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

ATENEO DE MANILA UNIVERSITY

MEMORANDUM FOR RESPONDENT

On Behalf Of	Against
Blackbeauty Equestrian.	*Phar Lap Allevamento*
Respondent	*Claimant*
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo

Counsels

Raphael Niccolo L. Martinez • Andrew Ray E. Rosales •

Jaims Gabriel L. Orencia. • Bianca Isabel D. Soriano

MANILA • PHILIPPINES

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INDEX OF ABBREVIATIONS

&	And
¶/¶¶	Paragraph/s
%	Per cent
§/Sec.	Section/s
ANoA	Answer to Notice of Arbitration
Art./Arts.	Article/s
Cl.	Claimant
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
Corp.	Corporation
DDP	Delivery Duty Paid
e-mail	Electronic mail
e.g.	Exempli gratia
ed.	Edition
et. al	And others
Exh.	Exhibit
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	*Idem* [the same]
Inc.	Incorporated
infra	[See] beneath
Ltd.	Limited
Memo.	Memorial
Mr.	Mister
Ms.	Miss

No.	Number
NoA	Notice of Arbitration
NTMs	Non-tariff Measures
p./pp.	Page/pages
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
R.	Respondent
supra	[See] above
UN. Doc.	UN Documents
UNCITRAL	United Nations Commissions on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus
Vol.	Volume
WG	Working Group

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STATEMENT OF FACTS

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

CLAIMANT operates Mediterraneo's oldest and most renowned stud farm which provides breeders with CLAIMANT for natural covering and frozen semen for artificial insemination. Phar Lap is particularly known for its breeding success regarding racehorses.

RESPONDENT is a company from Equatoriana and famous for its broodmare line. It recently purchased ten mares with excellent racehorse pedigree new racehorse breeding programme to its business.

2014	CLAIMANT nearly suffers bankruptcy due to unexpected additional health and safety tests which rendered a business transaction highly unprofitable.
21 March 2017	RESPONDENT contacts CLAIMANT about the possibility of purchasing 100 doses of frozen semen of CLAIMANT'S well-known stallion Nijinsky III.
28 March 2017	Due to CLAIMANT'S experience in the shipment of frozen semen, RESPONDENT asks for a delivery to its own premises on the basis of DDP.
31 March 2017	CLAIMANT confirms the changed delivery modality on the condition that it does not have to bear all of the associated risks. A hardship clause is therefore included in the contract. CLAIMANT further suggests arbitration in Mediterraneo for dispute resolution.
10 April 2017	RESPONDENT'S proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft.
13 April 2017	In relation to the hardship clause, the negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal.

6 May 2017	CLAIMANT and RESPONDENT sign the Frozen Semen Sales Agreement (hereafter: "the Contract"). The agreement provides for arbitration in Danubia and a choice of law in favor of Mediterranean Law.
15 November 2017	After the first two shipments, the government of Mediterraneo unexpectedly imposes a 25% tariff on agricultural products from Equatoriana.
19 December 2017	The Government of Equatoriana retaliates by announcing a 30% tariff on agricultural goods from Mediterraneo.
20 January 2018	CLAIMANT discovers that the tariffs cover racehorse semen and contacts RESPONDENT to renegotiate the purchase price. RESPONDENT urges CLAIMANT to deliver the doses and assures that a solution regarding the price would be found.
21 January 2018	RESPONDENT did not agree to any adaptation following CLAIMANT'S request in January 2018. Quite to the contrary, Mr. Shoemaker made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs but that he would verify that with the persons involved in drafting. He also pointed out that he had no authority to agree on an adaptation CLAIMANT authorizes the shipment and pays the tariffs.
12 February 2018	RESPONDENT'S CEO terminate the negotiations regarding an adaptation of the purchase price and refuses to pay any additional amount for the tariffs.
31 July 2018	CLAIMANT initiates arbitral proceedings against RESPONDENT

SUMMARY OF ARGUMENTS

Contrary to CLAIMANT'S submission, the Tribunal does not have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract which includes, in particular, the question of which law governs the arbitration agreement. This is because the determination of the law governing Sec. 15, FSSA and CLAIMANT'S claim of US$ 1,250,000.00 are not within the scope of Sec. 15, FSSA. CLAIMANT'S deviation from the HKIAC model clause and the negotiation the parties militate against the application of the Law of Mediterraneo to Sec. 15, FSSA. Further, CLAIMANT'S misapplied the three-step inquiry test in the case of *Sulamérica*. The Danubian Law, as the lex arbitri, is the more applicable law governing Sec. 15, FSSA as it is the parties' express and implied choice, as well as the law which bears the closest commercial relation to the parties' relationship. Consequently, an interpretation of Sec. 15, FSSA under Danubian Law militates against the power of the Tribunal to adapt the contract because contract adaptation is a non-arbitrable issue. Furthermore, even if the parties should agree that the Tribunal has the power to adapt the contract, the award of US$ 1,250,000.00 still cannot be enforced under the Danubian Law. In any event, assuming but not conceding, that Mediterranean Law does govern Sec. 15, FSSA, contract adaptation is still not possible because CLAIMANT'S was not able to sufficiently comply with the procedural requirements under Mediterranean Law. Further, the mere inclusion of a hardship clause in the substantive contract does not immediately grant the Tribunal the power to intervene and adapt the contract. Furthermore, the Tribunal also has no power to adapt the contract under Sec. 6.2.3, PICC despite being the law of the substance of the dispute **[ISSUE 1].**

CLAIMANT is not entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of confidentiality agreement or through an illegal hack of respondent's computer system. The Partial Interim Award is inadmissible under Art. 9.2 and 3 IBA Rules because it was obtained in violation of principles of procedural fairness and CLAIMANT'S duty to arbitrate in good faith. In any event, should the Tribunal decide that the Award is admissible under the IBA Rules, RESPONDENT submits that it is still both irrelevant to the present proceedings, and immaterial to the outcome of the case. The Tribunal must also necessarily exclude the evidence from the other arbitration because admitting them will jeopardize the enforcement of any award that the Tribunal will render. Further, the UNCITRAL Rules do not apply in the present case because the present arbitration is not an

investor-state arbitration pursuant to any treaty the parties have entered into. Even assuming that the UNCITRAL Rules do apply, the duty of confidentiality must still necessarily prevail since both CLAIMANT and RESPONDENT agreed to the application of the HKIAC Rules, which contain an express duty of confidentiality **[ISSUE 2]**.

Contrary to CLAIMANT'S submission, the newly imposed tariffs neither meet the requirements of the narrowly worded hardship clause nor do they justify an adaptation under the CISG. RESPONDENT submits that the tariff is not a hardship as defined under Clause 12, FSSA. Using the principle of *ejusdem generis*, the tariff is not a comparable event as health and safety requirements. Moreover, the literal meaning nor the intention of the parties do not show that Clause 12 operates the same way as ICC Hardship Clause 2003. In any event, the tariff is not a hardship under ICC Hardship Clause 2003 nor Art. 6.2.2, PICC. Even if the tariff was a hardship, ICC Hardship Clause 2003 nor Art. 6.2.3 does not permit adaptation of the FSSA to grant CLAIMANT'S claims. Lastly, CLAIMANT invokes the CISG in a last attempt to stay the saddle. CLAIMANT cannot find refuge within the CISG because RESPONDENT has fulfilled all its obligations as Buyer. Further, CLAIMANT misapplies Art. 7 in interpreting the Convention and does the same under Art. 79 by including hardship. Furthermore, CLAIMANT cannot claim the additional amount of $1,250,000 as damages under Art. 74 since there is no breach. CLAIMANT should hold its horses when it prays to the Tribunal to request adaptation as a result of hardship **[ISSUE 3]**.

ARGUMENT ON PROCEDURE

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION AND/OR POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT WHICH INCLUDE, IN PARTICULAR, THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

1. CLAIMANT erroneously argues that Mediterranean Law governs the arbitration agreement because both parties allegedly chose the Mediterranean Law expressly [Cl. Memo. ¶1] and impliedly [Cl. Memo. ¶¶ 2-3], based on the negotiations of the parties [Cl. Memo., ¶¶ 1-11]. Further, CLAIMANT argues that Danubian Law cannot be regarded as the law governing the arbitration agreement, because the doctrine of separability is allegedly insufficient to support the application of the *lex arbitri* [Cl. Memo. ¶¶ 14-16], and the application of Danubian Law allegedly does not favor neutrality [Cl. Memo., ¶17]. Furthermore, CLAIMANT argues that the Tribunal has the power to adapt the contract pursuant to the UNIDROIT Principles and the CISG [Cl. Memo. ¶¶ 21-24].

2. As RESPONDENT will prove, CLAIMANT'S arguments are incorrect. The determination of the law governing Sec. 15, FSSA and the CLAIMANT'S claim of USD 1,250,000 are not within the scope of Sec. 15, FSSA **[I.]**; should the Tribunal decide that it has the power to determine the law governing Sec. 15, FSSA, it still does not have the power to adapt the parties' contract **[II.]**.

I. THE DETERMINATION OF THE LAW GOVERNING SEC. 15, FSSA AND THE CLAIMANT'S CLAIM OF USD 1,250,000 ARE NOT WITHIN THE SCOPE OF SEC. 15, FSSA.

3. RESPONDENT submits that the determination of the law governing Sec. 15, FSSA is not a "dispute arising out of the contract" that can be ruled upon by the Tribunal **[A.]**, and the determination of whether the Tribunal has the power to adapt the contract is a not an arbitrable issue, and thus cannot be ruled upon by the Tribunal **[B.]**.

A. THE DETERMINATION OF THE LAW GOVERNING SEC. 15, FSSA IS NOT A "DISPUTE ARISING OUT OF THE CONTRACT" THAT CAN BE RULED UPON BY THE TRIBUNAL.

4. The relationship between the arbitrators and the parties is contractual in nature [*REDFERN*, ¶5.63], and the Tribunal's powers are derived from—and confined to—that which is stipulated in the

contract [*Berger,* p. 8; REDFERN, ¶ 2.01]. Here, RESPONDENT submits that CLAIMANT'S claims require the adaptation of the contract, a remedy that was *not* contemplated in the arbitration agreement [ANoA, ¶12-13].

5. Given this, RESPONDENT urges the Tribunal to rule that the determination of the law governing Sec. 15, FSSA is not covered by the arbitration agreement, and in any event, it is a non-arbitrable issue. Here, contrary to CLAIMANT'S position [Cl. Memo. ¶¶1-19], the language of the arbitration agreement does not grant the Tribunal the power to decide on the law governing the arbitration agreement because the Parties' deviation from the HKIAC model clause bars them from raising issues that effectively expand the scope of the arbitration agreement **[i.]**, and the determination of the law governing the arbitration agreement is a non-arbitrable issue **[ii.]**.

i. The Parties' deviation from the HKIAC model clause bars them from expanding the scope of the arbitration agreement.

6. The expansive wording of the HKIAC model clause guards against the inclusion of disputes in the arbitration agreement the parties could have never intended to submit to arbitration [MOSER & BAO, ¶4.06]. The HKIAC model clause provides that the proper language of the arbitration agreement must refer to "*all* disputes" in order to ensure that every possible dispute can be covered [MOSER & BAO, ¶ .06]. Sec. 15, FSSA, however, refers to "*any* dispute," which HKIAC Rules deem insufficient to ensure a broad enough scope [MOSER & BAO, ¶4.06].

7. In this case, the parties deliberately agreed upon a modified version of the arbitration agreement [NoA, ¶ 14]. Consequently, the Tribunal may find that Claimant is now barred from raising the question of whether the determination of the law governing Sec. 15, FSSA is included in the scope of the arbitration agreement.

ii. In any event, irrespective of the language of the arbitration agreement, the law governing Sec. 15, FSSA is a non-arbitrable issue

8. The Tribunal has no power to rule on issues that are non-arbitrable. In *B. Fernandez*— which, much like the present case, involves the question of arbitrability based on the language of the arbitration agreement — the court ruled that for an issue to be arbitrable, it must necessarily be within the precise terms of the arbitration agreement [*B. Fernandez,* p. 815; MOSER & BAO, ¶4.05;

REDFERN, ¶2.01]. The *Fernandez* court ruled that the arbitration agreement must be written in categorical and precise language, and the ambiguity and vagueness of the arbitration agreement makes it impossible for the court to determine whether, in such situation, the parties really intended to allow the Tribunal to decide what the Parties agreed to submit to arbitration [*B. Fernandez,* p. 815].

9. More importantly, regardless of the language of the arbitration agreement, it was the duty of the courts – not the arbitrators – to pass upon the question of whether the scope of the arbitration agreement is sufficient to cover the parties' present dispute [*B. Fernandez,* p. 815]. Even assuming that the parties' arbitration agreement was couched in broad language, the Tribunal would not have the competence to rule upon the issue of the contract's arbitrability [*B. Fernandez,* p. 815].

10. Thus, because of the Parties' deviation from the HKIAC model clause, and the Tribunal's consequent lack of jurisdiction to pass upon the question of whether the scope of Sec. 15, FSSA is broad enough to include the present dispute, then the Tribunal should rule that the determination of the law governing Sec. 15, FSSA as well as Claimant's claim of USD 1,250,000.00 are non-arbitrable issues.

II. SHOULD THE TRIBUNAL DECIDE THAT IT HAS THE POWER TO DETERMINE THE LAW GOVERNING SEC. 15, FSSA, IT STILL DOES NOT HAVE THE POWER TO ADAPT THE PARTIES' CONTRACT.

11. Contrary to CLAIMANT'S assertion [Cl. Memo. ¶¶1-16], it is RESPONDENT'S position that, in the remote event that the Tribunal should decide that it has the power to determine the law applicable to the arbitration agreement [*supra* I.A], it should find that Danubian Law governs Sec. 15, FSSA [**A**]. Further, Danubian Law does not grant the Tribunal the power to adapt the contract [B]. Lastly, should the Tribunal adapt the contract, the award of US$ 1,250,000.00 still cannot be enforced under Danubian Law [C].

A. DANUBIAN LAW GOVERNS SEC. 15, FSSA.

12. In *Sulamérica,* the English Court of Appeal ruled that the law governing the arbitration agreement may be determined by undertaking a three-stage inquiry into the parties' express choice, implied choice, and the law with the closest and most real connection with the contract. Quite similar to

the Tribunal in the present case, the *Sulamérica* court was faced with the task of determining the law applicable to the arbitration agreement. Ultimately, the English Court of Appeal ruled that English law, as the *lex arbitri*, governs the arbitration agreement for reasons the Tribunal may find highly persuasive in ruling in favor of RESPONDENT.

13. The Tribunal may resort to prior statements and agreements in determining the parties' choice of law to govern Sec. 15, FSSA [Art. 2.1.17, PICC] because, *first,* Art. 2.1.17 is operative regardless of whether Mediterranean or Danubian law governs Sec. 15, FSSA [PO1 ¶II; PO2, ¶45]. *Second*, RESPONDENT also resorts to the prior statements of the parties in its arguments in the ANoA [R. Exh. 1,2,3]. In this case, Danubian Law is the parties' express choice **[i.],** implied choice **[ii.],** and the law with the closest and most real connection with the contract **[iii.].**

i. Danubian Law is the parties' express choice of law to govern Sec. 15, FSSA.

14. CLAIMANT is mistaken in claiming that it was the parties' intention to have their entire relationship governed by the Mediterranean Law [Cl. Memo. ¶ 5]. To be clear, the negotiations on what law would govern the arbitration agreement did not begin until 10 April 2017 when RESPONDENT proposed for the Equatorinian Law to apply [R. Exh. 1]. It is also highly improbable that RESPONDENT was referring to the entirety of the contract in its 28 March 2017 e-mail, when it had clearly advocated for the Equatorinian Law to apply as a single system of law in its e-mail, 10 April 2017 [R. Exh. 1].

15. The intention to have two differing laws to govern as the *lex arbitri,* and the law of the arbitration agreement came as a result of CLAIMANT'S refusal to accept RESPONDENT'S suggestion [R. Exh. 2]. Having in mind the long-term contractual relationship and mutual benefit of both parties, RESPONDENT agreed. Thus, it cannot be said that the parties eventually intended for a single system of law to govern their relationship, contrary to CLAIMANT'S assertions [Cl. Memo. ¶ 5]. Based on the foregoing, the lengthy negotiations clearly convey how both had intended to arrive at differing laws applicable to the arbitration agreement, and as the *lex arbitri* [R. Exh. 1,2,3].

16. Moreover, the well-established doctrine of separability operates to distinguish between the arbitration clause and the substantive contract such that the two are independent [Art. 19.2, HKIAC Rules ; REDFERN, ¶ 2.101; *Pearson,* p. 117]. RESPONDENT submits that the narrow application of the doctrine of separability as argued by CLAIMANT [Cl. Memo. ¶ 14] is not the

only way that courts have interpreted this principle. The doctrine of separability has been consistently applied broadly, and not merely when the validity or invalidity of the matrix contract is at issue [*Primrose,* p. 143; *Pearson,* p. 121; *FirstLink case,* ¶ 10; *Sulamérica,* ¶ 32].

17. In *FirstLink,* the validity of the matrix contract was never put in question, yet in ruling that the law of the seat of arbitration should be the applicable law of the arbitration agreement, the Singapore High Court stated that "*the arbitration agreement is, at the moment, shielded by the doctrine of separability*" [*FirstLink case,* ¶ 10]. Indeed, if the arbitration agreement is separable from the matrix contract, which has much more to do with the *procedure* rather than with the *substance* of the dispute, parties cannot be presumed to have chosen the law of the substance, and not the law of the procedure, to govern the arbitration agreement [*Sulamérica,* ¶ 29,32; *Nazinni,* p. 691]. When the parties have entered into dispute resolution, the desire for neutrality comes to the fore, and thus the natural inference should be that the *lex arbitri* (as the procedural law of the arbitration) takes precedence over substantive law [*FirstLink* case, ¶ 13]. Thus, based on the foregoing, Danubian Law was the express choice of the parties.

ii. Danubian Law is the parties' implied choice of law to govern Sec. 15, FSSA.

18. At the onset, it must be emphasized that the choice of seat is one of the most important aspects of any arbitration agreement [MOSER & BAO, ¶4.10]. This is because the law of seat generally dictates the (i) arbitrability of a dispute and (ii) the enforceability of the award to be granted by the Tribunal [MOSER & BAO, ¶4.10]. In this regard, it bears stressing that the agreement to settle on a neutral venue arrived as a result of CLAIMANT'S suggestion to change the place of arbitration to Danubia [R. Exh. 2]. RESPONDENT submits that CLAIMANT had in fact originally intended the Danubian Law to apply to their arbitration agreement.

19. In *Sulamérica,* the English Court of Appeal noted how the seat of arbitration determines the procedural law and the supervising jurisdiction of the courts of the country where the seat is located [*Sulamérica,* ¶10]. In *XX Y.B.,* the Tokyo High Court noted that in the absence of a clear indication, the Parties intended the *lex arbitri* to govern the arbitration agreement as this is more in accordance with the procedural nature of arbitration agreements [*XX Y.B. case*].

20. *FirstLink* states that when parties have entered into arbitration, this means that the substantive relationship has broken down, and the natural inference would be that the parties' desire for

neutrality comes to the fore [*FirstLink case,* ¶ 13]. In this case, the parties clearly agreed on Danubian Law to ensure that neutrality is maintained in the event that the parties have to enter into dispute resolution [R. Exh. 2,3*;* ANoA*,* ¶¶ 6,7]. It is worth noting that it was CLAIMANT who specifically suggested the idea to conduct arbitration in a neutral venue mutually acceptable to both parties [R. Exh. 1,2,*3*], due to an internal policy in Mediterraneo that requires parties to seek approval from the Creditors Committee for the consent to arbitration clauses [R. Exh 2]. The choice of Danubia as a neutral venue effectively relieves them of the requirement to gain the Creditor Committee's approval, thus more feasibly facilitating the parties' agreement [*PO2,* ¶ 14]. Contrary, therefore, to CLAIMANT'S submission that the application of the Danubian Law will unduly favor RESPONDENT [Cl. Memo. ¶17], Danubian Law clearly works to the advantage of not only RESPONDENT, but also CLAIMANT.

21. In sum, based on the foregoing, the application of the Danubian Law thus serves three purposes, all of which weigh heavily in favor of the contention that it bears the closest commercial relation to the parties' agreement. *First,* the application of the Danubian Law, as the *lex arbitri,* is more in accordance with the procedural nature of arbitration agreements as the seat is most closely connected to issues of arbitrability and the enforcement of awards [MOSER & BAO, ¶4.10; *Pearson,* p. 121; *NY Convention, Art. V(1)(a); European Convention, Art. VI (2); XX Y.B. Case; XXII Y.B. Case*]. *Second,* the neutrality of the dispute would be more effectively maintained in the application of the Danubian Law [*FirstLink case,* ¶ 13; R. Exh. 1,2,3; PO2, ¶14]. *Third,* Claimant would not need the approval of the Creditors Committee to consent to the arbitration agreement [R. Exh. 1,2,*3*; PO2, ¶14].

B. DANUBIAN LAW DOES NOT GRANT THE TRIBUNAL THE POWER TO ADAPT THE CONTRACT.

22. Applying Danubian Law, the Tribunal does not have the power to adapt the contract. Here, no authorization whatsoever was granted by the parties to the Tribunal. According to the "four corners rule" under Danubian Contract Law, arbitration agreements are to be interpreted narrowly necessarily being limited to what is written in the agreement and no external evidence can be relied upon [ANoA ¶16*,* PO1, II; PO2*,* ¶45].

23. The *principle of synchronized competencies* states that the powers of Tribunals are merely equal

to that of state courts [BRUNNER, p. 495]. It is well-established and undisputed that Danubian courts only have the power to adapt contracts if expressly authorized by the parties [PO1, II]. Neither CLAIMANT nor RESPONDENT have expressly or impliedly authorized the Tribunal to adapt the contract. Thus, under the principle of synchronized competencies, the Tribunal has no power to adapt.

24. **CONCLUSION ON ISSUE 1:** To conclude, the Tribunal neither has the power to rule on the law governing Sec. 15, FSSA nor its power to adapt the contract, because these questions are not arbitrable. Even if the Tribunal should rule that it has the power to determine the law governing Sec. 15, FSSA, it does not have the power to adapt the contract under Danubian Law, which was the parties' express and implied choice of law to govern the arbitration agreement, as well as that which bears the closest commercial relation to the contract.

- END OF DISCUSSION ON ISSUE 1 -

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF CONFIDENTIALITY OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

25. Contrary to CLAIMANT'S position [Cl. Memo. ¶¶7-15], the Tribunal should deny CLAIMANT'S attempt to introduce a copy of the Award in these proceedings because the Award is inadmissible (*i.e.,* irrelevant and immaterial to the outcome of the proceedings) **[I.]**. Otherwise, the Tribunal risks rendering an unenforceable award for breach of procedural good faith and fairness **[II.]**.

I. UNDER THE HKIAC RULES AND THE IBA RULES ON EVIDENCE, THE TRIBUNAL SHOULD NOT ADMIT THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

26. During the pendency of the present arbitration, RESPONDENT had fallen victim to an illegal hack of its computer system resulting in a considerable amount of information being obtained from it [R. Letter, 3 Oct. 2018]. Against all precepts of confidentiality in arbitration proceedings [HKIAC Rules, Art. 45], CLAIMANT now attempts to introduce into these proceedings a purchased copy

of the Partial Interim Award ("Award") from another arbitration in which Respondent is a party [Cl. Letter, 2 Oct. 2018], from a company of doubtful reputation no less, and which could only have come from an illegal hack by the hackers themselves or from Respondent's previous employees [PO2, ¶41] in breach of the latter's contractual confidentiality obligations [PO2, ¶41].

27. In the exercise of its evidentiary powers, the Tribunal is limited by the principles of good faith and procedural fairness [*EDF Services, PO3,* ¶47; HKIAC Rules, Art. 13.5; MOSER & BAO, ¶ 9.48] – principles that stand jeopardized and potentially violated in these proceedings, should the Tribunal admit the evidence sought to be introduced by CLAIMANT.

28. For evidence to be admissible, it must be relevant to the proceedings and material to its outcome [Art. 22.3, HKIAC Rules; *Hochtief,* ¶ 85], and must *not* be excluded under any of the grounds in Art. 9.2, IBA Rules on the Taking of Evidence ("IBA Rules"). To be clear, it is CLAIMANT that has the burden of proof to prove that the Award is relevant and material [*ADF Case, PO3,* ¶ 3]. However, the Partial Interim Award is irrelevant to the present proceedings [**A.**]. The Partial Interim Award is immaterial to the outcome of the present proceedings [**B.**]. The Partial Interim Award is inadmissible under the IBA Rules [**C.**].

A. THE PARTIAL INTERIM AWARD IS IRRELEVANT TO THE PRESENT PROCEEDINGS.

29. Evidence is considered relevant if it can provide any specific demonstration that will successfully support the Party's contention [O'MALLEY, ¶3.69]. The burden of proof to demonstrate the relevance of the evidence is upon the requesting party. [*ICC Case 2007*].

30. PO2 clearly provides that the Award rendered in the 29 June 2018 merely confirms the Tribunal's power to adapt [PO2, ¶39]. The Award does not whatsoever deal with the issue on whether contract adaptation is warranted. In fact, such question has yet to be decided in the other arbitral proceeding, as an Award on the merits of that case has not yet been rendered but is expected to be due on August 2019 [PO2, ¶39]. Thus, much less should the Award bear any relevance and significance to the present proceeding [PO2, ¶39].

31. Clearly, regardless of any alleged "inconsistencies" or "contradictory behavior" [Cl. Letter, 2 Oct. 2018] Claimant might prove in introducing the Award, it will absolutely have no bearing to Claimant's cause of action. The Award from the other arbitration does not provide any specific

demonstration that will persuade the Tribunal to rule for contract adaptation. Thus, the Award is irrelevant to the present arbitration.

B. THE PARTIAL INTERIM AWARD IS IMMATERIAL TO THE OUTCOME OF THE PRESENT PROCEEDINGS.

32. Having previously established the application of Danubian Law and, consequently, the four corners rule [*supra*] Respondent submits that the Tribunal find the Award from the other proceeding as immaterial. Under the four corners rule [supra] the issue of whether the Tribunal should adapt the contract should be confined to what is written on the Parties' agreement [*supra*]. Thus, the FSSA by itself is sufficient for the resolution of the case.

33. Having established that Danubian law governs the arbitration agreement, the Tribunal should thus find that the Award from the other proceeding is similarly immaterial by virtue of the four corners rule [*supra*]. Under Danubian Law, an express conferral of the power to adapt must be granted unto the Tribunal, which the Parties in this case explicitly did not do.

34. Further, it is worth noting that the authenticity and truthfulness of the Award is clearly tainted with doubt [*supra*]. The Award is immaterial as it would only delay the proceedings, and the subsequent reaching of a final Award. Unless CLAIMANT is able to prove that the Award from the other proceeding would have a likely effect on the outcome of the case, the Tribunal should deem such as immaterial [O'MALLEY, ¶3.75; *Hochtief,* ¶85].

35. Furthermore, Respondent submits that the Award should be excluded as it was obtained in violation of CLAIMANT'S obligation to observe good faith and procedural fairness under Art. 9.2(g), IBA Rules. Good faith and procedural fairness are also principles of general application in International Commercial Arbitration, which should guide the Tribunal in their otherwise wide discretion to admit evidence [*EDF Services PO3,* ¶47].

i. The Award was obtained in violation of Claimant's obligation to observe good faith and procedural fairness.

36. Good faith is a central tenet of evidentiary procedure [O'MALLEY, ¶1.26]. In *EDF Services,* the Tribunal ruled that it should refuse to admit evidence, there are good reasons to believe that the principles of good faith and procedural fairness have not been respected [*EDF Services PO3,* ¶47].

Further, in *Methanex,* Methanex sought to introduce evidentiary materials unlawfully obtained through trespassing unto private property [*Methanex,* CARON & CAPLAN, ¶55]. The UNCITRAL Tribunal ruled that the principle of equality of arms renders evidence obtained through illegal means inadmissible [*Methanex,* ¶25; O'MALLEY, ¶9.117].

37. Following the ruling in *EDF Services* and *Methanex,* evidence obtained illegally and in violation of principles of good faith are generally inadmissible. It is undisputed that the hacking of Respondent's computer system occurred during the pendency of the present arbitration [R. Letter, 3 Oct. 2018]. Hence, the Tribunal must exclude the admission of the Award as evidence.

38. In this case, CLAIMANT specifically admitted that it seeks to obtain the Award from a company which has a doubtful reputation as regards the means it acquires its information [PO2, ¶41]. CLAIMANT is clearly negligent as it did not take any steps to ensure that the information contained in the document bears truth and accuracy [PO2, ¶41]. By seeking to introduce said documents and Award knowing of the doubtfulness of their nature, RESPONDENT submits that CLAIMANT necessarily violated its obligation act in good faith and observe procedural fairness [O'MALLEY, ¶7.50; HANOTIAU, p. 373]. Indeed, RESPONDENT was even authorized by its opponent from the other arbitration to state that the allegations of CLAIMANT do not reflect reality and are taken out of context [R. Letter, 3 Oct. 2018].

39. CLAIMANT violated its obligation to observe good faith and procedural fairness when it sought to introduce evidence acquired through a hacking of Respondent's computer system [R. Letter, 3 Oct. 2018*; PO2, ¶42*]. Hacked evidence must be considered as generally inadmissible based on the underlying principles of procedural fairness and equality of parties of the IBA Rules [O'MALLEY, ¶1.24; Preamble*, IBA Rules,*].

40. The case of *Caratube* illustrated how hacked evidence is treated as generally inadmissible. In *Caratube, Caratube* sought to introduce documents that were obtained through hacking of Respondent's computer system, which were later on leaked on a publicly available website [*Caratube,* ¶ 150]. In the instant case, the data obtained from Respondent does not in any manner form part of the public domain as the data was obtained under suspicious circumstances [R. Letter, 3 Oct. 2018*;* PO2, ¶ 41]. There is a high probability that the hacking was initiated or arranged by the questionable company from which CLAIMANT bought the copy of the Partial Interim Award

[P.O. 2 ¶41]. Thus, the Tribunal must exclude the Award.

41. CLAIMANT misapplied the ruling in *AEGIS* [Cl. Memo. ¶47-48]. In *AEGIS,* European Reinsurance sought to introduce the award from the first arbitration to prove that AEGIS is estopped form raising the same issue in the second arbitration. The Privy Council upheld the introduction of the ward from the first arbitration *only* because, *first,* the requesting party was already a party to the previous case [*AEGIS*] and, *second,* it was proof that the same issues had already been previously adjudicated in the first proceeding, and the introduction of the earlier Award in the subsequent proceeding was merely a form of enforcement of the earlier Award [*AEGIS*]. In the instant case, CLAIMANT requests to introduce the Award from the other proceeding not for the purpose of enforcing the same, but to bolster its claims in the instant proceeding. Clearly, CLAIMANT is in no capacity to seek enforcement of the Award from the other proceeding, the Award clearly granted in favor of Respondent. In fact, CLAIMANT was never a party in the other proceeding and knew nothing but the main issues of the same [PO2, ¶40]. CLAIMANT misconstrued the English Privy Council's ruling in *AEGIS,* and now requests the introduction of an Award for a purpose different from that of the *AEGIS* council.

ii. Even assuming that the Partial Interim Award was obtained in good faith, the same is still protected by confidentiality, and thus inadmissible under Art. 9.2(e) IBA Rules.

42. CLAIMANT relies on *Esso* in arguing that the current trend of case law has seen the diminishing of confidentiality in ICA proceedings as a whole [Cl. Memo. ¶37]. In response, RESPONDENT submits, that several cases still affirm the implied obligation of confidentiality [*Hassneh Insurance; Ali Shipping Corp; AAY case; International Coal; Myanma Yaung Chi*]. In stark contrast to *Esso,* all parties to both arbitrations expressly agreed on the application of the 2013 and 2018 HKIAC Rules which contain an express obligation to keep the arbitration proceedings confidential [Art. 42, 2013 HKIAC; Art. 45, HKIAC,].

43. Art. 9.2(e), IBA Rules mandates the Tribunal to exclude any document on the grounds of commercial or technical confidentiality. The *Emmot* court ruled that the duty of confidentiality arises not as a matter of business efficacy, but as an implied matter of law and all documents in an arbitration are inherently confidential irrespective of their nature [*Emmot,* ¶ 81; *Ali Shipping,* p.

326]. On this basis, the Tribunal may find that Claimant misconstrued the breadth of the duty of confidentiality by narrowly limiting it to commercially confidential interests [Cl. Memo. ¶¶ 35-36]. Thus, the Award is still inadmissible under the IBA Rules based on the general duty of confidentiality.

44. Claimant seeks to argue that the disclosure of the Award and documents from the other proceeding are reasonably necessary to protect its interests, thus allegedly serving as an exception to the duty of confidentiality [Cl. Memo., ¶¶40-43]. In support, CLAIMANT cites *Hassneh* and *Emmot* [Cl. Memo. ¶41], which RESPONDENT addresses in turn.

45. Thus, only a party to the original proceeding can provide an exception to the duty of confidentiality strictly for the purpose of enforcing a right based on Award already attained prior to the subsequent proceeding in order to support the Party's defense and cause of action [*Teck*]. The privilege of introducing an Award from a previous proceeding applies only when it is a party to the original proceeding who now seeks to introduce the Award against a third party in order to enforce a right [*Hassneh; Teck*]. In the instant case, the Award from the previous proceeding is ironically sought to be used against RESPONDENT, the grantee of the Award in the previous proceeding [PO2, ¶39; Cl. Memo. ¶26]. Clearly, therefore, CLAIMANT misapplied the doctrine in *Hassneh.*

46. *Second*, CLAIMANT argues that the *Emmot* case recognized another exception to the duty of confidentiality is whether or not the disclosure is required by the interests of justice and fair disposal of the disputes [Cl. Memo. ¶41]. The *Emmot* court ruled that evidence otherwise inadmissible for being confidential, may be admitted in the "interest of justice" pertains to "public interest" as differentiated from "private interest" [*Emmot,* ¶ 130]. In other words, the type of "interest" that the *Emmott* court identifies refers to "public" interest rather than mere "private" interest. Here, CLAIMANT fails to specifically demonstrate the sort of public interest that would warrant a removal of the cloak of confidentiality.

47. The disclosure made by a third party from the other arbitration to CLAIMANT constitutes a violation of the general duty of confidentiality. In *Hassneh,* the English Court ruled that "the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing." [BORN 2, p. 792]. The Court also included witness statements, outline

submissions, and pleadings as covered by the obligation of confidentiality [BORN 2, p. 792]. Thus, the relevant submission of RESPONDENT and the Partial Interim Award from the other arbitration are confidential and cannot be introduced by CLAIMANT in the present arbitration.

48. None of the exceptions are present in the instant case. Claimant's contention that the Partial Interim Award is reasonably necessary for the protection of its legitimate interests holds no water.

II. TO ADMIT THE EVIDENCE WOULD JEOPARDIZE THE ENFORCEABILITY OF THE AWARD.

49. RESPONDENT submits that CLAIMANT'S claim to admit the Award and documents from the other proceeding will render futile the enforceability of any Award that may be granted by the Tribunal in this proceeding. This is because CLAIMANT committed serious grounds that warrant the setting aside of an Award under the NY Convention.

50. An admittance of the Award from the other proceeding will undoubtedly result to a grave procedural irregularity as it violates the principle of fairness [KRÖLL, p. 675]. In this case, the principles of fairness will necessarily be violated should the Tribunal admit the evidence from the other proceeding for the following reasons. *First,* CLAIMANT seeks to obtain the documents from a company which has a doubtful reputation, and RESPONDENT'S data were obtained under suspicious circumstances [PO2, ¶ 41; *supra*]. *Second,* CLAIMANT is clearly conducting a fishing expedition as he does not know precisely what type of evidence he seeks. It bears stressing that CLAIMANT was never a party to the other proceeding from which it seeks to claim the Award, and knows very little of the dispute of the other case [*PO2*, ¶ 40; *supra*]. *Third,* all documents in an arbitration proceeding are inherently confidential irrespective of their nature [*Emmot,* ¶ 81; *Ali Shipping,* p. 326; *supra]* Thus, the Award must be excluded from evidence because it is protected by confidentiality [*supra*].

51. Art. V(2)(b), NY Convention provides that awards may be denied recognition if such would be contrary to the public policy of the seat of arbitration, making the failure to apply procedural public policies is an exception to the presumptive enforceability of an award [BORN 1, p. 389]. While Art. V(2)(b), NY Convention simply pertains to "national public policy," such should not be interpreted narrowly and has necessarily been defined as inclusive of principles of international public policy [BORN 1, p. 402]. In this case, CLAIMANT'S violations of the principle of fairness

due to the numerous procedural irregularities it had committed presents compelling reason that the admittance of the Award from the other proceeding would indubitably violate principles of international public policy. It bears stressing that national courts have treated serious procedural irregularities as violations of public policy [REDFERN & HUNTER, ¶ 10.63].

52. In a last ditch effort to justify its breach of the basic precepts of good faith and confidentiality in arbitration proceedings, CLAIMANT invokes the Rules on Transparency [Cl. Memo. ¶40; Letter dated 2 October 2018] However, these Rules do not apply for the simple reason that the present proceedings do not involve treaty-based investor-State arbitration [Art. 1, Rules on Transparency].

CONCLUSION ON ISSUE 2: To conclude, the evidence from other proceeding are inadmissible for being irrelevant and immaterial. Further, they were obtained under suspicious circumstances – a form of procedural irregularity, which is a violation of procedural fairness and good faith. As a product of procedural irregularity, the Award from the other proceeding would indubitably jeopardize the enforcement of any Award that the Tribunal may issue for being excluded under the NY Convention. Lastly, the Rules on Transparency are inapplicable, thus the duty of confidentiality is maintained.

– END OF DISCUSSION ON ISSUE 2 –

ARGUMENTS ON THE MERITS

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE FSSA.

53. As is standard in an DDP agreement [Cl. Exh 5, ¶8], the costs for the additional tariffs had to be borne by CLAIMANT. The newly imposed tariffs neither meet the requirements of the narrowly worded hardship clause **[I.]** nor do they justify an adaptation under the CISG **[II.].**

I. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,00 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12.

54. Impressed by CLAIMANT'S breeding success regarding racehorses [NoA, ¶3], RESPONDENT

contacted CLAIMANT for its newly started breeding programme [NoA, ¶5, Cl. Exh. 1], the terms of which are embodied in the FSSA. There were no issues with deliveries on the first and second shipment, until CLAIMANT requested for an increase on purchase price of the last shipment, claiming that the 30% tariff will increase CLAIMANT'S cost [NoA, ¶18]. RESPONDENT, however, respectfully requests this Tribunal to deny CLAIMANT'S claims for the following reasons: the tariff is not a hardship as defined under Clause 12, FSSA **[A.]**; and even if the tariff was a hardship contemplated by Clause 12, FSSA, CLAIMANT is not entitled to US$1,250,000.00 **[B.]**.

A. THE TARIFF IS NOT A HARDSHIP AS DEFINED UNDER CLAUSE 12, FSSA.

55. Clause 12 provides that the "[s]eller shall not be responsible … for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [Cl. Exh. 5, ¶12]. Contrary to CLAIMANT'S argument, the tariff imposition is not a hardship as defined under Clause 12 of the FSSA. *First*, the tariff is not a "comparable event" as "health and safety requirements" contemplated by Clause 12 **[i.]**. *Second*, the parties did not agree on the operation of ICC Hardship Clause 2003, in any form whatsoever **[ii.]**. Neither is the tariff a hardship as contemplated by Art. 6.2.2, PICC **[iii.]**.

i. The tariff is not a "comparable unforeseen event" as "health and safety requirements" contemplated by Clause 12

56. CLAIMANT argues that the tariff is comparable to health and safety requirements [Cl. Memo. ¶ 61]. However, RESPONDENT submits that using the *ejusdem generis* rule of construction, the hardship contemplated by Clause 12 apply only to the same class as health and safety requirements. *Ejusdem generis* means "of the same kind, class or nature" [ORSINGER. p. 24]. The *ejusdem generis* general rule is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned [ORSINGER, pp. 24, 28; *CSX Transp*]. Here, Clause 12 provides a general phrase "hardship" followed by an enumeration of particular events, namely "health and safety requirements". Clearly, a tariff imposition is not in the same class as health and safety requirements. Hence, Clause 12 does not apply to the tariff imposition.

57. CLAIMANT further argues that tariff and health and safety requirements are comparable because

"both of them are acts of government which can suddenly impose higher costs on CLAIMANT to deliver goods through the Customs" [Cl. Memo. ¶61]. Although both measures are acts of government that may ordinarily increase the cost for importers, this simple fact does not make the tariff comparable to health and safety requirements. "Comparable" is defined as "of equivalent quality" [*Oxford Dictionary*]. To put it simply, a tariff is incomparable to health and safety requirements because they are not equivalents. On one hand, tariffs are "customs duties imposed on products at the time of, and/or because of, their importation" [VAN DEN BOSSCHE, p. 502]. On the other hand, health and safety requirements are non-tariff measures ("NTMs"), which are "any policy measures other than tariffs that can impact trade flows" [*Staiger,* p. 2].

58. CLAIMANT finally argues that the tariff is comparable to health and safety requirements because they result in the same effect – increasing expenses through the deal and causing CLAIMANT great loss [Cl. Memo. ¶61]. RESPONDENT posits that "comparable" shall not be limited to similar results, but also similar functions or objectives. Tariffs and health safety requirements have different objectives. The main objective of tariffs is to decrease demand for imports while increasing demand for domestic products [*Goerzen,* p. 2]. Meanwhile, NMTs are used to control the importation of products "carrying potential health risks" [*Staiger,* p. 6]. Therefore, the tariff imposition is not a "comparable unforeseen event" as "health and safety requirements" under Clause 12.

ii. The parties did not agree on the operation of ICC Hardship Clause 2003, in any form whatsoever.

59. ICC Hardship Clause 2003 is intended to apply to any contract which incorporates it either expressly or by reference [ICC Publication No. 650]. From the wordings of Clause 12 or the FSSA contract as a whole, the ICC Hardship Clause 2003 was neither incorporated expressly nor by reference. Instead, the FSSA provides a narrowly drafted hardship clause which deviates from the broad ICC Hardship Clause. As opposed to CLAIMANT'S view, the parties did not agree on the operation of ICC Hardship Clause 2003, in any form whatsoever. The general rule in party autonomy, a guiding principle in international commercial arbitration. is that only those provisions and clauses agreed upon by the parties should be enforced. Therefore, only the agreed provision of Clause 12 should be enforced, and not ICC Hardship Clause 2003.

60. In determining whether Clause 12 is a revision of the ICC Hardship Clause 2003, Art. 8 of the

CISG and the PICC may guide the discretion of the Tribunal [SCHLECTRIEM & SCHWENZER pp. 364-365*; Machinery Case*]. In the present case, the terms of the contract are clear, and therefore should be given their literal meaning **[*a.*]**. Even assuming Clause 12 was unclear, the parties intended to narrow down Clause 12 **[*b.*]**. Lastly, a reasonable person would not recognize Clause 12 as a revision of the ICC Hardship Clause 2003 **[*c.*]**.

a. Clause 12 should be given its literal meaning

61. If the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their intentions should prevail [Art. 8(1), CISG; *Machine for Repair of Bricks Case*]. Clause 12 exempts CLAIMANT from liability "for hardship … caused by additional health and safety requirements or comparable unforeseen events" [ANoA, ¶4; Cl. Exh. 5, ¶13]. In this case, Clause 12 is evidently, clearly, and manifestly worded differently from the ICC Hardship Clause 2003. Hence, this literal meaning should prevail over any of CLAIMANT'S presumptions over the parties' intentions [Cl. Memo. ¶¶57-59].

b. The parties did not intend that ICC Hardship Clause 2003 would be applicable to the FSSA.

62. Art. 8(1) provides for a subjective analysis of the parties' intent determined by the statements and conduct that suggest the other party knew of the intent or could not have been unaware of that intent [Art. 8(1), *CISG; Fabrics Case, Aircraft Spares Case*]. Due consideration must be given to the relevant circumstances of the case, including the negotiations between the parties. [Art. 8(3), CISG; *Supply of Labor Personnel; Fashion Products Case*]. Here, the parties did not agree to applying a modified hardship clause with the same effect as the ICC Hardship Clause.

63. Contrary to CLAIMANT'S submission [Cl. Memo. ¶58], its statements and conduct during negotiations reflects RESPONDENT'S refusal to apply a modified hardship clause with the same effect as the ICC Hardship Clause. When restarting the negotiation, Mr. Krone told Mr. Ferguson that the ICC Hardship Clause suggested by Mr. Napravnik was considered by RESPONDENT to be too broad for the purposes of this contract and the objectives pursued. RESPONDENT clearly rejected the application of the ICC Hardship Clause 2003 [ANoA, ¶4; PO2, ¶12]. The inclusion of the word 'hardship' was intended to narrow down the broad coverage of the ICC Hardship Clause 2003. RESPONDENT could not have known of CLAIMANT'S presumed intention to apply

or modify the ICC Hardship Clause. Therefore, the preliminary negotiations do not prove that the parties' common intention is to apply a modified hardship clause with exactly the same effect as the ICC Hardship Clause.

c. Even a reasonable person would not recognize Clause 12 as having the same effect as the ICC Hardship Clause

64. When the statements are ambiguous or the conduct is unclear, Art. 8(2) is used as an objective analysis where intent is interpreted according to the understanding of a reasonable person of the same kind as the other party would have had in the same circumstance [SCHLECHTRIEM & SCHWENZER*;* CHATILLON, p. 220*; Cowhides Case*]. A reasonable person is expected to take into account all relevant circumstances, including negotiations or practices established between the parties [HONNOLD, p. 111; Art. 8(3), CISG]. It must be noted that in the other dispute, the contract, which was also negotiated by Mr. Antley, contained an ICC Hardship Clause 2003 [PO2, ¶39]. Therefore, a reasonable person can expect that Mr. Antley would have expressly referred to the ICC Hardship Clause, if he wanted the contract to have the same effect.

65. A reasonable person shall take into account the usual meaning of the words used by the parties [SCHWENZER, p. 163]. Here, ICC Hardship Clause require that hardship be "excessively onerous" and "unforeseeable". This is clearly different from the wordings of Clause12, which merely requires that the hardship be "more onerous" and "unforeseen". Hence, a reasonable person would understand that in tempering the higher threshold requirements of ICC Hardship Clause, Clause 12 is not to operate in the same way as the ICC Hardship Clause.

iii. Neither is the tariff a hardship as contemplated by the Art. 6.2.2, PICC

66. Hardship exists where (i) the occurrence of events fundamentally alters the equilibrium of the contract because the cost of a party's performance has increased or because the value of the performance a party receives has diminished and (ii) the events occur or become known to the disadvantaged party after the conclusion of the contract; (iii) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (iv) the events are beyond the control of the disadvantaged party; (v) the risk of events was not assumed by the disadvantaged party [Art. 6.2.2, PICC].

67. While the tariff occurred after the conclusion of the contract and the tariff was beyond the control of CLAIMANT, the other three requirements to meet the definition of hardship are not met: the tariff did not fundamentally alter the equilibrium of the contract **[*a.*]**; the tariff could have reasonably been taken into account by CLAIMANT, prior to the conclusion of the contract **[*b.*]**; and, CLAIMANT assumed this risk **[*c.*]**.

a. The tariff did not fundamentally alter the equilibrium of the contract

68. There is a fundamental alteration of equilibrium when performance of the contract has become not simply onerous, but excessively onerous [*Girsberger & Zapolskis*, p. 4; *Tessema*, p. 37]. Whether an alteration is fundamental in a given case will depend upon the circumstances [*Tessema*, p. 37]. An alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a fundamental alteration. [PICC COMMENTARY, p. 147; BRUNNER; *Tessema*, p. 37]. However, as supported by international arbitration practice, cost increases of 13%, 30%, 40%, or 25%-50% are not fundamental alterations of the equilibrium of the contracts [BRUNNER. p. 427; *Dawwas*, p. 8; *Ferrochrome Case*]. Here, CLAIMANT'S claims that suffered a loss of 25% [NoA, ¶18] is clearly below the 50% quantitative threshold. Therefore, the tariff cannot be considered to fundamentally alter the equilibrium of the contract, and consequently not a hardship contemplated by the PICC.

b. The tariff could have reasonably been taken into account by Claimant.

69. Whether an event is unforeseeable must include objective standards including surrounding market conditions [*Uribe*, p. 248]. Here, the circumstances would show that the tariff was forseeable. Two months before the last shipment, Mediterraneo's newly elected President, Ian Bouckaert, announced 25% tariffs on agricultural products from Equatoriana [NoA, ¶9; Cl. Exh. 6; Cl. Exh. C8]. In the past, the Equatorianian Government imposed a similar tariff as a retaliatory measure. Learning from this experience, the tariff could have reasonably been taken into account by CLAIMANT.

c. Claimant assumed the risk.

70. There can be no hardship if the debtor has assumed the risk of the change in the circumstances [Art. 6.2.2(d), PICC]. The word "assumption" makes it clear that the risks need not have been

taken over expressly, but that this may follow from the nature of the contract [Art. 6.2.2; PICC COMMENTARY]. In this case, CLAIMANT assumed the risk when CLAIMANT accepted a delivery DDP, only transferring certain risks, namely health and safety requirements and such comparable events [*supra,* ¶¶144-149] to RESPONDENT [NoA, ¶2]. Moreover, it was precisely because CLAIMANT absorbed much higher risks that it requested to a higher contract price [NoA, ¶7; Cl. Exh. 4; Cl. Exh. 8]. In turn, RESPONDENT accepted CLAIMANT'S proposal, recognizing that a higher price was warranted since CLAIMANT was absorbing a higher risk [Cl. Exh. 3; R. Exh. 4]. Therefore, CLAIMANT's acceptance of the DDP, as well as its proposal of a concomitant increase in price, clearly evinces that it absorbed the risk of a tariff imposition.

71. It must be noted that Art. 6.2.2 is invoked as an exemption of liability for non-performance [*DiMatteo*, p. 271]. Debtor may not rely on hardship if he has already performed his obligation; the hardship defense may only be claimed in regards to performance yet to be rendered [Art. 6.2.2, PICC; PICC COMMENTARY]. Since CLAIMANT absorbed and performed its obligation to bear the costs brought by the tariff, CLAIMANT cannot now invoke the hardship defense.

B. EVEN IF THE TARIFF WAS A HARDSHIP CONTEMPLATED BY CLAUSE 12 OF THE FSSA, CLAIMANT IS NOT ENTITLED TO US$1,250,000.00.

72. Even if the tariff was a hardship contemplated by Clause 12 of the FSSA, CLAIMANT is not entitled to US$1,250,000.00 by adaptation or any other form of relief. *First*, Clause 12 does not permit adaptation of the FSSA to grant CLAIMANT'S claims **[i.]**. *Second,* Art. 6.2.3, PICC cannot serve as basis for adaptation of the FSSA and CLAIMANT'S claims **[ii.]**.

i. Clause 12 does not permit adaptation of the FSSA to grant Claimant's claims.

73. Contrary to CLAIMANT'S insinuations, RESPONDENT did not agree to any adaptation following CLAIMANT'S request in January 2018 [ANoA, ¶10]. Again, when the terms of the contract are clear, they are to be given its literal meaning. Here, the wordings of Clause 12 do not permit adaptation of the FSSA to grant CLAIMANT'S claims. Instead, it provides that "[s]eller shall not be responsible …", a phrase ordinarily used to exempt parties of a contract from performance or non-performance. Therefore, the importation of the aforementioned phrase merely exempts performance and does not permit adaptation.

ii. Art. 6.2.3, PICC cannot serve as basis for adaptation of the FSSA and Claimant's claims.

74. Art. 6.2.3, PICC cannot serve as basis for adaptation of the FSSA and CLAIMANT'S claims. Here, adaptation is premature since the parties must be allowed to renegotiate the contract first **[*a.*]**. Nonetheless, CLAIMANT is not entitled to adaptation **[*b.*]**. Further, there is no fundamental alteration of the equilibrium **[*c.*]**.

a. Adaptation is premature since the parties must be allowed to renegotiate the contract first based on Art. 6.2.3, PICC

75. In case a party invokes hardship, it should renegotiate [Art. 6.2.3, PICC]. Among the guidelines to be observed by the parties in a renegotiation are to avoid rushed adjustment suggestions and to make concrete and reasonable suggestions for adjustment instead of a mere general declaration of willingness, [*Berger*, pp. 1365-1356]. This duty to renegotiate is seen to be based on a general duty to act in good faith [*Schwenzer,* p. 721; BRUNNER, pp. 480-481]. In this case, CLAIMANT cannot be considered to have renegotiated in good faith.

76. Here, in seeking renegotiation, CLAIMANT kept insisting on additional payment for bearing the costs brought by the tariff [Cl. Exh. 8]. CLAIMANT was not actually open to renegotiations, but instead demanded full payment and nothingness. CLAIMANT should have considered RESPONDENT'S side, especially since its proposals all centered around RESPONDENT paying the tariff. That being said, CLAIMANT rushed adjustment suggestions rather than providing alternative suggestions. CLAIMANT'S conduct appears to be more of a demand than a case of renegotiation.

77. Moreover, contrary to CLAIMANT'S argument that RESPONDENT stopped the negotiations [Cl. Exh. 8], RESPONDENT was, in fact, still open to further negotiations. It was CLAIMANT'S repeated accusations that RESPONDENT was breaching the alleged resale prohibition [Cl. Exh. 8] that ultimately resulted to the suspension of the negotiations [Cl. Exh. 8]. Indeed, in that meeting on 12 February 2018, RESPONDENT made absolutely no actuations or statements evidencing that it was no longer interested in negotiating the dispute further [PO2, ¶35]. Nonetheless, this one meeting is no indication that RESPONDENT was no longer interested in negotiations.

b. Nonetheless, Claimant is not entitled to adaptation under Art. 6.2.3.

78. It is true that renegotiations need not be resorted to if the contract expressly allows adaptation [Art. 6.2.3, PICC; PICC COMMENTARY]. In this case, however, it is clear in the FSSA that no express or implied Clause allowing for adaptation was included [NoA, ¶16; *supra,* Issue I] Moreover, the negotiations regarding the hardship clause resulted in a very narrowly worded clause, which did not provide for any adaptation by the Tribunal [NoA, ¶9]. This clause is not applicable to the tariff imposition and does not provide for the request remedy, i.e. adaptation by the Tribunal [ANoA, ¶19]. Hence, CLAIMANT cannot claim for adaptation.

c. Further, the equilibrium between the parties has not been fundamentally altered.

79. If a hardship situation exists, the court is authorized to adapt the contract with a view to restoring its equilibrium [Art. 6.2.3, PICC; PICC COMMENTARY]. The principle of equilibrium emphasizes the balanced position of all parties from the making of the contract [*Hasibuan,* p. 48]. Here, even prior the inception of the contract, CLAIMANT was already suffering financial difficulties [Cl Exh. 6; PO2, ¶29]. Hence, even if the tariff will cause financial strains to CLAIMANT, its financial status at the start of the contract did not change. In fact, there is no assurance that the tariff will financially endanger CLAIMANT [PO2, ¶29]. Therefore, the tariff did not disturb the contractual equilibrium between the parties.

80. Even assuming adaptation applies, CLAIMANT is not entitled to the full amount of US$1,250,000. Adaption does not automatically grant the full amount of a disadvantaged party's claims. The tribunal must "seek to make a fair distribution of the losses between the parties. In *CMS Gas,* the Tribunal followed the logic of the fair distribution of losses stated in the PICC Principles. In spite of its rejection of the hardship claim, the Tribunal include language in the award suggesting that Argentina should not entire assume the economic consequences of the Licenese's adjustment procedures [*CMS Gas*]. As discussed, the tariff does not, in fact, make CLAIMANT'S obligations excessively onerous [*supra,* ¶ 67]. Thus, even if the Tribunal were to adapt the FSSA, CLAIMANT is not entitled to the full amount of US$1,250,000.

II. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG.

81. The CISG governs the rights and obligations between the buyer and the seller. The buyer is obliged to pay the purchase price and accept delivery of the goods sold [Art. 53, CISG], while the seller has the obligation to deliver the goods and mitigate losses [Arts. 31-33, CISG]. Here, the CLAIMANT invokes the CISG to rein in the $1,250,000 it has paid pursuant to its contractual obligation. As it is CLAIMANT who must bear the effects of the tariff, RESPONDENT will most certainly not pony up $1,250,000.00 to pay something it should not.

82. CLAIMANT can find no support for its claims under the CISG. RESPONDENT has fully complied with its obligation as a seller **[A.]**. CLAIMANT IS not entitled to the additional payment under Art. 7 [**B**]. CLAIMANT IS not entitled to payment under Art. 79 [**C.**]. Lastly, CLAIMANT IS not entitled to any amount as damages for lost profits under Art. 74 [**D.**].

A. RESPONDENT HAS FULLY COMPLIED WITH ITS OBLIGATIONS AS A SELLER UNDER ART. 53, CISG.

83. Art. 53, CISG provides that the buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention. Non-payment of the agreed price or failure to accept the delivery of goods would constitute as a breach on the part of the buyer [SCHLECHTRIEM & SCHWENZER, p. 822]. This is not the case because RESPONDENT has fully complied with its obligations under the CISG.

84. Clause 6, FSSA clearly states the contract price of US$10,000,000. The first installment of US$ 5,000,000 was due on 18 May 2017 and the second instalment of US$ 5,000,000 was due on 21 January 2018. There is absolutely no dispute that these two installments have been paid. Further, Clause 5, FSSA states that CLAIMANT will ship the frozen semen only when all fees have been paid. It is undisputed that CLAIMANT sent all three shipments on 20 May 2017, 3 October 2017, and 23 January 2018. This shows that CLAIMANT fully accepted the contract price, as paid by RESPONDENT. RESPONDENT, in turn, successfully took delivery of the goods.

85. Taking Clause 5 and 6 together with the succeeding events would lead to the inevitable conclusion that RESPONDENT has already paid the purchase price and accepted delivery of the goods. Clearly, RESPONDENT has complied with all of its obligation under the CISG. Therefore, CLAIMANT cannot invoke the remedies of a seller because RESPONDENT has not breached its obligations.

B. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000.00 UNDER ART. 7, CISG.

86. CLAIMANT further invokes the Preamble of the CISG to supports its claims [Cl. Memo, ¶ 88]. CLAIMANT relies on "good faith" in the performance of the contract [Cl. Memo, ¶ 88]. Then CLAIMANT advances the argument that there is a gap within the CISG regarding hardship which requires the rules of interpretation based on the Convention [Cl. Memo, ¶73]. However, CLAIMANT misapplies these central concepts of the CISG. On the contrary, RESPONDENT submits that it has no obligation to observe good pursuant to Article 7. Further, there are no gaps within the FSSA requiring Art. 7(2) **[i.]**. Furthermore, even assuming there are gaps within the FSSA, adaptation is contrary to the general principle of Party Autonomy **[ii].**

i. Respondent complied with its obligation to observe good faith under Art. 7(1), CISG.

87. CLAIMANT invokes good faith in an effort to persuade the Tribunal to grant its claims. CLAIMANT cites the Preamble of the CISG and the Explanatory Note by the UNCITRAL Secretariat to support its claim [Cl. Memo, ¶88]. Followed by baseless claims on a resale prohibition to paint RESPONDENT to be in bad faith. CLAIMANT is sorely misguided. The maxim "observance of good faith in international trade" is established by Art 7(1) which concerns the interpretation of the Convention only and is not meant be directly applied to individual contracts [SCHLECHTRIEM & SCHWENZER, p. 127]. Hence, CLAIMANT cannot invoke good faith to claim the additional amount since it can only be applied to the interpretation of the Convention.

88. Nonetheless, RESPONDENT complied with its obligation in good faith. As stated above, RESPONDENT has fulfilled the obligations of a buyer to pay the purchase price and accept delivery [*supra,* ¶194]. Also, RESPONDENT even entered into renegotiations with CLAIMANT after the increased tariffs which goes beyond the obligations of a buyer [R. Exh. R4; PO2, ¶35]. Hence, CLAIMANT'S imputations of bad faith on the part of RESPONDENT are bereft of merit.

ii. There are no gaps in the FSSA requiring the application of the gap-filling provisions of Art. 7(2), CISG.

89. CLAIMANT advances the argument that there is a gap within the CISG regarding hardship which requires recourse to the PICC to allow adaptation [Cl. Memo. ¶73]. CLAIMANT, also admits that

hardship cannot be found anywhere within the text of the Convention [Cl. Memo. ¶71]. Indeed, that the CISG does not govern hardship was not unintentional.

90. As evidenced by the drafting history of the CISG, it was never contemplated to support the adaptation of a contract in case of hardship. During the review of the WG "Sales" draft in 1977, an article governing hardship situations was proposed, explicitly allowing for adaptation [HONNOLD, p. 350]. This proposal was rejected by the WG, clearly showing that the CISG was never intended to accommodate adaptation of contracts [SLATER, pp. 259-260].

91. The negotiations discussed whether Art. 79 could be the basis for exemption due to economic occurrences, such as the unaffordability of the performance to one of the parties [SCHLECHTRIEM, 101]. However, Schlechtriem noted that "increased procurement and production costs do not constitute exempting impediments.". He explained that the language of Article 79 is not expressly the language of impossibility. He also provides a practical rationale for granting an exemption for cases of hardship — to prevent the introduction of national variants of excuse into the application of Article 79 [SCHWENZER, p. 709; *DiMatteo*, p. 280]. Hence, contrary to CLAIMANT'S argument, the drafting history is clear evidence that there is no external gap in the CISG on hardship, requiring the application of rules external to the CISG.

92. CLAIMANT cites *Scafom* to support its claim [Cl. Memo. ¶72]. CLAIMANT misapplies this case. The Supreme Court rejected that the issue of hardship was an external gap in the CISG. It held that the lack of a specific hardship provision in the CISG was not an external gap allowing recourse to domestic law, but was an internal gap within the scope of Article 79 [*Scafom*]. As discussed above, there is no external gap regarding hardship. Thus, CLAIMANT misapplies the case by perpetuating the need to recourse to domestic law pursuant to the *Scafom*. Further, the case is consistent with the view that recourse to UNIDROIT Principles is inconsistent with the autonomous interpretation of the CISG [SCHLECTRIEM & SCHWENZER, p. 132]. Even if there are gaps in the FSSA requiring the application of Art. 7(2), CISG, Claimant is still not entitled to the payment of US$1,250,000.00.

iii. Even if there are gaps in the FSSA requiring the application of Art. 7(2), CISG, Claimant is still not entitled to the payment of US$1,250,000.00.

93. The Convention has a gap-filling provision which aims to unify both civil law and common law

countries who accede to the CISG. The basic concept underlying the gap-filling rule is simple and provides for a two-step procedure. The first step is to fill the gap by means of uniform rules. This step requires first "questions concerning matters governed by this Convention. These gaps are usually referred to as 'internal gaps'. Secondly general principles on which the Convention is based have to be discerned to fill these gaps. Only if this procedure fails then recourse to domestic rules determined by the conflict rules of the forum. Such gaps are referred as 'external gaps' [SCHLECHTRIEM & SCHWENZER, p. 132]. Hence, hardship must be viewed as an internal gap which must be first resolved with the Convention's general principles.

94. Recourse to general principles must be the first line. Party Autonomy is one of the general principles on which the CISG is based, and the parties' authority to regulate their relationship is unlimited [REDFERN, p. 315; MOSER & BAO, ¶ 4.05; *Berger,* p. 8]. The CISG only supplements the parties' agreement insofar as the parties did not regulate an issue [MAGNUS, p. 25]. As earlier established [*supra,* 1(II.B.ii)], since the FSSA regulates the transaction and nowhere does the agreement have an express provision for adaptation of the contract [Cl. Exh. 4]. Therefore, adaptation pursuant to Art. 7(2) cannot be a remedy invoked by CLAIMANT because this would necessarily contravene Party Autonomy [*supra,* 1(II.B.ii); *Berger,* p. 5-8; REDFERN, p. 315; MOSER & BAO, ¶ 4.05].Thus, the underlying principles of the CISG are best served by viewing the lack of coverage of hardship in Article 79 as an internal gap and not an external gap to be filled by domestic law.

C. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000.00 UNDER ART. 79, CISG.

95. CLAIMANT invokes the excuse doctrine of the CISG as basis for exemption purporting that hardship falls within Art. 79. However, CLAIMANT misapplies and broadens the scope of the excuse doctrine. RESPONDENT submits that Art. 79 does not regulate hardship **[i.]**. Further, even assuming that Art. 79 does regulate hardship, suspension is the remedy for non performance and not adaptation **[ii.]**.

i. Art. 79, CISG does not regulate hardship.

96. The CISG does not contain a special provision dealing with questions of hardship. It does not mention either force majeure or hardship. Art. 79 of the CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control. Professor

Honnold charted the development of Article 79 from its predecessor instruments and the negotiations of the provisions on excuse. Noting that the word "impediment" was substituted for the word "circumstances" to disallow the granting of an exemption merely because performance became more difficult or unprofitable [HONNOLD, p. 483; *DiMatteo*, p. 279]. Here, CLAIMANT resorts to Art. 79 because performance has become difficult and unprofitable. However, from the proponents of the uniform law, this has been explicitly disallowed.

97. As discussed above, the legislative history of Art. 79 proves that hardship is not regulated by Art. 79. Further, Art. 79 is primarily an excuse doctrine from performance of obligations and payment of damages. Article 79(1) governs the promisor's exemption from liability to pay damages if he is not able to perform his obligations in accordance with the contract due to an unforeseeable impediment beyond his control. Article 79 constitutes the necessary limitation to the principle of strict liability for non-performance of the contract which otherwise underlies the CISG. The provision's drafting history, systematic placement and wording imply that such an exemption should be considered only under very narrow conditions [SCHLECHTRIEM & SCHWENZER, p. 1129].

98. The exemptive effect of an impediment within the meaning of Article 79(1) is limited to the termination of the promisor's obligation to pay damages under the Convention to the extent that the impediment exists Article 79(5). The exemption only relates to the contractual obligation which has not been performed and does not affect the existence of the contract or other contractual duties. [SCHLECHTRIEM & SCHWENZER, p. 1148]. However, the FSSA has actually been completed. The purchase price has been paid and the goods have been delivered. It is unclear how CLAIMANT would like to invoke hardship as an exemption from performance when it has actually fulfilled its obligation to deliver the goods to RESPONDENT.

99. Hardship arises when performance of the obligation becomes excessively onerous such as increased financial cost. There are claims that a change in the financial aspects of a contract should exempt a breaching party from liability for damages have also appeared repeatedly in decisions. Sellers have argued that an increase in the cost of performing the contract should excuse them from damages for failing to deliver the goods and buyers have asserted that a decrease in the value of the goods being sold should exempt them from damages for refusing to take delivery of and pay for the goods [CISG CASE DIGEST, pp. 390-391].

100. However, these arguments have not been successful. Several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract [*Steel Ropes Case*]. Thus in denying a buyer's claim to an exemption after the market price for the goods dropped significantly, one court asserted the such price fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities" [*Vital Berry Case*]. Another court denied a seller an exemption after the market price for the goods tripled, commenting that it was incumbent upon the seller to bear the risk of increasing market prices [*Iron Molybdenum Case*]. Other reasons advanced for denying exemptions because of a change in financial circumstances are that the consequences of the change could have been overcome, and that the possibility of the change should have been taken into account when the contract was concluded [CISG CASE DIGEST, pp. 390-391].

101. CLAIMANT relies on the economic difficulty as a result of the increased tariffs to be sufficient enough to be an impediment within Art. 79. However, the cited cases clearly reject hardship as an impediment within the exemptions of Art. 79 citing that no exemption can result from increased market fluctuations.

102. There have been cases on state interventions resulting to a total ban of products. Russian and Chinese arbitral tribunals are much more severe in the assessment of state interventions: a number of decisions deny exemptions in cases of denial of export or import licenses or issuing of export and import bans respectively [*Sanguinarine Case*]. Furthermore, recourse is often made to foreseeability at the time of the conclusion of the contract. For this reason, parties will be advised to arrange for allocation of risk for for State interventions, namely in regard to import and export licenses, by means of contractual agreements [*Shirt Case*; SCHLECHTRIEM & SCHWENZER, p. 1137]. Tribunals have strictly ruled against state interventions as impediments falling within Art. 79. Here, the tariffs were increased by the government of Equatoriana as a retaliatory measure [Cl. Exh. 6]. Applying previous cases, the Tribunal should rule against the state intervention as an impediment within Art. 79.

ii. Even if Art. 79, CISG regulated hardship, it cannot serve as basis for adaptation of the FSSA.

103. So called *force majeure* clauses are quite common in international trade. Mostly, these clauses contain a long list of events that exempt the promisor. In addition to such force majeure clauses, hardship clauses are common (general clauses on adaptation, renegotiation, profitability, and revision of the contract. In contrast to Article 79, the scope of such clauses includes not only cases of frustration but also cases of depreciation, that is, for example fluctuations in exchange rates or currency's domestic purchasing power [SCHLECHTRIEM & SCHWENZER, p. 1152]. The scope of Art. 79 is narrower as compared to *force majeure* or hardship clauses. Hence, CLAIMANT cannot rely on the Art. 79 due to its limited application.

104. Essentially, the FSSA was completed upon acceptance of the delivery by RESPONDENT. However, CLAIMANT prays that the Tribunal to accept its theory of hardship under Art. 79 and requests the adaptation of the contract to recoup the additional amount of $1,250,000. This cannot be countenanced because it is contrary to the black letter of Art. 79. At first blush, Art. 79(1) may seem like a total exemption from performance if all the conditions are met. However, paragraph five provides nothing in Article 79 affects "any right other than to claim damages" [Art. 79, CISG]. Simply put, the party invoking Art. 79 shall not be liable for damages. Applying this to the case, CLAIMANT invokes Art. 79 after the performance of its obligation to deliver the goods.

105. An earlier Italian court made a firm stand that hardship could not sustain a claim for impediment. In that case, the seller argued that the international market price "rose remarkably and unforeseeably to the point that it upset the balance between the corresponding performances and justified, at least, a price correction." The court reasoned that that the seller could not rely on hardship as a ground for avoidance, since Art. 79 did not contemplate such a ground for an exemption [*Ferrochrome Case*; *DiMatteo*, p. 281].

106. CLAIMANT is essentially transferring an allocated risk by exemption under Art. 79. Case law does not support this. One tribunal held that the possibility of exemption under Art. 79 does not change the allocation of the contractual risk [*Vine Wax Case*]. Thus, anything within the non- performing party's sphere of control or allocated risk cannot be a reason to grant an excuse.

107. In the *Egyptian Cotton Case*, the court explains the requirements to sustain a claim of impediment: A party claiming an Art. 79 impediment "must prove that the failure was due to an unpredictable and inevitable impediment, which lies outside its sphere of control." [*Egyptian Cotton Case*]. The

concept of sphere of control acts as a surrogate for determining whether there was an express or implied allocation of risk. Thus, whether an event is foreseeable or unforeseeable is irrelevant if the court determines that the risk of the event had been allocated by the contract [*DiMatteo*, p. 285].

108. A CIETAC tribunal held that unless stated otherwise, the risk of importation is on the buyer and, generally, cannot be a ground for a claim of impediment or exemption. The tribunal concluded that the inability to obtain an import license was an allocated risk of the buyer-importer [*Alumina Case*]. Here, by virtue of the DDP arrangement for delivery, CLAIMANT has assumed the risk of importation [PO2, ¶8]. Since CLAIMANT agreed to shoulder the tariffs as an allocated risk, it cannot shift the burden to RESPONDENT using Art. 79.

109. Art. 79 provides for the sole remedy of "suspension" in cases of impediments. The remedy or right of suspension is more easily attached to the excuses of physical impossibility, and possibly of frustration of purpose [*DiMatteo*, p. 284]. It is extremely rare for a court to rescind or reform a contract due to the rise of costs or prices, which are generally viewed as express or implied allocated risks that fall to the party who must bear the burden of such changes of circumstances [*DiMatteo*, p. 285]. Hence, adaptation is inconsistent with the remedy of suspension of performance in cases of impediments.

D. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000.00 AS DAMAGES FOR LOST PROFIT UNDER ART. 74, CISG.

110. Art. 74 governs the scope of the buyer's or the seller's compensation for the breach of contractual obligations [SCHLECHTRIEM & SCHWENZER, p. 1057]. Liability pursuant to Article 74 to 77 arises when the buyer or the seller "fails to perform any of his obligations under the contract or the Convention [Arts. 45(1), 61(1), CISG]. Clearly, a breach must first be established. However, as discussed earlier, RESPONDENT has faithfully complied with its obligations. Since the obligations have been fulfilled, RESPONDENT has not breached the FSSA nor the CISG. However, CLAIMANT would like the Tribunal to rule in their favor on the basis of the breach of the "resale prohibition clause" and the 5% loss of profit margin [Cl. Memo. ¶76]. RESPONDENT submits that these claims are unfounded.

111. CLAIMANT relies on a statement in email to prove the existence of the resale prohibition clause

[Cl. Memo. ¶91]. Although the FSSA does not contain a resale prohibition clause [Cl. Exh. 5]. CLAIMANT is enlarging the agreement in contravention of the "four corners rule" [*supra*]. Further, the resale prohibition clause is outside the scope of arbitration [*supra*]. Since it is not an abatable issue, no further discussion is necessary to belabor the point.

112. The second sentence of Art. 74 limits recovery of damages to those losses that the breaching party foresaw or could have foreseen at the time the contract was concluded as a possible consequence of its breach [*Bullet Proof Vest Case*]. CLAIMANT could have not reasonably foreseen the resale of the goods nor the increase of tariffs resulting to the loss of profits at the conclusion of the FSSA. Hence, Claimant cannot recoup the additional amount since it it limited by the foreseeability rule.

113. **CONCLUSION ON ISSUE 3:** CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price neither under Clause 12 nor under the CISG. The tariff is not a hardship defined under Clause 12. Even assuming tariff constitutes hardship, CLAIMANT is not entitled to a price adaptation under Clause 12, PICC and CISG. RESPONDENT has complied with its obligation and there are no gaps requiring recourse to Art. 7. Moreover, Art. 79 does not regulate hardship and there is no basis to claim the additional amount as damages under Art. 74.

– END OF DISCUSSION ON ISSUE 3 –

REQUEST FOR RELIEF

On the basis of the foregoing arguments, RESPONDENT asks the Arbitral Tribunal for the following orders:

a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
b. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;
c. To order CLAIMANT to pay RESPONDENT'S costs incurred in this arbitration