Sixteenth Annual
Willem C. Vis East
International Commercial Arbitration Moot
Hong Kong
31 March – 7 April 2019

Memorandum for Respondent

RMIT

On behalf of
Black Beauty Equestrian
2 Seabiscuit Drive, Oceanside
Equatoriana
(RESPONDENT)

Against
Phar Lap Allevamento
Rue Frankel 1, Capital City
Mediterraneo
(CLAIMANT)

Counsel

Karim Ibrahim - Cassandra Knight-Grull - Lauren Meath
Paul Sutton - Artemis Wilkinson

Index of Abbreviations

Abbreviation	*Explanation*
§, §§	Paragraph, paragraphs
AA	Arbitration Agreement (i.e. the agreement contained in clause 15 of the SA)
Art. / Arts.	Article / Articles
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo.	CLAIMANT's Memorandum
HKIAC	Hong Kong International Arbitration Centre
No.	Number
p. / pp.	Page / Pages
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
q. / qq.	Question / Questions
Resp. Ex.	RESPONDENT's Exhibit
Resp. Memo.	RESPONDENT's Memorandum
USD	United States Dollar
SA	Frozen Semen Sales Agreement

Legal Index

Abbreviation	*Explanation*
CISG	United Nations Convention on the International Sale of Goods
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC Rules	2018 Hong Kong Administered Arbitration Rules
IBA Rules	2010 International Bar Association Rules on the Taking of Evidence in international Arbitration
Incoterms® Rules	International Chamber of Commerce, Incoterms 2010 Rules
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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'Kazakhstan Case'/Caratube v Kazakhstan 2018	Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (2018) ICSID Case No. ARB/13/13 §§ 66, 68
Cysteine Case	China International Economic & Trade Arbitration Commission [CIETAC] (PRC) Arbitration Award, Cysteine case (7 January 2000); available at http://cisgw3.law.pace.edu/cases/000107c1.html §
EDF Services v Romania	*EDF (Services) Limited v Republic of Romania*, ICSID Case No ARB/05/13 § 71
Giovanna a Beccara 2007	*Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* (2007) ICSID Case No. ARB/07/5.
Methanex 2005	*Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) § 66
RosInvest -	*RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005*
UNILEX d. 12.06.2001	*Unknown parties* (12 June 2001), Cour d'Appel de Colmar, France <http://www.unilex.info/case.cfm?id=814> §

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Abbreviation	***Citation***
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C v D	*C v D [2007] EWCA Civ 1282* *England* *§ 18*
FirstLink	*FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others [2014] SGHCR 12* *Singapore* *§§ 18, 20*
Frozen Raspberries Case	*Vital Berry Marketing NV v Dira-Frost NV (2nd May 1995), Rechtbank van Koophandel, Hasselt, Case No. AR 1849/94* *Belgium* *§*
Nuova Fucinati. v Fondmetall	*Nuova Fucinati S.p.A. v Fondmetall International A.B.,(14 January 1993)Tribunale Civile [District Court] di Monza, Case No. R.G. 4267/88* *Italy* *§*
Premium Nafta v Fili Shipping	*Premium Nafta Products Limited and others v Fili Shipping Company Limited and others [2007] UKHL 40* *England* *§ 6*
Scafom	*Scafom International BV v Lorraine Tubes S.A.S.* (19th June 2009), Court of Cassation of Belgium Case No. C.07.0289.N Belgium *§*
Shashoua and others v Sharma	*Shashoua and others v Sharma [2009] EWHC 957 (Comm)* England
Sulamérica v Enesa	*Sulamérica Cia Nacional de Seguros SA and ors v Enesa* *Engenharia SA and ors* EWCA Civ 638, 20 March 2012 England
PT Garuda Indonesia v Birgen Air	*PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 [2002] 1 SLR 393 Singapore

Summary of Arguments

RESPONDENT has prepared this submission in accordance with the Arbitral Tribunal's orders in PO1 and presents its pleadings on the issues requested by the Tribunal in both procedural and substantive law. RESPONDENT contends that:

1. The Tribunal does not have the power to adapt the contract

- The AA is an independent agreement to the SA, and it is the law of the place of the arbitration, Danubia, that governs the interpretation of the AA.
- Under the law of Danubia, an express conferral of power is required to authorise the Tribunal to adapt. There is no such express conferral of power to adapt in the AA. Even if the AA is read in conjunction with the SA, the hardship clause does not provide an express power to adapt. This submission is further supported in an assessment of the PARTIES pre-contractual negotiations. Lastly, the Tribunal does not have the power to adapt under Art. 79 of the CISG.

2. CLAIMANT is not entitled to submit documents from the other arbitration proceedings

- Both documents submitted by CLAIMANT should be excluded from this arbitration. There are four significant bases for exclusion: the documents are confidential, were obtained by unethical means, will cause procedural disadvantage for RESPONDENT and they hold minimal probative value. Any one of these factors is sufficient to promote exclusion, and when considered cumulatively they form a strong foundation for inadmissibility.

3. CLAIMANT is not entitled to adaptation of the SA under either clause 12 or CISG.

- Adaptation cannot be applied retroactively. CLAIMANT agreed to DDP and clause 12 does not derogate from DDP because the tariff is not comparable to additional health and safety requirements, was foreseeable and does not constitute hardship under Mediterraneo law. Nor does clause 12 include an adaptation mechanism.
- CISG does not provide relief for the CLAIMANT. While Article 79 covers hardship, the threshold for hardship has not been met. Hardship is a matter governed by Article 79 but not settled within it and recourse to UNIDROIT is not justified. Issues of hardship have been settled by the conduct and agreement of the PARTIES. In the alternative, the threshold for hardship under UNIDROIT has not been met.

Issue A, The Tribunal does not have jurisdiction or power to adapt the contract

Introduction

1 RESPONDENT submits that the Tribunal does not have the jurisdiction or power to adapt the contract under the AA, which is contained in Clause 15 of the contract (Cl. Ex. C 5, p. 14).

2 The PARTIES have both agreed to refer disputes to the HKIAC for resolution under the HKIAC Rules (*Cl. Ex. C 5, p. 14*). RESPONDENT accepts the Tribunal's jurisdiction to hear the dispute and interpret the contract (*PO1, p. 52; PO2, p. 61, q. 48*). However, under Art. 36.1 of the HKIAC Rules the Tribunal must decide this dispute in accordance with the terms of the contract and the rules of law agreed upon by the PARTIES. RESPONDENT submits that the applicable law to the interpretation of the AA is the law of Danubia (A). Under Danubian law, the PARTIES have not empowered the Tribunal to adapt the SA (B).

1. The Law of Danubia governs the interpretation of the Arbitration Agreement

3 It is incorrect to assert that the PARTIES have subjected the arbitration clause to the law of Mediterraneo as CLAIMANT does (*Cl. Memo. § 5*).

4 The doctrine of separability sets the arbitration clause apart from the substantive contract and it is the wording of Clause 15 on its own that must be considered to determine its scope (a). The wording of the AA confirms that the law of Danubia governs the interpretation of the AA by designating Danubia as the seat of arbitration. Further application of Danubian law to the AA ensures that any decision made by the Tribunal will be enforceable (b). Finally, even if the AA is not confined to its wording alone, the drafting history and the PARTIES' negotiations clearly evidence the mutual intention that it is Danubian law which governs interpretation of the AA (c).

a. The Arbitration Agreement is an independent agreement from the Sales Agreement and it may be governed by different law

5 RESPONDENT submits that the doctrine of separability applies to the agreement between the PARTIES. This doctrine acts to legally separate the AA from the remainder of the SA as an independent agreement. The doctrine applies even if an arbitration clause is physically included in the SA (Lew/Mistelis /Kröll 2003, § 6.9) and where the validity

of the substantive contract is not in question (Born 2009, p. 312; Gaillard / Savage 1999, § 392; Schwebel 1987).

6 Recognition of the doctrine of separability is further enforced in these circumstances by operation of Art. 19.2 of the HKIAC Rules (Moser/Bao 2017, p. 187). Article 19.2 states that 'an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract' (emphasis added). CLAIMANT's Memorandum has neglected to make reference to Article 19.2 of the HKIAC. However, the PARTIES have agreed to arbitrate under the HKIAC Rules (Cl. Ex. C5, p. 14). Due to this agreement, the Tribunal must proceed on the basis that the PARTIES intended any dispute arising under the SA to be decided in accordance with the dispute resolution procedure and rules they have selected (Premium Nafta v Fili Shipping § 6; Firstlink § 13).

7 Pursuant to Art. 19.2, that the Tribunal must begin with the position that the AA is a separate legal agreement to the contract that it is included within. By treating it as such, it is evident that Clause 14 governs the substantive part of the contract, whilst the seat of the arbitration, Danubian law, designates the law governing the AA (Cl. Ex. C5, p. 14). There is no indication otherwise within the terms of the AA itself. Further, it is not uncommon for an arbitration agreement to be governed by a law separate to that of the main contract (Born 2014, pp. 818-819; Jarvin/ Derains, 1990, p. 216).

8 CLAIMANT asserts that the doctrine of separability should not be viewed as isolating arbitration agreements for all purposes that may disempower a party's right to arbitration (Cl. Memo., § 15). This point is immaterial for this proceeding. It is common ground between the PARTIES that the Tribunal can hear and determine the dispute. The issue in dispute is whether the Tribunal has jurisdiction to decide on adaptation (PO1, § III; PO2, § 48).

9 Additionally, RESPONDENT does not submit that the AA should be read in a vacuum through the doctrine of separability. Yet the doctrine of separability does demand that the AA be considered an independent agreement to the remainder of the contract such that a different law may apply to its interpretation. The only reference to a choice of law in the AA is the seat of the arbitration. This choice designates that Danubian law applies to the AA and to its construction. In this circumstance the validity, scope or effect of the arbitration clause should not be determined by the law designated in the SA where the language of the AA itself indicates otherwise (Craig/Park/Paulsson 2000, § 5.05).

10 Recognising that the doctrine of separability applies, RESPONDENT submits that the law of Mediterraneo is not an express or implied choice of law governing the AA. Clause

14 of the contract only determines that the substantive 'sales' part of the contract is to be governed by the law of Mediterraneo, and not the AA. The reference made in Clause 14 of the contract, which states that 'this Sales Agreement is governed by the law of Mediterraneo', has no impact on the AA or its construction. Clause 14 simply determines the law applicable to the 'sales' part of the contract.

b. The law of the seat governs the interpretation of the Arbitration Agreement

11 RESPONDENT submits that the law of Danubia governs the interpretation of the AA. As the law of the seat named in Clause 15, Danubian law has the closest and most relevant connection to the AA (i). Further, application of Danubian law to the AA will ensure that any decision made by the Tribunal arbitral award is enforceability (ii).

i. The closest connection to the AA is the law of the place of arbitration, Danubia

12 CLAIMANT has argued that in the absence of a separate choice of law clause specific to the AA, it must be assumed that the PARTIES choice of law for the SA extends as the law governing the AA (*Cl. Memo., § 13*). CLAIMANT's position on this relies largely on the decision in the English case of *Sulamérica v Enesa* at § 11 where the Court of Appeal stated that '*in the absence of any indication to the contrary*' (emphasis added), it may be assumed that 'the parties intended the whole of their relationship to be governed by the same system of law'.

13 CLAIMANT has misapplied this case. In *Sulamérica v Enesa* it was common ground that the law governing the arbitration agreement would be determined in accordance with the English common law rules for ascertaining the proper law for any contract (at § 9). This is not common ground in this dispute.

14 However, if this case does hold sway in these proceedings, RESPONDENT notes that CLAIMANT's submission ignores relevant statements made by the Court of Appeal in *Sulamérica v Enesa* at § 26 which lays out that the application of the same system of law of the SA to the AA is a rebuttable assumption where there 'are other factors present which point to a different conclusion, [including] the terms of the arbitration agreement itself.' CLAIMANT's submission also fails to take into account that the Court of Appeal accepted that the determination of the law governing the arbitration agreement is 'normally made by identifying the seat of the arbitration' (*Sulamérica v Enes* at § 15). The Court of Appeal also supported commentary to the effect that where there is no express or implied choice of law, it is then that the 'arbitration agreement will be found

to be most closely connected with the law of the place where the arbitration has its seat' (*Sulamérica v Enesa* at § 16, citing Dicey/ Morris/ Collins, *2006*).

15 If the test set out in *Sulamérica v Enesa* applies, RESPONDENT submits that there is no express or implied choice of law in the AA and that the law which has the closest and most real connection with this clause is the law of the seat of the arbitration.

16 Regardless of the test in this decision, there is legal significance in the PARTIES active designation of the seat of arbitration as Danubia, which must be recognised. The seat of arbitration 'identifies a state or territory whose laws will govern the arbitral process' (*PT Garuda v Birgen Air* § 24; *C v D*; *FirstLink*). Further, an agreement on the seat of arbitration defines the curial law as being the law of that country, which would be Danubian law in this instance (*Shashoua v Sharma* § 23). Any reliance CLAIMANT makes on the premise that 'the law of the seat of arbitration […] hardly has any entitlement to apply' evidences a misunderstanding of the legal significance of the seat (*Cl. Memo., § 15;* Fouchard 1998, p. 604).

17 The terms of the AA designate that the seat of arbitration shall be Vindobona, Danubia (*Cl. Ex. C 5, p. 14, Clause 15*). On this ground, Danubian law is the only applicable law to the interpretation of AA.

ii. Applying Danubian law to the AA ensures that any decision made by the Tribunal is enforceable

18 The only choice of law specified in the AA is the law of the seat, Danubia (*Cl. Ex. C 5, Clause 15*) and application of Danubian law is the best means to ensure that the arbitral award is enforceable (Lew/Mistekis/Kröll *2003*). Article V(1)(a) of the New York Convention makes clear that in the absence of an express selection of law, an arbitration award will be unenforceable if it is invalid under the law of the Country where the award was made. An award may also be set aside pursuant to Art 34(2)(a)(i) of the UNCITRAL Model Law, which Danubia has adopted, on the same grounds.

19 It must be assumed that the PARTIES wished to ensure the validity and enforceability of the AA (*FirstLink* § 14).

20 Under Danubian law, the AA is seen as a separate contract limited to its wording by application of the four corners rule (*Answer to the Notice of Arbitration, p. 32, § 17; PO2, q. 45*). Further, under Danubian law, adaptation may only occur 'if authorised' by the PARTIES. The law of Mediterraneo, however, allows for interpretation to occur outside of the four corners of the contract (*PO1, p. 53, § 4*). If the law of Mediterraneo is applied to the AA, its interpretation of the contract will move outside of the four corners

of Clause 15 ((*Cl. Ex. C5, p. 14*). In the absence of an express selection of law, any interpretation of the AA under the law of Mediterraneo will be unenforceable on the basis of Article V (1)(a) of the New York Convention as it will be invalid under the law of Danubia where the award was made.

21 Further, it is reasonable to assume that the legal professionals who wrote the sales contract for both PARTIES did so with awareness and in light of their obligations under the New York Convention. It was CLAIMANT who first suggested Danubia as the seat of arbitration (*Resp. Ex. p. 34*) and Clause 15 of the contract is based entirely on CLAIMANT's suggestions. In this Clause, the seat of arbitration is the only expressly stated choice of the PARTIES (*Cl. Ex. C 5, Clause 15; Resp. Ex. R 2, p. 34*). As CLAIMANT's legal counsel, Ms Napravnik had worked in her role as a lawyer engaged in international contractual relations since 1 January 2011 (*Cl. Ex. C 8, p. 17*). She was experienced in this role. There must be an assumption that Ms Napravnik was well versed in the articles of the New York Convention which will ultimately govern the enforceability of the Tribunals decision or astute enough to check.

22 This is also true of the lawyer who replaced Ms Napravnik after the accident, John Ferguson. Whilst Mr Ferguson may have no experience in international contracting, he was still a qualified lawyer working in a company that frequently engaged in international contracts (*Cl. Ex. C 8, p. 17; Notice of Arbitration, p. 4, §§ 2, 3*). Although Mr Ferguson may have been inexperienced in international contracting, it does not follow that he was ignorant of international commercial law when he finalised the contract.

c. The drafting history and negotiations demonstrate the PARTIES' mutual intention that the law of Danubia governs the interpretation of the Arbitration Agreement

23 In the alternative, even if the Tribunal finds that external evidence must be considered, the drafting history and the PARTIES' negotiations demonstrate the mutual intention that the law of Danubia govern the AA. The pre-contractual negotiations show that the PARTIES intended the law of Mediterraneo to govern only the sales part of the contract and not the whole contract (i). Further, the PARTIES agreed on Danubia as the *lex arbitri* and *lex loci arbitri* (ii).

i. The pre-contractual negotiations demonstrate that the PARTIES intended for the law of Mediterraneo to govern the sales part of the contract, and not the whole contract.

24 The pre-contractual negotiations between the PARTIES clearly indicate that there was never an agreement that the law of Mediterraneo should govern the whole contract, as CLAIMANT has wrongly asserted (*Cl. Memo., p. 5, § 6*).

25 First, RESPONDENT relies on the email sent by Mr Antley to Ms Napravnik on 28 March 2017 (*Cl. Ex. C3, p. 11*), which includes a subheading titled 'Applicable Law and Dispute Resolution'. Under this subheading it is made clear that RESPONDENT has distinctly separated the two terms to mean first, the applicable law governing the 'purchase' of the semen, and second, a mechanism on how disputes would be resolved. The reference to the applicable law here (*Cl. Ex. C3, p. 11*) is solely directed to the SA, and this is made explicit in the preceding email by Ms Napravnik, as indicated by the statement that the purchase of the semen would be based on the Standard Frozen Semen Sales Agreement (*Cl. Ex. C 2, p. 10*). Emphasis must be placed on the term 'purchase', as the reference to the applicable law is clearly in regard to the substantive part of the agreement in the preliminary negotiations.

26 Second, in its correspondence with CLAIMANT regarding the drafting of the contract, RESPONDENT made it very clear that the law of Mediterraneo were to govern the substantive part of the contract, the SA, but not the AA. Instead, RESPONDENT distinguished the AA from the SA and proposed a first draft for the dispute resolution clause that would be inserted into the contract subject to different law than the SA (*Resp. Ex. R 1, p. 33*).

27 It is evident that both PARTIES acknowledged throughout the contract negotiations that there was a clear distinction between the sales part of the contract (the SA) and the procedural component of the contract (the dispute resolution clause).

ii. The pre-contractual negotiations demonstrate that the PARTIES intended for the law of the arbitration to be Danubia

28 Whilst the PARTIES intended for the law of Mediterraneo to govern the sales part of the contract, RESPONDENT submits that it was the PARTIES mutual intention to subject the AA to the law of the seat, being Danubia (*Cl. Memo., p. 5, § 6*).

29 CLAIMANT's amendments to both the AA and to the place of arbitration (*Resp. Ex. R 2, p. 34*) decisively portray an intention for the law of the place of arbitration to govern the AA.

30 The PARTIES did not merely select Danubia as a venue for arbitration. Instead, Danubia was selected by CLAIMANT as the place of arbitration as a neutral venue with a functioning judicial system (*PO2, q. 14*). This is a primary reason as to why

CLAIMANT suggested Danubia as the place of arbitration (*PO2, q. 14*). The importance of neutrality in the selection of the seat should not be undervalued. Primacy has been given to neutral law chosen by the PARTIES to govern disputes rather than non-neutral law (*FirstLink* § 13). Therefore, Danubia was not selected simply to conduct arbitration hearings as a matter of convenience as CLAIMANT (*Cl. Memo., § 11*). Rather, Danubia was selected as the *lex arbitri* due to its neutral judicial capabilities in resolving disputes through arbitration.

31 There is nothing in the negotiations to suggest that CLAIMANT's proposal of Danubia as the place of arbitration is as a place only rather than a legally based selection. Instead, it was the intention of CLAIMANT to select the place of arbitration to be Danubia and to have disputes and the arbitration governed by the law of the place of arbitration.

2. The Tribunal does not have the power to adapt the Sales Agreement

32 The PARTIES have not conferred on the Tribunal the power to adapt the SA.

33 Four arguments support this. Under Danubian law, the AA does not confer on the Tribunal the power to adapt the SA (a). Even if the AA is read with the SA, the PARTIES have not conferred on the Tribunal the power to adapt (b). The pre-contractual negotiations confirm that the Tribunal has not been empowered to adapt the SA (c). Finally, the CISG does not apply to the interpretation of the AA. However, even if the Tribunal finds that the CISG does apply to the AA, the CISG does not provide the Tribunal with the power to adapt the SA (d).

a. The Arbitration Agreement does not confer the Tribunal with the power to adapt

34 There is no express reference made to adaptation in the AA.

35 The correct legal determination as to the Tribunal's powers to resolve this dispute are limited to accepted approaches of the forum whose rules are applied, Danubia (Berger 2006, p. 305). Under the four corners rule, applicable to the AA under Danubian law, Clause 15 of the contract must be interpreted on its face and limited to its wording (*PO2, q, 45*).

36 The Tribunal is only empowered to adapt the contract if they have been expressly authorised to do so by the PARTIES in the AA itself. As the law of Danubia that applies to the AA, its interpretation is pursuant to Art. 28(3) of Danubian Arbitration Law (identical to *Art. 28(3) of the UNCITRAL Model Law*). This provision outlines that parties may confer exceptional powers to an arbitral tribunal 'only' if there has been 'express' authorisation for the tribunal to do so. Further, Art 6.2.3 (4)(b) of Danubian

Contract Law states that the power to adapt the contract may be made only 'if authorised' (*PO2, q. 45*).

37 Whilst the AA does state that the Tribunal may hear any dispute arising out of the contract (*Cl. Memo., §§ 23-27*) it does not confer the arbitral tribunal with the power to resolve disputes between the PARTIES through adaptation of the contract. For the Tribunal to have the power to adapt the contract, it would have to be expressly stated in the terms of the contract itself under Danubian law (*PO2, q. 45*). On this basis, CLAIMANT's assertion that the negotiations confirm the PARTIES intent to confer the Tribunal with power to adapt the SA holds is not valid under Danubian law (*Cl. Memo., §§ 31-34*). The AA is limited to its wording alone.

38 CLAIMANT may argue that the term 'resolved' should be interpreted to mean that adaptation may occur at the Tribunal's discretion. However, this would be an overly broad reading of this term. The binding nature of contracts, *pacta sunt servanda*, stands as a universally recognised principle (*Vienna Convention on the Law of Treaties, Preamble; UNIDROIT Principles Art, 1.3*). Adaptation of a contract after performance must therefore be viewed as an exceptional remedy, (Perillo 1998, p. 115; Uribe 2011, p. 247). Moreover, Danubian law applies to this contract. For such an exceptional remedy to be provided for it would have to be expressly stated. The Tribunal cannot accept that this arbitration clause may implicitly cover a claim as exceptional as adaptation.

39 There is no express statement allowing for adaptation of the contract in the AA. Without such a statement the Tribunal cannot adapt the contract under Danubian law.

b. Even if the Arbitration Agreement is read with the Sales Agreement, there is no express power to adapt the contract under Clause 12

40 There is no express reference made to adaptation in Clause 12 of the SA.

41 Even if the AA were to be read with the SA, the Tribunal would still lack the express power to adapt the contract under the hardship clause (Clause 12 of the contract) under Art 6.2.3 (4)(b) of Danubian contract law (*PO2, q. 45*). The power to adapt cannot be determined by reading the hardship clause with the AA, as CLAIMANT asserts (*Cl. Memo., §§ 26, 28-30*), due to the fact that the hardship clause does not contain an express authorisation to the Tribunal to adapt, as is required under Danubian law.

42 CLAIMANT asserts that the relevant authorisation may be provided even if it is not written out 'word-for-word' (*Cl. Memo., § 29*). This is incorrect under Danubian law. Further, it is incorrect for CLAIMANT to state that the PARTIES inserted a hardship clause that provides for adaptation (*Cl. Memo., § 29*) and 'foresees contract adaptation as

[a] remedy' (*Cl. Memo., § 26*). If this were the case, adaption would be clearly stated as a remedy within the terms of the contract.

c. The pre-contractual negotiations confirm that the Tribunal has not been empowered to adapt

43 There was no intention by both PARTIES to include an adaptation mechanism in the SA. CLAIMANT has referred to Ms Napravnik's witness statement, where she suggested that it would be important for CLAIMANT to have an adaptation mechanism (*Cl. Ex. C8, p. 17*). CLAIMANT in its memorandum has stated that RESPONDENT 'agreed' to Ms Napravnik's suggestion (*Cl. Memo., § 95*). This is categorically incorrect. The Tribunal's attention is drawn to the witness statement that CLAIMANT has referred to, in which Mr Krone replied that it should 'probably' be in the discretion of the Tribunal to adapt the contract if the PARTIES could not agree (*Cl. Ex. C8, p. 17*). The word 'probably' is not a definitive answer in the affirmative, and an adaptation mechanism remained an issue to be clarified. The PARTIES plainly did not reach a 'meeting of minds' on this issue (*Cl. Memo., § 95*), and CLAIMANT cannot assert that Mr Krone admitted that the PARTIES agreed to transfer the power to the Tribunal to adapt (*Cl. Memo., § 33*).

44 Further, there is no mention of an 'adaptation mechanism' in Mr Antley's negotiation file (*Resp. Ex. R 3, p. 35*) and CLAIMANT cannot assert that the note referring to the 'connection of hardship clause with arbitration clause' was a reminder to draft an arbitration clause which would be connected to the hardship clause and clarify the Tribunal's power to adapt (*Cl. Memo., § 32*). In the negotiations, Ms Napravnik stated that an adaptation mechanism should be incorporated expressly into the hardship clause 'or' the arbitration clause (*Cl. Ex. C8, p. 17*). In doing so it was made clear by CLAIMANT that any adaptation provision would need to be included expressly into one of these clauses. CLAIMANT cannot assert that the words '*connection of hardship clause with arbitration clause*' (emphasis added) is in reference to adaptation because it is clear that adaptation required an express reference in either clause and was to be treated as a separate mechanism.

45 It is not reasonable to link the hardship clause to adaptation as CLAIMANT has done. Rather, on an analysis of the PARTIES expressed intentions during the pre-contractual negotiations available as written evidence, it is clear that the inclusion of a hardship provision did not confer the Tribunal with the power to adapt.

46 On 12 April 2017, Ms Napravnik and Mr Antley had only agreed on Clauses 1-6 of the Contract (*Cl. Ex. C8, p. 17*). After the accident, it was Mr Ferguson and Mr Krone that added Clauses 7-15 with reliance of the pre-existing file between Ms Napravnik and Mr Antley and Mr Antley's vague negotiation file note (*Resp. Ex. R 3, p. 35*). This means that Mr Ferguson and Mr Antley relied purely upon the email from Ms Napravnik to Mr Antley on 31 March 2017 regarding the hardship clause, which makes no mention of an adaptation mechanism (*Cl. Ex. C4, p. 12*). Therefore, the only time that the word 'adaptation' is mentioned is during Ms Napravnik's oral discussion with Mr Antley on the 12 April 2017 as presented in her own witness statement (*Cl. Ex. C8, p. 17*).

47 In the email sent by CLAIMANT on 31 March 2017, the suggestion of a hardship clause made no mention of its purpose to address adaptation (*Cl. Ex. C4, p. 12*). In fact, CLAIMANT explicitly sought to insert a hardship clause into the contract to address issues of 'unforeseeable additional health and safety requirements' (*Cl. Ex. C4, p. 12*).

48 This correspondence reinforces RESPONDENT's submission that the hardship clause in the contract does not provide the Tribunal with the power to adapt, as it contains no express reference to an adaptation mechanism as required under Danubian law as applies to the AA.

d. The Tribunal does not have the power to adapt under the CISG

49 CLAIMANT has incorrectly asserted that interpretation of the AA is subject to the provisions of the CISG (*Cl. Memo., §§ 19, 20,22, 26, 36, 39*). CISG principles regarding interpretation and use of evidence in international sales transactions do not apply to the AA. Art. 1(1) of the CISG states that the Convention 'applies to contracts of sale of goods'. Art. 4 of the CISG states that the Convention governs '*only the formation of the contract of sale* and the rights and obligations of the seller and the buyer arising from such a contract' (emphasis added).

50 The AA is not a contract relating to sale of goods in the terms defined by the CISG (Koch 2008, p. 285; Kröll 2005-2006, pp. 39, 45). It is a procedural contract, separate from the SA it is included within due to the doctrine of separability. This is the consistent approach under Danubian law, which governs the AA (*PO2, § 36*).

51 As such the CISG does not apply to the AA and does not give the Tribunal power to adapt under the AA (Kröll 2005-2006, p. 44). However, even if the Tribunal rules that the CISG does apply to the AA, RESPONDENT submits that it still lacks the power to adapt the SA under the CISG.

52 Whilst Art 50 of the CISG, as raised by CLAIMANT (*Cl. Memo., § 36*), does provide for contract adaptation it does not apply in these circumstances and is irrelevant to the Tribunal's power to decide this matter. Art. 50 of the CISG relates purely to a reduction of price where sold goods do not conform to the terms of the contract. Nor does Art. 79 allow the Tribunal to adapt the contract (*Cl. Memo., § 36*). As is discussed in Issue C of this submission, Art. 79 of the CISG only provides for adaptation where a contract has not been performed. This contract has been performed in its entirety and in full compliance with the terms of the contract. Therefore, Art. 79 of the CISG has no application.

Conclusion to Issue A

53 There is no express or implied choice that the law of Mediterraneo governs the AA. Rather it is the seat of the arbitration that provides the clearest indication that the law governing the AA is the law of the place of the arbitration, Danubian law, and it is the seat that has the closest and most real connection with the contract. Moreover, the only way to ensure the enforceability of the arbitral award is to interpret the AA in line with Danubian law.

54 Under Danubian law adaptation must be expressly conferred. The PARTIES have not conferred on the Tribunal the jurisdiction or power to adapt under the terms of either the AA, or the contract when read as a whole. Further, conferral of this power cannot be demonstrated through the PARTIES pre-contractual negotiations. Finally, the CISG does not provide the Tribunal with the power to adapt the SA.

Issue B, CLAIMANT is not entitled to submit documents from the other arbitration

Introduction

55 CLAIMANT has requested the admission of two documents from RESPONDENT's other arbitration: a copy of the submission and the Partial Interim Award (*Cl. Memo., § 72)*. The admission or exclusion of potential evidence is entirely a matter of Tribunal discretion. The submitted documents are subject to four exclusionary grounds, which in their totality provide substantial support for their exclusion.

56 All documents from the other arbitration are protected by confidentiality and honouring these protections would be the discretionary choice most consonant with the HKIAC Rules (1). Both the Award and the submission were sourced in an unethical manner by CLAIMANT, affecting their admissibility and demonstrating bad faith in connection

with these proceedings (2**)**. Finally, the admission of either document will compromise the legitimate procedural rights of RESPONDENT (3). Finally, the relevance or materiality of these documents is insufficient to justify the admission of these documents (4). These grounds, taken individually or collectively, create a considerable basis for excluding these documents from this arbitration (5).

1. All documents from the other arbitration are protected by confidentiality and should be excluded

57 The first important exclusionary ground lies in the confidentiality of the submitted documents. This Tribunal should render these documents inadmissible for two reasons. First, both documents are protected by Art. 45 of the HKIAC Rules, which ensures their confidentiality (a). Second, choosing to uphold these confidentiality protections and exclude the documents is the discretionary option that is most congruent with the HKIAC Rules (b).

a. The relevant documents are protected from admission by Art. 45 of the HKIAC Rules

58 CLAIMANT incorrectly asserts that there are no contractual confidentiality provisions applicable to this dispute, as it is not bound by Art. 45 protections from that arbitration (*Cl. Memo., § 65*). Art. 45.1 of the HKIAC Rules states that 'no party or party representative may publish, disclose or communicate any information' related to either the award or the arbitration itself. Under Art. 45.2 (HKIAC Rules) this provision is extended further to bind all arbitrators involved in the arbitration, all experts and witnesses, and the HKIAC itself.

59 The other arbitration is also governed by HKIAC Rules and as such, the Art. 45 protections apply to all information related to those proceedings (*PO2, q. 39).* Regardless of whether CLAIMANT is bound by Art. 45, these documents are confidential. RESPONDENT does not rely on a general right to confidentiality as CLAIMANT suggests (*Cl. Memo., § 65*). Rather, it invokes its contractual rights under the HKIAC Rules to have the confidentiality of its other arbitration upheld.

60 It is implicit in the relationship between HKIAC and its arbitrators that confidentiality should be viewed as a fixed aspect of HKIAC arbitrations. All HKIAC-appointed arbitrators, even those chosen by the parties, are confirmed and appointed by the institution itself (Art. 9.1 HKIAC Rules). Furthermore, at the time of appointment, a

contractual arrangement is formed between the institution and the arbitrators (Born 2014, pp. 1985-6; Onyema 2012, pp. 96, 128).

61 This relationship is not static; HKIAC caps the remuneration of its arbitrators (Schedule 1-3 HKIAC Rules), decides on challenges (Art. 11.9 HKIAC Rules), and oversees the Tribunal's consistent and coherent interpretation of the procedural rules (Born 2014, pp. 1985-6). Within HKIAC, consistency with the rules holds so much importance that it is included as standard procedure for prospective arbitrators to declare: "I have familiarized myself with the requirements of the Rules… I am available to serve as an arbitrator in accordance with all of the requirements of the Rules" (*Arbitrator's Declaration of Acceptance, p. 24*). As such it is implicit in the nature of this contractual relationship between HKIAC and its arbitrators that the duty to remain consistent with the institutional rules is owed not only to the parties but also to the HKIAC. More specifically, any duty of confidentiality placed on the arbitrator is owed not only to the parties; it is also owed to the institution itself (Onyema 2012, p. 143).

b. The discretionary option most consistent with the HKIAC Rules is to uphold the confidentiality of the documents

62 Even if this Tribunal considers itself not contractually bound by Art. 45 (HKIAC Rules), it should utilise its discretionary power to exclude these documents. As all arbitrators would be aware, the essential role of the Tribunal is to resolve all aspects of a dispute in accordance with the arbitral rules chosen by the parties (Born 2014, p. 2001). In the present case, the option most accordant with the HKIAC Rules is to confirm the confidentiality of these documents and exclude them from this arbitration.

63 First, HKIAC has demonstrated a clear intention for confidentiality to be an integral part of its arbitral culture that is broadly implemented and set aside only with the consent of all parties. Art. 45.1 (HKIAC Rules) is limited only if 'agreed by the parties.' Similarly, Art. 45.5 (HKIAC Rules) denotes not only that all parties must agree to the publication of an award, but that even with consent, any release of the award will be protected by total deidentification. In fact, HKIAC's Rules encompass 'some of the strictest requirements for the publication of arbitral awards in comparison to other arbitral institutional rules' (Moser/Bao 2017, § 12.37) and the wide applicability of this rule is a distinguishing feature of HKIAC's confidentiality provision (Moser/Bao 2017, p.282). The breadth and strictness of its confidentiality provisions set HKIAC apart from various other prominent arbitral institutions, many of which offer only basic confidentiality protections (ICC Rules, Appendix I, Art. 6; SIAC Rules (2016) Art. 39). Art. 45 even

binds the arbitral centre itself to protect the confidentiality of arbitral documents (Art.45.2 HKIAC Rules).

64 CLAIMANT's attempt to have confidential documents admitted into this arbitration is a request that is inconsistent with the arbitral rules chosen by the PARTIES, and risks putting the Tribunal at odds with the HKIAC Rules.

2. These documents should be excluded as they were subject to improper and unethical solicitation

65 The second ground for exclusion applicable in this case lies in the unethical behaviour of CLAIMANT in its attempt to source this information. This improper behaviour should lead to the exclusion of these documents for two reasons. First, information should only be admissible if it has been solicited in such a way that the submitting party has 'clean hands', which CLAIMANT does not (a). Second, CLAIMANT's behaviour demonstrates bad faith towards these proceedings (b).

a. Claimant does not have clean hands in the manner in which they obtained the documents

66 As conceded by CLAIMANT (*Cl. Memo., § 68*) in cases of improperly obtained evidence, a crucial factor guiding admissibility is the guilt of the submitting party, or the 'clean hands' doctrine (Blair/Gojkovic 2018, p.256; *Caratube v Kazakhstan 2012*; Methanex 2005). In the circumstances, CLAIMANT does not have clean hands in the solicitation of this information.

67 Even if CLAIMANT's account is to be believed, and it indeed did not participate in the illegal hack or initial confidentiality breach suffered by RESPONDENT (*Cl. Memo.*, *§ 69*), this does not render it innocent of wrongdoing nor make these documents admissible. CLAIMANT's actions in soliciting the arbitration documents have been at the very least, unethical and improper, if not unlawful.

68 CLAIMANT's assertion that its 'clean hands' allow for the admissibility of the information (*Cl. Memo., § 69*) is a misapplication of the 'clean hands' doctrine. For example, the 'Kazakhstan case' cited by CLAIMANT (*Cl. Memo., § 69*), in which the 'clean hands' of the submitting party was sufficient to allow admission, involved evidence of significant materiality that had not only been hacked by a third-party, but had been made available to the general public on the internet (*Caratube v Kazakhstan 2012*). The submitting party had 'clean hands' as they had accessed the evidence via a website accessible to anyone who sought it. In another recent case, the submitting party

had ‘clean hands’ as they had transparently solicited the evidence from the newspaper in which it had already been published *(Ahongalu Fusimalohi v. FIFA 2012)*. By contrast, CLAIMANT not only actively solicited these documents, but attempted to purchase these documents in full knowledge of their disreputable source and confidential status, and at least some awareness that they had been stolen (*Cl. Memo., § 41)*. CLAIMANT’s behaviour does not align with the requirements of the ‘clean hands’ doctrine and instead is more closely demonstrative of bad faith.

b. Claimant’s attempt to purchase the documents is an example of bad faith

69 As CLAIMANT has correctly stated, one of the grounds on which the Tribunal could ‘reasonably reject the evidence’ is if it was ‘obtained by CLAIMANT’s active involvement’ (*Cl. Memo., § 68*). RESPONDENT submits that CLAIMANT was actively involved in obtaining these documents (*PO2*, *q. 41*). Even if they were uninvolved in the initial breach or hack, CLAIMANT’s direct solicitation and attempt to purchase confidential documents belonging to RESPONDENT (*PO2, § 42*) amounts to a serious breach of the procedural good faith required in this arbitration (UNCITRAL Art. 2(A)(1), Henriques 2015).

70 The duty to act in good faith in arbitration has been widely confirmed (Henriques 2015, p. 525), and the breach of the good faith principle has been increasingly accepted as a ground for excluding evidence (Waincymer 2012, p. 797). The IBA Rules provide for the exclusion of evidence that undermines fairness and equality, including evidence that was improperly obtained (IBA Rules Art. 9.2(g); O’Malley 2012, p. 322). Similarly, the Tribunal convened at ICSID in *EDF Services v Romania 2009* held that Tribunal discretion should be severely limited in cases of evidence obtained unethically, stating that:

> ‘Tribunals should refuse to admit evidence into the proceedings if…there are good reasons to believe that those principles of good faith and procedural fairness have not been respected.’ (Procedural Order 3, at § 47)

71 If CLAIMANT believed that these documents were integral to their case, it was open to them to argue this before the Tribunal and request document production under Art. 22.3 of the HKIAC Rules. Instead, they chose to pursue and validate this illegal source, even paying a significant amount of money just to obtain the documents and breach RESPONDENT’s valid confidentiality rights (*PO2, q. 41*). RESPONDENT submits that such behaviour is not only a clear example of bad faith, but actively works against CLAIMANT’s contractual obligation to act in the spirit of the Rules (Art. 13.9 HKIAC Rules). CLAIMANT cannot act in bad faith in its attempt to demonstrate bad faith.

72 While it may be unclear whether CLAIMANT was involved in the illegal activity, paying for access to confidential arbitral information is unethical and contrary to international public policy that demands arbitral regimes based on fairness, equality and efficiency (IBA Rules Foreword, p.2; IBA Rules Art. 9(2)(g); Art. 9(3)(e)). The Tribunal should exclude these documents in order to discourage the use of questionable evidence and sanction CLAIMANT's bad faith behaviour.

3. The admission of these documents will compromise Respondent's procedural rights and place an unjustified burden on the arbitration

73 CLAIMANT has noted that if the admission of these documents were to 'impede procedural fairness' for RESPONDENT, the Tribunal may 'reasonably reject the evidence' (*Cl. Memo., § 68).* CLAIMANT will see no procedural disadvantage if the documents are rules inadmissable (a). By contrast, the admission of these documents into evidence will compromise RESPONDENT's right of defence, right to be heard and right of equality (b).

a. Claimant will be wholly unaffected if these documents are excluded

74 CLAIMANT's suggestion that exclusion of this evidence would deny them the right to present their case in full is a misinterpretation of their rights under the HKIAC Rules (*Cl. Memo., § 62*). The Tribunal are required only to afford the parties a 'reasonable opportunity' of presenting their case (Art 13.1 HKIAC Rules; Moser/Bao 2017, para. 9.15).

75 Contrary to CLAIMANT's statement (Cl. Memo., § 52), this Tribunal is not bound to include any evidence, regardless of its probative value. Art. 22.3 HKIAC Rules establishes nothing more than that relevance and materiality are grounds on which the Tribunal 'may' allow evidence. By contrast, the Tribunal's power to exclude evidence is absolute and is not limited in any way (Art. 22.3 HKIAC Rules).

76 Tempering the right to be heard by applying a reasonableness standard is an important mechanism through which HKIAC limits evidence admission only to the most necessary (Moser 2017, § 9.15). It is entirely at the discretion of the Tribunal to interpret what is 'reasonable' in the circumstances. Similarly, RESPONDENT would not be obligated to produce these documents, contrary to CLAIMANT's suggestion (Cl. Memo., § 71-74). Like evidence admission, document production under Art. 22.3 HKIAC Rules is at the sole discretion of the Tribunal, who do not simply order production of any document

desired by a party unless the documents have real probative value (Moser/Bao 2017, § 9.160).

b. Respondent will suffer procedural disadvantage if these documents are admitted

77 CLAIMANT is aware that RESPONDENT is barred from submitting any documents from the other arbitration. Any procedural disadvantage will thus be on RESPONDENT, particularly its legitimate rights, both of equal treatment and to present its case (Art. 13.1 HKIAC Rules).

78 Given its Art. 45 (HKIAC Rules) obligations to the other arbitration, it would be impossible for it to adequately rebut the false accusations made by CLAIMANT. It is not merely RESPONDENT's confidentiality that is implicit in the documents, but also that of the other party to the arbitration. Offering any documents of its own volition would therefore be a breach of its obligations under Art. 45 (HKIAC Rules) and could attract sanctions in those proceedings.

79 Whether a party has the capacity to defend itself against items of evidence is a key factor influencing its admissibility (*Giovanna a Beccara 2007*, § 143). In deciding to exclude evidence from another arbitration, the Tribunal in *Giovanna a Beccara 2007* noted that information from a confidential arbitration is difficult to fairly assess and carried an 'unavoidable risk of out of context use' (§ 147):

> 'The exercise of putting the relevant [documents] back into their original context would not only be a very time-consuming exercise, but also a very delicate and difficult one given that full records of the proceedings are not freely accessible'

80 The admission of these documents would not only limit RESPONDENT's capacity to mount a defence and undermine the right to equality (Art. 13 HKIAC Rules; New York Convention (Art(V)(2)(b))), it would also present an unnecessary procedural burden on the arbitration.

4. Claimant has failed to demonstrate that these documents offer sufficient relevance and materiality to justify admission

81 Given the numerous applicable exclusionary grounds, the documents from the other arbitration must hold significant relevance and materiality in order to be admitted into evidence. While its exclusionary powers are unlimited, under HKIAC Rules the threshold for granting the admission of evidence is high: evidence *must* be both relevant and material (Art 22.3 HKIAC Rules). CLAIMANT's reason for requiring these

documents is solely to support their arguments that the documents are 'necessary to prove that Respondent is in bad faith rejecting contract adaptation' (*Cl. Memo., § 50*).

82 First, the Partial Interim award, as a ruling only on the jurisdiction of that specific Tribunal to hear that specific case, will have no influence on this Tribunal's decision on the presence of bad faith. Given that the Partial Interim Award would not demonstrate any bad faith, it holds minimal materiality to such a claim and should be excluded.

83 Second, the submission also will not support CLAIMANT's argument, as RESPONDENT has in no way acted in bad faith during these proceedings. It has sought only to enforce its valid rights in both arbitrations. RESPONDENT pursued contract adaptation as an appropriate remedy in the other arbitration as the sales agreement, with a clear choice of law in favour of Mediterranean law, provided for such a remedy (*PO2, q. 39*). By contrast, the AA in this arbitration is governed by Danubian law and requires an express conferral of power in order to have the contract adapted (*PO2, q. 36*). Thus, even if the submission were to show RESPONDENT requesting adaptation, it has a clear legal basis for doing so.

84 It is a widely accepted practice that Tribunals will exclude evidence that it considers to be irrelevant or immaterial (Pilkov 2014, p. 147). As a ruling on jurisdiction, the Partial Interim Award can offer no support to CLAIMANT's bad faith allegations, and nor will the submission reflect any bad faith on the part of RESPONDENT. Ultimately, these circumstances considered alone or in tandem with the various other exclusionary grounds, promote the exclusion of these documents.

5. All of these grounds, taken individually or collectively, are sufficient to justify the exclusion of these documents

85 RESPONDENT notes that there are multiple grounds of exclusion applicable to these documents (IBA Rules Art. 9(2)(a),(b),(g)). Even if the Tribunal is not satisfied that any one of the aforementioned grounds taken alone are sufficient to justify exclusion, when taken cumulatively, they create a clear basis for exclusion. This is consistent with arbitral decisions that use a cumulative approach to questions of admissibility (*Caratube v Kazakhstan 2012*; *RosInvestCo UK v Russian Federation 2010*). This Tribunal should utilise its discretionary powers to exclude the submitted documents given that there is a substantial legal basis for their exclusion.

Conclusion to issue B

86 Claimant is not entitled to submit evidence for the other arbitration proceedings in this arbitration. The documents are confidential, obtained by unethical means and will cause procedural disadvantage for RESPONDENT. Moreover, they hold minimal probative value. Whilst any one of these issues is a sufficient ground for exclusion, when considered cumulatively it is clear that this evidence is inadmissible.

Issue C, CLAIMANT is not entitled to adaptation of the SA under either Clause 12 or CISG

87 This Tribunal must uphold the sanctity of the SA. *Pacta sunt servanda* is a paramount feature of international contract law (Liu 2005). The binding nature of a contract is a key feature of Mediterraneo general contract law (UNIDROIT Art 1.3 §1, Art 6.2.1, §1). CLAIMANT is bound by the SA for three reasons: first, adaptation is not a remedy that can be applied retroactively; second, CLAIMANT must pay the tariff as it agreed to a DDP term and clause 12 does not derogate from DDP; third, CLAIMANT is not entitled to payment of $1,250,000 USD under the CISG.

1. Adaptation is not a remedy that can be applied retroactively

88 CLAIMANT seeks to retroactively adapt the price on a contract that has been fully performed. In so doing, CLAIMANT is asking the Tribunal to extend adaptation beyond its well-known and understood forward-acting application (Fucci 2006, UNIDROIT Art 6.2.2. §4). In this case there are no further payments or shipments that an adaptation could be applied to.

89 CLAIMANT has failed to address this point. This failure to outline the quite extraordinary grounds required to persuade the Tribunal to break new legal ground in the retroactive use of adaptation, means CLAIMANT's application must fail.

2. CLAIMANT agreed to DDP and clause 12 does not derogate from DDP

90 CLAIMANT agreed to DDP with Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery (*Cl. Ex. C 5 §8, PO2, Q.10*). Under DDP, CLAIMANT must ensure import clearance by dealing with any customs requirements, permit agencies or taxation on importation (Bergami 2016, p. 3; *Incoterms Rules 2010*). A tariff is a taxation or duty on importation and falls within the scope of DDP under the *Incoterms Rules 2010*.

91 Incoterms can be modified to suit the individual requirements of contracting parties (Oglinda/Olariu, p. 112; IncotermsExplained.com). The PARTIES modified DDP by expressly excluding tank rental and handling fees, and insurance during shipment (*SA Cl. 10 & 13*). The PARTIES did not expressly exclude tariffs from CLAIMANT's responsibilities under DDP.

92 Given CLAIMANT's experience in international trade (see §108 below), and the fact that the tariff was foreseeable (see §106 - §110 below), it is reasonable to conclude that had CLAIMANT wished to exclude liability for tariffs on imports it would have at least sought to do so. It is unreasonable of CLAIMANT to now seek that the RESPONDENT pays for the bulk of the tariff.

93 CLAIMANT incorrectly claims hardship under clause 12 of the SA alleviates it of its obligations under DDP. CLAIMANT is wrong for three reasons: firstly, the tariff is not comparable to additional health and safety requirements (a); secondly, the tariff was foreseeable so it cannot constitute an unforeseen event (b); and, thirdly, under Mediterraneo law the tariff is insufficient to constitute hardship (c).

94 The onus of proof is on CLAIMANT to justify its case. Not only must CLAIMANT discharge the burden of proof, it must prove each of the three points (a) through (c) above in order to be successful. RESPONDENT submits that CLAIMANT has failed to prove its case on all three points. But, the TRIBUNAL only needs to find in favour of the RESPONDENT on one of the three grounds for RESPONDENT to successfully demonstrate that clause 12 provides no relief for CLAIMANT.

a. The tariff is not comparable to additional health and safety requirements

i. Clause 12 is to be construed narrowly

95 CLAIMANT broadly interprets clause 12 to include any act of a public authority (*Cl. Memo. §79*) and reaches outside the contract to selective evidence from the negotiations to support its interpretation (*Cl. Memo. §80-83*). In so doing, CLAIMANT misconstrues the negotiations and the definition of "comparable".

96 Applying Arts 4.1, 4.2 and 4.3 of UNIDROIT as well as Art 8 CISG allows the tribunal to consider evidence of the pre-contractual negotiations when interpreting the SA. As UNIDROIT 6.2.2 §7 allows, the PARTIES modified the UNIDROIT definition of hardship through their negotiations.

97 CLAIMANT's initial position during negotiations was to include the ICC Hardship clause in the contract (*Resp. Ex R2*). RESPONDENT rejected the ICC Hardship clause

and instead the PARTIES agreed to include a "narrow hardship reference" in clause 12 (*Resp. Ex. R3*).

98 The final wording of Clause 12 was based on wording suggested by RESPONDENT to take into account CLAIMANT's concerns about additional health and safety requirements that might possibly by imposed on imported products (*PO2, Q12*). The suggestion was made with reference to Ms Napravnik's email of 31 March 2017 from which the key phrase "additional health and safety requirements" was directly lifted and placed into the SA (*PO2 Q 12; Cl. Ex. C 4*).

99 The effect of the wording in clause 12 is to only provide relief for hardship arising out of particular events: additional health and safety requirements or comparable unforeseen events. An event such as a sudden and dramatic increase in the cost of labour in Mediterraneo is not comparable to additional health and safety requirements and would not enliven clause 12.

100 The intent of the PARTIES, therefore, was to limit grounds for a claim for hardship to additional health and safety requirements or the like. Public authorities make many decisions on many grounds. It is far too broad an interpretation of clause 12 for CLAIMANT to claim any act of a public authority affecting the importation of goods is comparable to an additional health and safety requirement (*Cl. Memo. §79*).

101 While CLAIMANT initially sought to carve out "changes in customs regulations or import restrictions" (*Cl. Ex. C 4*), RESPONDENT did not agree to that wording and those words do not exist in clause 12 of the SA (*Cl. Ex. C 5*). CLAIMANT now seeks to squeeze them into the word "comparable" through Art 8(2) of the CISG (*Cl. Memo. §81*). Art 8(1) prevents CLAIMANT using Art 8(2) because CLAIMANT knew RESPONDENT agreed to hardship arising from additional health and requirements and the like. CLAIMANT is not entitled to claim that any changes in customs regulations or import restrictions cause hardship; rather, the negotiation history and wording of Clause 12 limits them to hardship claims from events akin to additional health and safety requirements.

102 CLAIMANT's application of the *contra proferentum* rule is incorrect. Firstly, CLAIMANT has neglected to demonstrate that Clause 12 contains any existing ambiguity. Secondly, *contra proferentum*, as applied under either Art 8 CISG or UNIDROIT Art 4.6, relates to circumstances where a party supplies contract terms from its own standard contracts (CISG-AC Opinion No. 13; *Cysteine Case; Automobile Case*). Clause 12 began as a standard term of the CLAIMANT and then bespoke phrases were

placed into it. Given the wording is bespoke and not standard, *contra proferentum* ought not apply in this instance.

ii. The tariff has a fundamentally political nature

103 The additional health and safety requirements that prompted CLAIMANT's desire to seek a hardship exemption were extra testing for foot and mouth disease and longer quarantine time on three mares being imported into Danubia (*PO2, Q21*).

104 In this instance, the tariff has a fundamentally political character: the tariff was put in place as a "tit for tat" retaliation to the 25% tariff levied by Mediterraneo on agricultural products from Equatoriana (*Cl. Ex. C6, PO2, Q23*). Simply put, the tariff is part of a political trade war between Mediterraneo and Equatoriana.

105 On the evidence, there is no rationale for the tariff that involves either the health or the safety of the people, flora or fauna of Equatoriana. Therefore, the tariff is not comparable to additional health and safety requirements.

b. The tariff was foreseeable so cannot constitute an unforeseen event

106 The tariff history demonstrates that CLAIMANT could reasonably have foreseen that Equatoriana was likely to impose a retaliatory tariff. In its pre-election policy position, the current Mediterraneo government flagged tariffs on agricultural imports (*Cl. Ex. C6*). The current Mediterraneo government was elected on 25 April 2017 (*PO2, Q.23*). On 5 May 2017, the Mediterraneo government appointed the anti-free trade Ms Cecil Frankel as Superminister for Agriculture, Trade and Economics (*PO2, Q.23*). The PARTIES then concluded the SA on 6 May 2017 (*Cl. Ex. C5*).

107 Where an incoming government has promised tariffs, then it is reasonable to expect tariffs to be enacted. Tariffs tend to result in retaliatory tariffs, and recent history affords many examples of tariff based trade wars (Pavlak 2018). An experienced international trader in Mediterrano, dealing with a company from Equatoriana, acting on 6 May 2017, ought reasonably to be aware that tariffs could be a problem under a long-term contract.

108 CLAIMANT is an experienced international trader as evidenced by its: one, internal policy on contracts submitted to foreign laws or dispute resolution in the country of the counter party (*Resp. Ex. R2*); two familiarity with the international transport of semen which underpinned the request for delivery DDP (*Cl. Ex. C3*); three, experience with import issues that can affect international sales agreements (*Cl. Ex. C4*, *PO2 Q.21*). CLAIMANT ought to reasonably have foreseen that tariffs between Equatoriana and Mediterraneo could be an issue during the life of the SA.

109 Foreseeability does not require proof that a tariff was promised on frozen horse semen. A reasonable person in the shoes of CLAIMANT would have foreseen that broad and wide-ranging tariffs were probable given Mediterraneo put a confirmed protectionist in as a super minister for agriculture, trade and economics (*PO2 Q23)*.

110 Clause 12 requires the comparable event to be unforeseen to trigger hardship. Given the foreseeability of the tariff, it is beyond the scope of the hardship term.

c. Under Mediterraneo law the tariff does not constitute hardship

111 CLAIMANT fails to define hardship with reference to UNIDROIT, the general contract law of Mediterraneo, which governs the SA. (*PO1, p. 53, §4*; *SA, §14*). While the tariff may have made performance "more onerous" for CLAIMANT (*Cl. Memo., §85*), it cannot constitute hardship under UNIDROIT because: there is no performance yet to be rendered by CLAIMANT (**i**); it has not fundamentally altered the equilibrium of the SA (**ii**); nor does it satisfy UNIDROIT Art 6.2.2 (b) and (d) (**iii**).

i. There is no performance yet to be rendered by CLAIMANT

112 UNIDROIT holds that "once a party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance" (Art 6.2.2 §4). CLAIMANT is seeking to claim hardship even though it has already completed the final delivery and paid the tariff (*Cl. Ex. C 5*, *Answer to Notice of Arbitration §12*). CLAIMANT's application is based on a fundamental error: it cannot at law seek to increase the price after it has delivered the goods.

ii. The tariff has not fundamentally altered the equilibrium of the SA

113 In the alternative, the effect of the tariff fails to reach the hardship threshold. The total cost of performance for CLAIMANT was $95,000 per dose (*PO2, Q31*). The tariff resulted in the CLAIMANT paying $30,000 per dose to enter Equatoriana. The tariff therefore increased the CLAIMANT's total cost of performance per dose by 31.6%.

114 This is below the 100% hardship threshold proposed by Brunner (2009, pp. 428-435). It is well below the 150% - 200% threshold suggested by Schwenzer (2008, p. 717). Furthermore, Schwenzer has found no international court or arbitral decision, which has upheld a finding of hardship under CISG sales agreements (Schwenzer 2008, p. 716). The Tribunal ought to be guided by the commentary and find that a 31.6% increase in the cost of performance is insufficient to cause a fundamental alteration to the equilibrium of the contract.

115 CLAIMANT argues the tariff represents a 200% increase in the variable costs of performance (*Cl. Memo., §122*). UNIDROIT Art 6.2.2 does not refer to "variable cost", it refers to "the cost of a party's performance". Commentary defines hardship as "a substantial increase in the cost for one party of performing its obligations" (UNIDROIT Art 6.2.2, §1). Both Art 6.2.2. and its commentary reference the total cost of performance, not the "variable cost". CLAIMANT is incorrect to assess hardship on the basis of "variable cost".

116 RESPONDENT concedes that financial ruin can lower the threshold at which hardship can be found (Girsberger/Zapolskis 2012, p. 131). CLAIMANT exaggerates when it claims it risks bankruptcy (*Cl. Memo., §126*). It is merely going to have to sell assets to renew its line of credit (*PO2, Q59*). CLAIMANT's circumstances do not amount to financial ruin.

117 Further, CLAIMANT was able to pay the tariff at the time of performance. If CLAIMANT was unable to pay the tariff, it would have been forced to withhold performance and CLAIMANT did not withhold performance. International trade involves weathering higher fluctuations than occur within domestic markets (Schwenzer 2009, p. 717). It cannot be found that CLAIMANT's circumstances justify a reduction in the threshold for hardship to a mere 31.6% increase in the cost of performance.

iii. The tariff fails to satisfy UNIDROIT Art 6.2.2 (b) and (d)

118 UNIDROIT Art 6.2.2(b) and Art 6.2.2(d) prevent hardship being claimed where CLAIMANT could have taken the tariff into account at the time of the conclusion of the contract or if the risk of the tariff was assumed by CLAIMANT.

119 As outlined above (§106-109), at the time of the conclusion of the SA, a reasonable person in the position of CLAIMANT would have been aware that new tariffs were a distinct possibility during the life of the SA. Therefore, the new tariff could reasonably have been taken into account by CLAIMANT at the time of the conclusion of the contract. UNIDROIT Art 6.2.2(b) therefore bars CLAIMANT from claiming hardship arising from the tariff.

120 CLAIMANT agreed to DDP and DDP provides that CLAIMANT must pay the tariff (§90-92 above). Therefore, when it signed the SA on 6 May 2017, CLAIMANT accepted that it bore the risk of paying any tariffs that arose during the life of the SA and is now barred from a claim for hardship under UNIDROIT 6.2.2(d).

d. Conclusion

121 CLAIMANT has failed to prove any of the three key elements required to enliven Clause 12: the tariff is not comparable to additional health and safety requirements; the tariff was foreseeable; and the tariff did not cause hardship as defined by UNIDROIT. The winds of fortune often buffet international traders, but the trust that international commerce requires is built on promises being kept even where circumstances change to the detriment of one party or the other. The principle of *pact sunt sevanda* places the change in circumstances on the party on which it falls (Schwenzer 2008, p. 709), and CLAIMANT has not sufficiently demonstrated that it should be absolved of its responsibilities under the SA.

3. Clause 12 of the SA does not contain an adaptation mechanism

122 CLAIMANT seeks adaptation as a remedy but is prevented by the fact that the SA and AA do not use the term "adapt" or "adaptation". CLAIMANT has neglected to address the requirements UNIDROIT Art 4.8 places on supplying an omitted term into the SA. Furthermore, there is no evidence of a common intent to include the remedy of adaptation in the SA (**a**) and CLAIMANT has misrepresented the RESPONDENT's subsequent conduct (**b**). Therefore, clause 12 cannot be construed to allow the Tribunal to adapt the SA.

a. There is no evidence of a common intent to include adaptation in the SA

123 First, clause 12 of the SA and the AA do not include the term "adapt" or "adaptation". It is reasonable to expect that if CLAIMANT wanted adaptation as the remedy for certain circumstance, it would have expressly inserted it into the SA or AA.

124 Secondly, CLAIMANT relies upon evidence of a meeting of the minds between Ms Napravnik and Mr Antley (*Cl. Memo. §97*) to substantiate the claim that the negotiation history demonstrates the parties had agreed on adaptation. This is erroneous, Ms Napravnik and Mr Antley had only agreed on clauses 1 through 5 by the time of the car accident (*PO2 Q 4*).

125 The remaining clauses were to be further negotiated and were agreed by Mr Ferguson and Mr Krone (*PO2 Q 4*). Mr Ferguson and Mr Krone elected to make no reference to adaptation in the final version of clauses 6 – 15.

b. CLAIMANT has misrepresented the RESPONDENT's subsequent conduct

i. RESPONDENT did not admit that adaptation is a remedy under Clause 12

126 Mr Shoemaker's statement to Ms Napravnik, in the phone conversation on 21 January 2018, cannot be construed as an "unequivocal acknowledgment of the adaptation mechanism" (*Cl. Memo. §99*). In the first place, Mr Shoemaker never promised to pay the tariff, nor did he promise to pay the bulk of the tariff (*Resp. Ex. R 4*). In fact, Mr Shoemaker's statement was definitively "equivocal" because it began with an "if".

127 Mr Shoemaker did not have access to legal advice at the time and therefore could not provide Ms Napravnik with an unequivocal response (*Resp. Ex. R 4*). Further, Mr Shoemaker had two conditions in his statement that needed to be met before it could be understood as an agreement to change the price: 1) the contract had to provide for an increased price; and 2) in circumstances where a high additional tariff had occurred.

128 Ms Napravnik, as an experienced lawyer, must have been aware that the SA did not expressly contain terms that met the conditions Mr Shoemaker put to her. RESPONDENT cannot be held responsible for Ms Napravnik's unreasonable reliance upon Mr Shoemaker's equivocal statement.

ii. Shoemaker's statement to Napravnik does not bind the RESPONDENT

129 Mr Shoemaker is not a lawyer (*Resp. Ex R 4*), nor is he an agent of the RESPONDENT as proposed by the CLAIMANT (*Cl. Memo., §§100-101*). The contract was first negotiated by a company lawyer, Mr Antley, and then finalised by the head of the legal department, Mr Krone (*Resp, Ex. R 3*). CLAIMANT was told that Mr Shoemaker was able to answer questions about the SA (*PO2 Q 32*). There is a large difference between designating a person to answer questions about an already agreed contract and providing an employee with the authority to agree to either a renegotiation or an adaptation of that contract. It is unreasonable to claim Mr Shoemaker is an agent able to bind RESPONDENT.

130 Ms Napravnik is responsible for negotiating CLAIMANT's international agreements. Given that Mr Shoemaker made an equivocal statement and he was not an agent capable of binding the RESPONDENT, it was unreasonable for the Ms Napravnik to have relied upon his statement.

Conclusion

131 In conclusion, clause 12 offers no avenue of relief to the CLAIMANT. CLAIMANT continually reaches beyond the four corners of the contract in an effort to import the remedy of adaptation into the SA but has failed to prove its case. There is no evidence that Mr Krone and Mr Ferguson agreed to adaptation when finalising clauses 6 -15. Mr

Shoemaker's statement does not amount to a commitment to pay and it is unreasonable to maintain otherwise.

4. CLAIMANT is not entitled to payment of $USD 1,250,000 under the CISG

132 RESPONDENT submits that any request for adaptation under the CISG cannot be sustained because (a.) Art 79 CISG provides for hardship but the 31.6% tariff does not meet the threshold required to qualify as hardship. Furthermore, although (b.) hardship is a matter governed by the CISG but not expressly settled within it, however CLAIMANT's recourse to UNIDROIT is not justified.

133 Instead, (c.) any interpretation of Art 79 CISG should, according to Art 7(2) CISG, first and foremost consider the general provisions (Art 7 – 13) of the CISG which support the finding that hardship has already been settled by the agreement and conduct of the PARTIES.

134 Finally, (d.) even if a recourse to UNIDROIT should be found to be available, the circumstances have been shown to fall short of the required threshold for hardship under the relevant provision of UNIDROIT.

a. Hardship is provided for under Art 79 CISG

135 Scholarship supports the fact that hardship is governed by the CISG (Brunner 2009, p. 213; Schwenzer 2008, p. 725; Lindstrom 2006, p. 24), despite it not being expressly written into the words of the CISG.

136 Although the CISG does not expressly provide for circumstances of either hardship, nor for adaptation as a remedy for hardship (Guillemard 1999; Lindstrom 2006), it is now well established that issues of non-performance resulting from economic impediments (i.e. hardship) are provided for under Art 79 CISG (Schwenzer 2008, p. 713; Schwenzer 2010, p. 1076).

i. The tariff does not meet the threshold required for hardship under Art 79 CISG

137 The fact that 'fluctuations of prices are foreseeable events in international trade and [are] well included in the normal risk of commercial activities' (Lindstrom 2006, p. 7) is also supported by the case law (Frozen Raspberries Case; UNILEX d. 12.06.2001). In fact, in international trade, 'economic difficulties only under very narrow conditions can constitute an impediment and […] increased procurement and production costs alone do not constitute exempting impediments.' (Lindstrom 2006, p. 7-8)

138 Indeed, 'courts interpreting Article 79(1) CISG have been very reluctant to allow hardship in case of fluctuations of prices' (Schwenzer 2008, p 716). The reluctance of

courts to find hardship is not surprising given the importance of the strict liability of contracts in ensuring confidence in international trade deals (described at §151 - 152).

139 For example, where the 1956 closure of the Suez Canal meant that shipping had to occur around the Cape of Good Hope, English courts found that the considerably longer and more expensive route was not cause for exemption from the contracts. Similarly, under the CISG, CLAIMANT (as the seller) is obliged to overcome the impediment and transport goods in spite of a significant increase in price 'even if this would result in a loss for the seller' (Lindstrom 2006, p. 10). This example is directly comparable to CLAIMANT's obligation to pay the tariff as a requirement of the shipping duties included in their agreement to DDP and under the CISG.

140 Again, Art 7(1) must be turned to in order to emphasise the intention of the CISG to regulate and support international trade. A lower threshold for hardship would perhaps be considered in domestic markets where transactions are less likely to be so affected by fluctuations in price.

141 Therefore, it is unnecessary to dispute how hardship might be settled under Art 79 CISG, as the 31.6% tariff in this case should not be found to constitute hardship under the CISG.

b. Hardship is a matter governed by the CISG but not settled within it

142 Art 79 CISG provides for an exemption from 'liability for a failure to perform' (CISG Art 79). That exemption only applies to claims for damages (Art 79(5) CISG). In this regard, respondent concedes CLAIMANT's point that adaptation is not present in the wording of Art 79 CISG (Cl. Memo. §112). However, this does not imply a gap that justifies an automatic recourse to UNIDROIT via Art 7(2).

143 In a case between a Swedish buyer and Italian seller (Nuova Fucinati. v Fondmetall), where the price of goods increased by 30% and the seller claimed avoidance of contract, an Italian court held that the CISG does not contain a gap with regards to hardship. The court found that hardship is not expressly excluded by Art 4 CISG from the scope of the CISG. The court further held that avoidance is not contemplated as a remedy either in Art 79 CISG or elsewhere in the Convention. Similarly, RESPONDENT submits that Art 79 CISG cannot be read as containing a gap with regards to hardship, nor is adaptation contemplated within the CISG as a remedy for hardship.

i. Recourse to UNIDROIT is not justified by Art 7(2) CISG

144 It is conceded that adaptation is not found within the wording of Art 79 CISG (Cl. Memo. §112), however, this does not justify an immediate leap to the UNIDROIT principles to settle the matter of hardship. UNIDROIT is in no way automatically

considered a 'general principle on which [the CISG] is based' (CISG Art 7(2); Veneziano 2010, p.143). Much scholarly opinion, for different reasons, denies that UNIDROIT may be used in any way to interpret or supplement the CISG (Veneziano 2010; Drobnig 1998; Ferrari 1998).

145 CLAIMANT is therefore erroneous in employing the UNIDROIT principles to 'fill' a 'gap' 'pursuant to Art 7(2) CISG' (Cl. Memo. §112). Indeed, CLAIMANT uses a 'a target-oriented interpretation' of Art 79 CISG so as to justify recourse to UNIDROIT, which 'is unacceptable' (Lindstrom 2006, p. 24).

146 Indeed, Art 79 CISG has been described as 'intended to define the boundaries of the obligor's performance obligation in an exhaustive manner' (Brunner 2009, p. 218). There is therefore no gap in the CISG regarding an obligor's reliance on hardship to exempt them from liability that would permit recourse to UNIDROIT (ibid).

147 Despite some debate, at the least, it is highly questionable in circumstances of hardship that there is sufficient justification for the application of UNIDROIT via Art 7(2) CISG (Veneziano 2010, p. 144). Instead, interpretation must primarily be settled via Art 7(2) CISG according to the general provisions of the CISG itself (Art 7-13 CISG).

c. Issues of hardship have been settled by the conduct and agreement of the PARTIES

i. Hardship must be settled in conformity with the general provisions of the CISG

148 Art 7(1) and (2) CISG together do not support a recourse to UNIDROIT. Instead, as per the specific wording of Art 7(2) matters 'are to be settled in conformity with the general principles on which it is based'. The general provisions of CISG, especially those outlined at Art 7, 8 and 9, are paramount and should certainly be considered before a recourse to UNIDROIT is justified.

149 Furthermore, Art 7(1) also emphasises that in interpreting Art 79CISG, 'regard is to be had to […] the need to promote uniformity in its application. An interpretation allowing for a permanent exemption from liability via adaptation through a recourse to UNIDROIT would also lead to 'an extremely vague provision for changed circumstances' (Lindstrom 2006, p. 25). Instead, due to the unsettled and differing views concerning hardship and Art 79 CISG, it has been recommended that contracting parties should agree on how hardship, should it arise, is to be settled between themselves.

150 According to Art 7(1) CISG, an express goal of CISG is its uniform application. 'An interpretation of Article 79 resulting in a gap in the CISG concerning hardship would not promote this goal' (Lindstrom 2006, p. 25). A more appropriate interpretation of Art 79 CISG would reach an outcome that assists in reaching a uniform application of the CISG.

ii. The PARTIES' intention is interpreted from the terms of the contract

151 A fundamental underpinning principle of the lex mercatoria on which the CISG is founded is pacta sunt servanda (Fauvarque-Cosson 1998, p. 482). It is a 'general principle that contracts should prima facie be enforced according to their terms […] which declares the strict liability of contractual obligations' (Lord Mustill, reproduced in Kahn 1992, p. 422).

152 International trade depends on the paramount importance of the contract as a legal transaction. Situations where all contracts would be entered into with the precondition that changed circumstances would unequivocally lead to adaptation would undermine the international commercial legal regime and have an adverse effect on international trade (Lindstrom 2006, p. 2).

153 Both Art 7 and Art 8 CISG give force to the argument that in interpreting Art 79 CISG, the Tribunal should first hold steadfast the sanctity of the SA and seek to give effect to the contractual terms. The autonomy of the PARTIES' intentions through their agreement is further highlighted by Art 6 CISG (Schwenzer/Hachem 2010; Perillo 1997, p. 11).

154 The requirements outlined in Art 7(1) CISG to have regard to the international character of the CISG and the need to promote uniformity in its application (Lindstrom 2006, p. 25) also emphasise the need to look first and foremost to the terms of the SA in order to settle issues of hardship.

155 Construction of the terms of the SA itself must be paramount in understanding the allocation of risk and in resolving any disagreement, both according to the provisions of the CISG (Schwenzer/Hachem 2010, p. 135) and to the scholarship (Brunner 2009, p. 104). Any disputes must therefore be settled according to an interpretation of the terms of the contract agreed to between the PARTIES (Brunner 2009, p. 395). 'The starting point has to be the contract itself. Primarily, it is up to the parties to define their respective spheres of risk in the contract' (Schwenzer 2008 p 715).

iii. Art 9 provides that the PARTIES are bound by their agreement to DDP

156 As per the provision in Art 9 CISG, the PARTIES are bound by the widely acknowledged and accepted usage in international trade by their agreement to DDP ('delivery duty paid'), a mode of transport which is universally recognised under the Incoterms Rules 2010 (see §90-91 above).

157 It is also established that in applying the CISG to any dispute, 'one must first examine whether the issue is or may be solved by interpreting the parties' intentions under Article

8 and those elements of their previous dealings that amount to established practices, (Article 9(1))' (Schwenzer/Hachem 2010, p. 135).

158 The provision in Art 9 CISG binds the PARTIES to any to any usage and any practice established between themselves. As a universally recognised term, DDP must have been understood by both PARTIES according to its widely acknowledged use as an Incoterm with the very widely acknowledged and recognised obligations that accompany it (for a description, see §92-93 above).

iv. RESPONDENT's behaviour does not entitle CLAIMANT to adaptation

159 Additionally, Mr Shoemaker's comment which CLAIMANT argues was relied on was equivocal and did not give rise to a promise of negotiation (see §126-128). Furthermore, RESPONDENT cannot be held or bound by Mr Shoemaker's statement (see §129-129).

160 Art 8(2) CISG provides that the PARTIES' intentions are to be construed by means of objective interpretation (Brunner 2009, p. 104). It is also well established that Art 8 CISG supports the proposition that any interpretation of an issue must start by an examination of what the parties themselves agreed to in the terms of the contract (Brunner 2009, p. 395; Schwenzer 2008, p. 715; Schwenzer/Hachem 2010, p. 135). In this case the PARTIES have agreed on terms limiting the application of hardship through clause 12 of the SA. The PARTIES have also accounted for the tariff through their agreement to DDP.

161 CLAIMANT can therefore not find recourse to UNIDROIT when not only is there no gap in Art 79 CISG to be filled but the parties themselves have agreed on terms which accommodate the 31.6% tariff as a liability attributed to CLAIMANT.

iv. There has been no 'failure to perform' by either of the PARTIES

162 It is important to note that the mitigation of the principle of *pacta sunt servanda* via hardship 'permits a renegotiation of the contract so as to re-establish the equilibrium of the contract and to facilitate its survival' (Guillemard 1999). The whole point of adaptation therefore is the continuing cooperation of the parties and to keep the contract alive (Horn 1985, pp. 181-182).

163 Art 79 CISG exists to temper the idea of strict liability under the doctrine of pacta sunt servanda. There is no uncertainty as to its application only as an exemption for a failure to perform (CISG Art 79; MacQueen 2012, p. 300; Schwenzer 2008, p. 724). This is not the case in this dispute. In fact, CLAIMANT and RESPONDENT have both entirely performed their obligations under the contract.

164 Again, the terms of the contract are paramount in seeking to settle any perceived issue of hardship. In this case each of the PARTIES obligations, including RESPONDENT's

payments and CLAIMANT's shipments, have been performed according to the terms of the SA. There has been no 'failure to perform' required to enliven Art 79 CISG. Seeking remedy via the provision in Art 79 CISG is therefore not available to the CLAIMANT from the outset.

165 RESPONDENT also notes that reference made by CLAIMANT to the Scafom Case to support this point is misleading (Cl. Memo., §112). In Scafom, delivery of the goods specified in the Contract had not been made. The facts of Scafom are not, therefore analogous to these circumstances and it cannot be relied on to construct this argument. Indeed, much of the case law supports the fact that hardship is only ever disputed in cases of non-performance (UNILEX d. 12.06.2001; Frozen Raspberries Case).

d. In the alternative, the threshold for hardship has not been met under UNIDROIT

166 Finally, should the Tribunal find that despite the above submissions, recourse to UNIDROIT is justified, it has been shown above that the circumstances of this case also do not meet the required threshold for hardship under UNIDROIT. Therefore, either way, adaptation of the contract is not available to CLAIMANT.

e. Conclusion

167 The threshold for hardship as a matter governed by Art 79 CISG is not met by the 31.6% tariff and therefore relief is not available to CLAIMANT directly under that provision. If the Tribunal finds that the tariff does constitute hardship under Art 79 CISG, then Art 7(2) CISG must be turned to as hardship is a matter governed but not expressly settled by the CISG. Recourse must then be made t% the general provisions of the CISG, especially Art 7, 8 and 9.

168 The general provisions negate any recourse to UNIDROIT as superfluous firstly, because the threshold for hardship under Art 79 CISG has not been met, furthermore, because hardship is a matter settled according to the PARTIES' agreement, i.e. within the SA, and finally, because the contract has been performed, i.e. there is no non-performance.

Conclusion to issue C

169 In conclusion, CLAIMANT is not entitled to adaptation of the SA. Adaptation cannot be applied retroactively to performance that has already been completed. CLAIMANT agreed to DDP and clause 12 of the SA does not exempt it from liability to pay the tariff. Even if adaptation could be applied retroactively, it is not a remedy provided for by the SA. Under CISG, the requirements of hardship have not been met and CLAIMANT is not entitled to the relief it seeks.

Request for Relief

On the basis of the foregoing submissions, RESPONDENT respectfully requests the Tribunal:

1. Find that the Tribunal does not have jurisdiction or power to adapt the price of the SA;
2. Reject CLAIMANT's request to admit evidence for the arbitration;
3. Find that CLAIMANT is not entitled to adaptation under the SA or CISG;
4. Order that CLAIMANT is to pay RESPONDENT's costs in this arbitration and the costs of the arbitration.

Respectfully submitted on 24th January 2019 by counsel for RESPONDENT.
Lauren Meath
Paul Sutton
Cassie Knight-Grull
Karim Ibrahim
Artemis Wilkinson