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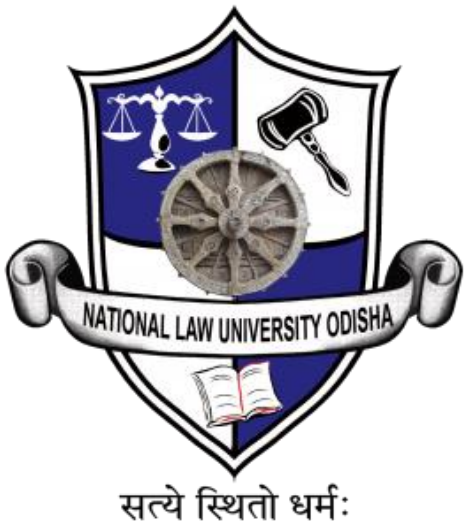
WILLEM C VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong

31st March to 7th April

NATIONAL LAW UNIVERSITY ODISHA



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ON BEHALF OF	**AGAINST**
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IN THE ARBITRAL PROCEEDING: HKIAC/A18128

COUNSELS

ASTHA AHUJA * MANASVINI VYAS * PRERONA BANERJEE * SIDDHARTH JAIN

YASASCHANDRA VENKATA SAI DEVARAKONDA

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%	Per cent
&	Ampersand
§(§)	Clause(s)
¶(¶)	Paragraph(s)
A No A	Answer to Notice of Arbitration
AAA	American Arbitration Association
Art.	Article
Au Contraire	On the contrary
AUS	Australia
BGH	Bundesgerichtshof, Germany
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nation Convention on International Sale of Goods, 1980
CISG-AC	United Nation Convention on International Sale of Goods – Advisory Council
Cl.	Claimant
CLOUT	Case laws on UNCITRAL Text
Co.	Company
Corp.	Corporation
DDP	Delivered Duty Paid

ed.	Editor
edn.	Edition
Ergo	Therefore
EU	European Union
Ex.	Exhibit
EXW	Ex Works
FR	France
GER	Germany
HCA	High Court of Australia
HKIAC	Hong Kong International Arbitration Centre
i.e.,	Id est (that is)
IBA	International Bar Association
ibid.	ibidem
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
In arguendo	In alternative
In casu	In the case at hand

In toto	In sum
Iss.	Issue
IUCT	Iran-US Claims Tribunal
LCIA	London Court of International Arbitration
LLP	Limited Liability Parternship
Ltd	Limited
No A	Notice of Arbitration
No.	Number
NOFOTA	Netherlands Oils, Fats and Oilseeds Trade Association
NZL	New Zealand
Ors.	Others
p(p)	Page(s)
PCA	Permanent Court of Arbitration
PCL	Hague Principles on Choice of Law
PECL	Principles on European Contract Law
Per Contra	On the other hand,
PO	Procedural Order
PRC	People's Republic of China
Quod non	Not the case in the present issue
Resp.	Respondent
SA	Sociedad Anónima (limited company in Spain)

Sec	Section
SIAC	Singapore International Arbitration Centre
SNG	Singapore
SG	Secretary General
Sub.	Submission
SUI	Switzerland
U.S.	United States of America
UCC	United Nation Convention on Contracts
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nation
UNCITRAL	United Nation Commission on International Trade Law
UNIDROIT	Institut international pour l'unification du droit privé
UPICC	UNIDROIT Principles on International Commercial Contracts
USD	United States Dollar
v.	Versus (against)
VIAC	Vienna International Arbitration Centre
Vol.	Volume
WTO	World trade Organisation

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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**", collectively "**the Parties**").

CLAIMANT operates Mediterraneo's oldest and most renowned stud farm. It is particularly known for its success in breeding racehorses. Its champion stallion, Nijinsky II, is one of the most sought-after stallions for breeding.

RESPONDENT, located in Equatoriana, is known for its broodmare lines. Motivated by profits associated with the powerful Equatorianian racehorse breeding industry, it also decided to set up its own racehorse breeding programme and was in the process of finding matching world class stallions.

21 MAR 2017	RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III for its newly started racehorse breeding programme.
24 MAR 2017	CLAIMANT offered 100 doses of Nijinsky III's frozen semen in accordance with its general terms and conditions.
28 MAR 2017	RESPONDENT accepted all terms of the offer except the choice of law and forum selection clause and insisted on delivery DDP.
31 MAR 2017	CLAIMANT agreed to delivery DDP only against a moderate price increase, transfer of certain risks to Respondent and inclusion of hardship clause to temper additional unforeseen risks. It further offered the Respondent to opt for arbitration in Mediterraneo.
10 APR 2017	RESPONDENT prepared the first draft of the dispute resolution clause which provided for the seat of arbitration to be Equatoriana and for the law of Equatoriana to govern the arbitration agreement.
11 APR 2017	CLAIMANT clarified that it required a special approval by its creditors' committee for consenting to a contract that is submitted to any foreign law. *Ergo*, it stressed on the application of law of Mediterraneo to the whole Contract. It also offered to hold arbitration in a neutral country, Danubia.
12 APR 2017	The Parties agreed on the feasibility of adaptation of the Contract by arbitrators, in case they could not agree on an amendment.
06 MAY 2017	Frozen Semen Sales Agreement was concluded between the Parties ("**Contract**"). According to it, the delivery was to be made in three instalments on DDP terms. It also included a hardship clause exempting CLAIMANT from certain risks and a choice of law clause in favour the law of Mediterraneo including the United Nation Convention on Contracts for International Sale of Goods, 1980 ("**CISG**"). The dispute resolution

	clause provided for arbitration in Danubia and application of the Hong Kong International Arbitration Centre Rules, 2018 ('**HKIAC Rules**').
15 NOV 2017	A tariff of 25% on all agricultural products from Equatoriana, including living animals, was imposed by the executive order of the new President of Mediterraneo.
19 DEC 2017	The Government of Equatoriana announced the imposition of a retaliatory tariff of 30% on all agricultural goods from Mediterraneo including frozen horse semen.
20 JAN 2018	CLAIMANT was informed by the customs authorities about the imposition of the 30% tariff on horse semen.
21 JAN 2018	RESPONDENT assured CLAIMANT of a solution to *The Problem* through negotiation. As a consequence, CLAIMANT authorised the last shipment of frozen semen in good faith.
23 JAN 2018	The final shipment of 50 doses of frozen horse semen was made and CLAIMANT bore the additional 30% tariff on the basis of representations by RESPONDENT.
2 FEB 2018	CLAIMANT was informed that RESPONDENT had breached the Contract by reselling frozen semen of Nijinsky III at a 20% profit to other breeders in Equatoriana.
12 FEB 2018	CLAIMANT confronted RESPONDENT with its discovery of the contractual breach of the resale prohibition committed by the latter. RESPONDENT refused to negotiate with CLAIMANT any longer.
2 OCT 2018	CLAIMANT informed the Arbitral Tribunal ("**Tribunal**") about another arbitration in which the RESPONDENT is involved. The other arbitration concerned the sale of a mare by RESPONDENT to a buyer in Mediterraneo, which had been affected by the 25% tariff imposed by Mediterraneo. In that case, RESPONDENT asked for price adaptation in light of the imposition of unforeseen tariffs.

OVERVIEW

'It can be challenging to identify a horse from the back because they are always switching their tails'

Ironically, much like the Wonder Horse Phar Lap, CLAIMANT, is being conspicuously poisoned to *debt*. CLAIMANT envisioned a stable relationship when it entered into the Contract with RESPONDENT. Be that as it may, things took a hoarse turn when the Government of Equatoriana imposed a retaliatory tariff disturbing the economic equilibrium the Parties' intended to maintain. In this regard, CLAIMANT expected a mutually acceptable solution, but RESPONDENT's unbridled ambitions got better of them. The latter ignored the Contract's inherent principle of risk-sharing and deceptively pushed CLAIMANT into insolvency. As if that was not enough, CLAIMANT'S worst nightmare came true when their star stallion Nijinsky III's semen was resold without authorisation. CLAIMANT was left with very little choice but to pursue arbitration to ensure that they could survive in the business. With the obvious inconsistencies in RESPONDENT'S Answer to the Notice of Arbitration, it is important that the Tribunal hears the truth from the horse's mouth.

The Tribunal has the powers under the arbitration agreement to adapt the contract. [PROCEDURAL ISSUE I]

The power of the Tribunal to adapt the contract stems from the arbitration agreement governed by the law of Mediterraneo. The Parties' express choice to be governed by the law of Mediterraneo extends to the arbitration agreement. Notwithstanding, the Tribunal has been conferred with express powers to adapt, under the law of Mediterraneo and Danubia.

The Tribunal should admit the evidence submitted before it (PROCEDURAL ISSUE II).

Arbitral tribunals have wide discretion in admitting evidence which should be used to apply the IBA Rules on the Taking of Evidence in International Arbitration, 2010 ("**IBA Rules**"). CLAIMANT'S request to submit the partial interim award from the other arbitration should be granted by the Tribunal as it does not compromise RESPONDENT's interests. CLAIMANT'S non-involvement in the evidence's illegal procurement together with its relevance to the merits of the case are reasons compelling enough to admit the contested evidence.

CLAIMANT is entitled to a payment of USD 1,250,000 resulting from an adaptation of price (MERITS ISSUE)

§12 of the contract reflects the common intention of the Parties to adapt the same in order to deal with any unforeseen event. The imposition of 30% tariff, being one such event, demands adaptation of the purchase price. In *arguendo*, the CISG recognises the hardship exemption and provides for the remedy of adaptation of contracts through an extended interpretation.

ARGUMENTS

PART ONE: ARGUMENTS REGARDING JURISDICTION OF THE TRIBUNAL AND ADMISSIBILITY OF THE EVIDENCE

ISSUE 1. THE TRIBUNAL HAS JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEEMENT TO ADAPT THE CONTRACT

1. The Parties in this arbitration are bound by §15 of the Contract, allowing them to initiate the present proceedings in accordance with Art. 4 HKIAC Rules. The arbitration clause is included in the Contract, which the Parties agreed to be governed by the law of Mediterraneo. It conferred the Tribunal with the power to decide on '*any dispute arising out of the contract'* which includes, in its ambit, the present adaptation claims [*Lew & Mistelis, p.153 ¶7-66*]. The arbitration agreement further provides that the seat of arbitration is Danubia. The Danubian Arbitration law is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments which operates as the '*lex arbitri'* in the present proceedings. ("**Model Law**") [*PO 1, III, ¶4*].

2. RESPONDENT erroneously argues that the Tribunal does not have jurisdiction and the powers over the claim for adaptation and refuted the application of the law of Mediterraneo to the arbitration agreement [*A No A, ¶¶12-17*]. Contrary to RESPONDENT's ill-founded allegations, CLAIMANT shall demonstrate that the Tribunal has jurisdiction and the power to adapt the Contract for the following reasons: *First,* pursuant to the consensus reached by the Parties, the law of Mediterraneo applies to the arbitration agreement and its interpretation (**I**) *Second,* the Tribunal is vested with the power to adapt (**II**). *Last,* the legal jurisprudence in Mediterraneo allows for adaptation (**III**). In any event, even if the Tribunal finds that the law of Danubia applies to the arbitration agreement, it has the power to adapt the Contract (**IV**).

I. THE LAW OF MEDITERRANEO APPLIES TO THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

3. The Contract signed by the Parties replicates the basic industry template from Mediterraneo with additions made by the Parties [*PO 2, ¶3*]. All additions that have been made by the Parties through long negotiations and deliberations are denoted in italics or are underlined [*ibid.*]. The arbitration clause that has been finally accepted is an italicised clause, which is a clear indication that it is a manifestation of the Parties' intentions [*Cl. Ex. 5, §15*]. All things considered, CLAIMANT shall establish that the Parties mutually chose the law of Mediterraneo to apply to the arbitration agreement and its interpretation (**A**) while excluding the application of law of Danubia (**B**). In any event, the law of Mediterraneo applies through a conflict of laws analysis (**C**).

A. THE PARTIES MUTUALLY CHOSE THE LAW OF MEDITERRANEO TO APPLY TO THE

ARBITRATION AGREEMENT AND ITS INTERPRETATION

4. RESPONDENT argues that it never agreed to have the arbitration agreement governed by the law of Mediterraneo. However, CLAIMANT shall proove that the Parties' choice in favour of Mediterraneo as the law governing the arbitration agreement is evident from the drafting history of the arbitration clause (**1**). Alternatively, submitting the Contract to the law of Mediterraneo results in the application of the same law to the arbitration agreement (**2**).

1. The Parties' intention to apply the law of Mediterraneo is evident from the drafting history of the arbitration clause

5. Party autonomy plays an overarching role in arbitration, particularly in resolving questions of applicable law [*Lew & Mistelis, p. 412 ¶17-4; Born I, pp.562,563; Sulamerica v. Enesa, p.18; BCY v. BCZ p.64*]. Art. 36.1 of HKIAC Rules and Art. 28(1) of Model Law, also give primacy to the choice of the Parties in determining the applicable law of the contract including that of the arbitration agreement. [*Lew & Mistelis, p. 120 ¶6-59; Born II, p. 2153*]. Here, the Parties mutually decided on the application of the law of Mediterraneo. This can be evidenced by the exchange of correspondence and long discussions between them. [*No A, ¶15*].

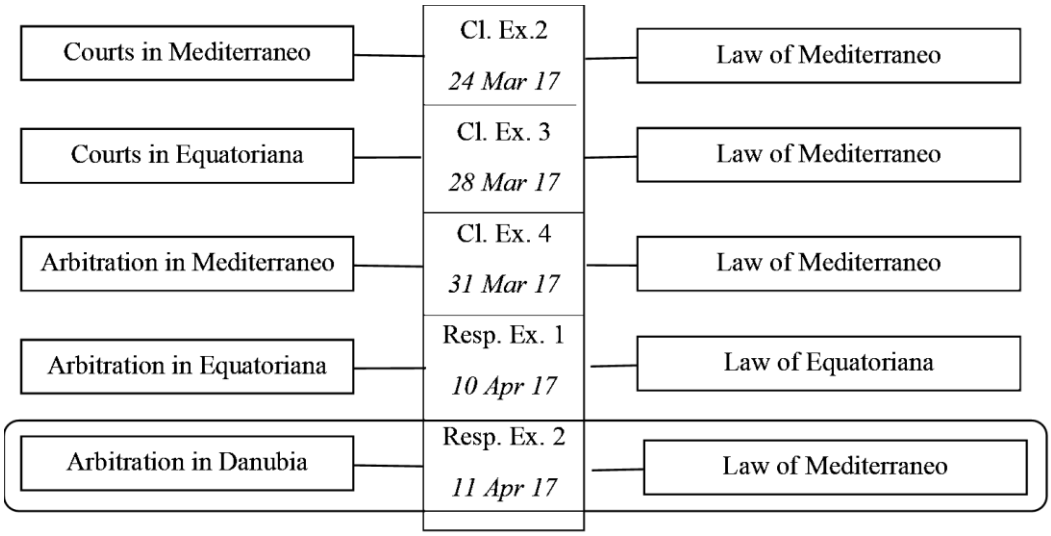
6. During the negotiations, CLAIMANT proposed that the Contract be governed by the law of Mediterraneo and any dispute to be resolved by the courts of Mediterraneo [*Cl. Ex. 2, ¶5*]. RESPONDENT objected only to the forum selection clause and suggested that the courts of Equatoriana have jurisdiction [*Cl. Ex. 3, ¶3*]. CLAIMANT in turn, offered by way of a solution that the Parties opt for arbitration in Mediterraneo [*Cl. Ex. 4, ¶5*].

7. RESPONDENT prepared the first draft of the arbitration clause in favour of Equatoriana [*Resp. Ex. 1, ¶2*]. CLAIMANT rejected the application of the law of Equatoriana on the ground that its internal policy mandates a special approval for contracts submitted to any foreign law [*Resp. Ex. 2, ¶3*]. CLAIMANT accommodated the request of RESPONDENT to not be subject to the courts in Mediterraneo and instead offered to hold arbitration in Danubia, which is a neutral country. This was subject to the overriding condition that the law of Mediterraneo remains to be the applicable law [*ibid.*]. The arbitration clause which had been introduced as a part of the Contract, is to be governed by the same law [*Sulamerica v. Enesa, p. 18; Pacific Recreation Case, p. 36; Jio Minerals Case, p. 79; Sonatrach Petroleum Case, p. 32; ICC Case No. 3572 (1989)*]. The word 'agreement' used by CLAIMANT contemplates all the clauses of the Contract including the arbitration clause [R*esp. Ex. 2, ¶4*].

8. The final arbitration clause does not reflect the objection that RESPONDENT made with respect to the application of the law of Mediterraneo [*Cl. Ex. 5, §§14, 15*]. This is despite the fact that the arbitration clause, which was typed in italics, was actively deliberated on by the Parties [*PO 2, ¶3*].

Furthermore, the persons who finalised the Contract had access to prior deliberations on their email chains [*PO 2, ¶5*]. Thus, the logical conclusion is that the final arbitration clause is a categorical restatement of the Parties' intentions to have the law of Contract extend to the arbitration agreement. The final agreement between the Parties reflected the terms of CLAIMANT's last offer [*Cl. Ex. 5, §15*] and therefore the law of Mediterraneo is the applicable law.

The flowchart elucidates that the last applicable law after final negotiations and signing of the Contract is that of Mediterraneo



2. Law governing the Contract extends to the arbitration agreement

9. In the same vein, RESPONDENT's argument that the choice of law for the Contract does not refer to the arbitration clause by virtue of the doctrine of separability is ill-founded [*A No A, ¶14*]. CLAIMANT does not dispute this well-accepted principle, however, the effect of separability in both common and civil law jurisdictions is limited to preventing the fate of the main contract from affecting the arbitration agreement [*Lew & Mistelis, p. 104 ¶¶6-14; Redfern/Hunter, p. 10 ¶ 2.102; Mayer, p. 264*]. It cannot be stretched to the extent of proving that one is independent of the other. [*Born I, p. 352; Moses, p. 67; Derains, p. 316*]. As a matter of fact, when the parties explicitly agree on the substantive law, the natural corollary is that the same system of law governs their relationship *in toto* [*Russell, ¶2-094; Merkin, p. 180; Oberlandesgericht, p. 264; Arsanovia case, p. 22 ;Dicey & Morris, p. 577; NOFOTA 1977; ICC Case No. 2626 (1997); ICC Case No. 6840 (1991); ICC Case No. 6379 (1990); BGH 1963; BGH 1976*].

10. In the leading case of '*Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A*', Moore-Brick J took the view that in the absence of any indication to the contrary, the parties to a contract will be assumed to have intended that their entire relationship is governed by a single system of law. This leads to the inevitable conclusion that in absence of an express choice of law between the

parties, the '*natural inference*' is that the law of contract is the proper law of arbitration agreement [*Sulamerica v. Enesa, p. 11*].

11. RESPONDENT'S legal evaluation of Art. 16 of Model Law is fallacious because it treats the arbitration agreement as an autonomous clause only for the purpose of allowing the Tribunal to rule on its own jurisdiction. For other purposes, such as the interpretation of the contractual clauses, the arbitration clause continues to be a part of the main contract [*Born I, p. 476; Swiss 29, 1995, pp.800-806; ICC Case No. 4131 (1984)*]. A contrary interpretation would subvert the legitimate expectations of the Parties who had inserted the arbitral clause as part of the Contract, and not as two separate documents [*Mayer, pp.261-262*].
12. *In sum*, the Tribunal should find that the Parties have chosen the application of the law of Mediterraneo to the arbitration agreement by virtue of an explicit choice of law governing the Contract.

B. THE PARTIES EXCLUDED THE APPLICATION OF LAW OF DANUBIA

13. The underlying policy of the HKIAC Rules and the Model Law is to effectuate the real and common intention of the parties [*Art. 36.1, HKIAC Rules; Art. 8(1), 34(2)(a)(iii) Model Law*]. In this regard, the scope of an arbitration agreement must be construed in accordance with intention of the Parties. Here, RESPONDENT has argued that the law of Danubia applies to the arbitration agreement [*No A, ¶7*]. However, there was no agreement between the Parties to that effect. In fact, Danubia was considered as the seat of arbitration only because it was a neutral country with a functioning judicial system [*PO 2, ¶14*].
14. Contrary to RESPONDENT's claim, the alleged intention of having the law of the seat govern the arbitration clause cannot be reasonably inferred by the correspondence of 10 April [*Resp. Ex. 1*]. Neither has RESPONDENT expressed the same, nor can a discernible pattern be deduced from a standalone email. Furthermore, RESPONDENT raised no objection to the suggestion of CLAIMANT with respect to the application of law of Mediterraneo to the Contract and Danubia as a neutral seat of arbitration [*Resp. Ex. 2, ¶1*]. The same is reflected in the Contract [*Cl. Sub. ¶8*].
15. Additionally, Danubia follows the 'four corners rule' which prohibits reliance on prior negotiations [*A No A, ¶16*]. Whereas here, RESPONDENT has itself extensively relied on prior negotiations to substantiate its claim [*A No A, ¶¶4-10, 15*].
16. *In sum*, it can be reasonably concluded that the Parties' never agreed to have their relationship be governed by the law of Danubia.

C. IN ANY EVENT, RELEVANT CONFLICT OF LAWS RULES ALSO POINT TO LAW OF MEDITERRANEO

17. If the Tribunal finds that there was no agreement between the Parties with respect to the law applicable to the arbitration agreement (*quod non*), the Parties' interests will be better protected by applying a law conceived with international realities in mind [*Benjamin, ¶1.01*]. The Tribunal should, therefore, resort to the conflict of laws rules in order to determine the applicable law (**1**). The closest connection test also leads to the application of the law of Mediterraneo (**2**).

1. Tribunal should apply conflict of laws rules to determine the applicable law

18. An important element of the legal framework for regulating arbitral proceedings is party autonomy [*Poudret, p. 679*; *Redfern/Hunter, p.187 ¶3.97*]. If the Tribunal finds that the Parties have failed to exercise their party autonomy rights, conflict of laws may arise. It is in these circumstances that the task of identifying the law governing the arbitration agreement falls on the tribunal. [*Fouchard, pp. 860, 865; Sulamerica v. Enesa, p.18; Arsanovia case; Habas v. VSC; ICC Case No. 1445 (1967); ICC Case No. 5713 (1989); ICC Case No. 5730 (1988)*]
19. The HKIAC Rules adopt the '*pure voie directe*' approach to conflict of laws analysis [*Lew & Mistelis, p. 434 ¶17-69; Art. 36.1, HKIAC Rules*] pursuant to which, if the parties fail to designate a particular law, the tribunal may determine the law of the substantive contract according to the circumstances of the case [*Benjamin, ¶2.49*]. By contrast, '*pure voie indirect'* approach to conflict of laws analysis, as evidenced in the Model Law limits the discretion of the tribunal by only allowing determination of the applicable law through the conflict of laws rules [*Art. 28(2), Model Law*]. These provisions also extend to the determination of the law of arbitration agreement, failing such designation by the Parties [*Lew & Mistelis, p.120 ¶¶6-59*].
20. RESPONDENT may contend that the Tribunal is not bound to resort to application of the conflict of laws rules. The Tribunal should, however, take note of the fact that applying conflict of laws rules through an exercise of discretion is in accordance with international practice. [*ICC Case No. 7177 (1993); ICC Case No. 6149 (1990); ICC Case No. 6360 (1990)*]. Parties' expectations and intentions are the main bases for the application of conflict of law rules [*Dicey & Morris, p.336; ICC Case No. 6401 (1992); ICC Case No. 11926 (2003); ICC Case No. 8716 (1997)*]. Not only is this deemed to be the most pragmatic approach but it also allows the parties to predict the law that will be applied to their relationship. [*Dicey & Morris, pp.343-345*].
21. For the foregoing reasons, it is tenable to assume that, in a situation where there is no agreement between the Parties, it is in their best interest to identify the law governing the arbitration agreement through the conflict of laws rules.

2. The conflict of laws rules leads to the application of the law of Mediterraneo

22. Arbitral tribunals refer to the principles of private international law to ascertain the applicable conflict of laws rules [*Texaco Case*, *Economy Forms Case*, *LIAMCO Case*]. This is further supported by the fact that the conflict of laws rules of the seat, the Hague Principles on Choice of Law in International Commercial Contracts, do not govern the question of law applicable to the arbitration agreement [*PO 2, ¶43* ; *Art. 1(3)(b), PCL*]. In this respect, commentators and arbitral awards affirm the application of the '*closest connection*' test [*Sulamerica v. Enesa, p. 18; BCY v BCZ; Van den Berg, p. 411; Born II, p. 2649*, *Benjamin, ¶2.81*]. Even though there exists a difference in approaches to the question of the applicable law, both '*pure voie indirect*' and *'pure voie directe'* lead to the application of the closest connection test [*Elisabeth Metzler, p. 264*].

23. The adoption of the closest connection test requires an arbitrator to identify connecting factors and establish where the connection lies [*Benjamin, ¶6.07*]. This test considers factors like the place of business of the party which had to perform the '*characteristic performance*' [*Patocchi, p.113*; *Batiffol, p.293*]. The characteristic performance of the parties is an obligation '*peculiar to the type of contract in issue or which marks the nature of the contract*' [*Marconi v. PT Pan, p.40*]. It is the performance rendered against payment which is characteristic in nature. [*Lagarde, pp.1-50*]. Other applicable factors for the closest connection test include the place where the business was situated when the relevant communications took place [*Wang, p.424*] and the place of contracting [*ibid.*]. In the present case, since CLAIMANT has undertaken to perform the sale against the payment of USD 10,000,000, it is the party affecting the characteristic performance of the Contract. Moreover, it was CLAIMANT's place of business, where the final negotiations and the signing of the Contract took place. [*PO 2, ¶13*]. Thus, these connecting factors lead us to the law of CLAIMANT's place of business which is Mediterraneo.

24. Additionally, the law governing the underlying agreement is also said to have a significant connection to the agreement to arbitrate because that law will govern the subject matter of the dispute in the arbitration [*Dongdoo, p.110*]. Here, the Parties chose the law of Mediterraneo as law governing the Contract [*Cl. Ex. 5, §14*] and therefore it has a closer connection to the arbitration agreement.

25. *In sum*, the conflict of laws analysis also points towards the application of law of Mediterraneo to the arbitration agreement.

II. TRIBUNAL IS VESTED WITH THE POWERS TO ADAPT THE CONTRACT

26. The power of adaptation of the Contract can be derived from the principle of kompetenz-kompetenz (**A**), the common intention of the Parties' (**B**) and the principle of good faith (**C**).

Notwithstanding, such power has already been assumed by the Tribunal under the law of Mediterraneo (**D**).

A. THE TRIBUNAL HAS THE AUTHORITY TO RULE ON ITS OWN COMPETENCE

27. Art. 19.1 HKIAC Rules and Art. 16 Model Law enshrine the fundamental principle of kompetenz-kompetenz, which hold that arbitral tribunals have the power to decide on their own competence [*Moser/Bao, ¶9.131*]. This power includes the ability of the tribunal to determine the scope of the arbitration agreement [*CLOUT 127*]. Considering this doctrine is borne out of applicable laws and rules, the power of the Tribunal to adapt the contract can be derived from the same.

B. THE PARTIES' COMMON INTENTION WAS TO CONFER THE TRIBUNAL THE POWER TO ADAPT THE CONTRACT

28. Arbitral tribunal derives its power from the arbitration agreement [*Wortmann, p.108; Diehl, p.341*]. Consistent jurisprudence in Mediterraneo allows for the application of the CISG to interpretation of an arbitration clause, when it is part of a contract governed by the CISG [*PO 1, III, ¶4*]. The interpretation of statements made by the Parties in accordance with Art. 8 CISG shows that from the inception of the Contract, the Parties intended that the Tribunal should adapt the Contract in case of any contingency.

29. The CISG provides for the employment of subjective as well as objective intent for the interpretation of the contract [*Kroll/Mistelis/Viscasillas, p.143*]. The Tribunal should first have regard to the intention of the Parties [*Art. 8 CISG*], considering all circumstances that existed at the time the contract was entered into and the conduct of the parties' subsequent to contract conclusion [*Art. 8(3) CISG*].

30. The commercial basis for this Contract is RESPONDENT's interest in expanding its race horse breeding program and CLAIMANT's need to recuperate losses and stay in the business. This commercial basis must be taken into consideration while interpreting the arbitration agreement because it is a manifestation of the Parties' expectations from this Contract [*McMeel, p.82 ¶1.144; Golden Key case, pp.26-29, 42; Miramar Maritime Corp case; Antaios case; Insigma v. Alstom, pp.30, 33*]. CLAIMANT always intended to have a commercially viable contract and had maintained that all risks must be borne by RESPONDENT, especially those with reference to custom regulation and trade restriction [*Cl. Ex. 4, ¶4*]. The Parties indicated this intention explicitly and unambiguously by agreeing to adapt, should they not reach an agreement upon occurrence of an unforeseen event [*Cl. Ex. 8, ¶4*]. Following the imposition of the tariff, CLAIMANT contacted RESPONDENT who assured of a constructive dialogue [*Resp. Ex. 4, ¶4*] given the good relationship between them and their interest in further business [*Cl. Ex. 8. ¶7*]. From these discussions, it is apparent that the

subjective intention of the Parties' was to include within the agreement's ambit the scope to adapt the Contract.

31. Viewing the present proposition through the prism of an objective standard [*Massimo, ¶2.4; Reinhart, ¶3*], the only discernible inference is that the Parties were in consensus on the aspect of adaptation. In the instant case, CLAIMANT accommodated all requests of RESPONDENT from the change in delivery terms to the reduction in the purchase price [*Cl. Ex. 4, ¶4; PO 2, ¶8*]. At the same time, it maintained that the risks associated with the transaction would have to be assumed by RESPONDENT [*Cl. Ex. 4, ¶4*] and that there should be a mechanism in place to ensure adaptation in case the Parties could not agree on an amendment [*Cl. Ex. 8, ¶4*]. This intention to adapt is also confirmed by RESPONDENT's assurance at the time of authorization of last shipment [*Resp. Ex. 4, ¶4; Cl. Ex. 8, ¶7*]. Therefore, if the statements and conduct of the Parties are taken into consideration, a reasonable man will conclude that there was always an intention to adapt the Contract.

32. *In sum*, CLAIMANT had reasonable expectation that RESPONDENT would not renege on the agreement to adapt the Contract, in case they could not agree on an amendment.

C. RESPONDENT'S FAILURE TO ACT IN GOOD FAITH WARRANTS ADAPTATION BY THE TRIBUNAL

33. It is widely accepted that, in the absence of any limiting language in the arbitration clause, the arbitrators are accorded with expansive powers to adopt commercially-sensible resolutions to the parties' disputes [*Born I, p.1338*]. The justification for the conferral of such broad remedial powers to the arbitrators is found in the intention of the parties to perform the contract in good faith [*Ferrario, pp.72, 73, 149*]. This requires the parties to seek adaptation upon occurrence of unforeseen events, in order to ensure that commercial interests and expectations from the contract are not frustrated [*ibid.; Amco Asia Corp Case*].

34. *In casu*, the Parties entered into the Contract with the objective to build and maintain a long-term relationship that satisfies their reciprocal interests and expectations [*Cl. Ex. 2, ¶3; Cl. Ex. 3, ¶¶1-4; Cl. Ex. 4, ¶2; Cl. Ex. 8, ¶8*]. In such contracts, when the balance tilts unfavourably towards one party, the other party has a duty to re-negotiate the terms of the Contract in good faith [*Ferrotitanium Case; Soffimat v. Sec; Française des pétroles v. Huard*]. Subsequent to the imposition of tariffs, the execution of the Contract was 30% more expensive to CLAIMANT [*Cl. Ex. 7, ¶1*]. While RESPONDENT assured CLAIMANT of a constructive dialogue at the time of the last shipment [*Resp. Ex. 4, ¶4*], it subsequently refused to cooperate and re-negotiate [*Cl. Ex. 8, ¶8*]. Upon non-fulfilment of the duty to re-negotiate by RESPONDENT, the Tribunal is empowered to provide for

adaptation of the Contract, in accordance with the principle of good faith. [*ICC Case No. 7929 (1995); Obchodní Banka Case*].

D. THE POWERS OF CONTRACT ADAPTATION HAVE ALREADY BEEN ASSUMED BY THE TRIBUNAL

35. The present issue regarding the power of the Tribunal has already been adjudicated in the other arbitration in which RESPONDENT participated [*PO 2, ¶39*]. It was held therein that a standard arbitration agreement is sufficient to provide the Tribunal with the power to adapt [*ibid.*]. Consequently, the Tribunal should refuse RESPONDENT's request to dismiss the claim as inadmissible on the basis of collateral estoppel [*A No A, ¶22*]. It is a common law doctrine under which parties cannot re-litigate on same issues that have been decided in a prior case in a subsequent litigation involving a different claim [*Born III, pp.3186, 3541*]. The application of the doctrine does not require mutuality [*Bernhard v. Bank of America National Trust & Savings Association Id. pp.812, 894-95*]. When the plaintiff asserts estoppel, it is called offensive and the same is recognised in leading common law jurisdictions [*Parklane v. Shore, pp.326-333*]. The application of this estoppel to the present arbitration is based on four prerequisites that the party asserting preclusion has to prove [*Shell, p.623*].

36. *First,* the party against whom the preclusion is being asked for must be a party to the prior adjudication [*Parklane v. Shore, pp.326-333; Geoffrey, Mastrobuono Case*]. *Second,* the issues in both arbitrations need to be identical [*JR French v. PC Architects; Deweese Case*]. *Third,* the issues decided need to be intrinsic to the final judgement delivered [*Deweese Case, Blonder Tonge Case, pp.313, 323, 324*]. *Last,* the party against whom the preclusion is asked for had been given a full and fair opportunity [*Blonder Tonge Case, p.329; Zenith Radio Case*].

37. The prerequisites for the application of the principle of collateral estoppel are satisfied in the present case. RESPONDENT is a common party to both arbitrations. Further, the subject matter of the issues in both arbitrations is concerned with the power of the Tribunal to adapt under the law of Mediterraneo. Additionally, the partial interim award was intrinsic to that arbitration as it granted competence to the Tribunal to decide on the merits of that claim. [*PO 2, ¶39*]. Finally, there is nothing on the record to suggest that RESPONDENT was denied a full and fair hearing.

38. *In sum,* the Tribunal assumed competence in the other arbitration under law of Mediterraneo [*PO 2, ¶39*] and hence should be precluded for reasons of finality.

III. THE LEGAL JURISPRUDENCE IN MEDITERRANEO ALLOWS FOR ADAPTATION

39. The law chosen by two rational parties to govern a commercial contract should accomplish the purpose of such an agreement. [*Born I, pp.543-545*]. This is supported by the fact that courts and tribunals seek to validate the law that allows for the broad interpretation of the scope of the

arbitration agreement [*Roller, p.259; Hausmaninger, p.227*]. *In casu*, the law of Mediterraneo allows the Tribunal to adopt such an approach and aids in creating an all-encompassing jurisdiction of the Tribunal. This is because, it allows for a broad interpretation of the arbitration agreement. (**A**) Furthermore, its contract law contains provisions for adaptation of contracts. (**B**).

A. THE LAW OF MEDITERRANEO ALLOWS FOR BROAD INTERPRETATION OF THE ARBITRATION AGREEMENT

40. Like most other jurisdictions [*Roller, p.260*], law of Mediterraneo allows for a broad interpretation of the arbitration agreement [*No A, ¶16*]. This interpretation allows the arbitration clause to encompass any dispute as long as it relates to the execution of the main contract [*Walter, p.385*]. CLAIMANT did not raise an objection on narrowing down the wordings of the model HKIAC arbitration clause [*Resp. Ex. 2, ¶3*] because the words '*any disputes*' (**1**) and '*arising out of*' (**2**) are broad enough to cover the claims raised.

1. The words '*any disputes*' encompasses the claim for adaptation of the Contract

41. The term *dispute* has been accorded with an expansive interpretation so as to include all plausible situations that arise vis-à-vis the relationship between the parties [*Born I, p.1347; ICAC 252/2010; Bechtel v. Ueg; Parsons-jurden International Corp. Case; Alghanim v. Alghanim; Kowalewski v. Samandarov; The Angelic Grace Case; The Damianos Case; Hohenzollern Locomotive case; Forwood & Co. v. Watney; Farhat Trading v. Daewoo; R GmbH v. O B.V.; Fiona Trust Case*]. The words '*any disputes*' in §15 of the Contract make a strong argument in favour of the Tribunal's broad remedial authority [*Mastrobuono Case, ¶82*]. Such usage of the words, at the outset, confers wide interpretative powers to the Tribunal [*Born I, p.1347; Mastrobuono v. Shearson*].

42. When an arbitration clause is interpreted, the mutual intent of the parties should be taken into consideration [*Insigma v. Alstom*]. CLAIMANT has in its reply, on 11th April, acceded to narrow down the wordings of the model HKIAC clause [*Resp. Ex. 2, ¶2*]. But it was only subsequent to this letter that the Parties discussed a mechanism to ensure adaptation for any dispute or disagreement between them. [*Cl. Ex. 8, ¶4*]. The Parties, after lengthy negotiations, agreed on the present wordings of the clause. Thus, the understanding of the clause should include consideration of the circumstances surrounding it, the text and purpose of such clause [*Toll v. Alphapharm; Pacific Carriers Case; ICC Case No. 7929 (1995)*]. Therefore, the wordings '*any dispute*' should not be taken at its face value but instead be construed in its spirit [*Schlosser, p.421; Todd Shipyards Case; RBC Case, p.12*].

2. The words '*arising out of*' encompasses the claim for adaptation of the Contract

43. Any dispute that has a significant relationship to the parties' contract can be said to be '*arising out of the contract*' [*Bardina, pp.123-146 ¶7.28; Born I, p.1325; Laurence, ¶5.07; Fouchard, p.481; Mitsubishi case*]. The basis of this approach is that in a commercial deal, rational businessmen want all their

disputes to be dealt in a single forum [*Larsen oil & gas Case, p.20; Tjong Case, "only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement"; Sonatrach Case*]. When two commercial parties agree at the time of the contract to have disputes referred to arbitration, the same should not be construed narrowly [*PRM Energy Case; Indus v. Costco*; *Century Indem Co. Case*]. This is because it is highly unlikely that the parties would have intended their disputes to be resolved by different tribunals [*Francis Travel Marketing Case*].

44. The prime negotiators of the Parties had a clear understanding in this regard. They agreed on the Tribunals' power to adapt [*Cl. Ex. 8, ¶4*]. While deliberating on the dispute resolution clause, the Parties showed no inclination towards resolving specific disputes in different fora [*ibid.*]. Thus, the Parties intended to have the arbitration agreement govern *'all disputes arising out of the agreement'*.

45. Notably, in the judgment of '*Premium Nafta Products Limited & ors. v. Fili Shipping Company Limited & ors.*' the UK Courts held that '*an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*' [*Fiona Trust Case, ¶13*]. Therefore, considering that the interaction of the negotiators shows clear intention, this assumption should be safely sustained [*Cl. Ex. 8, ¶4*].

46. *In sum*, the wordings of the arbitration clause provide for the claim of adaptation to be adjudged by the Tribunal.

B. THE CONTRACT LAW OF MEDITERRANEO PROVIDES FOR ADAPTATION OF THE CONTRACT

47. The general contract law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts, 2016 ("**UPICC**") permits adaptation [*PO 1, III, 4*]. Pursuant to Art. 6.2.3(4)(b) UPICC, adaptation of contract is a remedy to restore its equilibrium which was altered as a result of an unprecedented event. The courts and tribunals are vested with wide discretion to adapt the contract bearing in mind broad range of factors [*UNIDROIT Commentary 2009, p.819*].

48. *In sum*, Mediterranean law gives room for adaptation through its principles of broad interpretation and its well-established contractual jurisprudence.

IV. EVEN IF THE TRIBUNAL FINDS THAT THE LAW OF DANUBIA APPLIES, IT HAS THE POWER TO ADAPT THE CONTRACT

49. RESPONDENT has argued that the law governing the interpretation of the arbitration agreement is that of Danubia. The Danubian law adheres to the '*four corners rule*' or the '*parol evidence rule*', precluding reliance on any external evidence for interpretation of contracts, such as the drafting history and preceding communication [*No A, ¶15; A No A, ¶13*]. However, in a recent Singapore

High Court decision in *BQP v. BQQ,* the power of the arbitral tribunals to disregard national evidential rules relating to contractual interpretation was recognised [*BQP v. BQQ*].

50. As opined by Quentin Loh J, the question of applicability of evidential rules concerning the interpretation of contracts is procedural in nature [*BQP v. BQQ, p.122*]. Thus, when parties agree to apply arbitration rules which confer the tribunal with broad powers to decide on the admissibility, materiality and relevance of evidence, it also includes the power of the tribunal to disapply national evidential rules [*BQP v. BQQ, pp.126-129*].

51. In the present case, the Parties chose HKIAC Rules which vest the Tribunal with wide powers relating to taking of evidence [*Cl. Ex. 5, §15; Moser/Bao, ¶9.150*]. This choice, coupled with the fact that the Parties relied on external evidence, demonstrates Parties' intention to accord the Tribunal with full authority to determine evidential questions [*Eversheds Harry Elias, Mar. 2018*]. In light of the same, CLAIMANT requests the Tribunal to disregard the 'four corners rule' contained in the Danubian Contract Law [*Tan/Ng; Chan; Foxton*]. This will allow the Tribunal to interpret the Contract, after taking into account all pre-contractual negotiations and agreements between the Parties that did not get reflected in the Contract [*Posner, p.1596*].

52. One such agreement was with regard to the conferral of power to adapt on arbitrators, in case the Parties could not agree on an amendment [*Cl. Ex. 8, ¶4*]. This was concluded between the prime negotiators of the Parties during their conversation on 12 April 2017 and this satisfies the requirement of express authorisation of power to adapt for arbitrators in Danubia [*A No A, ¶13*]. Since the term '*express*' has been defined in the Black's Law Dictionary to mean something that is '*clearly communicated or directly stated*' [*Black, p.601*], the verbal agreement between the Parties can be taken to be an express conferral of powers to adapt on arbitrators.

53. For the foregoing reasons, even if law of Danubia governs the arbitration agreement, the Tribunal is still vested with the power to adapt the Contract.

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Conclusion: The Parties' have chosen the law of Mediterraneo to govern the arbitration clause. Further, the arbitration clause has conferred the Tribunal with the power to adapt and rule on the merits of this case. In any event, if the law of Danubia applies the Tribunal has the power to adapt.

ISSUE 2. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

54. The Tribunal has the jurisdiction and the power to adapt the Contract and the Parties are entitled to submit evidence to support or rebut their claims. CLAIMANT seeks to submit as evidence, a partial interim award rendered in another arbitration, in which RESPONDENT is a party. In that arbitration, RESPONDENT who is here denying the need to adapt the Contract had itself asked for an adaptation of the price under similar circumstances [*The Problem, p.50*]. The award rendered

therein confirmed the power of the tribunal to adapt the Contract under law of Mediterraneo, in case of hardship [*PO 2, ¶39*]. RESPONDENT, nevertheless, has contended that the Tribunal should not admit the evidence because it was procured illegally either through a breach of confidentiality agreement or a hack of its computer system [*The Problem, p.51*].

55. However, the merit of the present claim should not be prejudged because alleged illegality of evidence is not a ground for its inadmissibility [*Havalic/Boykin; PCA AA 226*]. CLAIMANT shall establish that such evidence should be admitted for the following reasons: *First,* the Tribunal should use its discretion to apply the IBA Rules (**I**). *Second,* CLAIMANT was not involved in the illegal procurement, and, therefore the Tribunal should admit the evidence (**II**). In any event, the evidence can be admitted irrespective of the manner in which it is procured (**III**).

I. THE TRIBUNAL SHOULD USE ITS DISCRETION TO APPLY THE IBA RULES

56. Arbitral tribunal's power to resolve issues related to evidentiary matters originate from the arbitration agreement, the applicable institutional rules, and the *lex arbitri* [*Berger/Heinz; Marghilota, p.122; Born II, p.2309, Pietrowski on Evidence, pp.374-375*]. Party autonomy is paramount, save where mandatory norms are concerned. A tribunal draws its own conclusions taking into account the agreement between the parties [*IAIGC v. DAII; Waincymer, p.754*]. The institutional arbitration rules and the *lex arbitri*, complement the parties' agreement [*Berger/Kellerhals, p.13; Born I, p.59; Erik/Herman/Christophe, p.10*].

57. Arbitration laws and institutional rules across jurisdictions do not set formal rules of procedure in dealing with evidence [*Art. 25(1), ICC; Art. 14(2), LCIA; Art. 17(1) UNCITRAL, Art. 16(1) AAA; Art. 17(1) ACICA; Blair/Gojković, p.240*]. They give arbitrators the flexibility of determining their own procedure to conduct arbitration [*Pietrowski on Evidence, pp.373, 374; Parker case; AAA 1310-0417-78; Caron/Caplan; Sandifer; SG–A/CN.9/97, p.176*].

58. In the present case, the arbitration agreement is silent on the procedure to be followed in matters concerning evidence. The Tribunal shall therefore resort to the HKIAC Rules [*Cl. Ex. 5, §15*] and Model Law to determine the procedure applicable to the present dispute [*ibid.*]. Pursuant to Art. 22.2 HKIAC Rules and Art. 19(2) Model Law, the Tribunal has the freedom to conduct the proceedings as it deems appropriate [*Exp. Note on Model Law, p.8 ¶30; Moser/Bao, ¶9.150*].

59. Thus, by agreeing to subject the arbitration to HKIAC Rules and Model Law [*Cl. Ex.5, §15*], the Parties have given the Tribunal wide discretionary powers in determining the procedure for admissibility of evidence [*§47(3), Hong Kong Arbitration Ordinance, 2013; Pilkov on Evidence, p.147; Trittmann/Kasolowsky, p.331; Sussman, p.10; Born II, p.2306*].

60. Appraisal of the evidentiary value of documents flows from the discretionary power of the tribunal [*Honduras v. Nicaragua*]. As HKIAC Rules and Model Law do not regulate specific procedure for

admissibility of evidence, the Tribunal may consult a set of rules that offer a detailed procedural mandate [*Cl. Sub. ¶56*]. The IBA Rules appropriately offer a set of specific requirements for admissibility and assessment of evidence under Art. 9 [*IBA Working party, p.35*]. Commentator Waincymer takes the view that the broad discretion accorded to tribunals includes all evidentiary powers bestowed to them under the IBA Rules [*Waincymer, pp.750-751*].

61. The IBA Rules also offer an independent regulation for the taking of evidence which represent both civil and common legal backgrounds [*IBA Working party, p.1; Shenton, p.150; Zuberbühler/Hofmann/Oetiker/Rohner, p.3 ¶8*]. The HKIAC itself regards these rules as helpful guidance [*Moser/Bao, ¶9.155*]. Consequently, applying the IBA Rules allows the Tribunal to fill the gaps left open by institutional rules and *lex arbitri* [*Zuberbühler/Hofmann/Oetiker/Rohner, p.4 ¶11*].

62. Therefore, the IBA Rules should be referred to by the Tribunal for the taking of evidence.

II. THE TRIBUNAL SHOULD ADMIT THE CONTESTED EVIDENCE AS CLAIMANT WAS NOT INVOLVED IN ILLEGAL PROCUREMENT

63. Good faith is an omnipresent principle guiding all proceedings in international commercial arbitration [*Cremades, p.761; Methanex case, ¶54*]. The term good faith has been embodied by several institutional rules, including the IBA Rules [*Art. 14.5, Art. 32.2 LCIA; Art. 20.7 ICDR; Art. 34(3) ICSID*]. In particular, the IBA Rules provide that they were '*intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations*' and call for adverse inferences where the parties do not act in good faith while taking evidence [*Art. 9.7 IBA Rules*]. In the same vein, Art. 3 IBA Rules calls for parties to conduct themselves in good faith in all aspects of arbitration proceedings [*Art. 3 IBA Rules; O'Malley, ¶9.115*].

64. In this case, CLAIMANT received information about the other arbitration from Mr. Kieron Velazquez, a former employee of the Respondent in the other arbitration. CLAIMANT was only made privy to the information that RESPONDENT rebuffed its obligation to deliver unless the contract was adapted [*PO 2, ¶40*]. Mr. Velazquez referred CLAIMANT to a company from where it could procure the partial interim award. The company provides intelligence on the horseracing industry and keeps sources discreet. It agreed to provide a copy of the award against payment of 1,000 USD [*PO 2, ¶41*]. Nothing on the record suggests that CLAIMANT was made privy to the sources and was involved in the illegal procurement of the evidence. In fact, an independent investigation conducted by RESPONDENT failed to establish a link between the sources of the information and CLAIMANT [*The Problem, p.51 ¶3*].

65. RESPONDENT has confirmed that there could only be two sources of disclosure of this information [*The Problem, p.51 ¶3*]. The first source being the two former employees of RESPONDENT who were witnesses in the other arbitration, bound by a confidentiality agreement [*ibid.*]. Since no plausible

link can be established between the former employees and CLAIMANT, the latter is not related to the evidence's illegal procurement. Notwithstanding, RESPONDENT has contended that since the source of information is illegal, it is inadmissible irrespective of CLAIMANT's involvement. The same is erroneous because in the case of '*Persia International Bank v. Council of the European Union*', the European Court of Justice recognised that if the applicant was not involved in the disclosure, the unlawful nature of the same cannot be held against him [*Persia International Bank Case, ¶95*]. Accordingly, the unlawful nature of the evidence should not be held against CLAIMANT.

66. The second source identified by RESPONDENT was the hack of its computer system [*The Problem, p.51 ¶3*]. RESPONDENT has contended that the evidence should not be admitted irrespective of whether it is available on the internet [*ibid.*]. However, in the case of '*Caratube International Oil Company LLP v. The Republic of Kazakhstan*', the tribunal accepted leaked information as evidence only on the basis that the same was made public and thus, was no longer privileged or confidential [*Caratube case*]. Information is said to be in the public domain if it is openly accessible and parties acknowledge obtaining it from external sources before or in the course of the proceedings, even if it relates to the opposing party [*Ileana, p.111*]. An information which enters public domain will not be protected by the law of confidence and needs to be admitted in an arbitration [*Spycatcher case*]. In addition to this, RESPONDENT has no one to blame for this breach, but itself. The leak can be traced back to its laxity in maintaining proper safety measures leading to the information being available in the public domain [*PO 2, ¶42*].

67. *In casu*, a considerable amount of data was retrieved from RESPONDENT's computer during the hack. If RESPONDENT's assertion that the leaked data was the source of information about the other proceedings were true, the logical implication is that the information was now in public domain and does not retain its confidentiality status.

68. *In sum*, CLAIMANT has not associated itself with any illegality, making its claim admissible.

III. IN ANY EVENT, THE EVIDENCE CAN BE ADMITTED IRRESPECTIVE OF THE MANNER IN WHICH IT HAS BEEN PROCURED

69. The Tribunal should admit the contested evidence because CLAIMANT's request meets the requirements under Art. 9(2) IBA Rules. As noted in the IBA Rules, arbitral tribunals must find the concerns to be '*compelling*' in order to exclude the evidence [*IBA Working party, p.4 ¶11*]. Here, RESPONDENT has only objected to the illicit nature of the contested evidence. However, mere illegality in procuring evidence is not sufficient to compel the tribunal to exclude the evidence [*Blair/Gojković, p.256*]. Art. 9(2)(a) IBA Rules states that the tribunal shall not exclude evidence if it is sufficiently relevant to the case and or material to its outcome (**A**). RESPONDENT's objection does not satisfy the confidentiality threshold as provided under Art. 9(2)(e) IBA Rules (**B**).

A. THE EVIDENCE IS RELEVANT TO THE CASE AND MATERIAL TO ITS OUTCOME

70. An evidence is relevant and material if it is necessary for complete consideration of the facts [*Hilmar, p.427; Marghilota, ¶52; Waincymer, ¶¶858-859*]. Art. 3.11 IBA Rules merely requires the party submitting the evidence to believe in its relevance and materiality and does not confer upon them the duty to confirm or prove them at the stage of admissibility. Therefore, parties only need to comply with the lowest standard of relevance and materiality [*Pilkov on Evidence; Born II, p.2310*].

71. *In casu*, the requested document is a partial interim award rendered in the other arbitration. This award held that a standard arbitration agreement is sufficient to provide an arbitral tribunal with the power to adapt under the law of Mediterraneo, in case of a hardship [*PO 2, ¶39*]. The jurisdictional question concerning the power of the tribunal to adapt in both arbitrations is identical, as the law governing the arbitration agreement is the same [*Cl. Sub.¶35*]. In consideration of the fact that the issue has already been decided in the other arbitration, the Tribunal should not reconsider the matter [*ibid.*]. The contested evidence is therefore, relevant and material to the present arbitration as it precludes re-adjudication on the same issue of law. Not admitting the contested evidence would lead to wastage of time and inefficient conduct of proceedings [*Waincymer, p.789*].

72. Even if the Tribunal finds that the issue cannot be precluded, the Tribunal should still be concerned that RESPONDENT has made hypocritic and contrary assertions before a different tribunal. [*The Problem, p.50*]. RESPONDENT has in a circumstance where imposition of tariffs was comparatively foreseeable sought to adapt. Whereas, when the imposition of retaliatory tariffs was unprecedented, RESPONDENT opposed the same [*ibid.*]. Thus, even if the contested evidence does not paint a true picture, it still undermines the veracity of RESPONDENT's claims.

73. *In sum*, the contested evidence should be admitted as it is relevant and material to the outcome of this case.

B. THE EVIDENCE SHOULD NOT BE EXCLUDED FOR REASONS OF CONFIDENTIALITY

74. RESPONDENT has objected to the admissibility of the contested evidence on grounds of violation of provisions of confidentiality. *Au contraire*, CLAIMANT submits that the contested evidence does not breach the confidentiality interests under the IBA Rules (**1**). Even if it is assumed that the contested evidence contained confidential information, the Tribunal should allow admission of the same in order to protect the legitimate interests of CLAIMANT (**2**) and adhere to the prevailing principles of transparency in international arbitration (**3**). Furthermore, the Tribunal may allow admission of contested evidence subject to a protective order (**4**).

1. RESPONDENT'S confidentiality interest under the IBA Rules has not been breached

75. Pursuant to Art. 9(2)(e) IBA Rules, a tribunal excludes admissibility of evidence on *'grounds of commercial confidentiality […] that it determines to be compelling'*. Contrary to RESPONDENT's assertion [*The Problem, p. 50*], the evidence sought by CLAIMANT does not involve confidential business information or business secrets. Business secrets are affected if '*the companies crown jewels are at stake*' [*Marghilota, p. 92*]. This is especially the case if the requested party has an economic interest to keep the requested information secret [*BGH 2009; Andreas Götz*]. Here, CLAIMANT only seeks to admit the award concerning the jurisdiction issue [*The Problem, p.50*] which in no way affects the business secrets or the commercial confidentiality of RESPONDENT. The confidentiality interest of RESPONDENT is limited to the information regarding the sale of mare [*ibid.*]. The evidence therefore does not breach commercial or technical confidentiality of RESPONDENT.
76. On the basis of the above, the contested evidence should be admitted as it does not compromise the commercial confidentiality of RESPONDENT and pertains only to the power of the Tribunal to adapt the Contract.

2. The Tribunal should admit the evidence in order to protect the legitimate interests of CLAIMANT

77. Even assuming that the confidentiality interests of RESPONDENT are at stake, the same should be balanced against CLAIMANT's legitimate interests. In other words, the Tribunal should strive to strike a balance between the interests of justice and procedural integrity [*Blair/Gojković, p.250*]. If the legitimate interests of CLAIMANT outweigh the confidentiality interests of RESPONDENT, the Tribunal can disclose the information to protect the same [*Myanma v. Win; Quinto, p.205; Foreman v. Kingstone; Schmidt v. Rosewood; Elisabeth Metzler, p.252*].
78. In the present case, CLAIMANT's interests outweigh RESPONDENT's concerns regarding confidentiality of the award for the following reasons: *First,* CLAIMANT is not requesting any information affecting the heart of RESPONDENT's equestrian business i.e., any contractual information containing details with regard to RESPONDENT's broodmare lines, such as the details of the racehorse breeding program, RESPONDENT's customers or purveyors. *Second,* based on the contested evidence, it is not possible to deduce additional information concerning the business of RESPONDENT, as the award only deals with the issue of the power of the Tribunal to adapt [*PO 2, ¶39*]. By contrast, CLAIMANT is dependent on the admissibility of the award for preclusion of an issue already adjudicated, thus relieving the Parties of the costs and vexation of multiple lawsuits.
79. In light of the above, the legitimate interests of CLAIMANT override any confidentiality interest that RESPONDENT has alleged.

3. Admission of the evidence should be allowed in adherence to the prevailing principles of transparency

80. RESPONDENT has contended that an express confidentiality provision should necessarily exclude any prevailing transparency principles. RESPONDENT's claim is refuted by relevant commentary and jurisprudence [*Poorooye/Ronan, p.321*]. *First,* CLAIMANT is not bound by the confidentiality agreement since Art. 42 Hong Kong International Arbitration Centre Rules 2013 only binds the parties and the arbitral tribunal [*Moser/Bao, ¶¶12.30-12.31*]. *Second,* commentators support that transparency rules become relevant when public interest comes into play in commercial disputes [*Cindy, p.135; Rogers, p.1301; Partasides/Maynard, p.197; Cremades, p.27*]. Market competition in today's globalised world is one such public policy concern that has made it essential to include principles of transparency in arbitration between two private parties [*Argen, pp.209, 234-235*].
81. In this case, RESPONDENT is trying to oust CLAIMANT from the business and become the sole trader of frozen semen of the champion stallion, Nijinsky III. CLAIMANT in good faith accommodated the extraordinary nature of RESPONDENT's request of 100 doses subject to an express written consent requirement for resale to third parties [*Cl. Ex.3, ¶1; PO 2, ¶16*]. *Per contra*, RESPONDENT, in complete disregard of the Contract, resold frozen horse semen to CLAIMANT's competitors [*Cl. Ex. 8, ¶11; PO 2, ¶¶19-20*].
82. Subsequently, RESPONDENT also wrongfully reneged on the adaptation commitments pushing CLAIMANT into bankruptcy upon the imposition of additional 30% tariff [*Cl. Ex. 8, ¶4*]. Consequently, RESPONDENT endangered CLAIMANT's existence in the market by unauthorised resale of semen and failure to adjust the Contract upon alteration of the contractual equilibrium. This is further evidenced by the fact that RESPONDENT was aware of the precarious financial status of CLAIMANT [*PO 2, ¶¶22, 28*]. Ultimately, these tactics deeply impacted CLAIMANT's business. It ensured that all the customers in Equatoriana turn towards RESPONDENT due to comparatively lower domestic prices of the frozen horse semen of Nijinsky III.
83. In view of the above, the principles of transparency require the contested evidence to be made admissible in order to demonstrate the anti-competitive agenda of RESPONDENT.

4. The Tribunal may allow the evidence subject to a protective order

84. If the Tribunal still maintains that the confidential interests outweigh the legitimate interests of CLAIMANT, a protective order may be issued while admitting the evidence. Protective orders help preserve confidential business information by preventing them from disclosure [*Born II, p.2388; Ileana, p.171; Zuberbühler/Hofmann/Oetiker/Rohner, p.53*]. As has already been submitted, the Tribunal is vested with enormous power to admit and assess evidence and can take measures to protect confidentiality interests of the Parties [*Cl. Sub. ¶56*].
85. The Tribunal can, by virtue of such discretion, issue a protective order while admitting the evidence by imposing explicit duty of confidentiality between the Parties. This necessitates the party

receiving confidential information to not disclose the information and only use it during the current proceedings [*Lee Kathryn Elizabeth, p.172; Redfern/Hunter,* ¶*2.161*].

86. Further, the Tribunal may also redact parts of the documentary evidence requested. Such redaction will allow the Tribunal to only disclose information that is pertinent to the case at hand. Since, the Tribunal has wide discretion regarding the admissibility of it may decide if and which protective order is necessary and suitable in the instant case [*Art. 9(4) IBA Rules*].
87. *In sum*, the contested evidence by CLAIMANT should not be barred from admission because of the aforementioned reasons.

* **

Conclusion: The contested evidence should be admitted by the Tribunal in light of its relevance to the present proceedings and CLAIMANT's non-involvement in its illegal procurement.

PART TWO: ARGUMENTS ON THE MERITS OF THE CASE

ISSUE 3. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 RESULTING FROM ADAPTATION OF THE PRICE EITHER UNDER §12 OF THE CONTRACT OR UNDER THE CISG

88. In pursuit of a long-term relationship, CLAIMANT assisted RESPONDENT to further its breeding programme by agreeing to sell an unusually high amount of semen [*Cl. Ex. 2,* ¶*3*]. CLAIMANT could not have anticipated that this generosity would be a '*death knell*' waiting to bring it to financial ruin. Being a veteran in the equestrian sport industry [*No A,* ¶*1*] and having an unpleasant history with unforeseen customs tariffs [*Cl. Ex. 4,* ¶*4; PO 2,* ¶*21*], CLAIMANT was aware of the risks involved. Thus, it stressed the need for a hardship clause in the Contract as a precaution [*Cl. Ex. 4,* ¶*4*]. However, upon imposition of 30% tariff levied by Equatoriana, RESPONDENT refused to honour its contractual obligations and denied any scope for adaptation of the Contract [*A No A,* ¶*18*].
89. Considering that CLAIMANT has already paid the 30% tariff on its last shipment [*Cl. Ex. 8,* ¶*8*], it is entitled to remuneration for the following reasons: *First*, CLAIMANT has the right to recover USD 1,250,000 through adaptation of the price under §12 of the Contract (**I**). *Second*, if the Tribunal finds that the imposition of the tariffs is not covered by §12 ("**Hardship Clause**"), the price should be adapted under the CISG (**II**).

I. CLAIMANT IS ENTITLED TO USD 1,250,000 THROUGH ADAPTATION OF THE PRICE UNDER §12 OF THE CONTRACT

90. After prolonged discussions, the Parties incorporated the Hardship Clause [*Cl. Ex. 5, §12*] to act as a pressure relief valve in order to make the Contract flexible [*Cl. Ex. 4,* ¶*4; Cl. Ex. 8,* ¶*4; Resp. Ex. 3,* ¶*3*]. The imposition of the tariffs increased the cost of the final shipment and caused

substantial hardship to CLAIMANT [*Cl. Ex. 8, ¶6*]. In light of the same, CLAIMANT demands payment of USD 1,250,000 resulting from the adaptation of the price under this Hardship Clause. The imposition of tariff can be construed to be a hardship under §12 of the Contract on either a subjective (**A**) or an objective interpretation (**B**) [*Hogg/Bishop/Barnhizer, p.146*]. As a consequence, adaptation of the price under the Contract is the most appropriate remedy (**C**).

A. SUBJECTIVE INTERPRETATION OF §12 OF THE CONTRACT DEMANDS CLAIMANT' S EXCLUSION FROM BEARING THE RISK OF IMPOSITION OF TARIFF

91. Pursuant to Art. 8(1) CISG, a contract should primarily be interpreted according to the subjective intention of the parties '*where the other party knew or could not have been unaware of what the intent was*' [*Enderlein/Maskow, ¶3.1*]. This read with Art. 8(3) CISG provides that pre-contractual negotiations act as precepts to gauge the intention of the parties [*ICC Case No. 7920 (1998), p.83; Packaging machine, case note 3.3*]. Here, on RESPONDENT's insistence, CLAIMANT agreed to the inclusion of DDP, conditional on a reasonable price increase and addition of a hardship clause [*Cl. Ex. 4, ¶¶4-5*]. The primary reason for the same was to mutually benefit from CLAIMANT's conversance with shipment of frozen semen and not to burden it with additional risks of DDP delivery [*Cl. Ex. 3, ¶2*]. Accordingly, CLAIMANT's acceptance of change in delivery terms was subject to the condition that further risks concerning changes in customs regulation or import restrictions would not be borne by it [*Cl. Ex. 4, ¶4*]. Since RESPONDENT did not object to the same and DDP was incorporated in the Contract [*Cl. Ex. 5, ¶8*], the conditions put forth by CLAIMANT were accepted by conduct [*Filanto v. Chilewich, 'the course of dealing between the parties created a duty on the part of the (seller) to object promptly and that delay in objecting constituted acceptance of the New York (buyer's) offer*'].

92. The intention of the Parties to relieve CLAIMANT of its liability is further evidenced by the wordings of §12 of the Contract. It excludes CLAIMANT's responsibility for '*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*' [*Cl. Ex. 5, ¶12*]. The catch-all phrase '*comparable unforeseen events*' demands interpretation in accordance with the meaning attributed to it by the Parties [*Treibacher v. Allegheny*]. Individual terms, being an integral part of the contract, should be read in the context of the entire agreement, giving due consideration to parties' interests [*Cobalt sulphate case; Lambskin coat case*]. Here, the Hardship Clause was added to the template at the behest of CLAIMANT [*Cl. Ex. 4, ¶4*]. Having experienced an increase of 40% in costs due to an executive order by the Danubian government, CLAIMANT sought to protect its interests in this transaction [*PO 2, ⁋21*]. Thus, the phrase was to act as a cushion against any such comparable governmental intervention that could destroy the commercial basis of the deal [*Cl. Ex. 4, ¶4*].

93. The present imposition of tariff, analogous to the measures by Danubian government, sabotaged the commercial interests of CLAIMANT. In fact, the only reason why customs regulation was not explicitly mentioned in the Hardship Clause was that neither of the Parties expected such measures at the time of contract conclusion [*No A, ¶19*]. All this demonstrates that the intention of the Parties was always to protect CLAIMANT from bearing such risks.

94. *In sum*, subjective interpretation of §12 of the Contract encompasses the present event of hardship.

B. IN ANY EVENT, AN OBJECTIVE APPROACH REQUIRES CLAIMANT TO BE EXCUSED FROM BEARING THE RISK OF IMPOSITION OF TARIFF

95. Should the Tribunal find that the Parties' subjective intention cannot be ascertained, an objective understanding of the Hardship Clause leads to the same conclusion [*Art. 8(2) CISG*]. The relevant test is to examine '*whether a reasonable person in the shoes of the failing party, under similar circumstances at the time of contract conclusion'* would have taken such an impediment into account [*Schwenzer, Art. 8 ¶ 20; Fruit and vegetables case, note 3.1*].

96. CLAIMANT has been suffering from persistent financial predicament and has survived only through stringent restructuring measures [*Cl. Ex. 8, ¶6*]. The restructuring plan that CLAIMANT agreed on, required it to be profitable from 2017 for prolongation of the two credit lines [*ibid.*]. A target profit of USD 180,000 in 2017 and USD 300,000 in 2018 was also set by its creditors [*PO 2, ¶29*]. Therefore, no reasonable person, in the quagmire of debt, would have entered into such a Contract, but for the exclusion of certain risks associated with DDP.

97. Additionally, with the change in delivery terms from EXW to DDP [*PO 2, ¶¶9-10*], CLAIMANT went from assuming the lowest degree of risk to the highest [*Hwan/Say, p.99*]. This change itself made the performance onerous at the time of Contract conclusion and there exists no reasonable justification for CLAIMANT to have agreed to the assumption of all risks against a marginal increase of 0.5% of purchase price [(500/100,000) *100= 0.5%] [*Cl. Ex. 4, ¶3; PO 2, ¶8*].

The following table elucidates the risk allocation under EXW and DDP

SPECIFICATIONS	DEPARTURE FROM WAREHOUSE EXW	SHIPPING CHARGES PAID BY SELLER UNTIL REACHING DESTINATION POINT DDP
Packaging	Seller	Seller
Loading from Warehouse	Buyer	Seller
Pre-carriage	Buyer	Seller
Export custom clearance	Buyer	Seller
Handling departure	Buyer	Seller
Main Transportation	Buyer	Seller
Import Customs Clearance	Buyer	Seller (excluded here)
Post-Carriage	Buyer	Seller
Unloading into Warehouse	Buyer	Seller

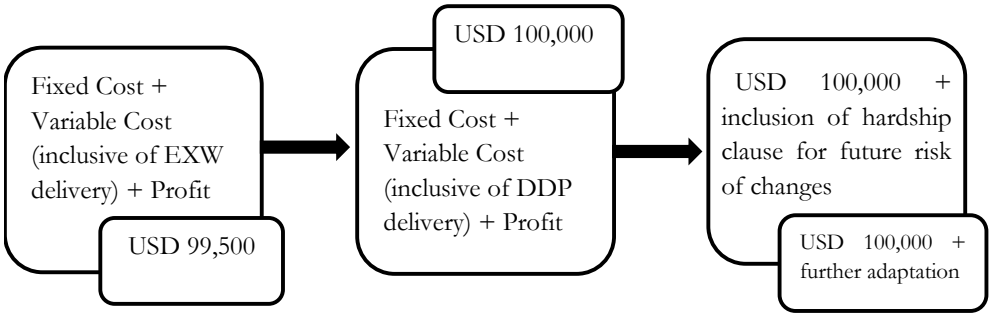
98. *In sum,* a rational person in the shoes of CLAIMANT would never have accepted this Contract on pure DDP against a slight increase in price.

C. IN LIGHT OF THE PARTIES' INTENT, ADAPTATION OF PRICE IS THE APT REMEDY

99. RESPONDENT asserts that §12 of the Contract does not provide for the requested remedy of adaptation [*A No A, ¶19*]. However, this view cannot be followed as the inclusion of this Hardship Clause itself portrays the Parties' intent to adapt the Contract [*Ullman, Art. 6 CISG*]. Commentators note that '*insertion of a hardship clause is an explicit demonstration of the parties' will to undertake a revision of the contract if supervening events make the performance more onerous'* [*Zaccaria, p.150; Draetta, pp.43, 85–86*]. Here, § 12 was incorporated to deal with the consequences of a drastic change in the economic equilibrium of the Contract [*Cl. Ex. 4, ¶4; Cl. Ex. 8, ¶4; Rimke, p.241*]. It begins with the words, '*seller shall not be responsible*', which exempts CLAIMANT from the risk of all unforeseen events [*Cl. Ex. 8, ¶4*]. In the absence of any ambiguity in the terms of the contract, literal interpretation of the words is adopted [*Helvering v. City Bank*]. This is based on the premise that the parties should not later claim for their undeclared intention to prevail [*Bricks Repair case*]. In view of the same, RESPONDENT cannot now demand for CLAIMANT to shoulder any impending risks.

100. Furthermore, the Parties meant for the risks to be allocated in favour of RESPONDENT. CLAIMANT always insisted on a minimum risk contract [*Cl. Ex. 4, ¶4*]. When DDP was incorporated, the purchase price was increased from USD 99,500 to USD 100,000 [*Cl. Ex. 4, ¶3; PO 2, ¶8*]. This was done to cover the costs of transportation, DDP delivery and other incidental costs [*ibid.*]. While the costs were covered, CLAIMANT was still exposed to uncertain risks. Thus, the Hardship Clause was included as a price review clause so that RESPONDENT could indemnify CLAIMANT by way of adjustment [*No A, ¶18*].

The following flowchart elucidates the change in delivery terms and its subsequent effect on the purchase price



101. Based on this intention for contract adjustment, the Parties were required to re-negotiate the Contract after the occurrence of this exigency [*Cl. Ex. 8, ¶4*]. The parties' duty to re-negotiate stems from the principle of good faith, which forms the legal basis of the hardship exemption [*Brunner p.480; Magnus II, Art. 79 CISG ¶24; Schwenzer, Art. 79 CISG ¶55; Pirozzi, p.211*]. This is

also in accordance with Art. 1.7 UPICC, the general contract Law of Mediterraneo [*Cl. Ex. 5, ¶14; PO 1, III, ¶ 4*]. This provision converts the ethical precept of good faith into a legal standard and parties are required to act in a fair and reasonable manner [*UNIDROIT Commentary 2009, ¶13*].

102. *In casu*, RESPONDENT has shown a flagrant disregard for this duty on several occasions. *First*, there was unwillingness to begin re-negotiations. CLAIMANT's phone calls and voicemails were left unanswered [*Cl. Ex. 7, ¶3*]. Considering the last shipment became 30% more expensive, CLAIMANT conveyed that they would need to find a solution in this regard urgently. In light of the fact that delivery was due in three days, CLAIMANT marked the email as '*high priority'* and wanted to be contacted expeditiously [*ibid.*]. RESPONDENT turned a blind eye to this and only reverted the next morning [*Cl. Ex. 8, ¶7*]. *Second*, during the conversation between CLAIMANT and RESPONDENT, the latter assured that the Parties would reach an agreement on the price if the same was provided for in the Contract [*Cl. Ex. 8, ¶8; A No A, ¶4*]. In view of the fact that the Parties had always shared the common intention of adaptation [*Cl. Sub. ¶28*], this assurance created an impression of acceptance of price adaptation [*Cl. Ex. 8, ¶8; A No A, ¶4*]. CLAIMANT authorized the delivery based on this assurance, binding RESPONDENT under the principle of promissory estoppel [*Audit, pp. 63-64; Art. 1.8 UPICC 'A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment'; Ferrari III, p.225; Crucelaegui, pp.73-74; Schwenzer/Hachem, p.136*]. *Last*, the meeting between the Parties on 12 February 2018 was nugatory as RESPONDENT refused to cooperate any further despite being aware of CLAIMANT's precarious financial condition and its inability to take on the risks of the customs regulation [*Cl. Ex. 8, ¶9; PO 2, ¶¶22, 28, 35*].

103. *In sum*, taking note of the circumstances causing hardship and the failure of re-negotiations, the Tribunal is requested to order adaptation under §12 of the Contract.

II. CLAIMANT IS ENTITLED TO USD 1,250,000 THROUGH ADAPTATION OF THE PRICE UNDER THE CISG

104. Should the Tribunal find that adaptation of the price is not covered by §12 of the Contract, the same must be provided under the CISG. Considering the Parties agreed that the CISG would govern all disputes arising out of the Contract, the present hardship must be interpreted in accordance with its provisions [*Cl. Ex. 5, ¶14*]. Although the CISG does not directly address the issue of hardship, it provides sufficient guidance for the situation of hardship to be conceivable under Art. 79 CISG **(A)** or under the principle of good faith pursuant to Art. 7(2) CISG **(B)** or private international law via Art. 7(2) CISG**(C).**

A. CLAIMANT IS ENTITLED TO ADAPTATION OF THE PRICE UNDER ART. 79 CISG

105. Art. 79 CISG sets forth a series of prerequisites which, when satisfied, provide an exemption from fulfilment of obligations, thus constituting a modification of the Contract [*Lookofsky, Art.79 ¶300*]. According to RESPONDENT, the present remedy is outside the scope of the CISG [*A No A, ¶21*]. By contrast, CLAIMANT demonstrate that the inclusion of a hardship clause does not constitute derogation from Art. 79 CISG pursuant to Art. 6 CISG **(1).** Additionally, the requirements of Art. 79(1) CISG are met **(2),** inducing adaptation of price under the CISG **(3).**

1. The inclusion of the Hardship Clause is not a derogation from Art. 79 CISG

106. In RESPONDENT's opinion, the inclusion of the Hardship Clause provides for a special regulation of changed circumstances constituting derogation from Art. 79 CISG [*A No A, ¶20*]. However, the same is untenable. In order to prove derogation, a '*clear, certain or real*' intent is required [*CISG-AC Opinion No. 16; Honnold/Flechtner ¶77; Enderlein/Maskow p.48; Ferrari, note 614; Ferrari II, p.220*]. This intent can either be explicit or implicit [*Kroll/Mistelis/Viscasillas, Art. 6 ¶15*]. The parties are said to explicitly derogate when they include a clause to that effect in their contract [*Gillette/Walt, pp.452,491*]. Here, the Parties stipulated in §14 that the Contract shall be governed by the law of Mediterraneo, including the CISG [*Cl. Ex. 5, ¶14*]. This Clause provides no evidence as to the exclusion of Art. 79 CISG, despite the inclusion of the Hardship Clause. Thus, there was no explicit derogation from Art. 79 CISG.

107. Furthermore, there was no implicit derogation from Art. 79 CISG either. To constitute implicit derogation, a contract clause must contain an exhaustive list of impediments [*Mietten, p.38*]. In this case, §12 did not lay down an exhaustive list of events to be considered as hardship, which expanded the scope of Art. 79 CISG instead of limiting it [*Flechtner, p.393; CLOUT 277*]. In fact, §12 was inclusive in nature as it listed '*additional health and safety requirements*' as one of the many classes of risks to be covered [*Cl. Ex. 5, ¶12*]. Moreover, the words '*comparable unforeseen events making the contract more onerous*' left room for other unspecified events to be covered within the Hardship Clause, indicating no implicit derogation.

108. Hence, absent a clearly worded or an exhaustive clause, Art. 79 CISG will not lose its force and will be applied in tandem with the Hardship Clause [*Flechtner, p.393*].

2. The imposition of the tariff fulfils all requirements of Art. 79 CISG.

109. Impediments are external circumstances which hinder performance and are, thus, outside the seller's sphere of risk [*Schwenzer, Art. 79 ¶11; Atamer in Kroll/Mistelis/Viscasillas, Art. 79 ¶47; Heuze, ¶469; Wilhelm, p.33; Corvaglia, ¶8.4*]. A customs restriction would constitute an impediment beyond control if a reasonable person in similar situations could not have foreseen the prohibition at the time of contract conclusion [*Ramberg/Herre, p.571*].

110. RESPONDENT argues that Art. 79 CISG does not regulate hardship [*A No A, ¶21*]. However, CLAIMANT maintains that hardship situation is conceivable under Art. 79 CISG as its legislative history is in consonance with this extended interpretation [*CISG-AC Opinion No. 7, ¶27*].

111. Legislative history of the CISG is consulted in order to make a sound interpretation of its provisions [*Honnold, pp.4-5*]. The Tribunal should note that use of elastic words like impediment in the CISG was only made to curb the homeward trend which would have led to divergent interpretations [*Nicholas, §5.02/5–5; Kofod, p.290; Andersen, p.94; McKendrick, p.290*]. This interpretation is also consistent with the views of the CISG Advisory Council. The Council observed that Art. 79 CISG does not equate impediment with physical impossibility. Thus, any change in circumstances, making the performance of contract excessively onerous, must be regarded as an impediment [*CISG-AC Opinion No. 7, 2007 ¶26*]. Hence, Art. 79 governs the event of hardship.

112. Having demonstrated that Art. 79 CISG encompasses hardship, CLAIMANT submits that is protected under Art.79 CISG as the imposition of the 30% tariff was an impediment beyond its control **(a),** unforeseeable **(b),** unavoidable **(c),** and was the sole reason for making CLAIMANT's performance more onerous **(d).**

a. Imposition of the tariff was an impediment beyond the Parties' control

113. An imposition must have its origin from a source that a party cannot or is not obliged to control [*Magnus, p.14*]. Only the objective circumstances having their roots outside the obligor's influence and affecting performance are considered beyond parties' control [*Mazzacano, p.53; Atamer in Kroll/Mistelis/Viscasillas, Art. 79 ¶ 46; Stolen car case, p.253; Lindström, ¶4.2*].

114. The imposition of the 30% tariff was an executive action by the government of Equatoriana [*PO 2, ¶25*]. Therefore, neither of the Parties could have exerted influence over the same. In particular, CLAIMANT being a company based in Mediterraneo [*No A, ¶1*], could not have exercised any control whatsoever on the regulatory action.

115. In view of the above, the customs tariff created an impediment far beyond CLAIMANT's control.

b. Imposition of the tariff was unforeseeable at the time of contract conclusion

116. As provided by Art. 79(1) CISG, the exogenous impediment must be unforeseen at the time of conclusion of the contract [*Raw Materials case; Australia cotton case*]. To assess foreseeability, the decisive factor is whether a reasonable person, in comparable circumstances, could have foreseen the impediment's initial or subsequent existence [*Pichonaz, ¶¶1732-1736; Lindström, ¶4.3; Schwenzer, Art. 79, ¶14; Zeller, p.157-158; ICC Case No. 6281 (1989)*]. Since virtually all events are theoretically foreseeable, it is not sufficient that the event was foreseeable in general terms, but that the time of occurrence and the extent of the event also have to be foreseeable [*Brunner, p.158-59; Rimke, p.197*].

117. In the present case, the event was unforeseeable for several reasons. *First,* neither Mediterraneo nor Equatoriana, being ardent advocates of free trade, have ever resorted to trade wars [*PO 2, ¶23*]. The preferred course of action by Equatoriana was amicable dispute resolution under the aegis of WTO [*Cl. Ex. 6, ¶2*]. The one-off instance when Equatoriana retaliated was when the 'National Party', a critic of free trade, was in power [*No A, ¶19*]. The Parties could not have reasonably anticipated such a drastic measure especially when the incumbent party, Progressive Liberals patronized free trade [*ibid.*]. *Second*, the size of the tariff came as a surprise even to the informed circles [*Cl. Ex. 6, ¶2*] and was beyond the worst expectations of analysts [*ibid.*]. Even more unforeseeable was the fact that horse semen was categorized as an '*agricultural product*' because both countries had never imposed tariffs on agricultural products including horse semen [*PO 2, ¶25*]. *Last,* the horse industry was growing at a stable rate of 4% [*No A, ¶4*]. The industry was further ameliorated by the lifting of ban on artificial insemination, which came as a rescue measure after the prolonged ban on natural coverage [*Cl. Ex. 1, ¶1*]. Thus, a customs regulation on the product, exclusively for which a ban was lifted, could not have been predicted to occur.

118. On the basis of the above, CLAIMANT could not have anticipated the tariffs.

c. Imposition of the tariff was unavoidable

119. Pursuant to Art. 79(1) CISG, non-performance is excused if the impediment is unavoidable [*Schwenzer, Art.79, ¶11; Atamer in Kroll/Mistelis/Viscasillas, Art. 79 ¶43*]. In this case, CLAIMANT could not have obtained an exemption or a reduction in additional tariffs charged on the last shipment [*PO 2, ¶27*]. Therefore, the introduction of 30% tariff was unavoidable.

120. Moreover, unavoidability depends on the degree of efforts parties expect from each other based on the contractual risk allocation [*Mullis/Huber, p.262*]. However, it was held in the *Scafom International case* that an exemption may be permitted if the insurmountable economic impediment crosses the limit of sacrifice [*Schwenzer II, p.39; Enderlein/Maskow; Tallon, p.576; Scafom international case; CLOUT 1501*]. The test for this limit is fulfilled only in severe cases where, considering the economic losses, a party cannot be presumed to perform onerous contractual obligations [*Klepac, p.46*]. For instance, in the case of a fundamental increase in the cost of performance which leads to the financial ruin of the seller [*Kruger, p.272; Reservoir case*].

121. Here, CLAIMANT has an abysmal financial record and has survived through stringent restructuring measures [*Cl. Ex. 8, ¶6*]. The racehorse section was running at a loss since 2014 [*PO 2, ¶15*]. In fact, financial support was available only against a commitment for a substantial rise in profits in the near future [*PO 2, ¶29*]. The impecunious position of CLAIMANT further declined due to the imposition of the tariff. It increased the cost of the last shipment by USD 1,500,000, destroying not only the profit margin of 5% but also compelling CLAIMANT to bear a loss of USD 1,250,000

[*ibid.*; *Cl. Ex. 8, ¶6*]. In view of the above, the additional cost extended way beyond the limit of sacrifice, making the impediment unavoidable for CLAIMANT.

d. There is a direct causal relationship between the impediment and the burdensome performance

122. According to Art. 79(1) CISG, performance of the contract must become more onerous as a result of change in circumstances [*Ishida, p.334; Schwenzer, Art. 79, ¶16; Brunner, p.399*]. In this case, the imposition of tariff by Equatoriana made the performance of the Contract more onerous [*Cl. Ex. 8, ¶6*]. CLAIMANT incurred huge monetary losses which crippled its business [*PO 2, ¶29*]. In fact, it was left unable to get an extension of its credit line [*ibid.*]. In light of the above, the burdensome delivery of last shipment is a direct consequence of this impediment.

123. Thus, the Tribunal should find that the present event fulfils the prerequisites of an impediment and entitles CLAIMANT for remedies under Art. 79 CISG.

3. The CISG provides for adaptation of the price in case of such hardship

124. RESPONDENT contests that Art. 79 CISG does not provide for the requested remedy of adaptation [*A No A, ¶21*]. By contrast, CLAIMANT maintains that the same can be perceived through an extended interpretation.

125. By virtue of Art. 79(1) CISG, if the promisor is exempted from performance in part [*Schwenzer, Art. 79 ¶50; Honnold/Flechtner, Art. 79 ¶435; Tallon, Art. 79 note 2.10.3; Liu, Force Majeure, No. 10; Magnus, pp.1-21*], the non-breaching party can claim specific performance of the non-exempted part of the obligation [*Lindström, ¶2.3*]. This acceptance of part-performance by the other party is an adaptation of the contract [*Schwenzer II, p.724*]. To demonstrate, if a seller obligated to deliver two shipments, fails to deliver one because of an impediment and this partial delivery is accepted by the buyer, the contract is considered to be adapted.

126. Additionally, Art. 79(5) CISG allows parties to exercise any right other than claiming damages under the CISG. The CISG Advisory Council is of the opinion that this provision can be relied upon by courts to find a balance of the performances pursuant to the changed circumstances, thereby 'adapting' terms [*CISG-AC Opinion No. 7, ¶40*]. Thus, courts can order any 'further relief' consistent with the CISG and its underlying principles [*ibid., opinion 3.2*].

127. Adaptation can be sought as a further relief if it is consistent with other principles in the CISG [*Lookofsky II, p.162*]. For instance, Art. 50 CISG and Art. 55 CISG allow for remedies similar to adaptation of price. Under Art. 50 CISG, the remedy of price reduction, a form of price adjustment, is provided for non-conforming goods that cause a disbalance in the equilibrium [*Schlechtriem, pp.235-236*]. Similarly, a hardship situation that fundamentally disturbs the equilibrium of the contract can be remedied by way of adaptation. In the same manner, Art. 55 CISG confers upon the tribunal the power to determine the price, in case parties have not explicitly or implicitly

agreed to the same. Therefore, in the words of Commentator Schlechtriem, price adjustment is a '*springboard to develop a general rule of adaptation'* in hardship conditions [*ibid.*].

128. *In sum*, the CISG provides for adaptation of price in the present event of hardship.

B. CLAIMANT IS EXCUSED FROM LIABILITY UNDER THE PRINCIPLE OF GOOD FAITH PURSUANT TO ART. 7(2) CISG

129. Even if the Tribunal finds that adaptation is not covered under the CISG, general principle of good faith should be relied upon to fill this internal gap [*Art. 7(2), CISG*]. The principle is applicable not only for the interpretation of the CISG but also for provisions of the contract [*Société Romay case*].

130. Interpretation of the CISG in accordance with the principle of good faith requires the event of hardship to be covered under Art. 79 CISG. Contrary interpretation would be inconsistent with the principle as it will be unfair for the affected party to keep performing its obligations as per the original terms, even when the same has become burdensome [*Jones/Schlechtriem, ¶216; Brunner, p.39; Maskow, p.658*]. *In casu*, imposition of tariff compelled CLAIMANT to fulfil an obligation which was drastically different from what it originally agreed to. Thus, the principle of good faith necessitates adaptation [*Cl. Sub. ¶33*]. Additionally, for the interpretation of contract, good faith demands determination of terms in accordance with the expectations of the parties [*Brownsword/Hird/Howells, p.27; Yee, p.214*] and the assumption of risks [*Treitel, p.455; Katz, p.391; CISG-AC Opinion No. 7, ¶39*]. Here, CLAIMANT concluded the contract with the expectation to earn additional revenues while assuming minimal risks [*No A, ¶6*]. Thus, any interpretation rendering CLAIMANT responsible for additional risks would defeat such expectation and would, therefore, be against the principle of good faith.

131. *In sum*, Art. 79 CISG should be interpreted in light of the good faith to include the situations of hardship.

C. CLAIMANT IS ENTITLED TO ADAPTATION OF THE PRICE UNDER THE UPICC

132. If the Tribunal were to consider that hardship is not conceivable under the CISG even through the application of the principle of good faith, it would have to apply UPICC as per Art. 7(2) CISG **(1).** UPICC directly governs the situation of hardship pursuant to Art. 6.2.2 UPICC **(2)** and provides for the remedy of adaptation sought by CLAIMANT under Art. 6.2.3 UPICC **(3).**

1. UPICC is applicable to the present dispute

133. Here, the Contract is governed by the law of Mediterraneo, including the CISG [*Cl. Ex. 5, ¶14*]. Art. 7(2) CISG provides for application of domestic law if gap filling by the underlying principles of the CISG fails [*Schwenzer, Art. 7, ¶42*]. The general contract law of Mediterraneo is a verbatim

adoption of the UPICC [*PO 1, III, ¶4*]. Hence, UPICC is applicable to the present dispute by virtue of rules of private international law.

2. Imposition of the tariff is a hardship under UPICC

134. Art. 6.2.2 (a)-(d), UPICC mirror the standards laid down in Art. 79 CISG for an event to be considered an impediment [*Sarah, p.2021*]. As submitted above, the present event meets these standards [*Cl. Sub. ¶¶113-123*]. However, Art. 6.2.2 UPICC contains an additional standard, which requires an event to fundamentally alter the equilibrium of the contract in order to qualify as a hardship. An event is said to fundamentally alter the equilibrium of the contract if it substantially increases the cost of performance for one party [*Art. 6.2.2 UPICC*]. The Official Commentary on UNIDROIT 1994 provided for an alteration of 50% or more of the cost to be a '*fundamental alteration*' [*UNIDROIT Commentary 1994, p.182-83*]. However, after considerable backlash from various commentators, the rule was renounced. [*UNIDROIT Commentary 2009, p.719*]. The question of what amounts to a fundamental alteration was left for judges and arbitrators to decide [*ibid.*]. In light of the same, threshold for fundamental alteration of the equilibrium must be determined as per distinct facts and circumstances [*Schwenzer II, p.716; UNIDROIT Commentary 2009, p.719*] such as financial capabilities of the affected party and the degree of risk the affected party assumed [*Da Costa/Filho/Basso, p.36*].

135. In the present dispute, the threshold for fundamental alteration of the equilibrium should be lowered as CLAIMANT assumed a smaller risk with regard to contingencies **(a)** and the burden of tariff can lead to financial ruin of CLAIMANT **(b).**

a. CLAIMANT assumed a smaller risk with regard to contingencies

136. A low-profit margin implies a smaller risk assumption with respect to unforeseen events, justifying a lowered threshold for fundamental alteration [*Brunner, p.122; Girsberger/Zapolskis, p.127*]. While the profit margin for natural coverage by Nijinsky III is 15%, the margin set for ordinary stallions is 10% [*PO 2, ¶19*]. However, taking into account, the minimal risks involved in the transaction, CLAIMANT fixed the profit margin at a modest 5% [*No A, ¶6; PO 2, ¶31*] Therefore, this minimum risk contract demands that the threshold test is not strictly adhered to.

137. The standard for the threshold test is also determined with reference to the hardship clause incorporated in the contract [*Brunner, p.515*]. If the parties have included a clause with less stringent wordings, a lower threshold is justified [*ibid.*]. To illustrate, a lower threshold is applied for a hardship clause which refers to events making the contract more burdensome instead of extensively or substantially burdensome [*Fontaine/De Ly, pp.497-498*]. Here, §12 of the Contract exempts CLAIMANT from hardship caused by '*unforeseen events making the performance more onerous*'

[*Cl. Ex. 5*]. The words '*more onerous'* denote CLAIMANT's exemption from performance when the degree of burden increases. However, this does not mean that the increase has to be substantial or should make the performance excessively onerous. Thus, the less stringent wordings in §12 of the Contract warrants a relaxed standard for threshold test.

b. The burden of 30% the tariff can cause financial ruin of CLAIMANT

138. In cases where the affected party loses a '*significant'* part of its profit due to changed circumstances, a lowered standard for fundamental alteration should be adopted [*Girsberger/Zapolskis, p.131; Brunner, p.435; Schwenzer II, p.716*]. In the instant case, CLAIMANT lost a significant portion of its profit because of the payment of USD 1,500,000. It expected a profit of USD 300,000 in the year 2018 [*PO 2, ¶ 29*] and approximately 83% of the same, i.e. USD 250,000 was to be accrued from the payment of the second installment. The following formula shows CLAIMANT's loss of profit for the year 2018:

CLAIMANT's expected profit for 2018	=	USD 300,000	[*PO 2, ¶29*]
CLAIMANT's profit from this	=	5% of the last shipment	
transaction	=	5% of USD 5,000,000	
	=	USD 250,000	
Percentage loss of profit	=	Profit from this transaction X 100 / Expected profit	
	=	USD 250,000 X 100 = approx. 83% / USD 300,000	

The increase in the cost of performance by 30% has not only destroyed the profits that CLAIMANT planned to make but has also resulted in a loss of USD 1,250,000 from this transaction alone, for the year 2018. The loss of revenue for CLAIMANT together with its vulnerable position in the market will cause its financial ruin. For the foregoing reasons, the threshold must be lowered.

139. In light of a lower threshold, the customs tariff of 30% fundamentally altered the equilibrium of the Contract, fulfilling the standards laid down in Art. 6.2.2 UPICC

3. Claimant is entitled to adaptation under Art. 6.2.3 UPICC

140. Art. 6.2.3 UPICC entitles the disadvantaged party to request re-negotiations in situations of hardship. In the instant dispute, RESPONDENT was notified about the need for price adjustment as soon as CLAIMANT knew about the tariffs. Owing to the failure of RESPONDENT to cooperate in re-negotiations [*Cl. Ex. 8, ¶9*], CLAIMANT requests the Tribunal to adapt the Contract under Art. 6.2.3(4)(b) UPICC.

141. Tribunals have the discretion to adapt contracts in order to restore its equilibrium [*UNIDROIT Commentary 2009, p.724 ¶7*]. They endeavor to distribute losses between the parties in a fair manner

[*Fucci, p.35*]. Therefore, the extent of risk assumed by the disadvantaged party and the extent of benefit that the other party receives from the performance needs to be considered [*UNIDROIT Commentary 2009, Official Comment No. 7 to Art. 6.2.3, p.191*]. In the present case, the Tribunal should pay heed to the breach of contractual obligations by RESPONDENT in order to determine the extent of price adaptation fairly.

142. RESPONDENT demanded an unusual quantity of CLAIMANT's most sought-after stallion's semen [*Cl. Ex. 1,* ¶*1*]. It was necessary for CLAIMANT to have its interests sufficiently protected and therefore a resale prohibition was included [*Cl. Ex. 2,* ¶*3*]. An express stipulation to that effect was added in the Contract which provided that *'The semen is to be used for the following mares: (and others after information of the Seller)'* [*Cl. Ex. 5*]. These words must be construed in light of the negotiations between the Parties [*Honnold/Flechtner, p.119*]. The offer to sell 100 doses of horse semen was made only on the condition that RESPONDENT would not resell the same to third parties without an express written consent [*Cl. Ex. 2,* ¶*3*]. In reply to this offer, RESPONDENT accepted all the terms of the offer but for the purchase price, delivery terms and choice of law clause [*Cl. Ex. 3,* ¶*2*]. Even though RESPONDENT, from the very beginning, had the intention to resell 25 doses per year [*PO 2,* ¶*11*], it accepted the prohibition concerning resale [*Cl. Ex. 3,* ¶*2*]. RESPONDENT was, therefore, not permitted to resell the semen. As a consequence, resale of 15 doses of horse semen constituted a breach.

143. Further, CLAIMANT authorized the final shipment and paid the 30% tariff accommodating RESPONDENT's request [*Cl. Ex. 8,* ¶*8*]. The reason why RESPONDENT wanted expedited delivery of the last shipment was because it needed to fulfill its subsequent commitments towards other breeders [*PO 2,* ¶*33*]. While exercising the power to adapt, the Tribunal should consider the benefit that RESPONDENT has illegally received pursuant to the performance of Contract by CLAIMANT. The final shipment that has caused a loss of USD 1,250,000 has benefitted RESPONDENT. It was able to realize a profit of 20% by the sale of frozen semen it received through the last shipment [*PO 2,* ¶*20*]. Moreover, the resale would help RESPONDENT garner support from other breeders to permanently lift the ban on artificial insemination [*Cl. Ex. 8,* ¶*9*]

144. If RESPONDENT is allowed to profit from the breach of the Contract, the already disturbed equilibrium of the Contract will be further altered. Hence, it is imperative to adapt the Contract in order to restore the equilibrium originally agreed upon.

145. *In sum*, the purchase price should be adapted under Art. 6.2.3 UPICC for the aforementioned reasons.

***

Conclusion: Having established the need and significance of adaptation in light of the increased onerousness of CLAIMANT's performance the Tribunal should order RESPONDENT to pay the amount of USD 1,250,000 resulting from the adaptation of price.

PRAYERS FOR RELIEF

In light of the foregoing submissions, counsel of CLAIMANT respectfully requests the Tribunal to find that:

1. It has the jurisdiction and powers to adapt the Contract.
2. CLAIMANT is entitled to submit evidence from the other arbitration.
3. CLAIMANT is entitled to payment of an additional amount of USD 1,250,000.
4. RESPONDENT should bear all the costs arising from these arbitration proceedings.

Respectfully submitted,
National Law University Odisha
06 December 2018

ASTHA AHUJA MANASVINI VYAS PRERONA BANERJEE

SIDDHARTH JAIN YASASCHANDRA VENKATA SAI DEVARAKONDA

Certificate and Choice of Forum
To be attached to each Memorandum

I Astha Ahuja, on behalf of the Team for National Law University Odisha hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for National Law University Odisha

Name Astha Ahuja

Astha Ahuja

Signature