SIXTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

# SYMBIOSIS LAW SCHOOL
# PUNE

## MEMORANDUM FOR RESPONDENT

HKIAC/A18128 – Phar Lap Allevamento v. Black Beauty Equestrian

| ON BEHALF OF | AGAINST |
| --- | --- |
| Black Beauty Equestrian<br>2 Seabiscuit Drive<br>Oceanside<br>Equatoriana | Phar Lap Allevamento<br>Rue Frankel 1<br>Capital City<br>Mediterraneo |
| RESPONDENT | CLAIMANT |

ISHANI CHOPRA • KSHITIJ RATHORE • VELPULA AUDITYAA

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| **¶/¶¶** | Paragraph/Paragraphs |
| **All ER** | All England Law Reports |
| **Art.** | Article |
| **ASA** | Association Suisse de l'Arbitrage |
| **AUT** | Austria |
| **Cir.** | Circuit |
| **Cl.** | Clause |
| **Cl. Memo.** | Memorandum for Claimant |
| **CLOUT** | Case Law on UNCITRAL Texts |
| **Co.** | Company |
| **Comm. Arb.** | Commercial Arbitration |
| **Ct.** | Court |
| **DAP** | Delivered At Place |
| **DDP** | Delivered Duty Paid |
| **ENG** | England |
| **Email by Cl.** | Email by Claimant |
| **Email by Res.** | Email by RESPONDENT |
| **Ex.** | Exhibit |
| **FSSA** | Frozen Semen Sales Agreement |
| **GER** | Germany |
| **HKIAC** | Hong Kong International Arbitration Centre |
| **i.e.** | that is / in essence |
| **IBA** | International Bar Association |

| | |
|---|---|
| **ICC** | International Chamber of Commerce |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **Inc.** | Incorporated |
| **INCOTERM** | International Commercial Terms |
| **JPN** | Japan |
| **Lloyds Rep** | Lloyds Law Reports |
| **Ltd.** | Limited |
| **No.** | Number |
| **OGH** | Obersten Gerichtshof (Supreme Court of Justice, Austria) |
| **OLG** | Provincial Court of Appeal |
| **ONSC** | Ontario Supreme Court |
| **p./pp.** | Page/Pages |
| **P.O.** | Procedural Order |
| **Res.** | Respondent |
| **Res. Memo.** | Memorandum for Respondent |
| **S.A.** | Société Anonyme/Corporation |
| **SFT** | Swiss Federal Tribunal |
| **SG** | Singapore |
| **SGHC** | Singapore High Court |
| **SGHCR** | Singapore High Court Registrar |
| **SWZ** | Switzerland |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNIDROIT** | International Institute for the Unification of Private Law |
| **UPICC** | UNIDROIT Principles of International Commercial Contracts |

| | |
|---|---|
| **US** | United States of America |
| **USD** | US Dollars |
| **v.** | versus (against) |
| **Y.B.** | Yearbook |

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| **CISG Advisory Council Opinion No.7** | CISG Advisory Council Opinion No. 7 Exemption of Liability for Damages Under Article 79 of the CISG |
| **Hague Convention** | Principles On Choice Of Law In International Commercial Contracts, 19 March 2015 |
| **HKIAC Rules** | 2018 HKIAC Administered Arbitration Rules, Hongkong November 1, 2018 |
| **IBA Rules** | IBA Rules on the Taking of Evidence, London May 29, 2010 |
| **Rome I Regulation** | Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 |
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| **UNCITRAL Model Law** | UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna June 21, 1985 |
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## LATIN MAXIMS

| | |
|---|---|
| **Arguendo** | For the sake of argument |
| **Contra Proferentem** | Interpretation against the draftsman |
| **Force Majeure** | Unforeseeable circumstances |
| **Lex Arbitri** | The law of the arbitration |
| **Ex Turpi Causa Non Oritur** | There can be no lawsuit arising out of an illegal cause |
| **Prima Facie** | On first impression |

## STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**", collectively "**the Parties**").

CLAIMANT is a renowned stud farm based in Mediterraneo and offers frozen semen of its champion stallions for artificial insemination. RESPONDENT is an equestrian center in Equatoriana and has started a new programme for breeding racehorses.

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| **21 March 2017** | RESPONDENT contacted CLAIMANT to inquire about the availability of '*frozen semen*' of Nijinsky III for its breeding programme. |
| **24 March 2017** | CLAIMANT accepted RESPONDENT's demand for purchase of 100 doses of Nijinsky III's frozen semen. |
| **12 April 2017** | Ms. Julie Napravnik and Mr. David Krone were severely injured in a car accident, leading to change of final negotiators. |
| **6 May 2017** | The Parties entered into the Frozen Semen Sales Agreement ("**FSSA**"). |
| **18 May 2017** | First instalment of USD 5,000,000 was paid by the RESPONDENT. |
| **November 2017** | 25% tariff imposed by Mediterraneo on agricultural products from Equatoriana. |
| **19 December 2017** | Equatorianian government retaliated by imposing 30% tariffs on selected products from Mediterraneo including frozen semen. |
| **21 January 2018** | The Parties discussed about the newly imposed tariff and timely delivery of goods. Second instalment of USD 5,000,000 paid by the RESPONDENT and the contractual obligations of the RESPONDENT came to an end. |
| **12 February 2018** | Difference of opinion arose between the Parties with respect to contractual obligations of RESPONDENT. |
| **31 July 2018** | CLAIMANT initiated arbitral proceedings at the HKIAC. |
| **2 October 2018** | Written Communication received from CLAIMANT requesting Partial Interim Award from another tribunal under HKIAC Rules to be submitted as evidence by the CLAIMANT in present proceedings. |
| **4 October 2018** | Written Communication received from the RESPONDENT in reply to contentions raised by the CLAIMANT in previous communication. |

## INTRODUCTION

1. The request for adaptation is not tenable as the Tribunal lacks the requisite power and jurisdiction. The law of Danubia governs the arbitration agreement, which restricts its interpretation from extending to a claim for adaptation. Examining the scope of the present arbitration agreement under the law of Mediterraneo, as is contended by the CLAIMANT, would still not attribute such power to the Tribunal **(Issue 1)**.
2. In support of its contention, the CLAIMANT seeks to rely on confidential documents and a 'Partial Interim Award' from another arbitration involving the RESPONDENT. However, the admissibility of such poisoned evidence is barred under HKIAC Rules and the UNCITRAL Model Law. Moreover, such evidence is neither relevant nor material to the present proceedings, and admitting it would be in breach of confidentiality and against the interest of justice. The CLAIMANT has also made obscure and meritless submissions under the inapplicable UNCITRAL Transparency Rules to substantiate such a claim. The illegal source of evidence makes the request of the CLAIMANT admissible **(Issue 2)**.
3. The CLAIMANT submits that it is entitled to a payment of USD 1,250,000. However, the same is baseless, as it is possible neither under the hardship clause of the FSSA, nor under CISG. The hardship clause constitutes a derogation from CISG and hence, CISG cannot be relied upon. The impugned tariff does not satisfy the requirements of the hardship clause or CISG. Therefore, in any event, adaptation is not available as a remedy **(Issue 3 & 4).**

## ARGUMENTS

### I. THE TRIBUNAL DOES NOT HAVE THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

4. The primary source of a Tribunal's authority to decide dispute is the arbitration agreement entered freely between the Parties [*Gailard/Savage, p. 650; Poudret/Besson, p. 457*]. The RESPONDENT submits that the Tribunal does not have the requisite jurisdiction and power to settle the claim for adaptation as raised by the CLAIMANT.
5. The CLAIMANT has requested the Tribunal to adapt the FSSA and order the RESPONDENT to pay USD 1,250,000 [*Notice of Arbitration, p.8*]. The CLAIMANT has made this request in light of loss of profit due to 30% tariffs imposed by Equatoriana [*Notice of Arbitration, p.7, para. 18*]. The Tribunal should refuse to grant this request regardless of the loss suffered by the CLAIMANT. Contrary to the CLAIMANT'S submission, the arbitration agreement is governed by

the law of Danubia **(A),** and cannot be interpreted broadly to extend to the claim for adaptation under the four corners rule and law of Mediterraneo **(B)**. Furthermore, the Tribunal does not have the power to adapt the FSSA **(C)**.

### A. THE ARBITRATION AGREEMENT SHALL BE GOVERNED BY LAW OF DANUBIA

6. Party autonomy is the cornerstone of international arbitration [*Born, p. 1257; Bühring/Kirchoff/Scherer, ¶ 3.I.1; Rau, p. 534*]. The Parties agreed that the seat of arbitration would be Vindobona, Danubia [*FSSA, Cl. 15*], and arbitration would be administered under the HKIAC Rules, 2018 [*P.O. No. 1, p. 52, ¶ II*]. However, the arbitration agreement [*FSSA, Cl. 15*] does not expressly mention a choice of curial law governing the arbitral proceedings.
7. The governing law of the arbitration agreement is to be determined in accordance with a three-step test: (a) the parties' express choice; (b) the implied choice of the parties as apparent from their intentions at the time of contracting; or (c) the system of law with which the arbitration agreement has the closest and most real connection [*Tan/Lee, pp. 141-143; Sul America Case (ENG, 2012); BCY v. BCZ (SG, 2016); Arsanovia v. Cruz (ENG, 2012)*].
8. In the present case, there is no express choice of law governing the arbitration agreement **(1)**. Moreover, the Parties' implied choice was that the arbitration agreement should be governed by the law of Danubia **(2)**. In any event, the closest connection test also asserts the applicability of the law of Danubia to the arbitration agreement **(3)**.

#### 1. There is no express choice of law

9. The doctrine of separability presumes that the arbitration clause is autonomous and juridically independent from the main contract in which it is contained [*Case No. 8938 (ICC)*]. To this end, the RESPONDENT submits that the term "sales agreement" does not refer to the arbitration agreement **(a)**, and the CLAIMANT has misinterpreted the doctrine of separability **(b)**.

##### *(a) The term "sales agreement" does not refer to arbitration agreement*

10. The use of specific terms in the governing law provision naturally connotes rights and obligations more directly relating to the substantive agreement rather than the arbitration agreement [*Arsanovia v. Cruz (ENG, 2012), ¶ 22*]. CLAIMANT's assertion that Cl. 14 of the FSSA extends to the arbitration agreement is unfounded. The CLAIMANT has erroneously cited the *Arsanovia Case* stating that by interpreting the ordinary meaning of Cl. 14, the term "*This Sales Agreement*" refers to the FSSA [*Cl. Memo., ¶ 6*].

11. FSSA contains both the terms 'agreement' and 'sales agreement'. The first line of the FSSA states, "*This Agreement is made….*", which clearly includes both the substantive contract and the arbitration agreement. Cl. 14 of the FSSA specifically states: "*This Sales Agreement is governed by the law of Mediterraneo…*" [*Ex. No. C5, p. 14, ¶ 14*]. The fact that the term '*Sales Agreement*' is used in Cl. 14 of FSSA and not '*Agreement*' clearly connotes that the law of Mediterraneo governs only the substantive part of FSSA and not the arbitration agreement.

***(b) The CLAIMANT has misinterpreted the doctrine of separability***

12. The analysis of choice of the law governing an international arbitration agreement begins with the separability presumption [*Born, p. 473*]. The arbitration agreement should be judged separately even when it is a part of the main contract [*Commentary on Hague Convention, ¶ 7.3; Kröll I, p. 44*]. One of the consequences of separability presumption is to ensure that a challenge to the validity of the main contract does not invalidate the arbitration agreement [*Binder, ¶ 4-006- 4-011; Holtzmann/Neuhaus, pp. 478-481*]. The doctrine of separability is not limited to the abovementioned consequence [*Born, p. 464; Hague Convention, Art. 7*].

13. The CLAIMANT asserts that the purpose of doctrine of separability is only to ensure a challenge to the validity of the main contract does not invalidate the arbitration agreement [*Cl. Memo., pp. 3 ¶¶ 4; Cl. Memo., pp. 8, ¶¶ 24-26*]. CLAIMANT relies on the interpretation of the term 'that purpose' in Art. 16.1 of UNCITRAL Model Law and Art 19.2 of the HKIAC Rules to restrain the consequence of separability presumption to the validity of the arbitration agreement only [*Cl. Memo., p. 8, ¶¶ 25*].

14. Another direct consequence of the separability presumption is that the arbitration agreement is separate from the underlying contract [*Briggs, p. 85-97; Case No. 8938 (ICC)*], and the law chosen to govern the main contract will not automatically extend to the arbitration agreement [*Vorobey, p. 138*]. Article 16 of Danubian and Mediterranean Arbitration Law acknowledge the doctrine of separability [*Answer to the Notice, p. 31, ¶ 14*]. The effect of choice of law for the main contract cannot be extended to the arbitration agreement [*Kröll I, p. 45, XL v. Owens (ENG, 2000)*]. Therefore, choice of law governing the sales agreement cannot be interpreted as an express choice for the law governing the arbitration agreement.

**2. The implied choice of law to govern the arbitration agreement was law of Danubia**

15. The implied choice of parties must be considered to determine the applicable law if there is no express choice of law governing the arbitration agreement [*CLOUT Case No. 268 (GER, 1996); Case No. A98/126 (SWZ, 1998)*]. The CLAIMANT has relied on the main contract

presumption to assert that the Parties impliedly chose the law of Mediterraneo to govern the arbitration agreement by choosing it to govern the sales agreement [*Cl. Memo., pp. 4-55, ¶¶ 8-13*]. The choice of law of Mediterraneo to govern the sales contract does not mean the Parties impliedly chose law of Mediterraneo to govern the arbitration agreement. The mere fact of an express choice of law in the sales agreement is not sufficient to displace the Parties' intention to have the law of the seat be the law governing the arbitration agreement [*First Link Case (SG, 2014), ¶ 16*].

16. Additionally, the main contract rule is limited only to a rebuttable presumption [*Sul America Case (ENG, 2012)*]. This rebuttable presumption can be displaced by interpreting the text of the arbitration agreement **(a)** and the negotiation between the Parties **(b)**.

***(a) Text of the arbitration agreement***

17. The choice of an arbitral seat presupposes parties' intention to have the law of the seat recognize and enforce the arbitration agreement [*First Link Case (SG, 2014), ¶ 14*]. The parties' selection of a neutral seat invariably comes with the implied acceptance of the *lex arbitri* of the seat of arbitration [*Waincymer/Barraclough, p. 19*]. The agreement to arbitrate in Danubia means the Parties impliedly selected the law of Danubia to govern the arbitration agreement.

***(b) Negotiations between the Parties***

18. The negotiation process must be considered to determine the Parties' implied choice of law [*Schlechtriem/Schwenzer, p. 6; CLOUT Case No. 911 (SWZ, 2006); Construction Materials Case (AUT, 1998)*]. The arbitration agreement has to be interpreted according to the intention shown by the parties [*CISG, Art. 8.1; CLOUT Case No. 429 (GER, 2000)*]. The CLAIMANT states that the RESPONDENT could not have been unaware of the CLAIMANT's intention for the law of Mediterraneo to govern the arbitration agreement [*Cl. Memo., pp. 6-7 ¶¶ 18-20*]. However, this intention does not bind the Parties. While the CLAIMANT wanted the law of Mediterraneo to govern the arbitration agreement, the RESPONDENT had also clearly expressed its desire that Law of Equatoriana should govern the arbitration agreement [*Ex. No. R1, p. 33*]. Moreover, the RESPONDENT also agreed that the law of Mediterraneo should govern the arbitration agreement only if courts of Equatoriana had the jurisdiction to decide the dispute [*Ex. No. C3, p. 11*]. Since the courts of Equatoriana did not have the jurisdiction, it was implied that the agreement for the law of Mediterraneo to govern the arbitration agreement was not accepted.

19. The Tribunal should interpret the negotiations of the Parties in accordance with the understanding of a reasonable person if no subjective intention can be established under Art. 8.1 of the CISG [*CISG, Art. 8.2; Farnsworth, p. 98, ¶ 2.4*]. The CLAIMANT asserts that a

reasonable man would draw a conclusion that Parties had chosen the law of Mediterraneo for governing the arbitration agreement [*Cl. Memo., pp. 7-8, ¶¶ 22-23*]. It states that a draft agreement was agreed upon by the Parties including a choice of law provision in favour of law of Mediterraneo. However, the draft agreement only specified the law applicable to the sales agreement and not the arbitration agreement [*Ex No. R2, p. 34*].

20. A reasonable person considers "all relevant circumstances" to determine the intention of the parties [*CISG, Art. 8.3; Docket No. 2 Ob 547/93 (AUT, 1994)*]. The CLAIMANT may argue, that it insisted on the law of Mediterraneo to govern the sales agreement as it could not submit the contract to a foreign law without a special approval of the creditor's committee [*Ex. No. R1, p. 33*]. However, the consent of the creditor's committee was not required to be taken to submit the arbitration agreement to the law of Danubia [*P.O. No. 2, pp. 56-57, ¶ 14*]. Moreover, the CLAIMANT's negotiator, Ms. Julie Napravnik, specifically suggested Danubia as it was a neutral country with a functioning judicial system and because Danubian Arbitration law is a verbatim adoption of the UNCITRAL Model Law like the arbitration laws of Mediterraneo and Equatoriana [*P.O. No. 2, p. 57, ¶ 14*]. The CLAIMANT'S suggestion based on such considerations clearly implies a choice to be subjected to the law of Danubia.

21. The principle of *contra proferentem* states that the ambiguous terms of an agreement must be construed against the party that provided the agreement [*Bernstein/Lookofsky, p. 131; DiMatteo I, p. 202*]. It is accepted that the *contra proferentem* principle applies under Art. 8.2 of the CISG [*CISG-AC No. 13, ¶ 9.1; Honnold I, p. 158, ¶ 107.1; Germany v. Latvia (GER, 2008)*]. In the present case, the CLAIMANT had provided the last draft of the arbitration agreement [*Ex No. R2, p. 34*]. The reasonable man will construe the terms of arbitration agreement against the CLAIMANT i.e. the arbitration agreement is not governed by the law of Mediterraneo, instead by the law of Danubia.

22. In light of the above, the text of FSSA and the negotiations between the Parties displaces the main contract presumption that the law governing the sales agreement shall also govern the arbitration agreement. Therefore, the implied choice of the law governing the arbitration agreement is law of Danubia.

### 3. Even the application of closest connection test leads to application of law of Danubia

23. If the Tribunal finds that the Parties failed to expressly or impliedly choose the governing law of arbitration agreement, the law with the "*closest and most real connection*" shall govern the arbitration agreement [*Sul America Case (ENG, 2012), ¶ 25; Habas Sinai Case (ENG, 2013), ¶ 101*]. The arbitration agreement has a closer and more real connection with the place where

the parties have chosen to arbitrate than with the place of the law of the underlying contract [*C v. D (ENG, 2008),* ¶ *26; XL v. Owens (ENG, 2000); Black v. Papierwerke (ENG, 1981)*]. If the parties' will is unclear, it is presumed the parties intended the law of the place where the arbitration proceedings would be held, to apply [*Joseph,* ¶ *6.36; Case No. 1994 (O) 1728 (JPN, 1995)*]. The law of Danubia is the law of the seat of arbitration [*FSSA, Cl. 15*].

24. While the CLAIMANT may argue that the law of Mediterraneo has the closest connection to the arbitration agreement, any consideration regarding the laws of the parties' states or place of execution of contract is applicable in considering the 'closest' substantive law applicable to contract dispute [*Compagnie Tunisienne v. Compagnie d'Armement (ENG, 1970); Whitworth v. James Miller (ENG, 1970)*]. Arbitration agreements are 'procedural' and therefore, are inevitably subject to the law of arbitral seat [*Case No. 1994 (O) 1728 (JPN, 1995)*]. Thus, the law with the "*closest and most real connection*" with the arbitration agreement is the law of Danubia.

25. In light of the above submissions, there is no express choice determining the law governing the arbitration agreement. The implied choice of the Parties for governing the arbitration agreement can be construed as the law of Danubia. In light of failure to ascertain the express or implied choice, the Tribunal should find that the law of Danubia has the "*closest and most real*" connection with the arbitration agreement. Therefore, the law of Danubia is the law governing the arbitration agreement.

### B. THE ARBITRATION AGREEMENT CANNOT BE INTERPRETED TO EXTEND TO THE CLAIM OF ADAPTATION

26. The interpretation of an arbitration agreement follows the rules of the law applicable to the agreement itself [*Hausmaninger,* ¶ *226, 228*], which is the law of Danubia in the present case. The arbitration agreement cannot be interpreted broadly under the law of Danubia **(1)**. Moreover, the arbitration agreement cannot be interpreted broadly under the law of Mediterraneo also **(2)**.

#### 1. The arbitration agreement cannot be interpreted broadly under the law of Danubia

27. The Danubian Contract Law contains the "four corners rule", which excludes all extraneous evidence for the interpretation of the contract, and limits the scope of interpretation to the wordings of the contract [*Perillo, pp. 12-13; Rosengren, pp. 1-16; P.O. No. 1, p.51,* ¶ *II*]. In substance, this has the same effect as that of a merger clause [*P.O. No. 1, p.61,* ¶ *45*]. The contract would, thus, be an exhaustive embodiment of all rights and responsibilities and no preliminary statements or agreements would be considered in the interpretation of the contract [*UNIDROIT Principles, Art. 2.1.17*]. Therefore, the negotiations between Mr. Chris Antley and

Ms. Julie Napravnik cannot be considered to determine whether the Parties have conferred the power of adaptation to the Tribunal.

28. The arbitration agreement gives the Tribunal the jurisdiction and power to decide a dispute [*UNCITRAL Model Law, Art. 7.1*]. Adaptation of contract would not be a 'dispute' arising out a contract as it would involve creation of future rights, and not adjudication of pre-existing rights [*Marcantonio, p. 237; Case No. 4265 (ICC); Docket No. 1 Ob 504/85 (AUT, 1985)*]. The CLAIMANT vaguely submits that the individual interpretation of terms '*performance*', '*all*' and '*arising out of*' can be interpreted to include the claim for adaptation in the arbitration clause [*Cl. Memo., pp. 12-13, ¶¶ 42-49*].

29. The CLAIMANT asserts that the claim for adaptation can be equated to the claim for performance of the contract as adaptation is a remedy included in Chapter 6 of UNIDROIT Principles, which is headed '*performance*' [*Cl. Memo., p. 12, ¶¶ 42-43*]. It fails to provide any authority for this assertion.

30. In the present case, the RESPONDENT has undisputedly performed all its obligations under the contract [*FSSA, Cl. 6; Answer to Notice, p, 31, ¶ 12*], and any subsequent adaptation of the FSSA will create a future right in favour of the CLAIMANT. The RESPONDENT will have an obligation of performance only if the Tribunal adapts the concluded contract. Therefore, there is no dispute in relation to the performance of the contract.

31. An agreement to arbitrate '*any dispute*' would not include the natural consequences flowing from the contract if the arbitration agreement has any limiting or excepting language [*Management Consultants v. Parsons-Jurden (US, 1987)*]. As stated by the CLAIMANT themselves, adaption is not a dispute arising out of the contract but is a '*natural consequence*' flowing from the contract [*Cl. Memo., p. 13, ¶ 45*]. In the present case, the Parties have limited the scope of 'dispute' by excluding certain provisions of the Model HKIAC Clause. Therefore, the agreement to arbitrate '*any dispute*' does not include the claim for adaptation.

32. Arbitration agreements containing the phrases '*arising out of*' are usually construed narrowly [*Tracer v. National Environmental Services (US, 1994); Texaco v. American Trading (US, 1981); Reddam v. KPMG (US, 2006)*]. Thus, the attribution of a broad interpretation to the terms '*arising out of*' by the CLAIMANT, finds no merit. Therefore, this arbitration agreement must be interpreted narrowly.

33. In light of the above submissions, the arbitration agreement cannot be interpreted to allow for adaptation of contract by the Tribunal.

**2. The arbitration agreement cannot be interpreted broadly under the law of Mediterraneo**

34. *Arguendo,* if the Tribunal were to apply the law of Mediterraneo, the arbitration agreement cannot be interpreted broadly to extend to the claim for adaptation. There was no intention to authorize the Tribunal to adapt the FSSA **(a),** and the '*pro-arbitration rule*' cannot be used to broadly interpret the arbitration agreement **(b)**.

***(a) There was no intention to authorize the Tribunal to adapt the FSSA***

35. The law of Mediterraneo allows CISG to govern the interpretation of arbitration agreements [*P.O. No. 1, p. 52, ¶ III.4*]. The arbitration agreement has to be interpreted according to the intention shown by the parties [*CISG, Art. 8.1*]. The CLAIMANT solely relies on the statement, "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" made by Mr. Antley to prove intent of the Parties to authorize the Tribunal to adapt the contract [*Cl. Memo., p. 10, ¶¶ 32-34*]. This statement does not show the complete intention of the Parties.

36. While the original negotiators had considered that the issue of adaptation required further clarification and an express reference in the arbitration agreement or the hardship clause [*Ex. No. C8, p. 17*], the express reference was not included in the FSSA by Mr. Antley or the new negotiators [*Ex. No. C8, p. 17*]. Due consideration must be given to all relevant circumstances of the case including subsequent conduct of parties to determine the parties' intention [*CISG, Art. 8.3; Case No. HOR.2006.79/AC/tv (SWZ, 2008)*]. Therefore, the intention of the Parties was to not authorize the Tribunal to adapt the FSSA.

***(b) The Pro-Arbitration Rule cannot be used to broadly interpret the arbitration agreement***

37. The pro-arbitration rule states that the Parties intend to resolve all disputes arising out of a commercial relationship into which they had entered into, to be decided by the same Tribunal [*Born, p.1326*]. The CLAIMANT submits that, in the interest of efficiency, the arbitration agreement must be interpreted to allow the claim for adaptation under the pro-arbitration rule [*Cl. Memo., p. 11, ¶¶ 35-39*]. However, every arbitration agreement cannot be construed with the arbitrability presumption if the language makes it clear that certain questions were intended to be excluded [*Franklin, pp. 93, 96*; *Koller, ¶ 3/260; Fiona Trust Case (ENG, 2007), ¶ 13*].

38. The actual version of the Model HKIAC Clause governed "*any controversy, difference or claim arising out of or relating to this contract and any dispute regarding non-contractual obligations arising out of or relating to it*" apart from '*disputes*' arising out of the contract [*Model Clause for Arbitration under HKIAC Administered Arbitration Rules*], which had been removed from the arbitration agreement. The

term '*relating to*' extends an arbitration clause to a broad range of disputes and encompasses non-contractual obligation [*Berger/Kellerhals,* ¶ 465-468; *Pennzoil v. Ramco (US, 1998); X v. Y (SWZ, 2011); Sonatrach v. K.C.A (SWZ, 1990)*]. The parties intend to limit the arbitrable issues if they tailor the arbitration agreement to make it applicable only in a clearly defined situation [*Bolden v. FedEx (US, 2011)*]. Therefore, the Parties have limited the arbitrable issues to only disputes arising out of the FSSA and not disputes relating to it.

39. Furthermore, it cannot be presumed that the Parties intended to submit all the disputes to arbitration if the arbitration agreement is itself narrowly crafted [*Century v. Certain (US, 2009); Electricity Workers v. Verizon (US, 2006)*]. The CLAIMANT, themselves, concede that the arbitration agreement is narrowly worded [*Cl. Memo., p. 10, ¶ 34*]. Therefore, the pro-arbitration rule cannot be applied in the present case.

### C. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT

40. In any event, the Tribunal does not have the power to adapt the contract. The power of the Tribunal to adaptation must be assessed under the Danubian Contract Law **(1),** which requires express conferral of power to adapt. The power has not been conferred by the Parties **(2)**. Furthermore, the Parties cannot derogate from Art. 6.2.3 (4)(b) of Danubian Contract Law **(3)**.

#### 1. The power of Tribunal to adapt the contract must be assessed under the Danubian Contract Law

41. The Tribunal's jurisdiction to amend the contract must be assessed under the law governing the arbitration at the seat of the arbitral tribunal [*Brunner, p. 493*], which in the present case is law of Danubia. Danubian Arbitration Law, which is a verbatim adoption of UNCITRAL Model Law does not deal with the issue of adaptation [*Berger I, p. 10*]. The CLAIMANT relies solely on the fact that the hardship clause i.e. Cl. 12 of the FSSA, is part of the sales agreement governed by the law of Mediterraneo, to submit that the power of Tribunal to adapt the FSSA must be assessed under the Mediterranean Contract Law [*Cl. Memo., pp. 13-14, ¶¶ 50-51*].

42. Nevertheless, the gap in Danubian Arbitration Law must be filled by having recourse to the substantive and procedural laws of the seat of arbitration regarding gap-filling and adaptation [*Brunner, p. 495*]. Thus, the Tribunal's jurisdiction to amend the contract must be assessed under the Danubian Contract Law.

#### 2. The Tribunal cannot adapt the contract under the law of Danubia

43. Art. 6.2.3 (4)(b) of the Danubian Contract Law grants power to courts to adapt the contract only if it is authorized by the Parties [*P.O. No. 2, p. 61, ¶ 45*]. Moreover, the courts in Danubia

are of the view that the Tribunal must adapt the contract only if the power to adapt are expressly conferred by the Parties [*P.O. No. 2, p. 60, ¶ 36*].

44. The CLAIMANT may argue that that the statement by Mr. Antley expressly authorized the Tribunal to adapt the FSSA. However, adaptation may be possible if there is a renegotiation clause present, which is linked with an arbitration agreement [*Berger II, pp. 1378–1379*]. The parties must make it clear that they wished to vest the tribunal with such "creative competence", which goes beyond normal 'dispute' resolution [*Kröll II, p. 154*]. Otherwise, the Tribunal has to merely assess the rights and obligations of the parties under the contract [*Himpurna v. PT (UNCITRAL, 1999)*]. In the present case, there is no such renegotiation clause or conferral of power to adapt the FSSA. Therefore, the Tribunal does not have the power to adapt the FSSA.

### 3. The Parties cannot derogate from Art. 6.2.3 (4)(b) of Danubian Contract Law

45. *Arguendo,* if the law of Mediterraneo governs the arbitration agreement, the requirement for an express conferral of power of adaptation cannot be derogated from. The selection of a particular seat of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework, with such derogation or variation as may be permitted [*Henderson, p. 890; Garuda v. Birgen (SG, 2002); Shashoua v. Sharma (ENG, 2009)*]. However, mandatory provisions have an overriding effect and must be compulsorily applied [*UNIDROIT Principles, Art. 1.4; Hague Convention, Art. 11; Rome I Regulation, Art. 9; Collins/Harris, p. 33; Redfern/Hunter, p. 176*], and the legislative restrictions under national arbitration regimes cannot be opted out by private contract of the parties [*Azteca v. ADR Consulting (US, 2004)*]. Therefore, the mandatory provisions of the Danubian Contract Law will prevail over the provisions of the Mediterranean Contract Law.

46. In order to determine the nature and application of a provision, it is necessary to determine the intent of the legislature [*Born, p. 2711; Case No. 13954 (ICC); Beverly Overseas SA v. Privredna Banka (SWZ, 2003)*]. The intention of the legislature can be analysed from the effect of the provision [*Henderson, p. 899*]. The use of mandatory language such as the use of the word "shall" indicates the intention of creating mandatory obligations [*Noble China Inc v. Lei Kat (CAN, 1998); Shin-Etsu Chemical v. Zhongtian Technology (CHN, 2008)*]. The construction of Art. 6.2.3 (4)(b) also portrays a similar intent. It stipulates that the courts 'shall' adapt the contract if they are authorized by the Parties. It is clear that Article 6.2.3 (4)(b) of Danubian Contract Law is a mandatory provision and cannot be opted out of by agreement of parties.

47. Therefore, Art. 6.2.3 (4)(b) will supersede the Mediterranean Contract Law even if the law of Mediterraneo governs the arbitration agreement.

### CONCLUSION TO ISSUE I

48. The arbitration agreement is governed by the law of Danubia and is to be interpreted narrowly, and should be extend to the claim for adaptation. Even if the law of Mediterraneo is considered to be the curial law, the arbitration agreement cannot be interpreted to extend to the claim for adaptation. Furthermore, the Parties have not authorized the Tribunal to adapt the contract. Therefore, the Tribunal should deny the claim for adaptation of the FSSA.

## II. THE 'PARTIAL INTERIM AWARD' AND ANY OTHER ILLEGALLY OBTAINED PRIVILEGED DOCUMENTS, FROM THE OTHER ARBITRAL PROCEEDINGS, ARE INADMISSIBLE AS EVIDENCE.

49. The principle of confidentiality is a general principle or doctrine of international law [*AAY v. AAZ (SG, 2011); AZT v. AZV (SG, 2012)*]. Pursuant to Art. 45.1 of the HKIAC Rules, unless otherwise agreed to by the parties, no party may publish, disclose or communicate information relating to an award made in arbitral proceedings [*HKIAC Rules, Art. 45.1*]. The CLAIMANT in the present case is attempting to circumvent the provisions under the HKIAC Rules and get the RESPONDENT's confidential and privileged information submitted as evidence. The CLAIMANT has illegally obtained a confidential 'Partial Interim Award' of another one of RESPONDENT's proceedings [*P.O. No. 2. p. 60, ¶ 41*], and has requested the Tribunal to admit the illegally sourced documents as evidence.

50. The RESPONDENT submits that this request of the CLAIMANT should be rejected by the Tribunal as the 'Partial Interim Award' and any other illegally obtained documents, from the other arbitral proceedings, are privileged, confidential and inadmissible as evidence.

51. The admissibility of evidence should be considered in accordance with HKIAC Rules and UNCITRAL Model Law **(A).** The evidence should not be admitted as it is not relevant or material to the present case **(B).** The 'Partial Interim Award' and other documents from the other arbitration cannot be admitted in a breach of confidentiality **(C).** Moreover, even if the principles of Transparency are applied, disclosure of 'Partial Interim Award' is not warranted in the present case **(D).** The 'Partial Interim Award' has been obtained from an illegal source and is hence inadmissible **(E).**

### A. THE ADMISSIBILITY OF EVIDENCE SHOULD BE CONSIDERED IN ACCORDANCE WITH HKIAC RULES AND UNCITRAL MODEL LAW

52. In international commercial arbitration, matters of evidence are governed by party autonomy and parties are to agree on the standard of proof necessary in their dispute [*UNCITRAL Model*

*Law, Art. 19.1; Mbadugha, p. 231*]. An arbitral tribunal's power to determine the admissibility of evidence may be derived from the Parties' agreement, the chosen institutional rules, and the relevant *lex arbitri* [*Böckstiegel, p. 2*].

53. The Tribunal is not bound to apply any inapplicable rules and should determine the matter of admissibility as per the law chosen by the Parties **(1).** Moreover, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are inapplicable to the present arbitration **(2)**.

### 1. The Tribunal is not bound to apply inapplicable rules

54. Parties have a broad freedom to agree upon rules of procedure applicable upon evidence-taking [*UNCITRAL Model Law, Art.18, 19.1 & 24.1; Case No. 7626 (ICC)*] Party autonomy necessitates that the evidentiary process in an arbitration must be pursuant to the terms of the parties' agreement and the rules of law they have chosen to the proceedings [*Sicard/Derains, pp. 194-195*]. In the present case, the Parties have chosen HKIAC Rules to be the procedural law applicable to the arbitration [*FSSA, Cl. 15, p. 14*], and the law of Danubia, the UNCITRAL Model Law is the relevant *lex arbitri* [*P.O. No.1, p. 52, ¶ 4; Res. Memo. I.A.*].

55. While substantiating its request for admissibility of evidence, the CLAIMANT has indiscriminately relied upon various systems of law such as IBA Rules of Evidence [*Cl. Memo., pp. 14-19, ¶ 55, 56, 76*], US Federal Rules of Evidence [*Cl. Memo., pp. 14, ¶ 56*], UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereafter "**UNCITRAL Transparency Rules**") [*Cl. Memo., pp. 18, ¶ 70*], and other such inapplicable rules. However, the IBA Rules, and other such systems of law, cannot bind the Tribunal without the Parties' explicit consent [*Waincymer, p. 757; Lew/Mistelis/Kröll, ¶¶ 22-29; Moses, p. 102*]. The Parties never consented to the application of such rules and thus the Tribunal is not bound to consider or apply other rules of evidence apart from the HKIAC Rules and UNCITRAL Model Law. Applying a set of rules in the absence of the Parties' agreement would violate the principle of party autonomy [*O'Malley, p. 7, ¶ 1.20*].

### 2. The UNCITRAL Transparency Rules are inapplicable to the present arbitration

56. The UNCITRAL Transparency Rules are only applicable to arbitrations between an investor and a State, or a regional economic integration organization conducted on the basis of an investment treaty [*UNCITRAL Transparency Rules, Art. 1*]. The CLAIMANT has averred that a disclosure of the 'Partial Interim Award' shall be done as outlined by the UNCITRAL Principles of Transparency [*Email by Cl., p. 50; Cl. Memo., p. 41, ¶ 70*]. However, the other arbitration proceedings were not with regards to an investment treaty involving any

governmental bodies, but pertaining to a commercial contract dispute between two private parties [*Email by Res., p. 51; P.O. No. 2, p. 60, ¶ 39*]. The arbitration, and the 'Partial Interim Award' made in the same are clearly outside the scope of the Transparency Rules. A blind and wholesale application of these rules in a commercial arbitration was not intended and doing the same in the present case would lead to inappropriate results. Therefore, any claims based on the UNCITRAL Transparency rules are *prima facie* unsustainable.

### B. THE EVIDENCE IS NOT RELEVANT OR MATERIAL TO THE PRESENT CASE

57. Arbitrators are charged with the duty of determining the relevance of evidence [*Iron Ore Co. v. Argonaut Shipping Inc. (US, 1985)*]. The right to submit evidence can be denied in case the evidence offered is not admissible, suitable or relevant [*Jaksic, p. 239*].

58. The CLAIMANT has submitted that the disclosure of the evidence from the other proceedings is relevant and material to the present case, as it has a similar context and governing law with this case [*Cl. Memo., p. 15, ¶ 57*]. Furthermore, the CLAIMANT has averred that the disclosure and breach of the RESPONDENT's confidentiality is imperative, as that is the only way to ascertain the RESPONDENT's controversial positions in two arbitrations with a similar factual basis [*Cl. Memo., p. 15, ¶ 58*]. The RESPONDENT is authorized by the opponent in the other arbitral proceedings to state that the allegations by the CLAIMANT do not reflect reality and are taken out of context [*Email by Res., p. 51*].

59. The underlying contract to the other arbitral dispute contained an ICC Hardship Clause 2003, a choice of law clause in favour of Mediterranean law and the Model HKIAC-Arbitration Clause with all additions [*P.O. No. 2, p. 60, ¶ 39*]. The choice of the Parties to adopt Model HKIAC Clause with all the additions conferred a wider ambit of powers and jurisdiction on the Arbitral Tribunal; something which has been specifically excluded in the present case through use of a narrow arbitration agreement [*FSSSA, Cl. 15; Ex. R1, p. 33; Res. Ex. R2, p. 34*]. Moreover, the RESPONDENT's claim for a renegotiation of price in the other proceedings was based upon the ICC Hardship Clause 2003, and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles), which was specifically chosen as the law applicable to the Tribunal [*P.O. No. 2, p. 60, ¶ 39*]. These facts in themselves show that there are fundamental differences between the two cases and hence the 'Partial Interim Award' is not relevant to the present proceedings.

60. Although the ultimate attainability of the requested document does not impact the question of its relevance to the issue of damages, it is a factor that the arbitrators may consider in their discretion to determine whether the probative weight of additional evidence is necessary or would simply prolong the proceedings [*Iron Ore Co. v. Argonaut Shipping Inc. (US, 1985); O'Malley,*

*p. 294, ¶9.67; Case No. 11258 (ICC); Case No. 12279 (ICC)*]. Even if some of the facts of the case might be construed to support the CLAIMANT's misguided arguments, the same is not material to the Tribunal's deliberations.

61. Moreover, the CLAIMANT may argue that 'Partial Interim Award' forms a precedent, and should hence be admitted before the Tribunal. However, such an averment would also be unsustainable as there is no rule of precedent in international arbitration [*Béguin., p 5, ¶ 27*; *AES Corp. v. Argentine Republic (ICSID); SGS Société Genérale v. Philippines (ICSID)*] or any meaningful precedential value of awards in international commercial arbitration [*Béguin., p 6, ¶ 19; Kaufmann-Kohler, p. 10*]. An award from another arbitral proceeding cannot be a governing instrument for judges in order to disregard the relevant texts and more generally the applicable law [*Guillaume, p.* 23]. As both the cases have material differences, any reliance upon the 'Partial Interim Award' would lead to inappropriate results.

62. Hence, the Tribunal should dismiss the present request for admission of the 'Partial Interim Award' as evidence.

### C. THE ADMISSION OF THE CONTESTED EVIDENCE WOULD BE IN BREACH OF CONFIDENTIALITY

63. Evidence may be protected by a privilege or secret, and arbitrators must take these into account [*Schlaepfer/Bärtsch, p. 211*]. The Tribunal must determine whether documents are confidential and, whether they ought to be excluded from evidence [*Müller, p. 71; Perkins, p. 273*]. In the present case, the CLAIMANT has requested the Tribunal to admit an unpublished and illegally obtained 'Partial Interim Award' as evidence [*Email by Cl., p. 50*]. This request of the CLAIMANT is untenable as they are in breach of the express obligation of confidentiality **(1)**, and in breach of an implied obligation to protect confidentiality **(2).** Further, the disclosure of 'Partial Interim Award' and other documents is not in the "interests of justice" **(3)**.

#### 1. There is a breach of an express obligation of confidentiality

64. HKIAC Rules place an express obligation as to keep the proceedings confidential [*HKIAC Rules, Art. 45*]. Unless otherwise agreed to by the Parties, no party may publish, disclose or communicate information relating to an award made in arbitral proceedings [*HKIAC Rules, Art. 45.1, Art. 45.5.b*].

65. The CLAIMANT has averred that since they were not a party to the arbitral proceedings, they do not have a duty to protect the confidentiality of the arbitration [*Cl. Memo., p. 16, ¶ 63-64*]. The CLAIMANT has tried to interpret the provision in HKIAC for confidentiality to limit its

scope just to the parties of the proceedings [*Cl. Memo., p. 16, ¶ 63*]. However, confidentiality protects any publication of arbitration materials which amounts to a violation or substantial prejudice as envisioned by the confidentiality agreement between the parties [*Aegis Case (ENG, 2003)*].

66. The RESPONDENT and the party from the other arbitration chose to conduct an arbitration under HKIAC Rules [*P.O. No. 2, p. 60, ¶ 39*], which provides them the right to keep the deliberations and proceedings of the Tribunal confidential [*HKIAC Rules, Art. 45*]. It was clearly the intention of the parties to keep their transactions private and not have their business details be a part of the public forum.

67. The 'Partial Interim Award' and any other such documents from the other arbitration are privileged documents protected under HKIAC Rules. Any publication of the 'Partial Interim Award', whether in its entirety or excerpts, cannot be done in light of the parties' objection [*HKIAC Rules, Art. 45.5*]. While the Tribunal is not bound by the strict rules of evidence that apply in court proceedings, it has to observe the rules relating to privilege under HKIAC [*Cheng/Moser, p. 26, ¶ 73*]. This implies that any disclosure of the RESPONDENT's confidential information in the present case would be in violation of the express obligation of confidentiality.

**2. There is a breach of an implied obligation of confidentiality**

68. Confidentiality is not only deemed necessary in arbitration, but is an implicit corollary to privacy [*Henkel, p. 1067; Poorooye/Feehily, p. 286*], and forms part of the legitimate expectations of the parties [*Dolling-Baker v. Merrett (ENG, 1990)*]. The private nature of arbitration proceedings is an essential factor, ensuring the highest level of secrecy, which in turn necessitates an implied duty of confidentiality as an inherent requirement of all arbitration agreements, regardless of any explicit confidentiality agreement between the parties [*AZT v. AZV (SG, 2012); Born, p 2780; Société K. Gesellschaft v. S.A. Q. (FRA, 2008)*].

69. The CLAIMANT has averred that it does not infringe the obligation of confidentiality in a broader sense, as the obligation of confidentiality is only on a contractual basis [*Cl. Memo., p. 16, ¶ 65*]. However, the absence of an express contract between and the CLAIMANT and RESPONDENT does not exclude the applicability of the implied obligation. The principle of confidentiality is a general principle or doctrine of international law [*AAY v. AAZ (SG, 2011); AZT v. AZV (SG, 2012)*], and there exists an implied obligation of confidentiality in international commercial arbitration [*Emmott v. Michael Wilson (ENG, 2008); Dolling-Baker v. Merrett (ENG, 1990)*].

70. The private nature of arbitral proceedings offers disputants a private forum where they can keep their disputes and any disclosure of 'proprietary know-how', away from the intrusiveness of the media and the prying eyes of their competitors [*Cremades/Cortes, p. 27; Poorooye/Feehily, p. 298; Boog/Menz, p.111; Denton/Heaton, p. 120*]. The CLAIMANT is well aware of this implied privilege that extends to documents of an arbitration, pertaining to parties' proprietary 'know-how' [*Cl. Memo., p. 16, ¶ 65*]. They have attempted to justify their illegal act of obtaining the 'Partial Interim Award' by suggesting that the information given therein is not privileged. However, the 'Partial Interim Award' and other such documents from the proceedings contain the parties' privileged and confidential information pertaining to their private business and disputes arising from the same [*P.O. No. 2, p. 60, ¶ 39*]. The CLAIMANT and the Tribunal, have an implied obligation to not violate the confidentiality of the RESPONDENT. The Tribunal should not allow the illegally obtained and unpublished away to be disclosed without the consent of the parties to the arbitration.

**3. The disclosure of 'Partial Interim Award' and other documents is not in the "interests of justice"**

71. There is a need to balance the two competing interests, that of public administration of justice and the principle of confidentiality in international arbitration [*AZT v. AZV (SG, 2012)*]. Confidentiality rules allow a person or party to refuse to disclose certain information, even if the information might be relevant and reliable [*Mosk/Ginsburg, p. 34; Cheng/Moser, p. 25, ¶ 695*]. The 'Partial Interim Award' does not form part of public domain, and forms part of the RESPONDENT's confidential information. It cannot be rendered public without the consent of the parties [*HKIAC Rules, Art. 45.1; UNCITRAL Arbitration Rules, Art. 32.5*]. The disclosure of an arbitral award against the Parties' wishes would destroy the private character of arbitration [*Hassneh v. Steuart J. Mew (ENG, 1993)*].

72. The CLAIMANT has averred that the 'Partial Interim Award' and other documents must be disclosed in the "interests of justice" to get a more "accurate assessment" of the present case [*Cl. Memo., p. 17, ¶ 68*]. While HKIAC allows for disclosure of confidential information on certain limited grounds [*HKIAC Rules, Art. 45.3*], the Tribunal has to balance diverging interests and has to determine if reasons exist which outweigh the confidentiality interests [*Foreman v. Kingstone (NZ, 2003); Schmidt v. Rosewood Trust (ENG, 2003); Metzler, p. 252*]. However, the CLAIMANT has failed to prove any specific relevance or grave materiality of the evidence to their case [*Res. Memo., II.B*], so as to necessitate the admission of the illegally obtained evidence in breach of the other parties' right to confidentiality.

73. Therefore, the Tribunal should not allow for the disclosure of the 'Partial Interim Award' and other documents from the other proceedings. The CLAIMANT's request for submission of evidence should be denied.

### D. EVEN IF PRINCIPLES OF TRANSPARENCY ARE APPLIED, DISCLOSURE OF 'PARTIAL INTERIM AWARD' IS NOT WARRANTED IN THE PRESENT CASE

74. *Arguendo,* if the Tribunal choses to apply principles of Transparency arising from the UNCITRAL Transparency Rules, the disclosure of the 'Partial Interim Award' as prayed for the by the CLAIMANT, is unsustainable. Disclosure based upon the duty of transparency may be allowed if the applicant third party: identifies with precision the excerpts it wishes to use; describes the specific purpose for which the identified excerpts would be put to use; and explains the reasons why such publication is deemed necessary [*Burlington Resources Inc. v. Ecuador (ICSID)*].

75. The CLAIMANT herein has failed to provide with proper precision and specificity, the reason and nature of the evidence it wishes to disclose. The CLAIMANT has made a vague request for evidence and documents from the RESPONDENT's other arbitration, citing a general similarity in the two cases [*Cl. Memo., p. 38, ¶ 57; Email by Cl., p. 50*]. However, while considering confidential documents, generalizations and formulation of detailed implied terms is not appropriate [*Aegis Case (ENG, 2003)*]. As they have failed to properly identify the relevancy and materiality of the evidence, the same should not be admitted as evidence on the basis of transparency.

76. Furthermore, as stated by the CLAIMANT themselves, in the trend for transparency, the publication of arbitral awards is done where the parties have consented [*Cl. Memo., p. 41, ¶ 70*]. In the present case, neither the RESPONDENT nor the party from the other proceedings, have agreed for the publication of the arbitral award. In fact, both the parties are opposed to the disclosure of their private information [*Email by Res., p. 51*]. In such a case, any request for disclosure by the CLAIMANT is immaterial.

### E. THE CONTESTED EVIDENCE HAS BEEN OBTAINED FROM AN ILLEGAL SOURCE AND IS HENCE INADMISSIBLE

77. Any evidence obtained in a manner that is contrary to international public policy shall not be admissible [*Moloo/Khachaturian, p. 1485*]. As per the doctrine of 'clean hands', the party seeking to admit any evidence may be barred to do so if it is found that the wrongdoing was done by the party seeking to benefit from that evidence [*Moloo/Khachaturian, p. 1485*]. In the present case, the CLAIMANT is attempting to submit an unpublished 'Partial Interim Award' which has

been obtained through a breach of confidentiality. Such illegally obtained documents cannot be submitted as evidence **(1)**. Moreover, the illegality of the documents cannot be cured through a joinder of parties of the two distinct arbitrations **(2).**

### 1. Illegally obtained documents cannot be submitted into evidence

78. Anything less than a "pure conscience", would prohibit a party from seeking the aid of clean hands doctrine [*Manahattan Med Co v. Wood (US, 1883); Keystone Driller Co. v. Gen. Excavator Co (US, 1933)*]. The CLAIMANT has argued that they have not breached any confidentiality or engaged in any illegal activity to obtain the evidence, and have "clean hands" [*Cl. Memo., pp.18-19, ¶ 71-77*]. However, this averment is false. The CLAIMANT is procuring the unpublished award, which is protected by confidentiality, by payment to a third party intelligence company [*P.O. No. 2, ¶ 40, pp. 60-61*]. The fact that the confidential documents are being illegally obtained in itself makes them inadmissible. The CLAIMANT has engaged in "unclean conduct" to obtain the present evidence. This willful act of the CLAIMANT is sufficient to invoke unclean hands [*Art Metal Works v. Abraham & Straus (US, 1934)*].

79. A Tribunal may refuse to admit into evidence, documents that may have been stolen or otherwise unlawfully obtained on the grounds of procedural fairness and the equality of parties [*Caratube Case (ICSID)*]. As stated by the CLAIMANT's themselves, allowing one party to rely on evidence illegally obtained by itself is not in line with procedural fairness and *ex turpi causa non oritur actio* principle [*Cl. Memo., p. 19, ¶ 72; Blair/Gojković, p.256*]. To allow the submission and disclosure of documents which have been obtained from gross violation of the RESPONDENT's privacy and confidentiality, would be against the principles of procedural fairness [*Methanex v USA (ICSID, 1976); Libananco Holdings Co v Turkey (ICSID)*].

80. Moreover, the CLAIMANTs have tried to mislead the Tribunal by narrowing the scope of exclusion of evidence on the grounds of confidentiality, by referring to Art. 9(2)(e) of IBA Rules which considers documents pertaining to "public interest" [*Cl. Memo., p. 19, ¶76*]. However, it must be noted that the preceding provision itself allows for exclusion of commercial confidential information [*IBA Rules, Art. 9(2)(f)*]. The mere fact that the documents pertain to private confidential information rather than a "public interest", is not a valid ground to admit illegal evidence

### 2. Illegality cannot be cured through joinder of parties

81. Under Art. 27.1 HKIAC Rules, for joinder of the parties, it is necessary that the arbitrations must arise from the same contract [*HKIAC Rules, Art. 27.1*]. In an attempt to abate their unethical conduct, the CLAIMANT has suggested a joinder of parties of the two arbitral

proceedings [*Email by Cl., p. 50*]. However, the Tribunal has no power to consolidate proceedings, if parties have not expressly opted for it [*HKIAC Rules, Art. 27; Sacor Maritima SA v. Repsol Petroleo SA (ENG, 1998)*]. Moreover, the two disputes and the underlying contracts thereon are completely unrelated and cannot be joined into one arbitration. It would not be in the Tribunal's interest to prolong the arbitration in the absence of any exceptional circumstances requiring the same.

82. Therefore, the Tribunal should reject the request for admission of illegally obtained evidence.

**CONCLUSION TO ISSUE II**

83. In light of the above submissions, the Tribunal should reject the request of the CLAIMANT for admission of illegally obtained evidence. The documents are privileged and confidential in nature, as considered under HKIAC Rules and the general principles of confidentiality. The evidence is not relevant or material to the present case so as to necessitate the waiver of such confidentiality. Moreover, the submission of such illegally obtained evidence would be against the general principle of confidentiality and not in the "interests of justice". Therefore, the Tribunal should declare the contested evidence to be inadmissible.

## III. THE CLAIMANT IS NOT ENTITLED TO PAYMENT OF USD 1,250,000 FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12.

84. Parties to a contract expressly contain their contingencies if they do not wish to give a broad interpretation to the hardship clause [*ICC Publication No. 421, p. 20, ¶ 2*]. The FSSA exhaustively delineated the rights and responsibilities of the parties. Under the same, the seller was not liable for hardship associated with health and safety requirements and similar situations [*FSSA, Cl. 12*]. Contradictory to the aforementioned agreement on the hardship clause, the CLAIMANT contends that the requirements under UNIDROIT Principles ought to apply [*Cl. Memo., p. 21, ¶ 82*]. The CLAIMANT also erroneously argues that the RESPONDENT is to bear the import tariff under the hardship clause [*Cl. Memo., p. 24, ¶ 95*].

85. The RESPONDENT submits that the contention of the CLAIMANT, with regard to the present situation constituting hardship, ought to be rejected because it does not satisfy the requirements of Clause 12 or UNIDROIT Principles, and therefore, adaptation is not necessitated. The CLAIMANT is not entitled to payment resulting from an adaptation of price as the tariff did not satisfy the requirements of the hardship clause **(A)**. Moreover, it does not satisfy any other requirements under UNIDROIT Principles **(B)**. In any event, the remedy of price adaptation is not available under Clause 12 **(C)**.

### A. TARIFF DOES NOT SATISFY THE REQUIREMENTS OF THE HARDSHIP CLAUSE

86. Parties to international trade normally use specific clauses in their contract to deal with hardship or *force majeure* situations, as they are specifically aware of the risks involved with a particular trade [*Flambouras, p. 283*]. The CLAIMANT submits that the requirements of hardship are satisfied under the hardship clause [*Cl. Memo., p. 20, ¶ 80*]. However, the tariff was not 'comparable' to health and safety requirements **(1)**, and the CLAIMANT had to bear the impugned tariff under Delivered Duty Paid (hereafter "**DDP**") **(2)**. Moreover, the tariff was not unforeseen **(3)**

#### 1. Tariff was not 'comparable' to health and safety requirements

87. The risk of performing and fulfilling the contract are borne by the parties themselves, unless the risks are otherwise expressly distributed in the contract [*Case No. 8486 (ICC)*]. Accordingly, the Parties had agreed on exonerating the seller, i.e. CLAIMANT, from being liable for "health and safety requirements" and "comparable unforeseen events" [*FSSA, Cl. 12*]. The impugned tariff is not a 'comparable' event **(a)**, as the intention of the parties was to exclude only public law measures **(b)**.

##### *(a) Impugned tariff is not a 'comparable' event*

88. As per the "four corners rule", a contract must subsist within the four corners of the contract and preclude any consideration of drafting history or other extrinsic evidence [*Rosengren, pp. 1-16; Perillo, pp. 12-13*]. Extrinsic evidence is not allowed to contradict, vary, add to or subtract from the terms of a written contract [*Rosengren, pp. 1-16*]. The CLAIMANT has attempted to add provisions to the contract that were not intended by the Parties, by relying upon extrinsic evidence into the contract [*Cl. Memo., p. 23,* ¶ 92]. However, interpreting clauses based on prior negotiations, cannot be done under "four corners rule" [*P.O. No. 2, p. 61, ¶ 45*].

89. Health standards and safety regulations are included within the definition of "public law standards" [*Schlechtriem/Schwenzer, p. 419*]. Such public law measures required for the safety of the animals, cannot be compared to the tariffs imposed by the RESPONDENT's country. This tariff was imposed post negotiations in December, with effect from January, 2018, as a retaliatory measure to the tariff imposed in the CLAIMANT's country. Such a tariff could, by no means, constitute a public law measure, but constitutes a general course of trade, which ought to be expected in international commercial transactions. Therefore, the nature of the impugned tariff is different from the nature of health and safety requirements.

***(b) Import tariffs were not intended to be included in "comparable events"***

90. *Arguendo*, such extraneous evidence is referred to, the import tariffs were not intended to be included in "comparable events". While determining the subjective intent of the parties, the statements made by a party and subsequently ratified by the other ought to be looked at [*Lookofsky, p. 55, ¶ 82*]. The CLAIMANT has contended that the subjective intent of the parties led to the tariffs being a 'comparable' situation [*Cl. Memo., p. 23, ¶ 91*]. Despite having access to the entire email exchange, the RESPONDENT had included *only* health and safety requirements, and not "*any further risk*" as requested by the CLAIMANT [*P.O. No. 2, p. 56, ¶ 12*]. Even if the original intention of the Parties was to exonerate the CLAIMANT from all obligations, the new negotiators had specifically agreed to a narrowed down clause.

91. The objective intent of parties is to be interpreted according to the understanding that a "*reasonable person*" to the same kind as parties would have had in the same circumstances [*CISG, Art. 8.2; Hideo Yoshimoto v. Canterbury Golf Intl Ltd (NZ, 2000); CLOUT Case No. 844 (US, 2007); CLOUT Case No. 932 (SWZ, 2006)*]. The CLAIMANT has asserted that a "reasonable person" would regard tariffs as a comparable event [*Cl. Memo., p. 23,* ¶ 92]. They have substantiated this claim by stating that the consequence of both is an increase in performance cost, thus being 'comparable' to each other [*Cl. Memo., p. 23,* ¶ 92]. Nonetheless, parties to an international sale of goods are subject to various kinds of restrictions that may lead to an increased performance cost. A reasonable person would understand that grouping all such risks on the basis of a common consequence would be incorrect.

92. Cl. 12 of the FSSA did not envision the entirety of import restrictions within its ambit. If the Parties had intended on not burdening the CLAIMANT with import tariffs, the chosen INCOTERM would have been "Delivered at Place" (DAP), and not "Delivered Duty Paid" (DDP). DAP resembles DDP in all aspects, except that import tariffs would have to be borne by the buyer [*INCOTERMS, p. 137*]. As the chosen INCOTERM was "Delivered Duty Paid", the reasonable interpretation is that the CLAIMANT had to bear all duties. Hence, the following submission should not be considered by the Tribunal.

**2. CLAIMANT had to bear the increase of tariffs under DDP**

93. The parties are bound by such usages to which they have expressly agreed [*CISG, Art. 9.1*]. INCOTERMS form a part of such trade usages [*Graffi, ¶ IV.1, p. 283; Melis, Art. 9, ¶ 7*] as the Parties had expressly agreed to the same [*P.O. No. 2, p. 56, ¶ 10*]. The Parties may also vary from the default application of risks and responsibilities under INCOTERMS, by way of

agreement [*INCOTERMS, p. 9*]. However, where the contract does not provide for something, the chosen INCOTERM would address and fill such gaps [*Johnson, p. 387*].

94. The CLAIMANT has tried to escape its obligations by merely stating that since tariff was a comparable event, the risk was assumed by the RESPONDENT [*Cl. Memo., pp. 23 -24, ¶¶ 92, 95*]. However, as already proved, the tariff is not a comparable event. In light of the same, RESPONDENT contends that exhaustive variations to DDP obligations were included in the contract **(a)**. Consequently, resort to INCOTERMS leads to the impugned tariff being an obligation to be borne by the CLAIMANT **(b)**.

***(a) Exhaustive variations to DDP obligations were included in the contract***

95. Where a hardship clause provides for exemptions from certain situations, exemption cannot be granted for situations not covered in such a clause [*CLOUT Case No. 142 (RUS, 1995)*]. INCOTERMS allocate responsibility with regards to delivery of goods and the costs involved in the same [*INCOTERMS, pp. 5-6*]. These default responsibilities may be varied or derogated from, by agreement between the parties [*Schwenzer/Hachem/Kee, ¶ 29.27*]. This represents the will of the parties and is in conformity with the doctrine of party autonomy [*CISG, Art. 6*].

96. RESPONDENT had agreed to bear certain obligations under DDP, in exchange for a reduction in the overall price [*P.O. No. 2, p. 56, ¶ 8*]. The CLAIMANT was exempt from liability in cases of additional health and safety requirements and similar situations [*FSSA, Cl. 12*], which would otherwise have been the responsibility of the CLAIMANT under DDP [*P.O. No. 2, p. 58, ¶ 21*]. Similarly, default obligation regarding tank rental and handling fees [*INCOTERMS, p. 152*], and claims regarding integrity of the shipment [*INCOTERMS, A5, p. 152*], have been expressly derogated from [*FSSA, Cl. 10; FSSA, Cl. 11*]. Consequently, the FSSA is exhaustive and prevents any scope for reading in further obligations.

***(b) Impugned tariff constitutes CLAIMANT's obligation under INCOTERMS***

97. Where the contract does not specifically provide for a situation, the lacunae would be filled by resorting to the responsibilities delineated under the chosen delivery term [*Johnson, pp. 382-383*], as they are contractually bound by them, being trade usages [*CISG, Art. 9.1; UNIDROIT Principles, Art. 1.9; Cloth Wind Coats Case (CIETAC, 1990)*]. Agreed usages have the same effect as a contract [*Forestry equipment case (FIN, 2002)*]. Even otherwise, the reference to a delivery term without explicit reference to INCOTERMS, would still attract its application [*St. Paul Insurance Company v. Neuromed Medical Systems (US, 2002); Case No. 406/1998 (ICAC, 1998); Marc Rich v. Iritecna (ITA, 1995)*].

98. Under the FSSA, various risks were exhaustively delineated, and there was no reference made to import tariffs. Both, export and import tariffs, being borne by the seller, constitutes one of the fundamental features of DDP [*INCOTERMS, p. 149*]. If import tariff was not envisioned as being borne by the CLAIMANT under the FSSA, the chosen delivery term would have been DAP instead [*INCOTERMS, p. 137*], or the DDP could have had an express exclusion of the same under the contract [*INCOTERMS, p. 61*]. However, the parties, despite having access to past emails containing discussions between former negotiators [*P.O. No. 2, p. 55, ¶ 5*], specifically chose only health and safety requirements and similar situations as not forming the obligations of the CLAIMANT [*FSSA, Cl. 12*].

99. In light of the above submissions, CLAIMANT had to bear the increase of tariffs, under DDP.

**3. Tariff was not unforeseen**

100. Anything which is provided for in the contract, will not frustrate it [*Todd, p. 189*]. If a particular risk has been placed on any party under a contract, it cannot be said to be an unforeseen event [*Todd, p. 189*]. The CLAIMANT has averred that the import tariff was unforeseen [*Cl. Memo., pp. 22-23, ¶ 90*]. As already proved, the risk of bearing the import tariff has been placed on the CLAIMANT under the DDP contract [*Res. Memo., III.A.2.*]. Therefore, the risk cannot be said to have been unforeseen.

**B. THE TARIFF DOES NOT SATISFY ANY OTHER REQUIREMENTS UNDER UNIDROIT PRINCIPLES**

101. In trying to prove that there was hardship, the CLAIMANT has asserted that the requirements of UNIDROIT Principles would apply [*Cl. Memo., p. 20, ¶ 82*]. Even if the requirements under UNIDROIT Principles were applicable, the present situation does not warrant any exemption as such requirements are not satisfied. Apart from the requirements which have already been proved before, there has been no change in the fundamental equilibrium of the contract.

102. First, for satisfying the fundamental alteration threshold, the UNIDROIT Principles had initially required "50% or more" increase in the costs [*UNIDROIT (1994), p. 147*]. However, even such threshold was considered to be "too low" [*UNIDROIT (2003), p. 15*]. Generally, an alteration threshold of 80-100%, excluding any profit margin, would constitute a sufficient ground for hardship [*Brunner, p. 432*]. The CLAIMANT has contended that the present rise of 30% in costs is a fundamental alteration under the ambit of hardship [*Cl. Memo., p. 21, ¶ 86*]. However, a cost/value alteration of less than 50% cannot be considered to be fundamental [*Girsberger/Zapolskis, p. 128*]. Hence, the present rise of 30% in import tariffs does not in itself constitute hardship.

103. Second, the threshold limit for determining hardship is higher where a party has undertaken greater risk and lower when a party has undertaken smaller risk [*Brunner, p. 432*]. This would be examined in light of the express or implied risk allocation as delineated in the contract [*Girsberger/Zapolskis, p. 128*]. The CLAIMANT has averred that a low profit margin would equate to less risk being undertaken by a party [*Cl. Memo., p. 22, ¶ 87*]. However, the CLAIMANT has not considered that under DDP contracts, the party bearing the maximum risk is the seller [*INCOTERMS, p. 149*], and the consensus to not exclude tariffs fortify such an obligation. Besides, relying only on the profit margin for determining the risk undertaken by a party would result in complications [*Girsberger/Zapolskis, p. 128*]. Thus, the reliance on the profit margin to demonstrate a change in the fundamental equilibrium is flawed, and should not be considered by the Tribunal.

104. Third, the deterioration of a party's financial capacity falls within its sphere of control and does not authorise it to invoke the hardship exemption [*Girsberger/Zapolskis, p. 131*]. The essential criterion would be the financial ruin or possible bankruptcy of the debtor [*Brunner, p. 437*]. The CLAIMANT has stated that it is faced with imminent risk of financial ruin if it bears the additional tariffs and has relied on its 'impossibility' to meet their profit requirement to substantiate its case [*Ex. No. C8, p. 17; Cl. Memo., p. 22, ¶ 89*]. However, these averments do not require consideration as the inability to meet profit requirements do not equate to imminent risk of financial ruins. The CLAIMANT operates the oldest and most renowned stud farm of Mediterraneo [*Notice of Arbitration, p. 4, ¶ 1*], and the RESPONDENT is not the only customer of the CLAIMANT. The mere loss of profit from a single contract cannot be a ground for their imminent financial ruin as the profit may be obtained from contracts with other customers. Moreover, the assertion by the CLAIMANT that it has been faced with the risk of going bankrupt [*Cl. Memo., p. 22, ¶ 89*], finds no merit as it has merely been facing losses since 2014 [*P.O. No. 2, p. 59, ¶ 29*], and not a definite risk of going bankrupt. In the unlikely situation that its credit line were to be stopped, it is not an imminent risk of financial ruin, as the CLAIMANT may negotiate for a new credit line, although it may be difficult [*P.O. No. 2, p. 59, ¶ 29*]. The deterioration of a party's financial situation is its own problem, and it cannot shift the risk to other parties [*Brunner, p. 436*]. Therefore, the CLAIMANT's financial situation cannot be a ground for invoking hardship.

### C. THE REMEDY OF PRICE ADAPTATION IS NOT AVAILABLE UNDER CLAUSE 12

105. Parties may expressly confer powers on a Tribunal to adapt a contract to appropriate the economic risk arising out of changed circumstances or hardship [*Brunner, p. 392*]. The CLAIMANT has averred that the hardship clause only sets forth the requirements of hardship,

and not any remedy in case of the same [*Cl. Memo., p. 24, ¶ 97*]. It has further claimed that the Mediterranean Law, being the law of the contract, ought to fill in the gap with regards to a remedy [*Cl. Memo., p. 24, ¶ 97*]. However, contrary to the CLAIMANT's assertion, the gap regarding the remedy shall be determined as per Danubian Contract Law.

106. Adaptation is not available as a remedy in the present matter **(1)**. Under the applicable Danubian Contract Law, the adaptation of contract is not allowed **(2)**. *Arguendo,* the Mediterranean Contract Law applies, adaptation is still not possible as the prerequisites for the same were not fulfilled **(3)**.

### 1. Adaptation is not available as a remedy in the present matter

107. The will of the parties should be applied if the contract does not contain a clear term [*GmbH Lothringer v. NV Fepco International (BGM, 2006)*]. The contract precedes CISG in case of hierarchy [*GmbH Lothringer v. NV Fepco International (BGM, 2006)*]. Even if the contract is supplemented by law to find a remedy, adaptation would not be available as a remedy, as the parties had excluded it. An express reference to adaptation was neither included in the arbitration clause nor in the hardship clause. Moreover, the CLAIMANT had initially suggested reliance on the ICC Hardship clause, which had termination of contract as a remedy, and not adaptation [*Ex. No. C4, p. 12*]. The narrow wording of the contractual clause, thus, shows the Parties' consent on the exclusion of adaptation as a remedy.

### 2. Danubian Contract Law does not allow for adaptation

108. When there is a gap in the contract, the law governing the contract may be resorted to, to fill in the gaps [*Waincymer, p. 1056; Brower, p.17*]. The law applicable is the law which the parties have agreed to, in accordance with the doctrine of party autonomy [*CISG, Art. 6*].

109. The CLAIMANT has asserted that the gaps ought to be filled in accordance with the Mediterranean Contract Law [*Cl. Memo, p. 24, ¶ 97*]. However, as already proved, the Danubian Contract Law is the law applicable in case of adaptation [Res. Memo, I.C.] and therefore, the gap ought to be filled in accordance to the same. As per the Danubian Contract Law, adaptation is not possible unless expressly 'authorized' in the contract [*P.O. No. 2, p. 61, ¶ 45*]. In the present contract, there is no express authorization or reference with regards to adaptation.

110. Moreover, as already proved, Art. 6.2.3 of the Danubian Contract Law is a mandatory provision and the same cannot be derogated from [*Res. Memo. I.C.3*]. Therefore, Mediterranean Contract Law cannot be applied in the present matter.

### 3. Mediterranean Law applies, prerequisites for adaptation were not fulfilled

111. *Arguendo,* even if the Tribunal choses to apply the law of Mediterraneo, the prerequisites for adaptation under the same have not been fulfilled. Contrary to the CLAIMANT's assertions, there has been an undue delay of notice **(a)**, and the CLAIMANT is deprived of the remedy because the contract has been performed **(b)**.

#### *(a) There has been undue delay of notice*

112. The notice of renegotiation shall be made as quickly as possible after the alleged hardship occurs [*UPICC Commentary, p. 224*]. The CLAIMANT has tried to excuse itself from this duty by stating that it did not foresee that the tariffs would be applicable to the frozen semen [*Cl. Memo., p. 25, ¶ 100*]. However, when a tariff having consequences akin to the impugned tariff is imposed, a reasonable person would have checked if the tariff applied to their goods, being similar in nature. Had necessary caution been exercised by the CLAIMANT, the goods could have possibly been shipped before the tariffs came into effect, i.e. January 20, 2018, thus overcoming the current loss. The undue delay of notice by the CLAIMANT has, thus, resulted in losses to itself.

113. Furthermore, the CLAIMANT contends that RESPONDENT could mitigate the loss by its resale [*Cl. Memo., p. 26, ¶ 105*]. However, there is no real market for the resale of frozen semen [*P.O. No. 2, p. 57, ¶ 19*]. Breeders carefully purchase semen only for specific mares [*P.O. No. 2, p. 57, ¶ 19*]. Therefore, the averment by the CLAIMANT that the loss may be mitigated by resale has no basis.

#### *(b) CLAIMANT cannot seek remedy since contract is performed*

114. Hardship applies only to the part of performance that is yet to be rendered [*UPICC Commentary, p. 221*]. The CLAIMANT has argued that it shall not be deprived of the right to seek remedy due to the performance of the contract [*Cl. Memo., p. 25, ¶ 101*]. Conversely, a contract cannot be adapted if the contract is already over, due to exhaustion of contractual obligations.

115. The CLAIMANT has further stated that the RESPONDENT did not act in good faith by trying to mislead him [*Cl. Memo., p. 27, ¶ 107*]. Firstly, the request for increasing price was made by the CLAIMANT two days before the shipment was actually due [*Ex. No. C8, p. 18*]. Time was of the essence of the contract and the RESPONDENT could not have rejected the request outright, as the RESPONDENT neither had the authority to approve nor reject the request [*Ex. No. R4, p. 36*]. Secondly, a readymade statement was read out to the CLAIMANT only because the RESPONDENT did not want to make any promise which was not within its powers. In reading out such a statement, the RESPONDENT had, in fact, acted in good faith. The statement was

made to a lawyer specialising in contractual matters [*Ex. No. C8, p. 17*]. It cannot be said that the RESPONDENT had misled the CLAIMANT by using a statement prepared by a lawyer. Therefore, the averments of the CLAIMANT should not be accepted by the Tribunal.

**CONCLUSION TO ISSUE III**

116. The impugned tariff satisfies the requirements of neither the hardship clause nor UNIDROIT Principles. The remedy of price adaptation is not available under Clause 12 either. Hence, payment is not required under Clause 12 of the FSSA.

## IV. THE CLAIMANT IS NOT ENTITLED TO PAYMENT OF USD 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CISG

117. Where the contract does not provide for certain situation, or, a "gap" exists, the applicable law, as chosen by the parties must be restored to [*Waincymer, p. 1056; Brower, p.17*]. The CLAIMANT erroneously argues that even if adaptation is not possible under Clause 12, the contract may be adapted under CISG [*Cl. Memo., p. 28, ¶ 110*].

118. Contrary to the CLAIMANT's submissions, the parties have derogated from Art. 79 of the CISG **(A)**, and hardship, as contemplated under the contract, is not governed under the CISG **(B)**. Arguendo, tariff can neither be exempted under UNIDROIT nor CISG **(C).** Art. 79 does not provide for the remedy requested by the CLAIMANT **(D)**.

### A. PARTIES HAVE DEROGATED FROM ART. 79 BY INCLUSION OF CLAUSE 12

119. A contractual provision would override CISG in matters expressly dealt with therein [*CLOUT Case No. 237*]. Parties can vary the effect of any of the provisions of the CISG and choose the standard by which they ought to be governed [*Borisova, p. 43; CISG, Art. 6; UNIDROIT Principles, Art. 1.5*], which includes derogation from the *force majeure* and/or hardship standard mentioned in the CISG [*CISG-AC No. 10, ¶ 2*]. When a contractual clause governing a particular matter is in contradiction with the CISG's standard, there is a derogation from the CISG with regards to such a question [*Case No. 11333 (ICC); CLOUT Case No. 237*].

120. The CLAIMANT has averred that CISG ought to be read in tandem with the hardship/*force majeure* clause, citing the *Iron Molybdenum* case [*Iron Molybdenum Case (GER, 1997)*] to substantiate its submission [*Cl. Memo., ¶ 123*]. However, the reasoning in the aforesaid case was based upon the fact that the *force majeure* clause did not provide for any specific exemptions, and merely allowed for general exemption in case of *force majeure* [*Iron Molybdenum Case (GER, 1997)*]. In contrast, the Parties have specifically agreed to exclude the liability of the CLAIMANT in matters

of *force majeure* for certain situations, and hardship caused *only* by additional health and safety requirements and comparable unforeseen events [*FSSA, Cl. 12*]. This is a derogation from the scope under the CISG, which governs a broader array of situations [*CISG, Art. 79*]. Therefore, this is evident of the intention of the parties to exclude liability only in such situations. Hence, the Parties have derogated from the CISG's standard of hardship.

121. Moreover, as already proved [*Res. Memo, III.A.1-2*], the contract exhaustively delineates all rights and responsibilities and no preliminary statements or agreements should be considered in the interpretation of the contract [*UNIDROIT Principles, Art. 2.1.17; P.O. No. 2, p. 61, ¶ 45*]. The new negotiators had discussions regarding the hardship clause and despite having access to the previous negotiations they agreed on its narrow wording [*Ex. No. R3, p. 35; P.O. No. 2, pp. 55-56, ¶¶ 5, 12*]. Therefore, there was a consensus on the current wording of the hardship clause.

122. Thus, as the parties had derogated from the CISG's standard of hardship and reached a consensus on the narrowly worded clause, the Parties have derogated from Article 79 of the CISG, and cannot be governed by it.

### B. HARDSHIP IS NOT GOVERNED UNDER THE CISG

123. Hardship refers to the performance of the disadvantaged party having become much more burdensome, but not impossible [*Flambouras (Felemegas), p. 500*]. The CLAIMANT has averred that hardship is governed under the CISG [*Cl. Memo, p. 32, ¶ 124*]. Yet, contrary to the CLAIMANT's averments, hardship is expressly excluded from the CISG **(1)** and UNIDROIT Principles cannot be used to read hardship into the CISG **(2)**.

#### 1. Hardship is expressly excluded from the CISG

124. The original intent of the CISG drafters was to not include the situation of hardship within the purview of Article 79 [*Schlechtriem, p. 97; Nuova Fucinati v. Fondmetall International (ITA, 1993); Slater, p. 259*]. Economic or commercial hardship as an excuse for non-performance is excluded from the scope of CISG [*Honnold II, ¶¶ 432.1–432.2; Honnold III, ¶¶ 185, 252*]. There was a specific rejection for a proposed provision on hardship [*UNCITRAL Yearbook 1977, p. 57*]. In the present matter, there was no impossibility of performance, and the same has been rightfully completed.

125. The CLAIMANT has stated that hardship qualifies as an impediment under Art. 79 [*Cl. Memo., p. 33, ¶ 124*]. However, Article 79 only governs impossibility of performance [*Flambouras (Felemegas), p. 504*]. It has relied on the *Scafom International* case to prove the same [*Cl. Memo., p. 33, ¶ 124; Scafom International BV v. Lorraine Tubes S.A.S (BGM, 2009)*]. However, to include

hardship within the definition of impediment, the argument in favor of such an inclusion must be based on CISG interpretive methodology, independent of the frameworks provided by the civil law, common law, or international legal instruments [*DiMatteo II, p. 284*]. Since the *Scafom International Case* has relied extensively on civil law concepts to interpret the CISG, it cannot be considered as proper law and hence, cannot be relied upon [*Flechtner, p. 84*].

126. Therefore, any interpretation of CISG to include hardship within the definition of CISG would be a gross misinterpretation of the same.

#### 2. UNIDROIT Principles cannot be used to read hardship into CISG

127. The UNIDROIT Principles were not intended to become a binding instrument aimed at unifying national laws relating to international contracts [*Bonell, ¶¶ 2(b)*]. They cannot be used as general principles to add to the CISG**.**

128. A "gap" is anything unresolved in the CISG, relating to the area of law the CISG governs, which is not excluded from the Convention [*Gebauer, pp. 695 – 696*]. The CLAIMANT has submitted that that there was a gap in the CISG with regards to hardship and adaptation [*Cl. Memo., p. 28, ¶ 112*]. Since hardship was not envisioned under the CISG, there is no gap regarding the same and it cannot be filled by resorting to the gap filling measures under Article 7.2.

### C. ARGUENDO, TARIFF CAN NEITHER BE EXEMPTED UNDER CISG NOR UNDER UNIDROIT PRINCIPLES

129. The exclusion of hardship from the scope of Article 79 CISG would emerge from its drafting history [*Honnold III, p. 252*]. There existed a consensus among the members of the Working Group against the doctrine of hardship [*Honnold III, p. 185*]. The CLAIMANT has asserted that the tariff is exempted under both, Art. 79 of CISG, and the UNIDROIT principles [*Cl. Memo., p. 30, ¶¶ 117, 125*]. Contrary to the CLAIMANT's assertion, even if UNIDROIT Principles, are applicable, requirements of hardship are not fulfilled **(1)**; and the tariff does not satisfy the requirements of Art. 79 CISG either **(2)**.

#### 1. Even if UNIDROIT Principles are applicable, requirements of hardship are not fulfilled

130. Despite being excluded from the CISG, hardship is dealt with under the UNIDROIT Principles [*UNIDROIT Principles, Art. 6.2.3*]. The CLAIMANT has asserted that the present case has satisfied all the requirements of hardship under the UNIDROIT Principles [*Cl. Memo., p. 30, ¶ 117*]. Contrary to the averments of the CLAIMANT, the tariff did not fundamentally alter

the equilibrium of the contract **(a)**; the tariff was foreseeable **(b)**; the tariff could be expected to be overcome by the CLAIMANT **(c)**; and the tariff has been assumed by the CLAIMANT **(d)**.

***(a) The tariff did not fundamentally alter the equilibrium of the contract***

131. An alteration threshold of 100-125%, including any profit margin, would constitute a sufficient ground for hardship [*Brunner, p. 432*]. The CLAIMANT has submitted that the 30% tariff has altered the fundamental equilibrium of the contract [*Cl. Memo., p. 30, ¶ 117*]. However, as already proved [*Res Memo, III.B.*], an increase in costs by 30% does not satisfy the threshold of fundamental threshold. Therefore, the tariff has not fundamentally altered the equilibrium of the contract.

***(b) The impugned tariff was foreseeable***

132. The foreseeability test would require to examine whether a reasonable person of the same kind could have foreseen such an event [*Graffi, p. 340*]. The CLAIMANT has contended that all the requirements of hardship under the UNIDROIT Principles were satisfied, including the current tariff being unforeseen [*Cl. Memo., p. 30, ¶ 117*]. However, the CLAIMANT, themselves, have stated that the requirement under the UNIDROIT Principles was whether an event was 'unforeseeable' and not 'unforeseen' [*Cl. Memo., p. 22, ¶ 90*]. The CLAIMANT has, thus, not proved that the tariff was 'unforeseeable'. The CLAIMANT has further averred that the CLAIMANT could not have reasonably been expected to have taken the impediment into account at the time of conclusion of contract [*Cl. Memo., p. 33, ¶ 127*].

133. Unforeseeability is a requirement to be exempted from liability in cases of hardship [*UNIDROIT Principles, Art. 6.2.2*]. Parties cannot be exempted if the impediment was foreseeable at the time of conclusion of contract [*Coal Case (BCCI, 1996)*]. The Presidential candidate of the CLAIMANT's country had announced a preference for a more protectionist approach in January, 2017 [*Ex. No. C6, p. 15*]. During the negotiations for the conclusion of the FSSA, that candidate was elected President [*P.O. No. 2, p. 58, ¶ 23*]. A day before the FSSA was signed, an outspoken protectionist who was advocating limiting the access of foreign agricultural products to the Mediterraneo market, was appointed as the "superminister" for agriculture, trade and economics [*P.O. No. 2, p. 58, ¶ 23*]. The tariff by Mediterraneo was expected [*Ex. No. C6, p.15*], and hence it is irrelevant to consider whether the severity went beyond expectations.

134. Though Equatoriana usually tried to resolve disputes amicably, it had taken direct retaliatory measures against countries which had imposed restrictions on imports from Equatoriana in the past [*Ex. No. C6, p. 15*]. CLAIMANT also knew that the frozen semen industry in

Equatoriana was subject to restrictions, with the ban on its import only being lifted temporarily [*Ex. No. C1, p.9*]. Therefore, when entering into a contract with a country which had imposed retaliatory measures in the past, CLAIMANT should have expected such measures, as they constitute general occurrences in the course of trade. Therefore, the impugned retaliatory tariff was foreseeable and the CLAIMANT could have reasonable taken the impediment into account at the time of conclusion of contract.

***(c) The tariff could be expected to be overcome by the CLAIMANT***

135. When hardship is being alleged, the notice of renegotiation shall be made as quickly as possible [*UPICC Commentary, p. 224*]. The CLAIMANT has averred that it could not have been expected to have avoided or overcome the tariff [*Cl. Memo., p. 30, ¶ 117*]. However, as already proved [*Res. Memo. III.C.a.*], when a tariff having consequences akin to the impugned tariff, is imposed, a prudent business person would have checked to see if their goods are subject to such tariffs. Had the CLAIMANT exercised due caution, the goods could have possibly been shipped before the tariffs applied, thereby avoiding such a loss. Therefore, the CLAIMANT could have avoided or overcome the tariff.

***(d) The tariff has been assumed by the CLAIMANT***

136. INCOTERMS allocate responsibility with regards to delivery of goods and the costs involved in the same [*INCOTERMS, p. 5-6*]. Where obligations are not specifically set forth in the contract, the chosen delivery term may be resorted to, to fill in the lacunae [*Johnson, I, pp. 382-383*]. The CLAIMANT has averred that the tariff has been assumed by the CLAIMANT. However, as already proved [*Res Memo., III.A.2*], the tariff had been assumed by the CLAIMANT under DDP, as it was not provided for, in the contract.

137. In light of the above submissions, the tariff has not satisfied the requirements of hardship under UNIDROIT Principles.

**2. The present situation is not exempted under Art. 79 of CISG**

138. Article 79 only governs impossibility of performance [*Flambouras (Felemegas), p. 504*]. However, CLAIMANT argues that the present situation is exempted since it constitutes an "impediment" under Art. 79, having satisfied all the requirements [*Cl. Memo., p. 32, ¶ 125*]. The CLAIMANT has averred that the tariff could not be expected to reasonably have been taken into account at the time of conclusion of contract and that the CLAIMANT could not have avoided or overcome it.

139. Firstly, when changes are foreseeable at the time of conclusion of contract, they do not exempt parties from liability [*Vital Berry Marketing v. Dira-Frost (BGM, 1995)*]. The CLAIMANT has

averred that at the time of conclusion of contract, tariff was beyond the foreseeability of the CLAIMANT [*Cl. Memo, p. 33, ¶ 127*]. However, while staying in a country whose President and "superminister" strongly advocated protectionist measures and entering into a contract with a customer in a country which had resorted to retaliatory measures in the past [*Res. Memo. IV.C.1.b*], the CLAIMANT ought to have reasonably foreseen and taken into account the tariff at the time of conclusion of contract. Therefore, the tariff could be expected to reasonably have been taken into account at the time of conclusion of contract.

140. Secondly, the notice of renegotiation shall be made as quickly as possible after the alleged hardship occurs [*UPICC Commentary, p. 224*]. The CLAIMANT has tried to avoid its obligation by stating that it could not be expected to have avoided or overcome the tariff [*Cl. Memo., p. 33, ¶ 129*]. However, as already proved, a reasonable person would have expected the tariff and possibly shipped the goods earlier, thereby avoiding the loss.

141. In light of the above submissions, the present situation is not exempted under Art. 79 of the CISG.

### D. ADAPTATION IS NOT A REMEDY UNDER ART. 79

142. Parties may expressly confer powers on a Tribunal to adapt a contract to appropriate the economic risk arising out of changed circumstances or hardship [*Brunner, p. 392*]. The CLAIMANT has averred that there was a gap with regards to adaptation, and that this gap had to be settled either in conformity with the general principles or in accordance with the applicable law, and that UNIDROIT Principles were applicable, being both general principles and the applicable law [*Cl. Memo., pp. 29-30, ¶¶ 116 – 118*].

143. Contrary to the CLAIMANT's contentions adaptation was not agreed as a remedy between the parties **(1)**. Adaptation is also not settled within the CISG **(2)** and even resorting to gap filling measures, adaptation is not available as a remedy **(3)**.

#### 1. Adaptation was not agreed as a remedy between the Parties

144. There are some issues in the CISG, which are excluded from its sphere of application, i.e. external gaps [*CISG, Art.* 4]; there are some issues which are governed, but not expressly settled in it [*CISG, Art. 7.2*]. The CLAIMANT has asserted that there was a gap in the CISG regarding remedies available in case of hardship, and to fill such a gap, any agreement between the parties had to be looked at [*Cl. Memo., p. 34, ¶ 131*]. With regards to the same, the CLAIMANT has stated that the Parties had reached an agreement under Art. 8 CISG whereby they agreed on the arbitrators adapting the price [*Cl. Memo., p. 34, ¶ 131*]. However, the new negotiators had further discussions regarding the hardship clause [*P.O. No. 2, p. 56, ¶ 12*]. Here, the new

negotiators did not agree on an adaptation clause. Therefore, the latest consensus reached between the parties suggests that adaptation was not envisioned under the contract. Moreover, the HKIAC Model Clause was reduced to include only 'disputes'. As already proved, adaptation is not a 'dispute' arising out of the contract. Hence, the subjective intent of the parties cannot be determined here.

**2. Adaptation is not settled within the CISG**

145. There are no guidelines under the CISG regarding adaptation [*CISG-AC No. 7, ¶ 40*]. This is so because the CISG drafters had expressly excluded hardship from the scope of the CISG [*Carlsen (1998); Rimke, ¶¶ B2; Ziegel, ¶¶ 1C*]. Therefore, parties should not be able to make claims of hardship or have the contract modified by a court or an arbitral tribunal [*Miettinen, p. 50*]. Though Danubia is a contracting state to CISG [*P.O. No. 1, p. 52, ¶ 4*], adaptation is not possible as it is not settled within the CISG.

**3. Even through gap filling, Adaptation is not possible**

146. There exists a gap in the CISG with regards to remedies available in case of hardship [*Silveira, ¶ 508*]. The CLAIMANT has averred that CISG's gap with regards to hardship remedies ought to be filled by UNIDROIT, as general principles [*Cl. Memo., p. 34, ¶ 133*]. Firstly, it is to be stated that UNIDROIT Principles are not binding upon the Parties [*Bonell, p. 1126; Garro, p. 1160*]. Secondly, when there is a conflict between a general principle in the CISG and a general principle in the UNIDROIT, under Art. 7.2, the general principle arising out of the Convention must be resorted to [*Slater, pp. 257-258*]. CISG recognises the general principle of performance despite difficulty, where performance is feasible, whereas UNIDROIT recognises exemption in case of hardship. Since this issue is this capable of being resolved on the general principle on which CISG is based, resorting to the hardship provision under UNIDROIT is unnecessary and inappropriate [*Slater, p. 258*]. Therefore, filling the gap by resorting to the UNIDROIT as general principles [*Cl. Memo., pp. 29-30, ¶¶ 116-117*] is not possible.

147. Even if the Tribunal does not accept performance in case of difficulty as a general principle, the law applicable by virtue of the rules of private international law ought to be looked at [*CISG, Art. 7.2*]. In the present matter, the law applicable would be the contract law of Danubia.

148. The CLAIMANT has averred that the Mediterranean Law would be applicable in filling the gap with regards to adaptation in the contract [*Cl. Memo., p. 30, ¶ 118*]. The contract law of Danubia

contains provisions with regards to hardship and adaptation [*Danubian Contract Law, Arts. 6.2.1 – 6.2.3*]. The Court or Tribunal may adapt the contract if it finds hardship, however, only "if authorised" [*P.O. No. 2, p. 61, ¶ 45*]. In the present matter, the Tribunal has not been expressly or impliedly authorised to adapt the contract. This is further fortified as it is not a long term contract. Therefore, the Law of Danubia does not allow for adaptation.

149. In light of the above submissions, adaptation is not a remedy provided under Article 79.

## CONCLUSION TO ISSUE IV

150. The hardship clause constituted a derogation from CISG. Hence, CISG cannot be relied upon to adapt the contract. Moreover, CISG does not govern hardship. *Arguendo*, the tariff is exempted neither under the UNIDROIT Principles or under the CISG. Moreover, Adaptation is not a remedy available under Article 79.

## REQUEST FOR RELIEF

For the reasons stated in this Memorandum, RESPONDENT respectfully requests the Arbitral Tribunal to find that:

1. The Tribunal does not have the jurisdiction and the power under the arbitration agreement to adapt the contract.
2. The CLAIMANT should not be entitled to submit the 'Partial Interim Award' and any other illegally obtained privileged documents from other arbitral proceedings as evidence.
3. The CLAIMANT is not entitled to the payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the contract or under the CISG.

Respectfully submitted, 24 January, 2019.

**CERTIFICATE**

Pune

24 January 2019

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

| Ishani Chopra | Kshitij Rathore | Velpula Audityaa |
|---|---|---|