of the Contract. RESPONDENT was not aware of CLAIMANT's financial difficulties and could not have reasonably known about it at any time of the conclusion of the Contract. There were only "*unspecific rumors in the market that Claimant had been losing money over the last years*" which is not reliable [*PO2, p. 58, ¶ 22*].

189 On the other hand, CLAIMANT acted in bad faith since the beginning of the negotiation by hiding its poor financial situation and that it was facing extensive restructuring measures. Had RESPONDENT known CLAIMANT's true financial position, it would not have entered into the Contract.

190 Yet, contrary to what CLAIMANT stated, the newly imposed tariffs do not constitute a disequilibrium implying a duty to re-negotiate between the Parties neither under the UNIDROIT Principles nor the principle of good faith. Thus, an adaptation of the price cannot be justified, and RESPONDENT should not be responsible for bearing any additional cost.

II. The price of goods as agreed between the Parties cannot be adapted under the CISG

191 Contrary to what CLAIMANT's contention, it cannot rely on Art. 79 CISG as it cannot be extended in case of hardship (**A.**). Should the Tribunal decide otherwise, an adaptation of the price cannot occur under the UNIDROIT Principles as the newly imposed tariffs do not match the definition provided by Art. 6.2.3 UNIDROIT Principles (**B.**).

A. CLAIMANT cannot rely on the applicability of Art. 79 CISG

192 According to Art. 79 CISG, "*a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*".

193 As CLAIMANT stated, the Parties did not expressly exclude the application of Art. 79 CISG [*CLAIMANT'S MEMORANDUM, pp. 24-25, ¶¶ 174-182*]. However, this provision is only applicable in case of force majeure and cannot be extended in case of hardship.

194 First, Art. 79 CISG necessarily requests an impediment preventing the Parties to perform their obligations [*CISG Commentary, pp. 8-10*]. As CLAIMANT stated, there is a gap in the CISG. The scope of Art. 79 CISG is not established, and the Convention does not provide any definition

of impediment [*CLAIMANT'S MEMORANDUM, pp. 25-26, ¶¶ 183, 194*]. Neither the doctrine, nor the jurisprudence nor the CISG specify if Art. 79 CISG is applicable or not in case of hardship [*CISG Commentary, pp. 8-10; NAGY, pp. 6-7*].

195 However, courts and arbitral tribunals have routinely denied petitions for Art. 79 CISG exemption grounded in hardship stemming from changes in market prices. For instance, it has been the case for sellers' failure to deliver the goods caused by an increase in cost [*Tomato Concentrate Case; Steel Bars Case; Iron Molybdenum Case; Chinese goods Case*] or where the market price of the goods dramatically increased [*Nouva Fucinati S.p.A v. Fondmetall Int'l A.B*]. Also, it has been confirmed for buyers' refusal to accept delivery and pay the seller because of a dramatic decrease in the value of the goods being sold [*Frozen Raspberries Case; Steel Ropes Case*]. When denying such petitions, courts have generally commented that "*a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract*" [*NAGY, p. 27; UNCITRAL Digest of Case Law, pp. 390-391, ¶ 15*].

196 The only time a court granted an Art. 79 CISG petition expressly on grounds of "*hardship*" stemming from a rise in the cost of raw materials was on the Steel Tube Case mentioned by CLAIMANT. This case involved a seventy per cent rise on the market price rendering the performance impossible to realize [*Steel Tubes Case; CLAIMANT'S MEMORANDUM, p. 26, ¶ 190; NAGY, pp. 27-28*]. As mentioned above, the new customs tariffs made the Contract only thirty per cent more onerous [*supra ¶ 184*]. It did not prevent CLAIMANT to perform its obligation as it deliberately sent the last shipment on 22 January 2018.

197 Even if the Tribunal decides otherwise and considers the need to extends Art. 79 CISG in the case at hand, it must be specified that hardship is only relevant in case of "*failure to perform*". Once the party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance.

198 To conclude, considering that CLAIMANT has already sent the last shipment and the price increase is not significant enough to be qualified as an "*impediment*" in the sense of Art. 79 CISG, CLAIMANT cannot rely on Art. 79 CISG to request an adaptation of the price and discharge itself from its contractual liabilities.

B. <u>An adaptation of the price cannot occur under UNIDROIT Principles</u>

199 CLAIMANT states that according to Art. 7(2) CISG, "*the internal gap regarding price adaptation of the Contract as a remedy must be filled using UNIDROIT Principles*". This is not correct [*CLAIMANT'S*

MEMORANDUM, pp. 25-26, ¶¶ 183, 194]. In fact, the circumstances of the case at hand do not meet the requirements of the UNIDROIT Principles.

200 In case of hardship, Art 6.2.3 UNIDROIT Principles provides that the disadvantaged party is entitled to request renegotiations [*MCKENDRICK, p. 815*]. If the court finds hardship it may adapt the contract with a view to restoring its equilibrium [*ibid.*]. The definition of hardship can be broken down into two elements: the first consists of the phrase "*fundamentally alters the equilibrium of the contract*" [*Art. 6.2.2 UNIDROIT Principles; MCKENDRICK, p. 814*]. As mentioned above, the thirty per cent tariffs imposed do not fundamentally alter the equilibrium of the Contract [*supra ¶ 184*]. Therefore, the first element of the hardship definition is not met.

201 The second element consists of the four matters referred to in Art 6.2.2(a)-(d) UNIDROIT Principles [*MCKENDRICK, p. 814*]. Indeed, a tribunal must have regard to all four of the matters identified in these provisions: they are not optional extras [*ibid.*]. If one of the elements is not met, there is no need to check if the other ones are met.

202 Art 6.2.2(b) UNIDROIT Principles excludes from the definition, events which "*could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract*" [*MCKENDRICK, p. 814*]. Force majeure as well as hardship can only exempt the aggrieved party from liability if the events causing the impediment could not reasonably be taken into account by the aggrieved party at the time of the conclusion of the contract [*STOLL GRUBER, pp. 10-24; BIANCA BONELL, p. 576; SALGER; MAGNUS VON STAUDINGERS, p. 719*]. If they could have been taken into account by the aggrieved party, then it can be expected that this party would insist on incorporating a specific contract clause or term to deal with the issue [*SCHWENZER, p. 719, ¶ D*]. Thus, this party must be assumed to have taken the risk [*STOLL GRUBER, pp. 10-24; BIANCA BONELL, p. 579; NEUMAYER and MING in DESSEMONTET, p. 763; AUDIT, p. 174, in SCHWENZER, p. 719*]. Also, if the change could have been taken into account at the conclusion, it is said that the party affected took the risk or that it was at fault in not having foreseen it [*LANDO BEALE, p. 156*].

203 CLAIMANT states that it could not have anticipated imposition of tariff at the time of the conclusion of the Contract [*CLAIMANT'S MEMORANDUM, p. 56, ¶ 137*]. This is simply not true.

204 In March 2017, the Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease, which already lasted for two years [*Notice of Arbitration, p. 5, ¶ 5; EXHIBIT C1, p. 9*]. Later on, the ban on artificial insemination for racehorses had been temporarily lifted thanks to powerful

interests in the Equatorianian racehorse breading industry [*ibid.*]. Few countries in the past had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size [*PO2, p. 58, ¶ 23*]. The fact that the industry had already been targeted by governments, the political climate due to the recent elections and CLAIMANT's experience in the racehorse breeding industry should have helped CLAIMANT to foresee the event and to maybe undertake another type of delivery [*Notice of Arbitration, pp. 4-5, ¶¶ 1-3; EXHIBIT C6, p. 15, ¶¶ 1-2*]. Therefore, CLAIMANT could reasonably have anticipated imposition of tariff at the time of the conclusion of the Contract.

205 Furthermore, where the risk of the event has been assumed by the disadvantaged party, it cannot invoke hardship [*Art. 6.2.2(d) UNIDROIT Principles; MCKENDRICK, p. 814*]. The imposition of tariffs does not create a hardship situation allowing for an adaptation of the price because CLAIMANT assumed the risks of the event when accepting to deliver the goods under the DDP. The term duty includes the responsibility for the risks of the carrying out of customs formalities, the payment of formalities, any customs duties, taxes and other charges [*ibid.*].

206 CLAIMANT states that it "*did not assume risk of the abovementioned event*" [*CLAIMANT'S MEMORANDUM, p. 63, ¶ 199*]. As a reaction to the increase imposed by Mediterraneo, the Equatoriana Government retaliated by imposing thirty per cent tariffs on selected products from Mediterraneo [*EXHIBIT C6, p. 15, ¶ 8*]. CLAIMANT clearly assumed the risks of the event when concluding the Contract [*supra ¶¶ 161-165*]. In the case at hand, an increase of thirty per cent does not create a fundamental disequilibrium of the Contract, neither on the ground of CISG nor Art. 6.2.2 UNIDROIT Principles. At least two of the four elements of Art. 6.2.2 UNIDROIT Principles triggering a situation of hardship are not met. The criteria being cumulative, there is no need to verify whether the other elements are met.

207 Therefore, no adaptation of the price should occur under the UNIDROIT Principles.

Conclusion of Issue 3

208 Contrary to what CLAIMANT stated, a price adaptation should not be granted neither under the Contract nor the CISG or the UNIDROIT Principles.

209 The Parties never intended on a mechanism for an adaptation of the price within or outside the Contract and only a hardship event could justify an adaptation of the Contract in these circumstances. However, the tariffs imposed by the Equatoriana Government do not constitute hardship under Clause 12.

210 Given that Art. 79 CISG remains unclear concerning its scope, CLAIMANT is not entitled to force RESPONDENT to re-negotiate the Contract. In any event, should the Tribunal decide otherwise, Art. 79 CISG is only applicable in case of force majeure and CLAIMANT has not shown any element enabling to extend its scope in case of hardship.

REQUEST FOR RELIEF

In light of the submissions above, **RESPONDENT** requests the Tribunal:

I. to determine that:

1. The claim is inadmissible for a lack of jurisdiction or power;

2. The evidence provided from the other proceeding is inadmissible for its lack of relevancy, materiality, and its illegality;

II. to determine on the merits of the case that:

CLAIMANT's claim for additional remuneration in the amount of USD 1,250,000 is rejected;

III. to order CLAIMANT to bear all the costs of this arbitration.

Versailles, France,

01/24/2019

On behalf of Black Beauty Equestrian

Inès Giauffret • Sarah Lasson • Pierre Nosewicz • Loïc Saint-Martin

Paisley Simonnet • Léane Thakrar • Léonard Vanvi • Fanny Vigier