16TH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, 31 MARCH – 7 APRIL 2019

UNIVERSITAS
GADJAH MADA

Memorandum for RESPONDENT

Case No.: HKIAC/A18128

On Behalf of:	Against:
BLACK BEAUTY EQUESTRIAN	**PHAR LAP ALLEVAMENTO**
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo

ANDI ADHYAKSA • ALDEENEA CRISTABEL
FELICIA KOMALA • GRADY LEMUEL GINTING • KARIESSYA RANIAH
KUKUH DWI HERLANGGA • REVINO FAUZAN

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LIST OF ABBREVIATION

§	Section
¶/¶¶	paragraph/paragraphs
&	and
%	percent
Art./Arts.	Article/ Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Ex./Exs.	CLAIMANT Exhibit/ CLAIMANT Exhibits
Co.	Corporation
DDP	Delivered Duty Paid INCOTERMS® (2010)
ed.	Edition
et al.	et alii (and others)
HKIAC	Hong Kong International Arbitration Centre
i.e.	id est (in other words)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICC INCOTERMS	ICC International Commercial Terms (2010)
ICC Hardship Clause	ICC Hardship Clause 2003
ICCA	International Counsel for Commercial Arbitration
ICSID	International Centre of Investment Disputes
Id.	ibidem (in the same place)
Inc.	Incorporated
Ltd.	Limited

Memo.	Memorandum
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
n.	note
No.	Number
NoA.	Notice of Arbitration
p./pp.	page/pages
PICC	UNIDROIT Principles of International Commercial Contract 2016
PO	Procedural Order
Res. Ex./Exs.	RESPONDENT Exhibit/ RESPONDENT Exhibits
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US$	United States Dollar
v.	versus
Vol.	Volume

LEGAL SOURCES AND MATERIALS

CISG	United Nations Convention on Contracts for the International Sales of Goods Vienna, 11 April 1980
HKIAC Model Clause	Model Clause for Arbitration under the Administered Arbitration Rules (HKIAC)
HKIAC Rules 2013	Arbitration Rules of the Hong Kong International Arbitration Centre, 1 November 2013
HKIAC Rules 2018	Arbitration Rules of the Hong Kong International Arbitration Centre, 1 November 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 29 May 2010
ICC Hardship Clause	ICC Hardship Clause 2003
INCOTERMS	ICC International Commercial Terms 2010
PICC	Principles of International Commercial Contracts (UNIDROIT)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 Vienna, 2008

STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento (**"CLAIMANT"**), and Black Beauty Equestrian (**"RESPONDENT"**).
2. CLAIMANT operates a stud farm covering all areas of equestrian sport, farrier school and research facilities in Mediterraneo.
3. RESPONDENT owns a racehorse stable known for its broodmare lines in Equatoriana.
4. RESPONDENT saw a fruitful opportunity to purchase frozen semen from CLAIMANT'S most-sought after stallion, Nijinsky III (**"Frozen Semen"**), following the temporary lift on the ban of artificial insemination for race horses in Equatoriana. RESPONDENT and CLAIMANT (**"Parties"**) agreed on the Frozen Semen Sales Agreement for their transaction (**"Contract"**).

2014	A strict health and safety requirement was imposed in Danubia, affecting CLAIMANT'S performance in another transaction.	*Cl. Ex. 4*; *PO2, ¶21*
21 – 24 Mar 2017	The Parties entered into negotiations as to the terms of the Contract. RESPONDENT and CLAIMANT, represented by Chris Antley and Julie Napravnik respectively (**"Preceding Negotiators"**), agreed on three shipments for the delivery of the Frozen Semen.	*Cl. Exs. 1-2*
31 Mar 2017	CLAIMANT requested for an increase in US$ 1000 in exchange of agreeing to the use of DDP term in the Contract. CLAIMANT expressly rejected the idea for Equatorianan courts to have jurisdiction.	*Cl. Exs. 3-4*
11 Apr 2017	The dispute resolution clause (**"Arbitration Agreement"**) was agreed by the Parties where Danubia become the seat of arbitration as it is neutral.	*Res. Ex. 2*
12 Apr 2017	The Preceding Negotiators held one last discussion for the Contract before they were severely injured after a car accident in Danubia.	*Cl. Ex. 8*; *Res. Ex. 3*

25 Apr 2017	Mr. Bouckaert, someone known for his protectionist approach on international trade, was elected as President of Mediterraneo.	*Cl. Ex. 6*; *PO2, ¶23*
6 May 2017	The Contract was concluded by John Ferguson and Julian Krone as representatives of CLAIMANT and RESPONDENT respectively (**"Subsequent Negotiators"**).	*Cl. Exs. 5, 8*; *Res. Ex. 3*
19 Dec 2017	The government of Equatoriana announced that a tariff of 30% is enacted for all agricultural products from Mediterraneo.	*Cl. Ex. 6*
23 Jan 2018	CLAIMANT delivered the remaining 50 doses of Frozen Semen, bearing the additional costs of the tariff.	*NoA, ¶13*; *Cl. Ex. 8*
12 Feb 2018	The Parties entered into renegotiations but could not find a solution based on different commercial interests.	*Cl. Ex. 8*
31 Jul 2018	CLAIMANT initiated arbitration proceeding against RESPONDENT.	*Records, p. 3*
2 Oct 2018	Having discovered that RESPONDENT had been involved in a different arbitration proceeding, CLAIMANT attempted to submit the proceeding's Partial Interim Award to the current case. Considering its confidential nature, CLAIMANT will have to pay US$ 1000 for such access.	*Records, p. 50*; *PO2, ¶40*

SUMMARY OF ARGUMENTS

5. Prior to the completion of the Contract, the government of Equatoriana enacted tariffs which falls under CLAIMANT's sphere of risk. Yet, CLAIMANT utilized such event to seek for justification in order to abandon its contractual duties. CLAIMANT veiled its baseless submission under contractual adaptation, despite exceeding the scope of the Arbitration Agreement and the unavailability of the requested remedy under the Contract.

6. Following CLAIMANT'S acknowledgement of the 30% tariff that has been enacted for over a month, CLAIMANT threatened to halt performance until a solution can be found. With RESPONDENT's best effort to accommodate CLAIMANT's concerns, CLAIMANT delivered the Frozen Semen as required under the Contract. However, CLAIMANT fabricated an extraneous claim to seek for remuneration over the present tariff. No remuneration should be granted to CLAIMANT as the present tariff does not amount to hardship and is therefore under CLAIMANT'S sphere of risk. Notwithstanding CLAIMANT'S attempt to seek redress under the Contract and the CISG, adaptation may not be granted due to the derogation of related provisions and its inapplicability [**Third Issue**].

7. In their attempt to seek something that is non-existent, CLAIMANT submits that this Tribunal has power to adapt the Contract. In doing so, CLAIMANT alleged that Mediterranean law governs the Arbitration Agreement, despite the Parties' reasonable expectation that the law of the seat (Danubia) governs the Arbitration Agreement. Nevertheless, interpretation of the Arbitration Agreement under neither of the governing law does not entail the authorization to adapt. This is because the Parties never intended to authorize adaptation, nor did they expressly authorize it in the Contract [**First Issue**].

8. Aware of its weak position, CLAIMANT tries to introduce this Tribunal to illicit information obtained from either an illegal hack or breach of confidentiality. However, not only does this aggravate the illegal distribution of such information, it also shows CLAIMANT's failure to uphold the fundamental principle of good faith. In any case, such information would not be of help to this Tribunal. Admitting the information would only harm the procedural integrity of the proceeding [**Second Issue**].

§1

THE AUTHORITY TO ADAPT THE CONTRACT FALLS OUTSIDE THIS TRIBUNAL'S SCOPE OF JURISDICTION

1. RESPONDENT initiated the purchase of 100 doses of Frozen Semen from CLAIMANT [*Cl. Ex. 1*], which led to negotiations over the terms of the Contract and the Arbitration Agreement. After extensive negotiations and several proposals with regard to the dispute resolution clause, the Preceding Negotiators were unable to continue drafting the Contract due to a car accident on 12 April 2017 [*Cl. Ex. 8*; *PO2, ¶7*]. Following this, the Subsequent Negotiators agreed on a contract with no reference for adaptation nor an express law governing the Arbitration Agreement [*Res. Ex. 2*; *PO2, ¶4*].
2. CLAIMANT is correct in establishing that the method of interpreting the Arbitration Agreement corresponds to its governing law [*Cl. Memo., ¶10*]. However, CLAIMANT has the wrong conclusion, as Danubian law governs the Arbitration Agreement, and not Mediterranean law **(I)**. Nevertheless, the Arbitration Agreement excludes this Tribunal's power to conduct contractual adaptation **(II)**.

I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

3. CLAIMANT correctly submitted that an implied choice to the law governing an arbitration agreement is to be looked into when there is no express choice [*Cl. Memo., ¶¶11-2*]. However, CLAIMANT has directly assumed the implied application of the law of the Contract to govern the Arbitration Agreement [*Cl. Memo., ¶¶14-5*]. This is mistaken as the law of the contract cannot automatically extend to the arbitration agreement simply because it is the law of the contract [*Tzeng, p. 20*; *Born I, p. 473*; *Fouchard/Gaillard/Goldman, p. 237*].
4. Here, it is Danubian law that governs the Arbitration Agreement based on the Parties intention **(A)**. Alternatively, Danubian law applies by virtue of closest connection test **(B)**. In any event, Model Law prescribes a default rule that leads to the application of Danubian law **(C)**.

A. The Parties Intended for the Application of Danubian law

5. The intention of the Parties is to have the Arbitration Agreement governed by Danubian law. Choice of law governing an arbitration clause can be implicit as long as the parties' intention can still be inferred [*NTPC v. Singer*; *UNI-KOD v. Ouralkali*; *A/CN.9/280/EN*]. This is based on the parties' preceding communications [*Duke Energy v. Ecuador*; *Batson Yarn v. Saurer Allma*]

and drafting history of the arbitration clause [*Telenor v. Storm*]. Further, tribunals should also take into account the reasonable expectation of the parties [*Blessing, p. 174*; *Berger II, p. 310*].

6. CLAIMANT argues that their suggestion to rely on the ICC Hardship Clause implies an intention to apply Mediterranean law [*Cl. Memo.,* ¶¶*18-9*]. However, this circular reasoning is mistaken. This is because the use of ICC Hardship Clause was rejected by the Parties [*Res. Ex. 3*]. In any case, contractual adaptation is not an option under the ICC Hardship Clause [*ICC 650*; *Schwenzer, p. 723*]. Thus, it is simply unreasonable to assume that a mere reference to ICC Hardship Clause leads to an intention for Mediterranean law to govern the Arbitration Agreement.
7. Rather, intention can be derived from the Parties' choice for the seat of arbitration. Having a neutral country as the seat of arbitration often refers to the application of the *lex loci arbitri* to the arbitration agreement [*Egypt v. Chormalloy*; *Redfern/Hunter,* ¶¶*3.37-8*], as it is seen to be an implicit acceptance by the parties [*First Link v. GT Payment*; *Born III, p. 111*]. Further, the wording "*seat*" in an arbitration agreement reflects the parties' intention for a juridical connection between the seat of arbitration and the arbitration agreement [*Egypt v. Chormalloy*; *Goode, pp. 32-3*; *Leurent, p. 272*]. This juridical link entails a degree of connection between the arbitration and the law of the seat [*Uribe, p. 69*].
8. Correspondingly, the Parties have placed a significant importance to the neutrality of the seat which extends to the Arbitration Agreement. RESPONDENT rejected the application of Mediterranean law if Mediterranean courts have jurisdiction [*Cl. Exs. 2-3*], while CLAIMANT rejected the application of Equatorianan law if the arbitration sits in Equatoriana [*Res. Exs. 1-2*]. Subsequently, with reference to CLAIMANT's creditors committee's policy, the Parties' eventually agreed on a neutral venue for dispute resolution [*Res. Ex. 2*; *PO2,* ¶*14*]. Here, the reasonable expectation of the Parties is to have a neutral seat of arbitration whose law would also govern the Arbitration Agreement.
9. This is further substantiated by Chris Antley's note where the neutral venue of the seat of arbitration and applicable law to the Arbitration Agreement is related [*Res. Ex. 3*]. Hence, when CLAIMANT agreed on Danubia as the seat while not contending anything about the Arbitration Agreement [*Res. Ex. 2*], they agreed to apply the law of the seat to the Arbitration Agreement.
10. The Subsequent Negotiators merely forgot why the sentence concerning the law governing the Arbitration Agreement was not included [*Answer to NoA,* ¶*15*; *PO2,* ¶*6*]. This is because the Parties have understood that the law of the seat extends to the Arbitration Agreement. All things considered, the Parties intended to apply the *lex loci arbitri* as the law governing the Arbitration Agreement as it is neutral for both Parties.

B. Alternatively, Danubian law Applies by Virtue of Closest Connection Test

11. Danubian law applies to the Arbitration Agreement because it is the closest. In the absence of any express or implied choice of law, the law closest to the arbitration agreement applies [*Sulamerica v. Enesa*; *Sonatrach v. Ferrell*; *Dicey/Morris/Collins,* ¶*32*-006]. In determining which law is closest, various connecting factors have to be taken into account [*Clothing Case*; *Born I, p. 506*]. Under this test, the selection of law is made by ascertaining what a reasonable person would do when the agreement was made [*Hayward, p. 413*; *Mayss, p. 71*].

12. Currently, Mediterranean law cannot extend to the Arbitration Agreement under the separability doctrine **(1)**. In consequence, Danubian law applies as it has the most connecting factors **(2)**.

1. Mediterranean law cannot extend to the Arbitration Agreement under the separability doctrine

13. CLAIMANT has misapplied the separability doctrine by arguing that it merely refers to the validity of an arbitration agreement [*Cl. Memo.,* ¶¶*23-4*]. However, such doctrine may also result in the application of a different governing law between the arbitration agreement and the contract [*Bulgarian Bank v. Al Trade*; *Born I, p. 401*; *Redfern/Hunter,* ¶*3.13*]. This stems from the notion that the law of the underlying contract should not extend to the arbitration agreement [*Trukhtanov, p. 124*], as it is specifically made for a substantive issue [*Sulamerica v. Enesa*]. Such assertion may also be supported by the intention of the parties [*Born I, p. 353*; *Choi, p. 106*]. Here, the Parties intended for the separability doctrine to exclude Mediterranean law.

14. *First,* RESPONDENT initially requested for the use of HKIAC Model Clause, that includes a separate choice of law for the Arbitration Agreement which follows the law of the seat [*Res. Ex. 1*]. This reflected RESPONDENT's intention to have a different choice of law for the Contract and the Arbitration Agreement. In response, CLAIMANT merely rejected the proposed seat of arbitration and suggested for it to be Danubia instead [*Res. Ex. 2*]. Further, CLAIMANT insisted that "*the law applicable to the Frozen Semen Sales Agreement remains the law of Mediterraneo*" [*Id.*], on which Mediterranean law never applies to the arbitration agreement before [*Res. Exs. 1-2*]. This showcases that CLAIMANT did not reject RESPONDENT's concern to differentiate the choice of law for the Arbitration Agreement and the Contract.

15. *Second,* the wording "*Sales Agreement*" further separates the Arbitration Agreement from the Contract. The email correspondences clearly show that "*Sales Agreement*" only refers to the sales part of the Contract [*Res. Ex. 1*]. This is manifested in the use of "*Sales Agreement*" in Clause 14 whereas the rest of the Contract uses the wording "*this Agreement*". Thus, the choice of law under Clause 14 cannot extend to govern the Arbitration Agreement.

16. Further, Clause 14 is only intended for the substantive part of the Contract. This is because it contains an explicit reference to the CISG, which is known to be unsuitable for arbitration agreements [*Schlechtriem/Schwenzer, p. 178*; *Giammarco/Grimm, p. 47*]. Following the consistent jurisprudence under Danubia, CISG also does not apply to arbitration agreements as it is considered to be a procedural contract and not part of the sales agreement [*PO2, ¶36*].
17. *Third,* choice of law placed under Clause 14 does not immediately extend to Clause 15. Regarding the placement of the choice of law clause, it was even held that when a choice of law for the Contract exists within the same clause as the arbitration agreement, it merely applies to the substantive part of the contract [*Sonatrach v. Ferrel*; *Lew, p. 143*]. This is then why a choice of law placed outside of the arbitration agreement would not necessarily govern the arbitration agreement [*Preston v. Ferrer*; *Mastrobuono v. Shearson*; *Born II, ¶97*]. The fact that the choice of law clause is within Clause 14 while the Arbitration Agreement is under Clause 15, it showcases the intention for Mediterranean law to apply only to the Contract.
18. Everything considered, Mediterranean law does not govern the Arbitration Agreement.

2. Consequently, Danubian law is closer to the Arbitration Agreement

19. As there is no connection between the Arbitration Agreement and Mediterranean law, this Tribunal should find that Danubian law is closer. The law of the seat of arbitration is, more often than not, seen to be the law closest to the arbitration agreement in comparison to other laws [*Abuja v. Meridien; Jarvin/Derains, pp. 111-4*; *Lew/Mistelis/Kröll, ¶6-23*]. In fact, it is rare for the law of an arbitration agreement to differ from the law of the seat [*C v. D*]. Here, Danubian law is closest to the Arbitration Agreement based on the nature of the Arbitration Agreement.
20. The law of the seat would have the closest connection to the arbitration agreement because it relates to the procedural nature of a contract, similar to the arbitration agreement [*Sulamerica v. Enesa*; *Tobler v. Justizkommission*; *Jörg v. Jörg*]. This is considering that the seat of arbitration is the place where the arbitration itself takes place and where the award is made [*Theofano v. Long Tons*; *Hamlyn v. Talisker*; *Lew, p. 142*], matters which are the direct product of the arbitration agreement's provision [*Arsanovia Ltd v. Cruz City*; *Hamlyn v. Talisker*].
21. Thus, without a connection to Mediterranean law, Danubian law should govern the Arbitration Agreement as the law closest to it.

C. In Any Event, Danubian law is the Default Choice by Virtue of the Model Law

22. In any case, Danubian law governs the Arbitration Agreement pursuant to the Model Law. This is because the default choice of law rule under the Model Law prescribes for it to be the law of

the seat in the absence of implied or express choice [*Model Law, arts. 34 (a)(i), 36(1)(a)(i)*; *Born I, pp. 526-7*; *Henderson, p. 890*]. As Danubia adopts the Model Law [*PO, III, ¶4*; *PO2, ¶14*], it should be considered as it applies to all arbitrations placed in a Model Law jurisdiction [*Model Law, art. 1(1), art. 1(2); Deco v. GPA*; *Berger II, p. 317*].

23. The default choice of law rule stems from the validation of the arbitration agreement [*Model Law, art. 36(1)(a)(i)*; *Born I, pp. 526-7*; *Belohavek, p. 266-7*]. It is based on the parties' hypothetical intent to essentially have the arbitration agreement valid under the law of the seat [*First Link v. GT Payment*; *Clothing Case*; *Matermaco v. PPM Cranes*]. As such, tribunals must presume the application of the law of the seat as the default choice [*Tokyo 30 May 1994*; *Born III, p. 120*], to minimize every risk of invalidation leading to unenforceability of the award [*Della Sanara v. Fallimento*; *Petrasol v. Stolt Spur*]. Hence, the formation and governance of the Arbitration Agreement is to be seen from the perspective of the law of the seat, which is Danubian law.

24. Moreover, CLAIMANT incorrectly asserts that the validation principle would exclude Danubian law from applying to the Arbitration Agreement [*Cl. Memo., ¶¶20-1*]. Choosing Danubian law, which requires express conferral of power to govern the Arbitration Agreement [*PO2, ¶36*], would not invalidate the said agreement. With the absence of any express or implied choice of law, the Model Law prescribes the application of Danubian law to the Arbitration Agreement.

II. CONTRACT ADAPTATION DOES NOT FALL UNDER THE SCOPE OF THE ARBITRATION AGREEMENT

25. CLAIMANT alleged that the Arbitration Agreement is broad enough to allow for contract adaptation by a third party [*Cl. Memo., ¶¶28-9*]. However, this is unfounded as third party contract adaptation is excluded from the scope of the Arbitration Agreement. Authorization within an arbitration agreement can be seen as a clear guidance to identify a tribunal's scope of power [*Beisteiner, p. 107*; *A/CN.9/WG.II/WP.44*]. A tribunal's scope of power can be reflected from the parties' intention by interpreting the terms of a contract [*Debevoise, p. 122*; *Nassar, pp. 171-5*]. The method of interpretation would depend on the *lex arbitri* [*Berger I, p. 10*].

26. Notwithstanding the *lex arbitri* of this case, this Tribunal should find that empowerment for contractual adaptation does not exist under either Danubian law **(A)** or Mediterranean law **(B)**.

A. Empowerment for Adaptation is Absent under Danubian law

27. In the event where Danubian law applies to the Arbitration Agreement, this Tribunal does not have the authority to adapt the Contract as an express empowerment is absent. Based on the *lex arbitri*, it is Danubian law's consistent jurisprudence that an express reference in the Contract

is needed [*PO2, ¶¶36*]. Evidently, there is no express provision in the Contract that would suggest such empowerment.

28. Additionally, any argument suggesting that such express authorization exists by virtue of Clause 14 should be rejected. This is because authorization provided under the substantive law must correspond to the consent of the parties through express terms in the contract [*Faruque, p. 159*] and the *lex arbitri* [*Kuwait v. AMINOIL*; *Berger I, p. 12*]. It is uncontested that adaptation under Art. 28(3) of Danubian Arbitration Law needs the same requirement as authorization for *ex aequo et bono* [*PO2, ¶36*], which calls for an explicit wording [*Liberty v. QBE*; *AIG Corporation v. X Company*; *Wigwe, p. 243*]. In addition, Danubian law excludes any external evidence e.g. drafting history and preceding communications that may contradict the express wording of the contract under the four corners rule [*Answer to NoA, ¶16*]. Thus, without an explicit conferral of power, this Tribunal is not empowered to conduct contract adaptation.

B. Alternatively, Empowerment for Adaptation is Absent under Mediterranean Law

29. CLAIMANT is highly mistaken to argue that the wording of the Arbitration Agreement would automatically grant this Tribunal power to adapt the Contract under Mediterranean law [*Cl. Memo., ¶¶28, 30*]. CLAIMANT's unfounded assertion is due to their failure to take into account all relevant circumstances and facts [*CISG, art. 8(3)*; *Lautenschlager, pp. 263-264*], including negotiations and conducts of the parties [*Chinchilla Furs Case*; *Metal Ceilings Material Case*].

30. A tribunal's power to adapt a contract depends on the wording of the arbitration agreement [*Berger I, p. 8*]. When there is no express reference that this Tribunal has the power to adapt the Contract [*NoA, ¶16*; *Answer to NoA, ¶13*], the Parties' intent should be seen to seek for an implied authorization [*Sulamerica v. Enesa; Kröll, p. 457*; *Brunner, p. 496*].

31. First, RESPONDENT could not have been aware of CLAIMANT's intention to empower this Tribunal for contract adaptation **(1)**. Second, a reasonable third person would similarly view that there exists no authorization to adapt **(2)**. Consequently, absent any authorization, this Tribunal cannot adapt the contract **(3).**

1. The Subsequent Negotiators could not have been aware of any intention to authorize contractual adaptation

32. Following the method of interpretation under CISG, subjective interpretation starts from defining the parties' intent where the other party knew or could not have been unaware of what that intent was [*CISG, art. 8(1); MCC Marble Case*; *Huber/Mullis, p. 13*]. In that respect, either a well-defined intent of a party or common intent of the parties are needed to determine

subjective intent [*Schlechtriem/Schwenzer, p. 155*]. By taking into account all relevant circumstances, the Subsequent Negotiators could not have been aware of the intention to authorize contractual adaptation.

33. The Contract was concluded by the Subsequent Negotiators by relying on the correspondences between the Preceding Negotiators [*Res. Ex. 3*; *Cl. Ex. 8*]. However, John Ferguson failed to express CLAIMANT's intention to authorize contractual adaptation to Julian Krone. Moreover, neither the idea nor mentioning for contract adaptation is manifested into any of the previous correspondences [*Cl. Exs. 1-4*; *Res. Exs. 1-2*]. Such idea was only mentioned in a meeting on 12 April 2017, as can be seen from Chris Antley's note [*Res. Ex. 3*]. As the note was considered to be irrelevant and of limited importance [*PO2, ¶7*], any intention for contract adaptation did not materialize to the Contract [*Cl. Ex. 8*]. Thus, the Subsequent Negotiators could not have been aware of any intention to empower this Tribunal for contract adaptation.

2. A reasonable third person would conclude that there is no authorization to adapt

34. In the event that subjective interpretation is deemed insufficient to determine intent, interpretation should be taken objectively [*CISG, art. 8(2)*]. Objective interpretation gives reference to a 'reasonable third person' in the same circumstances and capabilities as the addressee [*Chinese Goods Case*; *Vilus, pp. 1437, 1440-1*], which includes being in his field of expertise [*Roland v. Textil*; *Feltham, p. 349*; *Schlechtriem/Schwenzer, p. 152*]. In this case, a reasonable third person in the shoes of the Subsequent Negotiators would not arrive to the conclusion that this Tribunal has the power to adapt the Contract.

35. The language of an arbitration agreement plays an important and decisive role in interpreting its scope [*First Options v. Kaplan*; *Mitsubishi v. Soler*]. The phrase "relating to" is seen as broad which encompasses non-contractual and contractual claims [*Pennzoil v. Ramco*; *Nokia v. AU Optronics*]. Contrastingly, the phrase "arising out of" is considered narrow [*Sheehan v. Centex Homes*; *Tracer v. National Environmental*], as compared to "relating to" [*Hi-Fert v. Kiukiang*]. A removal of a wording within an arbitration would be significant to the power of the tribunal [*Seifert v. US Home*; *Tracer v. National Environmental*; *Bell Mobility v. MTS*], as not all wordings have the same meaning [*Lombard v. GATX*].

36. In this case, the surrounding circumstance of the case should be seen. The Subsequent Negotiators was left with a contract without a hardship reference alongside a narrow arbitration agreement. The wording of the Arbitration Agreement merely included the narrow term "arising out of", omitting the terms "relating to" and "non-contractual obligations" [*Res. Ex. 1*; *HKIAC Model Clause*]. Although Chris Antley suggested to connect the hardship clause with the

arbitration clause [*Res. Ex. 3*], no hardship reference was within the Contract [*PO2, ¶4*]. Even the reliance on ICC Hardship Clause was rejected [*Res. Ex. 3*].

37. Such view is in line with Julian Krone's statement that he would have objected to transfer powers to this Tribunal being surrounded by this circumstance [*Id.*]. All things considered, a reasonable third person in the shoes of the Subsequent Negotiators would conclude that there is no authorization to adapt the Contract.

3. Consequently, this Tribunal cannot adapt the contract without any authorization

38. Since there is no express or implied authorization, any assertion that Mediterranean law gives this Tribunal justification over contractual adaptation is mistaken. In the context of contract adaptation, a clear consent needs to be evident within the arbitration agreement [*Himpurna v. PLN*; *Craig/Park/Paulson, p. 144*; *Steingruber, ¶7.11*] as the result would later become an integral part of the contract [*Sanders, p. 205; A/CN.9/233*]. A clear consent is also necessary since when there is no express or implied intention for contract adaptation, it would be presumed that the parties intended for the sanctity of their contract to prevail [*Berger I, p. 9*].

39. Tribunals then cannot seek justification through the governing law of the Arbitration Agreement [*Himpurna v. PLN*; *Berger I, p. 9*]. In fact, without any authorization in the arbitration agreement, such matter would be left to state courts instead of arbitration [*Beisteiner, p. 87*]. Hence, by insisting on adapting the contract, the award rendered would neglect the initial intention of the parties towards the kind of arbitration intended [*Berger I, p. 9*].

40. In conclusion, even when Mediterranean law applies to the Arbitration Agreement and the substantive part of the Contract, this Tribunal does not have the power to do contractual adaptation due to the absence of express and implied empowerment.

CONCLUSION OF THE FIRST ISSUE:

41. The law governing the Arbitration Agreement is Danubian law, as established by the intention of the Parties and its close connection to the Arbitration Agreement. Nevertheless, the application of either Mediterranean or Danubian law would still leave this Tribunal powerless to adapt the Contract.

§2

CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE OBTAINED EITHER THROUGH A BREACH OF CONFIDENTIALITY OR ILLEGAL HACK

42. Recently, CLAIMANT uncovered that RESPONDENT has previously been involved in a dispute concerning contractual adaptation with a different party [*PO2, ¶39*]. CLAIMANT then arranged a transaction with an intelligence company who claims that they are in possession of that proceeding's Partial Interim Award (**"Evidence"**) [*PO2, ¶41*]. Despite its unlawful obtainment [*PO, III, ¶1b*], CLAIMANT extended its effort to use such fact to persuade this Tribunal to adapt the Contract [*PO2, ¶41*]. Currently, this Tribunal have the power to determine the admissibility, relevance, materiality and weight of any evidence [*HKIAC, art. 22.2*; *IBA Rules, art. 9*; *Model Law, art. 19(2)*]. With respect to that, regardless of the irrelevant matter brought by CLAIMANT on whether the other party in the other proceeding can be joined here [*Cl. Memo., ¶¶53-8*], this Evidence could not be admitted into this proceeding under two reasons.
43. First, the procurement of the Evidence renders it inadmissible **(I)**. Second, the utilization and value of the Evidence would prevent it from being admitted **(II)**.

I. THE PROCUREMENT OF THE EVIDENCE RENDERS IT INADMISSIBLE

44. How the Evidence was obtained renders it to be inadmissible in this proceeding. Here, The Evidence was obtained through two possible illegal means. *First*, the hack of RESPONDENT's computer system which constitutes an illegal obtainment of Evidence [*Records, p. 51*; *PO, III, ¶1b*; *PO2, ¶¶41-2*]. *Second*, the breach of confidentiality through a disclosure by RESPONDENT's former employees [*Records, p. 51*; *PO2, ¶41*], who were witnesses and under a contractual obligation to keep all information about the other arbitral proceedings confidential [*PO2, ¶41*; *HKIAC 2013 Rules, art. 42.2*].
45. Accordingly, illegally obtained evidences are inadmissible [*Hulley v. Russia*; *Persia v. Council*], as it violates the principles of good faith, fairness and justice [*Methanex v. USA*; *Boykin/Havalic, p. 6*]. *In casu*, CLAIMANT contended that there is no illegality arising from the breach of confidentiality due to the absence of confidentiality binding upon the Evidence [*Cl. Memo., ¶¶42-52*]. However, this is mistaken as the illegal nature of the Evidence still exists under confidentiality **(A)**. Taking that into account, the illegality of the Evidence bars its admission **(B)**.

A. The Evidence is Illegal as it was Obtained From a Breach of Confidentiality

46. In a transaction concerning private parties, there is little reasoning to presume that confidentiality was meant to be waived [*Poorooye/Feehily, p. 299*]. Even if its waiver is deemed necessary, observation is taken to the relevant circumstances [*Esso v. Plowman*]. With respect to that, the illegal nature of the Evidence is maintained as the confidentiality enveloping the Evidence has not been waived. First, it is not within public domain **(1)**. Second, under the concept of legal privilege, the Evidence is absolutely confidential **(2)**. Third, the principle of transparency is inapplicable to this case **(3)**.

1. The Evidence remains confidential as it is not within public domain

47. CLAIMANT asserts that the Evidence has lost its confidentiality as a result of "earlier disclosure" pursuant to Art. 9.3(d) IBA Rules [*Cl. Memo., ¶42*]. However, to waive confidentiality under the standard of "earlier disclosure", the document or evidence must have reached public domain [*IBA Rules, art. 3.13*]. A document is within public domain when it is commonly known and accessible to the public [*Attorney General v. Observer*; *Max v. News*; *Smeureanu, pp. 77, 91*]. For example, a document is no longer confidential when it has been disclosed through WikiLeaks as it would be within a "public domain" [*Bible v. USAF*; *Libananco v. Turkey*].
48. In this case, three parties possess the Evidence: the intelligence company and two other unclear sources [*PO2, ¶41*]. In order to obtain the Evidence from the intelligence company, CLAIMANT has to pay US$ 1000 to them [*Id.*]. Since the Evidence is only available when payment is made, it would showcase the intention to keep such Evidence confidential. This is because making the Evidence available to public will harm the intelligence company's purpose of possessing and making profit from it.
49. As the Evidence is not freely accessible and therefore not within public domain, its confidential nature has not been waived based on its earlier disclosure.

2. The concept of legal privilege renders the Evidence as absolutely confidential

50. Further, CLAIMANT wrongfully asserted that earlier disclosure of an evidence under the concept of legal privilege's strict liability will waive its confidentiality [*Cl. Memo., ¶42*]. This is because despite the misapplication of legal privilege, the Evidence would still be rendered as confidential under its application. In its argument, CLAIMANT misapplied the tribunal's rationale in *Vito v. Canada* [*Id.*], since an inadvertent disclosure of a document will not waive its legal-privileged status [*Vito v. Canada*; *O'Malley, ¶9.57*]. Hence, since the Evidence was disclosed by the former

employees without RESPONDENT's intention nor consent [*Records, p. 51*; *PO2, ¶39*], it suggests that the confidentiality of the Evidence remains.

3. The principle of transparency is inapplicable to this case

51. The principle of transparency would not permit the admission of the confidential Evidence. While agreeing with CLAIMANT that this Tribunal needs to see the public interest and interest of justice [*Cl. Memo., ¶49*], CLAIMANT arrived to the wrong conclusion regarding the admissibility of the Evidence. Here, neither public interest **(a)** nor interest of justice **(b)** allows for the admission of the Evidence under the principle of transparency.

a. <u>There is no public interest requiring the disclosure of the Evidence</u>

52. In this case, there is no public interest that requires for the Evidence to be admitted in this proceeding. While it is true that public interest may give rise to a deviation of confidentiality [*CoA v. Cockatoo*; *Esso v. Plowman*], it needs to be determined on case-by-case observation [*Kanowitz, p. 267*]. Public interest commonly depends on the existence of a matter that affects the welfare of local communities [*Esso v. Plowman*; *Mitsubishi v. Soler*; *Smeureanu, p. 94*] based fundamentally on constitutional consideration [*O'Callaghan v. Mahon*].
53. CLAIMANT, as a private company, wrongfully positioned themselves to represent "public interest" under the notion of good faith in order to admit the Evidence in this case [*Cl. Memo., ¶50*; *NoA, ¶1*]. However, the result of the other proceeding bears no significance to the welfare of the citizens of either Equatoriana, Mediterraneo, or Danubia.
54. Therefore, there is no public interest that urges the disclosure of the confidential Evidence.

b. <u>Interest of justice does not dictate the disclosure of the Evidence</u>

55. While it is true that the interest of justice may also allow the disclosure of confidential evidence [*Ali v. Trogir*; *Emmott v. Michael Wilson*], such interest cannot be found in this case. Presently, CLAIMANT asserts that imposing a strict confidentiality towards the Evidence would amount to abuse of rights and subsequently offend the principle of fairness [*Cl. Memo., ¶¶45-8*; *PICC, art. 1.7*]. However, such assertion is mistaken. CLAIMANT cannot utilize the concept of abuse of rights to force the admission of the Evidence **(i)**. Alternatively, the exclusion of the Evidence would not violate the principle of fairness **(ii)**.

i. The concept of abuse of rights does not grant CLAIMANT the right to admit the Evidence

56. The concept of abuse of rights does not lead to the admission of Evidence. Such doctrine arises from the misuse of rights within the contractual relationship of the parties [*Kröll, p. 468*; *Vogenauer, pp. 222-3*; *Brunner, p. 394*]. Similarly, in *Karaha Bodas v. Pertamina* cited by CLAIMANT, a question concerning abuse of rights arises from a contractual relationship of the parties to the dispute [*Cl. Memo., ¶45*].

57. On the contrary, with RESPONDENT maintaining the confidentiality of the Evidence in this proceeding, it would not amount to abuse of rights. Apparently, this right to maintain confidentiality arises from the contractual relation with the other party in the other proceeding [*Records, p. 51*], not with CLAIMANT. Therefore, maintaining the confidentiality of the Evidence by excluding it would not amount to an abuse of right.

ii. Alternatively, the exclusion of the Evidence would not violate the principle of fairness

58. Further, CLAIMANT tries to mislead this Tribunal by arguing that the Evidence must be admitted as its exclusion would offend the principle of fairness [*Cl. Memo., ¶¶46-7*] while using estoppel to support its contention [*Cl. Memo., ¶48*]. When a party makes a contradictory assertion or conduct from two different proceedings, it may amount to estoppel [*Waincymer, p. 789*]. However, such doctrine only applies if the two proceedings consist of the same parties, or within the same contractual relation [*Ali v. Trogir*; *Sacor v. Repsol*; *Fouchard/Gaillard/Goldman, p. 820*].

59. Further, a party's understanding may differ between each case when the facts presented are different [*Beccara v. Argentina*]. Accordingly, an inconsistent understanding of the fact or claim is recognized as the inherent risk of separate and different arbitrations [*Sacor v. Repsol*; *Kyriaki, p. 113*], similar to the current proceeding with the other one [*Records, pp. 50-1*].

60. Nevertheless, what is asked by CLAIMANT from the Evidence is to prove a subjective issue concerning whether tariffs imposed by Mediterraneo and Equatoriana amounts to hardship [*Cl. Memo., ¶48*]. However, such determination requires case-by-case analysis that takes into account each contract and its surrounding circumstances [*Schwenzer, pp. 715-6*]. It would be unreasonable to expect that RESPONDENT would have the exact understanding on hardship in both cases. Thereby, RESPONDENT having a different stance would not amount to estoppel.

61. *Ergo*, the confidentiality of the Evidence has not been waived by the principle of transparency.

B. The Evidence Should Not be Admitted Due to Its Illegal Nature

62. The admissibility of unlawfully obtained evidence is to be evaluated in light of the circumstances of a particular case [*Corfu Channel Case*; *Iranian Hostages Case*]. Presently, the Evidence must not

be admitted because first, CLAIMANT's violation of good faith renders the Evidence inadmissible **(1)**. Second, the Evidence's confidentiality suppresses its admissibility **(2)**. Third, this Tribunal should exclude the Evidence as it would disregard their procedural integrity **(3)**.

1. CLAIMANT's violation of good faith principle in attempting to submit the Evidence renders it inadmissible

63. The Evidence should not be admitted as CLAIMANT has violated the principle of good faith. In determining the admissibility of an unlawfully obtained evidence, its procurement is assessed to respect good faith in an arbitration [*IBA Rules, Preamble, ¶3*; *Methanex v. USA*]. Under good faith, illegally obtained evidence is admissible only if the party submitted the evidence in "clean hands" [*Methanex v. USA*; *Hulley v. Russia*; *Caratube v. Kazakhstan*]. The standard for "clean hands" refers to whether the illegally obtained evidence was publicly accessible prior to its submission [*Bible v. USAF*; *Boykin/Havalic, p. 19*] and whether the party's participation in the obtainment was to benefit itself [*Methanex v. USA*; *Libananco v. Turkey*].

64. Contrastingly, CLAIMANT cannot be considered as having "clean hands" in submitting the Evidence [*Cl. Memo., ¶¶39-40*]. While the Evidence is not within the public domain [*supra, ¶¶47-9*], CLAIMANT went the extra mile by arranging to buy it from a company that exploited RESPONDENT's firewall system [*PO2, ¶41*]. This was done with the notion in mind of the Evidence's confidential nature [*Records, p. 50*; *PO2, ¶39*]. It shows that CLAIMANT's hands are tainted by their contribution in the illegal distribution of the Evidence only to satisfy their needs.

65. Thus, CLAIMANT is not entitled to submit the Evidence due to the violation of good faith.

2. Confidentiality would suppress the admissibility of the Evidence

66. An evidence obtained through a breach of confidentiality should not be admitted into an arbitration. Confidentiality is deemed to be one of the fundamental hallmarks and prominent feature of arbitration [*Poorooye/Feehily, p. 277*]. It is then essential for parties to benefit from the protection of confidentiality afforded under the process of arbitration [*Lincoln v. Sun Life*; *Kyriaki, pp. 112-3*]. It was held that it is common to suppress evidences for the sake of maintaining confidentiality [*Fireman's v. Cunningham*]. The importance of confidentiality is similarly acknowledged by the applicable rules [*HKIAC 2013 Rules, arts. 42.1, 42.2*; *HKIAC 2018 Rules, arts. 45.1, 45.2*; *IBA Rules, art. 13.3*].

67. Therefore, obtaining the Evidence from proceedings protected by confidentiality [*Records, p. 51*; *PO2, ¶39*] should render the Evidence inadmissible.

3. Admission of the Evidence would infringe the procedural integrity of this Tribunal

68. Keeping in mind that HKIAC fosters the notion of confidentiality [*Born I, p. 2803*], tribunals should observe its procedural integrity by not allowing the process of arbitration to be defiled by the presence of an illegal object being utilized by the parties [*Libananco v. Turkey*; *Small, p. 182*; *Brown, p. 231*]. Therefore, as long as the tribunal can limit the access or mitigate further distribution of the illegal object [*Bible v. USAF*; *Maye v. Adam*], they should do so. With reference to the confidentiality, its usage should be at limited extent necessary to ensure a fair proceeding [*Independent Newspapers v. Murphy*].

69. Conclusively, it is unreasonable to admit the Evidence into this proceeding since it will further the circulation of an illegal and confidential object which harms the integrity of this Tribunal.

II. THE UTILIZATION AND VALUE OF THE EVIDENCE WOULD PREVENT IT FROM BEING ADMITTED

70. Whether the Evidence can be relied upon by this Tribunal to answer the questions presented before it, the IBA Rules must be looked into as they are a common reference for arbitrations under HKIAC [*Moser/Bao, ¶9.155*]. Noting that the applicability of the IBA Rules is not contended by CLAIMANT [*Cl. Memo., ¶¶34, 42*], the Evidence must be assessed based on its value and usage for this Tribunal before being admitted [*IBA Rules, art. 9.2*]. In doing so, this Tribunal will find that the Evidence should be excluded as it serves no value in this proceeding **(A)**, and disregards procedural fairness **(B)**.

A. The Evidence Serves No Value in This Proceeding

71. CLAIMANT correctly pointed out that the test of relevance and materiality is important in determining admissibility of evidences [*Cl. Memo., ¶¶33-4*]. This is because evidence that is irrelevant and immaterial is unnecessary, hence should be excluded [*O'Malley, ¶3.69*]. Relevance refers to whether an evidence would support a party's fundamental contention [*Glamis Gold v. USA*; *ADF v. USA*; *Marghitola, pp. 49,53*]. Materiality refers to whether an evidence would help arbitrators in its deliberation [*ABB v. Hochtief*; *Hanseatiches (1999)*; *O'Malley, ¶¶3.76, 9.17*].

72. However, it should be noted that when it is believed that the existing evidences are sufficient to decide on a matter, any further admission of evidence is deemed to be immaterial [*Century Indemnity v. Underwriters*; *Thema International v. HSBC*; *Beccara v Argentina*], and merely delays the proceeding [*Ruckersicherung v. Versicherungs*; *O'Malley, ¶3.76*]. Moreover, evidence is irrelevant and immaterial if it concerns or answers a different legal question [*Mobile v. Canada*] Here, CLAIMANT mistakenly concluded that the Evidence meets such standard of relevance and materiality.

73. *First,* the Evidence cannot be used as reference for RESPONDENT's understanding of what amounts to hardship. This is because determination of hardship must be made on a case-by-case basis by taking into account the surrounding circumstance of each case [*Brunner, p. 116*; *Schwenzer, pp. 715-6*]. Moreover, this standard for hardship and allocation of risk is commonly a matter of contractual interpretation [*Marzipan Case*; *Steel Ropes Case*; *Brunner, p. 116*]. This indicates that whether hardship exists in this case is not to be determined using the standards prescribed in the other proceeding as the surrounding circumstance of the case differs.
74. As the ICC Hardship Clause was relied on in the other proceeding [*PO2, ¶39*], any change in circumstance may be considered as hardship if it is proven to be onerous. It should not be forgotten that in the present case, the use of ICC Hardship Clause was explicitly rejected due to its broadness [*Cl. Ex. 4*]. The Parties then agreed on different trigger events for hardship which accommodates CLAIMANT's past experience [*Re. Ex. 3*; *PO2, ¶12*].
75. The difference in circumstance extends to the origin of the impediment between the two cases. In the other proceeding, the contract was affected by the tariff imposed from the Mediterranean government [*Cl. Ex. 6*; *PO2, ¶39*]. While in this case, it was from Equatorianan government [*Cl. Ex. 6*]. Evidently, the consideration for hardship differs between the two cases.
76. *Second*, there are other references that is available for this Tribunal to assist in answering the questions presented before them. The arbitration agreement in the other proceeding made use of the HKIAC Model Clause which, similarly to standard arbitration clauses, contain both the wording "arising out of" and "relating to" or "in connection with" [*PO2, ¶39*; *ICC Model Clause*; *UNCITRAL Model Clause*; *Born I, p. 1345*]. Here, according to the consistent jurisprudence of Mediterranean law, a standard arbitration agreement suffices to empower tribunals to do contractual adaptation [*PO2, ¶39*]. Hence, this Tribunal can easily refer to other Mediterranean law jurisprudences, rendering the admission of the Evidence unnecessary.
77. All things considered, the Evidence is irrelevant and immaterial as the circumstances of the case are different and there exists other references for this Tribunal to use in deciding the case.

B. Admission of the Evidence Would Disregard Procedural Fairness

78. The admission of the Evidence would jeopardize the fairness of this proceeding. An evidence is inadmissible when its presentation violates the concept of "equality of arms" under the principle of fairness [*IBA Rules, art. 9.2(g)*; *Methanex v. USA*]. Equality of arms necessitates that a party should not be disadvantaged when a case is presented [*Dombo v. Netherland*]. Precisely in this case, exclusion of the Evidence is required to ensure procedural fairness.

79. RESPONDENT will be disadvantaged if the Evidence is admitted, since RESPONDENT will be barred from discussing the content of the Evidence [*Records, p. 51*]. This is so as RESPONDENT is bound by confidentiality to the other proceeding and is prohibited from disclosing anything in relation with the Evidence [*HKIAC 2013 Rules, arts. 42.1, 42.4*].

80. It is true that disclosure is still possible when it is to "*pursue a party's legal interest before [...] judicial authority*" [*HKIAC 2013 Rules, art. 42.3(a)(i)*; *Moser/Bao, ¶¶12.32-3*; *Smutny/Polasek, ¶2.124*]. However, the term "*judicial authority*" merely refers to the authority appertaining to state functions [*Morgan v. Modi*], which may include i.e. the office of a judge [*Attorney General v. Nakibuule*], or state-governed arbitration [*BALCO v. Kaiser Aluminium*]. This Tribunal does not fall under the term "*judicial authority*". Therefore, RESPONDENT will not have a fair opportunity to properly present its argument and clarify with regards to the Evidence.

81. Thus, the Evidence should be inadmissible because its admission will gravely harm RESPONDENT'S right to have a fair proceeding.

CONCLUSION OF THE SECOND ISSUE:

82. Considering how the Evidence was obtained, its admission would violate the principle of good faith, disregard the importance of confidentiality and clearly harm the procedural integrity of this case. Additionally, as the Evidence contains no value and its utilization would be unfair, CLAIMANT should not be entitled to submit the Evidence.

§3

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

83. The Parties have agreed upon the Contract with CLAIMANT's obligation to deliver the Frozen Semen within RESPONDENT's premise [*PO2, ¶10*]. Following Equatorianan government's 30% tariff that was announced a month prior to the last shipment [*Cl. Ex. 6*; *PO2, ¶25*], CLAIMANT erroneously argues that it amounts to a hardship situation. Accordingly, CLAIMANT requests for remuneration in the amount of US$ 1,250,000, discharging its contractual duty to RESPONDENT.

84. CLAIMANT asserted their argument by calling for contractual adaptation [*Cl. Memo., ¶60*; *NoA, ¶¶9-10*]. Yet, they failed to acknowledge that the present tariff cannot be relied on to invoke a hardship defense. Consequently, rendering contract adaptation would be superfluous.

85. Presently, this Tribunal should refrain from modifying the Contract and leave it to be unaltered. This is reflected from CLAIMANT's non-entitlement to remuneration under Clause 12 **(I)**. Additionally, CLAIMANT may not rely on the CISG for an adaptation of the Contract **(II)**.

I. CLAIMANT IS NOT ENTITLED TO THE REMUNERATION UNDER CLAUSE 12

86. CLAIMANT correctly acknowledged that Clause 12 provides for exemption of performance when the requirements and trigger events of hardship are fulfilled [*Cl. Memo., ¶61*]. However, CLAIMANT misunderstood the intended purpose and applicability of Clause 12 in light of the present tariff by requesting for contract adaptation as a remedy instead. Presently, contract adaptation as a remedy is neither possible nor permitted under the Contract.

87. First, the present tariff does not amount to hardship under the scope of Clause 12 **(A)**. Second, the Subsequent Negotiators specifically agreed on Clause 12 without contract adaptation as a remedy **(B)**. Third, RESPONDENT conducted renegotiations in good faith **(C)**.

A. The Present Tariff Does Not Amount to Hardship Under the Scope of Clause 12

88. In light of the present tariff, CLAIMANT correctly acknowledged that there are specific events that attribute to hardship in Clause 12 [*Cl. Memo., ¶70*]. Yet, CLAIMANT mistakenly argued that the present tariff satisfies the prerequisite laid out under Clause 12 [*Cl. Memo., ¶62*].

89. While Clause 12 excludes certain risks from CLAIMANT's contractual obligations, CLAIMANT agreed upon DDP term [*Contract, Clause 8*]. DDP term obliges the seller (CLAIMANT) to bear all risk throughout delivery, including import custom clearance [*Murray, p. 124*; *Ramberg I, p. 4*]. In agreeing for such term to be read together with Clause 12, CLAIMANT obtained a monetary gain in the amount of US$ 50,000 in total [*PO2, ¶8*]. Based on that, the allocated risk would only fall to RESPONDENT when it is a matter governed under Clause 12.

90. Bearing in mind CLAIMANT's obligation to honor the Contract's DDP term, the present tariff would fall under CLAIMANT's responsibility as this situation does not fall within the exemptions under Clause 12. First, the tariff was not comparable to changes in health and safety requirements **(1)**. Second, the enactment of the tariff was foreseeable prior to the conclusion of the Contract **(2)**. Third, the tariff did not render the contractual performance more onerous **(3)**.

1. The present tariff is not comparable towards the changes in health and safety requirements

91. The tariff is not comparable towards the standard prescribed under Clause 12, which is the "*additional health and safety requirements or comparable unforeseen events*" in reference to CLAIMANT's previous experience which caused a change in delivery terms [*PO2, ¶21*]. Delivery terms refer to the parties' obligations in relation to place or time of delivery [*Murray, p.125*]. By reference to the Parties' negotiations [*CISG, art. 8(3)*; *Chinchilla Furs Case*; *Kröll/Mistelis/Viscasillas, p. 150*], a change in the Contract's delivery term was not modified.

92. Prior to this case, CLAIMANT was involved in the sales transaction of three mares in Danubian farms, with the use of a DDP term [*PO2, ¶21*]. However, a long quarantine was required due to a disease outbreak, automatically modifying the delivery date after the completion of the additional test and quarantine period [*Id.*]. Based on that, the Parties agreed to discharge CLAIMANT's obligation should a "*change in the delivery terms*" arises [*Cl. Ex. 4*; *Id.*]. The wording "*shall not be responsible for […] delays in delivery*" under Clause 12 suggests a similar understanding.

93. Here, the present tariff does not change the delivery term from what was prescribed within the Contract. It is to be noted that the Contract provides for DDP upon RESPONDENT's premise, as well as a delivery date on 23 January 2018 [*Contract, Clause 8*; *PO2, ¶10*]. All of which were honored and were not modified. This was evident from the completion of the Contract in accordance with the agreed terms [*Cl. Ex. 8*]. Therefore, it is evident that there are no changes in delivery terms that would allow CLAIMANT to rely on Clause 12 to argue that the present tariff satisfies the "comparable" prerequisite.

2. The change in circumstance was reasonably foreseeable prior to the conclusion of the Contract

94. CLAIMANT could reasonably foresee the imposition of the tariff prior to the conclusion of the Contract. An impediment is deemed to be reasonably foreseeable if there is a "realistic possibility" that it will occur [*ICC No. 7197*; *Silveira, p. 225*; *Flambouras I, p. 271*]. Such determination depends on the standard of a reasonable person in the shoes of the promisor [*Scaforn v. Exma*; *Schlechtriem/Schwenzer, p. 1068*; *Stoll in Schlechtriem, p. 605*]. In this case, it should be seen from a reasonable person in the shoes of CLAIMANT.

95. In determining whether an impediment is reasonably foreseeable, early signs or indicators that exist prior to the conclusion of the Contract are of much relevance [*Flambouras I, p. 271*]. Here, the tariff is nevertheless reasonably foreseeable based on three things.

96. *First*, it was foreseeable based on the nature of the Contract, considering its relevance [*Schwenzer, p. 716*; *Brunner, pp. 438-41*]. When a contract is highly based on speculation, the obligor is presumed to have undertaken the risk involved [*Schwenzer, p. 715*; *Steel Bars Case*; *Scaforn v. Exma*]. Here, the Contract was concluded on a temporary ban for artificial insemination [*Cl. Ex. 1*]. Reliance was placed on a temporary change within the laws of Equatoriana where a long-term cooperation was promised based on speculations that the ban is lifted permanently [*Cl. Exs. 1, 3*]. Consequently, the Parties' relied on speculations that Equatoriana's regulations would remain unvarying in the future. On the contrary with the other proceeding, there is no reliance upon the constancy of regulations in Mediterraneo [*PO2, ¶39*].

97. *Second*, it was foreseeable based on CLAIMANT'S expertise. The obligor's expertise is to be considered when determining foreseeability [*Société Romay AG v. SARL*; *Brunner, p. 160*]. Here, despite the political view of the government of Equatoriana and the unusual scope of the tariff [*Cl. Memo., ¶67*], the possibility of a trade conflict is apparent prior to the conclusion of the Contract. This is especially so as CLAIMANT is an expert in export and import documentation [*Cl. Ex. 3*]. A protectionist approach was taken after Mediterraneo's current president was elected in April 2017 [*Cl. Ex. 6*]. Even before he was elected, Mr. Bouckaert has strongly voiced out such preference since January 2017 [*Id.*]. Following his election, he appointed a "superminister" who was famous for her protectionist approach prior to the conclusion of the Contract, which was concluded in Mediterraneo on May 2017 [*PO2, ¶¶13, 23*].

98. *Third*, it was foreseeable as CLAIMANT duly considered the potential risk of changes in import restrictions prior to the conclusion of the Contract. It was held when a party took into account a particular risk early on, such risk is admitted to be foreseeable [*CMS Award*]. CLAIMANT explicitly took into account the risk of changes in the import restrictions [*Cl. Memo., ¶74*; *Cl. Ex. 4*]. Such understanding is asserted from CLAIMANT'S email on 31 March 2017, which states "*associated with changes in customs regulation or import restrictions"* [*Cl. Ex. 4*]. To the contrary, the utilization of a standard ICC Hardship Clause in the other proceeding [*PO2, ¶39*] does not show any indication of RESPONDENT's forfeiture to the unforeseeable element.

99. By observance of CLAIMANT's expertise and nature of the Contract, the imposition of tariff was reasonably foreseeable. In any case, CLAIMANT took the risk of the present tariff into account.

3. There is no alteration that renders the contractual performance more onerous

100. CLAIMANT mistakenly relied on the subjective threshold of 'limit of sacrifice' to determine whether the tariff has rendered the performance to be "more onerous" [*Cl. Memo., ¶65*; *Garro I, p. 245*; *Schlechtriem/Schwenzer, p. 1152*]. However, CLAIMANT disregards the objective threshold for onerousness under Clause 12. It is to be noted that in measuring onerousness, both the subjective and objective standard has to be taken in conjunction [*Brunner, pp. 431-7*; *Silveira, pp. 346-8*]. In doing so, the tariff did not modify the contractual equilibrium that renders the performance to be as onerous as prescribed under Clause 12.

101. Under the objective standard, a fixed percentage of increase in cost or value of performance may signify what amounts to a fundamental alteration to a contract [*Steel Tubes Case*; *Brunner, p. 426*]. However, this cannot be seen independently as it cannot solely foreclose the assessment of every individual case [*Brunner, pp. 426, 434*]. In other words, the percentage has to be followed by the subjective understanding towards its effect to determine onerousness.

102. Contrastingly, the Evidence cannot be relied on to determine the existence of hardship as the decision on the merits have not been decided [*PO2, ¶39*], and the Evidence is subject to RESPONDENT's capabilities for the subjective threshold. Thus, the determination of "onerous" from the present tariff should be strictly confined under the four corners of the present case.

103. To do so, CLAIMANT'S past experience should be resorted to since it is the primary context for Clause 12 [*PO2, ¶12*; *CISG, art. 8(3)*; *Schlechtriem/Schwenzer, p. 151*].While both the objective and subjective standard should be considered, the following table illustrates how the tariff does not render the performance "more onerous" as compared to CLAIMANT's previous experience.

	Change in Circumstance	***Price (US$)***	***Fact***
CLAIMANT'S Previous Experience	Price of the entire transaction	8,000,000	*PO2, ¶21*
	Additional Costs	3,200,000	
	Percentage of Additional Costs from the entire undertaking Contract	**40%**	*Cl. Ex. 4*; *PO2, ¶21*
Current Case	Price of the entire transaction (before the tariff)	10,000,000	*Cl. Ex. 5*
	Additional Costs	1,500,000	*Cl. Exs. 5, 7*
	Percentage of Additional Costs from the entire undertaking Contract	**15%**	

104. Whether equilibrium of a contract is altered should be seen from the entirety of a contract's performance, and not a part of it [*Florida Power v. Westinghouse*; *Freidco v. Farmers Bank*; *ICC 650*]. As seen, CLAIMANT's previous experience sets the standard to go as high as a 40% increase from the entire undertaking of the contractual performance [*PO2, ¶21*]. This rate was considered to amount to hardship as the 'limit of sacrifice' was indeed surpassed by CLAIMANT at that time as it nearly resulted in CLAIMANT's insolvency [*Cl. Ex. 8*; *PO2, ¶29*].

105. Here, not only does the 15% increase in price from the entirety of the Contract falls far under the 40% benchmark, the subjective threshold is also not fulfilled. The subjective threshold is not fulfilled when the obligor can still rely on their other resources within their business [*Louisiana v. Allegheny*; *BGH (1977)*; *Brunner, pp. 436-7*]. It is to be noted, CLAIMANT's business covers all kinds of equestrian sport, farrier school and research facilities [*NoA, ¶1*]. Evidently, no 'limit of sacrifice' was surpassed as the tariff only affected one part of CLAIMANT's business division [*PO2, ¶29*]. Consequently, CLAIMANT failed to assert the effects of the present tariff towards its entire business. Thus, the present tariff has not met the standards of Clause 12.

B. Alternatively, Clause 12 Does Not Provide Adaptation as a Legal Remedy

106. Despite the fulfillment of Clause 12, the Contract still cannot be adapted as per CLAIMANT's request. This is because Clause 12 does not provide contract adaptation as a legal remedy.

107. Following the accident, the Subsequent Negotiator continued the discussion on CLAIMANT's request to apply the ICC Hardship Clause [*Res. Ex. 2*]. CLAIMANT failed to acknowledge that contractual adaptation is absent from Clause 12 as a legal consequence for hardship [*Cl. Memo., ¶78*]. The wording of "*Seller shall not be held responsibility*" is a reference to a force majeure clause [*Iron Molybdenum Case*]. Similarly, Clause 12 states "*shall not be responsible"*, without any further consequence. It shows how Clause 12 mirrors a force majeure clause.

108. This is supported by the intention of the Parties to have Clause 12 function as a force majeure clause instead of a hardship clause. The difference in consequence between a hardship and force majeure clause lies with how the former gravitates towards renegotiation, whereas the latter focuses on suspension of obligation [*Fontaine/Ly, p. 456*; *Ly, p. 467*]. This is because hardship clauses are drafted to encourage continuity of the contract [*Bernardini, p. 419*]. Force majeure clauses have been blurred when situation of hardship is put in context [*Award (1995)*; *ICC No. 8783*], as it is common to broaden its scope to events that does not necessarily render the performance impossible [*Konarski, p. 425*; *Fontaine/Ly, pp. 442-3*].

109. Here, CLAIMANT misunderstood the Subsequent Negotiator's interests by arguing that a duty to renegotiate exists and this Tribunal should adapt the Contract following failed renegotiations [*Cl. Memo., ¶¶78-85*]. However, with CISG's method of interpretation [*CISG, art 8*; *Schlechtriem/Schwenzer, p. 149*], it is evident that Clause 12 was drafted to broaden its scope of trigger events in addressing CLAIMANT's interest. Such argument is founded as the Subsequent Negotiators could not have been aware of the intention for contract adaptation as a legal remedy **(a)**. Consequently, based on an understanding of a reasonable third person, Clause 12 would operate as a force majeure clause **(b)**.

a. <u>The Subsequent Negotiators could not have been aware of the intention to adapt the Contract</u>

110. The intention for contract adaptation is absent as the Subsequent Negotiators were not aware of the intention to have contract adaptation as a legal remedy. Interpreting the intention behind the use of Clause 12 requires the subjective intent of the parties whether the other party knew or could not have been unaware of the intent [*CISG, art. 8(1)*; *Schlechtriem/Schwenzer, pp. 149, 152*]. In doing so, CLAIMANT failed to take into account all the relevant circumstances of the case [*Cl. Memo., ¶¶86-8; CISG, art 8(3)*; *Lautenschlager, pp. 263-4*].

111. Here, no reference concerning contract adaptation was given to the Subsequent Negotiators [*Res. Ex. 3*; *PO2, ¶7*]. This is evident from the fact that Julian Krone was never involved in the previous negotiations and Chris Antley never discussed the result of his meeting with CLAIMANT

[*Res. Ex. 3*]. Moreover, Clause 12 was drafted without any reference to contract adaptation or the obligation to pursue an attempt to adapt the Contract should the need calls for it [*PO2, ¶12*]. Consequently, the Parties' subjective intention for contract adaptation does not exist.

b. Based on Art. 8(2) CISG, a reasonable third person would come to the conclusion that Clause 12 would operate as a force majeure clause

112. Since the Parties' subjective interpretation could not be established, Art. 8(2) CISG must be used to interpret Clause 12 [*Guang Dong v. ACI*; *Kröll/Mistelis/Viscasillas, p. 149*]. Following the understanding of a reasonable person in the shoes of the Subsequent Negotiators, it will be evident that Clause 12 operates as a force majeure clause. The standard for reasonable person refers to a party with the understanding of how the PICC operates [*PO, III, ¶4*; *Cl. Ex. 8*; *Res. Ex. 3*]. The PICC recognizes the concept of force majeure that includes the notion of hardship entitling the obligor to withhold its performance and terminate the contract, but not to adapt the contract [*PICC, art 7.1.7*; *Vogenauer, p. 867*].

113. Clause 12 states that:

> *"Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as […], or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"*

114. The wording "*seller shall not be responsible*" shows that the entirety of Clause 12 refers to the consequences of a force majeure clause [*Iron Molybdenum Case*]. Similar to Clause 12, force majeure clauses are often broad [*Konarski, p. 425*], and therefore able to incorporate hardship situations under the same provision [*Brunner, pp. 213-4*]. In this case, such assertion is evident from the drafting history of Clause 12.

115. With regards to the importance of a contract's drafting history [*CISG, art. 8(3)*; *Chinchilla Furs Case; Huber/Mullis, p. 12*], the ICC Hardship Clause becomes relevant due to its role throughout the drafting process [*Res. Ex. 3*]. While third party adaptation is not provided under the ICC Hardship Clause [*ICC 650*; *Silveira, p. 338*], RESPONDENT still deemed it to be too broad [*Cl. Ex. 8*]. Such provision merely acknowledge for the remedy of termination should parties fail to reach an agreement [*Kröll, p. 447*; *Brunner, p. 506*]. This is mirrored with the general notion of hardship and force majeure where termination or suspension of contract is possible following a renegotiation [*ICC No. 9797*; *Konarski, p. 423*]. However, adaptation is not contemplated nor possible under the force majeure concept [*Peter, p. 235*; *Qurashi, p. 280*].

116. Accordingly, the Parties took the Contract's initial force majeure clause and merely include hardship events to form Clause 12 [*Cl. Ex. 4*; *PO2, ¶12*;]. Yet, CLAIMANT still argues that contract adaptation is the appropriate remedy [*Cl. Memo., ¶¶81-4*]. A reasonable third person

would not follow in CLAIMANT's conclusions as such contention fails to acknowledge that contract adaptation is not the exclusive remedy for hardship [*Sica, p. 15*; *Flambouras II, p. 504*]. Thus, Clause 12 shows that its purpose was to broaden the scope of trigger events of force majeure to include hardship situations, while retaining the consequence of a force majeure clause. With that, any reliance on contract adaptation as a remedy should be excluded.

C. RESPONDENT Conducted Renegotiations in Good Faith

117. While CLAIMANT asserts that a duty to renegotiate exist under Clause 12 [*Cl. Memo., ¶81*], they failed to acknowledge that RESPONDENT have accommodated CLAIMANT's concern. CLAIMANT subsequently argued that the shipment of the goods was in exercise of good faith, and without it, the goods would remain undelivered [*Cl. Memo., ¶79*]. Such presumption is misleading as CLAIMANT undermines RESPONDENT's contractual rights, while their conduct is far from observance of good faith and fair dealing.
118. Accordingly, RESPONDENT have acted in accordance with the principle of good faith, through a proper accommodation of CLAIMANT's interests **(1)**. Further, RESPONDENT's action to end the renegotiations was based on business judgment **(2)**. Alternatively, the principle of good faith does not necessitate this Tribunal to adapt the Contract **(3)**.

1. RESPONDENT have accommodated CLAIMANT's interests accordingly

119. Even assuming that renegotiation was expected of the Parties from reference to the ICC Hardship Clause [*Cl. Memo., ¶81*; *ICC 650*], such renegotiations were conducted between the Parties. Notwithstanding CLAIMANT's unlawful request for renegotiation, RESPONDENT acted in accordance with the principle of good faith to address CLAIMANT's inquiry. CLAIMANT relies on the principle of good faith where it dictates Parties not to mislead or act in ambiguity to induce the other party to perform more than what is required [*Cl. Memo., ¶83*]. Yet, CLAIMANT misused the facts as RESPONDENT merely requested for its rights under the Contract.
120. In conjunction to the content of renegotiations conducted in good faith, the parties are entitled to consider their commercial interest [*HSBC v. Toshin*; *Lee, p. 216*]. This is because renegotiations post contract would have an adversarial relationship [*Walford v. Miles*; *Grossner v. Raffles*; *Sundercan v. Salzman*]. While the duty to disclose related information is merely limited to material information [*HSBC v. Toshin*; *Lee, p. 217*].
121. In hardship situations, the request for renegotiation does not entitle the obligor to withhold performance [*PICC, art. 6.2.3: Vogenauer, p. 180*]. Whereas in context of hardship, the disadvantaged party are still bound to perform what is required in the contract [*Brunner, pp. 487,*

499; *Vogenauer, p. 180*]. Here, CLAIMANT unilaterally withhold performance and pressured RESPONDENT by saying that no shipment will start before a solution is found [*Cl. Ex. 7*].

122. Presently, taking into account the renegotiations following CLAIMANT's inquiry [*Cl. Ex. 8*; *Res. Ex. 4*], Greg Shoemaker's conducts are consistent with the notion of good faith. Despite CLAIMANT's unlawful pressure within its request for renegotiation, Greg Shoemaker accommodated their interest by promising for a solution [*Res. Ex. 4*]. This was done based on RESPONDENT's commercial interest to ensure for shipment according to the Contract [*PO2, ¶34*]. Whereas the matters on RESPONDENT's interest in reselling the Frozen Semen have no bearing for the purposes in renegotiation for the present tariff.

2. RESPONDENT ends the renegotiations solely based on business judgment

123. Contrary to CLAIMANT's contention [*Cl. Memo.,¶¶83-4*; *Cl. Ex. 8*], ending renegotiations is justified under a party's business judgement [*Kuwait v. AMINOIL*; *Berger III, pp. 1368-9*]. Here, the renegotiation was ended solely based on RESPONDENT's business judgement. Further, CLAIMANT's assertion that resale was prohibited is without grounds. Looking at the Contract, it is evident that the use of Frozen Semen beyond the mares recognized under the Contract is allowed. Following CISG's method of interpretation, CLAIMANT should have been aware of RESPONDENT's interest to resell the Frozen Semen [*PO2, ¶11*; *Fabrics Case*; *Glass Bottles Case*].

124. CLAIMANT is aware of RESPONDENT'S recent involvement in the market of horse racing, and acquisition of ten mares with excellent pedigree [*NoA, ¶4*]. Further, the utilization of the semen acquired during the temporary lift is limited until 1 July 2019 [*PO2, ¶17*]. It is unreasonable to assume that 100 doses of frozen semen can be utilized solely by RESPONDENT in the span of three years. With CLAIMANT's awareness of the high number of doses requested by RESPONDENT, the action of reselling the Frozen Semen was merely made conditional [*Cl. Ex. 2*]. While conceding the absence of notification by RESPONDENT, it could be inferred that CLAIMANT was aware of RESPONDENT's interest in utilizing the Frozen Semen.

125. Nonetheless, during the subsequent negotiation as RESPONDENT's attempt to maintain a long-term cooperation [*Res. Ex. 4*; *PO2, ¶35*], CLAIMANT insisted on a permanent request not to resell the Frozen Semen [*Cl. Ex. 8*]. This would require RESPONDENT to invalidate its agreements with other parties, while undermining its commercial interest in entering the Contract [*Id.*; *PO2, ¶11*]. Consequently, it is sensible for RESPONDENT to put an end to the renegotiations based on a business judgment, due to CLAIMANT's unreasonable request.

3. Alternatively, principle of good faith does not necessitate contract adaptation

126. Notwithstanding RESPONDENT's conduct throughout the renegotiations, the principle of good faith does not necessitate contract adaptation. Although the concept of good faith exists under CISG [*CISG, art. 7*; *Schlechtriem/Schwenzer, pp. 126-7*], good faith as a general principle was rejected [*Industrial Equipment Case*; *Andersen, p. 318*]. Its use within the CISG is merely as a method of interpretation of the convention [*Sica, p. 12*] and could not be used independently to incur obligations to the parties [*Industrial Equipment Case; Lindström, n. 83*; *Keily, p. 23*]. Hence, the good faith principle is used under the CISG to prevent any misapplication of its provisions [*Andersen, p. 318*; *Farnsworth, p. 56*]. Consequently, whether this Tribunal should adapt the Contract depends on the determination of hardship situations and its propriety [*Himpurna v. PLN*]. All in all, the good faith principle alone cannot dictate this Tribunal to adapt the Contract if the need to do so is absent.

II. ALTERNATIVELY, CLAIMANT IS NOT ENTITLED FOR REMUNERATION UNDER CISG

127. In any event, CLAIMANT is not entitled to any form of remuneration under the CISG. While it is undisputed that the CISG applies to this Contract [*Cl. Memo.,* ¶*89*; *CISG, art. 1(1)(a)*], it would be misguided to rely on the provision to seek for contract adaptation in light of the present tariff. Contrary to CLAIMANT's assertion, the circumstance of this case does not lead to the applicability of Art. 79 CISG. Art. 79 CISG only relates to non-performance from breaches of contract [*Kröll/Mistelis/Viscasillas, p. 1059*; *Schlechtriem/Schwenzer, p. 1058*]. Here, the Contract was duly completed despite the imposition of the present tariff [*Cl. Ex. 8*].

128. Presently, CLAIMANT may not rely upon the CISG for its claim of remuneration. First, the CISG does not provide contractual adaptation as a legal remedy **(A)**. Second, the express incorporation of Clause 12 excludes the application of Art. 79 CISG **(B)**. Third, the present tariff does not amount to hardship under the CISG **(C)**.

A. Art. 79 CISG Does Not Provide for Contractual Adaptation as a Legal Remedy

129. Contrary to CLAIMANT's assertion, there is no remedy for contractual adaptation under Art. 79 CISG. CLAIMANT argued that the threshold under Art. 79 CISG similarly applies to situations of hardship and would result in contractual adaptation once the threshold is satisfied [*Cl. Memo.,* ¶¶*97-9*]. However, this is a desperate attempt to request for remuneration under the CISG as Art. 79 CISG does not govern hardship **(1)**. Consequently, the remedy of adaptation under Art. 79 CISG cannot be attained **(2)**.

1. Art. 79 CISG does not govern hardship

130. Art. 79 CISG does not govern hardship. Contrary to CLAIMANT'S assertion [*Cl. Memo., ¶94*], the legislative and drafting history serves as a valuable aid to ascertain whether there are an indicative firm of intention to exclude hardship from the convention [*Garro I, pp. 243-4*].

131. CLAIMANT asserts that the concept of hardship exists by neglecting the legislative history of the convention and wrongly illustrated that the term "impediment" should be read as broad as possible [*Cl. Memo., ¶¶90, 94*]. However, the use of the term "impediment" was intended to narrow the scope of exemption on Art. 79 CISG [*Rimke, p. 221*; *Garro II, p. 17*] and not to relate to any flexible notion of hardship, impracticability, frustration, or the like [*Garro II, p. 16*; *Andersen/Zeller, ¶28*; *Slater, p. 253*]. This is seeing that proposals of including hardship was made and explicitly rejected [*Garro II, p. 17*; *Rimke, p. 239*; *Brunner, p. 333*]. This is so that a party could not be excused merely when performance becomes more difficult [*Rimke, p. 221*]. Thus, it is clear that hardship is not governed under Art. 79 CISG, as also reflected in practice [*Sunflower Seed Case*; *Canned Orange Case*].

2. Consequently, the remedy of adaptation is unfounded under Art. 79 CISG

132. Having established that the CISG does not govern situation of hardship, the remedy for contract adaptation cannot be found. This is so as contract adaptation cannot be attained through the interpretation of Art. 7(1) CISG **(a)**, and hardship is not a "gap" under the CISG that can be filled through Art. 7(2) CISG **(b)**.

a. Contract adaptation cannot be attained through the interpretation of Art. 7(1) CISG

133. CLAIMANT contends that the remedy of contractual adaptation exists by virtue of Art. 79(5) CISG in conjunction with Art. 7(1) CISG [*Cl. Memo., ¶¶98-9*]. However, CLAIMANT has failed to comprehend the full interpretation concept of Art. 7(1) CISG. It should be kept in mind that Art. 7(1) CISG cannot be used to interpret what was intended to be excluded from the convention [*Andersen, p. 318*]. Therefore, contrary to CLAIMANT's assertion [*Cl. Memo., ¶ 98*], the principle of good faith cannot be used to bypass an explicit provision of Art. 79 CISG, which only provides for remedy of exemption [*Rimke, p. 223*; *Ramberg et al., p. 127*]. This is so as the hardship concept was excluded from the convention [*supra, ¶¶129-31*].

134. Further, CISG places an importance to its international character and uniform application [*Lookofsky, p. 49*; *Visser, ¶3.1*; *Slater, p. 246*]. Granting contract adaptation as a remedy would violate the convention's international character and uniform application. This is because such concept is deeply rooted in domestic law [*Schwenzer, pp. 710-1*; *Rimke, p. 221*; *Fletchner, p. 88*] and

that CISG does not grant adaptation solely on a change of circumstances [*Société Romay AG v. SARL*; *Canned Orange Case*; *Kuster/Andersen, p. 12*]. Thus, if one were to grant contract adaptation as remedy, its uniform application would be undermined [*Kuster/Andersen, p. 15, Rimke, p. 218*].

135. Additionally, instead of relying on Art. 50 CISG to argue that adaptation is possible [*Cl. Memo., ¶103*], weight should be placed upon the intended purpose of such provision. During the drafting process, hardship and renegotiation was explicitly requested for it to be included under the said article [*UNCITRAL Yearbook 1977, pp. 128, 142*]. However, such notion was intentionally left out as it is outside the scope of CISG [*CISG Digest, p. 25*] in addition to the express exclusion of the possibility of adaptation [*UNCITRAL Yearbook 1977, pp. 128, 142*].

136. Thus, Art. 79 CISG cannot be interpreted to find a remedy of contract adaptation.

b. Hardship is not a "gap" that could be filled through Art. 7(2) CISG

137. CLAIMANT contends that the remedy of adaptation is be found by virtue of Art. 7 CISG [*Cl. Memo., ¶¶100,104*]. However, such method is misguided as it is inapplicable to the current case.

138. It should be noted that Art. 7(2) CISG may only be resorted with respect to matters that are "governed but not settled" and may not settle matters that are not regulated [*CISG, art. 7*(2); *Lookofsky, p. 51*]. In essence, with hardship being rejected under Art. 79 CISG, such provision should not be filled through Art. 7(2) CISG [*Bridge, p. 636*]. Hence, following a hardship situation, parties are required to either perform or face the penalties under the provisions of the CISG [*Slater, p. 262*; *Ramberg et al., p. 126*].

139. Here, CLAIMANT insist in arguing that the provision should be supplemented with the general principles [*Cl. Memo., ¶100*] or, in the absence of such, with the applicable domestic law [*Cl. Memo., ¶104*]. However, this is misguided as there are no gaps that supports the supplementation through Art. 7(2) CISG, provided that Art. 79 CISG does not govern hardship [*supra, ¶¶129-31*]. Consequently, the CISG cannot be supplemented with general principles [*Rimke, p. 239*; *Slater, p. 257*] or other applicable domestic laws [*Fletchner, pp. 92-3*; *Rimke, p. 219-20*].

140. That being said, this Tribunal should not find a remedy of contract adaptation under the CISG.

B. The Express Inclusion of Clause 12 Excludes the Application of Art. 79 CISG

141. CLAIMANT asserts that Art. 79 CISG governs matters of hardship and allows for contractual adaptation as a remedy through the PICC [*Cl. Memo., ¶¶95-103; PICC, art. 6.2.2*]. In the case that this Tribunal deems it to be true, CLAIMANT is still not entitled to remuneration as Clause 12 acts as an implied derogation of Art. 79 CISG.

142. Rooted from the principle of party autonomy, CISG enables parties to derogate or vary the effect of its provisions [*CISG, art. 6*; *Borisova, p. 43*]. CLAIMANT mistakenly contended that Art. 6 CISG should be read narrowly [*Cl. Memo., ¶90*]. However, the parties' intention is of primary relevance in determining the invocation of Art. 6 CISG [*Steel Bars Case*; *CISG AC No. 16, ¶3*]. Such intention can be found implicitly and does not require an express statement [*CISG, art. 6*; *Kröll/Mistelis/Viscasillas, p. 100*].

143. Presently, the Parties have displayed the intention to derogate Art. 79 CISG by virtue of the inclusion of Clause 12 **(1)**. Correspondingly, contradictions between Clause 12 and Art. 79 CISG signifies an implied derogation of the latter **(2)**.

1. Inclusion of Clause 12 signifies an intention to derogate Art. 79 CISG

144. Notwithstanding CLAIMANT's failure to acknowledge the intent of the Parties, such element is rather crucial in determining whether a partial derogation from the CISG is evident [*Lee, p. 310*; *CISG AC No. 16, ¶3*]. Following the interpretation method under CISG, the common intention of the parties have to be determined. This can be done by taking into account the parties' negotiations, drafting history and trade usage [*CISG, art. 8(3)*; *Fashion Products Case*; *Canned Asparagus Case*]. Here, the Parties intended the use Clause 12 to supersede Art. 79 CISG.

145. With regard to the utilization of INCOTERMS standard delivery terms, it would provide a background towards the parties' respective duties [*Coetzee, p. 4*; *Casuccio, p. 70*]. Subjecting a contract to INCOTERMS, the provisions under the CISG on delivery and risk is derogated [*Fiberglass Composite Materials Case*; *Coetzee, p. 284*]. While it is common to combine INCOTERMS with exemption clauses [*Vogenauer, p. 870*; *Berman, pp. 1415-6*], the agreed delivery term would prevail over the CISG rules partly, provided that they are mutually exclusive [*Coetzee, p. 2*; *Piltz, p. 6*]. In the context of DDP delivery term, it would replace the governance of passing of risk under Art. 69 CISG [*Ramberg II, p. 221*].

146. It should be noted that CLAIMANT'S acceptance of DDP term was made under the condition of including Clause 12 to the Contract [*Cl. Ex. 4*; *Cl. Memo., ¶¶73-4*]. Under the standard DDP term, the contracting party have agreed to allocate the obligation of import clearance towards the seller [*Ramberg I, p. 61*; *Brunner, p. 131*]. Under Clause 12, CLAIMANT is exempted from certain risks as agreed by the Parties [*Cl. Ex. 4; Contract, Clauses 8, 12*]. Consequently, the DDP term was modified due to Clause 12 in order to allocate the Parties' contractual risk. Considering the Parties' utilization of a modified DDP term would prevail over Art. 79 CISG, it reflects the Parties' intent to have Clause 12 supersede the provision of the CISG. Thereby, it is unnecessary to use CISG's rules to govern a matter that has been specifically regulated under the Contract.

147. Thus, Clause 12 was included to regulate any potential changes in circumstance that consequently leads to the derogation of Art. 79 CISG.

2. Clause 12 is in contradictory with Art. 79 CISG

148. Moreover, the content within Clause 12 portrays contradictions with Art. 79 CISG. CLAIMANT argues that the threshold of "*comparable unforeseen events*" enlarges the scope Clause 12 [*Cl. Memo., ¶92*]. On the other hand, it is common to limit trigger events to invoke a hardship clause [*Bonell, p. 117*; *Fontaine/Ly, p.498*]. The standard of "comparable" must be seen from the Parties' initial understanding [*Cl. Ex. 4*; *Contract, Clause 12*; *PO2, ¶21*]. With that in mind, it is clear that Clause 12 limits the type of changes that may be considered [*supra, ¶85*]. In using *Iron Molybdenum Case* to provide an example where a similar force majeure clause is read in tandem with Art. 79 CISG [*Cl. Memo., ¶90*], CLAIMANT fails to acknowledge within the said case the effect of the utilization of the force majeure clause towards Art. 79 CISG is not considered [*Gillete/Walt, p. 337*].
149. Contradicting contractual terms with a provision of the CISG illustrates an intent to derogate the respective article [*ICC No. 7660*; *Rechtbank (2009)*; *Machine Case*]. Such contradictions may be found when there is an inconsistent function [*Landgericht (1991)*] or when the contractual terms falls outside the scope of the default rule [*Corn Case*; *ICC No. 7660*].
150. Presently, the application of Clause 12 would elucidate its contradiction with Art. 79 CISG. First, Clause 12's governance of third party failure excludes Art. 79(2) CISG **(a)**. Second, Clause 12 and Art. 79 CISG affirms a conflicting hardship concept **(b).**

a. Clause 12's governance of third party failure excludes Art. 79(2) CISG

151. There is a strict set of requirements to be fulfilled when relying upon the remedy provided under Art. 79 CISG [*Bianca/Bonell, p. 578*; *Honnold, p. 482*]. Contrastingly, Clause 12 does not recognize any form of requirement for third-party failure, unlike as required under the CISG.
152. Notwithstanding other elements required under the default provision, third persons engaged by the promisor is seen to be under the promisor's responsibility [*Wool Case*; *Chemical Fertilizer Case*; *Chinese Goods Case*]. It encompasses every service given by third person in relation to the obligor's duty [*Stoll in Schlechtriem, p. 277*; *Schlechtriem/Schwenzer, p. 1145*]. Consequently, Art. 79(2) CISG requires that the prerequisites under Art. 79(1) CISG must be met cumulatively by both the obligor and the engaged third person(s) [*Vine wax Case*; *Kröll/Mistelis/Viscasillas, p. 1079*; *Schlechtriem/Butler, pp. 203-4*].
153. On the other hand, Clause 12 discharges all form of liability caused by the conduct of a third person. This is evident from the wording "*not be responsible for […] failure of third party*". This

signifies when a third party breaches their obligation due to their omission, CLAIMANT would be exempted from liability [*Contract, Clause 12*]. In totality, Clause 12's governance of third person failure would contradict Art. 79(2) CISG's treatment for exemption.

b. Clause 12 and Art. 79 CISG affirms conflicting hardship concepts

154. Assuming but not conceding that Art. 79 CISG is gap-filled by the PICC [*PICC, art. 6.2.2*; *ICC No. 7365*; *Ramberg et al., p. 122*], the concept of hardship is in contradictory to Clause 12.

155. In utilizing the hardship defense under Art. 79 CISG, it entails a change of circumstances which renders the performance excessively onerous [*Steel Tubes Case*; *Brunner, p. 214*; *Silveira, p. 330*]. Situations where performance has become more onerous is excluded from the invocation of hardship, as it is presumed to be under the parties' risk [*Société Romay AG v. SARL*; *Brunner, p. 397*; *ICC 421*]. Some have even equated the concept to "economic impossibility", which renders the performance financially impossible for the obligor [*Louisiana v. Allegheny*; *Schlechtriem, pp. 101-2*; *Honnold, p. 485*]. Even where the market price had tripled, it was not sufficient to fulfill the threshold of excessively onerous [*Iron Molybdenum Case*; *Brunner, p. 424*].

156. Contrastingly with Clause 12, the threshold was set to only be of onerous instead of excessively onerous [*supra, ¶¶98*]. This is so as Clause 12 was drafted to address CLAIMANT's concerns when performance becomes merely "more onerous" [*Contract, Clause 12*], where a 40% increase in price is sufficient [*Cl. Ex. 4*]. Contradiction with Art. 79 CISG is evident, as the reference to more onerous have been rejected under the default provision [*Steel Bars Case*; *ICC No. 2508*].

157. Evidently, through the inclusion of Clause 12 with its respective terms, the Parties have impliedly derogated Art. 79 CISG in its totality.

C. The Present Tariff Does Not Amount to Hardship Under the CISG

158. In any event, the remedy of contract adaptation cannot be granted through the use of the CISG. While the default provision may provide for contract adaptation, there are requirements to be fulfilled [*Vogenauer, p. 822*]. In correlation to Clause 12 and Art. 79 CISG, CLAIMANT may not rely upon the latter to request for contract adaptation.

159. Here, CLAIMANT may not rely upon the threshold of "onerous" under Clause 12 to seek contract adaptation under the CISG **(1)**. Consequently, CLAIMANT is not entitled to adaptation as the tariff does not satisfy the standard provided under the CISG and PICC **(2)**.

1. CLAIMANT may not rely upon the threshold of "onerous" under Clause 12 to seek for contract adaptation

160. Notwithstanding the derogation of Art. 79 CISG [*supra, ¶157*], the disparity between the CISG and Clause 12 entails the parties to use the threshold under the CISG.

161. The CISG permits the act of varying its provisions through the parties' contractual freedom [*CISG, art. 6*; *Huber/Mullis, p. 14*; *Schlechtriem, p. 115*], with due regard to honoring contractual commitment [*Karaha Bodas v. Pertamina*; *Honnold, pp. 2-3*; *Kröll, p. 429*]. It is correct that parties may divert from provisions in the contract and recourse to the provisions of the CISG. Yet, specifically resorting to remedies under CISG may only be granted provided that it is consistent with the CISG and its underlying principles [*Christian v. Douet*; *CISG AC No. 7, ¶25*]. Thus, parties may not cherry-pick between its contract and the CISG provision for its advantage.

162. Such preposition is evident through an analogous observation of Art. 39 CISG on the right to raise objections upon non-conforming goods. The tribunal declared that the buyer should recourse to the contract and not the CISG because the contract regulate a different mechanism to raise objections on non-conforming goods [*Souvenir Coin Case*]. It was unreasonable to invoke other remedies under the CISG, when such remedies are provided under the contract and not by Art. 39 CISG [*Saidov, pp. 28-30*].

163. In this case, the understanding of hardship under the CISG, as supplemented by PICC, prefers contract adaptation as a remedy with the goal to continue the parties' contractual relationship rather than termination [*PICC, arts. 6.2.1-3*; *Vogenauer, pp. 820-1*]. On the contrary, the notion of hardship under Clause 12 as suggested from its drafting history, prefers termination or exemption from non-performance as a remedy [*supra, ¶110*; *ICC 650*]. This is similarly found in several legal systems, such as UK, USA, and Italy [*Brunner, pp. 407-8, 410, 491*]. In consequence, the CISG and the Parties' contract (Clause 12) prescribed an extremely different understanding of hardship as part of a general principle [*Id.*; *Silveira, pp. 321-3*].

164. In conclusion, Clause 12 is seen to be a coherent clause with an inconsistent understanding of hardship than the one adopted by the CISG. Consequently, CLAIMANT may not utilize the threshold under Clause 12 to seek for contract adaptation under Art. 79 CISG.

2. The present tariff does not satisfy the hardship threshold under the CISG

165. Having established that Clause 12's hardship threshold cannot be used, to seek for contractual adaptation as a remedy under CISG requires the fulfillment of its hardship threshold. In this case, CLAIMANT failed to acknowledge that while contractual adaptation as a remedy indeed

exists under the PICC [*Cl. Memo., ¶104*; *Steel Tubes Case*; *Vogenauer, p. 821*], the current impediment does not rise to meet its standards.

166. Under the CISG, hardship is measured from how the change in circumstance has rendered performance to be "excessively onerous" [*Brunner, p. 214*]. Further, the objective threshold to invoke hardship is high as an increase in price of 50-58% [*Iowa Electric Power Co. v. Atlas Corp*], 100% [*Brunner, p. 436*] or even 200% [*Nagy, p. 32*] was deemed insufficient to invoke a hardship defense. Evidently, even under the lower standards of Clause 12, the current impediment could not satisfy the threshold or the subjective requirements [*supra, ¶103*]. Thus, it would be unreasonable to conclude that it fulfills the higher standards of the CISG nor to grant for contractual adaptation as a remedy.

CONCLUSION OF THE THIRD ISSUE:

167. The current tariff imposition from Equatoriana does not amount to a situation of hardship. Rather the risk of bearing the tariff falls under CLAIMANT's responsibility. Taking into account that recourse to a remedy of adaptation is not possible under both Clause 12 and the CISG, the terms of the Contract should remain to be unaltered.

PRAYER FOR RELIEF

In response to this Tribunal's Procedural Orders, Counsel makes the above submission on behalf of RESPONDENT. For the above reasons, RESPONDENT respectfully requests this Tribunal to decide that:

1. This Tribunal does not have the power under the Arbitration Agreement to adapt the terms of the Contract;
2. CLAIMANT is not entitled to submit the Evidence from the other proceeding;
3. CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of price.

CERTIFICATE

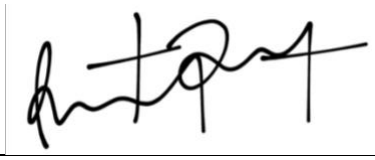
We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

ANDI ADHYAKSA

ALDEENEA CRISTABEL

FELICIA KOMALA

GRADY LEMUEL GINTING



KARIESSYA RANIAH

KUKUH DWI HERLANGGA

REVINO FAUZAN