SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MARCH 31 – APRIL 7 2019

MEMORANDUM FOR CLAIMANT

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

COUNSEL:

STUTI RAI ANAHAD NARAIN DHRUV MEHROTRA

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Corn case	International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade Case No. 218y/2011 [2012] available at: http://cisgw3.law.pace.edu/cases/120123u5.html cited as: *Corn Case* in: ¶¶144, 148
Cysteine case	China International Economic & TradeArbitration Commission Arbitration proceeding (2000) CISG/2000/06 http://cisgw3.law.pace.edu/cases/000107c1.html cited as: *Cysteine case* in: ¶116
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  cited as: VCLT

LIST OF ABBREVIATIONS

$	Dollar
%	per cent
&	And
¶/¶¶	Paragraph/Paragraphs
Ans. to Not. of Arb.	Answer to Notice of Arbitration
Apr	April
Art./Arts.	Article/ Articles
CEO	Chief Executive Officer
Cir.	Circuit
CISG	The United Nations Convention on Contracts for the International Sale of Goods
CISG- AC Op.	CISG Advisory Council Opinion
Cl. Ex.	CLAIMANT Exhibit
Cl. Memo.	CLAIMANT Memorandum
CLAIMANT	Phar Lap Allevamento
Corp.	Corporation
Dec	December
Ed./Eds.	Editor/ Editors
Edn.	Edition
et al	et alii (and following)
Feb	February
i.e.	id est (that means)

IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, London, 29 May 2010
ibid.	ibidem (the same)
ICAC	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
ICC	International Chamber of Commerce and Industry
ICSID	International Centre for Settlement of Investment Disputes
Indus.	Industry/Industries
Jan	January
Jul	July
KLI	Kluwer Law International
Ltd.	Limited
Mar	March
Memorandum for RESPONDENT	Memorandum for RESPONDENT of the team for NLSIU, Bangalore for the 16th Vis (East) Moot
Mr.	Mister
Ms.	Miss
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards (1958)
No.	Number(s)
Not. Of Arb.	Notice of Arbitration
Oct	October

OUP	Oxford University Press
p./pp.	Page/Pages
PICC	UNIDROIT Principles of International Commercial Contracts
Proc. Or.	Procedural Order
Prod.	Production
Res. Ex.	RESPONDENT Exhibit
RESPONDENT	Black Beauty Equestrian
Sales Agreement	Frozen Semen Sales Agreement
supra	see above
the parties	Phar Lap Allevamento and Black Beauty Equestrian
The Problem	Problem for the 16th Annual Willem C. Vis (East) International Commercial Arbitration Moot
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	United Nations International Institute for the Unification of Private Law
US	United States
v.	Versus
Vol.	Volume

STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento [hereinafter "CLAIMANT"] and Black Beauty Equestrian [hereinafter "RESPONDENT", together "the parties"].

CLAIMANT is Mediterraneo's oldest and most renowned stud farm operator. It provides its racehorse stallions for breeding and offers semen for artificial insemination.

RESPONDENT based in Equatoriana is famous for its broodmare lines. It decided to establish a racehorse stable three years ago and has acquired ten mares with an excellent racehorse pedigree.

24 Mar 2017	CLAIMANT responded to RESPONDENT's request for price of 100 doses of Nijinsky III's semen by offering a price of US$ 99,500 per dose to be sold in installments.	*Cl. Ex. C2, p. 10*
28 Mar 2017	RESPONDENT asked for a better price, a delivery DDP, and the jurisdiction to be given to Equatorianian courts.	*Cl. Ex. C3, p. 11*
31 Mar 2017	CLAIMANT said it was only willing to provide delivery DDP on the inclusion of a hardship clause. CLAIMANT also suggested for arbitration in Mediterraneo.	*Cl. Ex. C4, p. 12*
10 Apr 2017	RESPONDENT proposed an arbitration clause which deputed Equatoriana as the seat of arbitration and law of the seat, i.e. Equitorianean law as the governing law of Clause 15.	*Res. Ex. R1, p. 33*
11 Apr 2017	CLAIMANT counter-proposed an arbitration clause, deputing Danubia to be the seat of the arbitration. There was no mention of the governing law of the arbitration agreement.	*Res. Ex. R2, p. 34*
12 Apr 2017	Ms. Napravnik and Mr. Antley discussed the inclusion of an adaptation mechanism. Mr. Antley said he would provide the proposal. The two met with a severe car accident and had to be hospitalized.	*Cl. Ex. C8, p. 17*
6 May 2017	The parties entered into the FROZEN SEMEN SALES AGREEMENT. It provided that the sales contract would be governed by CISG.	*Cl. Ex. C5, pp. 13-14*
19 Dec 2017	The Government of Equatoriana imposed an import tariff of 30% on all agricultural goods from Mediterraneo.	*Cl. Ex. C6, p. 15*
20 Jan 2018	CLAIMANT reached out to RESPONDENT regarding a price readjustment.	*Cl. Ex. C8, p. 17 & Cl. Ex.*

		C8, p. 17
21 Jan 2018	Mr. Shoemaker urged Ms. Napravnik to deliver as planned. He also specified that if the contract provided for an increase in case of tariffs, then an agreement would be found.	*Cl. Ex. C8, p. 18*
12 Feb 2018	RESPONDENT terminated the round of negotiations as no agreement could be reached, and CLAIMANT had instead brought unrelated allegations against RESPONDENT.	*Cl. Ex. C8, p. 18*
31 Jul 2018	CLAIMANT initiated arbitral proceedings against RESPONDENT.	*Not. Of Arb., p. 4*
Oct 2018	CLAIMANT received information illegally, regarding another arbitration in which RESPONDENT was involved.	*Letter by Langweiler, 2 Oct 2018, p. 50*

SUMMARY OF ARGUMENTS

In today's world of cut-throat competition, horse breeding is an industry built on reputation. Commitment and long-term relationships can drive, or sink, a business. Being aware of this, RESPONDENT entered into a contract with CLAIMANT, rooted in good faith. Given that it was a transnational contract, not everything could have been predicted or determined beforehand. RESPONDENT negotiated under the expectations of adherence to common practices in international arbitration, and expected commitments to be upheld. This was not to be.

During the course of negotiations for adaptation, CLAIMANT could not provide good reasons and, instead, brought up other unrelated allegations to the table. Such a move led to the termination of the negotiations. But, to RESPONDENT's bewilderment, CLAIMANT initiated the present arbitration proceeding seeking adaptation of the contract. CLAIMANT tried to do this by claiming that law of Mediterraneo applies to the contract. This was in contradiction to the prevailing international practice, as well as choices made during the drafting of the SALES AGREEMENT. In fact, CLAIMANT's demand for adaptation also contravenes the prevailing practices and principles, which require express empowerment for such an exercise. It also diverges from the parties' agreement during the drafting process, that for an adaptation by arbitrators, a specific clause must be included. In the end, such clause was not included. RESPONDENT merely expected CLAIMANT to respect the commitments it made after prolonged negotiations. These groundless requests seek to destroy the foundation of the contract **[Issue I]**.

Any kind of international sale comes with its fair share of risks and CLAIMANT had assumed all such risks when it entered into the contract. Merely because the sale turned out to be a bad bargain for CLAIMANT does not mean that it can push its liabilities on to RESPONDENT. RESPONDENT had fulfilled all its obligations under the SALES AGREEMENT and cannot be made to pay for risks it never agreed to undertake. CLAIMANT had agreed to a delivery DDP and had assumed all risks associated with such a delivery except those related to health and safety requirements. The import tariffs were risks it had undertaken and are not covered by the hardship clause. Its claim that RESPONDENT had promised a solution is completely baseless and follows from a misguided reading of the conversation between Ms. Napravnik and Mr. Shoemaker. Moreover, a mere 30% increase in price cannot be said to amount to hardship. Additionally, neither does the hardship clause allow for adaptation of price as a remedy, nor did RESPONDENT agree to any adaptation mechanism **[Issue III (1)]**.

CLAIMANT'S alternative argument based on CISG also does not stand. Hardship is not covered under Art. 79 CISG as it only deals with *force majeure* cases. Further, CLAIMANT cannot rely on PICC to claim adaptation as Art. 6.2. PICC individually, and PICC as a whole, do not form trade usages under Art. 9(2) CISG. Furthermore, PICC cannot be used for gap filling as there is no gap in the CISG regarding hardship and adaptation; and nevertheless, PICC are not fit to be used for gap filling. In any case, CLAIMANT has not suffered any hardship as a 30% increase does not meet the required threshold limit for hardship and the risk of import tariffs was assumed by CLAIMANT. **[Issue III (2)]**.

CLAIMANT has sought to admit as evidence information regarding RESPONDENT's previous disputes that are protected by confidentiality. The evidence pertains to an unrelated trial on unique facts and has no relevance to, or materiality in the present case. Moreover, such evidence could only have been obtained via a hack or via breach of confidentiality by an employee. Given the illegal way in which such evidence was obtained, it ought to be rejected on policy grounds, as is done in most domestic jurisdictions. Specifically, the IBA rules include "legal impediment or privilege", "confidentiality", and "fairness" as grounds for excluding evidence, and these rules are widely accepted best practices **[Issue II]**.

ARGUMENTS

ISSUE I

1. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

1. Clause 15 of the FROZEN SEMEN SALES AGREEMENT [hereinafter "SALES AGREEMENT"] contains an arbitration clause, referring "any dispute arising out of this contract" to the Hong Kong International Arbitration Centre [hereinafter "HKIAC"] administered arbitration [*Cl. Ex. 5, p. 14, THE PROBLEM*]. CLAIMANT has sought an adaptation of the contract by the tribunal [*Not. Of Arb., p. 8, THE PROBLEM*]. RESPONDENT respectfully requests the tribunal to reject CLAIMANT's request. This is because the tribunal does not have the power to hear, and award, increased remuneration for the performance of pre-determined obligations.
2. The power of an arbitral tribunal to adapt a contract derives from the arbitration agreement [*Horn/Kröll, p. 448*]. This question of determining the scope of the arbitration agreement, then, depends on contractual interpretation, involving specifically the interpretation of an arbitration agreement [*Berger (Adaptation), p. 1376*]. In this regard, the law governing the arbitration agreement is of prime importance. It is the law applicable to the arbitration agreement that guides its interpretation, and thereby, its scope [*Born (Commercial), p. 315*].
3. RESPONDENT submits that it is the law of Danubia that governs the arbitration agreement **(1.1.)**. Applying the law of Danubia, the tribunal does not have the power to adapt the contractually stipulated price **(1.2.)**. *In any case*, under the law of Mediterraneo, the tribunal does not have the power to adapt the contract **(1.3.)**.

1.1. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT

4. Contrary to CLAIMANT's allegations [*Cl. Memo., p. XX*], Danubian law was the PARTIES' choice of law for the arbitration agreement **(1.1.1.)**. Further, the principle of pro-arbitration is not applicable **(1.1.2.)**.

1.1.1. Danubian law was the PARTIES' choice of law for the arbitration agreement

5. CLAIMANT has relied on the principle of party autonomy to allege that the PARTIES' expressly, and impliedly, chose the law of Mediterraneo [*Cl. Memo., p. XX*]. However, RESPONDENT refutes these notions. The law of Danubia governs the arbitration agreement, under the doctrine of separability **(1.1.1.1.)**. Further, the implied choice of law is Dabubian law **(1.1.1.2.)**. Furthermore,

the law of Danubia has the closest and most real connection with the arbitration agreement **(1.1.1.3.)**.

1.1.1.1. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT, UNDER THE DOCTRINE OF SEPARABILITY

6. The doctrine of separability is enshrined in Art. 19(2) of HKIAC Rules, as well as Art. 16 of the UNCITRAL Model Law on International Commercial Arbitration [hereinafter "Model Law"], the latter of which is the reigning legislation in both the countries [*Proc. Or. I, p. 53, THE PROBLEM*]. CLAIMANT has rejected the necessary consequences of the doctrine of separability by limiting it to the question of validity [*Cl. Memo., p. XXIII*]. RESPONDENT submits that under the doctrine of separability, the law of Mediterraneo does not govern the arbitration agreement **(1.1.1.1.1.)**; and, the law of Danubia governs the arbitration agreement **(1.1.1.1.2.)**.

1.1.1.1.1. The law of Mediterraneo does not govern the arbitration agreement, under the doctrine of separability.

7. CLAIMANT has correctly recognized Art. 16 as providing the doctrine of separability in the Model Law (*Cl. Memo., p. XXII*). However, CLAIMANT has failed to take cognizance of Art. 36(1)(a)(i) of the Model Law. This article specifies that in the absence of a law designated by the parties for the arbitration agreement, it is the law of the seat that grants validity to an arbitral award.
8. A necessary consequence of the separability presumption is that the choice of law analysis utilised for the container contract is not applicable to the choice of law analysis for the arbitration clause, or agreement [*Born (Commercial), p. 464; Lew/Mistelis/Kröll, p. 119*]. This is because the arbitration clause is considered to be an independent agreement. As a result, merely because a law has been expressly chosen for the container contract, it will not be applicable to the arbitral clause [*Fouchard/Gaillard/Goldman, p. 222*].
9. Further, the doctrine of separability is recognized as *legally* separating the arbitration agreement from the container contract, even if there is physical proximity [*Berger (Applicable Law), p. 319*]. The arbitration agreement is accorded a special character due to its procedural as well as substantive nature. It cannot be treated like any other clause of the contract. Thus, it is common in practice for the arbitration clause to be governed by a regime different from the law governing the container contract [*ICC Case No. 4504; ICC Case No. 5730; Born (Governing Law), p. 818; Fouchard/Gaillard/Goldman, pg. 212*].
10. In the present case, Clause 14 of the SALES AGREEMENT specifies that the SALES AGREEMENT will be governed by the law of Mediterraneo [*Cl. Ex. C5, p. 14, THE PROBLEM*]. There is no mention of any arbitral procedure. Rather, it is Clause 15, separate from Clause 14 and without

reference to it, which provides for arbitration and nothing else. Clause 15 does not mention any choice of law and is the last provision in the entire agreement. In light of the separability presumption and these facts, the choice of law for the SALES AGREEMENT cannot be extended to Clause 15.

1.1.1.1.2. The law of Danubia governs the arbitration agreement, under the separability presumption

11. The separability presumption does not mandate the application of a particular to the arbitration agreement. However, it does restrict the direct application of the law governing the contract (*lex causae*) to the arbitration agreement. It also reduces the import of *lex causae* in the determination of the governing law. It creates a lacuna in which a separate analysis for applicable law must be done.
12. Art. 36(1)(a)(i) of the Model Law and Art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter "New York Convention"] are considered extensions of the doctrine of separability enshrined in these documents. Under these provisions, when the parties have not chosen a law to govern their arbitration agreement, it is the law of the seat which will determine the validity of the arbitral award. While this refers only to the validity of the award at the post-arbitral stage, it has been interpreted to provide guidance for determination of choice of law, as well [*Berger (Applicable Law) p. 317; Lew/Mistelis/Kröll, p. 119*]. This is because the arbitrators have a duty to give an enforceable award.
13. Thus, in practice, arbitral tribunals across jurisdictions have resorted to applying the law of the seat to the arbitration agreement [*ICC Case No. 1507; ICC Case No. 3572; ICC Case No. 6149; ICC Case No. 5485; Owerri v. Dielle; Taniguchi, p. 338; Craig/Park/Paulsson,* ¶*5.05*]. This principle was also acknowledged by the UN Working Group that drafted the Model Law [*UN Doc. A/40/17,* ¶*284*]. The importance of this principle lies in the fact that it takes account of the parties' intention to achieve procedural effects, i.e. establishment of a private justice system for the parties [*Berger (Applicable Law), p. 321; Rhodia Fiber, p. 15*].
14. CLAIMANT has sought to rely on the English case of *Sulamérica* to dilute the consequences of the doctrine of separability [*Cl. Memo., p. XXIII*]. However, this case has been criticized by commentators for its inconsistency with the separability presumption [*Born (Governing Law), p. 832*]. Further, it is also not in consonance with the default law provision in the Model Law and New York Convention.
15. CLAIMANT seeks application of the law of Mediterraneo in order to empower the present tribunal to adapt the contract [*Not. Of Arb., p. 6, THE PROBLEM*]. However, this might result in an award which is unenforceable in Danubia. In any case, at the present stage itself, the duty to

given an enforceable award implies the selection of the law of Danubia. Therefore, the law of Danubia governs the arbitration agreement.

1.1.1.2. THE IMPLIED CHOICE OF LAW IS DANUBIAN LAW

16. CLAIMANT claims that Clause 14 is an express choice of law for the arbitration agreement [*Cl. Memo., p. XX*]. However, in the very case that CLAIMANT has consistently relied upon, the understanding of an "express" provision for choice of law governing the arbitration agreement required a specific reference to the arbitration in the choice of law provision, or the presence of choice of law provision in the arbitration agreement [*Sulamérica*]. The presence of a choice of law for the container contract was not treated as an express choice of law for the arbitration agreement. In fact, this has been the recent practice consistently [*Firstlink; C v. D; Cruz City*]. Then, by no means can Clause 14 be treated as an express choice of law provision for the arbitration agreement.
17. In the lack of an express provision, CLAIMANT seeks to rely on the implied choice of the parties, under the proper law approach [*Cl. Memo., p. XXI*]. As CLAIMANT has correctly pointed out, some authorities do consider that the *lex causae* is a strong indicator of the implied choice of law for the arbitration agreement [*ibid*]. However, this approach has been criticized for disregarding the parties' intention to choose a neutral forum in which to resolve their disputes [*Born (Governing Law), p. 832*]. This is because the law governing the main contract will generally have been chosen for reasons other than those on which the choice of the law governing the arbitration agreement is based [*ICC Case No. 5730; Fouchard/Gaillard/Goldman, p. 223*]. Moreover, rational businessmen would intend for arbitral awards to be binding and enforceable, and thus would be primarily focused on the law of the seat [*Firstlink*]. Thus, the implicit choice would be the law of the seat [*Black-Clawson; Firstlink; Clothing Case*].
18. In any case, CLAIMANT's argument merely raises a rebuttable presumption [*Sulamérica; Cruz City*]. In this regard, it must be noted that the issue of choice of law for the arbitration agreement was never specifically discussed by the parties. Rather, RESPONDENT had drafted an arbitration agreement, based on the HKIAC Model Clause, which specifically provided for the law of the erstwhile seat as the governing law [*Res. Ex. R2, p. 33, THE PROBLEM*]. CLAIMANT raised an issue regarding arbitration in Equitoriana and proposed Danubia as the possible seat [*Res. Ex. R3, p. 34, THE PROBLEM*]. Given that no issue was raised regarding the law governing the arbitration agreement, it was natural for RESPONDENT to believe that CLAIMANT, being rational businessmen and employing expert negotiator, were willing to adhere to the law of the seat.

19. Admittedly, this was on the condition that SALES AGREEMENT would be subject to the law of Mediterraneo. However, it is settled law that the law of the contract does not directly apply to the arbitration agreement, nor can it be treated as any other clause of the contract [*supra* ¶¶*34-36*] Ms. Napravnik, being the designated negotiator, ought to have known this.
20. It is true that the remaining clause regarding the choice of law was not provided again by RESPONDENT. However, this was because the law of the seat is often considered to be naturally implied in the arbitration [*supra* ¶¶*11-15*]. This is especially so, in the present scenario, where while the choice of law had not been discussed, one party had given an indication that it ought to be the law of the seat.
21. CLAIMANT contests this intention of RESPONDENT, by stating the four corners rule which would apparently bar the tribunal from considering the drafting history to determine the parties' intention. However, in a choice of law analysis, the arbitrators are not bound by any law [*Fouchard/Gaillard/Goldman, p. 491; Redfern/Hunter p. 122*]. Rather, HKIAC Rules specifically give freedom to the arbitrators to apply the rules they deem appropriate [*Art. 36.1, HKIAC Rules*]. In practice as well, countries where the four corners rule prevails continue to look at extrinsic evidence for the preliminary question of governing law [*Cruz City; Sulamérica*]. In any case, there is clearly a lacuna with respect to the arbitration agreement, as it cannot be considered a part of Clause 14 [*supra* ¶¶*7-9*]. Such lacunae can be remedied by reference to extrinsic evidence.

1.1.1.3. THE LAW OF DANUBIA HAS THE CLOSEST AND MOST REAL CONNECTION

22. Should this tribunal conclude that there is, in fact, no implied choice, the next relevant tier is the "closest and most real connection" in the proper law approach [*Cruz City; Habas Sinai; Sulamérica*]. The law which has the closest and most real connection with the arbitration agreement, in isolation, is deemed to be the governing law. In this regard, the law of the seat is unequivocally considered to have the closest and most real connection [*Cruz City; Sulamérica; BCY v. BCZ*]. This is on account of the supervisory role that the courts of the seat have over the arbitration, as well as the application of the mandatory procedural rules of the seat [*Lew/Mistelis/Kröll, p. 107*].
23. Therefore, the law of Danubia governs the arbitration agreement as it has the closest and most real connection to the arbitration agreement.

1.1.2. The principle of pro-arbitration is not applicable

24. CLAIMANT has relied on Art. 8 of the Model Law for the principle of pro-arbitration. Art. 8 prescribes that "*a matter which is the subject of an arbitration agreement*" shall be referred to arbitration by the courts. CLAIMANT has also elaborated that an arbitration agreement shall be extended to encompass disputed claims [*Cl. Memo., p. XXIII*]. As Danubian law is unlikely to allow for adaptation of the SALES AGREEMENT, CLAIMANT seeks to use this principle to apply the law of Mediterraneo.
25. RESPONDENT submits that the principle of pro-arbitration is not applicable to the present question, and cannot enlarge the arbitrator's powers against the wishes of the parties.
26. There is nothing in Art. 8 which allows the arbitral tribunal to enlarge its scope to cover a task that is not the subject matter of the arbitration agreement [*Art. 8, Model Law*]. The principle of pro-arbitration is merely used to encompass all the disputes in one forum. In this regard, it is used to dispel the separation between contractual, tortious, or even equity, claims, which arise out of the same contract [*Born (Commercial) p. 1344; Larsen Oil, ¶20; Tjong Very, ¶24*]. The intent behind this principle is to prevent simultaneous proceedings in different forums, causing unnecessary hardships for rational businessmen.
27. In fact, the very authority relied upon by CLAIMANT for the pro-arbitration principle has expressly clarified in the same text that this principle cannot be used for the purposes of adaptation, or rewriting the contract [*Born (Commercial), p. 1344*].
28. The issue in the instant case is that adaptation has not been made a subject of the arbitration agreement. In fact, words such as "differences" were specifically deleted from the Model Clause by RESPONDENT for Clause 15 [*Res. Ex. R3, p. 35, THE PROBLEM*]. Thereby, a difference regarding adaptation cannot be considered a "dispute" or matter that has to be necessarily referred to arbitration, under the aegis of the law of Mediterraneo. In such a scenario, the principle of pro-arbitration is not applicable.
29. Therefore, the law of Danubia governs the arbitration agreement.

1.2. UNDER DANUBIAN LAW, THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACTUALLY STIPULATED PRICE

30. CLAIMANT has alleged that even under Danubian law, the tribunal has jurisdiction to adapt the contract. However, this is manifestly wrong on two counts. The arbitration agreement does not constitute an express empowerment for adaptation **(1.2.1.)**; and the preliminary negotiations cannot empower the arbitrators **(1.2.2.)**.

1.2.1. The arbitration agreement does not constitute an express empowerment for adaptation

31. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [hereinafter "PICC"]. But, Art. 6.2.3(4)(b) is worded differently granting the power "to adapt the contract" to the court (or an arbitral tribunal) only "if authorized" [*Proc. Or. 2, ¶45, p. 61, THE PROBLEM*].
32. Clause 15 of the SALES AGREEMENT specifies that "any dispute arising out of this contract" shall be referred to arbitration. CLAIMANT has interpreted the usage of "dispute", and "arising out of" as express empowerment for adaptation [*Cl. Memo., p. XXV*]. However, this is incorrect.
33. In the context of adaptation, *express* empowerment is understood as an explicit reference to the arbitrator's power to adapt in either the hardship clause or the arbitration clause [*Horn/Kröll, p. 447*]. In some rare cases, the word "difference" or "disagreement" in the arbitration clause has been understood as providing for adaptation. The general arbitration clause regarding disputes arising out of a contract is not considered sufficient for the purposes of adaptation [*Stalev, p. 204; Ferrario, p. 128; AMINOIL; UN Doc. A/CN.9/WG.IIWP.41, ¶8*].
34. In fact, while the modification of PICC may be a peculiarity of the Danubian regime, the requirement of "express empowerment" for adaptation is a general practice in arbitration [*UN Doc.AICN.9/WG.IIIWP.37, ¶¶II.1-3*; *Beisteiner, p. 109; Bernardini, p. 421; Redfern/Hunter, ¶9.68; Waincymer, p. 1056; Berger, pp. 8-9; Horn/Kröll, p. 457*]. The expansive scope for "dispute" that CLAIMANT has argued for merely expands the scope of the arbitration agreement to contractual, tortious and pre-contractual claims relating to the business relationship.
35. This is because the word "dispute" does not cover differences regarding adaptation of the contract [*Horn/Kröll, p. 457; Bernardini, p. 411*]. The perceived contractual and creative nature of the arbitrator's decision is said to require a specific contract clause that contains an express authorization by the parties in addition to the usual arbitration agreement [*Berger, p. 8; Craig/Park/Paulsson, p. 144; Bernini, p. 421*].
36. This reluctance is rooted in the presumption of the professional competence of the parties, which is generally regarded by international arbitrators as a principle of transnational commercial law [*Berger, pg. 8; ICC Award No. 1990; ICC Award No. 5364*]. Silence about possible future contingencies is seen as a conscious decision to assume the risk of such eventualities [*Poznaski, p. 80; Ferrario, p. 138*]. If no such clauses are inserted into the contract, arbitrators are reluctant to overrule the principle of *pacta sunt servanda* in favour of contract adaptation and gap-filling [*Himpurna Case; ICC Award No. 1990; ICC Award No. 1512; ICC Award No. 2291; ICC Award No. 2438; ICC Award No. 3130; ICC Award No. 3380; ICC Award No. 1512; ICC Case No. 8486; Carbonneau, p. 593; Fouchard/Gaillard/Goldman, p.36; Berger (Adaptation), p. 1353; Houtte, p. 109*].

37. In the present case, there is no reference to arbitration in the hardship clause nor any reference to adaptation in the arbitration clause [*Cl. Ex. C5, p. 14, THE PROBLEM*]. Therefore, there is no express empowerment in the contract for adaptation. Thus, the present arbitral tribunal does not have the power to adapt the price.

1.2.2. The preliminary negotiations cannot empower the arbitrators

38. CLAIMANT has relied on the preliminary negotiations to satisfy the condition of "express empowerment". They have relied on the "ambiguity" exception to the four corners rule. According to CLAIMANT, the word "dispute" is ambiguous, and its meaning may be clarified by reference to the preliminary negotiations [*Cl. Memo., p. XXV*]. RESPONDENT requests the tribunal to reject this argument, as the preliminary negotiations are excluded under Art. 2.1.17 **(1.2.2.1.)**. In any case, the preliminary negotiations do not indicate an express empowerment **(1.2.2.2.)**.

1.2.2.1. THE PRELIMINARY NEGOTIATIONS ARE EXCLUDED UNDER ART. 2.1.17

39. RESPONDENT submits that irrespective of the preliminary negotiations, there is a lack of express empowerment for adaptation in the contract. This is based on general arbitral practice regarding adaptation, as well as principles of commercial law. In any case, Art. 2.1.17 does not allow usage of extrinsic evidence to contradict or supplement the contract [*CISG-AC Opinion No. 3; Shogun Finance, ¶49*].
40. Further, under Art. 2.1.17, the mere fact that an obligation has been discussed, or even orally agreed to, is not enough. It is only when the obligation or power is recorded in the contract can its scope be construed in accordance with the expectations of the parties [*Joseph Charles Lemire v. Ukraine*].
41. Clause 15 of the SALES AGREEMENT specifically elaborates the scope of the arbitration agreement. The word "dispute" has been understood to not cover claims of adaptation. Any reference to preliminary negotiations in order to empower the arbitrators with adaptation would be supplementing, or adding to, the scope that has been already been specified in Clause 15. Thus, the preliminary negotiations are excluded.

1.2.2.2. THE PRELIMINARY NEGOTIATIONS DO NOT INDICATE AN EXPRESS EMPOWERMENT

42. Should this tribunal find that there is ambiguity and the preliminary negotiations must be considered, RESPONDENT submits that such drafting history does not indicate an express empowerment.
43. The power to adapt generally requires express empowerment because, in order for it to be workable in practice, the precise manner of the triggering events and guidelines which indicate the scope and extent of adaptation, are necessary [*Craig/Park/Paulsson, p. 144; Bernini, p. 421; Berger, p. 8*]. In fact, it was this necessity that drove Mr. Antley to come up with a proposal for adaptation [*Cl. Ex. C8, p. 17, THE PROBLEM*]. Mr. Antley and Ms. Napravnik had merely discussed their preference for an arbitrator to adapt the contract. There is nothing to indicate that Mr. Antley agreed that the existing provisions were sufficient were sufficient to empower the arbitrators. In fact, the very opposite seems to have been the agreement of the parties: an express provision should be added, and Mr. Antley would draft it. However, such a proposal was never formulated or included in the final contract.
44. Furthermore, it must also be noted that when RESPONDENT proposed the arbitration clause, they had purposely narrowed down the broad wording of the HKIAC Model Clause [*Res. Ex. R1, p. 33, THE PROBLEM*]. Words such as "difference", which may indicate adaptation, were specifically deleted. This narrowing down had been communicated to CLAIMANT, who accepted the provision [*Res Ex. R2, p. 34, THE PROBLEM*].
45. On the basis of the preliminary negotiations, the word "dispute" cannot be expanded to cover adaptation. Rather, the drafting history seems to indicate the agreement of the parties that the present clause is narrow.
46. Thus, under Danubian law, the arbitrators are not empowered by the contract to adapt it.

1.3. UNDER THE LAW OF MEDITERRANEO, THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACTUALLY STIPULATED PRICE

47. Should this tribunal find that it is the law of Mediterraneo that governs the arbitration agreement, RESPONDENT submits that the tribunal still is not empowered to adapt the contract. This is because the contract does not provide for adaptation **(1.3.1.)**; and the applicable law cannot empower the arbitrators **(1.3.2.)**.

1.3.1. The contract does not provide for adaptation

48. CLAIMANT has relied on the perceived "broad understanding" of the traditional dispute resolution clause to argue in favour of adaptation [*Cl. Memo., p. XXIV*]. RESPONDENT submits that the contract does not provide for arbitration.

49. However, the broad understanding of the traditional dispute resolution clause is extended only to contractual, tortious and pre-contractual claims in the prevalent arbitral practice, on the basis of principles of commercial law. It is used merely to prevent simultaneous proceedings in different fori, which arise out of the same cause of action. It cannot be extended to cover adaptation, which is a completely different exercise.
50. Furthermore, Mediterraneo is a contracting state of United Nations Convention on the International Sale of Goods [hereinafter "CISG"] [*Proc. Or. 1, p. 53, THE PROBLEM*]. There is also consistent jurisprudence in Mediterraneo that CISG is also applicable to interpretation of arbitration agreements [*Proc. Or. 1, p. 53, THE PROBLEM*]. CISG allows for the usage of drafting history to determine the intent of parties, in the interpretation of contracts [*Art. 8(3), CISG*]. The parties' understanding of the narrowness of Clause 15 is apparent from the drafting history [*supra* ¶¶*42-46*].
51. Thus, the contract does not allow for adaptation even under the law of Mediterraneo.

1.3.2. The applicable law cannot empower the arbitrators

52. CLAIMANT has sought to rely on Art. 6.2.3. of PICC to empower the arbitrators under the SALES AGREEMENT. However, the applicable law by itself cannot empower the arbitrators. Adaptation is a matter of contractual interpretation. This situation may be changed by the mandatory provisions granting the court (or tribunal) powers to adapt the contract [*Ferrario, p. 129*].
53. However, the rules on hardship under PICC are not mandatory [*Lando, p. 40*]. This is because the parties are free to distribute risks in the contract themselves, which ought to be upheld under the principle of *pacta sunt servada*. As a result, when contracting parties have made their own provisions regarding hardship, it ousts the operation of Art. 6.2. of PICC [*Mckendrick, p. 713*]. In fact, under the ICC-Hardship Clause, a court-ordered adaptation of the contract as provided in PICC is not contemplated [*Da Silveira, p. 338*].
54. Further, CISG itself ousts the application of PICC. It is not possible to resort to PICC for hardship/adaptation provisions [*Mckendrick, p. 713; Slater, p. 261*]. Proposals for hardship and adaptation were expressly rejected in the drafting process of CISG [*Rimke, p. 240*].
55. In the present case, Mediterraneo is a contracting state of CISG and CISG is applicable to interpretation of arbitration agreements. Additionally, the parties negotiated the allocation of risks and decided upon Clause 12 on the basis of the ICC-Hardship Clause. It does not mention adaptation by arbitrators. Clauses 12, and the CISG, then oust the application of Art. 6.2.3 of PICC.
56. Therefore, the applicable law cannot be used to empower the arbitrators.

CONCLUSION OF ISSUE I

The governing law of the arbitration agreement is Danubian law. This is because it is the seat of the arbitral tribunal, and the implicit choice of the parties. Under Danubian law, the contract cannot empower the arbitrators to adapt the contract as there is no express empowerment. Even under Mediterranean law, the tribunal cannot adapt the contract, as the drafting history indicates otherwise and the application of Art. 6.2.3. of PICC is ousted.

ISSUE II

2. CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

57. CLAIMANT has sought to admit as evidence information regarding RESPONDENT'S previous disputes that are protected by confidentiality [*Letter by Langweiler, 2 Oct 2018, p. 50, THE PROBLEM*]. However, the evidence pertains to an unrelated trial on unique facts and has no relevance or materiality in the present case. RESPONDENT submits that the International Bar Association rules [hereinafter "IBA rules"] should be applied to this dispute, as they incorporate "international best practices" [*Moser/Bao, p. 272*]. In any event, CLAIMANT has conceded that the IBA rules are applicable to the present dispute [*Cl. Memo., p. XXVIII, ¶44*]. While it is true that both under the HKAIC rules and IBA rules the tribunal is granted broad liberty in determining the admissibility of evidence, the exceptions enumerated in Art. 9.2, IBA rules are widely regarded as acceptable objections to admissibility in international arbitration [*Marghitola, p. 33; O'Malley, p. 6; Born (Commercial), p. 2363*].

58. Contrary to CLAIMANT's submissions, RESPONDENT will show that the evidence in question is not relevant as per Art. 9.2(a), IBA rules **(2.1.)**; in any case, the evidence is excluded by the application of Art.9.2(b) due to legal impediment and 9.2(e) due to confidentiality **(2.2.)**. Finally, it would be against notions of fairness under Art. 9.2(g) to admit the evidence as it was obtained illegally, either via a hack or via breach of confidentiality **(2.3.)**.

2.1. THE EVIDENCE IS NOT "RELEVANT" WITHIN THE MEANING OF ART. 9.2(A)

61. For evidence to be admissible, it needs to be relevant to the case, and material to its outcome. CLAIMANT has submitted that such relevance must be adjudged on a *prima facie* standard, and on such a standard, evidence regarding the previous arbitration is admissible [*Cl. Memo., p. XXX,*

¶*52*]. RESPONDENT objects to this claim, and submits that the evidence in question does not satisfy the twin tests of relevance and materiality.

62. The term "relevant evidence" generally means evidence that tends to make any fact of consequence to the case more or less likely. Materiality typically refers to whether the fact proved by the evidence has any material impact on the outcome of the case [*Pilkov, p. 147*].

63. Here, the evidence of the previous arbitral proceedings proves no facts that are of consequence to this case, or that have any material impact on its outcome. The fact that RESPONDENT was party to another case where they requested contractual adjustment does not have any bearing on the present case, and was a matter particular to the facts of that previous case. The opinion of RESPONDENT was based on the unique facts of another case and cannot logically be used in the present case to show a contradictory attitude to the same issue [*Waincymer, p. 789*]. The issues were not the same, and the tax levied and the resulting communication was of a different kind in those other proceedings [*Letter by Langweiler, 2 Oct 2018, p. 50, THE PROBLEM*]. Thus, any evidence pointing to RESPONDENT's stance in another arbitral proceedings must be deemed to be inadmissible simply on the grounds of irrelevance and lack of material connection to the outcome of the present case.

2.2. THE EVIDENCE IS EXCLUDED BY THE APPLICATION OF ARTS.9(2)(B) AND 9(2)(E)

64. The IBA rules instruct arbitral tribunals to take into account multiple factors while determining the admissibility of evidence. Two in particular, concerning legal impediment or privilege **(2.2.1.)**; and breach of technical or commercial confidentiality **(2.2.2)** are applicable to the present case as grounds under which the evidence of the previous arbitral proceedings must be excluded.

2.2.1. The evidence is excluded as it is obtained under legal impediment

65. Art. 9.2(b) IBA rules, excludes from consideration evidence that has been obtained under applicable "*legal impediment or privilege under the legal or ethical rules".* CLAIMANT has submitted that legal impediment or privilege simply refers to the existence of direct statutory authority prohibiting the release of that data [*Cl. Memo., p. XXX,* ¶*54*]. In contrast, RESPONDENT submits that information obtained in breach of confidentiality amounts to evidence obtained in breach of a legal privilege **(2.2.1.1.)**, whereas evidence obtained via a hack clearly amounts to evidence obtained under legal impediment, as the means of obtainment were clearly illegal **(2.2.1.2.)**.

2.2.1.1. EVIDENCE OBTAINED IN BREACH OF CONFIDENTIALITY IS INADMISSIBLE UNDER ART. 9.2(B)

66. A legal impediment can be defined as any rule of law or an order of a public authority which prohibits disclosure [*Born (Commercial), p. 90*]. There are numerous rules of law prohibiting disclosure of arbitration related events. Art. 27.4 of the ICDR Rules states that '*an award may be made public only with the consent of all parties or as required by law*.' Art. 30 of the London Court of International Arbitration Rules says that parties '*undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration*.' These are indicative of a wide-ranging, cross-jurisdictional guarantee of confidentiality, which reinforces the objectives specified above. This need for confidentiality is so inherent that it is often considered implicit in the conduct of arbitral proceedings [*AAY v. AAZ; Marghitola, p. 79*]. Even the Permanent Court of International Justice has refused to consider evidence relating to previous settlement efforts [*Factory at Chrozow (Germany v. Poland), (PCIJ); Jurisdiction of European Commission of Danube Between Galatz and Braila, (PCIJ)*].
67. In particular, Art. 9.3(b) IBA Rules clarifies that in understanding "*legal privilege*", "*the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen*", must be kept in mind. These expectations may arise from what is practiced in domestic jurisdictions [*IBA Rules Review Subcommittee, p. 25; Born (Commercial), p. 75*]. At the time of the previous dispute, the party other than RESPONDENT, fully expected the contents of the dispute to be kept secret and confidential. This legitimate expectation of confidentiality would be breached if the said evidence is included in the present proceedings.

2.2.1.2 EVIDENCE OBTAINED VIA A HACK IS INADMISSIBLE UNDER ART. 9.2(B)

68. If the origin of the evidence lies in the hack of RESPONDENT's servers a few weeks ago, *prima facie*, such evidence cannot be admitted [*Wee Shuo Woon v. HT S.R.L.*]. Art. 9(2)(b) excludes any evidence obtained illegally, such as that from a hack, from consideration of the tribunal. This is true irrespective of whether the illegality was perpetrated by the opposing party or a third party [*Proc. Or. No. 2, ¶41, p. 60-61, THE PROBLEM*].
69. In *Libanaco*, the admissibility of more than 2000 privileged and/or confidential emails which were obtained via a hack, was in question. The court ordered the destruction and exclusion of all unlawfully obtained evidence. The court critically observed, "*The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result.*" [*Libanco v. Turkey (ICSID)*].

70. Similarly, in *Methanex*, the claimant trespassed into the office of the head of a lobbying organization and searched through internal trashcans and dumpsters. The tribunal noted that such evidence that was unlawfully obtained must not be admitted [*Methanex v. USA (NAFTA)*].

2.2.2. The evidence must be excluded as it is in violation of compelling grounds of confidentiality

71. Art. 9.2(e) IBA rules excludes confidential and privileged information of a commercial nature from being admitted where compelling interests are at play. The evidence is obtained in violation of grounds of confidentiality **(2.2.2.1)** and such grounds are compelling **(2.2.2.2)**. Finally, the exception of necessity is inapplicable in the present case **(2.2.2.3)**.

2.2.2.1. THE EVIDENCE IS OBTAINED IN VIOLATION OF GROUNDS OF CONFIDENTIALITY

72. What is confidential for the purposes of evidence can be determined by a tripartite test: (i) the limited number of persons knowing the information, (ii) the objective value of keeping the information secret, and (iii) the subjective intent or the efforts to do so [*Born (Commercial), p. 93*].
73. In the instant case, all three elements are fulfilled. Despite the hack, there is no evidence that an unlimited number of people have access to the information. There is commercial value in keeping the results of arbitral proceedings confidential, as this prevents costly injuries to reputation and prevents greater uncertainty. Finally, there was clear subjective intent on the part of the respondent to keep the information a secret, as evidenced by the confidentiality agreements it had its employees sign, an affirmative act to prevent the greater decimation of the information. Clearly, any information from the earlier case is "confidential".

2.2.2.2. THE GROUNDS OF CONFIDENTIALITY ARE COMPELLING

74. The need to preserve confidentiality of disputes and their settlement, including prior arbitral decisions, is well recognized [*Shone/Dimitrov, p. 169*]. This is considered crucial for considerations of fairness and commercial impediments, including altering the public perception of the company. Evidence obtained in breach of this legal privilege would tend to unfairly prejudice RESPONDENT, and discourage compromises in dispute resolution as parties will be concerned about the perception of their outcome in future disputes. Thus, it is important to preserve the integrity of the dispute resolution process that previous, confidential decisions should not be admitted as evidence.
75. The need for confidentiality with respect to a prior arbitration proceeding is integral for three primary reasons. *First*, on grounds of commercial certainty, a party must be allowed to protect

legally guaranteed rights to privacy and confidentiality from earlier proceedings, for it to be able to effectively calculate the impact such proceedings will have on its business [*Shone/Dimitrov, p. 169*].

76. *Second*, on grounds of public policy, it is important that illegal sourcing of information be discouraged to prevent wanton breaches of privacy [*Marghitola, p. 79*] One effective means of doing so is rendering such evidence inadmissible in all major disputes, drastically lowering the market value of such illegally obtained information, and thus reducing the financial incentive for committing such an illegality [*ibid*].
77. *Third*, to ensure speedy and effective justice, parties must not hesitate to reach compromises and worry about the consequences of such a compromise in terms of future perception and liability. Therefore, to effectively resolve a case solely on its own merits, an element of guaranteed and enforced confidentiality is essential [*Ireton, p. 11*].

2.2.2.3. THE EXCEPTION OF NECESSITY IS INAPPLICABLE IN THE PRESENT CASE

78. CLAIMANT has acknowledged that confidentiality is of great importance in determining admissibility [*Cl. Memo., p. XXXII, ¶65*]. However, they have stated there is an exception to the exclusionary rule of confidentiality, specifically in cases where it is considered necessary for protection of the parties' legitimate interests or the more general public interest[*ibid.*]. Here, the production of the evidence regarding the previous proceedings is not necessary for the protection of any legitimate interest of the claimant. Nor is such evidence important for more general public interest.
79. Given the importance accorded to confidentiality in arbitration proceedings, this exception must be construed narrowly. Thus, only evidence that can be included is evidence whereby a party which has a slim chance of success without admission has a very strong chance of success with it [*Nassé v. Science Research Council (SRC)*]. The evidence in the present case is at best, of marginal evidentiary value, and thus does not warrant admission under the necessity exception [*Dolling-Baker v. Merrrett, Hassneh Insurance v. Stuart Mew; Nassé v. Science Research Council (SRC); Friedman, p. 16*]. The normal rule of exclusion of confidential evidence must prevail.

2.3. THE EVIDENCE MUST BE EXCLUDED TO ENSURE FAIRNESS AND EQUALITY

80. Arbitral tribunals have broad discretion under Art. 9.2(g) read with Art. 9.1 IBA rules to determine the admissibility of any evidence, by taking into account whether it would be fair and

equitable to do so. Contrary to CLAIMANT's contention, including the evidence of the previous proceedings would in fact do a grave injustice to RESPONDENT. The grounds of fairness and equality must be evaluated by balancing the potential benefit of its use with the potential deleterious effects of admitting it [*Born (Commercial), p. 100; Waincymer, p. 744*].

81. In the present case, the deleterious effects are manifold, as there is no evidence that the information is in the public domain **(2.3.1.)**; and the production of the document unfairly prejudices RESPONDENT **(2.3.2.)**. Further, the evidence must be excluded because of public policy considerations of fairness and equality **(2.3.3.)**, and finally, the production of the evidence is not required by considerations of transparency **(2.3.4.)**.

2.3.1. The information is not in the "public domain"

82. CLAIMANT has cited cases such as the *Caratube* award [*Caratube v. Kazakhstan, (ICSID)*] and *Bankers Trust* [*Department of Economics of Moscow v. Bankers Trust*], in support of the proposition that confidentiality and other concerns of illegality may be disregarded and such evidence admitted, so long as the tribunal finds it appropriate [*Cl. Memo., p. XXIII ¶¶61, 62*]. However, such cases can be distinguished on facts, as crucially, in *Caratube*, the information was already in the public domain, rendering any considerations of confidentiality superfluous. In contrast, in the present case, there is no evidence adduced to show that the information regarding the previous proceedings is in the public domain.
83. Even more tellingly, in *Bankers Trust*, the information was decimated following a hack to as many as 15,000 subscribers, yet was found to be not in the public domain [*Department of Economics of Moscow v. Bankers Trust*]. Clearly, a hack by itself, giving a certain number of unknown people knowledge about the content, is insufficient to render it as being in the public domain. Evidence in the public domain must be accessible by members of the public and not just to any large number of people. To hold otherwise would benefit criminals, effectively lifting all caps of confidentiality once a hack occurs. Therefore, in the present case, on the facts available, the information cannot be regarded as being in the "public domain". Indeed, in *Conoco*, the arbitral tribunal even excluded publicly available information as it was obtained illegally [*Conoco Philips v. Venezuela*].
84. Certain classes of data, such as that regarding previous, confidential dispute settlements and other privileged information, such as conversations between lawyers and clients, are excluded from the preview of summonable evidence, except in exceptional cases [*Wee Shuo Woon v HT S.R.L.*; *Shone/Dimitrov, p. 168; Sandifer, p. 121*]. This exclusion is done to achieve a number of policy objectives, primary among them the deterrence of illegal production of evidence, and the

use of illegal means to obtain the evidence in the first place. It is a longstanding maxim of law that what is impermissible directly cannot be done indirectly, for to do so would defeat the very object of the prohibition.

2.3.2. The production of the document unfairly prejudices RESPONDENT

85. At the time of the previous proceedings, RESPONDENT was not aware that it would suffer a lawsuit at the hands of CLAIMANT, and thus did not account for that while taking its original stance. Holding it accountable now would be unjust, as with changing circumstances, RESPONDENT only now has had a chance to consider the case in favor of price adjustment. Indeed, RESPONDENT is legally entitled to make opposing claims in different cases, which are between different parties and on different facts. It is clearly settled that no estoppel operates on submissions of law, especially given different facts [*Waincymer, p. 789*]. Thus, using this evidence would unfairly prejudice the case against RESPONDENT even in the absence of any legal authority to do so; and further would deny RESPONDENT a legitimate legal right: to have all matters within an arbitration be conducted with privacy, secrecy and confidentiality [*Shone/Dimitrov, p. 166*].
86. In the present case, the evidence having been obtained illegally, it would be inequitable to allow it to be admitted. RESPONDENT has strictly abided by the rules when it comes to production of evidence, and it would be akin to rewarding illegality and punishing good behavior if CLAIMANT is permitted to admit evidence that has been unlawfully obtained.

2.3.3. The evidence must be excluded on grounds of public policy

87. Arbitral tribunals have often spoken for the need for balancing the need for accurate fact finding with public policy considerations [*Caratube v. Kazakhstan, (ICSID); OPIC v. Venenzula, (ICSID)*]. International policy considerations are considered valid grounds for excluding such evidence.
88. CLAIMANT has submitted that illegality *per se* is not an explicit ground for exclusion of evidence under the IBA rules or the HKIAC Rules or the Model Law. While that may be true, they do explicitly grant tribunals the power to consider factors of fairness and equity [*Art. 9.2(g), IBA Rules, Art. 22.2, HKIAC Rules 2018*]. These include fundamental international policy considerations that are of a commercial nature, including those that involve promoting obedience to the law and reducing defaults, as well as promoting commercial certainty [*O'Sullivan, Blair/Gojkovic, p. 257*].
89. In cases such as the present case, there is a significant problematic incentive created if the evidence is to be admitted. As per CLAIMANT submission, they paid for the evidence from the source. Now if such evidence is permitted to assist CLAIMANT in making its claim, it would

acquire demonstrable commercial value. This would incentivize further illegal attempts at obtaining data that helps win cases, while penalizing those who choose to stay honest in their evidence collection and not purchase evidence from questionable sources.

90. Clearly, even though CLAIMANT was not the source of the hack, admitting such evidence would still be tantamount to encouraging it. Such problematic consequences of admitting illegally obtained evidence is the reason it is excluded in most domestic jurisdictions [*AAY v. AAZ; Hong Kong Arbitration Ordinance (HKAO); Philippines Alternative Resolution Act 2004*]. RESPONDENT submits that the Arbitral tribunal should also follow suit and exclude such evidence, to prevent perverse incentives from hampering the justice process and skewing it against law abiding parties. The alternative would be against all notions of fairness and equality, and would hamper commercial certainty. Therefore, the evidence regarding the previous arbitral proceedings must be excluded.

2.3.4. The production of the evidence is not required by considerations of transparency

91. CLAIMANT has submitted that it would be in favour of transparency to admit the evidence from the previous case [*Cl. Memo., p. XXXII, ¶67*]. However, RESPONDENT submits that since the facts proved by such evidence are of limited relevance, admitting such evidence does not further the cause of transparency. The requirement of transparency is founded in particular in cases involving fraud, corruption and bribery, where the only way to protect third party interests is sufficient publication [*Tung/Lin, p. 82; Carmody, p. 221*]. In purely commercial cases such as the present matter any minor concerns of transparency ought to be rejected [*OPIC v. Venenzula, (ICSID); O'Malley, Evidence, n. 9.67*].
92. The facts proven by such evidence are of contestable relevance and definitely do not form an integral part of their case [*supra ¶¶61-63*]. Indeed, the evidence appears intended to disrepute the character of RESPONDENT by bringing up an unrelated case, and does not have any information that would assist this tribunal in its goal of "truth seeking" with regard to this case. Thus, on one hand, the policy reasons for not condoning illegality and preserving confidentiality are of great relevance in the instant case, and on the other hand, the facts sought to be established are of marginal relevance and do not significantly help in accurate fact finding regarding this case.
93. On the balance, therefore, policy considerations must take precedence in the present case over any concerns of transparency.

CONCLUSION OF ISSUE II

The evidence in question was obtained illegally, either via a hack or breach of confidentiality. This tribunal must refuse to admit such evidence under Art. 9.2, IBA Rules, as it is irrelevant and was obtained under legal impediment. Further, the evidence must be excluded on grounds of fairness and public policy, because of the critical importance of respecting confidentiality and discouraging unlawful means of collecting evidence.

ISSUE III (1)

3. CLAIMANT IS NOT ENTITLED TO ANY AMOUNT UNDER CLAUSE 12 OF THE SALES AGREEMENT

94. CLAIMANT had accepted a delivery DDP in return for an increased price and inclusion of a hardship clause [*Proc. Or. No. 2, ¶10, p. 56, THE PROBLEM; Cl. Ex. C4, p. 12, THE PROBLEM*]. The ICC-Hardship Clause suggested by CLAIMANT was narrowed down to include a few direct risks related to health and safety requirements [*Proc. Or. No. 2, ¶12, p. 56, THE PROBLEM*]. The Equatorianian Government imposed a tariff of 30% on all agricultural goods imported from Mediterraneo [*Cl. Ex. C6, p. 15, THE PROBLEM*]. This included breeding of racehorses and made the delivery of the final shipment 30% more expensive [*Cl. Ex. C7, p. 16, THE PROBLEM*]. CLAIMANT had to pay the additional 30% tariffs on the delivery of the final shipment [*Cl. Ex. C8, p. 18, THE PROBLEM*]. However, this was not on the basis of any promise made by RESPONDENT [*Res. Ex. R4, p. 36, THE PROBLEM*]. RESPONDENT even agreed to renegotiate the contract; however, no solution could be found [*Cl. Ex. C8, p. 18, THE PROBLEM*]. CLAIMANT has now asked for adaptation of the contract under the hardship clause on the basis of the price increase due to the additional tariffs [*Cl. Ex. C5, Clause 12, p. 14, THE PROBLEM*].

95. RESPONDENT submits that CLAIMANT is not entitled to the payment of any amount under the hardship clause as the risk of import tariffs was undertaken by CLAIMANT **(3.1.)**. Moreover, Clause 12 does not cover import tariffs **(3.2.)**. Further, even if import tariffs are covered under the hardship clause, the conditions for hardship are not met **(3.3.)**. Furthermore, adaptation as a remedy is unavailable under Clause 12 **(3.4.)**.

3.1. THE RISKS ASSOCIATED WITH A DELIVERY DDP WERE UNDERTAKEN BY CLAIMANT

97. A party cannot claim hardship arising from an event of which it has assumed the risk [*McKendrick, p. 721; CAM Award 30 Nov 2006; Brencius v. Ukio*]. In the instant case, CLAIMANT cannot claim hardship due to the import tariffs as it undertook the risk of import clearance.

98. The parties had agreed upon a delivery DDP INCOTERMS ® 2010 [*Proc. Or. No. 2, ¶10, p. 56, THE PROBLEM*]. INCOTERMS are meant for allocating costs and risks in relation to carriage of goods, and import, export and security clearances [*Ramberg, p. 16*]. Such a DDP puts the highest risk upon the seller. These risks include risks and costs related to import clearance, for instance, tariffs, permits, VAT, and other charges applicable to the import of goods [*Ramberg, p. 61*].

99. It is CLAIMANT's contention that the DDP increase was derogated as it was the parties' intent to not transfer the risks of import restrictions on CLAIMANT [*Cl. Memo., p. XXXVI, ¶92*]. Undoubtedly, a DDP term may be derogated from if there exists mutual consent between the parties to do so. However, in the present case such intent was lacking.

100. As stated by CLAIMANT, there were two prerequisites in respect to change of delivery terms from EXW to DDP: *first*, CLAIMANT would not take further risks associated with customs regulation and import restrictions and *second*, a price increase by US$ 1000 [*Cl. Memo., p. XXXVII, ¶. 95; Cl. Ex. C4, p. 12, THE PROBLEM]*. With regard to the first prerequisite, CLAIMANT had asked for an inclusion of a hardship clause [*Cl. Ex. C4, p. 12, THE PROBLEM*]. However, these were only proposals which were subject to further negotiations and changes. The increase in price was changed from US$ 1000 to US$500 [*Cl. Ex. C5, p. 13, THE PROBLEM; Proc. Or. No. 2, ¶8, p. 56, THE PROBLEM*]. Similarly, the ICC-Hardship Clause suggested by CLAIMANT was narrowed down [*Proc. Or. No. 2, ¶12, p. 56, THE PROBLEM*]. Hence, only a few risks associated with a DDP delivery, i.e. risk of changes in health and safety requirements and other comparable regulations, were added to the hardship clause and remaining risks were assumed by CLAIMANT. In fact, the additional price paid by RESPONDENT was due to CLAIMANT's assumption of additional risks associated with a delivery DDP.

101. Moreover, even if the purpose behind a delivery DDP was urgent delivery and taking advantage of CLAIMANT's experience, there is nothing to suggest that this excluded an intention to transfer risks associated with a DDP delivery. In fact, due to the urgency in delivery and much greater experience of CLAIMANT, it makes more sense for CLAIMANT to undertake risks associated with a delivery DDP.

102. Therefore, CLAIMANT is liable for risks associated with a delivery DDP that are not covered under Clause 12 of the SALES AGREEMENT.

3.2. CLAUSE 12 DOES NOT COVER IMPORT TARIFFS

103. After negotiating, the parties ultimately included a narrow hardship clause [*Proc. Or. No. 2, ¶12, p. 56, THE PROBLEM*]. Contrary to CLAIMANT's assertions, the import tariffs imposed by the government of Equatoriana are beyond the ambit of the hardship clause. This can be concluded by interpreting Clause 12 as per Art. 8 CISG **(3.2.1.)**. Further, Clause 12 must not be interpreted *contra proferentem* against RESPONDENT **(3.2.2.)**.

3.2.1. Interpretation of Clause 12 according to Art. 8 CISG

104. CLAIMANT wishes to include import restrictions under the ambit of the hardship clause [*Cl. Memo., p. XXXVII, ¶. 98*]. However, the hardship clause refers only to, *first*, "additional health and safety requirements" and *second*, to "comparable unforeseen events" [*Cl. Ex. C5, Clause 12, p. 14, THE PROBLEM*].

105. Art. 8 CISG regulates the interpretation of contracts [*Schlechtriem/Schwenzer 4th ed., p. 145; Secretariat Commentary, Art. 7 ¶2; Schmidt/Kessel in Schlechtriem/Schwenzer 2nd ed., p. 146; Ferrari Draft, p. 175; OLG Dresden 27 Dec 1999; HG Aargau 5 Feb 2008*]. Hence, the clause has to be interpreted using Art. 8 CISG. The subjective test to determine the real intent of the party must be applied first [*Art. 8(1), CISG*]. In case the real intent of the parties is not discernable, determination through an objective test must be done [*Art. 8(2), CISG*]. For the purposes of such an interpretation, all relevant circumstances including negotiations between the parties must be considered [*Art. 8(3), CISG*]. RESPONDENT submits that the hardship clause does not cover import tariffs as per Art. 8(1) CISG **(3.2.1.1.)**; and as per Art. 8(2) CISG **(3.2.1.2.)**.

3.2.1.1. INTERPRETATION OF REAL INTENTION OF PARTIES UNDER ART. 8(1) CISG

106. Applying Art. 8(1) CISG, the hardship clause is to be interpreted according to CLAIMANT's intent where RESPONDENT knew, or could not have been unaware of it. The negotiations between the parties preceding the agreement clearly indicate that Clause 12 is a narrow clause and does not cover import tariffs.

107. CLAIMANT had agreed to a delivery DDP, which meant that all risks and costs related to import clearance till delivery were assumed by it [*supra, ¶¶97-102*]. Admittedly, CLAIMANT had indicated its intent to not undertake all the risks associated with a delivery DDP, in particular risks related to custom regulations and import restrictions [*Cl. Ex. C4, p. 12, THE PROBLEM*]. However, as argued previously, this was a mere proposal, subject to further negotiation and change [*supra, ¶100*]. These negotiations included suggestion of the ICC-Hardship Clause by CLAIMANT. The clause was subsequently narrowed down as RESPONDENT had made it clear that the suggested

clause was too broad [*Res. Ex. R3, p. 35, THE PROBLEM; Proc. Or. No. 2, ¶12, p. 56, THE PROBLEM*]. The final clause that the parties agreed to, specifically referred only to health and safety requirements and comparable unforeseen events, and did not include custom regulations and import restrictions [*Cl. Ex. C5, Clause 12, p. 14, THE PROBLEM*]. Even though the clause was drafted in reference to CLAIMANT's mail mentioning risks related to health and safety requirements, and custom regulations and import restrictions, the latter risks were excluded from the final clause [*Proc. Or. No. 2, ¶12, p. 56, THE PROBLEM*].

108. Further, the relevant circumstances and purpose behind a provision need to be considered while interpreting it [*OG 12 Dec 2006; Art. 8(3), CISG*]. Around the time the negotiations started, a rare foot and mouth disease crisis in Equatoriana had resulted in restrictions on the transportation of live animals which had a serious impact on breeding of racehorses [*Cl. Ex. C1, p. 9, THE PROBLEM.*]. CLAIMANT had also had bad experiences in the past with health and safety requirements related to a foot and mouth disease which made highly expensive tests necessary, thereby increasing the cost by upto 40% [*Cl. Ex. C4, p. 12, THE PROBLEM; Proc. Or. No. 2, ¶21, p. 58, THE PROBLEM*]. Hence, the objective behind the hardship clause was to safeguard from risks related to these past experiences related to health and safety requirements.
109. Thus, the intention of the parties was to temper risks associated with hardship caused in the past by such requirements, and not import restrictions. This intention was known to both parties and in any case, they could not have been unaware of it.
110. Therefore, the real intention of the parties under Art. 8(1) CISG was not to include import tariffs under Clause 12 of the Sales Agreement.

3.2.1.2. INTERPRETATION USING OBJECTIVE TEST UNDER ART. 8(2) CISG

111. If the real intention of parties under Art. 8(1) CISG is unclear, then the hardship clause will be interpreted according to CLAIMANT's intent as understood by a reasonable person of the same kind as RESPONDENT in the same circumstances [*Art. 8(2), CISG*]. Due consideration must be given to the usual meaning of words used by the parties [*OLG Dresden 27 Dec 1999; Magnus in Staudinger, Art. 8 ¶24*].
112. The words of a 'catch-all provision' that follows a list of specific events are construed narrowly [*Bund, p. 410*]. Further, the principle of *ejusdem generis* is applicable [*Bund. p. 408; Langham-Hill v. Southern Fuels*]. When a catch all provision is present in reference to some specified events, the provision would only include events corresponding to the specified events [*CISG/1997/11 (CIETAC)*]. Clause 12 mentions a specific impediment, i.e. health and safety requirements and is followed by a catch all provision: comparable unforeseen events. Therefore, for an impediment

to be covered under the present hardship clause, it must be analogous to health and safety requirements.

113. CLAIMANT cannot argue that import tariffs are included under Clause 12 as they are comparable to health and safety requirements. Tariff measures are distinct from non-tariff measures. Non-tariff measures include import licensing, prohibitions, quotas and others [*Goode, p. 264*]. Tariffs on the other hand impose a kind of duty on the product to be paid to the relevant authority [*Goode, p. 347*]. Health and safety requirements particularly qualify as sanitary and phytosanitary measures and technical barriers to trade [*Goode, pp. 311, 350*]. These governmental regulations are a separate category altogether and are governed by distinct rules and tariff measures. While health and safety requirements and tariffs both result in a rise in price, this does not make them comparable as the hardship clause is based on events and not consequences. Hence, tariffs and health and safety requirements are not comparable.

114. Had it been the parties' intention to include all government policies within Clause 12, they would have resorted to a broader terminology, such as qualifying the term events with, "including but not limited to", or mention hardship caused by governmental actions [*Bund, p. 407*]. However, the parties chose a narrow clause.

115. Therefore, even according to the understanding of a reasonable third person, import tariffs are not covered by the hardship clause.

3.2.2. Clause 12 must not be interpreted *contra proferentem* against RESPONDENT

116. CLAIMANT asserts that Clause 12 should be interpreted against RESPONDENT to include import tariffs as per the *contra proferentem* rule [*Cl. Memo., p. XXXIX, ¶107*]. The *contra proferentem* rule says that in case of any ambiguities, they will be resolved and interpreted against the party which drafted it [*Honnold/Fletchner, ¶107.1, p. 158; Schmidt-Kessel in Schlechtriem/Schwenzer 2nd ed. Art. 14 ¶49; Staudinger/Magnus in Schlechtriem/Schwenzer 2nd ed., ¶18; Huber/Mullis, p. 236; Cysteine Case; Automobile case*]. Undoubtedly, the rule is applicable under CISG [*CISG-AC Op. No. 13*].

117. However, the *contra proferentem* rule does not apply to the present case. The purpose that the rule seeks to serve is to put the risks arising out of any ambiguity of a clause on him who drafted it, particularly when the other party has not been able to negotiate the clause [*Honnold, ¶107.1; Schmidt-Kessel in Schlechtriem/Schwenzer 2nd ed. Art. 14 ¶49; Printed Press Case*]. Hence, the *contra proferentem* rule applies in the context of standard form-contracts where the other party does not have a say in its wording [*Vogenauer in Vogenauer/Kleinheisterkamp, p. 529*]. However, it would not apply in cases where the parties have negotiated the clause [*ibid*]. Even though RESPONDENT

supplied the wording of the final hardship clause, it was a result of extensive negotiations. Hence, to put all risks on RESPONDENT only because it supplied the final wording after negotiations would be unfair.

118. Further, the *contra proferentem* rule only applies in case there is ambiguity in a clause. As demonstrated previously, it was clear to both parties and would have been clear to a reasonable third person that Clause 12 did not cover import tariffs [*supra, ¶¶106-115*]. Thus, the *contra proferentem* rule is not applicable in the present case.

119. Therefore, Clause 12 must not be interpreted against RESPONDENT under the *contra proferentem* rule.

3.3. IN ANY CASE, CONDITIONS FOR HARDSHIP ARE NOT MET

120. Even if the hardship clause was held to cover import tariffs, it is not attracted in the present case as the conditions for hardship have not been met. Since Clause 12 is silent on the conditions for hardship, the conditions required under general standards will be considered [*Fontaine/de Ly, pp. 440-43; Brunner, p. 387*]. In the present case, there is no hardship as the threshold requirement is not met **(3.3.1.)**; and the risk of import tariff was assumed by CLAIMANT **(3.3.2.)**.

3.3.1. The threshold requirement for hardship is not met

121. To claim hardship, there has to be a fundamental change in the equilibrium of the contract [*Art. 6.2.2, PICC; Schlechtriem/Schwenzer 4th ed., p. 1142; Case No. 8486 (ICC)*]. In the present case there was only a 30% increase in the price of performance. RESPONDENT submits that there is no alteration in the fundamental equilibrium of the contract as 30% increase in price is insufficient to constitute hardship **(3.3.1.1.)**, and the threshold cannot be lowered **(3.3.1.2.)**.

3.3.1.1. A 30% INCREASE IS NOT SUFFICIENT TO CONSTITUTE HARDSHIP

122. CLAIMANT rightly asserts that the peculiarities of each case have to be considered to determine whether hardship has taken place [*Cl. Memo., p. XLI, ¶119*]. Given the risk associated with price change that normally exists in international trade, the threshold required for a hardship claim is higher than that required in domestic sales [*Schwenzer, p. 1076; Kuster, p. 9; Case No. 8486 (ICC)*]. The threshold requirement in cases of international sales is advised to be a 150-200% increase in price [*Schwenzer, p. 716; Nuova Fucinati v. Fondmetall; Steel Bars Case*]. Since the present case involves an international sale, the threshold limit should be high, therefore, a mere 30% increase cannot result in a valid claim for hardship.

123. Further, hardship in cases of an increase of 30% has been refused by tribunals [*CISG/1997/11 (CIETAC); Nuova Fucinati v. Fondmetall; CIETAC 2 May 1996*]. Even increases higher than 30%, such as increases of 50% [*MSG v. SARL*], and even 300% have been held to not constitute hardship [*Iron molybdenum case*]. The official commentary on PICC adopted a general threshold level of 50% or more to constitute hardship [*UNIDROIT Commentary 2004, §2 p. 182*]. But even this limit was termed too low and was removed subsequently [*UNIDROIT Commentary 2004, Art. 6.2.2 §8*]. Scholars agree that there must be at least a 100% rise in price to justify a hardship claim [*Brunner, p. 43; Schwenzer, p. 717*]. Regardless of which limit is considered, it is clear that a 30% is not enough to constitute a fundamental alteration in the equilibrium of a contract.
124. Therefore, a 30% increase in price is not enough to constitute hardship.

3.3.1.2. THE THRESHOLD CANNOT BE LOWERED

125. CLAIMANT has argued that the 30% price increase is causing its financial ruin and must be considered to lower the threshold for hardship [*Cl. Memo., p. XLI, ¶119*]. However, such a claim is not justified. A hardship claim is not based on the financial capacities of the parties [*Brunner, p. 437; Zweigert/Kotz, p. 521; Alimenta v. Cargill*]. It is based on the nature of agreement and the expectations of parties [*ibid*].
126. Further, there is no financial ruin in the instant case. The primary difficulty being faced by CLAIMANT is that it might not be able to secure a credit line [*Proc. Or. No. 2, ¶29, p. 59, THE PROBLEM*]. CLAIMANT is known for its teaching, research, and demonstration facility and professional development courses on horse care, breeding and riding/driving [*Not. Of Arb., p. 4, THE PROBLEM*]. It is further involved in the business of breeding and other areas of equestrian sport [*ibid*]. Hence, the additional 30% tariff will not result in its financial ruin.
127. Furthermore, financial ruin such as business failures and insolvency are within CLAIMANT's own sphere of control [*Flambouras, p. 267; Atamer in Kröll/Mistelis/Viscasillas, Art. 79 §47; DiMatteo, p. 287*]. A hardship claim cannot be based on a factor which is within the sphere of control of the seller [*ibid*]. Allowing it would result in parties enjoying undue benefits despite their own financial mismanagement.
128. Moreover, CLAIMANT's allegation that RESPONDENT has unjustly enriched itself by breaching the SALES AGREEMENT cannot be considered as CLAIMANT has provided no evidence to substantiate the claim. In any case, the resale, if any, would be immaterial to CLAIMANT's hardship claim as there is no causal nexus between the hardship and the alleged breach.
129. Therefore, the threshold requirement for hardship has not been met in the present case.

3.3.2. The risk of import tariff was undertaken by CLAIMANT

130. As has been argued already, a party cannot claim hardship caused by an event whose risk the party has undertaken [*supra, ¶97*]. In the instant case, CLAIMANT had undertaken all risks associated with a delivery DDP except those related to health and safety requirements [*supra, ¶¶98-100*]. Import tariffs are risks associated with a delivery DDP [*supra, ¶98*]. Hence, CLAIMANT had undertaken the risks related to import restrictions.
131. Therefore, CLAIMANT cannot claim hardship under Clause 12 of the Sales Agreement.

3.4. ADAPTATION AS A REMEDY IS UNAVAILABLE UNDER CLAUSE 12

132. Contrary to CLAIMANT's assertions, the remedy of adaptation is not provided under Clause 12 of the Sales Agreement.
133. Admittedly, Mr. Antley had stated that according to his understanding of the contract, it would be the task of the arbitrators to adapt the contract [*Cl. Ex. C8, p. 17, THE PROBLEM*]. However, this was only his opinion on the matter and not an agreement to include an adaptation remedy under the contract. He had clarified that he would return with a proposal the next morning [*Cl. Ex. C8, p. 17, THE PROBLEM*]. Further, for him it was an unresolved issue as he had noted down "Connection of hardship clause with arbitration clause" as an open issue [*Res. Ex. R3, p. 35, THE PROBLEM*]. This was a reference to adaptation as Ms. Napravnik and he had discussed the arbitration agreement and hardship clause together in this context [*Cl. Ex. C8, p. 17, THE PROBLEM*]. This indicates that Clause 12 was not considered sufficient as an adaptation mechanism.
134. Furthermore, the intention of RESPONDENT to not include an adaptation mechanism allowing the tribunal to adapt the contract is evidenced from the following excerpt from the witness statement of Julian Krone, "*I would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion.*" [*Res. Ex. R3, p. 35, THE PROBLEM*].
135. In the absence of an agreement on change of prices, arbitrators cannot be granted the power to adapt the contract. Parties to an international contract are assumed to be professionals and ought to protect themselves from changes in circumstances, in their contract [*Fouchard/Gaillard/Goldman, §36*]. If CLAIMANT wanted the tribunal to have power to adapt the agreement, it should have included that in the contract.
136. Moreover, CLAIMANT's allegation that Mr. Shoemaker promised a solution, is baseless. Mr. Shoemaker had made it abundantly clear that he was not a lawyer and had not been involved with the negotiations of the contract [*Res. Ex. R4, p. 36, THE PROBLEM*]. He had further clarified that he had to confirm with his superiors whether there was an obligation by CLAIMANT to deliver at the conditions agreed upon or not [*ibid*]. Furthermore, he stated that according to his

understanding, DDP meant that all risks were assumed by CLAIMANT [*ibid*]. Additionally, he said that they would find an agreement on the price, "*if the contract provides for an increased price in the case of such a high additional tariff*" [*ibid*]. Hence, there was no promise of price adjustment made by Mr. Shoemaker and his statements cannot give rise to any legal obligations between the parties.

137. Therefore, RESPONDENT never agreed to include the remedy of adaptation under the agreement and such a remedy is not available under Clause 12 of the SALES AGREEMENT.

CONCLUSION OF ISSUE III (1)

The hardship clause does not cover the additional tariffs according to its interpretation under Art. 8 CISG. In any case, there is no hardship as a mere 30% increase does not meet the threshold limit for hardship and the risk of import tariffs was assumed by CLAIMANT. Moreover, Clause 12 does not provide for adaptation as a remedy.

ISSUE III (2)

4. CLAIMANT IS NOT ENTITLED TO ANY AMOUNT RESULTING FROM ADAPTATION OF THE PRICE UNDER CISG

138. Adaptation cannot be allowed under the hardship clause [*supra, ¶¶94-137*]. CLAIMANT contends that even if it is not entitled to a payment of any amount under Clause 12 of the contract, it is entitled to a payment under CISG [*Not. Of Arb., p. 8, THE PROBLEM*]. However, CLAIMANT is not entitled to any amount under CISG, as adaptation for hardship cannot be allowed under Art. 79 CISG **(4.1.)**. Further, adaptation cannot be allowed under PICC **(4.2.)**. In any case, the conditions for hardship have not been met **(4.3.)**.

4.1. ADAPTATION IN CASE OF HARDSHIP CANNOT BE ALLOWED UNDER ART. 79 CISG

140. As admitted by CLAIMANT in its written submission, it cannot seek adaptation under Art. 79 CISG [*Cl. Memo., p. XLV, ¶¶140-141*]. Art. 79 is not applicable to the present case as by including the hardship clause into the contract, the parties have excluded an application of Art. 79 CISG **(4.1.1.)** and in any case, Art. 79 CISG does not cover hardship **(4.1.2.)**.

4.1.1. Application of Art. 79 CISG has been excluded

141. Art. 6 CISG, in the broad interest of party autonomy, allows parties to exclude, or derogate from CISG, or any of its provisions [*Schlechtriem Uniform Sales Law, p. 34; Gül, p. 80; CISG-Online 1317; CISG-Online 641*]. Such an exclusion can be express or implied [*Schlechtriem in Schlechtriem/Schwenzer 2nd ed.*, *pp. 88-89 ¶12; Award of 23 January 2012 (ICAC); CISG-Online 2551; CISG-Online 1889; CISG-Online 1420; OLG Dresden 27 Dec 1999*].
142. When a buyer's right to avoid the contract was contractually limited, a court had held that Art. 49(1)(b) CISG could not be applied as it had been implicitly excluded under Art. 6 CISG [*CLOUT Case 1305*]. In the instant case, the parties had chosen to include a *force majeure* and hardship clause in the contract. This shows the intent of the parties to restrict the application of *force majeure* and hardship to only Clause 12 of the agreement. Applying Art. 79 CISG despite there being a separate clause to govern cases of hardship would violate party autonomy [*Atamer/Kröll Art. 79 ¶89; CLOUT Case No. 142*].
143. Therefore, the application of Art. 79 CISG has been excluded.

4.1.2. Art. 79 CISG does not cover hardship

144. Art. 79 CISG excuses a party from liability in case of non-performance due to an "impediment" [*Art. 79(1), CISG*]. Contrary to CLAIMANT's assertion, Art. 79 CISG does not cover situations of hardship and is restricted to situations where performance has become impossible [*Zeller, p. 153; Veneziano, p. 143; Lee, p. 389; Jenkins, p. 2025; Flambouras, p. 278; Kessedjian, p. 643; Nuova v. Fondmetall ; Vital Berry; Iron molybdenum case; Tomato concentrate case; Steel ropes case; Corn case*].
145. On account of the legal nature of CISG, the relevant rules for interpreting Art. 79 are those laid down in Vienna Convention on the Law of Treaties (hereinafter "VCLT") which also constitute customary international law [*Petsche, p. 157; Gardiner, p. 127*]. Art. 31 VCLT requires the interpretation of a treaty to be done in light of its ordinary meaning, its context, and its object and purpose. CISG's own rules of interpretation call for regard to be had to its international character and need to promote uniformity [*Art. 7(1), CISG*]. Since Art. 7(1) reflects the basic objective pursued by CISG, the interpretative approach is largely identical with the rules under Art. 31 VCLT [*Petsche, p. 155*]. Thus, there is no need for a separate analysis under Art. 7 CISG.
146. RESPONDENT submits that Art. 79 CISG does not include hardship according to its interpretation in light of its ordinary meaning, context, and object and purpose **(4.1.2.1.)**. Moreover, hardship is excluded according to the interpretation under Art. 32 VCLT **(4.1.2.2.)**.

4.1.2.1. INTERPRETATION IN LIGHT OF ORDINARY MEANING, CONTEXT, AND OBJECT AND PURPOSE OF ART. 79 CISG

147. The ordinary meaning of Art. 79(1) CISG and terms such as "impediment", "failure was due to", and "avoided or overcome" indicate that Art. 79 CISG only contemplates situations where the event relied upon has rendered performance impossible and not merely more onerous or burdensome [*Brunner, p. 340*; *Petsche, pp. 156-158*]. Further, unlike PICC which has separate provisions for *force majeure* and hardship, CISG only has one provision dealing with broad exemption rules [*Arts. 7.1.7. & 6.2., PICC; Art. 79, CISG*]. The fact that Art. 79(1) CISG is substantially identical to the *force majeure* provision of PICC indicates that it is restricted to situations of impossibility of performance [*Petsche, pp. 156-157*].

148. The context of Art. 79 CISG also indicates that hardship is excluded. The appearance of Art. 79 CISG under a Section titled 'Exemptions' which covers all exemptions and the absence of a specific remedy for hardship clearly suggest its exclusion [*Lookofsky, p. 442; Petsche, pp. 158-161*]. Furthermore, the objective and purpose of CISG to achieve uniformity in application is best served in interpreting Art. 79 CISG to exclude hardship, as it reflects the currently predominating judicial orientation and allows for most certainty [*CISG-AC Op. No. 7, ¶35*; *Nuova v. Fondmetall*; *Vital Berry; Iron molybdenum case; Tomato concentrate case; Steel ropes case; Corn case*].

149. Therefore, Art. 79 CISG does not cover hardship.

4.1.2.2. INTERPRETATION OF ART. 79 CISG UNDER ART. 32 VCLT

150. Art. 32 VCLT provides for recourse to "supplementary means of interpretation" which includes the *travaux préparatoires* and the circumstances of the conclusion of the treaty. Such supplementary means can be used to confirm the meaning derived from interpretation under Art. 31 VCLT [*Petsche, p. 163*]. In the present case, since the rules under Art. 31 VCLT clearly establish that Art. 79 relates only to cases in which performance has been rendered *impossible*, recourse to supplementary means can be used to confirm the established meaning.

151. The general legislative intent behind Art. 79 was to narrow the grounds for exoneration and make it available only on the occurrence of an objective impediment [*Honnold Documentary History, p. 185*]. The predecessor provision, i.e. Art. 74 of the Uniform Law on the International Sale of Goods used the broad term 'circumstances'. However, it was replaced by a much narrower term 'impediment' [*ibid*]. The legislative intent of excluding hardship from the ambit of Art. 79 is further evidenced from the express rejection of a proposal to include a hardship provision [*ibid, p. 350*]. Furthermore, the failure of an attempt at introducing hardship by a Norwegian delegation during a diplomatic conference in Vienna goes to show that the drafters did not intend to allow *any* exceptions based on hardship [*CISG-AC Op. No. 7; Adebayo, ¶3.4; Flechtner Force Majeure*].

152. Therefore, Art. 79 CISG does not cover hardship. Since, in the present case it was possible to perform the obligations, as CLAIMANT did, it cannot claim a remedy for hardship under Art. 79 CISG. Further, the remedy of adaptation is not available under Art. 79 CISG [*Aksoy, p. 109; Sunflower seed case; Petsche, p. 159*]. In any case, as admitted by CLAIMANT, the remedy under Art. 79 is only available when impediment causes the non-performance of a party [*Cl. Memo., p. XLV, ¶141; UNIDROIT Commentary 2004, p. 184; Dawwas, 12; Bund, 390; Brunner, p. 400; Honnold, p. 629; Maskow, p. 644; Rimke, pp. 201-202*]. In the present case, performance has already been rendered by CLAIMANT, therefore, a remedy under Art. 79 cannot be claimed.

4.2. ADAPTATION IN CASE OF HARDSHIP CANNOT BE ALLOWED UNDER PICC

153. After conceding that Art. 79 CISG does not allow for adaptation, CLAIMANT has relied solely on the argument that PICC meet the requirements of an international trade usage under Art. 9(2) CISG and therefore, can be used to provide for adaptation in the present case CISG [*Cl. Memo., pp. XLVI-XLVII, ¶¶142-149*]. Contrary to this, RESPONDENT submits that PICC are not applicable as they do not qualify as trade usage under Art. 9(2) CISG **(4.2.1.)**; and PICC cannot be used for gap filling **(4.2.2.)**.

4.2.1. PICC do not qualify as trade usage under Art. 9(2) CISG

154. Art. 9(2) CISG binds parties to a trade usage which parties knew or ought to have known and which in international trade is "widely known" and "regularly observed". Contrary to CLAIMANT's assertion, neither do PICC as a whole constitute trade usage **(4.2.1.1.)**; nor does Art. 6.2. PICC constitute trade usage under Art. 9(2) CISG **(4.2.1.2.)**.

4.2.1.1. PICC AS A WHOLE DO NOT CONSTITUTE TRADE USAGE

155. PICC, even if widely known, do not form trade usage under Art. 9(2) [*Gotanda, p. 23*]. General contract principles, such as PICC typically do not qualify as trade usages, being practices of commerce that are regularly observed by only those involved in a particular industry or marketplace [*Honnold, pp. 126-127; Fawcett/Harris/Bridge, p. 936*]. Further, as admitted by CLAIMANT, the threshold for consideration of sets of rules and corresponding usages like PICC committed to writing is much higher, since the requirements of ¶2 must be met for all of the rules contained therein [*Cl. Memo., p. XLVI, ¶¶146*]. In order to qualify as trade usage *in toto*, all the Articles would have to be shown to be regularly observed and widely known, which is not true for PICC [*Bridge, p. 7*].

156. Therefore, PICC as a whole do not form trade usage under Art. 9(2) CISG.

4.2.1.2. ART. 6.2. PICC DOES NOT CONSTITUTE TRADE USAGE

157. Undoubtedly, individual provisions of PICC can be deemed trade usage if they meet the prerequisites under Art. 9(2) CISG [*UNCITRAL Digest ; p.189, ¶16*]. Admittedly, both parties have places of business in areas where PICC is established, as the domestic contract law of both parties' countries is a verbatim adoption of PICC [*Proc. Or. No. 1, p. 53, THE PROBLEM*]. However, the essential conditions of PICC being widely known and regularly observed are not fulfilled.

158. Observation of a practice only in domestic sales is not enough to constitute trade usage; the practice needs to be observed in international sales [*Honnold, p. 173; Schmidt-Kessel in Schlechtriem/Schwenzer 2nd ed., pp. 186-187; OLG Frankfurt July 1995*]. Whether a practice is observed by those in a particular industry or business, depends on an individualized factual analysis [*Schlechtriem/Schwenzer 2nd ed., p. 147-149*]. The burden of proving that a practice amounts to trade usage rests on the party alleging it is a trade usage [*Pamboukis, p. 117; Pizza cartons case; CLOUT Case No. 347*]. And if the party that carries the burden of proof does not succeed in proving it, the usages will not be binding [*Pamboukis, p. 125; CLOUT Case No. 347; Propane case; Damstahl v. ATI; MSG v. SARL*].

159. In the present case, the burden of proving PICC is a trade usage lies on CLAIMANT since it has alleged PICC to be a trade usage. However, it has furnished no facts to suggest that Art. 6.2. PICC or provisions under it were widely known or regularly observed by the parties in international trade of Horse Semen. In any case, generally, PICC provisions on hardship are not considered to be an expression of trade usages under Art. 9(2) [*Da Silveira, p. 338; ICC Case No. 8873 of 1997; ICC Case No. 12446 of 2004*].

160. Therefore, Art. 6.2. PICC does not constitute trade usage under Art. 9(2) CISG.

4.2.2. PICC cannot be used for gap filling

161. A matter governed by, but not expressly settled by CISG constitutes an internal gap and has to be settled in conformity with general principles of CISG [*Art. 7(2), CISG*]. CLAIMANT asserted that PICC can be used to prove hardship under CISG [*Not. Of Arb., p. 8, THE PROBLEM*]. RESPONDENT submits that not only can PICC not be used as a trade usage under Art. 79 CISG, they can also not be used to fill gaps related to hardship.

162. Hardship has been specifically excluded from CISG [*supra, ¶¶144-152*]. Thus, there is no gap in CISG pertaining to hardship. In any case, PICC are not fit to be used for gap filling as they do not constitute general principles of CISG [*Tepeš, p. 688*]. PICC were adopted 14 years after CISG and were drafted by a different institution [*Yesim et al, p. 117; Klepac, p. 39*]. The scopes of

application of the two instruments are significantly different [*Art. 1(1) CISG; Tepeš, p. 688*]. Further, while PICC may be general principles of international commercial or trade law, they are not general principles of CISG [*Tepeš, p. 682; Flechtner, p. 85*]. Furthermore, adaptation in case of hardship favors a Civilian as opposed to Common Law position on a controversial question [*Flechtner, p. 11*]. CISG was adopted as a compromise and system of solutions acceptable to lawyers from all legal tradition, and using PICC to fill the gaps would violate the need to interpret it by having regard to its international character [*Zeller, p. 175; Schlechtriem/Schwenzer 3rd ed., p. 123*]. Therefore, PICC cannot be used to fill gaps related to hardship.

4.3. IN ANY CASE, THE CONDITIONS FOR HARDSHIP HAVE NOT BEEN MET

163. Even if hardship was held to be included under CISG, or PICC were held to be applicable, CLAIMANT would not be entitled to any amount as the conditions for hardship have not been met. As argued already, a mere 30% rise in price cannot justify a claim for hardship as the threshold limit is not satisfied [*supra, ¶¶122-124*]. The threshold limit cannot be lowered either [*supra, ¶¶125-129*]. Further, by agreeing to a delivery DDP, claimant had accepted the risk of import tariff, and thus, cannot claim hardship [*supra, ¶¶97-102*]. Therefore, the conditions for hardship have not been met.

CONCLUSION OF ISSUE III (2)

As admitted by CLAIMANT, hardship is not covered under Art. 79 CISG. In any case, application of Art. 79 CISG has been excluded by the parties under Art. 6 CISG. CLAIMANT cannot rely on Art. 6.2. PICC for adaptation. Neither PICC as a whole, nor Art. 6.2. PICC amount to trade usage under Art. 9(2) CISG. PICC can also not be used for gap filling.

PRAYER FOR RELIEF

For the above reasons, Counsel for RESPONDENT respectfully requests the tribunal to find that:

- The tribunal does not have the power to adapt the contract under the arbitration agreement;
- CLAIMANT is not entitled to submit evidence from the other arbitration proceedings;
- *In any case,* CLAIMANT is not entitled to the payment of US$ 1,250,000, or any other amount, under Clause 12 of the contract or under CISG.

Certificate and Choice of Forum

We, the Team for National Law School of India University, hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

✔ Our School is competing in both Vis East Moot and Vienna Vis Moot.

✔ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representatives of the Team for National Law School of India University

Stuti Rai — Stuti Rai

Anahad Narain — Anahad Narain

D. Mehrotra — Dhruv Mehrotra