SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MARCH 31 – APRIL 7 2019

MEMORANDUM FOR CLAIMANT

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

COUNSEL:

STUTI RAI ANAHAD NARAIN DHRUV MEHROTRA

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	Judgment of 4 August 1993 XIX Y.B. Comm. Arb. 703 (1994) in: ¶5
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Case No. HG 010395/U/zs	Handelsgericht Zurich, 24 October 2003 CISG-Online No. 857 CLOUT No. 889 available at http://cisgw3.law.pace.edu/cases/031024s1.html cited as: *HG Zürich 24 Oct 2003* in: ¶122
Case No. Ap 91/04	Tribunal Cantonal du Jura, 3 November 2004 CISG-Online No. 965 CLOUT No. 904 available at http://cisgw3.law.pace.edu/cases/041103s1.html

	cited as: *CISG-Online No. 965*
	in: ¶128

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	[1981] 2 Lloyd's Rep. 389
	cited as: *Bangladesh Chemical*
	in: ¶5
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	[1934] 2 KB 1
	cited as: *Classique Coaches*
	in: ¶44
Intrafor Cofor v. Gagnant	English Court of Appeals
	[1985] Rev Arb 299
	cited as: *Intrafor Cofor*
	in: ¶45
Star Shipping A.S. v. China National Foreign Trade Transportation Corporation	English Court of Appeal
	[1993] 2 Lloyd's Rep. 445
	cited as: *The Star Texas*
	in: ¶5
Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA	English Court of Appeal
	[2012] EWCA Civ 638
	cited as: *Sulamerica*
	in: ¶9, 13, 16
Arsanovia Ltd v Cruz City 1 Mauritius Holdings	Queen's Bench
	cited as: *Cruz City*
	[2012] EWHC 3702 (Comm)
	in: ¶9, 13, 16
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	in: ¶5

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Union of India v. McDonnell Douglas Corp.	Queen's Bench [1993] 2 Lloyd's Rep. 48 cited as: *McDonnell Douglas Corp.* in: ¶5
Fiona Trust & Holding Corp. v. Privalov	House of Lords [2007] UKHL 40 cited as: *Fiona Trust* in: ¶13
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Felman Prod. Inc. v Bannai	Southern District Court of West Virginia

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Football Club Metalist, Kharkiv, Ukraine v. Union of European Football Associations	Court of Arbitration for Sport Award of 2013 available at: https://www.uefa.com/MultimediaFiles/Download/uefaorg/CASdecisions/02/47/24/25/2472425_DOWNLOAD.pdf cited as: *FC Metalist v. UEFA* in: ¶70
ICAC Award of 23 January 2012	available at http://cisgw3.law.pace.edu/cases/120123u5.html cited as: *Award of 23 January 2012 (ICAC)* in: ¶128
ICC Case No. 11333 of 2002	Yearbook of Commercial Arbitration (2006), Vol. 31, pp.117-126 *CISG-Online No. 1420* available at: http://cisgw3.law.pace.edu/cases/021333i1.html cited as: *CISG-Online No. 1420* in: ¶128
ICC Case No. 2508 of 1976	in: J-J Arnaldez, Y. Derains& D. Hascher (eds.). Collection of ICC Arbitral Awards (1984–1985), p. 292

ICC Case No. 5754 of 1988	in: W. Lawrence Craig, William W. Park & Jan Paulsson (eds.), International Chamber of Commerce Arbitraion 3rd ed., Dobbs Ferry (2000) in: ¶35
ICC Case No. 7544 of 1996	in: ICC International Court of Arbitration Bulletin (2000), Vol. 11(1), p. 56 in: ¶44
ICC Case No. 8385 of 1996	in: J-J Arnaldez, Y. Derains & D. Hascher (eds.). Collection of ICC Arbitral Awards (1996-2000), p. 474 in: ¶16
ICC Case No. 8486 of 1996	24 Yearbook of Commercial Arbitration (1999), Vol. 24, pp.162-173 available at: http://www.unilex.info/case.cfm?id=630 cited as: *Case No. 8486 (ICC)* in: ¶16
ICC Case. No. 6840 of 1997	in: J-J Arnaldez, Y. Derains & D. Hascher (eds.). Collection of ICC Arbitral Awards (1991-1995), pp. 467 – 469 in: ¶5
ICC Case No. 10351 of 2001	in: ICC International Court of Arbitration Bulletin (2009), Vol. 20(2), pp. 76-86 in: ¶30
Islamic Republic of Iran v. Cubic Defense Systems, Inc.	ICC Award in Case no. 7365/FMS 5 May 1997 available at http://www.unilex.info/case.cfm?pid=2&id=653&do=case cited as: *ICC Award of 5 May 1997* in: ¶141
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	http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C77/DC2251_En.pdf cited as: *Libanco v. Turkey* in: ¶¶ 71, 73
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- Hong Kong International Arbitration Centre Rules (as revised in 2018)
  cited as: *HKIAC Rules*
- IBA Guidelines on Conflict of Interest
  International Bar Association (2010)
  cited as: *IBA Guidelines*

- Convention on the International Sale of Goods
  19 I.L.M. 668 (1980)
  cited as: *CISG*
- UNIDROIT Principles of International Commercial Contracts
  International Institute for the Unification of Private Law
  (2010)
  cited as: *PICC*

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards
  (1958)
  cited as: *New York Convention*

LIST OF ABBREVIATIONS

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

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

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

STATEMENT OF FACTS

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

CLAIMANT is Mediterraneo's oldest and most renowned stud farm operator. It provides its racehorse stallions for breeding and offers semen of its champion stallions for artificial insemination. The star among CLAIMANT's stallions is Nijinsky III.

RESPONDENT, based in Equatoriana, is famous for its broodmare lines that have resulted in world champion show jumpers and international dressage champions. It decided to establish a racehorse stable three years ago and has acquired ten mares with an excellent racehorse pedigree.

24 Mar 2017	CLAIMANT responded to RESPONDENT's request for price of 100 doses of Nijinsky III's semen by offering a price of US$ 99,500 per dose to be sold in installments.	*Cl. Ex. C2, p. 10*
28 Mar 2017	RESPONDENT asked for a better price and a delivery DDP. The reason stated was CLAIMANT's experience and need for urgent delivery. RESPONDENT also asked for jurisdiction to be given to Equatorianian courts.	*Cl. Ex. C3, p. 11*
31 Mar 2017	CLAIMANT said it was only willing to provide delivery DDP on the inclusion of a hardship clause covering concerns, such as price increases due to changes in customs regulations and import restrictions. CLAIMANT also offered a price of US$ 1000 per dose and suggested arbitration in Mediterraneo.	*Cl. Ex. C4, p. 12*
10 Apr 2017	RESPONDENT proposed an arbitration clause which deputed Equatoriana as the seat of arbitration and law of the seat of arbitration, i.e., Equitaranean law as the governing law of the arbitration.	*Res. Ex. R1, p. 33*
11 Apr 2017	CLAIMANT counter-proposed an arbitration clause, deputing Danubia to be the seat of the arbitration. This clause specifically excluded the governing law from being the law of the seat.	*Res. Ex. R2, p. 34*
12 Apr 2017	Ms. Napravnik and Mr. Antley discussed the inclusion of an adaptation mechanism. Mr. Antley said it would be the arbitral tribunal's task to adapt the contract in case the parties	*Cl. Ex. C8, p. 17*

	could not agree. The two met with a severe car accident and had to be hospitalized.	
6 May 2017	The parties entered into the FROZEN SEMEN SALES AGREEMENT [hereinafter "SALES AGREEMENT"]. It provided that the sales contract would be governed by the United Nations Convention on International Sale of Goods (hereinafter "CISG"). The delivery had to be made in three installments, the final one of which was of 50 doses to be delivered on 23 January 2018. RESPONDENT was not allowed to resell the semen without informing CLAIMANT.	*Cl. Ex. C5, pp. 13-14*
19 Dec 2017	The Government of Equatoriana imposed an import tariff of 30% on all agricultural goods from Mediterraneo. This came as a big surprise to even informed circles.	*Cl. Ex. C6, p. 15*
20 Jan 2018	CLAIMANT was informed that the Equitorianian restrictions covered import of frozen horse semen. The resultant price increase destroyed CLAIMANTs 5% profit margin and caused a loss of 25%. CLAIMANT immediately reached out to RESPONDENT regarding a price readjustment.	*Cl. Ex. C8, p. 17 & Cl. Ex. C8, p. 17*
21 Jan 2018	Mr. Shoemaker called Ms. Napravnik. He urged delivery as planned. He also gave the impression that price would be renegotiated. Based on the same, CLAIMANT authorized delivery and paid the 30% in tariffs.	*Cl. Ex. C8, p. 18*
2 Feb 2018	CLAIMANT learned that RESPONDENT had made unjust profits by reselling 15 doses to 10 different breeders at a markup of 20%.	*Cl. Ex. C8, p. 18 & Proc. Or. No. 2, ¶20, p. 57*
12 Feb 2018	CLAIMANT confronted RESPONDENT's CEO, Ms. Kayla Espinoza, regarding the breach. She got aggressive and arbitrarily terminated the price renegotiation.	*Cl. Ex. C8, p. 18*
31 Jul 2018	CLAIMANT initiated arbitral proceedings against RESPONDENT.	*Not. of Arb., p. 4*
Oct 2018	CLAIMANT received information regarding another arbitration in which RESPONDENT was involved. In that arbitration, RESPONDENT had itself asked for adaptation of	*Letter by Langweiler, 2 Oct 2018, p.*

the price due to hardship as it had been negatively affected by the tariff. *50*

SUMMARY OF ARGUMENTS

In today's world of cut-throat competition, horse breeding is an industry built on reputation. Commitment and long-term relationships can drive, or sink, a business. Being aware of this, CLAIMANT entered into a contract with RESPONDENT, rooted in good faith and mutually profitable terms. Then, come what may, CLAIMANT fulfilled its duties under the contract, even when the performance became unduly burdensome and there remained no scope for profits. This was under the legitimate belief that RESPONDENT would pay heed to such hardship, and help restore the viability of the contract for CLAIMANT. This was not to be.

Upon the request of CLAIMANT to renegotiate, RESPONDENT terminated the contract. CLAIMANT initiated arbitration proceedings, seeking to amicably resolve the dispute. But RESPONDENT made groundless challenges, under Danubian law, to the very power of the tribunal to award increased remuneration. To CLAIMANT's bewilderment, RESPONDENT alleged that Danubian law applied to the arbitration agreement, when Danubian law was never even mentioned in the contract or during the negotiations. This was done against the parties' express acceptance of application of Mediterranean law to the contract, as well as an implicit acceptance of the tribunal's power to adapt the contract. RESPONDENT's contentions contravene the very promises they made during the drafting of the contract, as well as commercial practice. CLAIMANT, who has remained faithful to its word throughout, should not be made to suffer for RESPONDENT's reneging **[Issue I]**.

CLAIMANT complied with RESPONDENT's request for a DDP delivery as RESPONDENT needed urgent delivery and wished to profit from CLAIMANT's experience with delivery ensuring lower risk of damage. The parties did not intend to burden CLAIMANT with all the risks of a delivery DDP and even included a *force majeure* and hardship clause to reflect this. A very clear need for application of the clause arrived, due to hardship caused by an unforeseeable import tariff. CLAIMANT took the heavy burden of the extra tariff payment based on RESPONDENT's representations that they would find a solution. RESPONDENT not only breached the contract by reselling the semen without CLAIMANT's submission, it also broke its promise by arbitrarily terminating the renegotiations with CLAIMANT. CLAIMANT is entitled to the outstanding contractual payment of US$ 1,250,000 by adaptation of the price under Clause 12. It was clearly the parties' intention for the hardship clause to cover import restrictions as can be seen from a plain reading of the contract as well as negotiations between the parties **[Issue III (1)].**

Even in the unlikely event that the tribunal finds adaptation cannot be allowed under Clause 12, it must still be allowed under CISG. RESPONDENT's claim of exclusion of Art. 79 CISG is baseless as there is no express or implicit intention of the parties to exclude it. Applying Art. 79 CISG, the hardship caused by the import restrictions qualify as an impediment and adaptation must be allowed. Adaptation should also be allowed even if the tribunal finds that hardship and adaptation are not settled by CISG or are not governed by CISG. In the former case, hardship and adaptation can be read into CISG by gap filling using general principles of CISG both including and excluding PICC. In the latter case, it can still be read into CISG by reference to PICC as it is the contract law of Mediterraneo which governs the contract **[Issue III (2)]**.

Not only has RESPONDENT consistently broken its promises, it has also adopted an insincere stance. RESPONDENT has been part of a separate sale which got affected by tariffs imposed by the President of Mediterraneo. In relation to this contract, a separate set of proceedings were instituted. The only material difference between those proceedings and the present ones is that RESPONDENT has been affected negatively there. Consequently, RESPONDENT has conveniently asked for adaptation under the hardship clause in that contract. This behavior is not only extremely contradictory, it is also highly relevant for the present proceedings. Therefore, CLAIMANT seeks to submit evidence from the other arbitration in the present one. CLAIMANT must be allowed to submit the evidence as the tribunal has discretion over questions of admissibility under the HKIAC Rules. This tribunal is not bound by any rules of admissibility especially any rule against illegally obtained evidence. The admission would not be barred under the IBA Rules and neither would RESPONDENT's obligation of confidentiality be violated. The tribunal should allow this evidence in the interest of policy goals of international arbitration and principles of natural justice **[Issue II]**.

ARGUMENTS

ISSUE I

1. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

1. Clause 15 of the FROZEN SEMEN SALES AGREEMENT [hereinafter "SALES AGREEMENT"] contains an arbitration clause, referring *"any dispute arising out of this contract"* to the Hong Kong International Arbitration Centre [hereinafter "HKIAC"] administered arbitration [*Cl. Ex. 5, p. 14, THE PROBLEM*]. RESPONDENT has contested the tribunal's jurisdiction to adapt the contract [*Ans. to Not. of Arb., ¶ 12, p. 31, THE PROBLEM*]. CLAIMANT respectfully requests the tribunal to reject RESPONDENT's challenge. This is because the tribunal has the power to hear, and award, increased remuneration for CLAIMANT's performance of contract, under changed circumstances.
2. The power of an arbitral tribunal to adapt a contract derives from the arbitration agreement [*Horn/Kröll, p. 448*]. This question of determining the scope of the arbitration agreement, then, depends on contractual interpretation, involving specifically the interpretation of an arbitration agreement [*Berger (Adaptation), p. 1376*]. In this regard, the law governing the arbitration agreement is of prime importance. It is the law applicable to the arbitration agreement that guides its interpretation, and thereby, its scope [*Born (Commercial), p. 315*].
3. Contrary to RESPONDENT's allegations, it is the law of Mediterraneo that governs the arbitration agreement **(1.1.)**. Applying the law of Mediterraneo, the tribunal has the power to adapt the contractually stipulated price **(1.2.)**.

1.1. THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT

4. The law chosen by the parties to govern the SALES AGREEMENT is the law of Mediterraneo [*Cl. Ex. C5, p. 14, THE PROBLEM*]. CLAIMANT requests the tribunal to apply this law to the arbitration agreement because the law of the underlying contract also governs its arbitration clause **(1.1.1.)**; further, under a conflict of laws approach, the applicable law is the law of Mediterraneo **(1.2.1.)**; and, in any case, the law of Mediterraneo has the closest and most real connection with the arbitration **(1.3.1.)**.

1.1.1. The law of the matrix contract governs its arbitration clause

5. An arbitration clause, when contained within a larger matrix contract, is governed by the law of the contract [*Born (Commercial), pp. 535-538; Berger (Applicable Law), p. 319; Collins, p. 127; Final Award in ICC Case No. 6840 of 1997, p. 469*; *Owerri Commercial, p. 706; Recyclers of Australia; Lurgi Energie, p. 803; Svenska Petroleum, ¶¶76-77; McDonnell Douglas Corp., p. 50; Bangladesh Chemical; Felman Prod.; Palmco Corp.*]. This is because the arbitration clause, like any other clause of the contract, is considered a part of the substance of the underlying contract [*Kröll (Arbitration) p. 72; Kaplan/Moser, p. 139; Poudret/S.Besson p. 178; Buhler/Webster, p. 80; Bond, p. 14; Merkin, ¶7.12; Ronly Holdings; Sonatrach, p. 32; Recyclers of Australia; NTPC v. Singer; Aastha Broadcasting; The Star Texas*]. The difference in its nature arises only when the matrix contract is challenged as being void, and the arbitration clause is allowed to survive nonetheless [*Kaplan/Moser, p. 132*].
6. In this regard, the tribunal must consider the provision for arbitration, i.e. clause 15 of the SALES AGREEMENT [*Cl. Ex. C5*, *p. 15, THE PROBLEM*]. This clause was discussed in the wider context of the SALES AGREEMENT itself and there were no separate negotiations about its governing law [*Cl. Ex. C8, p. 17, THE PROBLEM; Res. Ex. R5, p. 35, THE PROBLEM*]. In fact, the last communication regarding this clause deputed Danubia as the seat of arbitration, and specifically mentioned that *all* terms of the SALES AGREEMENT shall be governed by the law of Mediterraneo [*Res. Ex. R2, p. 32, THE PROBLEM*]. Therefore, the arbitration clause is a part of the underlying contract, and its interpretation should be governed by the law of Mediterraneo.

1.1.2. Under a conflict of laws approach, the applicable law is the law of Mediterraneo

7. Should the tribunal consider that the law of the contract does not directly cover the arbitration clause, CLAIMANT submits that a conflict of laws approach should be used. Under such an approach, the law of Mediterraneo will govern the arbitration clause as it is the implied choice of the parties.
8. A conflict of laws approach involves the determination of the applicable law, guided by a set of conflict of law rules [*Naón, p. 34*]. An arbitral tribunal does not have its own set of conflict of law rules, nor is it bound by the rules of the forum [*Goldman p. 491; Mayer p. 247; Redfern/Hunter p. 122*]. However, the current choice-of-law trend in international commercial arbitration involves the usage of the national and a-national legal sources of the seat of arbitration to determine the law governing the arbitration agreement, and its interpretation [*Naón, p. 34; Award of 1999 in ICC case 10044 (unpublished); Award of 1999 in ICC case 9772 (unpublished)*]. Given that Danubia is a common law country [*Proc. Or. II, ¶44, p. 61*], the common law tradition constitutes an a-national legal source for determination of the law governing the arbitration agreement.

9. The recent approach in common law jurisdictions is the application of the proper law of arbitration test [*Sulamerica; Cruz City; Habas Sinai; BCY v. BCZ*]. It has also been followed by civil law jurisdictions and arbitral tribunals [*Redfern/Hunter, p. 53*].
10. Under the proper law approach, it is the express, or *implied*, choice of law that governs the arbitration clause [*Born (Law & Practice), p. 434*]. This approach, then, is also preferable as it gives primacy to party autonomy over other factors [*Blessing, p. 44; Leong/Tan, p. 71*]. This is because the will of the parties forms the foundation of the arbitration agreement, whether express or implied [*Born (Commercial), p. 560; Redfern/Hunter, p. 7*].
11. In the absence of an express choice of law in the arbitration clause, CLAIMANT submits that the implied choice of law is the law of Mediterraneo **(1.1.2.1.)**. Further, contrary to RESPONDENT's allegations, the implied choice of law is not the law of Danubia **(1.1.2.2.)**.

1.1.2.1. THE IMPLIED CHOICE OF LAW IS THE LAW OF MEDITERRANEO

12. There is no express choice of law in clause 15 of the SALES AGREEMENT. Then, the implied choice must be determined, under the proper law approach.
13. In the absence of an express provision for the law of the arbitration agreement, the express choice of law for the underlying contract is considered a significant indicator of the implied choice of law for an arbitration clause [*Leong/Tan, p. 76*; *Sulamerica; Cruz City*]. This standard operates on the belief that businesspersons generally intend their entire relationship to be governed by the same law [*Fiona Trusts; BCY v. BCZ*]. It can be rebutted by indicators such as invalidation of the arbitration agreement under the implied law [*Sulamerica; Habas Sinai*].
14. The law of Mediterraneo was expressly chosen by the parties to govern the matrix contract [*Cl. Ex. C5, p. 14, THE PROBLEM*]. The arbitration agreement is not invalid under this law. Then, commercial reasonability dictates that the implied choice of the parties is for the law of Mediterraneo to govern the arbitration clause as well.

1.1.2.2. THE IMPLIED CHOICE OF LAW IS NOT THE LAW OF DANUBIA

15. RESPONDENT has contended that the implied choice of law is the law of Danubia, as it is the law of the seat [*Ans. to Not. of Arb., ¶14, p. 31, THE PROBLEM*]. CLAIMANT respectfully requests the tribunal to discard such a contention. This is because the relevant law and factors indicate a rejection of the law of Danubia as the choice of law.
16. Under the proper law approach, the mere choice of a seat does not sufficiently indicate that the law of the seat is implied as the governing law of the contract [*Sulamerica; Cruz City; BCY v. BCZ*]. Further, in determining the implied choice of law, the tribunal must also determine whether an

"implicit negative choice" has been made by the parties [*Blessing p. 44; Frick, p. 46; Jones, 928; ICC Case No. 8385 of 1996; Sapphire v. NIOC, p. 172*]. This means that the absence of certain provisions may be understood as the specific rejection of those provisions.

17. In this regard, it must be noted that the law of Danubia is merely the law of the seat. *Per se*, it cannot displace the presumption that the implicit choice is the law of the underlying contract.
18. Further, it must also be noted the HKIAC Model clause was used to draft clause 15 of the SALES AGREEMENT [*Res. Ex. R1, p. 33, THE PROBLEM*]. The HKIAC Model clause provides for the law of seat as the governing law of the arbitration agreement. In fact, RESPONDENT had, in their initial draft of clause 15, specifically provided for such a choice of law [*ibid*]. However, CLAIMANT reverted with changes in the clause, and had *clearly excluded* the choice of law provision that had deputed the law of seat as the governing law [*Res. Ex. R2, p. 34, THE PROBLEM*].
19. Furthermore, CLAIMANT was bound to seek the approval of the Creditor's Committee if the contract was to be subjected to foreign law. This had been communicated to RESPONDENT [*Res. Ex. R2, p. 34, THE PROBLEM*]. But the Creditor's Committee never gave its assent to the application of the law of Danubia to the contract. In its absence, CLAIMANT could not have chosen to opt for arbitration under Danubian law, even implicitly.
20. In light of all these factors, the implicit choice of the parties cannot be the law of Danubia. The implicit choice, then, remains the law of the SALES AGREEMENT: the law of Mediterraneo.

1.1.3. The law of Mediterraneo has the closest and most real connection to the arbitration agreement

21. The alternative to the express, or implied, choice approach is the "closest and most real connection" test [*Dicey and Morris, p. 829; Sonatrach Petroleum, ¶ 32*]. CLAIMANT submits that the law of Mediterraneo has the closest and most real connection with the arbitration agreement.
22. The "closest connection" approach requires an objective evaluation of all the differing factual considerations in a dispute [*Born (Governing Law), p. 829; Lew/Mistelis/Kröll, p. 118; Fouchard/Gaillard/Goldman, p. 222*]. Admittedly, some arbitral awards have considered the law of the seat to be most closely connected with the arbitration. However, the selection of a seat does not, by itself, indicate a strong connection of its law with the arbitration agreement [*Paulsson, p. 368*; *Fouchard/Gaillard/Goldman, pp. 227, 424; Redfern/Hunter, p. 166; Götaverken Arendal*].
23. The value of the seat has no real significance in a "delocalized international arbitration" [*Paulsson, p. 53*]. A seat may be chosen "because it is a suitably neutral venue", which has nothing to do with the arbitration or arbitration agreement. In fact, the neutrality of a seat lies in the very fact that it has no relation with the parties or their commercial relationship [*Redfern/Hunter, p. 165*].

The parties in such arbitrations circumvent any relation with municipal law by choosing institutional arbitration rules that govern the proceedings.

24. In such a scenario, the "closest connection" may then be seen in light of the underlying dispute itself [*NTPC v. Singer; Enercon*]. There is an inherent close connection between the underlying contract and the arbitration agreement, as the latter enforces rights arising out of the former [*Habas Sinai*]. Such an approach takes into account the contractual nature of the arbitration agreement [*Batenkas, p. 4; Born, (Governing Law), p. 831*].
25. Danubia as the seat of arbitration was suggested by CLAIMANT solely for its neutrality, in order to assuage the concerns of RESPONDENT [*Res. Ex. R2, p. 34, THE PROBLEM*]. Simultaneously, the parties had also chosen the HKIAC Rules to govern the arbitration proceedings [*Cl. Ex. C5, p. 14*]. The arbitration is, then, a delocalized international arbitration. Thus, *per se*, Danubian law has no valid connection to the arbitration agreement. The choice of Danubia as the seat was clearly made for purposes irrelevant to the scope of the obligations the parties intended to undertake.
26. On the other hand, CLAIMANT is situated in Mediterraneo [*Not. of Arb., p. 4, THE PROBLEM*]. The impact of RESPONDENT's actions has, then, been felt in Mediterraneo. Further, the merits of the dispute involve an interpretation of the law of Mediterraneo [*Cl. Ex. R5, p. 13, THE PROBLEM*]. Furthermore, the triggering event of the present dispute was the import tariff imposed by Equitoriana on animal products from Mediterraneo [*Cl. Ex. R6, p. 15, THE PROBLEM*].
27. An evaluation of the connected factors indicates that the law of Mediterraneo has the closest connection to the dispute, and thereby, the arbitration agreement. Therefore, the governing law of the arbitration agreement is such law. The scope of the arbitration agreement must be interpreted in accordance with the law of Mediterraneo.

1.2. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACTUALLY STIPULATED PRICE

28. The tribunal has the power to adapt the contractually stipulated price. This is because the hardship clause allows for price adaptation **(1.2.1.)**; and, in any case, the power to adapt is implicit in Clause 15 of the SALES AGREEMENT **(1.2.2.)**.

1.2.1. THE HARDSHIP CLAUSE ALLOWS FOR PRICE ADAPTATION

29. CLAIMANT submits that the hardship clause empowers the tribunal to adapt the contract. This is on account of the hardship clause, Clause 12 of the SALES AGREEMENT [*Cl. Ex. C5, p. 14, THE PROBLEM*]. Clause 12 clarifies the risks that will not be borne by CLAIMANT. RESPONDENT had a duty to renegotiate the price under Clause 12, which it breached. Breaches of contractual duties

are specifically covered by clause 15 of the SALES AGREEMENT. This specific breach must, then, be remedied by the tribunal, by adapting the SALES AGREEMENT.

30. The central principle underlying a hardship clause is the principle of good faith [*Brunner, p. 480*]. Good faith is, in fact, a general principle of international commercial law and CISG [*Brunner, p. 516; Fontaine/De Ly, p. 517; Secretariat Commentary Art. 6; Bianca/Bonell, pp. 84-85; Magnus Remarks on Good Faith, p. 91; Herbert in Schlechtriem Uniform Sales Law, p. 61; Schwenzer/Hachem in Schlechtriem/Schwenzer 2nd ed., p. 136; Zeller, p. 97; ICC Case No. 10351 of 2001*]. Out of the principle of good faith arises the duty of both the parties to renegotiate terms of the contract [*Berger (Adaptation), p. 1352; Ferrario, p. 73; ICC case no. 9994/2001*]. In fact, insertion of a hardship clause is an explicit demonstration that the contracting parties are willing to undertake revision of the contract [*Bonell (Restatement), p. 130; Zaccaria, p. 10; Ferrario, p. 84*].
31. The overarching duty to renegotiate exists irrespective of the inclusion of a specific clause on adaptation [*ICC Case No. 9994/2001; Scaffom International*]. However, when the parties fail to reach an agreement, or when this duty to renegotiate in good faith is breached, the tribunal may undertake the task of adaptation itself [*Kröll (Adaptation), p. 448; Peter, 201; Ferrario, p. 77; Berger (Adaptation), p. 1353; Brunner, p. 400; UN Doc. A/CN.9/233, ¶16; ICC Case No. 2508 of 1976; Shell case*]. A claim for increased remuneration is, then, reliant upon a contractual obligation, and is covered by the dispute resolution clause [*Kaverit Ltd v. Krone Corp*].
32. When CLAIMANT alleged hardship on account of the increased tariff, RESPONDENT had a duty to renegotiate the terms in good faith. CLAIMANT made efforts to initiate this renegotiation. However, RESPONDENT wrongly, and without reason, ended their commercial relationship [*Cl. Ex. C8, p. 18, THE PROBLEM*]. Thus, RESPONDENT has breached its duty to renegotiate. Clause 15 of the SALES AGREEMENT refers to arbitration of all claims of breach of contractual duty.
33. As this claim for renegotiation of the contractually stipulated price is rooted in a breach of Clause 12 of the SALES AGREEMENT, this clause empowers the tribunal to adapt the contract. It can, then, also award increased remuneration should CLAIMANT prevail on the merits.

1.2.2. The power to adapt the contract is implicit in Clause 15 of the Sales Agreement.

34. Irrespective of whether the duty to renegotiate existed in Clause 12, the tribunal is vested with the power to adapt the contract by virtue of Clause 15 of the SALES AGREEMENT. Clause 15 provides that "any dispute arising out of the agreement" shall be referred to arbitration. CLAIMANT submits this power is implicit in the wording of Clause 15.
35. The power of an arbitrator can be implied in a contract [*Bordacahar, p. 2; Berger, p. 5; Horn/Kröll, p. 449; ICC Case No. 5754 of 1988; UN Doc. A/CN.9/WG.II/WP.44, ¶22*]. It need not be expressly

provided. When the power to adapt the contract can be read into the existing provisions of a contract, the principle of *pacta sunt servanda* mandates that the tribunal have the jurisdiction to adapt the contract [*Berger (Adaptation), p. 1376*].

36. The interpretation of Clause 15 of the SALES AGREEMENT is guided by the applicable law, the law of Mediterraneo [*supra* ¶¶*1-27*]. In Mediterraneon jurisprudence, the United Nations Convention on Contracts for International Sale of Goods [hereinafter "CISG"] is applicable to arbitration clauses, and their interpretation [*Proc. Or. I, p. 53, THE PROBLEM*]. The mention of dispute resolution in Art. 19(3) of CISG is considered a sufficient indication that the convention applies to interpretation of arbitration clauses [*Schwenzer/Tebel, p. 746*].
37. Art. 8 serves as an interpretive aid, with Art. 8(3) directing the tribunal to take into account all the relevant circumstances of the case, including the negotiations [*Schlechtriem/Schwenzer 4th ed., p. 144*]. In general, Art. 8 prohibits restrictions on the materials for contract interpretation [*ibid, p. 152*]. In this regard, the negotiations for the SALES AGREEMENT indicate that price adaptation is covered in clause 15 **(1.2.2.1.)**. Further, commercial practice indicates that price adaptation is implicit in clause 15 **(1.2.2.2.)**.

1.2.2.1. THE NEGOTIATIONS FOR THE SALES AGREEMENT INDICATE THAT PRICE ADAPTATION IS COVERED IN CLAUSE 15

38. As per Art. 8(1) of CISG, statements made by a party are interpreted according to its intent, where the other party knew or "could not have been unaware of" such intent. A particular party's intent regarding the interpretation of a clause is, thus, decisive only if it had been addressed to the other party to the contract [*Staudinger/Magnus in Schlechtriem/Schwenzer 4th ed., ¶11*]. The negligence of the addressee in conveying its disagreement, or its failure to realize the implications, is not relevant in the process of interpretation [*Schlechtriem/Schwenzer 4th ed., p. 152*]. This reflects the notion of *consensus ad idem*, whereby the other party was not "unaware of the intent".
39. CLAIMANT submits that RESPONDENT knew, or at least could not have been unaware, of CLAIMANT's intent that the arbitration clause be wide enough to allow for price adaptation, in case of hardship. The prime negotiators of the SALES AGREEMENT for both the parties had agreed that the arbitrator should adapt the contract if the parties could not agree [*Cl. Ex. C8, p. 17, THE PROBLEM*]. In fact, it was also understood that under the existing provisions, the arbitrators would have such power. A separate provision was considered unnecessary, from a legal perspective [*Cl. Ex. C8, p. 17, THE PROBLEM*].

40. Further, after this, the new negotiator for RESPONDENT who formulated the remaining provisions of the contract had access to Mr. Antley's (the prime negotiator for RESPONDENT) notes, where a connection between the hardship clause and arbitration clause was clearly envisaged [*Res. Ex. R3, p. 35, THE PROBLEM*].
41. Thus, there was a *clear meeting of minds* regarding adaptation, by the prime negotiators of the contract. After this, there was no further discussion on this matter [*Proc. Or. II, ¶6, p. 55, THE PROBLEM*]. RESPONDENT neglected to notify CLAIMANT of its changed stance on the issue of price adaptation, and was negligent in its negotiation via Mr. Krone [*Res. Ex. R3, p. 35, THE PROBLEM*]. This lack of care cannot vitiate the common intent of the negotiators who had drafted clause 15 of the SALES AGREEMENT, on behalf of the parties.
42. Thus, according to the negotiations that went into drafting clause 15, the arbitrators have the power to adapt the contractually stipulated price.

1.2.2.2. COMMERCIAL PRACTICE INDICATES THAT PRICE ADAPTATION CAN BE READ INTO CLAUSE 15.

43. CLAIMANT submits that as per international practice, price adaptation can be read into the arbitral clause of the SALES AGREEMENT. This is because the phrase "any dispute arising out of the contract" covers price adaptation.
44. For contracts where performance has been concluded, it is considered reasonable to read the phrase "any disputes arising out of the contract" broadly [*Kröll (Adaptation), p. 451; Russell, pp. 10-11; ICC Case No. 5745 of 1988*]. Such broad reading recognizes the need to dispense with the strict distinction between dispute settlement and price adaptation [*Kröll (Arbitration), pp. 96, 160; David, p. 123; Berger, 17; UN Doc. A/CN.9/WG.II/WP.44, ¶22; Hillas v. Arcos; Classique Coaches*]. This is because such price adaptation merely requires "*liquidation of the various consequences of past conduct of the parties*", rather than creation of any future rights or liabilities [*Horn, p. 189; Ferrario, p. 146; Campagnie Maritime; Alcoa case; Gamecock; AMINOIL Arbitration; ICC Arbitration No. 7544 of 1996*]. This is done with a view to restore the economic equilibrium, and profitable relationship, that the parties had intended to maintain [*Ferrario, p. 113*].
45. Thus, more and more jurisdictions are affirming the doctrine of *rebus sic stanibus* when the performance of the contract has been made onerous for one of the parties [*Alcoa case; Gamecock; Intrafor Cofor; Valentini case; Moscatiello case; Shell case; Cosarma*]. Arbitrators are now legitimately assuming the power to adapt the contract, upon the happening of triggering events [*Fouchard/Gaillard/Goldman, p. 28; Gotanda (Adaptation), p. 1471; ICC case no. 2508 of 1976; Maritime Belge*].

46. CLAIMANT and RESPONDENT had had a thorough discussion on the risk allocation [*Cl. Ex. C3, p. 11, THE PROBLEM; Cl. Ex. C4, p.12, THE PROBLEM*]. This was because the parties had intended to maintain a mutually profitable relationship. Further, it must be noted that the contract is already concluded. CLAIMANT has already performed its obligations under the contract, by delivering the last dose of the horse semen [*Not. of. Arb., p. 6, THE PROBLEM*]. Any price adaptation resulting from this arbitration would not affect future obligations, or rights. It would merely restore the mutually profitable relationship the parties had envisaged.
47. Thus, as such, CLAIMANT's request for increased remuneration is a "dispute" for the purposes of Clause 15 of the SALES AGREEMENT. Therefore, the arbitral tribunal has power under Clause 15 to adjudicate on such a claim of price adaptation.

CONCLUSION OF ISSUE I

The power of the tribunal to adapt the contract, or award increased remuneration, is implicit in Clause 15, read with Clause 12, of the SALES AGREEMENT. This is because the governing law of the arbitration agreement, the law of Mediterraneo, allows for such a broad interpretation of the phrase "any dispute arising out of the contract", on account of the drafting history and commercial practice surrounding the arbitration agreement.

Issue II

2. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

48. CLAIMANT wishes to present to this tribunal evidence regarding another arbitral proceeding RESPONDENT is involved in; it concerns the sale of a mare to a buyer in Mediterraneo. This sale had been hit by the tariff of 25% imposed by the president of Mediterraneo. In the present case, RESPONDENT has vehemently denied adaption of the contract [*Resp. to Not. of Arb., p. 32, THE PROBLEM*]. In stark contrast, in the other arbitration, RESPONDENT had itself asked for an adaptation of the price, invoking hardship. CLAIMANT seeks to submit evidence from the other proceedings to point out the contradictory stance of RESPONDENT [*Letter by Langweiler, 2 Oct 2018, p. 50, THE PROBLEM*].
49. RESPONDENT has disputed the admissibility of the abovementioned evidence on two grounds. First, compelling RESPONDENT to produce the award would be in breach of confidentiality.

Second, that the method of obtaining the evidence was illegal as it could have happened either through a hack of RESPONDENT's computer system or through a breach of a confidentiality agreement. Therefore, RESPONDENT claimed that the evidence should not be admitted in the arbitration [*Letter by Fasttrack*, *3 Oct 2018, p. 51, THE PROBLEM*].

50. Even if it is assumed that the evidence was obtained through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system, CLAIMANT respectfully requests the tribunal to admit evidence from the other arbitration proceedings. This is because this tribunal has discretion to determine the admissibility of any evidence (**2.1.)**, and it should exercise the said discretion in favour of allowing the evidence from the other arbitral proceedings **(2.2.)**. Further, there is no bar on the admissibility of evidence in the present case under the IBA Rules **(2.3.)**, and RESPONDENT's obligation of confidentiality is not a ground for exclusion of the evidence **(2.4)**.

2.1. THE ARBITRAL TRIBUNAL HAS DISCRETION TO DETERMINE THE ADMISSIBILITY OF ANY EVIDENCE

51. Matters related to evidence are procedural in nature and are consequently governed by the rules of procedure applicable before the tribunal. Hence, whether a party is entitled to submit evidence is a question governed by the applicable procedural rules [*Redfern/Hunter,* p. 353]. Further, this also implies that the tribunal is not bound by evidentiary rules applicable before the national courts of the seat of the tribunal [*Born, p. 2147*].
52. Therefore, the applicable rules of procedure come from the institutional rules chosen by the parties [*Poudret/Besson, p. 643*]. In the instant case, the parties have chosen the HKIAC Rules, 2018 as the applicable institutional rules [*Ex. C5, Cl. 15, p. 14, THE PROBLEM*].
53. Art. 22.2 of the HKIAC Rules provides that the tribunal shall determine matters of admissibility, relevancy, and materiality of evidence [*Art. 22.2, HKIAC Rules 2018*]. The rules further leave it upon the tribunal to determine whether to apply strict rules of evidence or not [*Art. 22.2, HKIAC Rules 2018*]. No further guidelines are prescribed regarding the metric by which such admissibility is to be determined, implying that the same is left to the discretion of the tribunal. Therefore, the applicable procedural rules allow tribunals to rule upon the entitlement of parties to submit evidence in the proceedings.
54. Thus, the tribunal is not bound by any strict rules of evidence but can make its own determination regarding the entitlement of CLAIMANT to submit evidence from the other arbitral proceedings.

2.2. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION IN FAVOUR OF ALLOWING THE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDINGS

55. RESPONDENT alleges that the material from the other arbitration proceedings was obtained illegally and, therefore, cannot be admitted in the current proceedings [*Letter by Fasttrack*, *3 Oct 2018, p. 51, THE PROBLEM*].
56. As already established, the tribunal has the power to determine issues of admissibility of evidence [*supra ¶¶48-50*]. It is submitted that the tribunal should allow CLAIMANT to submit the evidence from the other proceedings because international tribunals follow a liberal approach of admitting evidence **(2.2.1.)**. Further, permitting the admission of the evidence fulfils the policy goals of international arbitration **(2.2.2.)**. And, in any case, refusing to admit the evidence would violate CLAIMANT's right to be heard **(2.2.3.)**.

2.2.1. International tribunals follow a liberal approach of admitting evidence

57. Parties are generally given the greatest freedom to submit evidence by international tribunals. Restrictions on the use or submission of evidence are generally not imposed by such tribunals. [*Reisman/Freedman, p. 739*]. Admission of evidence is considered a norm which cannot be derogated from unless it is proved that admitting such evidence would violate the procedural law of the tribunal [*Sandifer, p. 189*]. The strict rules of evidence of national courts arise out of the needs presented by domestic legal systems, and therefore are completely unsuitable in an international arbitration context [*Waincymer, p. 793*]. Thus, the strict rules of evidence which might apply before national courts seldom apply to arbitral proceedings.
58. In the light of this, CLAIMANT submits that rules governing admissibility of evidence before national courts are not applicable to international arbitrations **(2.2.1.1.)**; and the rule excluding illegally obtained evidence cannot be applied to arbitral proceedings **(2.2.1.2.)**.

2.2.2.1. RULES GOVERNING ADMISSIBILITY ARE NOT APPLICABLE TO INTERNATIONAL ARBITRATIONS

59. The rules of admissibility originated from the practice of jury trials in Anglo-American and common law jurisdictions [*Reisman/Freedman, p. 740*]. The basis of these rules is that jurors are laymen with no legal training, therefore incapable of assessing and evaluating evidence. These rules arose out of a need to prevent any effect of placing potentially prejudicial evidence in front of these jurors [*Waincymer, p. 793; Born, p. 2310*].

60. These concerns are, however, not present in an international arbitration context. In an arbitral proceeding, the arbitrators are the adjudicating authority and are competent jurists, highly trained in the legal discipline. Therefore, the members of the tribunal are assumed to be competent in assessing and evaluating evidence. There is no risk with placing potentially prejudicial evidence before such a tribunal, as it is competent enough to take the prejudicial nature of the evidence into consideration while reaching a decision [*Sandifer, p. 182*].
61. Therefore, rules governing admissibility of evidence before national courts are inapplicable to international arbitrations.

2.1.1.2. THE RULE EXCLUDING ILLEGALLY OBTAINED EVIDENCE CANNOT BE APPLIED TO ARBITRAL PROCEEDINGS

62. The rule excluding illegally obtained evidence originated from common law and sought to prevent one party from submitting evidence against the other obtained by breaching the latter's procedural rights [*Reisman/Freedman, p. 745*].
63. This rule exclusively applies to criminal proceedings where the opposing party is the State and has backing of the entire State machinery [*Halsbury's Laws, vol. 17* ¶*12*]. This puts one party, the State, in a greatly more powerful position as compared to the other party, the defendant. Hence, this rule is necessary in such a context to prevent any abuse of said power [*Thirlway, p. 630*].
64. In international arbitration, however, neither party holds such an overwhelming power over the other, rendering the rule unsuitable in this context. Since in arbitral proceedings, parties are usually corporations, businesses, or other private entities, they are on a much more equal footing. Therefore, the inclusion of procedural safeguards becomes unnecessary because no party is that much more powerful than the other [*ibid*].
65. Hence, in the context of international arbitration, rules relating to admissibility, especially the rule barring illegally obtained evidence, are wholly unsuitable. In this vein, tribunals are very liberal in their approach towards admitting evidence. In the instant case as well, the tribunal ought to follow this liberal approach.
66. Therefore, CLAIMANT must be allowed to submit the evidence relating to the other arbitral proceedings.

2.2.2. Allowing the admission of the evidence fulfils the policy goals of international arbitration

67. As already established, international tribunals adopt a liberal policy relating to admissibility of evidence in arbitral proceedings [*supra* ¶¶*57-66*]. This liberal approach can be evidenced from the

way tribunals have been recently treating the issue of illegally obtained evidence in notable investor-state arbitrations as well as before the Court of Arbitration for Sport. In these cases, the tribunals have tried to strike a balance between policy goals, such as protecting client-attorney privilege, against the fundamental goal of arbitration, i.e., seeking to find what actually happened, or 'truth-seeking' [*Blair/Gojkovic, p. 257*]. The view, taken consistently by tribunals in such cases, is that unless there is a violation of international public policy, there is no reason for excluding illegally obtained evidence [*O'Sullivan*, *Blair/Gojkovic, p. 257*].

68. In that vein, CLAIMANT submits that arbitral tribunals rely on the balancing test to determine the admissibility of illegally obtained evidence **(2.2.2.1.)**; and the balancing test leads to admittance of the evidence related to the other arbitration **(2.2.2.2)**.

2.2.2.1. ARBITRAL TRIBUNALS RELY ON THE BALANCING TEST TO DETERMINE THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

69. Of the arbitrations mentioned above, the most significant is *Caratube v. Kazakhstan*; here *Caratube* sought to submit confidential documents obtained through a hack of the Kazakhstan Government's IT systems [*Caratube v. Kazakhstan (ICSID)*]. The tribunal had to balance policy considerations against the goal of fact finding. It allowed the admission of such evidence as it gave more importance to the latter than the former.
70. In awards rendered by tribunals in the Court of Arbitration for Sport, the same rationale has been followed as they admitted illegally obtained evidence. These tribunals held the interest of arriving at the truth to be much more valuable than the infringement of the procedural right of the defendant as long as no fundamental policy goal is being infringed [*Valverde v. CONI (CAS)*; *Amos Adamu v. FIFA (CAS)*; *FC Metalist v. UEFA (CAS)*].
71. Even in cases where the admissibility of illegally obtained evidence has been denied, the tribunals relied on the balancing test to determine admissibility of the illegally obtained evidence presented [*Libanco v. Turkey (ICSID); Methanex v. USA (NAFTA)*]. The reason for denying admissibility in such cases was never the fact that it was obtained illegally but that it was obtained illegally *by the party seeking to submit it*. The principles relied on by the tribunals was that of good faith which is fundamental to international public policy [*EDF v. Romania (ICSID)*].

2.2.2.2. THE BALANCING TEST LEADS TO ADMISSION OF THE EVIDENCE RELATED TO THE OTHER ARBITRATION

72. As already established, tribunals do not exclude evidence for the sole reason of it being obtained illegally [*supra* ¶¶*69-71*]. The relevant factor is the application of the balancing test, weighing

public policy goals against accurate fact finding. If the latter is given more importance then evidence is admitted.

73. Undoubtedly, tribunals have held public policy goals such as good faith or protection of privileged information as outweighing the interest of accurate fact finding [*Caratube v. Kazakhstan (ICSID)*; *Libanco v. Turkey (ICSID)*]. However, the practice of tribunals shows that they distinguish among different public policy goals. Tribunals have held good faith and privilege as policy goals that must not be infringed upon, but have not extend the same treatment to confidentiality. This is evidenced in *Caratube*, where the tribunal made confidential information admissible but excluded privileged information [*Caratube v. Kazakhstan (ICSID)*; *Libanco v. Turkey (ICSID)*]. Therefore, confidentiality does not qualify as a policy goal important enough to outweigh the interest of accurate fact finding.
74. In the instant case, the evidence that CLAIMANT seeks to submit is highly material to the outcome of the proceedings as it demonstrates that the import tariff leads to hardship allowing for adaptation of the contract [*Letter by Langweiler*, *2 Oct 2018*, *p. 50, THE PROBLEM*]. Therefore, the evidence is crucial for determining the facts accurately and fulfilling the tribunal's objective of 'truth-seeking'.
75. Further, no international public policy goal is being violated as CLAIMANT had no involvement in the illegal means of obtaining the evidence; the evidence was merely obtained from a third party [*Proc. Or. No. 2, ¶41, p. 60-61, THE PROBLEM*]. Therefore, there is no violation of the principles of good faith or privilege resulting from the admission of the evidence. A mere breach of confidentiality is not a breach of policy sufficient to outweigh the interest of 'truth-seeking' and disallow submission of evidence.
76. Therefore, the tribunal must admit the evidence.

2.2.3. Refusing to admit the evidence would violate CLAIMANT's right to be heard

77. The principle of *audi alteram partem* is a principle of natural justice which provides that all parties to a proceeding must be given a chance to be heard. This principle is also integral to the need of due process in any adjudicatory proceedings, including arbitral proceedings [*Lew/Mistelis/Kröll ¶¶18-21*]. This principle extends to allowing the parties full opportunity to present their case, otherwise their right to be heard would be violated [*Mehren/Salomon, p. 290*].
78. Not allowing a party to submit evidence can be construed as a violation of the right of the party to be heard in the proceeding [*Waincymer, p. 793*]. This is so because it infringes upon the opportunity of the parties to present their case to the fullest extent. In fact, the New York Convention has codified the importance of the right to be heard in arbitral proceedings. Art.

V(1)(b) provides that an award may not be recognized if the other party was not able to present its case. If the evidence is not admitted, the award given by this tribunal will be open to challenge as due process would not have been followed. This would be contrary to the tribunal's goal of rendering an enforceable award [*Redfern/Hunter*, *p. 29*].

79. Not allowing the admission of the evidence will put the enforceability of the award in doubt. Therefore, the tribunal should allow CLAIMANT to submit the evidence related to the other arbitration.

2.3. THERE IS NO BAR ON THE ADMISSIBILITY OF EVIDENCE IN THE PRESENT CASE UNDER THE IBA RULES

80. RESPONDENT may allege that International Bar Association (IBA) Rules are applicable in the present case, and under them the tribunal should refuse the admission of the evidence. CLAIMANT submits that the IBA rules do not apply in the instant case and even if applied, they allow for admissibility of evidence in the current proceedings.
81. The IBA rules are inapplicable as the parties never consented to their application. This tribunal is not bound to apply any other rules or guidelines of evidence apart from those chosen expressly by the parties, i.e. HKAIC Rules. Further, nothing in the HKIAC Rules mandates the tribunal to apply the IBA rules.
82. Even if the IBA Rules are applied due to them having persuasive value, they allow for admission of the evidence in the present proceedings. Art. 9 of the IBA Rules provides that a tribunal may exclude evidence if it is *inter alia* declared confidential by a state or public institution, or declared privileged, or are part of any settlement negotiations. Even in these cases, the tribunal has to be satisfied as to the sufficiency of the policy concerns raised, in order to make the evidence inadmissible. However, confidentiality on its own is clearly absent from Art. 9. This goes to show that evidence is only excluded if admitting it results in violation of large policy considerations such as privilege.
83. Thus, the IBA Rules also require a larger public policy consideration than just confidentiality for excluding evidence [*IBA Rules Review Subcommittee, p. 25f*]. This is in line with the practice of arbitral tribunals [*supra* ¶*73*].
84. Therefore, in the present dispute, the admissibility of the evidence from the other proceeding is not barred under the IBA Rules.

2.4. RESPONDENT'S OBLIGATION OF CONFIDENTIALITY IS NOT A GROUND FOR EXCLUSION OF THE EVIDENCE

85. RESPONDENT alleges that submission of the evidence from the other arbitral proceeding must not be allowed as it breaches RESPONDENT's obligation of confidentiality of proceedings under Art. 42 of the HKIAC Rules, 2013 [*Letter by Langweiler*, *2 Oct 2018*, *p. 50, THE PROBLEM*].
86. CLAIMANT submits that RESPONDENT's obligation of confidentiality does not lead to exclusion of the evidence from the other arbitral proceeding. This is because the said duty is restricted to, *inter alia*, the parties to the arbitration, the members of the tribunal, and witnesses [*Moser/Bao, ¶12.31*]. The obligation does not extend to external third parties [*Born, p. 2108*].
87. In the instant case, CLAIMANT is the one seeking to submit the evidence. Since CLAIMANT is an external third party to the other proceedings, it cannot be barred from submitting the evidence. Further, the present members of the tribunals are not involved with the other proceedings [*Proc. Or. No. 2, ¶37, p. 60, THE PROBLEM*]. Hence, there will be no breach of obligation of confidentiality on submitting the evidence.
88. Therefore, RESPONDENT's obligation under Art. 42 does not lead to exclusion of the evidence.

CONCLUSION OF ISSUE 2

The tribunal has complete discretion over matters of admissibility under the applicable law, i.e. HKIAC Rules. The tribunal should exercise this discretion and allow CLAIMANT to submit the evidence as the rules of admissibility and the rule against illegally obtained evidence are not applicable. Further, admission would be in line with the policy goals of international arbitration and principles of natural justice. Such admission is not barred under the IBA rules and neither would RESPONDENT's obligation of confidentiality be violated.

ISSUE III (1)

3. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CLAUSE 12 OF THE CONTRACT

89. The Equatorianian Government imposed a tariff of 30% on all agricultural goods imported from Mediterraneo [*Cl. Ex. C6, p. 15, THE PROBLEM*]. This included breeding of racehorses and made the delivery of the final shipment 30% more expensive [*Cl. Ex. C7, p. 16, THE PROBLEM*]. RESPONDENT asked CLAIMANT to deliver the doses as they were required urgently.

RESPONDENT also represented that they understood CLAIMANT's problem and a solution would be found. On the basis of this representation CLAIMANT delivered the final shipment, suffering the increased costs [*Cl. Ex. C8, p. 18, THE PROBLEM*]. CLAIMANT later realized that RESPONDENT breached the SALES AGREEMENT as it had resold 15 does of the horse semen supplied by CLAIMANT, at a 20% mark-up without CLAIMANT's consent.

90. In fact, the resale was RESPONDENT's reason for wanting the urgent delivery [*Cl. Ex. C8, p. 18, THE PROBLEM*]. RESPONDENT further refused to cooperate with CLAIMANT and cut off negotiations pertaining to adaptation [*Cl. Ex. C8, p. 18, THE PROBLEM*]. RESPONDENT can afford the additional payment of US$ 1,250,000 (25%of the price for the third delivery of semen) [*Proc. Or. No. 2, ¶30, p. 59, THE PROBLEM*] and it has made unjust profits by breaching the SALES AGREEMENT. CLAIMANT on the other hand has been suffering losses and cannot afford the additional payment of US$ 1,250,000 [*Proc. Or. No. 2, ¶29, p. 53, THE PROBLEM*].
91. The contract has a hardship clause allowing for adaptation of the contract [*Cl. Ex. C5, Clause 12, p. 14, THE PROBLEM*]. RESPONDENT contends that adaptation of the contract must not be allowed under the hardship clause [*Resp. to Not. of Arb., p. 32, THE PROBLEM*].
92. CLAIMANT respectfully requests the tribunal to award the payment of US$ 1,250,000 or any other amount due to price adaptation under the hardship clause. This is because there is hardship caused by the import tariff **(3.1.)**; the hardship clause is applicable to import tariffs **(3.2.)**; and the hardship clause allows for adaptation [*supra* ¶¶29-33].

3.1. THE IMPORT TARIFF RESULTED IN HARDSHIP UNDER CLAUSE 12

93. The import tariff imposed by the government of Equatoriana made the delivery 30% more expensive, destroying CLAIMANT's commercial basis of the contract. Further, this was made even more burdensome for CLAIMANT due to the financial difficulties it has been facing. Clause 12 of the SALES AGREEMENT does not define what it means by hardship. Therefore, the conditions which need to be fulfilled to establish hardship will be interpreted according to general standards in international sales [*Fontaine/de Ly, pp. 440-43; Brunner, p. 387*].
94. The essential conditions that have to be fulfilled for proving hardship are, *first*, performance must become more onerous; *second*, the change of circumstances must have happened after the conclusion of the contract; *third*, the change in circumstances must be unforeseeable; and *fourth*, the change in circumstances must be unavoidable [*Clive, pp. 82, 85; Rimke, p. 200*].
95. The second condition for hardship is fulfilled as the imposition of tariff happened on 19 December 2017 which was after the contract had been concluded on 6 May 2017 [*Cl. Ex. C5, p. 13, & Cl. Ex. C6, p. 15, THE PROBLEM*].

96. The remaining conditions are also fulfilled as the import tariff imposed by the Equatorianian Government met the threshold requirement for hardship **(3.1.1)**; the imposition of tariffs was not reasonably foreseeable **(3.1.2)**; and the tariffs were beyond the control of CLAIMANT **(3.1.3)**.

3.1.1 The tariff met the threshold requirement for hardship

97. The tariff made the performance of the contract onerous enough for CLAIMANT to meet the threshold requirement for hardship under general contract principles **(3.1.1.1)**; and the threshold requirement under the hardship clause **(3.1.1.2)**

3.1.1.1 THE TARIFF MET THE THRESHOLD REQUIREMENT UNDER GENERAL CONTRACT PRINCIPLES

98. Where an event results in the fundamental alteration of the equilibrium of the contract, it amounts to hardship [*Art. 6.2.2, PICC; Schlechtriem/Schwenzer 4th ed., p. 1142; ICC Case No. 8486 of 1996*]. The threshold may be defined in relation to commercial reasonability [*Secretariat Commentary Art. 65 ¶10; Miettinen, p. 235*]. A party cannot reasonably be expected to perform its obligations beyond such a threshold [*Ishida, p.372; Routamo/Ramberg, p.219; Gomard/Rechnagel p. 223; Lando, p.299*].
99. Whether an alteration is fundamental or not will depend on the circumstances of each case [*Brunner, p. 426; Lookofsky, p. 440; Rimke, p. 239; Mckendrick p. 719*]. Regard is to be had *inter alia* to the financial situation, and implicit and explicit risk allocation between the parties [*Da Silveira, p. 326; Schwenzer, p. 716*]. Even a small alteration in the contractual equilibrium would qualify as hardship if it results in the financial ruin of the obliging party [*ibid*].
100. In the instant case, the rise in price due to the import tariff, which destroyed CLAIMANT's 5% profit margin [*Cl. Ex. C8, p. 17, THE PROBLEM*]. The additional payment of US$ 1,250,000 is a heavy loss, incurring which will cause CLAIMANT's financial ruin. The past two years had been economically difficult for CLAIMANT and it had been able to stay in business only through extensive restructuring measures and considerable reduction in the workforce [*Cl. Ex. C8, p. 17, THE PROBLEM*]. It had been making losses due to the high interest payments for loans taken to finance the restructuring and construction of new stables [*Proc. Or. No. 2, ¶29, p. 59, THE PROBLEM*]. The restructuring plan provided that CLAIMANT would be profitable again from 2017 onwards which would be extremely difficult if CLAIMANT had to bear the additional expenditure of US$ 1,250,000 [*Proc. Or. No. 2, ¶30, p. 59, THE PROBLEM*]. This makes it impossible for CLAIMANT to shoulder the additional 30% tariff [*Cl. Ex. C8, p. 17, THE PROBLEM*].

101. The contractual equilibrium is further distorted by the unjust profits made by RESPONDENT. It resold 15 doses of the semen at a mark-up of 20% [*Proc. Or. No. 2, ¶20, p. 57, THE PROBLEM*]. This was without CLAIMANT'S knowledge or consent and therefore in breach of the SALES AGREEMENT which provided that the semen cannot be resold without informing CLAIMANT [*Cl. Ex. C5, p. 13, THE PROBLEM*].
102. Hence, CLAIMANT is being financially ruined by having to shoulder the burden of the tariff while RESPONDENT is enjoying unjust profits made by breaching the contract. These factors lead to the conclusion that the fundamental contractual equilibrium has been altered.

3.1.1.2. THE TARIFF MET THE THRESHOLD REQUIREMENT UNDER THE HARDSHIP CLAUSE

103. Contracting parties may deviate from general requirements of hardship and establish a lower threshold [*Fontaine/de Ly, p.440*]. In the instant case, Clause 12 of the SALES AGREEMENT provides that hardship would occur if performance becomes "*more onerous*". This threshold is far lower and more diluted than that required under general contract principles [*Maskow, p. 662; Bund, p. 394; Fontaine/de Ly, pp. 497-98; Brunner, p. 214*].
104. RESPONDENT itself accepted that the *"*high additional tariffs*"* [*Res. Ex. R4, p. 36, THE PROBLEM*] posed a problem for CLAIMANT. CLAIMANT delivered the final shipment only on the basis of RESPONDENT's representations, which included the promise to find a solution and establish a long-term relationship [*Cl. Ex. C8, p. 17, THE PROBLEM*]. Considering all the factors already established [*supra ¶¶98, 99*], it is clear that even if the tribunal were to find that there has not been a fundamental change in the contractual equilibrium, the lower threshold required under the hardship clause has been satisfied.
105. Therefore, the threshold requirement for hardship is met.

3.1.2. The imposition of tariffs was not reasonably foreseeable

106. The standard for determining whether an event is foreseeable or not is whether a reasonable person in the same situation would have taken the event into account [*Dimatteo, p. 301; Flambouras, p. 271; Steel Bars Case; Raw Materials v. Manfred Forberich*]. In the present case, the imposition of import tariffs was not foreseeable.
107. The tariffs imposed by the government of Equatoriana were in retaliation to restrictions imposed by the Mediterranean Government [*Cl. Ex. C6, p. 15, THE PROBLEM*]. The latter restrictions themselves surprised and went beyond the worst expectations of most analysts [*Cl. Ex. C6, p. 15, THE PROBLEM*]. They were further extraordinary in terms of the breadth of the goods and

countries covered, and the amount and speed of imposition [*Proc. Or. No. 2, ¶23, p. 58, THE PROBLEM*].

108. The Equatorianian tariffs and their size came as a still bigger surprise to even informed circles, as the country had always been a strong supporter of free trade [*Cl. Ex. C6, p. 15, THE PROBLEM*]. No reasonable person in the same situation as CLAIMANT, would have been able to foresee such restrictions at the time of conclusion of the contract.
109. Therefore, the imposition of import tariffs was not reasonably foreseeable.

3.1.3. The tariffs and their consequences were unavoidable

110. A change in circumstances must be unavoidable to qualify as hardship [*Dimatteo, p. 277; Dawwas, p. 10*]. Tariffs or trade restrictions are in the nature of state interventions which are outside the sphere of control of commercial companies [*Kröll, pp. 1067, 1068; CISG-Online No. 774*]. There was nothing that CLAIMANT could have done to avoid the 30% tariffs as they were unforeseeable and being a result of government actions, beyond its control. Further, CLAIMANT could not have been exempted from or obtained a reduction in the tariffs [*Proc. Or. No. 2, ¶27, p. 58, THE PROBLEM*].
111. Hence, the tariffs and the resultant additional 30% cost were unavoidable.
112. Since all conditions for hardship are satisfied, the import tariffs qualify as hardship under Clause 12 of the contract.

3.2. THE HARDSHIP CLAUSE IS APPLICABLE TO THE TARIFF IMPOSED BY THE EQUATORIANIAN GOVERNMENT

113. Art. 8 CISG regulates the interpretation of contracts [*Schlechtriem/Schwenzer 4th ed., p. 145; Secretariat Commentary Art. 7 ¶2; Schmidt/Kessel in in Schlechtriem/Schwenzer 2nd ed., p. 146; Ferrari Draft, p.175; OLG Dresden 27 Dec 1999; CISG-Online No. 1740*]. RESPONDENT has alleged that the hardship clause is not applicable to the present impediment [*Resp. to Not. of Arb., ¶19 p. 32, THE PROBLEM*]. CLAIMANT submits that the hardship clause is applicable to the present impediment because that was the parties' real intent under Art. 8(1) CISG **(3.2.1.)**. Alternatively, the hardship clause is applicable according to an objective understanding of the clause by a reasonable party under Art. 8(2) **(3.2.2.)**. Further, if the tribunal finds Clause 12 to be ambiguous, the hardship clause should be applicable to the tariff applying the *contra proferentem* rule **(3.2.3.)**.

3.2.1. CLAIMANT's intention to include the present impediment can be derived under Art. 8(1) CISG

114. Applying Art. 8(1) CISG, the hardship clause is to be interpreted according to CLAIMANT's intent where RESPONDENT knew or could not have been unaware of it. In determining parties' intent, negotiations between them have to be given due consideration [*Art. 8(3) CISG*].

115. CLAIMANT intended to include import tariffs under the hardship clause. Even though CLAIMANT had agreed to a delivery DDP, it was clear to both parties that the reason behind the inclusion was not to burden CLAIMANT with all risks associated with such delivery [*Cl. Ex. C8, p. 17, THE PROBLEM*]. Instead, it was to take advantage of CLAIMANT's much greater experience in shipment of frozen semen including the necessary export and import documentation [*Cl. Ex. C3, p. 11, THE PROBLEM*].

116. CLAIMANT had made it clear that it did not wish to take any risks associated with such delivery terms, "*in particular not those associated with changes in customs regulation or import restrictions*" [*Cl. Ex. C4, p. 12, THE PROBLEM*]. The final hardship clause that was put in the contract was in reference to the risks mentioned in Ms. Napravnik's email of 31 March 2017, which included import restrictions [*Proc. Or. No. 2, ∫ 12, p. 56, THE PROBLEM*].

117. Therefore, it is clear that RESPONDENT knew of, and in any case, could not have been unaware of CLAIMANT's intent for the hardship clause to include import tariffs.

3.2.2. Hardship clause is applicable to import tariff according to an objective understanding of the clause by a reasonable party under Art. 8(2) CISG

118. If Art. 8(1) CISG is not applicable, then the hardship clause will be interpreted according to CLAIMANT's intent as understood by a reasonable person of the same kind as RESPONDENT in the same circumstances [*Art. 8(2) CISG*]. In determining such reasonable person's understanding, all relevant circumstances including negotiations between the parties have to be given due consideration [*Art. 8(3) CISG*].

119. RESPONDENT had the intention to include import tariff under the hardship clause and so would a reasonable person in the shoes of RESPONDENT because import restrictions were mentioned in relation to health and safety requirements **(3.2.2.1.)**; and in any case, "comparable unforeseen events" must be given a wide interpretation **(3.2.2.2.)**.

3.2.2.1. IMPORT RESTRICTIONS WERE MENTIONED IN RELATION TO HEALTH AND SAFETY REQUIREMENTS

120. Even though the hardship clause does not expressly refer to import and trade restrictions, import tariffs are covered under "*comparable unforeseen events making the contract more onerous.*" The

parties' intention to include the import tariffs under "comparable unforeseen events…" is evidenced from Ms. Napravnik's 31 March 2017 email [*Cl. Ex. C4, p. 12, THE PROBLEM*].

121. The express mention of risks associated with customs regulations and import restrictions are followed by the example of risks related to health and safety requirements [*Cl. Ex. C4, p. 12, THE PROBLEM*]. This indicates that it was the parties' intention to include import tariffs under unforeseen events comparable to health and safety requirements.

3.2.2.2. "COMPARABLE UNFORESEEN EVENTS" MUST BE GIVEN A WIDE INTERPRETATION

122. Art. 8(2) CISG requires that the usual meaning of words used by the parties must be given importance [*Magnus in Staudinger, Art. 8 ¶ 24*; *OLG Dresden 27 Dec 1999; HG Zürich 24 Oct 2003*]. The words of a 'catch-all provision' that follows a list of specific events is construed to have a larger meaning not limited to events *ejusdem generis* with the enumerated list [*Brunner, p. 387*]. In the instant case, the words "comparable unforeseen events" constitute a 'catch-all provision'. Thus, they have to be given a wider interpretation than only events *ejusdem generis* to health and safety requirements. Additional health and safety requirements are customs regulations. Import tariff is a comparable event as it is also a form of customs regulations. This would lead to an inclusion of import and trade restrictions under the clause.

3.2.3. The hardship clause should be interpreted in *contra proferentem*

123. In case the tribunal holds that the hardship clause is ambiguous, it should still include import tariffs as per the *contra proferentem* rule. The *contra proferentem* rule says that in case of any ambiguities, they will be resolved and interpreted against the party which drafted it [*Honnold, ¶107.1; Schmidt-Kessel in Schlechtriem/Schwenzer 2nd ed. Art. 14 ¶49; Staudinger/Magnus in Schlechtriem/Schwenzer 2nd ed., ¶18; Huber/Mullis, p. 236; Cysteine Case; Automobile case*]. The rule emanating from Art. 8(2) CISG puts the burden on him who drafts a contract to communicate clearly to a reasonable person in the same position as the other party [*CISG-AC Op. No. 13*; *Honnold, ¶107.1; Schmidt-Kessel in Schlechtriem/Schwenzer 2nd ed. Art. 14 ¶49; Printed Press Case*].

124. Even if the hardship clause is held to be unclear on its applicability on import tariffs, it must be interpreted in *contra proferentem*. It is undisputed that the hardship clause was drafted by RESPONDENT [*Proc. Or. No. 2, ¶12, p. 56, THE PROBLEM*]. Thus, since the clause was provided by RESPONDENT, it should be interpreted against it.

125. Thus, Clause 12 applies to the import tariffs imposed by the Equatorianian government. As this clause also allows for adaptation [*supra* ¶¶*29-33*], CLAIMANT is entitled to increased remuneration.

CONCLUSION OF ISSUE 3

Clause 12 of the SALES AGREEMENT is applicable to import tariffs. It further allows for adaptation of the price in case hardship occurs. The sudden import tariff caused hardship to CLAIMANT. RESPONDENT refused to renegotiate the price. This tribunal should adapt the contractual price and order RESPONDENT to pay US$ 1,250,000 or any other amount to CLAIMANT.

ISSUE III (2)

4. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CISG

126. CLAIMANT has suffered hardship due to the imposition of the import tariff [*supra* ¶¶*95-102, 106-112*]. Even if adaptation is not allowed under Clause 12 of the SALES AGREEMENT, CLAIMANT is entitled to an increased remuneration of US$ 1,250,000 due to price adaptation under CISG as application of Art. 79 CISG has not been excluded **(4.1.)**; and the import tariff constitutes an impediment under Art. 79(1) CISG **(4.2.)**. Alternatively, hardship and adaptation can be read into Art. 79 CISG by gap filling **(4.3.)**. In any case, CLAIMANT is entitled to US$ 1,250,000 due to price adaptation under the domestic law of Mediterraneo **(4.4.)**.

4.1. THE APPLICATION OF ART. 79 CISG IS NOT EXCLUDED

127. Art. 6 CISG, in the broad interest of party autonomy, allows parties to exclude or derogate from CISG or any of its provisions [*Schlechtriem Uniform Sales Law, p. 34; Gül, p. 80; CISG-Online 1317; CISG-Online 641*]. RESPONDENT alleges that by including the hardship clause into the contract, the parties have excluded an application of Art. 79 CISG as it constitutes a derogation under Art. 6 CISG [*Resp. to Not. of Arb., ¶20 p. 30, THE PROBLEM*].

128. Such an exclusion can be express or implied, but the intent to derogate must be clear [*Schlechtriem in Schlechtriem/Schwenzer 2nd ed., pp. 88-89 ¶12; Award of 23 January 2012 (ICAC); CISG-Online 2551; CISG-Online 1889; CISG-Online 1420; OLG Dresden 27 Dec 1999*]. In the instant case, there was no express exclusion of Art. 79 CISG as there is no mention of the same either in the contract or

the communication between the parties. For there to be implicit derogation from the provisions of CISG under Art. 6 CISG, there must be agreed intent between the parties to derogate [*CISG-AC Op. No. 16, ¶2.2; CISG-Online 1377; CISG-Online 965; CISG-Online 730*].

129. A restrictive approach is to be taken to decide whether there is *ex ante* exclusion [*Enderlin/Maskow, pp. 48-49 ¶¶ 1.2, 1.3; Schlechtriem in Schlechtriem/Schwenzer 2nd ed., pp. 88-89 ¶12; Bridge in Flechtner, p. 78*]. In the instant case, Clause 12 was introduced to regulate some risks directly into the contract [*Resp. to Not. of Arb., ¶4 p. 32, THE PROBLEM*]. There are no facts that lead to an inference of intent to exclude the application of Art. 79 CISG. A mere inclusion of a *force majeure* or hardship clause does not lead to exclusion of Art. 79 CISG in the sense of derogation under Art. 6 CISG [*UNCITRAL Digest 2016, p. 379; Iron molybdenum case; Gasoline and gas oil case*].

130. Therefore, application of Art. 79 CISG has not been excluded by the parties.

4.2. THE IMPORT TARIFF CONSTITUTES AN IMPEDIMENT UNDER ART. 79(1) CISG

131. RESPONDENT alleges that CISG does not allow for adaptation in cases of hardship, therefore the import tariffs cannot allow for adaptation of price [*Resp. to Not. of Arb., ¶21 p. 32, THE PROBLEM*]. CLAIMANT submits that the import tariff is covered under Art. 79(1) CISG as "impediment" includes hardship **(4.2.1.)**; and the import tariff constitutes hardship **(4.2.2.)**.

4.2.1. Impediment under Art. 79(1) includes hardship

132. The word impediment in Art. 79(1) CISG does not expressly equate to events rendering performance absolutely impossible [*CISG-AC Op. No. 7, ¶3.1, ¶¶27-31; Schlechtriem/Schwenzer 3rd ed., p. 1077; Schlechtriem Uniform Sales Law, pp. 102-103; Bernardini, p. 207; Draetta, p. 349; Perillo, p. 9; Bund, pp. 386-389*]. It extends to situations of economic unaffordability or unreasonableness [*ibid; Schlechtriem/Schwenzer 4th ed., p.1142; Jones/Schlechtriem, ¶217 p. 136; Magnus in Staudinger, Art. 79 CISG ¶24; Enderlein/Maskow, Art. 79 CISG ¶6.3; Neumayer/Ming, Art. 79 CISG ¶14; Rimke, pp. 223, 226; Pichonnaz, ¶¶1769, 1836; Bernstein/Lookofsky, ¶¶6-19 p. 152; Lüderitz/Dettmeier in Soergel, Art. 79 CISG ¶13; Brunner, Art. 79 CISG ¶23*].

133. RESPONDENT may contend that hardship has been excluded from CISG. However, CLAIMANT submits that legislative and drafting history evidenced from the *travaux préparatiores* are not conclusive enough to warrant a conclusion that the hardship problem was meant to be excluded or included within its scope [*CISG-AC Op. No. 7, ¶¶27-30; Kröll ¶78; Bianca/Bonell, p. 90; Ziegel*].

Furthermore, a textual interpretation of Art. 79 CISG also does not lead to the conclusion that the drafters wanted to exclude hardship from the provision [*Petsche, p. 159; Masný, p. 115*].

134. Therefore, hardship constitutes an impediment under Art. 79(1) CISG.

4.2.2. The import tariff constitutes hardship

135. If performance becomes excessively onerous, even if not absolutely impossible due to an unforeseeable and unavoidable event, it amounts to an impediment under Art. 79(1) CISG [*supra* ¶*94*].
136. In the instant case the delivery became excessively onerous for CLAIMANT [*supra* ¶¶*98-102*] due to an unforeseeable [*supra* ¶¶*106-109*] and unavoidable event [*supra* ¶¶*110-112*].
137. Therefore, the import tariff constitutes an impediment under Art. 79(1).

4.3. ALTERNATIVELY, HARDSHIP CAN BE READ INTO ART. 79 CISG BY GAP FILLING UNDER ART. 7 CISG

138. Even if hardship does not constitute an impediment under Art. 79(1) CISG or any other provision, it can still be read into CISG. A *praeter legem* or internal gap in CISG means that the matter is governed by, but not expressly settled by CISG. Hardship has not been expressly excluded from CISG [*supra* ¶*133*]. Assuming it is not expressly settled by it, it constitutes an internal gap because it is still governed by CISG [*Masný, p. 117; Lindström*; *Da Silveira, p. 334*].
139. Therefore, there would exist an internal gap in CISG relating to hardship. This gap can be filled in conformity with general principles of CISG derived from its provisions **(4.3.1.)**; in any case, from UNIDROIT Principles of International Commercial Contracts [hereinafter "PICC"] **(4.3.2.)**; or by using analogy **(4.3.3.)**.

4.3.1. The gap can be filled with reference to general principles of CISG derived from its provisions

140. A matter governed by but not expressly settled by CISG has to be settled in conformity with general principles of CISG [*Art. 7(2), CISG*]. CLAIMANT submits that adaptation in cases of hardship is allowed by CISG by gap filling in reference to the principle of good faith alone **(4.3.1.1)**, and in any case, in reference to good faith and other general principles of CISG **(4.3.2.2)**.

4.3.1.1. GAP FILLING IN REFERENCE TO THE GENERAL PRINCIPLE OF GOOD FAITH

141. Good faith is a general principle under CISG which imposes upon the parties a duty to re-negotiate in case of an unforeseeable and fundamental change in circumstances [*supra* ¶¶29-33]. Upon failure to renegotiate, the tribunal may adapt the contract to restore the contractual equilibrium [*Brunner, p. 400*]. It is applicable only when it is not excluded by the parties and change in circumstances are fundamental and unforeseeable [*Brunner, p. 516; Fontaine/De Ly, p. 517; ICC Award of 5 May 1997*].
142. In the instant case, RESPONDENT had a duty to renegotiate under the general principle of good faith. It failed to fulfil this duty by wrongfully termination the renegotiation [*Cl. Ex. C8, p. 18, THE PROBLEM*]. There was no exclusion of the principle of good faith by the parties. The change in contractual circumstances was also fundamental and unforeseeable [*supra* ¶¶*98-102, 106-109*].
143. Therefore, under the general principle of good faith, hardship and adaptation can be allowed under CISG.

4.3.1.2. GAP FILLING IN REFERENCE TO GOOD FAITH AND OTHER GENERAL PRINCIPLES

144. There are five relevant principles under CISG which collectively allow for adaptation in case of hardship. The principle of good faith governs the party behavior throughout their contractual dealings [*supra* ¶¶29-33]. The principle of reasonableness is a general criterion for evaluating party conduct [*Ferrari (Uniform Sales Law), p. 255; Ferrari (General Principles), p. 174; Herbert in Schlechtriem Uniform Sales Law, p. 67; Bianca/Bonell, p. 81*]. The duty to cooperate requires parties to collaborate in carrying out steps necessary for performance of contract and this duty, with a view to due performance, is the fourth relevant principle, the principle of *favor contractus* [*Bianca/Bonell, p. 81*]. Finally, the duty to mitigate loss is another general principle requiring parties to take all necessary steps to mitigate each other's losses [*Audit, pp. 51-52; CISG-AC Op. No. 7, ¶40; Brunner, p. 394, 480; Schwenzer, p. 721; Stoll in Schlechtriem Uniform Sales Law, p. 618; Stoll/Gruber in Schlechtriem/Schwenzer 2nd ed., p. 825; Veneziano, pp. 147-148*].
145. The right to seek renegotiation and upon its failure seek adaptation can be derived from these five principles [*Da Silveira, pp. 342-343*]. Therefore, the parties must in good faith, enter into renegotiation conducted according to objectively reasonable standards, with a view to restoring the contractual balance and enabling the performance of the contract.
146. In the present case, adaptation should be allowed to restore the contractual balance according to reasonable standards as RESPONDENT failed to fulfil its duty to renegotiate in good faith.
147. Therefore, adaptation is allowed in case of hardship by gap filling in reference to a combination of five general principles of CISG.

4.3.2. The gap can be filled with reference to general principles of CISG derived from PICC

148. CLAIMANT submits that adaptation in cases of hardship is allowed under CISG by gap filling in reference to PICC **(4.3.2.1.)**; and in any case, in reference to general principles of CISG supplemented by PICC **(4.3.2.2.)**.

4.3.2.1. ADAPTATION IN CASES OF HARDSHIP IS ALLOWED BY CISG BY GAP FILLING IN REFERENCE TO PICC

149. Adaptation is allowed in cases of hardship under CISG by reference to PICC as PICC form part of the general principles underlying the convention under Art. 7(2) CISG **(4.3.2.1.1.)**, and hardship and adaptation can be read into CISG by reference to Arts. 6.2.2 and Art. 6.2.3 PICC **(4.3.2.1.2.)**.

4.3.2.1.1. PICC form part of the general principles underlying the convention under Art. 7(2) CISG

150. PICC can be used for gap filling under Art. 7(2) CISG [*Perillo, p. 9; Brunner, p. 218; Garro, pp. 1152, 1184; Schwenzer/Hachem in Schlechtriem/Schwenzer 2nd ed., p. 139; Bonell; Bund, p. 392; Basedow, p. 136; Veneziano; Gotanda, p. 107; Scafom v. Lorraine Tubes; CISG-Online 1863*]. PICC is a model law of commercial contracts that incorporates general principles of international commercial law [*ibid*]. PICC's preamble allows it to be used to interpret or supplement international uniform law instruments [*Preamble, PICC*]. By resolving gaps in CISG by referencing PICC instead of domestic law, the need to promote uniformity and autonomous interpretation is further fulfilled [*Art. 7(1) CISG; Bonell, pp.34-36; Bund, p. 392*].

151. RESPONDENT may allege that PICC are not general principles on which CISG is based. However, principles may be extracted from the substance, structure and spirit of the convention and must respond to the evolving needs of international trade [*Veneziano, pp. 142-143; Da Silveira, p. 339*]. Therefore, reliance on PICC must be allowed.

152. Furthermore, even if CISG were not based on these principles, PICC must be considered such 'additional general principles' as they vastly correspond to the provisions of CISG as well as to general principles derived from it [*Magnus General Principles, ¶6.b*]. Hence, an expanded definition of the general principles on which CISG is based must include PICC [*Felemegas, ch. 2, 4*]. Therefore, PICC is part of the general principles underlying the convention under Art. 7(2) CISG.

4.3.2.1.2. Hardship and adaptation can be read into CISG by reference to Art. 6.2.2 and Art. 6.2.3 PICC

153. Assuming hardship and adaptation are matters not settled by CISG, they constitute a gap under Art. 7(2) CISG [*supra* ¶*138*]. The gap can be filled with reference to PICC [*supta* ¶¶*149-159*].
154. Art. 6.2.2 PICC deals with hardship and Art. 6.2.3 PICC deals with remedies in case of hardship [*Art. 6.2.2 PICC; Art. 6.2.3 PICC*; *Bonell, p. 26*]. Art. 6.2.2 PICC provides that there is hardship when due to the occurrence of events, the contract's equilibrium is fundamentally altered [*Art. 6.2.2 PICC*]. The events must occur after the conclusion of the contract, they must be unforeseeable, unavoidable and their risk not undertaken by the disadvantaged party [*Art. 6.2.2 PICC*]. In the instant case all the conditions are fulfilled [*supra* ¶¶*95-102, 106-112*].
155. Art. 6.2.3 provides that in case of hardship, the tribunal can adapt the contract to restore the equilibrium [*Art. 6.2.3 PICC*]. In the present dispute, there is hardship and adaptation must be allowed to restore the contract's equilibrium.
156. Therefore, hardship and adaptation can be read into CISG by reference to Art. 6.2.2 and Art. 6.2.3 PICC allowing for adaptation of price entitling CLAIMANT to US$ 1,250,000.

4.3.2.2. IN ANY CASE ADAPTATION IN CASES OF HARDSHIP IS ALLOWED UNDER CISG BY GAP FILLING IN REFERENCE TO GENERAL PRINCIPLES SUPPLEMENTED BY PICC

157. Even if PICC cannot alone be used to fill gaps in CISG, they can be used to supplement other general principles of CISG [*Veneziano, p. 143*]. A general principle that is first inferred from the Convention, may then be supported by a specific provision of PICC [*Huber/Mullis, p. 36.*]. If the relevant provisions of PICC are the expression of a general principle underlying CISG, then the general principles may be supplemented by PICC [*Bonell, p. 36; Sica, ¶III; Schlechtriem/Butler, p. 54; Felemegas, ch. 4, 5; Veneziano, p. 142*].
158. The general principles underlying CISG lead to a duty of the parties to, in good faith, enter into renegotiation conducted according to objectively reasonable standards, with a view to restoring the contractual balance and enabling the performance of the contract [*supra* ¶¶*144-145*]. The relevant provision, Art. 6.2.3 PICC is a restatement of these principles as it provides for duty to renegotiate and power to adapt in case of hardship. Thus, it can be used to supplement the already existing general principles of CISG and allow for adaptation of contract in case of hardship.
159. Therefore, adaptation in cases of hardship is allowed under CISG by gap filling in reference to general principles supplemented by PICC.

4.3.3. The gap can be filled by analogy

160. The *ratio legis* of certain provisions applies to cases even if they are not covered by the phrasing of the provisions [*Brandner, 38*]. This is the principle behind using analogies for gap-filling [*ibid*]. CLAIMANT submits that hardship and adaptation are included by CISG by gap filling using analogy with Art. 79 CISG **(4.3.1.1.)**, and Art. 50 CISG **(4.3.1.2.)**.

4.3.3.1. GAP FILLING USING ANALOGY WITH ART. 79 CISG

161. The *ratio legis* of Art. 79 CISG is to provide a remedy in cases of fundamental changes of circumstances affecting performance of contractual obligations [*Kröll, ¶¶80-81*]. The provision is based on the doctrine of *clausula rebus sic stantibus*, which is similar to the principle of hardship [*Mazzacano, pp. 1-3*]. Hence, the conditions for constituting hardship can be derived from Art. 79(1) CISG. The threshold required would be based on the limit beyond which a party cannot be reasonably be expected to perform its obligations [*supra ¶98*]. Further, Art. 79(5) can be used to justify the remedy of adaptation of contract, as it is a broad provision that allows for all remedies except damages. It can be relied upon to allow an arbitral tribunal or a court to adapt the terms of the contract so that the parties' can reasonably overcome the impediment and perform their obligations [*CISG-AC Op. No. 7 ¶40; Ishida, p.372*]. Therefore, Art. 79 CISG itself can be used as an analogy for gap filling.

4.3.3.2. GAP FILLING USING ART. 50 CISG

162. Art. 50 CISG provides for reduction of price in case of seller delivering non-conforming goods. Its *ratio legis* is that the buyer can retain the goods and demand a price reduction to restore the contractual equilibrium [*Gartner, p. 59; Huber, ¶472*]. Similarly, in cases of hardship an arbitral tribunal or a court can exercise its power to adapt the contract and restore the equilibrium [*Schlechtriem Workshop, p. 237*]. Therefore, Art. 50 CISG can be used to justify price adaptation.

4.4. IN ANY CASE, CLAIMANT IS ENTITLED TO US$ 1,250,000 DUE TO PRICE ADAPTATION UNDER THE DOMESTIC LAW OF MEDITERRANEO

163. CLAIMANT is entitled to US$ 1,250,000 due to price adaptation under the domestic law of Mediterraneo if there are no general principles underlying CISG to fill the gap in Art. 79 CISG and even if there is an external gap in relation to Art. 79 CISG.

164. Art. 7(2) CISG provides that in the absence of general principles on which CISG is based, internal gaps are to be filled in accordance with law applicable by virtue of rules of private international law. The law governing the contract would be the law chosen by the parties [*Briggs, ¶11.06; North/Fawcett, 451; Clarkson/Hill, 203*]. The internal gap then, has to be filled with the

law of Mediterraneo as the parties chose it to govern their contract [*Cl. Ex. C5, Clause 14, p. 14, THE PROBLEM*]. The general contract law of Mediterraneo is a verbatim adoption of PICC [*Proc. Or. No. 1, p. 53, THE PROBLEM*].

165. Even if this tribunal finds that there is an external gap in CISG, it means that the matter is not governed by CISG and must be governed by the law applicable by virtue of rules of private international law [*Yesim et al, p. 115*].

166. The import tariff amounts to hardship and adaptation is allowed under PICC [*supra* ¶¶*153-156*].

167. Therefore, CLAIMANT is entitled to US$ 1,250,000, or any other amount, due to price adaptation in the absence of general principles underlying CISG and in case there is an external gap in CISG.

CONCLUSION OF ISSUE III (2)

Even if Clause 12 does not allow for adaptation in case of import tariffs, the contractual price must be adapted under CISG. Application of Art. 79 CISG has not been excluded and is applicable to both hardship and adaptation. In case there is an internal gap in CISG, hardship and adaptation can be read into CISG by gap filling using general principles of CISG with and without PICC. In case there are no general principles to fill the internal gap or there is an external gap, adaptation must be allowed by applying the law of Mediterraneo. Therefore, this tribunal should adapt the contractual price and order RESPONDENT to pay US$ 1,250,000 to CLAIMANT.

PRAYER FOR RELIEF

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

1. The tribunal has the power to adapt the contract under the arbitration agreement;
2. CLAIMANT is entitled to submit evidence from the other arbitration proceedings;
3. CLAIMANT is entitled to the payment of US$ 1,250,000, or any other amount, resulting from an adaptation of the price under Clause 12 of the contract;
4. In any case, CLAIMANT is entitled to the payment of US$ 1,250,000, or any other amount, resulting from an adaptation of the price under CISG.

CERTIFICATE AND CHOICE OF FORUM

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

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

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

Stuti Rai | Anahad Narain | Dhruv Mehrotra