Sixteenth Annual Vis East Moot
International Commercial Arbitration Moot
31 March – 7 April 2019

Memorandum for Respondent

NUS
National University
of Singapore

On Behalf Of
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana
(Respondent)

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

Counsel

Daniel Fong • Kenneth Lim
Law May Ning • Teo Tze She

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	Model Law on International Commercial Arbitration (with amendments as adopted in 2006) 7 July 2006	
PICC	UNIDROIT Principles of International Commercial Contracts 2016 9 May 2017	27, 50, 96, 97, 107, 108
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Effective 1 April 2014	14

Travaux Préparatoire

Abbreviation	**Citation**	**Paragraphs**
A/CN.9/SER.A/1974	United Nations Commission on International Trade Law A/CN.9/SER.A/1974 New York: United Nations, 1975	101
A/32/17	Report of the United Nations Commission on International Trade Law on the work of its tenth session UN Doc. A/32/1 Vienna: 23 May – 17 June 1977	95, 101

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CISG AC 7	CISG-AC Opinion No. 7, "Exemption of Liability for Damages under Article 79 of the CISG". Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007	94
Azeredo	Azeredo Da Silveira, Mercédeh *Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation* The Netherlands: Kluwer Law International (2014)	85, 95, 99, 101, 105
Belohlavek	Belohlavek, A. J. "Importance of the Seat of Arbitration in International Arbitration: Delocalisation and Denationalisation of Arbitration as an Outdated Myth" ASA Bulletin 31-2 (2013)	44
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Berger/Fletcher	Berger, Klaus P. "Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense" In Fletcher, Ian F.; Mistelis, Loukas A.; Cremona, Marise *Foundations and Perspectives of International Trade Law* London: Sweet & Maxwell (2001)	37
Born	Born, Gary B. *International Commercial Arbitration*, 2nd Ed The Hague: Kluwer Law International (2014)	10, 30, 32, 34, 36, 37, 43, 44
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DiMatteo/Janssen/Magnus/Schulze	DiMatteo, Larry A. "Chapter 22: Excuse: Impossibility and Hardship" In DiMatteo/Janssen/Magnus/Schulze *International Sales Law: Contract, Principles & Practice* Germany: Nomos Verlagsgesellschaft (2016)	88, 96
Farnsworth	E. Allan Farnsworth "*Farnsworth on Contracts*" (3rd Ed) New York: Aspen Law & Business (2004)	60
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Redfern/Hunter	Blackaby, N.; Partasides, C; Redfern, A.; Hunter, Martin J. *Redfern and Hunter on International Arbitration*, 6th Ed The Netherlands: Kluwer Law International (2015)	30, 32, 36
Rimke	Rimke, Joern "Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts" In Pace University International Law Review *Review of the Convention on Contracts for the International Sale of Goods (1999-2000)* The Netherlands: Kluwer Law International (2001)	78
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Schwenzer	Schwenzer, Ingeborg "Force Majeure and Hardship in International Sales Contracts" 39 Victoria University of Wellington Law Review 709 (2008 – 2009)	80, 101
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Scafom International	*Scafom International BV v. Lorraine Tubes S.A.S.* Belgian Cassation Court Case Reference No. C.07.0289.N 19 June 2009	94
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Aita v Ojjeh	*G. Aita v A. Ojjeh* Paris Court of Appeal 18 February 1986 1986 Rev. Arb. 583	10
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Crude Oil Pipeline Case	Ad hoc Award (*Hungarian State Enterprise v. Jugoslavenski Naftovod)* Decision of 6 January 1983 YBCA (1984) 69-70	73

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Caratube	*Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan* Award of 27 September 2017 ICSID Case No. ARB/13/13	5
Libanaco	*Libanaco Holdings Co. Ltd v Republic of Turkey* Award of 23 June 2008 ICSID Case No. ARB/06/8	6
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Arsanovia Ltd	*Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings* 2012 Folio 1047 High Court of England and Wales, Queen's Bench Division, Commercial Court 20 December 2012	30
Campbell	*Campbell v MGN Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 UK House of Lords 6 May 2004	12
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https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm

Agricultural Products (Equine Semen)	Biosecurity Authority, Ministry of Agriculture and Forestry (Wellington, New Zealand) *Review of Submissions* (2000) in: *Import risk analysis: horses and horse semen* Available at: https://www.mpi.govt.nz/dmsdocument/2846/loggedIn	74

INDEX OF ABBREVIATIONS

Abbreviation	Expansion
Answer	Answer to the Notice of Arbitration (24 August 2018)
Arbitration Agreement	Clause 15, Frozen Semen Sales Agreement
Art. / Arts.	Article / Articles
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo.	Memorandum for the CLAIMANT (Nagoya University)
Danubian Arbitration Law	Danubian Arbitration Law, as adapted from the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
Equatorianian Tariffs	30% import tariffs on selected products from Mediterraneo, including animal semen, imposed by the Equatorianian government
First Shipment	Shipment of frozen semen, delivered by CLAIMANT to RESPONDENT on 20 May 2017
HKIAC 2013 Rules	2013 Hong Kong International Arbitration Centre Administered Arbitration Rules
HKIAC 2018 Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
ICC INCOTERMS (2010)	ICC Rules for the Use of Domestic and International Trade Terms (2010)
Letter from Langweiler	Letter from Langweiler (2 October 2018)
Letter by Fasttrack	Letter by Fasttrack (3 October 2018)
Mediterranean Tariffs	25% import tariffs on all agricultural goods from Equatoriana, imposed by the Equatorianian government
Notice	Notice of Arbitration (31 July 2018)
PO1	Procedural Order No. 1 (5 October 2018), in the Arbitral Proceedings HKIAC/A18128: Phar Lap Allevamento v. Black Beauty Equestrian
PO2	Procedural Order No. 2 (2 November 2018), in the Arbitral Proceedings HKIAC/A18128: Phar Lap Allevamento v. Black Beauty Equestrian
para./paras.	Paragraph/ Paragraphs
Resp. Ex.	RESPONDENT's Exhibit
Sales Agreement	Frozen Semen Sales Agreement
Second Shipment	Shipment of frozen semen, delivered by CLAIMANT to RESPONDENT on 3 October 2017
Third Shipment	Shipment of frozen semen, delivered by CLAIMANT to RESPONDENT on 23 January 2018
Tribunal	The present tribunal constituted to hear the Arbitral Proceedings HKIAC/A18128

STATEMENT OF FACTS

1. **CLAIMANT** runs Mediterraneo's largest and oldest stud farm [*Notice* para. 1]. Since **2014**, CLAIMANT has had financial difficulties [*PO2* para. 21] and currently answers to a creditor committee [*PO2*. para. 21]. **RESPONDENT** runs an equestrian business in Equatoriana [*Notice* para. 4].

2. On **21 March 2017**, RESPONDENT contacted CLAIMANT to purchase 100 doses of frozen semen from its star racehorse Nijinsky III for artificial insemination [*Cl. Ex.* C1]. Although CLAIMANT did not ordinarily provide such frozen semen, CLAIMANT considered this a good opportunity to increase its revenue [*Notice* para. 6]. It needed to urgently make a profit to continue prolongation of its credit lines [*PO2* para. 29].

3. On **24 March 2017**, CLAIMANT offered RESPONDENT a sale at US$ 99,500 per dose, on its Standard Frozen Semen Sales Agreement terms used for other semen products [*Cl. Ex.* C2]. The Sales Agreement was submitted to Mediterranean law and the exclusive jurisdiction of Mediterraneo courts [*Cl. Ex.* C3]. It also stipulated EXW delivery [*Cl. Ex.* C3].

4. On **28 March 2017**, RESPONDENT replied, insisting on delivery on DDP terms [*Cl. Ex.* C8]. It cited urgency of delivery and CLAIMANT's "greater experience in the shipment of frozen semen" as basis for the change [*Cl. Ex.* C3]. RESPONDENT also wanted CLAIMANT to agree to the exclusive jurisdiction of the Equatoriana courts [*Cl. Ex.* C3].

5. On **31 March 2017**, CLAIMANT communicated that it was amenable to DDP delivery for an additional cost of US$ 1,000 per dose [*Cl. Ex. C4*]. But CLAIMANT wanted protection from additional risks, especially from "unforeseeable additional health and safety requirements". CLAIMANT did not agree to litigation in Equatoriana and counter-proposed arbitration in Mediterraneo [*Cl. Ex.* C4].

6. RESPONDENT replied on **10 April 2017** affirming that Mediterranean law would govern the Sales Agreement, but specifically designated Equatoriana as the arbitral seat and Equatorianian law to govern the Arbitration Agreement [*Resp. Ex.* R1]. On **11 April 2017**, CLAIMANT replied with its own draft clause, designating Danubia as a neutral seat of the arbitration [*Resp. Ex.* R2]. It informed RESPONDENT that special approval was not required from its creditors committee for a neutral arbitration venue [*PO2*. para. 14]. On the additional risks issue, CLAIMANT also suggested reliance on the ICC Hardship Clause.

7. By this time, parties had agreed on Clauses 1-5 of the eventual Sales Agreement [PO2 para. 4]. But on **12 April 2017**, after CLAIMANT's lawyer and prime negotiator, Ms. Napravnik, met with RESPONDENT's lawyer and prime negotiator Mr. Antley to discuss the dispute resolution clause and the hardship clause, both negotiators were injured [*Cl. Ex.* C8].

8. On **6 May 2017**, replacement negotiators, Mr. Ferguson and Mr. Krone finalised Clauses 6-15 of the Sales Agreement [*PO2* para. 5]. Clause 14, which stipulated Mediterranean law to govern the Sales Agreement, was separate from the Arbitration Agreement which was contained in Clause 15. In drafting Clause 15, the previous negotiators' emails were stitched together and reliance was placed on a note written by Mr. Antley at the last meeting, which referenced a "neutral venue" [*Resp. Ex.* R3]. The parties did not rely on the ICC Hardship Clause and instead included a limited hardship reference in Clause 12 without any adaptation remedy mentioned. Delivery was to be made in three shipments at US$ 100,000 per dose. The price was agreed to be US$ 100,000 per dose and delivery was to be in three shipments.

9. Prior to concluding the Sales Agreement, in **January 2017,** the Mediterraneo President had already announced his intention for a protectionist approach to trade [*Cl. Ex.* C6]. On **25 April 2017**, he appointed an "ardent critic of free trade" as his "superminister" for agriculture, trade and economics [*PO2* para. 23]. Finally, on **15 November 2017**, Mediterraneo imposed tariffs on Equatoriana products [*PO2* para. 23]. On **15 January 2018**, Equatoriana retaliated, imposing 30% tariffs for agricultural products, including racehorse semen [*PO2* para. 25]. Consequently, on **20 January 2018**, CLAIMANT's lawyer phoned Mr. Shoemaker, who was responsible for the development of RESPONDENT's racehorse breeding programme, regarding the Third Shipment [*Cl. Ex.* C7].

10. Mr. Shoemaker was told that the Equatorianian Tariffs increased the cost of the Third Shipment scheduled for **22 January 2018** by US$ 1,500,000. He responded that he was not legally trained and had to seek further clarification from his superiors. Mr. Shoemaker also did not commit to any adaptation of the price [*Resp. Ex.* R4]. However, without waiting for RESPONDENT to come back on the price issue, CLAIMANT authorised delivery on **21 January 2018** [*Resp. Ex.* C8]. But on **12 February 2018**, CLAIMANT reinitiated discussions on the tariff issue [*PO2* para. 35]. By then, RESPONDENT had already paid the contract price [Answer *para.* 12]. RESPONDENT did not accept CLAIMANT's demands for additional remuneration. CLAIMANT commenced arbitration on **31 July 2018**.

11. CLAIMANT now also seeks to admit before this Tribunal RESPONDENT's submissions and the Partial Interim Award from a separate and ongoing Mediterraneo Arbitration [*Letter from Langweiler*]. It intends to purchase the Partial Interim Award from an intelligence company of "doubtful reputation" [*PO2* para. 41]. These are ongoing proceedings between RESPONDENT and a third party, based on a separate contract with different clauses [*PO2* para. 39]. These documents either originated from a breach of a confidentiality agreement, or an illegal hack of RESPONDENT's computer system [*PO1* para. III.1.b].

SUMMARY OF ARGUMENTS

1. **This Tribunal should not admit documents and information from the Mediterraneo Arbitration.** Under Art. 13.5 HKIAC 2018 Rules, this Tribunal has a duty to ensure equal treatment between the parties. It would be inappropriate for this Tribunal to admit these documents in light of this duty to ensure equal treatment between the parties. CLAIMANT will only have access to these documents because the documents have either been obtained (i) pursuant to an illegal hack of RESPONDENT's computer system, or (ii) in breach of confidentiality agreements. CLAIMANT has full knowledge of the improper means by which the documents had been obtained. Were CLAIMANT to obtain and submit these documents, it would be acting in furtherance of and be complicit in the unlawful conduct, and would obtain an unfair and wrongful advantage over RESPONDENT. This Tribunal should thus apply its wide discretion under Art 22.2 HKIAC 2018 Rules to exclude these documents from evidence. Finally, the documents and information from the Mediterraneo Arbitration are inadmissible because they are irrelevant to the case and immaterial to the outcome of the dispute. The documents relate to a different arbitration altogether, and are in respect of a completely different contract between RESPONDENT and an unrelated third party.

2. **This Tribunal has no power under the Arbitration Agreement to adapt the contract.** The Arbitration Agreement should be interpreted according to Danubian law. Under Art. 36.1 HKIAC 2018 Rules, this Tribunal is to apply "the rules of law agreed upon by the parties", or failing such agreement the "rules of law which it determines to be appropriate". Absent an express choice of law, Danubian law was the implied choice of the parties in light of their desire for neutrality of the seat of arbitration and the law applicable to the Arbitration Agreement, and so that the *lex arbitri* would be consistent with the law governing the Arbitration Agreement. The application of Danubian law also adheres with the presumption that where parties choose a neutral seat, the law of the seat of arbitration should apply to interpret the arbitration agreement. Even if there was no implied choice, Danubian law bears the closest connection to the Arbitration Agreement as it is the supervisory jurisdiction of the arbitration. Properly interpreted pursuant to the four corner rule under Danubian contract law, nothing in the language of the Arbitration Agreement nor any other clause in the Sales Agreement confers on this Tribunal the power to adapt the contract price. This analysis would not change even if Mediterranean law governs the interpretation of the Arbitration Agreement because the parties' prior negotiations did not evince any common intention for this Tribunal to have the power to adapt the contract price.

3. **Clause 12 does not entitle CLAIMANT to the remedy of adaptation.** The only remedy provided under Clause 12 is that CLAIMANT may under certain specified circumstances be exempted from liability for failing to perform its obligations under the Sales Agreement. Nothing in the wording of Clause 12 suggests that any other remedy, much less adaptation, is available. During negotiations, both parties also agreed that Clause 12 is a *force majeure* clause. This indicates that the parties only contemplated the usual force majeure remedy of exemption of liability to be available under Clause 12. Further, CLAIMANT's current hardship situation does not correspond with any of the situations specified under Clause 12. In particular, the Equatorianian Tariffs were neither "additional health and safety requirements" nor "comparable unforeseeable events" within the meaning of Clause 12. Furthermore, the tariffs were not sufficiently onerous to constitute hardship because they did not fundamentally alter the contractual equilibrium of the Sales Agreement.

4. **CLAIMANT is not entitled under the CISG to any additional sum from an adaptation of the price.** CLAIMANT has no recourse to the CISG for an adaptation of the price because the parties intended for Clause 12 to deal exhaustively with situations of hardship and the consequences flowing from them. Alternatively, Art. 79 CISG does not provide for any remedy of adaptation. Art. 79 only excuses a party from liability for failing to perform its contractual obligations. Contrary to CLAIMANT's assertions, there is no gap to be filled pursuant to Art. 7(2) CISG. The rights and remedies available in respect of CLAIMANT's current hardship situation are already governed and expressly settled by the CISG. The CISG drafters had deliberately excluded hardship situations from the scope of "impediments" under Art. 79 CISG, despite a proposal for its inclusion. Although the PICC as part of Danubian contract law applies to the Sales Agreement, CLAIMANT cannot rely on Art. 6.2.3 PICC to assert an adaptation remedy. Art. 79 CISG, as part of Mediterranean law, is *lex specialis* which precludes recourse to Art. 6.2.3 PICC. The parties also derogated from Art. 6.2.3 PICC when they agreed to Clause 12. Finally, the requirements of hardship under Art. 6.2.3. PICC are not even satisfied on the present facts.

ARGUMENTS

I. THIS TRIBUNAL SHOULD NOT ADMIT DOCUMENTS AND INFORMATION FROM THE MEDITERRANEO ARBITRATION.

1. As a preliminary matter, RESPONDENT wishes to address CLAIMANT's application to admit documents and information generated from the Mediterraneo Arbitration, a set of proceedings between RESPONDENT and a third party. CLAIMANT does so to sustain its claims that the Arbitration Agreement confers power to adapt the contract [*Cl. Memo.* paras. 5-50], and that this Tribunal can adapt the contract under Clause 12 of the Sales Agreement or the CISG [*Cl. Memo.* paras. 89-132]. In particular, CLAIMANT seeks to admit the Partial Interim Award and RESPONDENT's submissions from the Mediterraneo Arbitration [*Letter from Langweiler*].

2. It has come to light that these documents originated either from a breach of a confidentiality agreement or from an illegal hack of RESPONDENT's computer system [*PO1* para. III.1.b]. Further, RESPONDENT reiterates that it has been authorised by the opponent in the other arbitral proceedings to state that the allegations by CLAIMANT do not reflect reality and are taken out of context [*Letter by Fasttrack*].

3. CLAIMANT's application must be denied. **(A)** This Tribunal should exclude the improperly obtained documents and information from the Mediterraneo Arbitration on grounds of procedural fairness and arbitral confidentiality. **(B)** In any event, the evidence should not be admitted as it is irrelevant to the present case and immaterial to its outcome. **(C)** Finally, contrary to CLAIMANT's contentions, the Partial Interim Award should not be accorded weight as legal precedent.

A. The unlawfully obtained evidence should be excluded to uphold procedural equality and arbitral confidentiality.

1. The unlawfully obtained evidence should be excluded to uphold procedural equality between the parties.

4. Art. 22.3 HKIAC 2018 Rules grants arbitral tribunals a wide discretion to admit or exclude evidence [*Moser/Bao* para. 9.162; *Waincymer* 752]. In applying this power, a tribunal has an overarching duty to provide for "equal treatment" between the parties [Art. 13.1 HKIAC 2018 Rules]. To this end, where evidence would compromise equal treatment of the parties, a tribunal should exclude it as part of its Art. 13.5 HKIAC 2018 Rules obligation to "do everything necessary to ensure the fair and efficient conduct of the arbitration".

5. In this vein, arbitral tribunals should exclude unlawfully obtained evidence when the party introducing the evidence is complicit in the impropriety. When a party partakes in the unlawful procurement of evidence, they disrespect the equality of arms between arbitrating parties because they obtain an unfair and wrongful advantage over the other party, thus undermining the principle of equal treatment [*Methanex* para. 54]. In contrast, in the limited situations where tribunals have admitted unlawfully obtained evidence, parties were removed from the impropriety. An example of this is when the information was publicly available on Wikileaks [*Caratube*]. Complicity is thus the deciding factor in admitting evidence.

6. In fact, parties will be considered complicit even if their improper conduct is not unlawful *per se*. In *Libananco*, the State of Tukey had procured evidence through government surveillance. Although the tribunal recognised that the surveillance was a legitimate exercise of Turkey's sovereign powers, the tribunal refused to admit the evidence [*Libananco* para. 78, 79]. The tribunal emphasised that "it is not enough that justice should be done, it must also manifestly be seen to be done" [*Libananco* para. 79]. This approach is appropriate here given the "high ethical standard" in Art. 13.5 HKIAC 2018 Rules [*Moser/Bao* para. 9.49], where parties must "***do everything necessary*** to ensure the fair… conduct of the arbitration".

7. Finally, while instances of evidence having been illegally or improperly obtained typically arise in investment arbitration, the same principles apply to commercial arbitration. Admissibility should in all cases must balance the efficiency of the arbitral process with fairness [*Waincymer* 744].

8. Here, CLAIMANT is complicit in the "unlawful collection of evidence" [*O'Malley* para. 9.123, 9.119; *Waincymer* 797]. CLAIMANT is fully aware of the unlawful means by which the documents and information from the Mediterraneo Arbitration were procured [*PO2* para. 39]. Yet, CLAIMANT deliberately and wilfully insists on introducing it into the present proceedings [*Letter from Langweiler*], going so far as to purchase the Partial Interim Award from an intelligence company of doubtful reputation [*PO2* para. 41]. In doing so, CLAIMANT has partaken in the unlawful procurement of evidence and disrespects the equality of arms between the parties.

9. Accordingly, this Tribunal should exclude the evidence from the Mediterraneo Arbitration to uphold procedural equality between the parties.

2. <u>The evidence should be excluded to uphold arbitral confidentiality.</u>

10. Arbitral confidentiality is an important feature of international commercial arbitration. The "dominant reason" for parties to arbitrate rather than litigate is based on the assumption that

proceedings and awards will not enter the public domain [*Rix; Born* 2816]. The significance of arbitral confidentiality has thus manifested in arbitral rules which impose an express duty of confidentiality upon parties to the arbitration [Art. 45 HKIAC 2018 Rules; Art. 30 LCIA Rules]. Even in the absence of such rules, courts have implied a duty of confidentiality thus preventing the parties from sharing documents generated from arbitration, whether in court or otherwise [*Ali Shipping; Aïta v. Ojjeh; Wee Shuo Woon*].

11. Here, CLAIMANT seeks to adduce documents and information from the Mediterraneo Arbitration which was conducted under the HKIAC 2018 Rules [*PO2* para. 39]. As CLAIMANT is fully aware, the HKIAC 2018 Rules include an express duty of confidentiality [Art 45 HKIAC 2018 Rules], and the evidence could only have been obtained through an illegal hack or a breach of confidentiality agreement [*PO*1 para. III.1.b]. These arbitral documents ought to be protected from disclosure using this Tribunal's wide exclusionary discretion under Art. 22.3 HKIAC or Art. 9(2)(g) of IBA Rules. This is regardless of whether CLAIMANT has breached the specific "duty of confidentiality set forth under Art. 42 of the HKIAC 2013 Rules" [*Cl. Memo.* para 78].

12. Arbitral documents are of a confidential nature. Courts consistently redact information when admitting arbitral documents to protect confidentiality [*O'Malley* para. 9.88], even though courts are neither parties to the arbitration nor bound by any specific duty. This Tribunal should thus exclude the evidence regardless of which party the confidentiality obligations attach to. In fact, some jurisdictions have considered a confidential document protected to the extent that when "[for example] a private diary, is dropped in a public place, and is then picked up by a passer-by", the unrelated third party has an obligation of confidence [*Spycatcher; Campbell; Wee Shuo Woon*].

13. The arbitral documents remain confidential because they have not entered the public domain. It cannot be said that "the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential" [*Spycatcher* 281]. Quite apart from the horseracing intelligence company which CLAIMANT is purchasing the documents from, the evidence from the Mediterraneo Arbitration have not been found anywhere else [*PO2* para. 41]. This is unlike the cases which CLAIMANT refers to [*Cl. Memo* para. 59], where information was publicly available online.

14. Finally, CLAIMANT contends that considerations of confidentiality should be disregarded "in line with the prevailing principles of transparency… evidenced in the Transparency Rules of UNCITRAL" [*Letter from Langweiler; Cl. Memo.* para. 80]. This is untenable. The

Transparency Rules only apply to investor-state arbitrations [Art. 1(9) Transparency Rules]. This is to account for the public interest involved in investor-state arbitrations, such as the interest in promoting good governance [Preamble Transparency Rules]. Clearly, these considerations do not apply to private arbitrations between two commercial parties.

15. Thus, this Tribunal should exclude the documents and information from the Mediterraneo Arbitration to uphold arbitral confidentiality.

B. In any event, documents and information from the Mediterraneo Arbitration should not be admitted as they are irrelevant to the case and immaterial to its outcome.

16. Under Art. 22.3 HKIAC 2018 Rules, evidence should only be admitted if it is relevant to the case ***and*** material to its outcome. This is the same standard as Art. 9(2)(a) IBA Rules [*Moser/Bao* para. 9.161]. This Tribunal should not admit the evidence from the Mediterraneo Arbitration as it is neither relevant nor material.

17. CLAIMANT has not shown how the evidence is relevant. Evidence is relevant where it is useful to establish the truth of a ***factual*** allegation [*Moser/Bao* para. 9.161; *Raeschke-Kessler* 427; *O'Malley* para. 3.69]. While CLAIMANT refers to the relevancy-materiality threshold in Art. 22.3 HKIAC 2018 Rules [*Cl. Memo* para. 57-58], it has not pleaded how the evidence proves or disproves any factual allegation.

18. Instead, properly characterised, the evidence can only be relevant to RESPONDENT's intentions when drafting the Sales Agreement, if at all. However, even if relevant, it is immaterial to the outcome of the present proceedings because it has "very little probative value" [*O'Malley* para. 9.16]. Evidence is only material to the outcome where the factual allegation which it supports is ***necessary*** for complete consideration of the case [*Moser/Bao* para. 9.161; *O'Malley* para. 3.73].

19. Here, the Mediterraneo Arbitration was based on a different contract between RESPONDENT and a third party [*PO2* para. 39]. However, what presently concerns this Tribunal are CLAIMANT and RESPONDENT's common intentions as they appear from the Sales Agreement. These cannot be discerned from the Mediterraneo Arbitration.

20. Furthermore, RESPONDENT's intentions in the Mediterraneo Arbitration would be different based on the difference in wording of the contractual clauses. While the contract in the Mediterraneo Arbitration contains the ICC Hardship Clause, the ICC Hardship Clause was explicitly rejected by RESPONDENT when drafting Clause 12 [*Answer* para. 4; *Resp. Ex. 4*]. Similarly, when Mr. Antley proposed the wording of the arbitration clause in Clause

15, he modified the wording of the original HKIAC arbitration clause by removing any words that could be deemed to empower the tribunal to adapt the contract [*Answer* para. 13; *Resp. Ex.* R1].

21. Finally, in the contract for the Mediterraneo Arbitration, RESPONDENT was acting in a different capacity as seller [*PO2* para. 39]. As the seller, RESPONDENT would want to be able to adapt the contract in circumstances of hardship and thus implemented this intention into that separate contract. Thus, a finding that RESPONDENT had the specific intention for that tribunal to adapt that contract does not *ipso facto* lead to the conclusion that RESPONDENT had such an intention in relation to the Sales Agreement.

22. Thus, the documents and evidence from the Mediterraneo Arbitration should not be admitted as they are irrelevant and immaterial to the present case.

C. Contrary to CLAIMANT's contentions, the Partial Interim Award is not analogous and should not be accorded weight as legal precedent.

23. Finally, CLAIMANT has argued that the Partial Interim Award from the Mediterraneo Arbitration is relevant as "precedent" because it has "analogous" facts [*Cl. Memo.* paras. 70 - 71]. Insofar as CLAIMANT is relying on this as legal precedent, and not as "evidence" as it originally pleaded [*Letter from Langweiler*, above para. 17], the Partial Interim Award should not be accorded weight as legal precedent.

24. The Mediterraneo Arbitration is still ongoing and an award on the merits has not even been rendered [*PO2* para. 39]. Crucially, the Mediterraneo Arbitration is not analogous to the present situation — as canvassed above, the former is based on the ICC Hardship Clause, the HKIAC Model Clause, a completely different contract, and a distinct set of facts that can be distinguished from the present proceedings [*PO2* para. 39] [above para. 19-21]. It is thus submitted that the documents and information from the Mediterraneo Arbitration would not serve as useful "precedent".

25. In these circumstances, none of the documents and information from the Mediterraneo Arbitration should be admitted as evidence or relied on as legal precedent in this Arbitration.

II. THIS TRIBUNAL HAS NO POWER TO ADAPT THE CONTRACT PRICE UNDER THE ARBITRATION AGREEMENT.

26. CLAIMANT has proceeded on the basis that adaptation is a question of power and not jurisdiction [*Cl. Memo.* para. 5]. It asserts that this Tribunal has power under the Arbitration Agreement in Clause 15 of the Sales Agreement to adapt the contract price [*Cl. Memo.* para. 5]. In direct response to CLAIMANT's assertions, RESPONDENT submits that when parties agreed to the Arbitration Agreement no power to adapt the contract price was conferred on this Tribunal.

27. As a starting point, it is clear on its face that the Sales Agreement between CLAIMANT and RESPONDENT makes no reference whatsoever to adaptation. The power to adapt goes against what the parties have explicitly provided. **(A)** Applying Danubian contract law, as impliedly chosen by the parties, the Arbitration Agreement does not confer this Tribunal any power to adapt the Sales Agreement. **(B)** Even if Mediterranean law were to be applied, as CLAIMANT has asserted ought to be the case, the same conclusion would be reached. The relevant divergence between the two laws is that Danubian contract law applies the four corners rule whereas Mediterranean law allows extrinsic evidence to be taken into account [*PO1* paras. II, III.4; *PO2* para. 45; Art. 8 CISG; Art. 2.1.17 PICC]. However, both the language of the Sales Agreement and parties' negotiations support the conclusion that no power to adapt was agreed on.

A. Interpreting the Arbitration Agreement under the four corner rule in Danubian contract law, this Tribunal has no power to adapt the Sales Agreement.

1. Danubian law governs the interpretation of the Arbitration Agreement.

28. Pursuant to Art. 36.1 HKIAC 2018 Rules, this Tribunal is to apply "the rules of law agreed upon by the parties" to the interpretation of the Arbitration Agreement. Where an express choice of law is not designated, this Tribunal may exercise its discretion to apply any "rules of law which it determines to be appropriate" without reference to conflict of law principles [*Moser/Bao* paras. 11.57, 11.58].

29. RESPONDENT is aware of a contrary view expressed in the commentary, that Art. 36.1 HKIAC 2018 Rules are inapplicable to resolve the law governing the interpretation of the arbitration agreement [*Moser/Bao* para. 11.52]. However, the commentary only states that the law governing the interpretation of the arbitration agreement can be separate from the law of the substantive dispute [*Moser/Bao* para. 11.52]. It does not explain why as a consequence there should be a preclusion of the application of Art. 36.1 HKIAC 2018 Rules to determine

these separate laws. Instead, this Tribunal should place emphasis on the fact that the question of what law governs the interpretation of the arbitration agreement should be properly characterised as a non-procedural issue which goes to the "substance of the dispute". Thus, other commentators have taken the view that Art. 36.1 HKIAC 2018 Rules should apply to determine the law governing the interpretation of the Arbitration Agreement [*Lew* 136]. This Tribunal is urged to make the same finding.

30. This Tribunal should thus find that where no express choice of law has been stipulated, it is appropriate to consider parties' implied choice of law, or alternatively the law with the closest connection to the arbitration agreement [*Born* 517-518; *Redfern/Hunter* paras. 3.19, 3.24; *Fouchard* 224; *Sulamerica*]. These are tests which have been routinely applied by tribunals and courts in various Model Law jurisdictions [*BCY v BCZ; Firstlink; Arsanovia Ltd; Kundan Singh*]. Further, Danubian Arbitration Law, which the parties have expressly chosen to govern the present arbitration, is a verbatim adoption of the Model Law [*PO1* para. III.4; *PO2* para. 14].

31. Here, **(a)** there was no express choice of law to govern the interpretation of the Arbitration Agreement. **(b)** Short of an express choice of law, Danubian law should apply as it was the implied choice of the parties. **(c)** Further, Danubian law bears the closest connection to the Arbitration Agreement.

a) There was no express choice of law to govern the interpretation of the Arbitration Agreement.

32. CLAIMANT asserts that, by virtue of Clause 14, parties expressly chose Mediterranean law to govern the interpretation of the Arbitration Agreement [*Cl. Memo.* paras. 11-12]. However, contrary to CLAIMANT's assertions, a proper analysis of Clause 14 in the context of the Sales Agreement indicates that parties did not intend for Mediterranean law to govern the Arbitration Agreement. First, Clause 14 was inserted ***after*** the substantive obligations of the main contract but ***before*** the Arbitration Agreement in Clause 15. This placement suggests that Mediterranean law only governs the former (substantive obligations) but not the latter (Arbitration Agreement). Second, Clause 14 only states that the "Sales Agreement shall be governed by the law of Mediterraneo" without explicit reference to the Arbitration Agreement [emphasis added] [*Cl. Ex.* C5]. In such situations, it is unlikely that an express choice of law will be found [*Born* 491; *Redfern/Hunter* para. 3.10].

33. More critically, by relying on the Model-HKIAC Clause [*Resp. Ex.* R1], parties contemplated that the law of the arbitration clause may be different from the main contract. The Model-HKIAC Clause contains an express choice-of-law provision which states that "[the] law of

this arbitration clause shall be… [Hong Kong law]". In its proposed draft of 10 April 2017, CLAIMANT utilised this express choice-of-law provision, communicating to RESPONDENT its intention for Equatorianian law to govern the ***Arbitration Agreement*** while Mediterranean law governs the ***Sales Agreement*** [*Resp. Ex.* R1]. Therefore, short of any subsequent discussions to the contrary, the choice of Mediterranean law to govern the "Sales Agreement" should not encompass the Arbitration Agreement.

34. Further, even though the express choice-of-law clause was eventually omitted from the Arbitration Agreement, this omission was merely fortuitous. It does not indicate parties' intentions for Clause 14 to govern the entire Sales Agreement including the Arbitration Agreement. The omission was most likely due to an oversight by replacement negotiators Mr. Ferguson and Mr. Krone [*PO2* para. 6], coupled with their lack of understanding of Ms. Napravnik and Mr. Antley's intentions in their 12 April 2017 discussions [*Resp. Ex.* R3; *PO2* para. 7]. This is fully consistent with the principle of separability in Art. 16(1) of Danubian Arbitration Law, pursuant to which an arbitration agreement may be governed by a different law from the main contract [*Born* 473].

35. In light of the above, parties did not expressly choose Mediterranean law to govern the interpretation of the Arbitration Agreement.

b) Short of an express choice of law, Danubian law should apply as it was the implied choice of the parties.

36. CLAIMANT submits that the parties have impliedly chosen Mediterranean law to govern the Arbitration Agreement [*Cl. Memo.* paras. 13-27]. However, contrary to CLAIMANT's submissions, Danubian law should apply as the parties' implied choice of law. Danubia was designated as the seat of arbitration specifically to ensure neutrality in the arbitration process. In such situations, courts and tribunals have been inclined to find that parties' implied choice is the law of the seat [*Born* 519-520; *Redfern/Hunter* paras. 3.15-3.32; *Firstlink; Matermaco*], because the law of the seat provides a neutral legal framework to facilitate the arbitration [*Fouchard* 223]. This is especially so where parties selected the seat precisely to disassociate the arbitration process from the home jurisdiction of either contracting party [*Born* 74, 518]. Thus, applying the law of the neutral seat would best give effect to parties' expectations underlying the commercial relationship.

37. Further, it would be appropriate to apply the law of the seat to determine this Tribunal's power to adapt the Sales Agreement. The law of the seat typically concerns the "internal" procedures in the arbitration [*Born* 2052]. A tribunal's power of adaptation is derived from

the combined effect of the Arbitration Agreement and the *lex arbitri* [*Berger/Fletcher* 19-021]. The arbitration agreement provides the basic authority for a tribunal to adapt the contract, but it is the *lex arbitri* that endorses the tribunal's exercise of this procedural power [*Berger/Fletcher* 19-020]. Since both the *lex arbitri* and the interpretation of the Arbitration Agreement affect this Tribunal's procedural powers, it may be presumed that parties intended consistency between the *lex arbitri* and the law governing the interpretation of the Arbitration Agreement. Therefore the law governing the interpretation of the Arbitration Agreement should be Danubian law.

38. The rationale for applying the law of the seat is all the more compelling in light of the fact that neutrality was highlighted as a key concern of both parties. CLAIMANT proposed Danubia as the seat of the arbitration specifically because it was a neutral country [*Resp. Ex.* R2]. This was a compromise from the parties' initial proposals for their respective courts, Equatoriana and Mediterraneo, to hear any disputes arising out of the Sales Agreement [*Cl. Ex.* C3; *Cl. Ex.* C4]. Since neutrality was a key thread throughout the parties' negotiations, it was likely that they intended Danubian law, a neutral law of the seat, to govern the interpretation of the Arbitration Agreement.

39. Moreover, the application of Danubian law is consistent with CLAIMANT's creditors committee requirements. The creditors committee had previously exempted CLAIMANT from obtaining special approval for arbitration clauses, as long as the seat of arbitration is a "neutral country with a functioning judicial system" [*PO2* para. 14] and not the country of the counterparty [*Resp. Ex.* R2]. This was the specific requirement imposed in relation to arbitration clauses. Since the creditors committee was only concerned with the seat of arbitration, applying Danubian law to the interpretation of the Arbitration Agreement would not contravene the committee's requirements. Therefore, even though the parties were aware of the committee's requirements, these requirements were consistent with their intentions to apply Danubian law to govern the interpretation of the Arbitration Agreement.

40. Conversely, applying Mediterranean law to govern the interpretation of the Arbitration Agreement would be incongruous with parties' intentions. CLAIMANT argues that by agreeing on the substantive law of the contract, there is a presumption that the parties intended this same law to apply to all clauses including the arbitration clause [*Cl. Memo.* para. 15]. However, none of the pre-contractual negotiations suggests this.

41. Although CLAIMANT stated on 11 April 2017 that "the law applicable to the Sales Agreement remains the law of Mediterraneo" [*Resp. Ex.* R2], properly construed this does

not refer to the law governing the Arbitration Agreement. Earlier on 10 April 2017, a distinction was already made between the law of the Sales Agreement and the law governing the Arbitration Agreement. CLAIMANT communicated to RESPONDENT its intention for Equatorianian law to govern the ***Arbitration Agreement***, and for Mediterranean law to govern the ***Sales Agreement*** [*Resp. Ex.* R1]. Moreover, as discussed above [para. 33], the eventual omission of the choice-of-law provision from the Arbitration Agreement was merely fortuitous and inconclusive of the parties' intentions. Therefore, short of any express discussions to the contrary, it is likely that the parties did not intend Mediterranean law to govern the Arbitration Agreement by virtue of Clause 14.

42. In light of the above, the parties impliedly chose Danubian law, and not Mediterranean law, to govern the interpretation of the Arbitration Agreement.

c) Further, Danubian law bears the closest connection to the Arbitration Agreement.

43. In the event that the parties' implied choice of law cannot be discerned, Danubian law should still apply as it bears the closest connection to the Arbitration Agreement. It is appropriate to apply the law with the closest connection, on the assumption that parties would prefer the law with the most significant relationship to govern the Arbitration Agreement [*Born* 518]. The closest connection test involves a fact-sensitive inquiry, in which various factors are considered including the parties' chosen seat of arbitration, the place the arbitration agreement was concluded, the use of an arbitration clause from a standard form contract linked to a particular country's legal system and the choice of a country's arbitration institution [*Fouchard* 224-228].

44. In this case it is the seat of arbitration which bears the most significant relationship to the Arbitration Agreement. Parties applied their minds to choosing the seat of arbitration, compromising on Danubia only after many rounds of negotiations [*Cl. Ex.* C3; *Cl. Ex.* C4; *Resp. Ex.* R1; *Resp. Ex.* R2]. Given that Danubia is the seat of arbitration, Danubia would be the legal jurisdiction where the award will be issued [*Belohlavek* 271; *Bernardini* 201; *Firstlink*], and Danubian Arbitration Law will be the applicable law to determine whether the award may be set aside [*Born* 2057]. Further, Danubian courts exercise supervisory jurisdiction over the arbitration process [*Born* 2057-2058]. The selection of Danubia as the seat of arbitration thus strongly points to Danubian law as bearing the closest connection to the Arbitration Agreement.

45. On the other hand, the only factor in favour of Mediterranean law is that the Sales Agreement was signed in Mediterraneo [*PO2* para. 13]. There is no indication why this was the case, or whether parties attached special significance to the place of conclusion of the Sales Agreement. It appears that this was more likely a matter of mere convenience or coincidence.

46. Moreover, the remaining factors are inconclusive. Although the Sales Agreement was based on a basic industry template from Mediterraneo, the template did not contain an arbitration clause but only a forum selection clause in favour of Mediterraneo courts [*PO2* paras. 3, 4]. Further, the choice of HKIAC does not point to Danubian nor Mediterranean law. Since the HKIAC is one of various international arbitration institutions utilised by commercial parties worldwide, it is taken not to have any link to any particular jurisdiction [*Fouchard* 225]. Neither of these factors establish a link between the Arbitration Agreement and Danubian or Mediterranean law. Instead, the designation of Danubia as the seat of arbitration bears the most significance to the Arbitration Agreement, and should outweigh any other factor in favour of Mediterranean law.

47. Therefore, Danubian law should govern the Arbitration Agreement as it was the parties' implied choice of law, and also the law with the closest connection to the Arbitration Agreement. Mediterranean law, the law of the Sales Agreement, was not expressly nor impliedly chosen by the parties to govern the Arbitration Agreement, neither does it bear the closest connection to the Arbitration Agreement.

2. <u>On an application of Danubia's four corner rule, the language of the Arbitration Agreement does not confer on this Tribunal any power to adapt the contract price.</u>

48. It is undisputed that where the Arbitration Agreement is interpreted using Danubian contract law, there is a "high likelihood" that this Tribunal will not be authorised to adapt the Sales Agreement [*PO1* para. II]. RESPONDENT submits that this Tribunal should likewise interpret the Arbitration Agreement to preclude its power of adaptation, notwithstanding CLAIMANT's assertions to the contrary [*Cl. Memo.* paras. 36-49].

49. Pursuant to Art. 28(3) of Danubian Arbitration Law, the applicable *lex arbitri,* adaptation is considered an exceptional power requiring express authorisation from the parties [*PO2* para. 36]. Nothing in the Arbitration Agreement suggests that this Tribunal can exercise the power of adaptation. As elaborated below [paras. 58-83], there are no other words which suggests the availability of adaptation as a remedy for hardship, whether pursuant to Clause 12 or any other provisions of the Contract. RESPONDENT also shows below [paras. 84-108] that no

remedy of adaptation is available under the Sales Agreement pursuant to the CISG, whether under Art. 79 CISG or otherwise.

50. Contrary to CLAIMANT's assertions [*Cl. Memo.* para. 30], Ms. Napravnik and Mr. Antley's discussions of 12 April 2017 cannot be taken into account. The four corner rule in Danubian contract law excludes prior negotiations where they would contradict or supplement the writing of the contract [Art. 2.1.17 PICC; *PO1* para. II]. As prior discussions concerning the inclusion of an express adaptation mechanism were not eventually reflected in the Sales Agreement, relying on those negotiations to imply a power of adaptation would supplement the writing of the Sales Agreement. Therefore, such discussions are inadmissible.

51. CLAIMANT's argument that Art. 8(3) CISG should be applied, instead of the four corner rule in Danubian contract law, is also untenable [*Cl. Memo.* para. 44]. There is consistent Danubian jurisprudence that the CISG does not apply to the interpretation of arbitration agreements [*PO2* para. 36]. Moreover, the parties already implicitly agreed in their telephone conference of 4 October 2018 that if the Arbitration Agreement were to be interpreted under Danubian contract law, the four corner rule will apply [*PO1* para. II]. CLAIMANT's argument on the applicability of Art. 8(3) CISG contradicts its own prior position, and has no merit.

B. Even if this Tribunal were to consider extrinsic evidence under Mediterranean law, it would not find any common intention to adapt the Sales Agreement.

52. It has been established [above para. 48] that nothing in the Arbitration Agreement, or the Sales Agreement as a whole, suggests that this Tribunal can exercise the power of adaptation. Further, even if this Tribunal considers evidence of prior negotiations under Mediterranean law, the interpretation of the Arbitration Agreement should be the same as that under Danubian law.

53. CLAIMANT's argument that this Tribunal has the power to adapt the contract price when the Arbitration Agreement is interpreted under Mediterranean law does not stand [*Cl. Memo.* paras. 28-32]. CLAIMANT primarily relies on discussions between Ms. Napravnik and Mr. Antley on 12 April 2017 to argue that both parties intended this Tribunal to have the power to adapt the Sales Agreement [*Cl. Memo.* para. 30]. There is no evidence that this intention actually persisted when Clause 15 was drafted by the parties, or when the Sales Agreement was eventually concluded. When finalising the Sales Agreement, Mr. Ferguson and Mr. Krone considered the Arbitration Agreement to be of "limited importance" [*PO2* para. 7]. They simply stitched together the relevant parts of the 10 and 11 April 2017 drafts proposed

by RESPONDENT and CLAIMANT respectively without further discussions [*PO2* para. 6].

54. The intentions of the replacement negotiators, Mr. Ferguson and Mr. Krone, should be given most weight because they were the ones who finally agreed on the wording of the Arbitration Agreement. Ms. Napravnik and Mr. Antley's intentions as expressed during the 12 April 2017 discussions were not communicated to the replacement negotiators, in light of their medical conditions after the car accident [*PO2* para. 7]. While the replacement negotiators had access to the prior email chains [*PO2* para. 5], none of the emails made reference to the power of adaptation. Further, although Mr. Antley had documented his discussion with Ms. Napravnik in his note of 12 April 2017, Mr. Krone did not understand what Mr. Antley meant by the "connection of hardship clause with arbitration clause" [*Resp. Ex.* R3]. This was because Mr. Krone was not privy to the discussions, during which Ms. Napravnik suggested an express reference to the hardship clause or the arbitration clause in the context of discussing an adaptation of the Sales Agreement [*Cl. Ex.* C8]. Thus, both Mr. Ferguson and Mr. Krone could not have intended to confer on this Tribunal the power of adaptation pursuant to the Arbitration Agreement.

55. Nevertheless, even if the 12 April 2017 discussions between Ms. Napravnik and Mr. Antley are taken into account, the Arbitration Agreement remains ambiguous. The fact that both Ms. Napravnik and Mr. Antley were in favour of clarifying whether this Tribunal had the power of adaptation [*Cl. Ex.* C8] indicates that the current drafting of the Arbitration Agreement remains unclear.

56. In light of such ambiguity, the *contra proferentum* rule should be applied to interpret the Arbitration Agreement, precluding this Tribunal's power to adapt the Sales Agreement. The *contra proferentum* rule is based on the principle that the party who drafts a clause bears any risk of its possible ambiguity [*Schwenzer/Schlechtriem* 168]. This rule is applicable by virtue of Art. 7(2) CISG, as a general principle on which the CISG is based [*Schwenzer/Schlechtreim* 168]. Accordingly, since the operative phrase "[a]ny disputes arising out of the contract…shall be… resolved by arbitration" was adopted from CLAIMANT's draft of 11 April 2017 [*PO2* para. 6], the *contra proferentum* rule should be applied to favour an interpretation against CLAIMANT.

57. Therefore, this Tribunal does not have the power to adapt the contract pursuant to the Arbitration Agreement, whether interpreted under Danubian law or Mediterranean law.

III. CLAUSE 12 DOES NOT ENTITLE CLAIMANT TO THE REMEDY OF ADAPTATION.

58. CLAIMANT is not entitled to the remedy of adaptation under Clause 12. While CLAIMANT asserts that Clause 12 entitles it to adapt the Sales Agreement in response to alleged hardship caused by the Equatorianian Tariffs, RESPONDENT submits that **(A)** Clause 12 is a force majeure clause which can only exempt liability for non-performance and was not intended to provide for adaptation. **(B)** In any event, the Equatorianian Tariffs are not an event causing hardship within the meaning of Clause 12.

A. Clause 12 is a force majeure clause which can only exempt liability for non-performance and was not intended to provide for adaptation.

59. Under Art. 8(1) CISG, which governs the interpretation of the Sales Agreement, statements must be interpreted according to the drafter's intention where the other party knew or could not have been unaware of this intent. Clause 12 provides that "seller shall not be responsible" for, *inter alia*, certain hardship events which occur during performance of the contract [*Cl. Ex.* C5]. This clause was drafted by Mr. Krone, RESPONDENT's negotiator, who did not intend for adaptation to be available [*PO2* para. 12; *Resp. Ex.* R3]. Given that the remedy of adaptation is neither mentioned nor suggested in its wording, CLAIMANT could not have been unaware that RESPONDENT did not intend for the remedy of adaptation to be included within Clause 12. In addition, the wording of the clause merely excludes liability ("seller shall not be responsible") rather than placing it on another party (eg: "buyer shall be responsible"). This is inconsistent with the remedy CLAIMANT seeks to read into Clause 12, which places responsibility for the Equatorianian Tariffs on RESPONDENT.

60. Even if one were to assume that CLAIMANT had not actually been aware of RESPONDENT's intentions vis-à-vis Clause 12, under Art. 8(2) CISG, Clause 12 should be interpreted according to the understanding that a reasonable person of the same kind as CLAIMANT would have. Applying this approach, the same conclusion, that Clause 12 does not provide for a remedy of adaptation, would similarly be reached. As stated mentioned , the phrasing "seller shall not be responsible" would be understood by a reasonable person in CLAIMANT's position to mean an exemption of CLAIMANT's liability, instead of a right to adapt the contract. Importantly, this phrasing is typically used in force majeure clauses only to exempt liability for a party's non-performance [*Schwenzer/Schlectriem* 1152; *Fontaine* 489; *Farnsworth* 646; *Brunner* 385], and CLAIMANT has adopted such phrasing in the force

majeure clause in its existing contract template which it uses for other agreements [*Cl. Ex.* C5; *PO2* para. 12].

61. Further, a reasonable person in CLAIMANT's position would have understood from the parties' negotiations that Clause 12 does not provide for adaptation. During negotiations, CLAIMANT's proposal for a separate clause providing for hardship remedies was not taken up by RESPONDENT [*Cl. Ex.* C5; *Resp. Ex.* R3]. While parties eventually agreed to provide for hardship situations within the Sales Agreement, RESPONDENT chose to regulate hardship within the existing force majeure clause in the Sales Agreement. Thus, none of the hardship remedies in CLAIMANT's proposed hardship clause were incorporated into Clause 12 [*Cl. Ex.* C5; *Resp. Ex.* R3]. By including a hardship wording within the existing force majeure provision and by rejecting the inclusion of any hardship remedies in the Sales Agreement, a reasonable person in CLAIMANT's position would have understood from the parties' negotiations that no hardship remedies would be available under Clause 12.

62. Considering the above, this Tribunal should give effect to the plain meaning of Clause 12. As stated by tribunals and commentators, contract clauses should be interpreted according to their plain meaning unless the negotiations suggest that a different meaning was intended [*Schwenzer/Schlechtriem* 163; *Soy Bean Oil Case*; *Coke Case*]. In this case, both the parties' negotiations and the plain meaning of Clause 12 strongly indicate that the remedy of adaptation was not intended to be available under Clause 12.

63. Contrary to CLAIMANT's assertion, the discussion between Ms. Napravnik and Mr. Antley on 12 April 2017 should not be considered when interpreting Clause 12 [*Cl. Memo.* para. 30, 97]. Similar points are made here to those stated above in relation to the Arbitration Agreement [paras. 53-54]. Though a possible adaptation remedy was discussed, the conversation did not involve Mr. Ferguson who replaced Ms. Napravnik as CLAIMANT's negotiator after her accident and who was the person who ultimately negotiated and agreed to the final wording of Clause 12 [*Cl. Ex.* C8]. Importantly, the evidence does not suggest that Mr. Ferguson was ever aware of Ms. Napravnik's intention for adaptation to be available. While he had access to Ms. Napravnik's prior emails, this would not have reflected the discussion which took place orally the same day the accident took place [*PO2* para. 5; *Cl. Ex.* C8]. Outside of these emails, Mr. Ferguson made no attempt to contact Ms. Napravnik for her position because he viewed Clause 12 with limited importance [*PO2* para. 7]. Consequently, a reasonable person in Mr. Ferguson's position would not have taken into account Ms. Napravnik's proposed adaptation mechanism when he agreed to the final wording of Clause 12 on 6 May 2017.

64. Therefore, on a proper interpretation under Art. 8(2) CISG, the remedy of adaptation is unavailable under Clause 12 because a reasonable person in Mr. Ferguson's position would not have understood Clause 12 as providing for the remedy of adaptation.

B. In any event, the Equatorianian Tariffs are not an event causing hardship within the meaning of Clause 12.

65. Under Clause 8 of the Sales Agreement, CLAIMANT agreed to deliver the frozen semen on DDP terms to RESPONDENT. DDP delivery, as defined by INCOTERMS, obliges the seller to "bear all the costs involved in bringing the goods to the named place of destination", and these include import tariffs [*ICC INCOTERMS (2010)*; *Ramberg* 61, 149]. The INCOTERMS definition is applicable to the Sales Agreement through Art. 9(1) CISG because both parties agreed on its usage during negotiations [*PO2* para. 10; *Schwenzer/Schlectriem* 184; *Fish Powder Case*]. Accordingly, CLAIMANT is *prima facie* obliged to bear the costs of the Equatorianian Tariffs under the Sales Agreement.

66. While it is acknowledged that the DDP obligation in Clause 8 is qualified by Clauses 9-13 which reallocate certain risks which would otherwise be borne by CLAIMANT, RESPONDENT submits that none of these clauses remove the risk of the Equatorianian Tariffs from CLAIMANT.

67. CLAIMANT asserts that Clause 12 reallocates the risk of the Equatorianian Tariffs to RESPONDENT because it constitutes "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Cl. Ex.* C5; *Cl. Memo.* para. 89]. However, contrary to that assertion, Clause 12 does not reallocate the risk of Equatorianian Tariffs for two reasons. **(1)** The Equatorianian Tariffs do not constitute hardship within the scope of Clause 12 because they are neither "additional health and safety requirements" nor "comparable unforeseen events". **(2)** The costs incurred by CLAIMANT from the Equatorianian Tariffs are not sufficiently onerous to constitute "hardship" within the meaning of Clause 12.

1. <u>The Equatorianian Tariffs are neither "additional health and safety requirements" nor "comparable unforeseen events" within the meaning of Clause 12.</u>

68. Clause 12 only applies to hardship which was "caused by additional health and safety requirements" or "comparable unforeseen events" [*Cl. Memo.* para. 89; *Cl. Ex.* C5]. However, RESPONDENT contends that, on a proper interpretation, Clause 12 does not apply to the present circumstances because the Equatorianian Tariffs constitute neither "additional health

and safety requirements" nor "comparable unforeseen events" within the meaning of Clause 12.

69. Though the meaning of "additional health and safety requirements" was neither communicated nor discussed during negotiations, reference can be had to its usual meaning which can be considered when applying Art. 8(1) CISG [*Schwenzer/Schlectriem* 163]. Generally, health and safety requirements are associated with measures such as inspection and quarantine requirements, which purpose is to ensure safety standards of goods being imported into countries [*WTO (Standards and Safety)*]. Here, the Equatorianian Tariffs are not an "additional health and safety requirement" within the usual meaning of Clause 12 because the purpose behind the tariffs was to retaliate against protectionist Mediterranean Tariffs [*Cl. Ex.* C6].

70. Equally, the Equatorianian Tariffs are not a "comparable unforeseen event" within the meaning of Clause 12. As parties' subjective intentions as to the meaning of Clause 12 cannot be discerned from their negotiations, Art. 8(1) CISG is inapplicable. Applying Art. 8(2) CISG, RESPONDENT submits that a reasonable person in CLAIMANT's position would have understood a "comparable unforeseen event" as an event which was comparably unforeseeable to the health and safety requirements imposed in its previous Danubian transaction [*PO2* para. 21].

71. The concern that CLAIMANT wanted to address in Clause 12 related to events which extremely unforeseeable and not discoverable at the time of contracting. Clause 12 was drafted in response to CLAIMANT'S previous experience with a Danubian buyer of its horses [*PO2* para. 12; *Cl. Ex.* C4]. There, CLAIMANT was beset with unforeseeable health and safety requirements imposed by the Danubian government in response to a rare disease carried by horses [*PO2* para. 21]. CLAIMANT's fear stemmed particularly from the fact that the disease was completely unexpected due to its rare occurrence and also because it was asymptomatic [*PO2* para. 21]. In fact, CLAIMANT emphasised how the disease was ***unforeseeable*** in its email to RESPONDENT in requesting for protection against such risks [*Cl. Ex.* C4]. Therefore, a reasonable person of the same kind as CLAIMANT would have understood the subsequent addition of the phrase "comparable unforeseen events" in Clause 12 to refer to risks which were comparably unforeseeable to the Danubian health and safety requirements it previously experienced.

72. Here, Clause 12 does not apply to hardship caused by the Equatorianian Tariffs because they were not comparably unforeseeable to the Danubian health and safety requirements. While

there were no prior signs which could have warned CLAIMANT of the Danubian safety measures, there were events prior to the signing of the Sales Agreement on 6 May 2017 which made the Equatorianian Tariffs relatively foreseeable. The Equatorianian Tariffs were enacted in retaliation to Mediterranean Tariffs imposed by President Bouckaert, the Mediterranean President. He had made known his support for protectionist measures for agricultural products during his election campaign [*Cl. Ex.* C6], and subsequently appointed a protectionist minister for agriculture, trade and economics [*PO2* para. 23]. At the same time, the existence of hardliners in the Equatorianian Ministry of Economics supporting protectionist measures made the possibility of retaliatory tariffs likely, even though the Equatorianian government had rarely engaged in protectionist measures in the past [*Cl. Ex.* C6].

73. Crucially, a significant change of government policy has been considered reasonably foreseeable due to changing governmental attitudes exhibited at the time of contracting. In the *Crude Oil Pipeline Case*, the tribunal considered a sudden restriction by the Organisation of the Petroleum Exporting Countries on the global oil supply to be foreseeable. The "changing attitudes" of OPEC countries when the contract was concluded made a future restriction in oil production reasonably foreseeable [*Brunner* 164; *Yearbook (1984)* 69-70].

74. Moreover, CLAIMANT's assertion that it was not foreseeable for tariffs on "agricultural products" to include frozen semen is counterintuitive [*Cl. Memo.* para. 91]. Frozen equine semen is widely recognized as an agricultural product in countries such as New Zealand, South Korea, Canada and Ireland by virtue of being considered an animal byproduct [*Agricultural Products (Equine Semen)*].

75. Furthermore, CLAIMANT's interpretation of Clause 12 as encompassing all customs regulations and import restrictions is inconsistent with the parties' negotiations [*Cl. Memo.* para. 98]. While CLAIMANT aired multiple concerns including, *inter alia*, risks associated with changes in customs regulations and import restrictions, as well as additional health and safety requirements [*Cl. Ex.* C4], RESPONDENT only chose to include the latter in Clause 12 [*Cl. Ex.* C5]. If RESPONDENT had intended for hardship from all customs regulations and import restrictions to be included within the scope of Clause 12, it would have chosen to include the former in Clause 12 instead.

76. Therefore, the Equatorianian Tariffs do not constitute hardship within the meaning of Clause 12 because they were not "caused by additional health and safety requirements" or "comparable unforeseen events" [*Cl. Ex.* C5].

2. The costs incurred by CLAIMANT from the Equatorianian Tariffs are not sufficiently onerous to constitute "hardship" within the meaning of Clause 12.

77. The increased costs from the Equatorianian Tariffs are also not sufficiently onerous to constitute hardship within the meaning of Clause 12.

78. Clause 12 relieves CLAIMANT from responsibility arising out of "hardship … making the contract more onerous". Consistent with how hardship is generally understood, this formulation refers to the occurrence of an event which "fundamentally alters the equilibrium of the contract", thus making it unreasonable for the party to continue performance on the same terms [*Brunner* 398; *Girsberger* 123; *Lindstrom* 1; *Lookofsky* 439]. In other words, this involves a fact-sensitive inquiry into whether what the parties undertook to perform at the time of contracting had been altered so fundamentally by the purported "hardship" event [*Brunner* 426]. In doing so, several factors must be considered, including the parties' intentions and their respective assumptions of risk at the time of contracting [*Brunner* 422-423; *Rimke* 227].

79. Here, no fundamental alteration can be found as the Equatorianian Tariffs have only resulted in a 15% increase of CLAIMANT's cost of performance under the Sales Agreement. This is because the Equatorianian Tariffs have only been imposed on the Third Shipment [*Cl. Ex.* C8]. Hence, while CLAIMANT's cost of performance has increased by US$ 1,500,000 (30% tariff on shipment valued at US$ 5,000,000), this only amounts to a 15% cost increase in comparison to the total value of the sale, which is US$ 10,000,000. While parties did not specify in the Sales Agreement what "more onerous" means, RESPONDENT submits that parties would not have intended for a 15% increase in costs to cross that threshold.

80. First, while Clause 12 was drafted to address CLAIMANT's previous experience in Danubia where government measures caused a 40% increase in costs [*PO2* para. 21], the current cost increase of 15% is almost two thirds less than this figure. Even in jurisdictions which recognize the hardship excuse, there is general agreement that only a 100-150% cost increase will suffice for a finding of hardship [*Brunner* 428-435; *Schwenzer* 716-717; *Schwenzer/Schlechtriem* 1142]. This is justified by the relatively higher risks expected of international sales agreements as compared to domestic contracts [*Schwenzer* 717; *Schwenzer/Hachem/Kee* 671]. On the facts, there is nothing which indicates parties wanted to change the standard of hardship to thresholds far below the norm.

81. Even taking into account CLAIMANT's financial situation, a finding of hardship remains unjustified. A party's financial difficulties does not *prima facie* attract a finding of hardship, as

it must be viewed in light of parties' expectations under the contract [*Brunner* 437; *Peanut Case*; *Schwenzer/Hachem/Kee* 670]. Importantly, the decisive element is not the financial position of the party, but whether there has been a fundamental alteration of the contractual equilibrium [*Brunner* 437]. Consistent with the general principle that a party guarantees its own financial capacity when it agrees to contractual obligations, a party should not be allowed to shift the risk of any further deterioration of its financial situation to other parties [*Brunner* 436-437]. In particular, where a party undergoing financial difficulties nonetheless agrees to extensive contractual obligations, it can be reasonably expected that the party assumes the risk of its own financial ruin [*Brunner* 437; *Zweigert/Kotz* 521; *Dalhuisen* 110; *Girsberger* 132]. Here, by agreeing to undertake the wide risks of DDP delivery even when it was facing financial difficulties, CLAIMANT should be taken to have assumed the risk of financial insolvency in its performance of obligations under the Sales Agreement.

82. Moreover, keeping with the nature of a "fundamental alteration", CLAIMANT cannot argue that its insolvency is sufficient for a finding of hardship because it was already near insolvency at the time of contracting. In fact, CLAIMANT was already dependent on loans to stay afloat, and it would have taken a relatively small loss to cause its insolvency [*PO2* para. 21, 29]. Therefore, though unfortunate, the possibility of CLAIMANT's financial ruin should not be seen as a "fundamental alteration" within the meaning of hardship given CLAIMANT's financial state when the contract was formed.

83. In light of the above, this Tribunal should find that hardship within the meaning of Clause 12 has not been established because the Equatorianian Tariffs are not sufficiently onerous to fundamentally alter the equilibrium of the Sales Agreement.

IV. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL US$ 1,250,000 FROM AN ADAPTATION OF THE PRICE UNDER ART. 79 CISG.

84. This Tribunal should dismiss CLAIMANT's claim that it is entitled to an additional payment of at least US$ 1,250,000 pursuant to an adaptation of the price under the CISG. **(A)** Parties intended for Clause 12 to oust the application of Art. 79 CISG by exhaustively governing the rights and obligations of parties in relation to hardship situations. **(B)** In any event, CLAIMANT is not entitled to an additional US$ 1,250,000 from an adaptation of the contract price under Art. 79 CISG.

A. Parties intended for Clause 12 to oust the application of Art. 79 CISG by exhaustively governing the rights and obligations of parties in relation to hardship.

85. CLAIMANT is relying on Art. 79 CISG to adapt the contract price for the increase in costs caused by the Equatorianian Tariffs by asserting that the increase in costs amounts to hardship. Hardship refers to situations where the contractual equilibrium between the parties have been fundamentally altered by an unforeseen change of circumstances [*Azeredo* 323]. An example of this is when an increase in costs makes performance much more onerous but not impossible [*Brunner* 391-392]. However, Art. 6 CISG states that "parties may… derogate from or vary the effect of any of its provisions". Art. 79 CISG has no application in the present case because parties intended for Clause 12 of the Sales Agreement to exhaustively govern the rights and obligations of parties in hardship situations.

86. RESPONDENT is aware that Clause 12 makes no express reference to Art. 79 CISG. However, it is incorrect to conclude, as CLAIMANT has asserted, that only an express derogation is permitted under Art. 6 CISG [Cl. Memo. para 110].

87. A derogation under Art. 6 CISG "may be made implicitly, although there is no… express provision to that effect" [*Schlechtriem/Schwenzer* 102]. Therefore, it is not necessary for the parties to expressly state their intent to derogate [*Sheets of Vulcanized Rubber Case*; *Corn Case*].

88. In the specific context of Art. 79 CISG, commentators have noted that the inclusion of a force majeure clause in the contract would preclude the application of Art. 79 CISG [*Schwenzer/Schlechtriem* 1152; *DiMatteo/Janssen/Magnus/Schulze* 702]. The *Corn Case* is also instructive in this regard. In those proceedings, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry found that Art. 79 CISG had been derogated from by the parties' detailed force majeure provisions in the contract, even though the parties did not expressly state that they were derogating from Art. 79 CISG. This

is sensible because by drafting specific rules in a detailed contract to address specific situations, parties chose to regulate their rights and obligations via these specific rules and not the CISG provisions which would have otherwise applied [*Kröll/Mistelis/Viscasillas* 105].

89. Clause 12 provides that in situations of hardship caused by "health and safety requirements" or "comparable unforeseen events", seller shall not be responsible for hardship. Similarly, Clause 12 is inconsistent with Art. 79 CISG insofar as it limits CLAIMANT's exemption from liability for a failure to perform only to hardship situations caused by "health and safety requirements" or "comparable unforeseen events". As such this Tribunal should find that the operation of Art. 79 CISG is ousted in favour of Clause 12. CLAIMANT is thus precluded from relying on Art. 79 CISG for adaptation of the contract price.

B. In any event, the US$ 1,250,000 CLAIMANT seeks by way of adaptation CLAIMANT seeks is not allowed under Art 79 CISG.

90. Art. 79(1) CISG provides that "a party is not liable for a failure to perform any of his obligations…". It excuses parties from paying damages for non-performance if their non-performance had been caused by an impediment which was beyond their control and which was unforeseeable. Contrary to CLAIMANT's assertions, its claim for an adaptation of the contract price by US$ 1,250,000 under Art. 79 CISG is unjustified. **(1)** Art. 79 CISG only excuses liability for a failure to perform and does not provide for the remedy of adaptation. **(2)** Further, the requirements for relief under Art. 79 CISG are not satisfied because the Equatorianian Tariffs were foreseeable and not onerous enough.

1. Art. 79 CISG only excuses liability for a failure to perform and does not provide for the remedy of adaptation.

91. There is nothing in the language of Art. 79 CISG to suggest, as CLAIMANT has asserted, that an adaptation of contract price is allowed. Art. 79(1) merely provides that "a party is ***not liable for a failure to perform*** any of his obligations [emphasis added]" if its requirements are satisfied. In other words, it allows a party suffering hardship, not to have to continue performing its obligations. But it does not provide for the imposition of additional terms on the counterparty. CLAIMANT has not disputed that this is the plain reading of Art. 79(1) CISG [*Cl. Memo.* para. 112].

92. CLAIMANT has placed reliance on Art. 79(5) CISG, stating that it "entails remedy [sic] other than a claim for damage" [*Cl. Memo.* para. 124]. This is erroneous. Art. 79(5) CISG only states that "nothing in [Art. 79 CISG] prevents either party from exercising any other right other than to claim damages under this Convention". Art. 79(5) CISG merely clarifies that

Art. 79 CISG excuses the obligor from paying damages but not against a claim to enforce other rights. It does not independently create any remedy by itself. Since no other provision of the CISG expressly provides for an adaptation of the contract price in hardship situations either, this Tribunal should conclude that Art. 79(5) CISG does not assist CLAIMANT.

93. CLAIMANT has also asserted that the remedy of adaptation is available using the gap-filling mechanism of Art. 7(2) CISG [*Cl. Memo.* para. 125]. However, Art. 7(2) CISG can only be applied when there are "questions concerning matters governed [by the CISG] which are not expressly settled in it". There is no room for its application when the question is governed and expressly settled within the CISG.

94. In the present instance, the question of whether adaptation is available as a remedy under the CISG has been expressly settled. Whilst hardship situations fall within the scope of "impediment" in Art. 79 CISG [*Schwenzer/Schlechtriem* 90-91, 1142; *Brunner* 222; *CISG AC 7* 3.1; *Scafom International*], the CISG rejects the remedy of adaptation and only provides for an exemption of liability for a failure to perform.

95. The drafters of the CISG had occasion to consider the inclusion of the remedy of adaptation for hardship situations but ultimately chose not to. During the drafting of the CISG, the Committee of the Whole I had at its tenth session rejected a proposed article on hardship which would have allowed a party to "claim an adequate amendment of the contract" if it was faced with "excessive difficulties" [*Azeredo* fn. 1307; A/32/17]. In this light, the lack of a remedy of adaptation was deliberate and does not by itself create a 'gap' in the CISG; it instead reflects the drafters' rejection of such a remedy for hardship situations in the CISG [*Flechtner 2011* 93].

96. RESPONDENT is aware that the Supreme Court of Belgium found in the case of *Scafom International* that hardship situations can be resolved by recourse to the PICC via an application of Art. 7(2) CISG. However, little reliance should be placed on this case because the Supreme Court did not address the issue of the drafting history behind Art. 79 CISG. Furthermore, the analysis of the Supreme Court should also not be followed because it was reasoned through the civilian law concept of "imprévision" (changed circumstances) and was not an autonomous interpretation of Art. 79 CISG [*DiMatteo/Janssen/Magnus/Schulze* 676], contrary to what Art. 7(1) CISG dictates. RESPONDENT respectfully submits that this Tribunal should treat the *Scafom International* case with caution as it stands in contradiction to the intention of the drafters of CISG.

97. Insofar as Art. 79 CISG has already provided the relevant relief for hardship cases, there is no further gap to fill and Art. 7(2) CISG has no application. It is on this basis that this Tribunal should reject CLAIMANT's attempt to read in a remedy of adaptation through reliance on Art. 6.2.3. PICC as a general principle on which the CISG is based [Cl. Memo. para. 126]. In any event, the PICC is an external source which may represent general international law principles [*Flechtner* 96; *Ferrari/Gillete/Torsello/Walt* 101]. But it is challenging to accept the PICC as representing principles on which the CISG is based when chronologically, the CISG pre-dates the existence of the PICC. Moreover, to use Art. 6.2.3. PICC, which was developed within the civil law framework, to 'supplement' the CISG, is to run the risk of importing civil law concepts into the CISG which is to be interpreted autonomously [*Flechtner* 97].

98. Considering the above, Art. 79 CISG does not allow for the remedy of adaptation, contrary to CLAIMANT's assertions.

2. <u>The requirements for relief under Art. 79 CISG are not satisfied because the Equatorianian Tariffs were foreseeable and not onerous enough.</u>

99. Even if it were to be assumed that Art. 79 CISG provides for the remedy of adaptation, CLAIMANT would need to show that it has suffered an "impediment" which is actionable under Art. 79 CISG to succeed in its claim. First, such an impediment must be unforeseeable, be beyond the control of that party, and be unavoidable in the sense that the party cannot reasonably be expected to overcome it [*Schwenzer/Schlechtriem*1133; *Kröll/Mistelis/Viscasillas* 1055]. Second, performance of the contract must have become "excessively onerous [and] not merely more onerous" [*Azeredo* 317]. Not every mere increase in the costs of performance will amount to an impediment [*Schlechtriem/Schwenzer* 1142; *Brunner* 214, 431].

100. RESPONDENT submits that the increase in costs caused by the Equatorianian Tariffs does not meet either threshold. The increase in costs is not "excessively onerous" so as to amount to an impediment within the meaning of Art. 79 CISG. Further, the Equatorianian Tariffs were also foreseeable.

101. In order for an increase in costs to amount to an impediment under Art. 79(1) CISG, the increase must have fundamentally altered the contractual equilibrium by being "excessively onerous". In light of this stringent requirement, it has been suggested as a general rule by commentators that only cases where the cost of performance has increased by upwards of 100% should suffice to be an impediment [*Brunner* 428-435; *Schwenzer* 716; *Schlechtriem/Schwenzer* 1142]. This aligns with the intention of the drafters of the CISG that

"impediment" should be construed extremely narrowly. It is significant to note that it was precisely to narrow down the ambit of this provision that the word "circumstances" in Art 74 ULIS (the CISG's predecessor) was replaced with "impediment" [*A/CN.9/SER.A/1974* 39 para. 108]. This was because the drafters were concerned that "a party could be too readily excused from performing his contract", unless the conditions for exemptions were more narrowly and objectively defined [*CISG AC 7* fn. 33; *Azeredo* para. 508]. A narrow meaning thus should be ascribed to "impediment" to give effect to the intention of the drafters.

102. As mentioned above [para. 79], the increase in costs caused by the Equatorianian Tariffs is only 15%. An increase in costs must fundamentally alter the contractual equilibrium in order to amount to an impediment under Art. 79 CISG [*Brunner* 218]. Therefore, for the same reasons as to why the increase in costs does not amount to hardship under Clause 12 [above at paras 80-82], this increase of 15% must also be considered too insignificant to amount to an impediment under Art. 79 CISG since it has not fundamentally altered the contractual equilibrium.

103. Even if we consider the Third Shipment in isolation, such that the Equatorianian Tariffs increased the cost of performance by 30%, this is also nowhere sufficient to constitute an impediment under Art. 79 CISG. The case of *Nuova Fucinati* is analogous. The court there opined that a price increase of 30% of the ironchrome to be sold did not satisfy the threshold for a finding of an impediment under Art. 79CISG. Accordingly, the increase in costs caused by the Equatorianian Tariffs should be considered too insufficiently onerous to qualify as an impediment under Art. 79 CISG.

104. Although CLAIMANT has asserted that it would be "financially endangered" should it be made to pay the Equatorianian Tariffs [*Cl. Memo.* para. 123], this Tribunal should not be minded to find that the increase in costs amounted to an impediment simply on that basis. As mentioned above [para. 81], the inquiry should be centered around whether there has been a fundamental alteration of the contractual equilibrium. There is no fundamental alteration of the contractual equilibrium on the present facts insofar as the increase in costs was not onerous enough, and CLAIMANT was already endangered financially even before entering into the contract

105. Furthermore, even if the Equatorianian Tariffs were to be considered economically onerous, as stated above, CLAIMANT needs to show that cost increase was unforeseeable in order to be entitled to relief under Art. 79 CISG. If a reasonable person in the shoes of the promisor under the actual circumstances at the time of the conclusion of the contract ought

to have foreseen the impediment, then the obligor would be responsible for it [*Schwenzer/Schlechtriem* 1134-1135]. This is because a party is taken to have impliedly assumed the risk of it occurring if no provision is made [*Azeredo* 223; *Schlechtriem/Schwenzer* 1135].

106. In this case, it must have been foreseeable by CLAIMANT that a change in import duties, of which the Equatorianian Tariffs fall under, could cause it to face an increase in costs. This is because CLAIMANT has agreed to DDP delivery pursuant to Clause 8 of the Sales Agreement. In order to fulfill its DDP delivery obligations, CLAIMANT is obliged to "bear all the costs involved in bringing the goods to the named place of destination", including the cost of import duties [ICC INCOTERMS. (2010); *Ramberg* 61, 149]. In fact, CLAIMANT was cognisant of this when it mentioned that DDP delivery would entail it having to bear the risk of changes in "import restrictions" in its email to RESPONDENT [*Cl. Ex.* C4]. Crucially, CLAIMANT did not make any provision for such changes in the Sales Agreement, since Clause 12 only provides a narrow exemption for "health and safety requirements" or "comparable unforeseen events" [above para. 75]. Since no provision was made, CLAIMANT should be understood to have assumed the risk for the Equatorianian Tariffs, and accordingly relief under Art. 79 CISG is not possible.

107. Finally, it ought to be noted that while this Tribunal has ordered CLAIMANT to limit its submissions to its entitlement "to the payment of US$ 1,250,000… resulting from an adaptation of the price… ***under the CISG*** [emphasis added]" [*PO1* para. III.1.c.ii], CLAIMANT has contended that it is entitled to adaptation under the PICC as the governing law of the Sales Agreement [*Cl. Memo.* paras. 129-131]. Consequently, CLAIMANT claims it is entitled to an additional US$ 1,250,000 in order to "restore the equilibrium of the Agreement" pursuant to Art. 6.2.3 PICC. CLAIMANT's submissions on this issue should not be heard as they fall out of the scope of the issues laid down in Procedural Order 1. In any event, the hardship provisions in Art. 6.2.3 PICC which is Mediterranean *lex generalis* have no application in the present case, having been displaced by Art. 79 CISG, which is Mediterranean *lex specialis* [*Leyens* fn. 165; *Schwenzer/Schlechtriem* 81]. Further, an adaptation of the contract price by US$ 1,250,000 would upset, rather than restore the contractual equilibrium, which is what Art. 6.2.3 PICC is intended to do in hardship scenarios. This is because the risk of the Equatorianian Tariffs is allocated to CLAIMANT as it agreed to DDP delivery.

108. Considering the above, this Tribunal should find that CLAIMANT is not entitled to any remedy of adaptation under Art. 79 CISG and Art. 6.2.3 PICC is inapplicable to the present case.

V. PRAYERS FOR RELIEF

109. For the foregoing reasons, RESPONDENT humbly requests this Tribunal to find that:

a. CLAIMANT is not entitled to submit evidence from the Mediterraneo Arbitration;

b. Under the Arbitration Agreement this Tribunal has no power to adapt the contract; and

c. CLAIMANT is not entitled to the payment of US$ 1,250,000 or another amount resulting from an adaptation of the price under either Clause 12 or the CISG.

Respectfully signed and submitted by counsel on 24 January 2019.

Daniel Fong

Kenneth Lim

Law May Ning

Teo Tze She