SIXTEENTH ANNUAL WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONK KONG | 31ST MAR – 7TH APRIL, 2019

MEMORANDUM FOR CLAIMANT

NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

MADHYA PRADESH, INDIA

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

COUNSEL

PRANJAL AGARWAL | ADITYA WADHWA

ANKIT GUPTA | NILAKSHI SRIVASTAVA | SHIULI MANDLOI

LIST OF ABBREVIATIONS ..... **I**

INDEX OF AUTHORITIES ..... **V**

Legal Resources and Materials ..... **V**

Books, Journal and Articles ..... **VI**

Domestic Cases ..... **XVII**

International Cases ..... **XXVI**

Others ..... **XXVIII**

STATEMENT OF FACTS **1**

SUMMARY OF ARGUMENTS **1**

ARGUMENTS **2**

ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT **2**

I. THE LAW OF THE CONTRACT GOVERNS THE ARBITRATION AGREEMENT 2

A. Presumption is in favour of law of the contract 2

B. Law of the main contract applies to the arbitration agreement as per the three-step test (*Sulamérica*). 3

a) The implied choice that emanates from the intention of the parties 3

b) The '*closest connection*' test 4

II. THE PRESENT DISPUTE IS WITHIN THE JURISDICTION OF THE TRIBUNAL 4

A. The arbitration agreement covers the present dispute 5

B. The pro-arbitration principle is in favor of the jurisdiction of the Tribunal ..... **Error! Bookmark not defined.**

III. THE TRIBUNAL IS EMPOWERED TO ADAPT THE CONTRACT 6

A. Presumption is in favour of adaptation in case of absence of express conferral 6

B. Application of the law of Mediterraneo allows for adaptation **Error! Bookmark not defined.**

a) Under Art. 8.1 CISG, RESPONDENT's subjective intention cannot be relied upon 7

b) Under Art. 8(2) CISG, the Parties' objective intent was to empower the Tribunal to adapt the Contract 7

i. Previous negotiations 7

ii. Subsequent conduct of the parties 9

C. The arbitral tribunal can adapt the contract even on application of Danubian law... 9

ISSUE 2: EVIDENCE FROM THE OTHER ARBITRATION CAN BE SUBMITTED DESPITE BEING ILLEGALY OBTAINED 10

I. THE TRIBUNAL HAS DISCRETION TO ADMIT THE AWARD AS EVIDENCE 11

A. Illegally obtained evidence is admissible before the tribunal 12

a) Participation of the party seeking to admit the evidence in the unlawful activity that led to its disclosure 12

b) Relevance and Materiality of the Evidence 13

c) Whether prejudice is caused due to disclosure of evidence 13

i. Existence of duty of confidentiality between the parties 14

ii. Actual proof of injury 14

iii. Other party as the originator of breach 14

II. NON-ADMISSION WILL VIOLATE DUE PROCESS OF LAW 14

III. TRANSPARENCY PRINCIPLES PERMIT DISCLOSURE DESPITE CONFIDENTIALITY 15

A. Avoid contradictory decisions on similar dispute 15

B. Protect and serve the interest of the public 16

C. Development of the arbitral legal order 16

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE 18

I. THE PRICE OF GOODS AS AGREED BETWEEN THE PARTIES SHOULD BE ADAPTED UNDER CLAUSE 12 OF THE CONTRACT 18

A. The tariffs imposed by the Equatorianian Government constitute hardship under clause 12 of the Contract 18

a) The imposition of tariffs qualifies as a 'comparable unforeseen' event 19

b) The imposition of tariffs has made performance of Contract more onerous for the CLAIMANT 20

B. Price of the Contract should be adapted to resolve such a situation of hardship 20

a) Parties intended for price adaptation as a remedy for hardship 20

b) Delivery was authorized only upon RESPONDENT's assurance that a solution would be found 20

c) Price adaptation is the most appropriate remedy in the present situation 21

C. Adaptation of the Price should be made in favour of CLAIMANT 21

a) CLAIMANT is facing a situation of financial ruin and cannot bear further losses. 22

b) The sum paid by CLAIMANT for the tariffs exceeds the risks accepted by it under the Contract 22
c) RESPONDENT has unlawfully earned profits by breaching the resale prohibition in the Contract 23
II. THE PRICE OF GOODS AS AGREED BETWEEN THE PARTIES SHOULD BE ADAPTED UNDER CISG 23
A. Application of Art. 79 CISG has not been excluded by the Parties 24
a) Parties have not expressly excluded the application of Art. 79 CISG 24
b) Parties have not impliedly excluded the application of Art. 79 CISG 24
B. There exists a gap in relation to price adaptation as remedy of hardship under CISG 25
a) There exists an external gap regarding price adaptation of the Contract as a remedy for hardship 25
b) Alternatively, there exists an internal gap regarding price adaptation of the Contract as a remedy for hardship 25
C. Price adaptation should be granted as a remedy using UNIDROIT 26
a) The events occurred or became known to CLAIMANT after the conclusion of the Contract 26
b) The events could not reasonably have been taken into account by CLAIMANT at the time of conclusion of the Contract 26
c) The events were beyond the control of CLAIMANT 27
d) The risk of the events was not assumed by CLAIMANT. 27
REQUEST FOR RELIEF 28

LIST OF ABBREVIATIONS

Abbreviation	Expansion
&	and (ampersand)
%	Percentage
AC	Advisory Council
All ER	All England Reporter
Art.	Art.
AUT	Austria
BEL	Belgium
CAS	Court of Arbitration for Sport
CEO	Chief Executive Officer
cf.	Compare
Cl. Ex.	Claimant's Exhibit
CLOUT	Case law on UNCITRAL text
Co.	Company
DDP	Delivery Duty Paid
E.D. Va.	United States District Court for the Eastern District of Virginia.
ECJ	European Court of Justice
EDF	Électricité de France
etc.	Etcetera

EWHC	High Court of England and Wales
F. Suppl.	Federal Supplement
FRA	France
GBR	Great Britain
GER	Germany
GMBH	A German Company with Limited Liability
HA ZA	The Hague District Court
HKIAC	Hong Kong International Arbitration Centre
i.e.	That is
ICC	International Chambers of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	The International Centre for Settlement of Investment Disputes
ILC	International Law Commission
In re	In reference
Inc.	Incorporated
ITA	Italy
LLC	Limited Liability Company
Lloyd's Rep.	Lloyd's reporter (Law Report)
Ltd.	Limited
Ned	Netherlands

No.	Number
NY	New York
Op.	Opinion
Or(s).	Other(s)
p.	Page Number
para.	Paragraph Number
PICC	Principles of International Commercial Contract
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
QB	Queen's Bench
Re. Ex.	Respondent's Exhibit
SCC	Supreme Court Cases
SG	Singapore
SGHC	Singapore High Court
SWE	Swedish Supreme Court
SWZ	Switzerland
U.S.	United States of America
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCISG	United Nations Commission on International Trade Law

UNCITRAL	United Nations Convention on Contracts for the International Sale of Goods, 1980 ("CISG"/ "Convention")
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, 2010
USA	United States of America
USD	US Dollar (US$)
v.	Versus
W.D.P.A	Western District of Pennsylvania
WLR	Welsh Law Reporter

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CISG-AC OP. NO. 16	CISG-AC Opinion No. 16, Exclusion of the CISG under Art. 6, Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia, Adopted by the CISG Advisory Council following its 19th meeting, in Pretoria, South Africa on 30 May 2014.
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
ICC Rules	Arbitration Rules of the International Chambers of Commerce, 2012.
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Rules VEM16	Vis East Moot Foundation Ltd. Rules
UNCITRAL Legal Guide	UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, United Nations, Ney York (1988), p. 251.
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments

	adopted in 2006.
UNCITRAL Digest	UNCITRAL Digest of Case Law
UNIDROIT	UNIDROIT Principles on International Commercial Contracts, 2016.

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in para. 14, 25

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(ITA, 1999)

B. AS (Turkey) and C. AS (Turkey) v A. S.p.A. (Italy),
Swiss Federal Supreme Court,
22nd February, 1999.
BGer (1999) 17(4) Bull ASA, 537.
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in para. 102

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(NED, 2007)

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in para. 176

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Rb Arnhem,
29 July 2009,
Case No. LJN BJ4645; 172927 / HA ZA 08-1230.
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in para. 196

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BCY v BCZ
(SG, 2016)

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High Court Of The Republic Of Singapore,
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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"; together "**the Parties**"). **CLAIMANT** is a company registered and located in Mediterraneo. It operates Mediterraneo's oldest stud farm, covering all areas of equestrian sport. **RESPONDENT** is a company registered and located in Equatoriana and is famous for its broodmare lines.

21 Mar '17	RESPONDENT contacted CLAIMANT to inquire about the availability of frozen semen of Nijinsky III, CLAIMANT's stallion of world repute for artificial insemination.	*Cl. Ex. 1, p. 9*
24 Mar '17	CLAIMANT offered 100 doses of Nijinsky III's frozen semen as per its standard terms. It also highlighted a prohibition on re-sale to third parties without '*express written consent*'.	*Cl. Ex, 2, p.10*
28 - 31 Mar '17	RESPONDENT accepted most of the terms and demanded for delivery DDP. Further, it proposed for the courts in Equatoriana to have jurisdiction. CLAIMANT proposed to regulate risk arising from delivery DDP by inserting a hardship clause. It objected to jurisdiction of courts in Equatoriana and offered for arbitration in Mediterraneo.	*Cl. Ex. 3 & 4, p. 11 & 12.*
10 – 11 Apr '17	RESPONDENT proposed a dispute resolution clause providing for arbitration in Equatoriana and subjected the arbitration clause to the law of Equatoriana. Claimant changed the seat to Danubia and removed the clause regarding the law governing the arbitration agreement.	*Re. Ex. 1 & 2, p.33 & 34*
12 Apr '17	Mr. Antley, representing Respondent, prepared a note after his short meeting with Ms. Napravnik, representing Claimant The prime negotiators met with an accident and were later replaced. The subsequent negotiators signed the contract on 6 May '17.	*Cl. Ex. 5, p. 17.*
6 May '17	The Forzen Semen Sales Agreement (**"the Contract"**) was finalised and signed by the Parties.	*Cl. Ex. 5, p. 14*
19 Dec '17	Equatoriana imposed a retaliatory tariff of 30% on all agricultural goods (including horse semen) imported from Mediterraneo, which	*PO2, p.58, para. 25;*

	made the delivery of the last installment, burdensome for the CLAIMANT.	*Cl. Ex. 6, p.15*
20 Jan '18	CLAIMANT informed RESPONDENT that due to the unforeseen event, the Parties should renegotiate the price before the final shipment could be dispatched.	*Cl. Ex. 7, p.16*
21 Jan '18	RESPONDENT assured CLAIMANT that a solution would be found and insisted on a timely delivery. Relying on such assurance, CLAIMANT dispatched the final shipment and paid the additional sum of 1,250,000 USD.	*Cl. Ex. 8, p.18*
12 Feb '18	CLAIMANT met Ms. Kayla Espinoza, RESPONDENT's CEO and confronted her regarding the resale prohibition and renegotiation of the price of the Contract. She refused to co-operate and rejected the demand for payment of any additional amount.	*Cl. Ex. 8, p.18*
31 July '18	Due to disagreement between the Parties on price adaptation of the Contract, CLAIMANT filed the Notice of Arbitration.	*Notice of Arbitation, p.4*
24 Aug '18	RESPONDENT submitted the Answer to the Notice of Arbitration.	*Answer to the Notice of Arbitration, p.29*
2 Oct '18	CLAIMANT informed the Tribunal of another arbitration, wherein RESPONDENT being negatively affected by the tariffs has claimed price adaptation. CLAIMANT wishes to submit a copy of the Partial Interim Award ("**the Award**") given in that arbitration as evidence to prove RESPONDENT's contradictory behaviour. It also requests the Tribunal to join the other party if need arises.	*Letter by Langweiler, p. 49*
3 Oct '18	RESPONDENT informed the Tribunal that such evidence should not be admitted as it could only have been obtained by means of an illegal hack or by breach of confidentiality.	*Letter by Fasttrack, p. 50*

SUMMARY OF ARGUMENTS

RESPONDENT showcased that it was eager to establish a long-term relationship with CLAIMANT based on coopera-tion and loyalty. However, in the very first transaction, RESPONDENT deceived CLAIMANT to earn unlawful profits. It manipulated CLAIMANT to ensure the delivery of shipment by giving assurance of adaptation of contract due to hardship but walked away from its commitment once it received the shipment. Therefore, it seems that making wrongful profit is the only motive of RESPONDENT.

To prevent RESPONDENT from doing this, the Tribunal in this dispute should grant the remedy of adaptation of contract to accommodate the drastic increase in shipment cost.

In absence of express choice of law governing the arbitration agreement, the Tribunal should apply the law of Mediterraneo to the arbitration agreement. Thereby, the arbitration agreement should be interpreted broadly to include the present dispute. Furthermore, the Parties have impliedly conferred power upon the Tribunal to adapt the Contract which is allowed under the Mediterranean law. **[I]**

Furthermore, CLAIMANT should be allowed to submit the Award as it is necessary to prove the contradictory behaviour of RESPONDENT. CLAIMANT approaches the tribunal with clean hands and has no role in the illegal procurement of the award. Moreover, the Award had already lost its confidential status and therefore its admission will not result in breach of confidentiality. Lastly, even if the Award is considered to be confidential, it is admissible because transparency should be given primacy to avoid contradictory decision on similar issues. **[II]**

The imposition of tariffs by Equatoriana makes performance of the Contract burdensome for CLAIMANT thereby, constituting hardship under clause 12 of the Contract. Therefore, a remedy of price adaptation of the Contract should be granted entirely in favour of CLAIMANT to balance the financial disequilibrium between the Parties. Alternatively, there exists a remedy for price adaptation under CISG which must be granted by filling gaps under Art. 7(2) CISG using UNIDROIT. **[III]**

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

1. The dispute arises because of RESPONDENT's denial to adapt the contract in light of unforeseen imposition of tariffs. This is because as per RESPONDENT, in absence of an express choice, the law of the seat governs the arbitration agreement. Thereby, the arbitration agreement is to be *interpreted narrowly* to exclude the present dispute and the Tribunal cannot adapt the Contract as it is not *expressly authorized* to do so.

2. CLAIMANT rejects this reasoning and respectfully requests the Tribunal to find that in absence of an express choice of law, **[I]** the law of the Contract governs the arbitration agreement, thereby **[II]** the dispute falls within the jurisdiction of the Tribunal, and in absence of express authorization **[III]** the Tribunal is empowered to adapt the Contract.

I. THE LAW OF THE CONTRACT GOVERNS THE ARBITRATION AGREEMENT

3. In absence of an express choice of law governing the arbitration agreement [*Cl. Ex. 5, p. 14*], the law of the main Contract shall apply to the arbitration agreement as the **[A]** presumption is in favour of the law of the Contract and as per the **[B]** application of three-step test (per *Sulamérica).*

A. Presumption is in favour of law of the contract

4. There is a strong presumption that the law applicable to the substantive Contract shall be the law applicable to the arbitration agreement [*Tonicstar Case (GBR, 2005)*].

5. This presumption is reasonable [*ICC Case No. 6840 in 1997*] since applying the same law to the parties' arbitration agreement will generally avoid complexities and uncertainties that may result from application of the law of the seat to the arbitration agreement [*Born, p. 42*].

6. The Contract herein is governed by CISG [*Cl. Ex. 5, p. 14*]. As per the consistent jurisprudence in Mediterraneo, in a sales agreement governed by CISG, CISG shall also extend to the interpretation of the arbitration agreement [*PO1, p. 53, para. III (4)*].

7. Accordingly, even if the Tribunal is to apply the law of the seat i.e., Danubia to the arbitration agreement, application of CISG would allow negotiations, trade usages, conduct of Parties, etc. to act as interpretative aids [*Art. 8, CISG*]. This would be in direct conflict with the '*four corners'* rule of Danubia, which excludes reliance on external evidences for interpretation [*Answer to the Notice of Arbitration, p. 32, para. 16*], thereby leading to

complexity. This complexity can be avoided by subjecting both the Contract and the arbitration agreement to the law of Mediterraneo.

8. Furthermore, RESPONDENT's claim that arbitration agreement is governed by the law of the seat would not, in itself, displace the presumption that the proper law of the Contract should also govern the arbitration agreement [*BCY v BCZ (SG, 2016)*]. It could have been displaced had there been other factors in addition to the choice of seat. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract [*XL Insurance v Owens (GBR, 1999)*]. Due to the absence of any such factors, RESPONDENT's claim is unsubstantiated.

9. Furthermore, RESPONDENT would have been accurate, had there been no express choice of law governing the main Contract [*Habas v VSC Steel Coy (GBR, 2013)*] or if the application of the law of the main Contract to the arbitration agreement would have resulted in the invalidation of the arbitration agreement [*Sulamérica (GBR, 2012*]. However, due to absence of the same, the presumption remains unrebutted.

B. Law of the main contract applies to the arbitration agreement as per the three-step test *(Sulamérica).*

10. To determine the law governing the arbitration agreement, the English Court of Appeal formulated a three-step test. Since the Parties failed to incorporate an express choice of law [*Cl. Ex. 5, p. 14, Clause 15*] as specified under the first step, the same shall be ascertained by application of the second step, **[A]** the implied choice that emanates from intention of the Parties, and if need be, the third step, **[B]** '*closest connection*' test. [*Sulamérica (GBR, 2012].*

a) The implied choice that emanates from the intention of the parties

11. Pre-contractual negotiations are an excellent indicator of the real intention of the parties [*ICC Case No. 7920 of 1993*]. During the course of negotiations, CLAIMANT modified and removed the express choice of law clause from the proposed arbitration agreement submitted by RESPONDENT [*Re. Ex. 2, p. 34*].

12. The removal of the choice of law clause along with a mandatory stipulation that the law applicable to the Contract remains the law of Mediterraneo [*Re. Ex. 2, p. 34*] indicates that the Parties intended to subject the arbitration agreement to the law governing the underlying Contract [*Buhler/Webster, p. 80*].

13. This does not deviate from common practice, where parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract [*Born Art., p. 827*].

14. Additionally, RESPONDENT may not apply principle of separability [*Born, p. 50*] to invalidate CLAIMANT's submission, because the principle simply prevents a party from impugning the

arbitration agreement by alleging that the main agreement is invalid. [*BCY v BCZ (SG, 2016)*]. Its purpose is not to isolate the arbitration agreement from the substantive contract [*XL Insurance v Owens (GBR, 1999)*]. This is even more so in a situation such as the present case, where the arbitration agreement is one of the clauses of the Contract and not contained in a separate agreement, the law of the Contract governs the whole Contract including the arbitration agreement [*NTPC v Singer (IND, 1992)*].

15. Therefore, the Tribunal should find that the implied choice is in favour of the law of the underlying Contract remains undisputed.

b) The 'closest connection' test

16. Even if the Tribunal rejects the previous assertion, the closest connection test also dictates that the law of Mediterraneo will govern the arbitration agreement.

17. The 'closest connection' test stipulates that the disputed arbitration agreement should be governed by the legal system with which it has the closest connection. [*Fouchard, p. 222; Born, p. 466*].

18. To determine such connection, priority must be given to factors such as the law of the underlying contract, law of the seat of arbitration and the place of signing and negotiations of the arbitration agreement [*Fouchard, p. 222, 224*].

19. *First*, when parties make an express choice of law to govern the substantive contract, which is also the present case, there exists a real and close connection between the law governing the substantive contract and the law governing the arbitration agreement [*Sulamérica (GBR, 2012)*].

20. *Second*, the seat of the arbitration is Danubia, however, the value of the seat as a connecting factor is still relatively low, as it is often chosen for reasons of geographical convenience or neutrality in relation to the parties [*Fouchard, p. 227*] and at *last*, Mediterraneo was the place where the Contract was negotiated and finally signed [*PO2, p. 56, para. 13*].

21. Therefore, the analysis of all the relevant factors point to a conclusion that the law of Mediterraneo shall govern the arbitration agreement as per the close connection test.

II. THE PRESENT DISPUTE IS WITHIN THE JURISDICTION OF THE TRIBUNAL

22. Art. 19 of the HKIAC Rules embodies the principle of '*kompetenz-kompetenz*' [*Inc. Owners v Sincere Co. (HK, 2005); PCCW Global v Interactive Comm. (HK, 2006)*], which states that a tribunal can rule on its jurisdiction, including any objections to the scope of the arbitration agreement [*Choong/Weeramantry, p. 46.19*].

23. Therefore, it is for the Tribunal to decide whether the dispute over the claim of an increased remuneration by adaptation falls within the scope of the arbitration agreement.

24. The Tribunal possesses the jurisdiction to hear the said claim because **[A]** the arbitration agreement covers the present dispute and **[B]** the pro-arbitration principle is in favor of the jurisdiction of the Tribunal.

A. <u>The arbitration agreement covers the present dispute</u>

25. The interpretation of the arbitration agreement is governed by the law applicable to it [*Born p. 489; NTPC v Singer (IND, 1992)*], which in the present case is the arbitration law of Mediterraneo [*Cl. Memorandum, p. 12, para. 30*].

26. The arbitration law of Mediterraneo provides for a broad interpretation of the arbitration agreement [*Notice of Arbitration, p. 7, para. 16*]. This is in consonance with the internationally prevalent practice whereby courts tend to apply a broad interpretation to the scope of arbitration agreements [*Liebscher, p. 260*]. This requires that in the event of any ambiguity, an arbitration clause is to be interpreted expansively [*Judgment of 17 February 1989*].

27. RESPONDENT's claim that the arbitration agreement should be narrowly interpreted because the broad wording of the arbitration clause was explicitly reduced [*Answer to the Notice of Arbitration, p. 31, para 13*] is unfounded. This is because an arbitration agreement which incorporates phrases such as 'any dispute' and 'arising out of', as in the present case [*Cl. Ex. 5, p. 14, Clause 15*] is given a wide meaning and is said to cover every dispute [*HE Daniel v Carmel Exporters (GBR, 1953)*; *Gov of Gibraltar v Kenney (GBR, 1956)*].

28. Further, the term 'dispute' refers to any conflict or difference between parties on a particular matter that could not be solved by mutual agreement [*Sutton/Gill/Gearing, p. 10*]. The present situation falls within the ambit of the term "dispute" because there is a difference or conflict between the parties concerning how to adjust a specific term of the contract in light of supervening events [*Ferrario, p.146*].

29. Therefore, the Tribunal should find that the scope of the arbitration agreement extends to a claim for an increased remuneration owing to hardship.

B. <u>The pro-arbitration principle is in favor of the jurisdiction of the Tribunal</u>

30. The pro-arbitration principle rests on the premise that parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they had entered, to be decided by the same tribunal [*Franklin, p. 93, 96; Shipping Company Case (GBR, 2007); Inc. v Kaplan (USA, 1995)*]. Therefore, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration [*Mitsubishi Motors Case (USA, 1985);*

Judgment of 27 January 2010], regardless of the law applicable to the parties' arbitration agreement [*Born p. 1397*].

31. Even if the law of Danubia is to be applied to the arbitration agreement, the pro-arbitration approach mandates that the claim for increased remuneration falls within the jurisdiction of the Tribunal since the Parties did not intend to be inconvenienced by having possible disputes from their transaction being heard in two places [*Comm. Marine Corp Case (AUS, 2006)*].

32. Therefore, the arbitration agreement should be interpreted to encompass the present dispute.

III. THE TRIBUNAL IS EMPOWERED TO ADAPT THE CONTRACT

33. Having established that the dispute as to increased remuneration falls within the scope of the arbitration agreement, CLAIMANT contends that the Tribunal is empowered to grant the relief of adaptation of the Contract because **[A]** presumption is in favour of adaptation in case of absence of express conferral, **[B]** application of the law of Mediterraneo allows for adaptation and **[C]** the tribunal can adapt the Contract under Danubian law as well.

A. Presumption is in favour of adaptation in case of absence of express conferral

34. In cases where there is no express authority spelled out for power of an arbitrator to adapt the contract, the presumption is in favor of existence of such power [*Wachter, p. 81; Moses, p. 5*]. A tribunal does not rewrite the contract but performs a limited function for its adjustment, which is inherent in the arbitration clause [*Peter, p. 42*].

35. Moreover, while adapting a contract, the tribunal does not create new rights and obligations since the obligation to pay the price is already provided in the original agreement and remains unaltered. It merely reshapes and modifies existing rights. What changes is the amount to be paid in light of the change in circumstances. [*Fouchard, p. 227*].

B. Application of the law of Mediterraneo allows for adaptation

36. The arbitration agreement is governed by the arbitration law of Mediterraneo [*Cl. Memorandum, p. 12, para. 30*]. It corresponds to the Model Law under which, no express conferral of powers is required to adapt the contract. Therefore, the Tribunal is not prohibited to adapt the Contract.

37. Furthermore, the Contract provides for the power of the Tribunal to adapt the Contract. This can be determined by the interpretation of the hardship clause and the arbitration clause.

38. Since, the interpretation of both the arbitration agreement [*PO1, p. 53, para. III(4)*] and the law of the Contract is governed by CISG [*Cl. Ex. 5, p. 14*], Art. 8 CISG shall be applied to interpret the same [*Ziegel (1981)*].

39. CLAIMANT shall demonstrate that the intention of the parties was to confer power upon the Tribunal to adapt the Contract as **[a]** under Art. 8(1) CISG, RESPONDENT's subjective intention cannot be relied upon and **[b]** under Art. 8(2) CISG, the Parties' objective intent was to empower the Tribunal to adapt the Contract.

a) Under Art. 8.1 CISG, RESPONDENT's subjective intention cannot be relied upon

40. The first step in the interpretation process is a subjective approach, which is contained in Art. 8(1) CISG as per which, statements or conduct of a party are to be interpreted according to its intent where the other party knew or could not have been unaware what that intent was [*Huber, p. 235*].

41. RESPONDENT may argue that its intent was not to adapt the Contract since its subsequent negotiator, Mr. Julian Krone asserts that he *would have objected* to transfer of powers of adaptation to the tribunal [*Re. Ex. 3, p. 35*].

42. However, the subjective intent of a party that it secretly had is irrelevant unless it is manifested in some fashion. [*Packaging Machine Case (SWZ, 2006); Office Furniture Case (SWZ, 2006)*].

43. In the present case, Mr. Julian Krone did not express his intent to object at the time of the conclusion of the Contract. Claimant could not have been aware of this hidden intent, therefore, this subjective intent is irrelevant.

b) Under Art. 8(2) CISG, the Parties' objective intent was to empower the Tribunal to adapt the Contract

44. If Art. 8(1) CISG is not applicable, the statements by and acts of the Parties shall be interpreted according to the intent that a reasonable person would have had in the same situation as the Parties [*Farnsworth in Bianca-Bonell, p. 96*].

45. Under Art. 8(2) CISG, due consideration shall be given to **[i]** previous negotiations, and **[ii]** subsequent conduct of the parties to ascertain the intent as per a reasonable person [*Farnsworth in Bianca-Bonell, p. 97*].

i. Previous negotiations

46. On 12th April, 2017, the prime negotiators of the contract, Ms. Julie Napravnik and Mr. Chris Antley, representing CLAIMANT and RESPONDENT respectively, conducted negotiations and subsequently agreed that the Parties may adapt the Contract. Further, in

case of disagreement between the Parties, it should be the task of the Tribunal to adapt it [*Cl. Exh. 8; p. 17*].

47. Even though not required by the law of Mediterraneo, for the mere purpose of removal of doubts, Ms. Napravnik suggested including an express reference of this adaptation mechanism in either the hardship or the adaptation clause. Mr. Antley made a note in this regard which reads "*Connection of hardship clause with arbitration clause*" [*Re. Ex. 3, p. 35*].

48. This note is in line with their agreement that in case of disagreement between the parties, the arbitrators shall have the power to adapt the Contract. The '*connection*' between the hardship and the arbitration clause denotes that in particular cases of disagreement between the Parties on hardship, the Tribunal may adapt the Contract.

49. This is further substantiated by the fact that Mr. Antley had intended the same as he promised to come up with the proposal to include an express reference in either the hardship clause or the arbitration clause [*Cl. Ex. 8, p. 17*].

50. Therefore, in light of the negotiations, the objective intent of the Parties was to confer powers upon the Tribunal to adapt the Contract.

51. RESPONDENT may argue that this objective intent was not the final intention of the Parties, since the subsequent negotiators while making the necessary changes to clauses 6-15 (including the hardship and arbitration clause), did not include an adaptation clause as agreed between the prime negotiators [*PO2, p. 55, para. 4*].

52. However, as admitted by RESPONDENT's subsequent negotiator, discussions in relation to an adaptation mechanism did not take place. This is because he did not understand what Mr. Antley meant by point number 3 of his note i.e., "*Connection of hardship clause with arbitration clause*" [*Re. Ex. 3, p. 35*]. Therefore, the intention of the prime negotiators was not displaced and failure to include an express adaptation clause does not necessarily mean that the parties had no intention to adapt [*Bockstiegel, p. 161*].

53. Rather, the intention of the prime negotiators was replicated by the subsequent negotiators as inserting a hardship clause is an explicit demonstration of the willingness to undertake adaptation of the Contract [*Declercq, p. 246*; *Rimke (1998)*] because "a hardship clause without adaptation is hardly worth the paper on which it written" [*Schmitthoff, p. 88*].

54. Therefore, the intention of the Parties to confer power upon the arbitrators to adapt the Contract remains undisplaced.

ii. Subsequent conduct of the parties

55. On 20th January 2019, CLAIMANT informed RESPONDENT that the Parties must find a solution before the final shipment could be dispatched. This was to account for the increase in the cost owing to the newly imposed tariffs [*Cl. Ex. 7, p. 16*].

56. Mr. Greg Shoemaker, the person responsible for the racehorse breeding programme of RESPONDENT and for answering all questions concerning the Contract *[PO2, p. 59, para. 34.]* took notice and reverted.

57. He stated that a '*solution would be found*' [*Cl. Ex. 8, p. 18*] to take in account the increased costs which can be only by adaptation of the contract. Such a solution was promised considering RESPONDENT's interest in a long-term relationship with CLAIMANT. In particular, he mentioned RESPONDENT's plan to buy 50 more doses of another stallion of CLAIMANT [*Cl. Ex. 8, p. 18*].

58. These assurances were given because RESPONDENT's primary motive was to ensure the timely delivery of shipment. This was because of its existing commitments to resell the shipment to its own customers before 1st February 2018 [*Re. Ex. 4, p. 36; PO2, p. 56, para.11*].

59. CLAIMANT authorized the shipment as it was under a reasoned impression that RESPONDENT was willing to adapt the Contract. In adherence to its assurance, RESPONDENT met CLAIMANT for the purpose of deciding upon the adaptation of contract [*PO2, p. 60, para. 35*]. This conduct should be given due consideration as it sheds light on the intention of the Parties [*Honnold, p. 121*] to follow the first step of the adaptation mechanism i.e., to renegotiate on the adaptation of the contract [*Cl. Memorandum p. 7, para. 46*].

60. Subsequently, RESPONDENT disagreed to adapt the contract resulting in prejudice to CLAIMANT [*Cl. EX. 8, p. 18*]. In accordance to the agreed adaptation mechanism, if the parties disagree on an amendment of a contract, the tribunal was empowered to adapt the Contract [*Cl. Memorandum, p. 7, para. 47*].

61. Therefore, this common intention of the existence of the adaptation mechanism in the contract was pervasive throughout the pre-contractual negotiations and subsequent events. To uphold this intention of the parties, the Tribunal should adapt the Contract despite the absence of express conferral of power to adapt the Contract [*Aluminium Co. v Essex (USA, 1980)*].

C. <u>The arbitral tribunal can adapt the contract even on application of Danubian law</u>

62. Even if the Tribunal were to apply Danubian law to the arbitration agreement, CLAIMANT requests the Tribunal to find that the Tribunal still has the power to adapt.

63. Under Art. 28(3) of the Danubian Arbitration Law (identical to Art. 28(3) of the UNCITRAL Model Law), Danubian courts are of the view that express authorisation is required for the tribunal to exercise the exceptional power of adaptation of contract [*PO2, p. 60, para 36*].

64. The third draft of the Model law [*Working Group II*] also required the parties to expressly authorize the arbitrators to adapt the contract. This express conferral of powers to adapt the Contract was discussed to apply only to cases in which *the independent objective of the proceedings was to rewrite* one or more terms of the Contract which would then have to be carried out by parties [*Holtzmann/Neuhaus, p. 1129*].

65. However, when *adaptation of the contract is claimed as a remedy or relief* from the other party on the grounds of changed circumstances, which have allegedly caused him undue hardship, no express authorisation by the parties is needed for an arbitral tribunal to adapt the contract [*Holtzmann/Neuhaus, p. 1130*].

66. In the present case, the Contract has already been performed. Therefore, adaptation of the Contract is being claimed as a remedy from RESPONDENT on the ground of changed circumstances, which has caused hardship to CLAIMANT.

CONCLUSION ON ISSUE 1

The Tribunal should find that the law of the contract applies to the arbitration agreement and the Tribunal has the jurisdiction to adjudicate upon the present dispute. On application of the Mediterranean law, no express conferral of power to adapt is required. Therefore, the Tribunal can adapt the contract as it was also the intention of the parties. Even if Danubian law were to apply to the arbitration agreement, no express conferral of powers is required when adaptation is claimed as a remedy. Therefore, the Tribunal is not prohibited from granting adaptation the contract.

ISSUE 2: EVIDENCE FROM THE OTHER ARBITRATION CAN BE SUBMITTED DESPITE BEING ILLEGALY OBTAINED

67. CLAIMANT respectfully submits a copy of the Award rendered in another arbitration having similar facts, where the RESPONDENT is a party.

68. RESPONDENT in that arbitration claimed hardship due to imposition of additional tariff of 25% and subsequently demanded adaptation in absence of an explicit provision in the contract [*PO2, p. 60, para. 39*].

69. On the contrary, RESPONDENT denies hardship when in the present case, a tariff of 30% causes detriment to CLAIMANT [*Letter by Langweiler, p. 50*]. Additionally, it denied CLAIMANT's request to adapt the contract despite the existence of same circumstance of absence of any explicit provision in the Contract.

70. This contradictory behaviour [*Figure 1*] is in itself a violation of the principle of '*good faith*' [*Iraq v GJV (GER, 1998)*] and '*fair and equitable treatment*' [*MTD Equity v Chile*], which parties owe to each other and to the tribunal in an international arbitration [*Methanex v USA; Libananco Holdings Co.*].

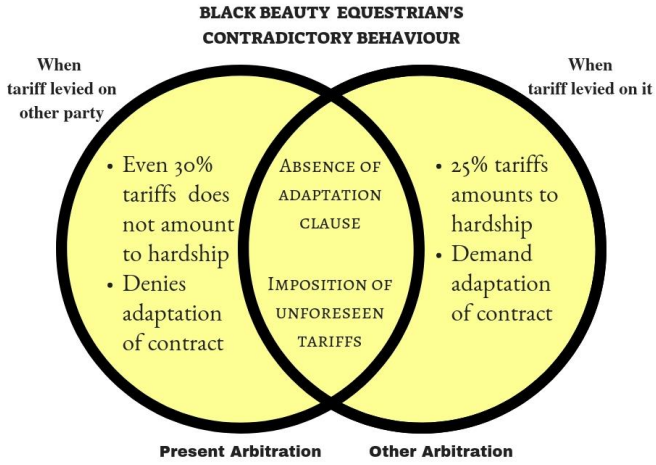

Figure 1

71. The Award is an evidence of such contradictory behaviour and undermines the veracity of the claims of RESPONDENT [*Waincymer, p. 789*]. Therefore, it should be submitted despite presumptively being obtained through illegal means because **[I]** the Tribunal has absolute discretion to admit the Award as evidence and **[II]** the principles of transparency allow such admission.

I. THE TRIBUNAL HAS DISCRETION TO ADMIT THE AWARD AS EVIDENCE

72. In an international arbitration, parties are free to submit any evidence, to prove the facts, which are necessary to establish their case [*Pilkov, p. 147*].

73. Consequently, in practice, arbitral tribunals admit almost any evidence submitted to them in support of the position of the parties [*Lew/Mistelis, p. 561*]. They are not bound by the strict rules of evidence and enjoy broad discretion to determine the admissibility, relevance, materiality, and weight of any evidence [*HKIAC Guide, p. 190*].

74. In *the present case,* the Tribunal should exercise its discretion to admit the award as evidence because **[A]** illegally obtained evidence is admissible before the Tribunal and **[B]** non-admission of these evidences will violate due process.

A. Illegally obtained evidence is admissible before the tribunal

75. '*Fruit of the poisonous tree*' refers to an evidentiary doctrine, which precludes the introduction of evidence obtained illegally [*Nardone v U.S. (USA, 1939); Townes v New York (USA, 1999)*].

76. However, the Tribunal is not bound by strict rules of evidence [*EDF v Romania*] and should exercise its discretion to admit illegally obtained evidence. Accordingly, factors such as **[a]** participation of the party seeking to admit the evidence in the unlawful activity that led to its disclosure, **[b]** materiality and relevance of the evidence, and **[c]** whether prejudice is caused due to disclosure of evidence should be considered [*Boykin/Havalic, p. 33*].

a) Participation of the party seeking to admit the evidence in the unlawful activity that led to its disclosure

77. It is an established practice that if the party comes with *clean hands* and is not involved in the unlawful nature of procuring evidence, the disclosure cannot be held against it and the evidence is deemed admissible [*Persia International Bank v Council (ECJ, 2013)*].

78. Where respondent presented wiretap records of the appellant fraudulently procured by a newspaper, the arbitral tribunal admitted it as evidence since respondent had not performed any illegal activity in order to obtain the recordings [*FIFA Case*].

79. In the present case, it may be argued that procurement of the Award was done at the behest of CLAIMANT as it paid 1000 USD to the intelligence company providing information on horseracing industry. Therefore, this Award cannot be admitted as evidence because CLAIMANT cannot take advantage of his own wrong doings.

80. The allegation is unfounded as it was Mr. Kieron Velazquez, a former employee of the Mediterranean buyer, who had offered to provide a copy of the award to CLAIMANT [*Letter by Langweiler, p. 50*]. However, upon his failure to arrange for the Award, he informed CLAIMANT of the intelligence company's offer to sell the Award it already had [*PO2, p. 61, para 41*].

81. CLAIMANT, therefore, was merely introduced to the easily available information in the horseracing market and was not involved in its procurement. Therefore, it maintained its duty to RESPONDENT and the Tribunal to conduct itself in good faith [*Methanex v USA*].

82. Even if the Tribunal opines that CLAIMANT was involved in the illegal procurement of the Award, it cannot per se be deemed inadmissible [*Reisman/Freedman, p. 748; Corfu Channel Case (ICJ, 1949)*] as the means of procurement is not to be considered if the evidence is relevant and material [*Kuruma v Queen (1955)*].

b) Relevance and Materiality of the Evidence

83. Relevance under Art. 22 HKIAC Rules suggests that the document must be useful for the line of evidence by a party in order to establish the truth of its factual allegations. Or makes the existence of any *fact that is of consequence* more probable than it would be without the evidence [*Pilkov, p. 148; HKIAC Guide, p. 190; Raeschke-Kessler, p. 427*].

84. CLAIMANT's allegation or the *fact that is of consequence* is the contradictory stand taken by RESPONDENT in the other arbitration [*Cl. Memorandum, p. 10, para. 63*]. The Statement of Facts as part of the Award establishes the truth of this allegation [*PO2, p. 60, para. 39*], thereby is a relevant piece of evidence.

85. The term '*materiality*' means that the tribunal is provided with an evidence which is sufficient to allow complete consideration as to whether a factual allegation is true or not [*Raeschke-Kessler, p. 427; Pilkov, p.149*].

86. In *the present case*, the Statement of Facts as part of the Award provide the required information which clearly demonstrate the contradictory behaviour of RESPONDENT [*Cl. Memorandum, p. 10, para. 63*]. This is sufficient in itself to prove the *fact of consequence*, thereby is a material evidence.

87. All relevant evidence that is material to the outcome of the evidence is admissible [*HKIAC Guide, p. 190*]. Therefore, as the Award is both relevant and material to the *fact of consequence*, it should be admitted.

c) Whether prejudice is caused due to disclosure of evidence

88. If the evidence is relevant and material, its admissibility should be analysed in light of the prejudice caused to the interest of other parties to the arbitration due to its unlawful procurement [*Boykin/Havalic, p. 33*].

89. There is no harm to RESPONDENT's business reputation, any drop-down in its revenues or any possibility of misuse of its confidential information [*Biwater Gauff v. Tanzania*]. RESPONDENT therefore, may claim that the admission of the award results in the breach of confidentiality of the other arbitration amounts to harm per se.

90. However, the question of breach of confidentiality cannot arise since the Award had already lost its confidential status once it was out of the exclusive control of RESPONDENT [*Toulson/Phipps, p. 117; Bancoult Case (GBR, 2008)*].

91. The intelligence company was already in its possession and the Award had lost its confidential status. Therefore, admission of the Award as evidence cannot result in any harm per se to RESPONDENT [*PO2, p. 61, para. 41*].

92. Even if the Tribunal considers the award to retain its confidential status, to assess any claims of breach of confidentiality to result in any harm, it should be accompanied by showing the **[i]** existence of duty of confidentiality between the parties, **[ii]** actual occurrence of breach and proof of injury, and **[iii]** other party as the originator of breach [*Smeureanu, p. 180*].

i. Existence of duty of confidentiality between the parties

93. The other arbitration has been conducted under the HKIAC Rules 2013, which contain in Art. 42, an express obligation to keep the proceedings confidential [*Letter by Fastrack (3rd October, 2018), p. 51*]. This statutory obligation is upon the parties to that arbitration, witnesses, experts etc. [*HKIAC Guide, p. 282*].

94. CLAIMANT was not involved in the said arbitration in any aforesaid capacity and, therefore, CLAIMANT did not owe a duty of confidentiality arising from that arbitration.

ii. Actual proof of injury

95. To assess the actual proof of injury, information strictly related to the operation and activity of the parties and the disputed matters (deserving enhanced protection) is to be differentiated from purely procedural issues and the progress of the arbitral process. Communications relating to the latter are not considered to be injurious [*Bulgarian Bank Case (SWE, 2000)*].

96. In *the present case*, the Award comprises of legal principles concerning the procedural issues in the other arbitration. However, it does not contain any information regarding the merits of that dispute which would have required strict confidentiality. Therefore, disclosure of the contents of the Award is not injurious to the RESPONDENT.

iii. Other party as the originator of breach

97. To sustain a claim for breach of confidentiality, the *other party* to the arbitration must be precisely identified as the originator or source of the breach [*Smeureanu, p. 180*].

98. In the present case, CLAIMANT being the *other party* was nowhere involved in the breach of confidentiality. It was either the former employees of RESPONDENT or a computer system hack by an unknown party which was the reason for the leak of the information [*Letter by Fasttrack, (3rd October, 2018), p. 51*].

99. Therefore, admission of the Award does not amount to harm per se and thereby is admissible.

II. NON-ADMISSION WILL VIOLATE DUE PROCESS OF LAW

100. Art. 13 of the HKIAC Rules embodies the principle of due process of law, which includes fair hearing, equal treatment of the parties and *opportunity to present the case* [*Elgueta, p. 165;*

HKIAC Guide, p. 161]. This corresponds to Art. V(1)(b) of the NY Convention, to which the parties are contracting states [*Rule 20, Rules VEM16*].

101. Where an arbitral tribunal fails to ensure reasonable opportunity for a party to present its case, the award may be vulnerable to challenge under the law of the seat [*HKIAC Guide, p. 162; NY Convention, Art. V(1)(b)*] because refusal to admission of an evidence negatively affects the right of the party to present its case [*Von Mehren/Salomon, p. 290*].

102. In the present case, with respect to the evidence relevant for corroborating the allegations of CLAIMANT, an *opportunity to present the case* is not satisfied if it is not evaluated by the Tribunal [*T AG v H Company (SWZ, 1997); G.AG v TAS (SWZ, 1999); Turkey v Italy (ITA, 1999)*].

103. Therefore, in line with the duty of the Tribunal to make every reasonable effort to ensure that an award is valid [*HKIAC Rules, Art. 13.10*] the evidence sought to be presented by CLAIMANT should be admitted as it is both relevant and material to the outcome of the case [*X v. Y*].

III. TRANSPARENCY PRINCIPLES PERMIT DISCLOSURE DESPITE CONFIDENTIALITY

104. Transparency refers to information about a decisional process provided to interested parties [*Rogers, p.1307*] and as a principle of international arbitration, it is synonymous to openness or accountability. It helps to guarantee democratic principles such as the right of access to information and also promotes fairness, rule of law, equity, and due process [*Maupin, p.142*]

105. The admission of the Award as an evidence is in line with the principles of transparency as it ensures that RESPONDENT does not take advantage of its contradictory behaviour [*Claimant Memorandum, p. 10, para. 63*], thereby ensuring fairness to the parties.

106. RESPONDENT may claim absolute confidentiality over the award relying on the confidentiality provision in the HKIAC Rules [*Letter by Fastrack (3rd October, 2018), p. 51*]. However, the application of confidentiality depends on the specific circumstances of the case as it is neither absolute nor is it an overriding principle of international commercial arbitration [*Ruscalla, p. 10; Tweeddale, p. 59; Poudret, p. 316*].

107. Rather, confidentiality undermines the legitimacy of the system of international arbitration [*ICCA Congress Series, p. 732*] as it may become a tool to hide inappropriately rendered decisions [*Szalay, p. 17*]. Therefore, transparency is to be given primacy in certain cases to **[A]** avoid contradictory decisions on similar dispute, **[B]** protect and serve the interest of the public, and for the **[C]** development of the arbitral legal order [*Ruscalla, p.* 9.].

A. Avoid contradictory decisions on similar dispute

108. In situation of similar fact disputes where the same legal provisions are to be applied [*Tung/Lin, p. 83*], inconsistent resolution of disputes may arise as conflicting awards may be rendered by different arbitral tribunals [*Confidentiality vs. Transparency, sec. 2.2*].

109. In these circumstances, more transparency is desirable *[Confidentiality vs. Transparency, sec. 2.2]* as it allows a subsequent tribunal to review the application of the law to the same factual matrix and would thereby promote consistency [*Tung /Lin, p. 83*].

110. The present dispute and the other arbitration involve issues concerning similar facts and legal principles. If this Tribunal ignores the Award passed in the other arbitration, it may lead to a situation whereby two different tribunals dealing with the same issue of adaptation due to hardship give contradictory decisions.

B. Protect and serve the interest of the public

111. Public has an interest in seeing that arbitration operates as a legitimate system for dispute resolution which operates coherently and is fair. This is especially when general public could be affected by its outcome [*Buys, CG, p. 135*]. Allowing for this to be observed requires some degree of transparency [*Rogers, p. 1337*].

112. Admission of the Award will lead to consistent decisions in matters pertaining to adaptation. The businessmen engaged in inter-country trade who had been seriously affected could benefit from the outcome of this adjudication.

C. Development of the arbitral legal order

113. In order to be considered an autonomous system of justice ensuring certainty, international commercial arbitration needs to have consistent and homogeneous series of arbitral awards on a specific legal question [*Born, p. 3822*]. Obligation of confidentiality can harm this by creating a lack of consistent interpretation of similar legal provisions [*Tung/Lin, p. 82*].

114. To conclude, the Tribunal should find that the admission of the Award is in consonance with the principles of transparency. Therefore, it must exercise its discretion to admit the award despite it being obtained illegally.

115. Even if the Tribunal were to hold the Award to be inadmissible, contradictory behaviour can be evidenced if the Tribunal may *join* the Mediterranean buyer to this arbitration.

116. The agreement of the parties to arbitrate includes their intent to pursue the most efficient and economical means of commercial justice, which would presumably include joinder [*Stipanowich, p. 473*].

117. However, to join a 'third party' [*Letter by Langweiler (2nd October, 2018), p. 50*] it must be bound by an arbitration agreement under the HKIAC Rules [*HKIAC Guide, p. 201*]. In the present

case, the Mediterranean buyer may be joined as it is bound by an arbitration agreement under the HKIAC 2013 Rules [*Letter by Fasstrack (3rd October, 2018), p. 51*].

118. In the present case, joinder becomes particularly important because CLAIMANT may lose certain claims or defences or be subjected to inconsistent judgments if the Mediterranean buyer is not joined to this arbitration [*Strong, p. 980*].

119. Even if the parties do not consent to a joinder [*HKIAC Rules, Art. 27.1*], the Tribunal may exercise its inherent equitable powers [*ILA Resolution*], which can be used to permit a joinder [*Strong, p. 985*].

120. However, the scope of these powers varies in different jurisdictions [*Hoellering, p. 2*]. In civil law jurisdictions such as France, arbitrators rely on parties to grant them equitable powers. Whereas, in common law jurisdiction such as U.S.A and Danubia (for the present matter) [*PO2, p. 61, para. 44*], inherent equitable powers to the arbitrators are recognised [*Strong, p. 984*].

121. To permit a joinder by exercising these powers, the tribunal must assess factors such as existence of a contractual link between an existing party and the third party, common issues of law or fact and harm to an existing party if joinder is refused [*Strong, p. 986*].

122. In the present case, RESPONDENT has a contractual link with the Mediterranean buyer. Further, both the proceedings involve a common issue of adaptation of contract owing to hardship, and CLAIMANT will suffer harm as non-joinder will allow RESPONDENT to take advantage of contradictory stand resulting in unfairness to CLAIMANT.

123. Therefore, the Tribunal may order joinder of an additional party to prevent the Respondent from taking advantage of its contradictory stand and ensure fairness and due process in the arbitral proceedings.

CONCLUSION ON ISSUE 2

The Tribunal should find that the award can be submitted as the act of its illegal procurement cannot be imputed to Claimant. Even if Claimant is held responsible for the illegal procurement, the award is admissible as it is relevant and material to the outcome of this arbitration. The award had lost its confidential status and therefore, its admission will not result in breach of confidentiality. Even if the award is considered to be confidential, it is admissible because transparency should be given primacy over it to avoid contradictory decisions on similar issues.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

124. A change in government policies of Equatoriana at the time of delivery of the third and last shipment resulted in an unexpected rise in the cost of delivery causing hardship to CLAIMANT. Upon communication of the tariffs imposed, RESPONDENT promised that a solution would be found [*Cl. Ex. 8, p. 18*].

125. CLAIMANT relied upon this assurance and delivered the goods along with making the payment for tariffs on behalf of RESPONDENT. Therefore, the price of goods as agreed between the Parties should be adapted **[I]** under clause 12 of the Contract or **[II]** under the CISG.

I. THE PRICE OF GOODS AS AGREED BETWEEN THE PARTIES SHOULD BE ADAPTED UNDER CLAUSE 12 OF THE CONTRACT

126. CLAIMANT changed the mode of delivery to DDP upon RESPONDENT's request. Such a change was made only to profit from CLAIMANT's experience in the transportation of frozen semen and not to impose any additional risk [*Cl. Ex. 3, p. 11*].

127. Accordingly, the Parties intended that RESPONDENT was to bear majority of the risk arising out of said change. This is evidenced by the fact that a hardship clause, merged with the force majeure clause, was inserted into the Contract therefore, transferring the risk associated with the *'DDP'* delivery of goods [*Cl. Ex. 5, p. 14*].

128. CLAIMANT shall demonstrate that **[A]** the tariffs imposed by the Equatorianian Government constitute hardship under clause 12 of the Contract, **[B]** price of the Contract should be adapted to resolve such a situation of hardship and **[C]** adaptation of the price should be made in favour of CLAIMANT.

A. The tariffs imposed by the Equatorianian Government constitute hardship under clause 12 of the Contract

129. CLAIMANT had contracted with RESPONDENT for making a profit margin of 5% which was necessary to achieve its goal of earning a profit of 300,000 USD in 2018. This was imperative for prolonging the two main credit lines which were issued to CLAIMANT from the bank [*PO2, p. 59, para. 29*].

130. However, due to the imposition of the new tariff of 30% by the Equatorianian authorities, CLAIMANT is incurring a loss of 25% amounting to 1,250,000 USD which is seriously endangering its plan for continuation of credit lines.

131. Hardship is said to occur if the performance of the Contract has become excessively onerous, in other words, if the equilibrium of the Contract has been fundamentally altered

[*Rimke, p.219*; *Art. 6.2.2, UNIDROIT*]. To ascertain this, primary consideration is to be given to the circumstances of each individual case [*Schwenzer, p. 715*].

132. Clause 12 of the Contract, which is the hardship clause, states:

"Seller shall not be responsible […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the Contract more onerous."

133. Therefore, the Parties agreed upon a general definition of exempting impediments to ensure that all events having the characteristics set forth in clause 12 will be considered to constitute hardship [*UNCITRAL legal guide, p. 251*].

134. The imposition of tariffs qualifies as hardship under clause 12 because **[a]** it constitutes a *'comparable unforeseen'* event and **[b]** made the Contract more onerous for CLAIMANT.

a) The imposition of tariffs qualifies as a 'comparable unforeseen' event

135. While demanding the inclusion of hardship clause, CLAIMANT stated that it shall not take any further risk, in particular, risks relating to any additional health and safety requirements [*Cl. Ex. C4, p. 12*]. CLAIMANT here made a reference to an earlier incident that was widely reported in the press. It had suffered a loss of 40% which nearly resulted in its insolvency. [*PO2, p. 58, para. 26*] The said loss was incurred due to imposition of unforeseen health and safety requirements by the buyer's country (Danubia) in that case.

136. Accordingly, the Parties intended that the word *'comparable'* should be interpreted in light of events of such similar nature [*comparable, in Merriam-Webster*]. Therefore, all unforeseen changes in government policies resulting in imposition of additional costs that financially burden a party qualify the criteria of a '*comparable'* event.

137. Furthermore, the Equatorianian Government has always been an ardent supporter of free trade and has, with one exception [*Notice of Arbitration, p. 7, para. 19*], never imposed any retaliatory tariffs [*Cl. Ex. 6, p. 15*].

138. Additionally, Equatoriana in the past has always tried to solve disputes amicably [*Cl. Ex. 6, p. 15*]. Therefore, the imposition of 30% tariffs on selected products from Mediterraneo after a very short period of unsuccessful discussions could not have been anticipated.

139. The inclusion of racehorse semen in abovementioned category could also not have been anticipated as it is generally categorized differently from pigs, sheep, or cattle [*Notice of Arbitration, p. 6, para. 11*].

140. Furthermore, RESPONDENT may not argue that since the tariffs imposed by Mediterraneo were foreseeable, the retaliatory measures by Equatoriana could have been anticipated. This is because the former imposition was extraordinary by itself in several regards i.e., the

breadth of the included goods, the countries covered and the amount and the speed with which it had been imposed [*PO2, p. 58, para. 23*].

141. Accordingly, even if imposition of tariffs by Mediterraneo could have been foreseen, the *'severity of the disruption'* caused due to such imposition could not have been anticipated [*McKendrick, p. 721*].

142. Therefore, imposition of tariffs qualifies as a 'comparable unforeseen' event.

b) The imposition of tariffs has made performance of Contract more onerous for the CLAIMANT

143. The Contract is said to be *'onerous'* when its performance causes great difficulty [*onerous, in Black's Law, p. 1122*]. Last several years have been financially difficult for CLAIMANT and it has been able to stay in business only through extensive restructuring measures and a considerable cut in the work force [*Cl. Ex. 8, p. 17*].

144. Imposition of tariff of 30% changed the circumstances surrounding the Contract. This destroyed the profit margin of 5% anticipated by CLAIMANT and resulted in a situation of financial difficulty [*PO2, p. 59, para. 29*].

145. Thereby, continuation of performance resulted in CLAIMANT 'risking ruin' [*Bonell, p. 130*] since the same became excessively burdensome making the Contract more onerous.

146. To conclude, imposition of tariffs was an unanticipated change levying additional costs upon CLAIMANT and therefore, qualifies the criteria of hardship under clause 12 of the Contract.

B. <u>Price of the Contract should be adapted to resolve such a situation of hardship</u>

147. Hardship clauses organise the revision of the Contract whenever a change of circumstances significantly modifies the economy of the Contract [*Haerynck, p. 232*]. They apply to situations of changed circumstances in which the Parties intend to continue the Contract, as opposed to terminating it [*Rimke, p. 198*].

148. Since CLAIMANT duly performed the Contract upon request of RESPONDENT, the price of the Contract should be adapted because **[a]** Parties intended for price adaptation as a remedy for hardship, **[b]** delivery was authorized only upon RESPONDENT's assurance that a solution would be found and **[c]** price adaptation is the most appropriate remedy in the present situation.

a) Parties intended for price adaptation as a remedy for hardship

149. Previous negotiations reflect that the parties had agreed on an adaptation mechanism [*Cl. Memorandum, p. 7, para. 46*]. Therefore, the said agreement between the Parties denotes an intention to provide for adaptation as a remedy for hardship.

b) Delivery was authorized only upon RESPONDENT's assurance that a solution would be found

150. Upon receiving communication of the tariffs imposed, CLAIMANT requested RESPONDENT to enter into negotiations and made delivery of goods conditional on reaching a solution [*Cl. Ex. 7, p. 16*].

151. Mr. Greg Shoemaker while negotiating stated that a solution would be found given the good relationship between the Parties and their interest in further business [*Cl. Ex. 8, p. 18*]. Considering the fact that the hardship clause in the contract provided for the buyer's liability in a situation relating to *'increased remuneration'*, the statement made my Mr. Shoemaker deemed to be an assurance to adapt the Contract. [*Cl. Memorandum p. 8, para. 57*].

152. Therefore, CLAIMANT finally authorized delivery of the goods upon the representation of Mr. Shoemaker that a solution would be found i.e., price adaptation of the Contract in the present case.

c) Price adaptation is the most appropriate remedy in the present situation

153. Given the financial condition of CLAIMANT, the fundamental change in circumstances due to imposition of tariffs rendered performance much more burdensome [*Brunner, p. 123*].

154. The hardship clause imposed an obligation on Parties to renegotiate the Contract under the principle of good faith in order to alleviate the hardship which had arisen [*McKendrick, p. 257; Beale/ Bishop/ Furmston, p. 493; Berger, p. 297; Molinaux, p. 55; Mustill, p. 111*]. In furtherance of the same, CLAIMANT approached the RESPONDENT to renegotiate price of the Contract. However, RESPONDENT refused to pay any additional amount in relation to tariffs [*Cl. Ex. 8, p. 18*].

155. Since, Parties could not agree upon revision of the Contract, therefore, sanctions which are usually termination or adaptation of the Contract by a third person shall follow [*Rimke, p. 241*]. In the present case, CLAIMANT upon RESPONDENT's request, delivered the goods and performed its part of the Contract, therefore, termination of the Contract is not possible.

156. Accordingly, the most appropriate remedy is price adaptation which has been universally recognized [*Silveira, p. 323*] and widely followed [*Horn, p. 54, Aluminium v. Essex Group, (USA, 1980)*]. Therefore, this remedy should be granted to restore contract equilibrium between the Parties as inferred from the initial spirit of the Contract [*Brunner, p. 392*].

C. Adaptation of the Price should be made in favour of CLAIMANT

157. Price of the Contract should be adapted completely in the favour of CLAIMANT as **[a]** CLAIMANT is facing a situation of financial ruin and cannot bear further losses, **[b]** the sum paid by CLAIMANT for tariffs exceeds the risks accepted by it under the Contract and **[c]** RESPONDENT has unlawfully earned profits by breaching the resale prohibition in the Contract.

a) CLAIMANT is facing a situation of financial ruin and cannot bear further losses

158. CLAIMANT is in a weak financial position as it has been incurring losses since 2014 primarily due to the high interest payments on the loan taken to finance the new stables in 2013 [*PO2, p. 59, para. 29*].

159. Additionally, the restructuring plan which CLAIMANT has agreed with its creditors provides that the automatic prolongation of the two main credit lines is dependent on the guarantee that CLAIMANT shall earn a profit of 300,000 USD in 2018. This plan will be seriously endangered if it has to bear the amount of 1,250,000 USD that had not been anticipated [*PO2, p. 59, para. 29*].

160. Furthermore, one of CLAIMANT's major creditors is now the house bank of its largest competitor who is interested in buying the '*dressage division*' of CLAIMANT. Therefore, it is probable that the bank would make the said sale a precondition for the entry into a new credit agreement [*PO2, p. 59, para. 29*].

161. Therefore, the distribution of losses between the Parties should be done fairly keeping in view the financial condition of CLAIMANT [*Commentary Art. 6.2.3 UNIDROIT*; *Darankoum, p. 473*] and to make performance of the Contract bearable [*Fucci, p. 38*].

162. CLAIMANT is willing to forego the 5% profit which it expected to earn from the present transaction [*PO2, p. 59, para. 31*] and RESPONDENT is in a position to bear the entire amount of 1,250,000 USD without it being caused any financial strain [*PO2, p. 59, para. 30*].

163. Therefore, CLAIMANT should be reimbursed to the extent of additional cost incurred due to tariffs.

b) The sum paid by CLAIMANT for the tariffs exceeds the risks accepted by it under the Contract

164. CLAIMANT cannot be forced to comply with efforts which are beyond what it reasonably envisaged or was reasonably expected to perform in good faith while concluding the Contract [*Silveira, p. 353 ; Aluminium v. Essex Group, (USA, 1980)*]

165. To accommodate RESPONDENT's demands, CLAIMANT made an exception to its usual practice and adjusted the Contract by accepting the delivery to be made by DDP. However, this was conditional on non-acceptance of any risks arising from such change in circumstances [*Cl. Ex. 3, p. 11*].

166. Accordingly, RESPONDENT accepted to bear any further risks arising from change in delivery terms as evidenced from wording of clause 12 of the Contract which states *"Seller shall not be responsible […]"*.

167. Therefore, an inference can be drawn from the circumstances surrounding the case [*Uribe, p. 202*] that the tariffs exceeds the risks accepted by CLAIMANT under the Contract.

Consequently, the entire amount paid by CLAIMANT on behalf of the RESPONDENT should be reimbursed to it.

c) RESPONDENT has unlawfully earned profits by breaching the resale prohibition in the Contract

168. Principle of good faith is incumbent on all who participate in international arbitration and without which it cannot operate [*Veeder, p. 439*].

169. CLAIMANT had never sold more than 10 doses to any breeder at a time and therefore, was concerned with the size of the doses requested by RESPONDENT. However, it made an exception and furthermore, informed RESPONDENT that it could not resell the frozen semen to any third party without its express written consent [*Cl. Ex. C2, p. 10*]. This later materialised as part of the Contract [*Cl. Ex. 5, p. 13; PO2, p. 57, para. 16*].

170. RESPONDENT committed a breach of this condition by reselling 15 doses of semen at a price, 20% higher than the price charged by CLAIMANT thereby earning unlawful profits [*PO2, p. 57, para. 20*]. Therefore, it breached the principle of good faith since it concluded the Contract with an intention to deceive and deprived CLAIMANT of its reasonable expectations [*Keily, p. 19*].

171. This resulted in the equilibrium of the Contract being skewed in favour of RESPONDENT [*Maskow, p. 663; Bund, p. 392*]. CLAIMANT was expecting to earn a profit of 5%, however, it is presently incurring huge losses. In contrast, RESPONDENT is unlawfully earning profits over and above that had been agreed upon by the Parties.

172. Therefore, price adaptation should be granted completely in favour of CLAIMANT to balance the financial disequilibrium between the Parties [*Bonell, p. 117; Figure 2*].

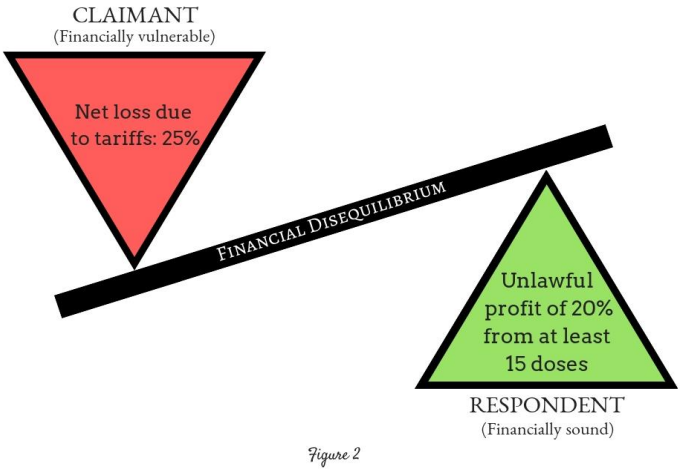

Figure 2

II. THE PRICE OF GOODS AS AGREED BETWEEN THE PARTIES SHOULD BE ADAPTED UNDER CISG

173. Even if the Tribunal rejects the request to grant price adaptation under clause 12 of the Contract, there exists a remedy for the same under CISG. CLAIMANT shall demonstrate that **[A]** application of Art. 79 CISG has not been excluded by the Parties, **[B]** there exists a gap in relation to price adaptation as remedy of hardship under CISG and **[C]** price adaptation should be granted as a remedy under Art. 7 (2) CISG using UNIDROIT.

A. Application of Art. 79 CISG has not been excluded by the Parties

174. Art. 79 CISG is applicable in the present case in spite of the Contract providing for a hardship clause. This is because its application was not excluded either **[a]** expressly or **[b]** impliedly.

a) Parties have not expressly excluded the application of Art. 79 CISG

175. Art. 6 CISG reserves the Parties' option to set aside, totally or partially, the application of CISG. However, to be effective, such exclusion must be expressed in a clear manner [*cf. Fallon/ Philippe, p. 21*].

176. Like any other contractual term, a clause stating such total or partial exclusion of the CISG has to be validly stipulated in the Contract to become effective [*Bonell, p. 56*]. Therefore, exclusion requires a clear [*ICC Case No. 2291 of 1975*], unequivocal [*Auto case (AUT, 2007)*] and affirmative [*American Mint LLC v. GOSoftware, Inc. (USA, 2005)*] agreement of the Parties [*Bernards v. Carstenfelder, (NED, 2007)*].

177. In the present case, no such stipulation was inserted into the Contract. Furthermore, clause 14 of the Contract distinctly provides for the application of the CISG to the whole of the Sales Agreement [*Cl. Ex. C5, p. 14*] thereby, negating any possible intention to exclude the application of the CISG.

178. Therefore, application of Art. 79 CISG is not excluded since the Contract does not have clear language to that effect [*Asante Technologies v. PMC-Sierra, (USA, 2001)*].

b) Parties have not impliedly excluded the application of Art. 79 CISG

179. An implied exclusion is possible only when the Parties' intent to exclude the CISG is clear [*Auto case (AUT, 2007); Corn Case, (UKR, 2012)*] and real [*Building materials case, (SWZ, 2004)*]. This requires interpretation of statements made by and other conduct of the Parties, reference should be made to Art. 8 CISG [*Bonell, p. 56*].

180. In the present case, there is an absence of any pre-contractual negotiations reflecting an intention of the Parties to impliedly exclude the application of Art. 79 CISG. Therefore, the mere presence of a hardship clause does not reflect the clear intention of the Parties to exclude the application of Art. 79 CISG since its use is not incompatible with CISG [*Borisova, p. 3*].

181. Clause 12 of the Contract acts complementary to the CISG and performs a function that cannot be well served by it [*Hellner, p. 86; Honnold II, p. 161*]. Unlike CISG, it enumerates the events which may make the Contract more onerous for any of the Parties thereby, acting harmoniously with the CISG.

182. Since no contrary intention can be established from the Parties' statements and other conduct, the balance shall tip in favour of non-exclusion of Art. 79 CISG [*Spagnolo, p. 208*].

B. <u>There exists a gap in relation to price adaptation as remedy of hardship under CISG</u>

183. Art. 79 CISG provides for a remedy of exemption of damages in circumstances wherein a party fails to perform any of its obligations. However, CLAIMANT has already performed its part of the Contract by delivering the goods thereby, making the remedy under Art. 79 CISG ineffectual.

184. Art. 79 CISG does not explicitly provide for a remedy in situations of hardship. This is evidenced by its legislative and drafting history which reveals that the drafters did not agree on remedies in case of hardship [*Silveira, p. 358*]. However, such a silence does not result in an inference that no remedy is available to a party or that the only remedy available is the one offered under Art. 79 [CISG-AC OP. NO. 7*; Neumayer/Ming, p. 535*].

185. Therefore, there exists a gap in the CISG regarding remedy for hardship where the Contract has been duly performed. CLAIMANT shall demonstrate that there exists **[a]** an external gap or **[b]** alternatively, an internal gap in respect of remedy for hardship.

a) There exists an external gap regarding price adaptation of the Contract as a remedy for hardship

186. *'External gaps'* are said to occur when the CISG does not govern a matter at all [*Second-hand tractor case, (SWZ, 2008)*]. These matters are resolved by placing reliance on the domestic law applicable pursuant to the rules of private international law [*Flowers case, (GER, 2009); San Lucio, v. Import & Storage Services, (USA, 2009)*]

187. In adherence to these rules, the law governing the Contract (Mediterraneo), which is a verbatim adoption of UNIDROIT [*PO1, p. 52, para. 4*], shall be used for the purpose of filling in the gap [*Bonell, p. 69; Lookofsky, 80*].

b) Alternatively, there exists an internal gap regarding price adaptation of the Contract as a remedy for hardship

188. Even if it is considered that the remedies available for hardship are a matter governed by the CISG, it remains a matter not explicitly settled in CISG [*Honnold, p. 622; Kroll et al., p. 1089*]. Therefore, there exists an 'internal gap' regarding the same [*Garro*]. This gap must be filled according to the prescriptions of Art. 7(2) CISG [*Silveira, p. 312; Garro*].

189. An analogical application of specific provisions of CISG, as required under Art. 7(2) CISG, is ineffectual in situations of hardship. This is because the same was not expressly envisaged by the drafters and as a result would be contrary to their intention [*Zeller, p. 67*].

190. Therefore, reliance should be placed on general principles as provided under Art. 7(2) CISG for gap-filling [*Kropholler, p. 292; Minibus case, (NED, 2009); Scafom v. Lorraine Tubes (BEL, 2009)*].

191. UNIDROIT provisions on hardship implement general principles that underlie both the UNIDROIT and the CISG [*Slater, p. 252*]. Accordingly, they should be relied upon as *'general principles'* to fill the gaps [*Perillo, p. 114, Scafom v. Lorraine Tubes (BEL, 2009)*]. This is further substantiated by the fact that the preamble to UNIDROIT explicitly provides for the abovementioned possibility of its usage to supplement international uniform law instruments [*UNIDROIT Preamble*].

192. In the '*Scafom International case'*, the Belgian Supreme Court while relying on Art. 7(2) CISG to fill the CISG's internal gap regarding situations of hardship, turned to general principles as incorporated in the UNIDROIT [*Scafom International v. Lorraine Tubes S.A.S*].

193. Therefore, the internal gap regarding price adaptation of the Contract as a remedy must be filled using UNIDROIT. If the Tribunal decides that UNIDROIT cannot be considered as 'general principles' to fill the gap regarding hardship then, the gap must be filled in conformity with the law applicable by virtue of the rules of private international law [*Art. 7(2), CISG*].

194. In adherence to these rules, the law governing the Contract (Mediterraneo) shall be used for the purpose of filling in the gap i.e. UNIDROIT [*Cl. Memorandum, p. 62, para. 187*].

C. Price adaptation should be granted as a remedy using UNIDROIT

195. CLAIMANT shall demonstrate that the tariffs constitute hardship under Art. 6.2.2 of the UNIDROIT as **[a]** the events occurred or became known to CLAIMANT after the conclusion of the Contract, **[b]** the events could not reasonably have been taken into account by CLAIMANT at the time of conclusion of the Contract, **[c]** the events were beyond the control of CLAIMANT and **[d]** the risk of the events was not assumed by CLAIMANT.

a) The events occurred or became known to CLAIMANT after the conclusion of the Contract

196. The Contract was concluded on 6th May, 2017 and CLAIMANT received knowledge of the newly imposed tariffs only on 20th January, 2018 [*Cl. Ex. 7, p. 16*], which is subsequent to the conclusion of the Contract.

b) The events could not reasonably have been taken into account by CLAIMANT at the time of conclusion of the Contract

197. The imposition of tariffs was unforeseeable since the government of Equatoriana always resorted to solving disputes amicably and as a practice, did not impose retaliatory tariff [*Cl. Ex. 6, p. 15*]. Therefore, CLAIMANT could not have anticipated imposition of tariff at the time of the conclusion of the Contract [*Cl. Memorandum, p. 56, para. 137*]

c) The events were beyond the control of CLAIMANT

198. Since, the tariffs were imposed by the government of Equatoriana, the decision of imposition was beyond the control of CLAIMANT [*McKendrick, p. 721*].

d) The risk of the events was not assumed by CLAIMANT.

199. CLAIMANT, during negotiation of the Contract, specifically stated that it shall be willing to make delivery of goods via DDP only on the condition that it will not be taking any further risks associated with the DDP [*Cl. Ex. 2, p. 10*]. This is further substantiated by the language of clause 12 of the Contract. Therefore CLAIMANT did not assume risk of the abovementioned event.

200. In conclusion, imposition of tariffs constitutes hardship under Art. 6.2.2 UNIDROIT. Accordingly, it should be granted a remedy under UNIDROIT which provides for termination or adaptation of the Contract [*Art. 6.2.3(4), UNIDROIT; Brunner, p. 124.*]. Since CLAIMANT has already performed the Contract by delivering the shipment, the remedy of termination would be ineffectual.

Therefore, the Tribunal should adapt the price of the Contract entirely in favour of CLAIMANT to restore the equilibrium between the Parties [Cl. Memorandum p. 58, para. 157].

CONCLUSION ON ISSUE 3

The Tribunal should find that that tariffs imposed by the Equatorianian Government constitute hardship under clause 12 of the Contract. The Contract must be adapted since it is the most appropriate remedy. Furthermore, price adaptation should be made entirely in favour of CLAIMANT to balance the financial disequilibrium between the Parties. Alternatively, there exists a remedy for price adaptation under CISG. This remedy should be granted by filling gaps under Art. 7(2) CISG using UNIDROIT.

REQUEST FOR RELIEF

Counsels for CLAIMANT respectfully request the Tribunal:

1. To find and hold that the Tribunal has the jurisdiction and power to adapt the contract under the arbitration agreement.
2. To find and hold that the Award from the other arbitral proceedings is admissible as evidence before the Tribunal and that CLAIMANT is entitled to rely on the same.
3. To find and hold that CLAIMANT is entitled to an increased remuneration resulting from adaptation of the price under clause 12 of the Contract or under CISG.

Based on these findings, CLAIMANT respectfully requests the Tribunal:

1. To order RESPONDENT to pay the additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen.

Respectfully submitted,

Bhopal, 6th December, 2018

Pranjal Agarwal

Aditya Wadhwa

Ankit Gupta

Nilakshi Srivastava

Shiuli Mandloi

Certificate and Choice of Forum

To be attached to each Memorandum

I **PRANJAL AGARWAL**, on behalf of the Team for (name of School) **NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL, INDIA** 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 (School name): NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

Name: PRANJAL AGARWAL

Signature: _____