SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION

MEMORANDUM FOR CLAIMANT

UNIVERSITAS PADJADJARAN

INDONESIA

On behalf of:

Phar Lap Allevamento

Rue Frankel 1

Capital City

Mediterraneo

Against:

Black Beauty Equestrian

2 Seabiscuit Drive

Oceanside

Equatoriana

COUNSELS

JORRYN ALEXANDER ROTTY • MICHAEL CHRISTOPHER FERDIAN •

MUHAMMAD LAZUARDY THARIQ MAKMUN • RAFI ADRIAN RAHAD

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INDEX OF ABBREVIATIONS

&	And
¶/¶¶	paragraph/paragraphs
%	percent
§	Section
2013 Rules	2013 HKIAC Rules
Ans. NoA.	Answer to Notice of Arbitration
Arbitration Clause	Clause 15 of the Frozen Semen Sales Agreement
Art.	article
Choice of Law Clause	Clause 14 of the Frozen Semen Sales Agreement
Cl. Memo	CLAIMANT's Memorandum
the Contract	The Frozen Semen Sales Agreement concluded by the Parties
the Convention	1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
DDP (INCOTERMS 2010)	Delivery Duty Paid
the Doctrine	the doctrine of separability
the Goods	the frozen horse semen
Hardship Clause	hardship clause incorporated under Clause 12 of the Frozen Semen Sales Agreement
HKIAC Rules	Hong Kong International Arbitration Centre Rules
IBA Rules	International Bar Association Rules on Taking of Evidence
Ibid.	ibidem (in the same place)
ICC	International Chambers of Commerce
ICSID	International Centre for Settlement Investment Dispute

INCOTERMS	International Commercial Terms
Intel	intelligence company that provides information on the horseracing industry
LCIA Rules	London Chamber of International Arbitration Rules
Ltd.	Limited
Model Law	The 2006 UNCITRAL Model Law
NoA	CLAIMANT's Notice of Arbitration
p./pp.	page/pages
the Parties	CLAIMANT and RESPONDENT
PIA	Partial Interim Award from the other arbitration involving RESPONDENT
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
Predecessor Negotiators	CLAIMANT's and RESPONDENT's first pair of negotiators which consist of respectively, Ms. Napravnik and Mr. Antley
Resp. Ex.	RESPONDENT's Exhibition
Successor Negotiators	CLAIMANT's and RESPONDENT's second pair of negotiators which consist of respectively, Mr. Ferguson and Mr. Krone
the Theory	the seat theory
The Tribunal	the arbitral tribunal in the present dispute
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2010
US$	United States Dollar
v.	versus
WTO	World Trade Organization

INDEX OF AUTHORITIES

BUSHAN, Abhinav	*Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line Rule?, 25 Am. Rev.* (Int'l Arb., 2014) Cited as: Bushan Cited in:
BUYS, Cindy	*The Tension Between Confidentiality and Transparency in International Arbitration* (Int'l Arb., 2003) Cited as: Buys Cited in: ¶47
FERNYHOUGH, Richard	*A World of Choice: the Competition for International Arbitration Work - Part I Asian Dispute Review* Volume 10 Issue 2) pp. 44- 47 (Hong Kong International Arbitration Centre (HKIAC) 2008) Cite as: Fernyhough
FOUCHARD, Phillipe **GAILARD, Emmanuel** **GOLDMAN, Berthorld**	*InternationaI Commercial Arbitration* p. 24, (Kluwer Law International, 1999) Cited as: Fouchard/Gailard/Goldman Cited in:
FUCCI, Frederick R.	*Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance* (American Bar Association, 2006) Cited as: Fucci Cited in: ¶*112*

GAILLARD, Emmanuel **SAVAGE, John**	*International Commercial Arbitration* (The Hague, London, Boston, 1999) Cited as: Gaillard/Savage Cited in: ¶6, ¶9, ¶11, ¶12, ¶ 13, ¶14, ¶ 25
GLICK, Ian **NIRANJAN, Venkatesan** **KAPLAN, Neil** **MOSER, Michael J.**	*Jurisdiction, Admissibility, and Choice of Law in International Arbitration* (Kluwer Law International, 2018) Cited as: Kaplan/Moser/Glick/Venkatesan Cited in: ¶11, ¶12
HAY, Emily	*'Winds of Change? Confidentiality and in International Commercial Arbitration',* (© Carlos González-Bueno Catalán de Ocón; Dykinson, S.L. 2018) Cited as: Hay Cited in: ¶47
HONNOLD, John O.	*Uniform Law for International Sales under the 1980 United Nations Convention,* (Kluwer Law International, 1999) Cited as: Honnold Cited in: ¶*114*
HUBER, Peter **MULLIS, Alastair**	*The CISG: A New Textbook for Students and Practitioners* p. 12 (Sellier European Law Publishers, 2007) Cited as: Huber/Mullis Cited in: ¶88, ¶97
ICC	*Incoterms® Rules 2010* *Accessible at http://iccwbo.org* *Cited as: INCOTERMS 2010* Cited in: ¶*134*

IRETON, Jessica O.

The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidenc, (ICSID Review, Vol. 30, No. 1., 2015).

Cited as: Ireton

Cited in:

KARTON, Joshua

A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards, Arbitration International, Volume 28 Issu (Journal of International Dispute Settlement, 2015)

Cited as: Karton

Cited in: ¶60

LANDO, Ole

A Vision of Future World Contract Law: Impact of European and UNIDROIT Contract Principles, (Pace Institute of International Commercial Law, 2004)

Cited as: Lando

Cited in: ¶*141*

LEW, Julian D. M.
MISTELIS, Loukas A.
KRÖLL, Stefan Michael

Comparative International Arbitration Law
(The Hague: Kluwer Law International, 2003.)
Cited as: Lew/Mistelis/Kröll
Cited in: ¶12

LINDSTROM, Niklas

Changed Circumstances and Hardship in the International Sales of Goods (Nordic Journal of Commercial Law, 2006)

Cited as: Lindstrom

Cited in: ¶*115*

LIU, Chengwei

Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL §22.3.2 (Pace Law School Institute of International Commercial Law, 2003)
Cited as: Liu

Cited in: ¶81, ¶85, ¶*113, ¶118, ¶123*

MARGHITOLA, Reto

Interpretation of the IBA Rules'

Document Production in International Arbitration, International Arbitration Law Library, Volume 33 (© Kluwer Law International; Kluwer Law International, 2015)

Cited as: Marghitola

Cited in: ¶40, ¶59

MAYER, Pierre

The Limits of Severability of the Arbitration Clause Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention

(ICCA Congress Series, Volume 9, 1999)

Cited as: Berg/Mayer

Cited in: ¶ 13

MOSER, Michael
BAO, Chiann

*A Guide to the HKIAC Arbitration Rules, (*HKIAC Secretary-General, Hong Kong International Arbitration Centre, 2013)

Cited as: Moser/Bao

Cited in: ¶40

MOSES, Margaret L.

The Principles and Practices of International Commercial Arbitration

(Cambridge University Press, New York, 2008)

Cited as: Moses

Cited in: ¶6

NAZZINI, Renato
The Law Applicable to the Arbitration Agreement: Towards Transnational Principles
International and Comparative Law Quarterly, Volume 65, Issue 03 (2016), pp. 681-703
(King Research Portal, 2016)
Cited as: Nazzini
Cited in: ¶11, ¶12, ¶13

O'MALLEY, Nathan D.
Rules of Evidence in International Arbitration: An Annotated Guide (Informa Law, 2012)
Cited as: O'Malley
Cited in: ¶41, ¶62, ¶66, ¶67

ONYEMA, Emilia
International Commercial Arbitration and the Arbitrator's Contract
(Routledge, 2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN, 2010)
Cited as: Onyema
Cited in: ¶6, ¶9

PERILLO, Joseph
Force Majeure and Hardship Under The UNIDROIT Principles of International Commercial Contracts (5 Tul. J. Int'L. & Comp.5, 1997)
Cited as: Perillo
Cited in: ¶117, ¶130

POOROOYE, Avinash
FEEHILY, Rońan
Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance
(Harvard Negotiation Law Review, Vol. 22: Spring 2017)
Cited as: Poorooye/Feehily
Cited in: ¶47

REDFERN, Alan **MARTIN, Hunter**	*Law and Practice of International Commercial Contract* (Sweet & Maxwell, London, 6th ed. 2015) Cited as: Redfern/Hunter Cited in: ¶4, ¶6, ¶13, ¶14, ¶30
RIMKE, Joern	*Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, Pace Review of the Convention on Contracts for the International Sale of Goods* (Kluwer, 1999-2000) Cited as: Rimke Cited in: ¶¶*130, 131*
SCHLECHTRIEM, Peter **BUTLER, Petra**	*UN Law on International Sales The UN Convention on International Sales of Goods (*Springer, 2009*)* Cited as: Schlechtriem/Butler Cited in: ¶*113*
SCHWENZER, Ingeborg **HACHEM, Pascal** **KEE, Christopher**	*Global Sales and Contract Law* (Oxford University Press, 2012) Cited as: Schwenzer/Hachem/Kee Cited in: ¶20, ¶87, ¶97, ¶99, ¶147
SILVEIRA, Mercedeh Azerdo Da	*Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation* (Wolters Kluwer Law and Business, 2014) Cited as: Silveira Cited in: ¶149

SMUREANU, Ileana M.

Confidentiality in International Commercial Arbitration, International Arbitration Law Library, Volume 22 (© Kluwer Law International; Kluwer Law International, 2011)

Cited as: Smureanu

Cited in: ¶62

URIBE, Momberg R.A.

The effect of a change of circumstances on the binding force of contracts, Comparative perspectives, Ius Commune Europaeum Series, no. 94. (METRO, the Institute for Transnational Legal Research at the Maastricht University, 2012)
Cited as: Uribe
Cited in: ¶96

WAINCYMER, Jeffrey

Procedure and Evidence in International Arbitration, (© Kluwer Law International; Kluwer Law International, 2012)

Cited as: Waincymer

Cited in: ¶31, ¶41

WEIDEMAIER, W. Mark C.

Toward A Theory Of Precedent In Arbitration (William And Mary Law Review, 2010)

Cited as: Weidemaier

Cited in:

WOLFGANG, Peter

Contractual Leverage, Section 3. Adaption, Force Majeure and Renegotiation Clauses, Arbitration and Renegotiation of International Investment Agreements p. 250 Chapter 4 (Kluwer Law International; Kluwer Law International, 1995)
Cited as: W. Peter
Cited in: ¶94

WTO

What is The World Trade Organization?

Accessible at http://wto.org

Cited as: What is The World Trade Organization?

Cited in: ¶*125*

ZACCARIA, Christine Elena

The Effects of Changed Circumstances in International Commercial Trade. p. 150 (International Trade and Business Law Review, 2004)

Cited as: Zaccaria

Cited in: ¶*100, ¶129*

ZHIKO, Stalev

New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions, ICCA Congress Series, Volume 1 pp. 199-209 (Kluwer Law International, 1983)

Cited as: Zhiko

Cited in: ¶96

INDEX OF CASES

UK	Arsanovia Ltd v. Cruz City I Mauritius Holdings [2012], High Court of England and Wales Case No. EWHC 3702 (Comm) Cited as: Arsanovia Ltd v Cruz City I Mauritius Holdings Karl Leibinger and Anr v. Stryker Trauma GmbH [2006], High Court of England and Wales Case No. EWHC 690 Cited as: Leibinger v Stryker Trauma GmbH Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi v. VSC Steel Company Ltd. [2013] High Court of England and Wales Case No. EWHC 4071 (Comm) Cited as: Habas v VSC Cited in: ¶101 Sonatrach Petroleum Corp v. Ferrell International Ltd [2001], High Court of England and Wales Case No. EWHC 481 (Comm) Cited as: Sonatrach Petroleum Corp v Ferrell International Ltd. ¶6 Sul América Cia Nacional De Seguros S.A v. Enesa Engenharia S.A. [2012] England and Wales Court of Appeal Case No: EWCA Civ 638 Cited as: Sul América v Enesa Engenharia Cited in: ¶4, ¶ 30 Ali Shipping Corporation v Shipyard Trogir [1999]

	English Court of Appeal Case No: 1 W.L.R. 314 Cited as: Ali Shipping v. Shipyard Trogir
	Hassneh Insurance Co of Israel v. Stuart J Mew [1993] 2 Lloyd's Rep. 243. Cited as: Hassneh
	Associated Electric & Gas Insurance Services Limited v European Reinsurance Company of Zurich [2003] Case No: UKPC 11 Cited as: Aegis v. European Re Cited in: ¶54
United States Court	Wultz v. Bank of China Ltd., 942 F. Supp. 2d 452, 467 (S.D.N.Y. 2013)
	Century Indemnity Company *v* Certain Underwriters at Lloyd's [2009] Case No: 08-2924. Cited as: Century Indemnity Co v. Certain Underwriters at Lloyd Cited in: ¶41
High Court of Bombay, India	Sumitomo Heavy Industries Ltd. v. Oil & Natural Gas Commission of India [2001] High Court of Bombay, India Civil Appeal No. 8341 Cited as: Sumitomo v Oil Case Cited in: ¶ 14
Singapore high court	AAY and others v. AAZ [2005], Singapore High Court Cited as: AAY v AAZ
General Court (European Court)	Persia International Bank plc v. Council of the European Union [2013], General Court (European Union) Case No. T-493/10 Cited as: Persia International Bank v Council

Supreme Court of Columbia	Quintette Coal Ltd. v. Nippon Steel Corporation, [1991] Supreme Court of Columbia Case no. CanLII 5708 (BC CA) Cited as: Quintette v. Nippon Steel Cited in: ¶21
Stockholm Chamber of Commerce	RosInvestCo UK Ltd. v. The Russian Federation SCC [2005] Case No. V079/2005 Cited as: RosInvestCo UK v. Russian Federation Cited in: ¶69

INDEX OF ARBITRAL AWARDS

International Chamber of Commerce (ICC)	ICC International Court of Arbitration 11869 Case No.11869 Cited as: ICC Case No. 11869 Cited in: ¶7, ¶ 14
	ICC International Court of Arbitration (seat Essen, Germany) Case No. 2626, 1977 Cited as: ICC Case No. 2626 Cited in ¶4, ¶7
	ICC International Court of Arbitration Case No. 4367, 1984 Cited as: ICC Case No. 4367 Cited in: ¶7
	ICC International Court of Arbitration Case No. 1639, 2011 Cited as: ICC Case No. 1639 Cited in: ¶151
	ICC International Court of Arbitration Case No. 12990 Cited as: ICC Case No. 12990 Cited in: ¶41
	ICC International Court of Arbitration Case No: 12761 Cited as: ICC Case No. 12761 Cited in: ¶41
	Century Indemnity Company *v* Certain Underwriters at Lloyd's [2009] Case No: 08-2924. Cited as: Century Indemnity Co v. Certain Underwriters at Lloyd Cited in: ¶41

Ad Hoc Arbitral Tribunal	Methanex Corporation v. United States of America [2005], Ad Hoc Tribunal (UNCITRAL) Case No. 44 ILM 1345 Cited as: Methanex v USA Cited in:
	The American Independent Oil Company v. The Government of the State of Kuwait [1982] Ad Hoc Arbitral Tribunal Case No. 21 ILM 976 Cited as: Aminoil v Kuwait Cited in: ¶103
ICSID	Amco Asia Corporation and others v. Republic of Indonesia, [1988] ICSID Case No. ARB/81/1 Cited as: Amco v. Indonesia Cited in: ¶62
	EDF (Services) Ltd *v* Romania [2009] ICSID Case No. ARB/05/13 Cited as: EDF Services Ltd v. Romania Cited in: ¶66
	Libananco Holdings Co Ltd v *Republic of Turkey* [2008] ICSID Case No. ARB /06/08 Cited in: ¶66
	Aguas del Tunari, S.A. v. Republic of Bolivia ICSID Case No. ARB/02/3 Cited as: ICSID No. ARB/02/2 Cited in: ¶60

Tribunal Supremo	Parties Unknown [2014] Case No. 333/2014;30.06.2014 Cited as: Tribunal Supremo No. 333/2014 Cited in:
Permanent Court of Arbitration	Hulley Enterprises Limited (Cyprus) v. The Russian Federation [1995] Case No. AA 226 Cited as: Hulley Enterprises v. The Russian Federation Cited in:

INDEX OF LEGAL SOURCES, RULES, AND TREATIES

CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2010
HKIAC Rules 2013 and 2018	Hong Kong International Arbitration Centre Rules 2013 and 2018
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration, 1985 with amendments as adopted in 2006
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
ICC Rules	International Chamber of Commerce Rules, 1998
LCIA Rules	The London Court of International, Arbitration 2014

STATEMENT OF FACTS

The Parties to the present arbitration are Phar Lap Allevamento ["CLAIMANT"] and Black Beauty Equestrian ["RESPONDENT"].

CLAIMANT is Mediterraneo's oldest and most renown stud farm
RESPONDENT is a world-famous equestrian farm located in Equatoriana

21 March 2017	RESPONDENT contacted CLAIMANT, inquiring about the availability of its top horse, Nijinsky III for its newly started breeding program since the Equatorianan Government had temporarily lifted the ban on artificial insemination
24 March 2017	CLAIMANT offered 100 doses of Nijinsky III's frozen semen
28 March 2017	RESPONDENT accepted the offer, and also replied asking CLAIMANT for DDP
31 March 2017	CLAIMANT accepted the DDP obligation.
10 April 2017	RESPONDENT requested that the law of arbitration should be governed by the law of the place of arbitration and not by the law of the contract.
11 April 2017	CLAIMANT requested that the seat of arbitration shall be Danubia.
12 April 2017	Both of the Parties negotiators attended the annual colt auction in Danubia. While going on their way to the annual colt auction, both Ms. Napravnik and Mr. Antley, were severely injured in a car accident
6 May 2017	The Parties concluded the Contract
18 May 2017	The first payment installment from RESPONDENT in the amount of US$ 5,000,0000
20 May 2017	The first shipment from CLAIMANT in the amount of 25 doses
3 October 2017	The second shipment from CLAIMANT in the amount of 25 doses
20 December 2017	The newly elected president of Mediterraneo imposed a new tariff on agricultural products.

15 January 2018	The new tariff from Equatoriana took effect
20 January 2018	CLAIMANT' requested RESPONDENT's clarification regarding the delivery of the Goods because of the newly imposed tariff
21 January 2018	The second payment installment from RESPONDENT in the amount of US$ 5,000,000 RESPONDENT promised CLAIMANT for renegotiation of the purchase price and insisted CLAIMANT to send the Goods for the third instalment
23 January 2018	The third shipment from CLAIMANT in the amount of 50 doses
12 February 2018	The Parties had a meeting to renegotiate the purchase price which ended without them reaching a new agreement.
6 July 2018	RESPONDENT's employees were fired to keep all information regarding the other arbitral proceeding confidential.
31 July 2018	RESPONDENT received CLAIMANT's Notice of Arbitration. Incorporated in the same document, the appointment of Ms. Wantha Davis as its arbitrator.
1 August 2018	Ms. Wantha Davis, CLAIMANT's appointed arbitrator, submitted her Declaration of Acceptance and statement of Availability, Impartiality, and Independence.
24 August 2018	RESPONDENT has paid its share of the initial deposits. RESPONDENT also nominates Dr. Francesca Dettorie as its arbitrator.
27 August 2018	HKIAC confirmed the party-appointed arbitrators' designations as the co-arbitrators.
14 September 2018	The Parties have agreed to designate Prof. Calvin de Souza as Presiding Arbitrator.
2 October 2018	CLAIMANT sent an email to Arbitral Tribunal stating that it received reliable information at the annual breeder conference about another arbitration.
3 October 2018	RESPONDENT objects CLAIMANT's allegation of contradictory behavior.

SUMMARY OF ARGUMENTS

1. Upholding the sanctity of the Contract, CLAIMANT fulfilled its obligation by enduring the DDP price and delivered the frozen horse semen even in the wake of an unforeseen tariff policy on the grounds of the Hardship Clause and renegotiation. RESPONDENT on the other hand, ignored to even consider the value of the Hardship Clause by ending the renegotiation and slandered that CLAIMANT's requests were too excessive.
2. In light of RESPONDENT's ill-fated behavior, the Tribunal possesses the jurisdiction to adapt the Contract. Since Mediterranean Contract Law governs the Contract, it provides for a broad interpretation of the Contract. Consolidated further by the jurisprudence of Mediterraneo. RESPONDENT have consented to the arbitration law in an implicit manner. Assuming that Danubian Law is applicable to the arbitration agreement, a pivotal aspect of arbitration as to Parties' rational commercial purpose shall be rendered as futile (**ISSUE I**)
3. In an effort to further convince the Tribunal that it has the power to grant Contract adaptation, a partial interim award which emanated from an arbitration between RESPONDENT and a party in Mediterraneo shall be submitted before the Tribunal as evidence. RESPONDENT baselessly alleged that a breach of confidentiality or an illegal hack are the only plausible method of its obtainment. Regardless of RESPONDENT's unfounded claims, the partial interim award is still an admissible evidence since it holds tremendous relevance and materiality, and exclusion derived from a breach of confidentiality or an illegal hack is unjustifiable (**ISSUE II**).
4. Now that the jurisdictional grounds have been established, the situation of the merits of the dispute all lean towards an adaptation of the Contract. The Tribunal can derive its power from the Hardship Clause provided in Clause 12. Moreover, the situation surrounding the present dispute falls within the ambit of contract adaptation under the UNIDROIT Principles. If the Tribunal were to reject the adaptation of the price, it would be too burdensome for CLAIMANT since the tariff policy is not the only financial issue which CLAIMANT must endure. Internal profit problems had been engulfing CLAIMANT's financial status since 2013 and selling the frozen horse semen is a method of recovering profit. By denying for any need of Contract adaptation, RESPONDENT is not only cornering CLAIMANT in a disadvantageous financial position, but also degenerating the core value of the Contract itself (**ISSUE III**).

ARGUMENTS

I. ISSUE A: THE TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. Under the doctrine of *kompetenz-kompetenz*, the present tribunal (**hereinafter "the Tribunal"**) has the jurisdiction to hear the case to decide on its own jurisdiction [*Art. 19, HKIAC Rules*]. It is with this doctrine in mind that, after the tariff policy occurred [*NoA, ¶11, p. 6*], CLAIMANT submits that the Tribunal has the power to adapt the Frozen Semen Sales Agreement (**hereinafter "the Contract"**) as requested by CLAIMANT.
2. RESPONDENT challenges the jurisdiction of the Tribunal to adapt the Contract on the ground that Danubian law governs the Clause 15 of the Contract (**hereinafter "Arbitration Clause"**), rendering the Tribunal with no jurisdiction to adapt the Contract due to the narrow interpretation of the scope of the Arbitration Clause under Danubian law. CLAIMANT respectfully requests the Tribunal to declare that the adaptation of the Contract undisputedly falls within the scope of the Arbitration Clause [*NoA, ¶16, p. 7*], provided that Mediterranean law governs the Arbitration Clause **(A)**. Furthermore, the seat theory, which would Danubian law, should not be applied in the present case **(B)**. In any event, the Application of Danubian law will defeat the rational commercial purpose to arbitrate **(C)**.

A. MEDITERRANEAN LAW SHALL GOVERN THE ARBITRATION AGREEMENT

3. CLAIMANT submits that Mediterranean law shall directly govern the Arbitration Clause in the absence of an expressed choice of law **(i)**. Further, the Doctrine of Separability (**hereinafter "the Doctrine**") does not preclude the application of Mediterranean law **(ii)**. In any event, RESPONDENT exhibits an acceptance to the application of Mediterranean law **(iii)**.

i. Mediterranean Law shall directly govern the Arbitration Agreement in the absence of an expressed choice of law

4. An expressed choice of law would by default govern the arbitration agreement. However, in the absence of such, courts and tribunals have endorsed the practice of deriving the choice of law from the implied choice and the 'closest' law [*Redfern/Hunter, ¶3.19, p. 95; ICC Case No. 2626; Sul América v Enesa Engenharia; Habas v VSC*].
5. Accordingly, Mediterranean law shall directly govern the Arbitration Clause as derived from the implied choice contained in Clause 14 of the Contract (**hereinafter "the Choice of Law**

Clause") **(a)**. Failing any indication thereon, Mediterranean Law governs the Contract through the 'closest connection' principle **(b)**.

a. The Choice of Law Clause constitutes an implied Choice of Law

6. The inclusion of Mediterranean law in the Choice of Law Clause constitutes an implied choice of law to govern the Arbitration Clause. A reference of *lex contractus* in the choice of law clause is considered to be sufficient in showing the intention and acceptance of the parties towards the application of *lex contractus* in governing the arbitration agreement [*Redfern/Hunter, ¶3.12, p. 94; Gaillard/Savage, p. 223; Born, §2.06; Onyema, p. 23; Moses, p. 67; Sonatrach Petroleum Corp v Ferrell International Ltd*]. This measure has also been reinforced in numerous precedents [*ICC No. 4367; ICC No. 5294; Peterson Farms Inc v C & M Farming Ltd; Sonatrach Petroleum Corp v Ferrell International Ltd; Arsanovia Ltd v Cruz City I Mauritius Holdings*].

7. In one case, the tribunal was in favor of the extension of the law governing the contract to the arbitration clause, as there was no indication that parties wished for the contrary [*ICC No. 11869*]. An undivided opinion also occurred in a separate ICC case, where the tribunal went to the extent on saying that the law governing the contract presumptively applies to the arbitration clause [*ICC No. 2626*].

8. Similarly, there is no indication to say that the Parties would have wanted to apply another law except for Mediterranean law, as proven by the absence of any expressed choice of law governing the Arbitration Clause concluded in the Contract [*Cl. Ex. C 5, ¶14, p. 14*]. The Choice of Law Clause thus constitutes an implied choice of law to refer to Mediterranean Law as the law of the Arbitration Clause.

b. Mediterranean Law has the "Closest Connection" to the Arbitration Agreement

9. Should the Tribunal deem that the arbitration agreement is silent on the expressed and implied choice, the law which has the 'closest connection' would govern the arbitration agreement [*Gaillard/Savage, ¶425, p. 222*]. This denotes that the 'closest' law should be prioritized in determining the governing law for the arbitration agreement [*Ibid, ¶425, p. 223*], which could be derived from the place of the conclusion of the arbitration agreement [*Onyema, p. 23*]. Evidently, the Contract was concluded in Mediterraneo along with the Arbitration Clause [*PO 2, ¶13, p. 56*]. Hence, Mediterranean law should be considered to be the law with 'closest connection' to the Arbitration Clause.

ii. The Doctrine of Separability does not preclude the Application of Mediterranean Law

10. RESPONDENT alleged that Mediterranean law could not be directly applied due to the Doctrine, which completely separates the Arbitration Clause with other clauses of the Contract [*Ans. NoA., ¶14, p. 31*]. As opposed to RESPONDENT's allegation, CLAIMANT submits that the Doctrine does not preclude the direct application of Mediterranean law from governing the Arbitration Clause for two reasons.

11. First, the Doctrine only serves certain purposes, such as the assessment of the existence, validity, and effectiveness of the arbitration agreement [*Gaillard/Savage, ¶410, p. 210; Kaplan/Moser/Glick/Venkatesan, §9.02, p. 132; Nazzini, §II, p. 3*]. This is affirmed by Model Law and HKIAC Rules, which limit the application of the Doctrine through Art. 16 and Art. 19(2) respectively.

12. Specifically, the usage of the phrase "…*For that purpose*…" and "…*For the purpose of*…" by the two abovementioned articles questions "*the existence or validity*" of the arbitration agreement, limiting the scope of the Doctrine [*Lew/Mistelis/Kröll, ¶¶6.9, 6.14, pp. 102, 104*; *Kaplan/Moser/Glick/Venkatesan, §9.05, p. 137*]. For that reason, parties are able to invoke the arbitration agreement to pursue its claim in the event the main contract is invalid [*Gaillard/Savage, ¶410, p. 210; Nazzini, §II, p. 3*]. At hand, the dispute brought to the arbitration concerns the law governing the Arbitration Clause, which is not contemplated by the Doctrine.

13. Second, the Arbitration Clause is not completely separated from the Contract [*Redfern/Hunter, ¶3.13, p. 94; Gaillard and Savage, ¶425, p. 222*; *Nazzini, §II, p. 3; Berg/Mayer p. 264*]. As endorsed in the case of *Leibinger v Stryker Trauma GmbH*, the arbitration clause remains adjunct to the contract despite the Doctrine. This is evident by the fact that there is no distinction from acceptance of the arbitration clause and of the contract [*Gaillard/Savage, ¶408, p. 209; Berg/Mayer p. 264*]. It denotes that acceptance of the contract also entails acceptance of the arbitration clause, such as the case at hand [*Cl. Ex. C 5, ¶15, p. 14*].

14. The application of the Doctrine merely gives the possibility for different laws to govern the arbitration agreement [*Redfern/Hunter, ¶3.12, p. 94; Born, § 4.02, ¶476; Gaillard/Savage, ¶412, p. 212; Sumitomo v Oil Case*]. Further emphasis was done by the tribunal in an ICC case which considered that the Doctrine does not nullify the extension of the choice of law for the contract to the arbitration agreement [*ICC No. 11869*]. Subsequently, the Doctrine does not exclusively

subject the Arbitration Clause to a certain law, allowing Mediterranean law to apply in the case at hand.

15. In conclusion, the Doctrine does not preclude the application of Mediterranean law in governing the Arbitration Clause.

iii. RESPONDENT accepts the application of Mediterranean Law

16. While on the one hand RESPONDENT refutes the applicability of Mediterranean Law [*Ans. NoA., ¶14, p. 31*], RESPONDENT had in fact accepted the application of Mediterranean law. This shall be evaluated by interpreting RESPONDENT's behavior in accordance with Art. 8 of the Convention on International Sales of Goods (**hereinafter "CISG"**) as agreed by the Parties [*Cl. Ex. C 5, ¶14, p. 14*].

17. Considering prior relevant circumstances, RESPONDENT's statements and conducts exhibit an acceptance to the application of Mediterranean law **(a)**. In addition, any reasonable person given the same circumstances would interpret RESPONDENT's conduct and statements as an acceptance to Mediterranean law **(b)**.

a. RESPONDENT's subsequent conducts and statements exhibit an acceptance to Mediterranean Law

18. Through an assessment of the facts, RESPONDENT has never intended to apply any other law to govern the Arbitration Clause except for Mediterranean law. This is proven by RESPONDENT's behavior during the process of negotiation, specifically the lack of RESPONDENT's rejection towards CLAIMANT's proposal in the email of 11th April 2017. Instead, RESPONDENT signed the Contract without objecting to any of the clauses provided within [*Cl. Ex. C 5, p. 14*], showing consent to applying Mediterranean law to govern the Arbitration Clause. Had RESPONDENT intended not to apply Mediterranean law, they would have made an objection or refused to sign the Contract.

19. Hence, RESPONDENT has shown intention to accept the application of Mediterranean law in governing the Arbitration Clause.

b. Any Reasonable Person given the same circumstances would exhibit an acceptance to the application of Mediterranean law

20. In the event that the preceding method fails, any reasonable person of a kind, given the same circumstances, would construe RESPONDENT's behavior as an acceptance to Mediterranean law. Considering the present circumstances, a reasonable person would be any person acting under a long-term international commercial contract [*Schwenzer/Hanchem/Kee, ¶26.11*].

21. As seen in the email of 28th March 2017, RESPONDENT expressed its interest in a long-term cooperation with CLAIMANT, being subject to future purchases [*Cl. Ex. C 3, p. 11*]. Further, both CLAIMANT and RESPONDENT agreed on the inclusion of Clause 12 of the Contract (**hereinafter "Hardship Clause"**) [*Cl. Ex. C 5, ¶12, p. 14*]. RESPONDENT's high interest in a long-term cooperation would lead the Parties to a long-term contract, which would be likely subject to amendments due to unstable circumstances. In relation to that, the Hardship Clause preserves Parties' intention to have a long-term cooperation, serving as a tool to claim for renegotiation and adaptation of contract [*Zaccaria, p. 150; Quintette Coal v Nippon Steel*].
22. Considering the legal consequences of a hardship clause [*Cl. Memo, ¶109*] and the expressed intention for long-term cooperation, any reasonable person acting under a long-term international commercial contract would have subjected itself to Mediterranean law, which grants for adaptation of the contract by virtue of the wide interpretation of the arbitration clause provided by it. Otherwise, parties would fail to have a long-term cooperation and moreover defeat the function of the hardship clause.
23. In that respect, RESPONDENT's behavior is construed as accepting the application of Mediterranean law.

B. THE SEAT THEORY SHOULD NOT BE APPLIED IN THE PRESENT CIRCUMSTANCES

24. As opposed to RESPONDENT's claim, the Theory is not applicable in the present circumstances since Danubia merely serves as a neutral forum for the Parties' proceeding **(i)**. Additionally, the Theory constitutes only a subsidiary choice of law **(ii)**.

i. Danubia merely serves as a neutral forum for Parties' proceeding

25. As falsely alleged by RESPONDENT, it is inappropriate to consider that the Parties have intended to apply Danubian law. The appointment of the seat of arbitration is merely for the convenience of a neutral forum [*Gaillard/Savage, ¶433, p. 227*].
26. As confirmed by the creditors' committee, Danubia does not require any special approval for its neutral character with a functioning judicial system [*PO 2, ¶14, pp. 56-57*]. It is further affirmed in prior emails between the Parties, where they chose Danubia for its neutral character [*Ibid*] . In the email on 28th March 2017, RESPONDENT emphasized that having the proceeding in Mediterraneo is inappropriate [*Cl. Ex. C 3, p. 11*] and subsequently proposed for Equatoriana [*Resp. Ex. R 1, p. 33*]. CLAIMANT responded with an objection to RESPONDENT's proposal

and finally suggested Danubia as a neutral forum to conduct the proceeding [*Resp. Ex. R 2, p. 34*].

27. Evidently, it is clearly proven that the aim of appointing Danubia as the seat of arbitration is merely to preserve the neutral character of arbitration, as no national jurisdiction affects the arbitration. It does not extend to bind the Parties to Danubian law.

28. Concluding, appointing Danubia merely satisfies the neutral criteria for a seat of arbitration.

ii. The Theory constitutes only a subsidiary choice of law

29. The Theory is a subsidiary choice of law, which constitutes a last resort as the applicable law for the arbitration agreement [*Art. V(1)(a), New York Convention; Art. 36(1)(i)(a), UNCITRAL Model Law*]. RESPONDENT may argue that the Theory directly applies to govern the Arbitration Clause in the present circumstances. However, the Theory could only be applied in two conditions.

30. First, in the absence of parties' expressed and implied choice of law [*Art. V(1)(a), New York Convention; Art. 36(1)(i)(a), UNCITRAL Model Law; Redfern/Hunter, ¶3.15; p. 159; Born, §4.04, pp. 495, 499; Gaillard and Savage, p. 219*]. Second, in the event the expressed or implied choice of law renders the award unenforceable [*Redfern/Hunter, ¶3.15; p. 159; Sulamérica. v Enesa Engenharia*]. Neither condition is met in the case at hand since the Parties made an implied choice to apply Mediterranean law [*Cl. Ex. C 5, ¶14, p. 14*] and Mediterranean law would not render the award unenforceable. Therefore, the Theory should not be applied in the present case.

C. THE APPLICATION OF DANUBIAN LAW WILL DEFEAT THE PARTIES' RATIONAL PURPOSE TO ARBITRATE

31. Generally, when reasonable businessmen enter into an agreement, they are presumed to have done so to achieve some rational commercial purpose, including in choosing the dispute resolution mechanism. Bearing the rational commercial purpose in mind, parties, as reasonable businessmen, wish to settle all disputes within a single mechanism to reduce the cost and time [*Born, p. 205; Waincymer, ¶3.2.5, p. 144; Fernyhough p. 47*].

32. In the case at hand, RESPONDENT challenges the Tribunal's jurisdiction to adapt the Contract since Danubian law applies [*Ans. NoA., ¶12, p.* 31]. Assuming that Danubian law governs the Arbitration Clause, the Tribunal would not have the jurisdiction to adapt the Contract, forcing the Parties to litigate. Such approach would defeat Parties' rational commercial purpose to arbitrate in the first place, increasing the cost and time to solve the disputes. In the event of such ambiguity, the Tribunal should rule in favor of the Parties' rational commercial purpose to

arbitrate. By that reason, Mediterranean law should govern the Arbitration Agreement to preserve the Parties' rational commercial purpose.

CONCLUSION OF THE FIRST ISSUE

33. It is undisputed that, under Mediterranean law, the Arbitration Clause is construed broadly, granting jurisdiction for the Tribunal to adapt the Contract. As for that matter, Mediterranean law shall directly govern the Arbitration Clause through an implied choice, as the Theory should not be applied in the present circumstances. Furthermore, the application of Danubian law will defeat the essence of the arbitration.

II. ISSUE B: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

34. RESPONDENT was involved in another arbitration with a customer from Mediterraneo concerning the sale of a promising mare, and by default, RESPONDENT was forced to endure the tariff policy of 25% imposed by the government of Mediterraneo. As a consequence, RESPONDENT requested for price adaptation of the contract. [*Letter of Evidence, p. 49*]. Provided that Mediterranean Contract Law governs the contract of the other arbitration, Tribunal affirmed that it "had confirmed its power to adapt the contract should the tariff result in hardship for Respondent" [*PO 2, ¶39, p. 60*].

35. This information is well inscribed within a partial interim award (**hereinafter "PIA"**) in possession of an intelligence company (**hereinafter "Intel"**), which monitors the horseracing industry [*Letter of Evidence, p. 49; PO 2, ¶39, p. 60*].

36. The PIA reveals that, in contradiction with its other dispute, RESPONDENT in this present dispute adamantly denies CLAIMANT's request for price adaptation before this Tribunal. Furthermore, RESPONDENT alleged that the only way that CLAIMANT was able to obtain the PIA and therefore the information on RESPONDENT's inconsistency was either through a breach of confidentiality by RESPONDENT's former employees, or illegal hacking [*Letter of Evidence, p. 50*].

37. Regardless of the REPONDENT's contentions, CLAIMANT is entitled to submit the PIA as evidence, since the Tribunal possesses the discretionary power to admit the PIA as evidence **(A)**, the PIA is admissible for disclosure regardless of the duty to maintain confidentiality **(B),** and even if the PIA was obtained through an illegal hack, it is still an admissible evidence **(C)**

A. THE TRIBUNAL POSSESSES THE DISCRETIONARY POWER TO ADMIT THE PARTIAL INTERIM AWARD AS EVIDENCE

38. The PIA reveals that, in contradiction with its other dispute, RESPONDENT in this present dispute adamantly denies CLAIMANT's request for price adaptation before this Tribunal. Furthermore, RESPONDENT alleged that the only way that CLAIMANT was able to obtain the PIA and therefore the information on RESPONDENT's inconsistency was either through a breach of confidentiality by RESPONDENT's former employees, or illegal hacking [*Letter of Evidence, p. 50*].

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i. The Partial Interim Award is relevant and material to the present case

40. The Tribunal should admit the PIA as evidence since it possesses immense relevance and materiality for CLAIMANT's submission in convincing the Tribunal to adapt the Contract. Under Art. 22.2 HKIAC Rules, the Tribunal possesses broad discretion to determine the relevance, materiality and weight of the evidence. This principle is further consolidated by the IBA Rules on the Taking of Evidence in International Arbitration (**hereinafter "IBA Rules"**), a non-binding guideline that has been considered as "best practice" by international arbitrations and is frequently referred to in HKIAC arbitrations [*Moser/Bao ¶ 9.155; Marghitola, ¶ 1 p. 33*]. Art. 9.2 (a) of IBA Rules affirms principle, as it stipulates that the Tribunal is free to exclude evidence which lacks relevance and materiality to the case.

41. Relevance refers to the probative value of an evidence and its degree of influence on a party's burden of proof of the case at hand [*O'Malley, p. 269; Waincymer, p. 858*]. Materiality on the other hand, supersedes relevance, preventing duplication of any unnecessary material [*O'Malley, p. 272; Waincymer, p. 859*]. The "relevance and materiality" criteria is prevalent in international practices, as exclusion of evidence in tribunals due to the insufficiency in amounting to the said criteria is not uncommon [*ICC No. 12990; ICC No. 12761; Century Indemnity Co v. Certain Underwriters at Lloyd*].

42. In that respect, the PIA yields probative value of immense authority. In the other arbitration, the tribunal derived its affirmed jurisdiction from the Mediterranean Contract Law and its

consistent jurisdiction to adapt the contract. Since the circumstances are clearly synonymous with the case at hand, admission of the PIA as evidence shall be critical for the Tribunal in determining the outcome of the case. Moreover, the evidence that CLAIMANT wishes to introduce is material in a sense that it is narrowed down with the purpose to only convince the Tribunal for price adaptation of the Contract.

43. As such, the Tribunal should admit the PIA as evidence since it has fulfilled the criteria of relevance and materiality.

ii. Exclusion of the Partial Interim Award jeopardizes CLAIMANT's "equal treatment" and "reasonable opportunity to present its case"

44. By excluding the PIA from the proceedings, the Tribunal clashes with the fundamental principles of "equal treatment" and "reasonable opportunity to present its case", both taken into account by Art. 13.1 of HKIAC Rules and a multitude of institutional rules [*Art. 17(1) UNCITRAL Rules; Art. 22 2012 CIETAC Rules; Art. 28(1) VIAC Rules*]. The core value of equal treatment guarantees that parties are given the same status before a Tribunal. This, however, does not mean that equality should be construed literally, relating only to the aspects of the proceedings at hand [*Moser/Bao, ¶ 9.14; Born, p. 2174*]. The reasonableness test, under Art. 13, on the other hand, grants the disputing parties opportunity to present non-duplicative evidence before the Tribunal. [*Moser/Bao ¶ 9.15*].

45. Exclusion of the PIA evidence by the Tribunal would negate the purpose of Art. 13.1 of HKIAC Rules. First, CLAIMANT is deprived from its right to equal treatment in the form of adaptation of the Contract resulting from hardships arising from tariffs. The PIA yields evidence that in such an event of hardship, the Tribunal has the jurisdiction to adapt the contract. While the PIA only binds RESPONDENT and the party in the other arbitration, it is nonetheless evidence of how a tribunal would decide given a hardship affecting the parties i.e. to adapt the contract, and it would amount in a difference in treatment for the tribunal to rule otherwise in the present case given the similarity in circumstances. In other words, CLAIMANT would not be provided equal treatment. Secondly, exclusion of the PIA would put CLAIMANT in a disadvantaged position. CLAIMANT would be deprived from its opportunity to present evidence that yields immense probative value as CLAIMANT would not have any other evidence with the same gravity as the PIA.

46. In conclusion, exclusion of the PIA contradicts the fundamental principles of the arbitration enshrined in Art. 13.1 HKIAC Rules.

iii. In any Event, Disclosure of the PIA as Evidence Provide the Tribunal Precedential Authority

47. With all due respect to the 2013 Rules, HKIAC Rules, and the common practice of international commercial arbitration, the PIA should be disclosed as it guides the Tribunal with precedential authority. Scholars and commentators alike have urged that awards are fruitful in providing tribunals precedential authority, as it promotes efficiency, consistency and predictability in an arbitration [*Born, p. 2822; Buys p. 136; Weidemaier p. 1927; Hay, p. 228, Pooreye/Feehily, p. 303; Noussia pp. 170, 177*]. Furthermore, disclosure of awards as evidence shall be rudimentary for tribunals in ensuring a defensible, persuasive and precise decision [*Born, p. 2822*].

48. In the present dispute, the PIA shall provide precedential authority for the Tribunal at hand. The circumstances which arose from both arbitrations are somewhat similar, as CLAIMANT and RESPONDENT had been gravely affected by the tariff policy, resulting in the performance of both contracts becoming more onerous. The tribunal on the other arbitration had confirmed its jurisdiction for price adaptation, derived from circumstances similar to the case at hand [*PO 2, ¶39, p. 60*. This is an invaluable precedential information, which shall affirm the Tribunal's stance that it possesses jurisdiction to adapt the Contract.

49. In conclusion, the Tribunal should admit the evidence since it provides the Tribunal immense precedential authority.

B. CLAIMANT IS ENTITLED TO SUBMIT THE PARTIAL INTERIM AWARD AS EVIDENCE, EVEN IF IT WAS OBTAINED THROUGH A BREACH OF CONFIDENTIALITY

50. RESPONDENT alleged that disclosure of the PIA is only possible either under the premise of a breach of confidentiality by RESPONDENT's former employees who acted as witnesses in the other arbitration, or an illegal hack. Even if the former method of obtainment were to be true, the PIA is still admissible since the breach of confidentiality of the other arbitration was wholly without CLAIMANT's involvement **(i)**, the disclosure of the PIA pursues CLAIMANT's legal rights **(ii)** and in any event, disclosure of the PIA does not amount to a breach of confidentiality **(iii)**.

i. The Breach of Confidentiality of the Other Arbitration was wholly without CLAIMANT's involvement

51. CLAIMANT is entitled to disclose the PIA as evidence despite the element of confidentiality for arbitration awards. Art. 42.1 of HKIAC Rules 2013 (**hereinafter "2013 Rules"**) which governs the other arbitration is decisive in addressing this notion, stipulating that "*an award made in the arbitration*" falls within the scope of confidentiality. These measures, however, are only applicable to the actors involved in the arbitration such as the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and the HKIAC itself [*Art. 42.2 2013 Rules*]. This reflects the practice of international arbitration, in which the spectrum of confidentiality lies only within the agreement of the parties themselves [*Smureanu, p. 133*]. This denotes however, that actors wholly uninvolved in the conduct of an arbitration are not obliged to maintain the confidentiality of the arbitration. [*Born, p. 2821; Smureanu, p. 134*].

52. Even if the witnesses who signed a confidentiality agreement in the other arbitration were responsible for the disclosure of the PIA, CLAIMANT is not obliged to maintain such obligation. Art. 42.1 of 2013 Rules cannot be applied to CLAIMANT since CLAIMANT was wholly uninvolved in the other arbitration in the first place. By default, this means that CLAIMANT is not under the obligation of confidentiality and is entitled to disclose the PIA for this present arbitration.

ii. Alternatively, Disclosure of the Partial Interim Award Pursues CLAIMANT's Legal Rights and Interests

53. If the Tribunal were to decide that CLAIMANT is bound to the duty to maintain the confidentiality of the PIA, it shall nevertheless be excused, since its disclosure pursues CLAIMANT's legal rights and interests to adapt the contract.

54. This notion has been contemplated by the procedural rules governing the other and present arbitration under Art. 42.3(a)(i) of 2013 Rules and Art. 45.3(a)(i) of HKIAC Rules respectively, asserting that awards are subject to disclosure if it is intended "*to pursue a legal right or interest"*. The practice of courts and tribunals have affirmed the stance that awards are may be disclosed for the purpose of protecting or pursuing a party's legal rights. [*Ali Shipping v. Shipyard Trogir; Aegis v. European Re; AAY v. AAZ; Insurance Company v. Lloyd's Syndicate*].

55. By disclosing the PIA as evidence, CLAIMANT is simply pursuing its legal rights for an adaptation of the Contract. The circumstances that arose in the other arbitration parallels to that of the present dispute, in which the tribunal confirmed its jurisdiction to adapt the contract should it result in hardship for RESPONDENT. This position is derived from the consistent jurisprudence of the courts in Mediterraneo and Art. 6.2.3 para. 4b Mediterranean Contract Law,

which underlies the contract of the other and present arbitration. By this logic, CLAIMANT is clearly entitled for an adaptation of the Contract, since the circumstances in both arbitrations are similar.

56. As such, the PIA shall be disclosed as evidence before the Tribunal in pursuing CLAIMANT's legal right to adapt the Contract, just as the other arbitration granted a price adaptation for RESPONDENT.

iii. In any event, disclosure of the Partial Interim Award does not amount to a breach of confidentiality

57. Even if the PIA's confidentiality is fortified by the 2013 Rules and the witnesses' contractual agreement, RESPONDENT's allegations that disclosure of the PIA amounts to a breach of confidentiality must be subjugated to scrutiny.

58. As specified by tribunals, courts, and scholars alike, claims for a breach of confidentiality must be assessed based on the nature of the information disclosed**,** the extent of damages caused by disclosure, and the existence of a harmful intent [*Smureanu,* p. 164; *Bulbank v. AIT]*. Presently, the conduct of disclosing the PIA is devoid of these elements.

59. Firstly, the nature of the information contained within the PIA cannot be considered as sensitive to the extent that it hinders any form of disclosure. Privileged or confidential information such as arbitral deliberations, pleadings and trade secrets should be kept under absolute confidentiality since it may constitute as sensitive documents [*Marghitola ¶ 5 p.* 90; *Brown, p. 7*]. The PIA, on the other hand, only contain basic information regarding the contract and confirmation of the tribunal's power to adapt conduct price adaptation should it result in hardship for RESPONDENT.

60. Secondly, there is no plausible outcome in which RESPONDENT is adversely damaged by the disclosure of the PIA. In practice, parties have a legitimate interest in maintaining confidentiality of the arbitration itself. Disastrous repercussions may arise in which disclosure of any information emanating from an arbitration such as sensitive trade and business information which may damage a party's reputation [*Born,* p. *2781; Karton, p. 467-468*]. Such drawback is evident in *Aguas del Tunari SA v. Republic of Bolivia*, in which disclosure of the tribunal's jurisdiction containing sensitive information forced the claimants to withstand an array of public backlash [*ICSID No. ARB/02/2*].

61. At hand, the witnesses only disclosed the PIA towards the Intel, which contains information that the Tribunal in the other arbitration possesses jurisdiction to adapt the contract. Any

information that may potentially cause harm towards RESPONDENT such as business and trade secrets are not inscribed within the PIA. Even if the PIA were to be publicly disseminated, there is no sensitive information that may potentially be detrimental for RESPONDENT.

62. Thirdly, RESPONDENT cannot interpret disclosure of the PIA in a manner that it is intended to harm RESPONDENT. In *Amco v. Indonesia,* the tribunal decided that disclosure of confidential arbitral information devoid of any intent to harm cannot amount to a breach of confidentiality [*Amco v. Indonesia; Smeureanu, p. 31*]. Even if the former employees who were witnesses in the other arbitration were responsible for disclosing the PIA, mere allegations cannot be implied as a justifiable assertion [*CCIG Arbitration 1994*; *O'Malley, p. 322*]. Moreover, CLAIMANT's intention for disclosing the PIA as evidence is specifically to ensure that the Tribunal has jurisdiction to adapt the Contract, since the situation in the present and other arbitration are parallel.

63. Conclusively, the Tribunal shall admit the PIA as evidence since the 3 criteria were not fulfilled here.

C. EVEN IF THE PARTIAL INTERIM AWARD WAS OBTAINED THROUGH HACKING, IT IS STILL AN ADMISSIBLE EVIDENCE

64. RESPONDENT alleged that the Intel obtained the PIA through an illegal hack into RESPONDENT's computer system [*PO 2, ¶41, pp. 60-61*]. Even if this were to be true, the PIA shall be admitted into this arbitral proceeding since CLAIMANT did not participate in the illegal hacking **(i)** and illegally obtained evidence is provides probative authority **(ii)**.

i. CLAIMANT did not participate in the illegal hacking

65. Under its discretion, the Tribunal is free to exclude evidence obtained in a manner contrary to the principle of "good faith" *i.e.* hacking in this present dispute. However, to render the PIA as inadmissible is unjustifiable, since CLAIMANT had never participated in the illegal hacking.

66. The practice of international arbitrations confirmed that the exclusion of evidence is well founded if its method of obtainment were derived from the grounds incompatible with the principles of "procedural fairness" and "good faith" [*Methanex v. USA; EDF Services Ltd v. Romania; Libanaco Holdings v. Turkey; O'Malley, pp. 321-323; Boykin/Havalic, p. 6*]. The tribunal in *Methanex v. USA* reiterates this notion. The claimants sought to introduce evidence obtained through illegal means. The claimants then detached agents into private property in order to extract the documents sought to be presented as evidence. The Tribunal declared that

introduction of the documents is unjustifiable since it was obtained unlawfully, contradicting the principle of "good faith" [*Methanex v. USA; O'Malley, p. 321; Boykins/Havalic, p. 6*].

67. The same logic cannot be applied in the present dispute. CLAIMANT had never participated in obtaining the PIA through hacking. Instead, CLAIMANT was only promised a copy of the PIA against payment of US$ 1000. [*PO 2, ¶41, pp. 60-61*]. This demonstrates that any hacking activity that ultimately culminate in the obtainment of PIA is conducted without any involvement of CLAIMANT.

68. Therefore, CLAIMANT is entitled to submit the partial interim award as evidence since CLAIMANT was wholly uninvolved in the hacking activity.

ii. In practice, illegally obtained evidence provide tribunals probative authority

69. Numerous precedents dictate that even if an evidence's method of obtainment were unlawful, admission of the evidence is not always opted out [*RosInvestCo UK v. Russian Federation; Hulley Enteprises Limited v. Russian Federation; Persia International Bank v. Council*]. In *RosInvestCo UK v. Russian Federation,* the tribunal relied extensively upon confidential cables from the United States Department of State which had been published by *Wikileaks* [*RosInvestCo UK v. Russian Federation*]. Notwithstanding the fact that *Wikileaks* cables were obtained in a dubious manner, the tribunal seemed unproblematic with that predicament. Even if tribunals were to reject evidence obtained from illegal means by third parties, its grounds for exclusion are derived from the lack of relevance and materiality [*Karimun Corporation v. Bolivia, ICSID No. ARB/10/1; Kilic v. Turkmenistan, ICSID No. ARB/10/1; Ireton, p. 240*].

70. Presently, the Intel has a doubtful reputation to where it obtained its sources from and refused to disclose the sources at hand [*PO 2, ¶41, pp. 60-61*]. Regardless of the nature that the Intel possesses, it shall be deemed as synonymous with *Wikileaks*. Moreover, CLAIMANT has proven that the PIA yields relevance and materiality, which in turn is capable of assisting the Tribunal with its judgment [*Cl. Memo, ¶ 42*].

71. Conclusively, the partial interim award shall be admitted to this present arbitration, despite of the fact that the origins of the award are subject to scrutiny.

CONCLUSION TO THE SECOND ISSUE

72. Due to the immense probative value that the PIA yields, CLAIMANT is entitled to submit it as evidence before the Tribunal. Assuming that RESPONDENT's allegations that the PIA was

obtained through a breach of confidentiality or illegal hacking were to be true, it shall nevertheless be admitted as evidence.

III. ISSUE C: CLAIMANT IS ENTITLED TO THE PAYMENT OF THE PURCHASE PRICE IN THE AMOUNT OF US$ 1,250,000

73. Interested in breeding CLAIMANT's top-quality horse, Nijinsky III, RESPONDENT contacted CLAIMANT asking for Nijinsky III's frozen semen (**hereinafter "the Goods"**) [*Cl. Ex. C 1, p. 9*]. By 6th May 2017, the Parties have concluded the Contract which calls for two instalments of payment and three instalments of shipment. The Parties have also agreed for a special term of DDP (INCOTERMS 2010) delivery that has to be performed by CLAIMANT [*Cl. Ex. C 5, p. 14*]. For the following eight months after the conclusion of the Contract, the Parties performed their obligations without experiencing any problems.

74. However, two days prior the last shipping instalment, CLAIMANT contacted RESPONDENT to inform the new tariffs imposed by RESPONDENT's home country, Equatoriana [*Cl. Ex. C 7, p. 16*]. The Equatorianan government has imposed a tax increase by the amount of 30% towards agricultural products including horse semen [*Cl. Ex. C 6, p. 15*]. The 30% raise has clearly affected CLAIMANT by demolishing CLAIMANT's profit percentage of 5%, resulting in a loss for CLAIMANT in the amount of 25% [*NoA. ¶18, p. 7*].

75. Accordingly, CLAIMANT asked RESPONDENT for the solution of the hardship situation by negotiation to find an agreement for the adaptation of the purchase price [*Cl. Ex. C 8, p. 18*]. Since the negotiations failed, CLAIMANT requested the Tribunal to adapt the purchase price in order to restore the equilibrium of the Contract and to prevent CLAIMANT from bearing US$ 1,250,000 from the tariff [*Ibid; NoA, ¶19, p. 7*]. RESPONDENT however, rejected the claim on the basis that adaptation of the purchase price is not provided neither under the Contract and the CISG [*Ans. NoA, ¶¶19-21, p. 32*].

76. Nevertheless, RESPONDENT is obliged to pay CLAIMANT after the failure of the negotiations for the purchase price since Clause 12 of the Contract entitles CLAIMANT to request for adaptation by the Tribunal **(A)**. In the event Clause 12 cannot be extend to adaptation, CLAIMANT is still entitled to do so under the UNIDROIT Principles **(B)** therefore, The Tribunal should grant CLAIMANT' request for adaptation of the purchase price **(C)**.

A. CLAIMANT IS ENTITLED TO THE PAYMENT IN THE AMOUNT OF US$ 1,250,000 FROM ADAPTATION AS PROVIDED UNDER CLAUSE 12 OF THE CONTRACT

77. CLAIMANT requested for adaptation by the Tribunal in an effort to achieve remuneration, yet RESPONDENT rejected the request on the basis that Clause 12 is not applicable to the present dispute and Clause 12 does not provide the adaptation requested by CLAIMANT [*Ans. NoA, ¶¶¶4,9,19, pp. 30,32*].

78. In order to solve the current hardship situation, the Parties should only refer to the Hardship Clause provided in the Contract. This is line with the application of Art. 6 CISG in which if a provision on a contract governs the same terms as the CISG, then the provision on the contract should be prioritized first. The usage of Art. 6 is also in line with RESPONDENT's contention thus it is unnecessary for the Parties to solve the hardship solution with the provisions provided by the CISG [*Ans. NoA, ¶20, p. 32*].

79. In light of these reasons, CLAIMANT is entitled to request adaptation to the Tribunal from Clause 12, since it is applicable to the present hardship **(i)** and provides the adaptation requested by CLAIMANT **(ii)**.

i. Clause 12 of the Contract is applicable to the present hardship

80. RESPONDENT contents that CLAIMANT could not rely on Clause 12 to request leniency from the tariff as it should have been CLAIMANT's obligation to bear the tariff from their DDP obligation [*Ans. NoA, ¶19, p. 32; Resp. Ex. R 4, p. 39*]. However, RESPONDENT's claim should only be regarded as frivolous since Clause 12 of the Contract is applicable to the present dispute under the interpretation provided by Art. 8 of the CISG **(a)** and under the scope of Clause 12 **(b)**.

a. The intention of the Parties showcases that they included the Hardship Clause to ensure CLAIMANT from further risks associated which may destroy the commercial basis of the Contract

81. Despite CLAIMANT's DDP obligation, Clause 12 of the Contract prevents CLAIMANT from bearing any risk that may destroy the commercial basis of the Contract. In this case, a provision of a contract contradicts an obligation arising out of INCOTERMS. However, if such case happens then it is a matter of interpretation of the contract to determine which clause should

prevail [*Schwenzer/Hachem/Kee, ¶38.10*]. Similarly, Clause 12 needs to be interpreted so that it could prevail over the CLAIMANT's DDP obligation.

82. In order to find the true meaning of a clause, it is important to interpret the clause in accordance with the parties' subjective intent when drafting the Contract [*Art. 8, CISG; Huber/Mullis, p. 12*]. The tribunal then, may refer to the negotiations undertaken by the parties to ascertain the parties' intent [*Art. 8(3), CISG*]. As reflected by their intentions, The Parties have agreed on the inclusion the Hardship Clause to protect CLAIMANT from additional risk associated with DDP (a) and also Clause 12 is drafted as a hardship clause based on their negotiations (b).

a. The Parties included the Hardship Clause under Clause 12 in order to protect CLAIMANT from additional risk associated with DDP

83. Clause 12 of the Contract must be interpreted based on CLAIMANT's subjective intention [*Art. 8(1), CISG*]. It is CLAIMANT's subjective intention to include a hardship clause to the Contract to protect them from any additional risks associated with DDP [*Cl. Ex. C 4, p. 12*].

84. After RESPONDENT requested the change of delivery terms into DDP, CLAIMANT at first was reluctant to accept such obligation due to its bad experiences with additional customs regulations and import restrictions in which CLAIMANT's previous business was severely harmed due to the regulations and restrictions [*Ibid; PO 2, ¶21, p. 58*]. In order to prevent such loss to happen again CLAIMANT requested for the inclusion of a hardship clause, as requested, "*we are not willing to take over any further risks associated with such change in the delivery terms, in particular not those associated with changes in customs regulations or import restrictions*". [*Cl. Ex. C 4, p. 12*]. In response to such request, RESPONDENT did not make any objection and proceed with the negotiations to include the Hardship Clause to protect CLAIMANT from further risk arising out of the DDP obligation.

b. Clause 12 is drafted as a hardship clause not a *force majeure* clause with a narrow hardship reference

85. In accordance with the Parties' intention to include a hardship clause to the Contract, Clause 12 shall not be considered as a *force majeure* clause with a narrow hardship reference [*Resp. Ex. R 3, p. 35*] based on the negotiations of the Parties [*Art. 8(3), CISG*].

86. The Parties negotiators at the time, Mr. Antley and Ms. Napravnik (**hereinafter "Predecessor Negotiators"**) discussed the inclusion of hardship clause with Ms. Napravnik suggesting the

ICC Hardship Clause for the basis. The negotiations however, was halted since the Predecessor Negotiators suffered a car accident, severely injuring them [*Cl. Ex, C 8, p. 17*].

87. The Parties continued the negotiations by appointing Mr. Krone and Mr. Ferguson (**hereinafter "Successor Negotiator"**) as the next negotiators. The Successor Negotiators constructed the Hardship Clause following Mr. Antley's instruction on his note, point 2, which states that the ICC Hardship Clause suggested by CLAIMANT was too broad [*Resp. Ex. R 3, p. 35*]. Based on the notes from their predecessor, the Successor Negotiators agreed on the ICC Hardship Clause as the common ground of the Hardship Clause yet only to be drafted on a narrower context [*Cl. Ex. C 4, p. 12; PO 2, ¶12, p. 56*].

88. Due to the Successor Negotiator's lack of experience in drafting international contracts [*Cl. Ex. C 8, p, 17*] and the lack of information from their predecessors due to the accident [*PO 2, ¶7, p. 55*], they included the narrow-worded hardship clause into the default *force majeure* clause of the Contract which is provided from the basic industry template of Mediterraneo [*PO 2, ¶3, p. 55*]. This is proven by the style of the font of the Hardship Clause that is in italic indicating that it is added by the Parties to the default template when drafting the Contract [*ibid*].

89. Despite of the Hardship Clause's narrow wordings, its construction is in line with international commercial practices which usually consists of two elements [*Liu, §22.3.2*]. The first being the triggering circumstances that may change the Contract, the change must be unforeseeable, substantial, and beyond control of the parties at the time of the conclusion of the contract [*ibid.*]. The other being the effect of the change in circumstances, namely that the contract is out of balance, leading to a substantial economic hardship [*ibid.*].

90. Both elements are present in Clause 12. The sentence "*caused by additional health and safety requirements or comparable unforeseen events*" constitutes as the triggering circumstance that changes the contract, and the sentence "*making the Contract more onerous.*" constitutes as the effect from the change in circumstances [*Cl. Ex. C 5, ¶12, p. 14*].

91. Thus, the narrow hardship reference shall be regarded as a hardship clause by virtue of the Parties' negotiations and can be applied to the present dispute despite CLAIMANT's DDP obligation.

b. The current circumstances also fall into the scope of the Hardship Clause

92. After the Hardship Clause is established, CLAIMANT is able to invoke the clause in situations of hardships if the circumstance fulfills the conditions required. In order to invoke the Hardship

Clause then the circumstance must be, "*additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Cl. Ex. C 5, ¶12, p. 14*].

93. It can be seen from the wordings that there are two type of events that could be constituted as hardship. The first being the "*additional health and safety requirements*" which reflects CLAIMANT's previous experience with additional unforeseen health and safety requirements in which it ruins the commercial basis of CLAIMANT's previous business [*PO 2, ¶21, p. 58*]. And the latter being the "*comparable unforeseen events making the contract more onerous*", which means that any other event as long as it is similar or comparable with the previous event.

94. In comparison, the tax increase opposed by Equatoriana is comparable with CLAIMANT's previous experience. The tax increase was unforeseeable considering the government of Equatoriana's reputation for supporting free trade. Furthermore, the tariff has successfully made the Contract more onerous to perform as the tariffs imposed by Equatoriana has caused CLAIMANT detrimental loss by changing its 5% profit, into a 25% loss [*NoA, ¶¶10, 18, pp. 6, 7*; *Cl. Ex. C 8, p. 18*; *PO 2, ¶¶23, 26, p. 58*].

95. Since the present circumstance fall within the scope of the Hardship Clause, CLAIMANT is entitled invoke the Hardship Clause.

ii. CLAIMANT is entitled to request adaptation of the purchase price by virtue of Clause 12 of the Contract

96. When a hardship clause is inserted into a contract, the aggrieved party should be able to request for adaptation after the renegotiations failed [*W. Peter, p. 250*]. Similar to the present dispute, after RESPONDENT cut off the renegotiations, CLAIMANT requested for adaptation of the purchase price to Tribunal by virtue of Clause 12 [*NoA, ¶18, p. 7*; *Cl. Ex. C 8, p. 18*].

97. RESPONDENT however, rejected CLAIMANT's request on the basis that the Hardship Clause does not expressly provide any means for adaptation [*Ans. NoA, ¶19, p. 32*]. Nonetheless, CLAIMANT is entitled to request for adaptation since it is implicitly provided by the Hardship Clause **(a)** and as it is the legal consequences of the hardship clause **(b)**

a. The Hardship Clause implicitly provides for adaptation based on the Parties' intention to consent

98. In some cases, hardship clauses do not always provide the express reference by the parties to allow the arbitral tribunal to adapt [*Stalev, pp. 208-209*]. Nevertheless, if the parties did not include the expressed wordings of adaptation in the hardship clause, the arbitral tribunal is still entitled

to conduct adaptation through the parties' consent [*Uribe, p. 5*]. Similarly, the Parties have expressed their consent through their intention when drafting the Hardship Clause.

99. The CISG provides the interpretation of an intention in the form of Art. 8(1). Art. 8(1) interprets a clause from a contract based on drafters' intention [*Schwenzer/Hachem/Kee*, ¶*26.06*]. If the intention is not made known to the parties, then to interpret the intention, calls for the judgement or understanding of a reasonable person operating under the same circumstances of the parties [*Art. 8(2), CISG; Hubber/Mullis, pp.12-13*].

100. Applicably, the Parties' intention to consent for adaptation derive from the conversation between the Parties' Predecessor Negotiators, where they agreed on the need for the Parties to ensure that there would be an adaptation mechanism in the event the Parties could not agree on the purchase price [*Cl. Ex. C 8, p. 17*]. The intention then, failed to be made know to the Successor Negotiators as the Predecessor Negotiators suffered severe injuries from a fatal car accident [*Ibid; PO 2, ¶7, p. 55*].

101. Since RESPONDENT failed to acknowledge CLAIMANT's intention, to interpret this intention calls for the judgement of reasonable person under the same circumstances [*Art. 8(2), CISG*]. Considering the reasonable person have to come from the same background and kind whom the contract is addressed, then the reasonable person in this present dispute should be a reasonable person operating under the scope of a long-term international commercial contract [*Schwenzer/Hachem/Kee*, ¶*26.11*]. The nature of a long-term international commercial contract is very familiar to hardship clauses or adaptation since the occurrence of unforeseen events that changes the balance of a contract is quite common [*Ferrario, pp. 71-72*]. Thus, it would be fitting for a reasonable person under the scope of a long-term international commercial contract to interpret the Parties' intention.

102. A reasonable person operating under the same circumstances would conclude that it is the Parties' intention to provide adaptation since the Parties have inserted the Hardship Clause and the Arbitration Agreement [*Cl. Ex. C 4, p.12*]. By including the hardship clause in the Contract, it is an explicit demonstration that the Parties are willing to undertake any revision of the Contract, including adaptation [*Cl. Ex. C 8, p. 17; PO 2, ¶12, p. 56; Zaccaria, p. 150; Brunner, p. 514*].

103. In regards to the Arbitration Clause, the Clause inserted by the Parties have been drafted with a broad wording along with the Mediterranean law as the law that governs the arbitration [*Cl. Ex. C 5, ¶15, 13; Cl. Memo, ¶3*]. The selection of wordings and the applicable law have been drafted

to authorize the Tribunal for adaption [*Cl. Memo, ¶33*]. Thus, the interpretation of the Arbitration Clause indicates that the Parties have authorized the Tribunal to conduct adaptation of the purchase price [*Ibid*].

104. Both of these Clauses correspond to the note left by Mr. Antley before his fatal car accident [*Resp. Ex. R 3, p. 35*]. On his note point 3, Mr. Antley wrote "*Connection of hardship clause with arbitration clause*". His notes reflect the discussion he had with Ms. Napravnik regarding the adaptation mechanism [*Cl. Ex. C 8, p. 17*]. While Mr. Krone at the time when drafting the Contract does not realize the meaning of point 3, he did not object or made changes for either Clauses so the intention for the Parties to consent for adaptation is not entirely lost [*Resp. Ex. R 3, p. 35*].

105. As mentioned by the tribunal in the *Aminoil* case, the request of adaptation by the Tribunal can only be granted if as quoted "*that right is conferred upon it by law, or by the express consent of the parties*" [*Aminoil v Kuwait, ¶74*]. Similar to the present dispute, the Tribunal is authorized to perform adaptation since the parties have expressed their consent under Clause 12 and since the Parties have chosen the law of Mediterraneo that allows an arbitral tribunal to perform adaptation [*PO 2, ¶39, p. 60*].

106. Thus, a reasonable person operating under the scope of international commercial long-term contract would also conclude that the Parties have the express consent to authorize adaptation by the Tribunal.

b. The legal consequences of the Hardship Clause entitle CLAIMANT request for adaptation

107. The Parties' agreement to include a hardship clause is an explicit demonstration that the Parties are willing to undertake any revision of the contract, if any unpredicted circumstances resulted in making the Contract excessively onerous for either of the Parties to perform [*Zaccaria, p. 150*].

108. Applicably, if the Parties fail to reach an agreement from renegotiations, then the Parties would have intended to resort to the arbitral tribunal to fill in the gap and adapt the price [*Fouchard/Gaillard/Goldman, ¶33, p. 24; Peter, p. 250*].

109. Furthermore, such view for adaptation is also similar to the legal consequences from failure to renegotiate from a renegotiation clause. The consequences of failure to renegotiate under the renegotiation clause is adaptation [*Brunner, p. 514*]. Although hardship clause and renegotiation clause are to be distinguished, the consequence of both clauses, if it provides renegotiation is to be assumed that the parties have intended to allow the Tribunal to fill in the gaps to adapt the

contract [*Ibid*]. Similarly, when Ms. Napravnik contacted the RESPONDENT to clarify for the tariffs, Mr. Shoemaker responded by promising CLAIMANT negotiations for the purchase price in exchange for CLAIMANT delivering the Goods [*Cl. Ex. C8, p. 18; Resp. Ex. R 4, p. 36*].

110. RESPONDENT may argue that at the time when Mr. Shoemaker promised CLAIMANT the renegotiations, he did not have any authority to agree on adaptation [*Ans. NoA, ¶10, p. 32; Resp. Ex. R 4, p. 39*], yet the fact that RESPONDENT would still cooperate with CLAIMANT by conducting renegotiations, indicate that RESPONDENT consented for adaptation as the consequence if the renegotiations from the Hardship Clause of the Contract fails [*Cl. Ex. C 8, p. 18; PO 2, ¶35, p. 60*].

111. In light of the reasons submitted above, CLAIMANT should be entitled to request for adaptation by the Tribunal by virtue of the Hardship Clause under Clause 12 of the Contract.

B. IN THE EVENT CLAUSE 12 OF THE CONTRACT CANNOT BE EXTENDED INTO ADAPTATION, THE UNIDROIT PRINCIPLES ENTITLES CLAIMANT FOR AN ADAPTATION OF THE PURCHASE PRICE BY THE TRIBUNAL

112. In the event Clause 12 of the Contract is deemed to be silent on adjustment for hardship, the Parties shall refer to the CISG as the *lex contractus* [*Cl. Ex. C 5, ¶¶ 12, 14, p. 14; Fucci, p. 11*]. This reference to the CISG does not constitute as a derogation as laid out in Art. 6 of the convention, since there are no provisions in the Contract that provides adaptation of purchase price from the Hardship Clause [*Cl. Ex. C 5, pp. 13-14; Ans. NoA, ¶20, p. 32*].

113. However, adaptation by the arbitral tribunal through the CISG should be regarded as impossible since the CISG does not contain any specific provisions on hardship and adaptation of contract [*Liu, §21.2.3*]. Thus, it is beyond the capacity of the gap filling mechanism provided under the CISG [*Schlechtriem/Butler, §7.1.3, ¶291, pp. 203-204*].

114. The incapacity of the CISG to fill this gap would necessarily lead to the Parties referring to the UNIDROIT, as international trade usage, by virtue of Art. 9(2) [*Honnold, §119, p. 128*]. Art. 9(2) of the CISG stipulates that, unless agreed otherwise, the parties are considered to have impliedly agreed on the applicability of international trade usages in their contracts [*Art. 9(2), CISG*].

115. Hardship provisions under the UNIDROIT stresses that even if a performance becomes more onerous for a party, that party is nevertheless still obliged to perform the contract [*Art. 6.2.1, UNIDROIT*]. This is seen as a mark that balances between the principles of *pacta sunt servanda*

and *rebus sic stantibus* [*Lindstrom, §4.1*]. Furthermore, the legal effect of hardship as provided by UNIDROIT is that the aggrieved party may request for negotiations and if it fails, they may then request for adaptation to the tribunal to restore the equilibrium of the contract [*Art. 6.2.3, UNIDROIT Principles, Comment, §7, p. 226*].

116. The situation in the present dispute call for the applicability of the provisions laid out in the UNIDROIT. First, the tariff imposed by the government of Equatoriana has resulted in hardship **(i)**. Second, CLAIMANT immediately requested for renegotiation when the tariffs took place **(ii)**. Finally, to assert CLAIMANT's entitlement for adaptation, CLAIMANT did not withhold their performance when faced by the tariffs acting as the hardship **(iii)**.

i. The tariff imposed by the government of Equatoriana amounts as hardship

117. Under the UNIDROIT, an event can be considered as hardship if there has been a fundamental alteration of the equilibrium of the contract [*Art. 6.2.2,* UNIDROIT]. This fundamental alteration could be in a form of an increase in cost of performance **(a)**. In addition to that, the article also sets out four fundamental elements that must coexist within the definition in order to make the hardship legally relevant [*Perillo, p. 22*], all of which have been fulfilled in the present case. Those elements are that the hardship occurs after the conclusion of the Contract **(b)**, the hardship could not be reasonably taken into account by CLAIMANT **(c)**, the hardship is beyond the control of CLAIMANT **(d)**, and lastly, CLAIMANT did not assume the risk arising out of the hardship **(e)**.

a. The tariff has increased the cost of performance and made it excessively onerous for CLAIMANT to perform

118. If there is no fundamental alteration on the equilibrium of the contract, it will be impossible for a party to invoke hardship as it is the crucial point [*Art. 6.2.2, UNIDROIT Principles, Comment, §2, p. 219; Liu, §21.3.*2]. One of the factors that fundamentally alters the contract is an increment on cost of performance caused by an event [*Art. 6.2.2, UNIDROIT Principles, Comment, §2, ¶a, p. 219*]. This factor can be seen in the present dispute, when the government of Equatoriana imposed a 30% tariff on agricultural products including the Goods [*NoA, ¶10, p.* 6].

119. After RESPONDENT demanded the delivery [*Cl. Ex. C 8, p. 18*], it has resulted in the reversion of CLAIMANT's 5% profit from the purchase price into a 25% loss. Consequently, the tariff has altered the equilibrium of the Contract. The increment of the tariff has caused the performance to be excessively onerous for CLAIMANT, who at that time was already financially

endangered [*PO 2, ¶29, p. 59*]. As if it were not enough, CLAIMANT even had to sacrifice their workforce in order to keep their business [*Cl. Ex. C 8, p. 18*]. By that instance, for CLAIMANT to bear the tariff would be to bear a burden too excessive for any party.

120. Therefore, the present circumstances indicate that a fundamental alteration of the Contract existed through an increase on cost of performance. It follows that CLAIMANT is entitled for an adaptation of the purchase price, in order to return the balance of the Contract.

b. The tariff occured after the conclusion of the Contract

121. For an event to constitute as hardship, the event must occur or become known after the conclusion of the contract [*Art. 6.2.2 (a), UNIDROIT Principles*]. If a party knew of the possibility of the event before the contract was concluded, that party may not rely on the hardship provisions [*Art. 6.2.2, UNIDROIT Principles, Comment, §3, ¶a, p. 220*].

122. In the present dispute, the tariff was announced and became effective after the Parties concluded the Contract [*PO 2, ¶25, p. 58*]. The Contract was concluded on 6 May 2017, whereas the government of Equatoriana announced the tariff on 19 December 2017, which become effective on 15 January 2018 [*ibid; Cl. Ex. C 5, p. 14*].

123. However, when the tariff was imposed it did not occur to the Parties that the Goods would be affected [*PO 2, ¶26, p. 58*]. CLAIMANT acknowledge this when the custom officials of Equatoriana informed them, on 20 January 2018 [*ibid*]. Therefore, it is clear that the tariff happened and became known after the conclusion of the Contract.

c. The tariff imposed by the government of Equatoriana was unforeseen

124. If an event is beyond the ambit of probability, it could be constituted as hardship [*Liu, §21.3.3.2*]. Subsequently, the disadvantaged party may not rely on hardship if they had already taken it into account before the conclusion of the contract [*Art. 6.2.2, UNIDROIT Principles, Comment, §3, ¶b, p. 220*].

125. The facts in the present dispute are in line with the provisions contained in the UNIDROIT. The government of Equatoriana had a reputation that they have always been an ardent supporter of free trade before the tariffs were imposed. Thus, when Equatoriana imposed the tariff, it staggered everyone including the Parties [*NoA, ¶11, p.* 6., *Cl. Ex. C 6, p. 15*].

126. Furthermore, since Equatoriana is a member of WTO, an organization that functions to serve companies and governments confidence by preventing sudden changes of trade policy and to ensure that trades between states flow freely [*PO 2, ¶47, p. 61; What is the World Trade*

Organization?], it is expected that the government of Equatoriana would uphold this purpose and implement it on their trade policy. In light of these facts and considering the government of Equatoriana's reputation, CLAIMANT could have never foreseen that they would impose such extreme tariff, before concluding the Contract.

d. The tariff was beyond the control of CLAIMANT

127. The provision under the UNIDROIT states that the event must be beyond the control of the disadvantaged party [*Art. 6.2.2 (c), UNIDROIT Principles*]. The facts in the present dispute show that this is the case for CLAIMANT [*NoA, ¶10, p. 6*].

128. To illustrate, reference can be made to a Spanish case, under the *Tribunal Supremo* court, where the judge granted a request for adaptation by basing its decision on the UNIDROIT. The judge granted the adaptation, due to an economic crisis in Spain, with a consideration that the crisis has resulted in substantial change of circumstances towards the contract [*Tribunal Supremo, 333/2014*]. In that case, it can be seen that the disputing parties had no control at all over the economic crisis.

129. The case at hand reflects similar circumstances. The tariff was imposed by the government of Equatoriana, and the Parties had neither the power to control nor avoid the tariff. Therefore, according to the above-mentioned fact, the tariff has satisfied the requirement of the hardship being beyond the control of CLAIMANT.

e. CLAIMANT did not assume the risk from the tariff imposed by the government of Equatoriana

130. As illustrated in the UNIDROIT, if a party includes a risk allocation clause in a contract and that party accepted the risk of an event, they may not invoke hardship [*Art. 6.2.2, UNIDROIT Principles, Comment, §3, ¶d, p. 221; Zaccaria, p. 170*]. The inclusion of such a clause will be regarded as a sign of assumption of risk from that party to whom the clause is relevant [*Perillo, p. 25*]. In the present dispute, CLAIMANT did not assume the risk from the tariff as the Contract does not provide for any kind of risk allocation for hardship (a), in addition, the requirements for DDP does not constitute as a risk allocation (b).

a. The Contract does not provide risk allocation for increment of the price

131. In the event Clause 12 of the Contract is primarily a *force majeure* clause with a hardship reference, it shall merely operate as a *force majeure* clause [*Ans. NoA, ¶9, p. 30; Resp. Ex. R 3, p. 35*]. The legal

consequences of such is that the clause will only relieve the obligor from their liability [*Rimke, §B.3, p. 231*].

132. Clause 12 should thus only function as a means of protection for CLAIMANT from further risk associated with the DDP requirement. It also serves to exempt CLAIMANT from its liability caused by an event that amounts to *force majeure* or hardship, as stipulated in the Clause [*Cl. Ex. C 5, ¶12, p. 14; Cl. Ex. C 4, p. 12*]. It does not provide for any revision or sanctions which should otherwise be undertaken if it were a hardship clause [*Rimke, §A.2, p. 229*].
133. Moreover, when drafting the Contract, CLAIMANT had already calculated the price of the Goods, including the amount of the natural coverage from DDP and the profit margin of 5% [*PO 2, ¶¶8, 31, pp. 56, 59*]. Other than that, there are no further calculations for an increase of the price, or any kind of revision. This indicates that CLAIMANT never assumed that the price would rise in the future.
134. Therefore, it would be baseless to say CLAIMANT had assumed the risk, since the Contract does not provide any kind of risk allocation for hardship, Clause 12 notwithstanding.

b. <u>The requirements of DDP does not constitute as a risk allocation</u>

135. Under terms of DDP delivery, a seller's obligation would be fulfilled if the goods are placed at the disposal of the buyer. All expenses for the delivery must be borne by the seller, which includes customs and clearance of the goods, unless the parties expressly agreed otherwise [*Incoterms 2010*].
136. However, the DDP in the present dispute is exempted by virtue of Clause 12, since the Parties had expressly agreed that CLAIMANT may not be injured by an unforeseen event [*Cl. Ex. C 5, ¶12, p. 14*]. Although CLAIMANT had shown their willingness to deliver the Goods based on DDP, they did not want to be associated from the risks arising from it [*Cl. Ex. C 4, p. 12*]. This is since CLAIMANT had suffered detrimental loss in the past due to customs regulations [*ibid*]. Thus, the DDP cannot extend to the injury suffered by CLAIMANT from an event inside the scope of Clause 12, which includes a rise in tariff. [*Cl. Memo, ¶95*]
137. Furthermore, CLAIMANT's loss was because they delivered the goods prior to a new agreement on the price. Thus, when RESPONDENT said that they would provide renegotiation for a new purchase price [*Cl. Ex. C 8, p. 18; Resp. Ex. R 4, p. 36*], it indicated RESPONDENT's consent to bear the tariff for CLAIMANT. Due to its consent, and since Clause 12 exempts the allocation of risk on DDP, it follows that the DDP cannot be considered as an allocation of risk.

138. To conclude, since the present circumstances have fulfilled all requirements set forth by the UNIDROIT, CLAIMANT is entitled to request to the Tribunal for an adaptation of the purchase price under the grounds of hardship.

ii. CLAIMANT's request to renegotiate was made without undue delay

139. Pursuant to Art. 6.2.3 (1) of the UNIDROIT, CLAIMANT immediately requested for clarification and later renegotiation to RESPONDENT when the custom officials informed them that the tariff is also applicable to the Goods [*Cl. Ex. C 8, p. 17*]. CLAIMANT's request to renegotiate was not without reason, as the tariff had altered the balance of the Contract that was concluded by the Parties.

140. Following CLAIMANT's request, RESPONDENT agreed to renegotiate for the adjustment of the purchase price. After agreeing to CLAIMANT's request, RESPONDENT urged CLAIMANT to authorize the shipment [*Cl. Ex. C 8, p. 18*]. Acting in good faith and out of trust for RESPONDENT, CLAIMANT delivered the Goods under the assumption that RESPONDENT would provide the solution through further negotiation. However, RESPONDENT chose to halt the negotiation process unilaterally [*ibid*], failing to reach new terms as promised.

141. Since the renegotiations failed to reach a new agreement on the purchase price, it resulted in CLAIMANT's loss of profits, in addition to other severe losses [*NoA, ¶18, p. 7*]. Therefore, CLAIMANT is entitled to resort to the Tribunal for an adaptation of price.

iii. CLAIMANT did not withhold their performance when faced by hardship

142. A party is bound to perform his obligations under the contract even if the performance has become more onerous [*Lando, p. 37*]. Chapter 6 of the UNIDROIT labeled 'Performance' regulates hardship and its legal consequences [*Brunner, p. 400*]. Hence, even though hardship is considered as an impediment, the disadvantaged party is still obliged to perform, regardless of if the performance has become excessively onerous [*Art. 6.2.1, UNIDROIT*].

143. The purpose of Art. 6.2.1 of the UNIDROIT is to make it clear that, as a consequence of the general principle of the binding character of the contract, performance must be rendered as long as it is possible regardless of the burden it may impose on the performing party [*Art. 6.2.1, UNIDROIT Principles, Comment. §1. p 217*]. This obligation must be performed, even after a request for renegotiation is made [*Art. 6.2.3 (2), UNIDROIT*].

144. Presently, despite the tariff causing the delivery to be excessively onerous, CLAIMANT still delivered the Goods without stalling or causing late performance [*NoA, ¶13, p. 6*]. This delivery was done even in the absence of agreement for a new price. By doing so, CLAIMANT had shown their integrity as a seller, as they were willing to bear a severe loss in order to respect the Contract.

145. Therefore, under the grounds of hardship and for the sake of restoring the equilibrium of the Contract, the Tribunal shall adapt the purchase price, since the situation has fulfilled all requirements for an adaptation set by the UNIDROIT.

C. CLAIMANT IS ENTITLED FOR AN INCREASE OF A PURCHASE PRICE

146. CLAIMANT should be entitled for an increase of the purchase price since CLAIMANT has performed the Contract only to receive nothing from it **(i),** granting adaptation by the Tribunal would be much more reasonable **(ii)** and finally, CLAIMANT performed the Contract in good faith **(iii).**

i. CLAIMANT performed the Contract only to receive nothing in return

147. It is widely accepted that a contract must function to facilitate an exchange of "considerations" between parties. This includes the exchange of goods and services for money [*Stone, p. 3*]. The view for the value of consideration is that it needs to be sufficient. Exchange of consideration will generally be deemed sufficient where the promisee suffers a detriment by giving away a value and the promisor receives benefit from the promisee's detriment. In most sale of goods situations, the identification of consideration is the arising obligations for both parties to perform their promises [*Schwenzer/Hachem/Kee, ¶¶¶9.19, 9.20, 9.23*].

148. In the present dispute the exchange of consideration between the Parties is not manifested at all since the raise in tariff has affected the exchange. RESPONDENT's obligation as the promisee was not affected, whereas CLAIMANT as the promisor did not receive any benefit due to the tariff' raise. The tariff raise was proven to be too much for CLAIMANT to bear as it anulled the US$ 200.000 received from CLAIMANT's calculated 5% profit, turning it into a 25% loss [*NoA, ¶18, p. 7*]. In light of these facts, CLAIMANT has received no profit from the Contract and thus implies destruction of the commercial basis of the Contract, in addition to depriving the Contract of its function.

149. The Tribunal should consider adaptation as it would rectify the Contract of the loss of its purpose, restoring the initial equilibrium [*Silveira, ¶492, p. 327*]. If the Tribunal does not adapt the Contract, then it would render the Contract useless as there is no exchange of considerations.

ii. It would be much more reasonable for the Tribunal to adapt the purchase price

150. Adaptation would be the most reasonable and fair decision in the present dispute. As stipulated in UNDIROIT, the Tribunal may adapt the contract if it is reasonable and fair. To assess reasonableness, it shall be seen from the situation in the present dispute [*Art. 6.2.3, UNIDROIT Principles, Comment, §7, p. 226*].

151. This can be seen in an ICC case, where the tribunal decided to adapt the purchase price between a transaction of a buyer from Kosovo and a seller from Switzerland. In that case, the value of the goods has diminished and thus altered the contract fundamentally. The tribunal, basing its decision on Art. 6.2.3 (4)(b) of the UNIDROIT, with consideration that it would be the most reasonable and fair decision regarding the situation in the dispute [*ICC, No. 1639*]. Similar to the present dispute, the tariffs have altered the balance of the Contract, which consequently lead to CLAIMANT's suffering of severe loss and even jeopardized their business.

152. Since 2014, CLAIMANT has been struggling to make profit due to the high interests from the loan taken to finance their new stables in 2013 [*PO 2, ¶29, p. 59*]. In an attempt to start gaining profit, CLAIMANT had to restructure their company and even cut off their workforce [*Cl. Ex. C 8, p.* 17]. The restructuring plans includes an agreement with their creditor, which provided that from 2017 onwards CLAIMANT must earn profit [*PO 2, ¶29, p. 59*]. CLAIMANT has planned the present transaction to earn profit [*ibid*]. Failing to do so, CLAIMANT would lose the right on their line of credit and would have to negotiate for a new one [*ibid*] which would be very difficult, since CLAIMANT would probably have to sacrifice a part of their company [*ibid*].

153. Hence, CLAIMANT is left with the option to give up part of their company or losing their source of funding. Either way, it would be disastrous for CLAIMANT if the Tribunal decided not to restore their profit, since it is CLAIMANT's only hope to maintain their creditor, and termination would be catastrophic to CLAIMANT's business.

154. The amount that CLAIMANT requested is only to restore CLAIMANT's profits, nothing more. This is in order for CLAIMANT to be able pay its debt to their creditor and maintain their business. Further, taking into consideration that RESPONDENT would not be affected by

paying the increased purchase price [*PO 2, ¶30, p. 59*], it shall be fair and reasonable for the Tribunal to adapt the price.

iii. CLAIMANT has performed the Contract in good faith

155. An ICC case has provided that where the requested party has fulfilled his obligation to execute the Contract in good faith before requesting for adaptation, the Tribunal shall grant an adaptation of the contract [*ICC, No. 1035*]. This view should also be applicable in the present dispute as CLAIMANT has performed all of its obligation on good faith.

156. It is CLAIMANT's DDP obligation to bear the tariffs, despite this being against the Hardship Clause as it protects CLAIMANT from the high additional risks that makes the Contract more onerous [*Cl. Ex. C 5, ¶12, p. 14*]. CLAIMANT, under the impression of good faith and *pacta sunt servanda* delivered the goods while bearing the 30% raise in tariffs [*Cl. Ex. C 8, p. 17; Resp. Ex. R 4, p. 36*]. CLAIMANT's conduct of paying the tariffs despite suffering loss, to comply with RESPONDENT's urgency for the start of the "breeding season" evidences good faith [*Cl. Ex. C 8, p. 17; Resp. Ex. R 4, p. 36*].

157. Thus, the Tribunal should grant CLAIMANT the price increase since CLAIMANT has performed its obligation to execute the Contract in good faith.

CONCLUSION OF THE THIRD ISSUE

158. CLAIMANT is entitled for remuneration of the purchase price through adaptation by the Tribunal. The Tribunal is authorized to adapt the purchase price as it is provided under the Hardship Clause. Furthermore, in the event that Clause 12 of the Contract does not provide adaptation, present circumstances entitle CLAIMANT to receive adaptation by the Tribunal through the UNIDROIT principles.

PRAYER FOR RELIEF

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. The respective counsels would like to submit that for the reasons stated above, CLAIMANT respectfully request the Tribunal to find that:

1. The Tribunal have the jurisdiction to adapt the Contract;
2. The Tribunal shall admit the Partial Interim Award as evidence;
3. CLAIMANT is entitled to the payment in the amount of US$ 1,250,000 through adaptation of the purchase price.

Bandung, December 2018

Jorryn Alexander Rotty

Michael Christopher Ferdian

Muhammad Lazuardy Thariq Makmun

Rafi Adrian Rahadi