SIXTEENTH VIS EAST MOOT

RENMIN UNIVERSITY OF CHINA

MEMORANDUM FOR RESPONDENT

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

ERIC M. DAVID • GILBERT NICOLAS XAVIER A. • SUN RUILIN • ZHENG YANJI

YE HEMING • LIU XINYANG • GUO HAO • DONG ZHIHAO

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STATEMENT OF FACTS

CLAIMANT	**Phar Lap Alle**, seated in Capital City, Mediterraneo, operates the oldest and most renown stud farm in the State, covering all areas of the equestrian sports.
RESPONDENT	**Black Beauty Equestrian**, seated in Oceanside, Equatoriana, is famous for its broodmare lines.
24 Mar. 2017	CLAIMANT makes an offer to RESPONDENT for the sale of frozen racehorse semen for the price of 99.500 USD/dose. [*Cl. Ex. 2*]
28 Mar. 2017	RESPONDENT objects to the choice of law and the forum selection clause and insists on a DDP delivery. [*Cl. Ex. 3*]
31 Mar. 2017	CLAIMANT replies that they can accept a DDP delivery on the condition of a price increase. Furthermore, CLAIMANT proposes a transfer of certain and specific risks to RESPONDENT through the inclusion of a hardship clause. [*Cl. Ex. 4*]
10 Apr. 2017	RESPONDENT sends to CLAIMANT the first draft of the dispute resolution clause, based on the HKIAC Model Clause, RESPONDENT requests that Equatoriana be the seat of arbitration, and that the law of Equatoriana apply to the arbitration agreement. [*Re. Ex. 1*]
11 Apr. 2017	CLAIMANT largely accepts RESPONDENT's proposal but suggests an amendment "as to the place of arbitration" [*Res. Ex. 1*] CLAIMANT suggests also the adoption of the ICC Hardship Clause in the contract.
12 Apr. 2017	Mr. Antley makes clear that RESPONDENT considers the scope of the ICC Hardship Clause too broad during the meeting with Ms. Napravnik. [*Re. Ex. 3*] On the same day, both prime negotiators of the Parties are injured in a car accident and are replaced for the finalization of the contract. [*Cl. Ex.8; Re. Ex. 3*]
5 May 2017	President of Mediterraneo appointed Ms.Cecil Frankel, one of the most

	ardent critics of free trade, as his "superminister" for agriculture, trade and economics.
6 May 2017	The Parties sign the FSSA. RESPONDENT purchases 100 doses of frozen semen from Nijinsky III in three shipments at the price of USD 100,000 per dose. [*Cl. Ex. 5*] The FSSA confirms DDP as delivery method. [*Cl. Ex. 5*] The FSSA is governed by the law of Mediterraneo under Clause 14. [*Cl. Ex. 5*] Clause 15 stipulates that the seat of arbitration is Danubia, but is silent on the law governing the arbitration agreement. [*Cl. Ex. 5*]
20 May; 3 Oct. 2017	CLAIMANT sends the first two shipments. [*N. A. para. 9*]
19 Dec. 2017	The Government of Equatoriana imposes a tariff of 30 percent on agricultural products from Mediterraneo as a retaliation for the tariff of 25 percent imposed by the new President of Mediterraneo. [*Cl. Ex. 6*]
20 Jan. 2018	One month after the imposition of the tariff, CLAIMANT emails RESPONDENT the increase of tariffs and threatens to withhold the performance of the third shipment. [*Cl. Ex. 7; Re. Ex. 4*]
21 Jan. 2018	The Parties negotiate over the phone. RESPONDENT's employee Mr. Shoemaker emphasizes that he has no authority to agree on additional payments and an agreement may be reached only if FSSA provides for an increased price for such a tariff. [*Re. Ex. 4*]
23 Jan. 2018	CLAIMANT delivers the remaining 50 doses of semen. [*N.A. para. 13 ; Cl. Ex. 8*]
12 Feb. 2018	The negotiation process ends without reaching any agreement. [*Cl. Ex. 8*]
31 July 2018	CLAIMANT initiates the arbitral proceedings before HKIAC.
2 Oct. 2018	CLAIMANT sends an email to the Tribunal stating that it has been promised a copy of the award and relevant submission of another arbitration proceedings between RESPONDENT and a third party and it seeks to immediately submit them. The CLAIMANT bought these documents from a company of doubtful reputation which refused to

disclose the dource of the documents. It may well obtain the the documents by an illegal hacking or from the former employees who have a confidentiality agreement with the RESPONDENT. [L*etter by Langweiler, 2 Oct. 2018; PO2, pp.60-61*]

3 Oct. 2018 RESPONDENT emails the Tribunal stating that the evidence was obtained illegally either by hacking RESPONDENT's computer, or from RESPONDENT's former employees in breach of a confidentiality contract, and thus, should not be admitted. [*Letter by Fasttrack, 3 Oct. 2018*]

SUMMARY OF ARGUMENTS

ISSUE I: The Tribunal does not have the jurisdiction to adapt the contract under the law of Danubia: The arbitration agreement contained in Article 15 was constructed as an autonomous clause by the Parties and is a legally separate agreement from the FSSA under the separability doctrine. The law of Danubia applies to this separate arbitration agreement as it reflects the implied intent of the Parties. Moreover, in case the intent of the Parties cannot be ascertained, the Law of Danubia applies to the arbitration agreement because the seat of the arbitration, *i.e*. Danubia, has the closest and most real connection with the arbitration clause. Under the Law of Danubia, Article 15 must be interpreted narrowly and irrespective of any external evidence. Thus, the Arbitral Tribunal does not have jurisdiction to adapt the contract.

ISSUE II: CLAIMANT is not entitled to submit the evidence due to following reasons: First and foremost, the documents the CLAIMANT is to submit are not sufficiently relevant to the case and should be excluded. Secondly, the document the CLAIMANT seeks to submit is protected under the obligation of confidentiality. And our case does not fall within any exception to such confidentiality. Furthermore, conducted by CLAIMANT, the method of taking evidence is illegal. CLAIMANT failed to conduct itself in good faith and, further, the evidence cannot be justified by its relevance and materiality. Even if the Tribunal deems that the taking of evidence is legal, the Tribunal should still exclude the evidence because the evidence is not in a public domain.

ISSUE III: CLAIMANT is not entitled o the payment of USD 1,250,000 or any other amount under Clause 12 of FSSA or the CISG. Under Clause 12 of FSSA, the Parties intended for a narrow definition of "hardship" and the imposition of the tariff does not fall within that realm. But even if this situation is viewed as a "hardship" under Clause 12, the negative nature of the contract language, along with the choice to base the drafting of Clause 12 upon ICC Hardship Clause, which does not provide the remedy of court-ordered adaptation, demonstrates their intent to exclude this remedy in the contract. Moreover, CLAIMANT is not entitled to a payment from adaptation of the contract under CISG. First, CISG offers no remedy on present case and could not trigger the application of UNIDROIT Principles. However, even if the Tribunal decides that UNIDROIT Principles may apply, the conditions under its Article 6.2.2 and 6.2.3 have not been fulfilled.

ISSUE I: THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, SINCE THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

1 RESPONDENT respectfully submits that the Tribunal does not have jurisdiction to adapt the contract under the arbitration agreement contained in Article 15 of the FSSA. The arbitration agreement and its interpretation are governed by the Danubian Contract Law [I] which includes, in relevant part, the "four corner rule". Under this rule, Article 15 must be interpreted narrowly and irrespective of any external evidence, and thus, the Arbitral Tribunal is not authorized to adapt the contract [*PO1, § II*] [II].

I. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

2 The arbitration agreement is considered to be a legally separate agreement from the FSSA under the separability doctrine [**A**]. In the absence of an express choice-of-law disposition contained in Article 15, the arbitration agreement is governed by the Law of the seat of arbitration, *i.e*. Danubia, according to the implied intent of the Parties [**B**]. Should the Tribunal determine that the implied intend of the Parties is missing, the Law of Danubia applies to the arbitration agreement because they share the closest and most real connection [**C**].

A. The Separability Doctrine Applies, And Thus, The Arbitration Agreement Must Be Considered Independent From The Main Contract Governed By The Law Of Mediterraneo.

3 Under the separability doctrine, the agreement to arbitrate contained in Article 15 must be regarded as a separate agreement from the rest of the contract between the Parties. Therefore, the choice-of-law clause contained in Article 14 of the FSSA - in which the law of Mediterraneo governs the Sales Agreement - does not apply to the arbitration agreement. The application of the separability doctrine is upheld by both the intent of the Parties [**1**], and the HKIAC 2018 adopted in the arbitration agreement [**2**].

1. The arbitration agreement derives its autonomy from the intention of the Parties.

4 The doctrine of separability is based on the autonomy of the Parties [**a**]. As such, the arbitration agreement cannot be held as forming part of the FSSA. Rather, it was constructed as an autonomous clause by the Parties, so that the separability doctrine applies **[b].**

a. An arbitration agreement is considered separate from the main contract under the separability doctrine if the parties, expressly or impliedly, intended the agreement to be regarded as independent.

5 It is well established that under the separability doctrine it is "theoretically possible, *and common in practice* [*emphasis added*], for the parties' arbitration agreement to be governed by a law different from the law governing their underlying contract [*G. Born, p. 819*]. The separability doctrine does not imply that the arbitration clause is automatically separated from the main contract, but rather "constitutes a guideline for the presumed intention of the parties" [*A. Sklenyte, p. 37*].

6 In other terms, the application of the doctrine depends on the implied or express intent of the Parties. It is perfectly possible for contracting parties to exclude the application of the separability presumption or, on the contrary, to uphold its application. CLAIMANT mistakenly argues that the term of the FSSA ["Agreement"] demonstrates the intent of the Parties for the law of Mediterraneo to govern the entire contract, irrespective of the separability doctrine. However, it is clear from the drafting history of Article 15 that the real intent of the Parties was for the arbitration agreement to be considered independent/autonomous/separate from the FSSA.

b. The drafting history of the arbitration agreement demonstrates the intent of the Parties to consider Article 15 apart from the FSSA.

7 On 10 April 2017, RESPONDENT contacted CLAIMANT for the sole purpose of negotiating the arbitration agreement [*Resp. Ex. 1*]. RESPONDENT submitted to CLAIMANT a first draft of the dispute resolution clause, which was considered "appropriate in light of the fact that the Sales Agreement was governed by the law of Mediterraneo" [*Resp. Ex. 1*]. This email evidences the clear dichotomy between the "Sale Agreement" and the "dispute resolution clause" and demonstrates the intent of the Parties to treat the arbitration agreement independently of the main contract. Moreover, RESPONDENT's proposal submitted the arbitration clause to the law of the proposed seat of arbitration, *i.e.* the law of Equatoriana, showing its intent for the arbitration agreement to be governed by a law different from the law of Mediterraneo [*Resp. Ex. 1*].

8 On 11 April 2017, CLAIMANT agreed on arbitration in a neutral country but suggested an amendment "as to the place of arbitration", *i.e.* Danubia, citing the time consuming procedure for selecting Equatoriana [*Resp. Ex.* 2]. CLAIMANT specified that "the offer" [the arbitration clause] was made "on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo". Again, the Parties' discrete treatment of "the offer" and the FSSA shows that the Parties considered the arbitration clause separated from the main contract.

9 Finally, the fact that the specific provision regarding the law applicable to the arbitration agreement was deleted in the last draft proposed by CLAIMANT [*Resp. Ex.* 2] cannot be interpreted as a renunciation of the application of the doctrine of separability. It is well established that the silence of RESPONDENT following the offer was due to the tragic accident involving Mr. Antley, RESPONDENT's representative at that time, on 12 April 2017. The note contained in Mr. Antley's negotiation file indicated that further negotiations would clarify the law applicable to the agreement, therefore considering it as separate from the FSSA.

2. The arbitration agreement contained in Article 15 is independent from the FSSA under Art. 19.2 of the HKIAC 2018.

10 Arbitration rules derive their authority from the intentions of the parties who refer to them in their arbitration agreement [*A. Sklenyte, p. 35*]. The Parties have agreed to resolved their disputes by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC 2018 [*Art. 15 FSSA*]. Consequently, as Parties have referred to the HKIAC 2018 which stipulate the application of the doctrine of separability to the arbitration agreement, the Parties are presumed to have intended that the arbitration agreement contained in Article 15 of the FSSA be treated separately from the main contract.

11 Article 19.2 of the HKIAC 2018 provides that:

> "The arbitral tribunal should have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part. For the purpose *of Article 19 [emphasis added]*, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement."

12 It is important to notice that the wording of Article 19.2 HKIAC 2018 differs from the wording of Article 16 of the Model Law., which also upholds the validity of the separability doctrine.

13 CLAIMANT argues that the "purpose" referred to in Article 16 is directly related to "the objections with respect to the existence or validity of the arbitration agreement" so that the separability doctrine canonly apply in restricted circumstances.

14 Under Article 19.2 of the HKIAC 2018, such narrow interpretation of the separability doctrine is not supported. Indeed, Article 19.2 provides for the application of the separability doctrine "for the purpose *of Article 19[emphasis added]*". Under this article, the tribunal may rule on its own jurisdiction, "including any objections with respect to the [...] *scope* [*emphasis added*] of the arbitration agreement". Therefore, there is no doubt that Article 15 must be treated as an agreement independent of the FSSA for the purpose of deciding if the scale of the arbitration agreement encompass a modification of the price.

B. The Arbitration Agreement Is Governed By The Law Of The Seat Of Arbitration, *I.E.* Danubian Contract Law, According To The Implied Intent Of The Parties.

15 According to the CISG and the principle of party autonomy which underpins the international arbitral process [*Leong H., Tan J.-H, p. 76, Collins, §16-020*], the real intent of the Parties at the time of the conclusion of the contract determines the law applicable to the arbitration clause. It will be demonstrated that the express choice of the seat of arbitration, *i.e.* Danubia, creates a strong presumption that the Parties intended for the Danubian Contract Law to govern the arbitration agreement [**1**]. Moreover, in the case that the Tribunal chooses to follow CLAIMANT's view, which proposes that the implied choice of law should presumptively be the law of Mediterraneo, it will be established that the presumption can be set apart [**2**].

1. The Parties' express selection of Danubia as the seat of arbitration creates a strong presumption that Parties intended for Danubian Contract Law to govern the arbitration agreement.

16 As established in *Firstlink*, the "natural inference" is for the law of the seat of arbitration to apply to the arbitration agreement [*FirstLink, §13*]. Indeed, primacy is to be accorded to the neutral law selected by the Parties, *i.e.* Danubian Law, to govern the proceeding of dispute resolution [**a**]. Moreover, "the very choice of an arbitral seat presupposes parties' intention to have the law of that seat recognize and enforce the arbitration agreement" [*FirstLink, §14*], therefore, the Law of Danubia prevails [**b**].

a. The Law of Danubia governs the arbitration agreement in order to meet the Parties' requirement of neutrality.

17 Departing from the presumption established in *Sulamérica* under which the implied choice of law should presumptively be the law of the underlying contract, the Court held in *FirstLink* that the "more commercially sensible viewpoint" would be for the law of the seat of the seat of arbitration to apply to the arbitration agreement [*FirstLink, §13*]. Indeed, the Court rightly determined that parties would not always want the same system of law to govern their relationship of performing the substantive obligations under the contract and "the quite separate (and often unhappy) relationship of resolving disputes when problems arise" [*FirstLink, §13*].

18 The first point raised by the Court in favor of the law of the seat of arbitration was that:

> "When commercial relationships break down and parties descend into the realm of dispute resolution, parties' *desire for neutrality [emphasis added]* comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution" [*FirstLink, §13*].

19 This desire for neutrality was expressly stated by RESPONDENT and acknowledged by CLAIMANT who confirmed the possibility "to agree on arbitration in a neutral country" [*Re. Ex. 2*]. Further allegations by CLAIMANT that its implied intent was to apply the law of Mediterraneo to the arbitration clause are inconsistent with the expectation that an objective third party would have had [*Kaufmann-Kohler, § 3.121*]. On the contrary, Parties' express selection of the seat of arbitration in Danubia leads to the implicit acceptance of the *lex arbitri* of the neutral seat to govern the entire arbitral process [*Harisankar K.S., p. 632*].

20 In regard to the above consideration, there is no doubt that the Parties desire for neutrality extends to the issue of interpreting the arbitration agreement and that the law of Danubia therefore applies.

b. The Law of Danubia presumptively governs the arbitration agreement in order to preserve the enforceability and recognition of the arbitral award.

21 The presumption that the law of the seat of arbitration governs the arbitration agreement is directly derived from legal documents such as the New York Convention and the UNCITRAL Model Law. Article V (1)(a) of New York Convention provides that a foreign arbitral award may be refused

recognition or enforcement, among other things, if "the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, *under the law of the country where the award was made [emphasis added]* [*see* also similar Art 36(1)(a)(i) of the Model Law]. In addition, an award may be set aside if the arbitration agreement is invalid under the law of the seat pursuant to Art 34(2)(a)(i) of the Model Law.

22 Accordingly, "given that rational businessmen *must* commonly intend the awards to be binding and enforceable [...], their attention with regard to the validity of their arbitration agreements would *primarily* be focused on the law of the seat (as, in this context, opposed to the substantive law)" [*FirstLink, §14*]. Seen from this light, there is no doubt that when it comes to determining if the Parties are presumed to intend for the law of the underlying contract or the law of the seat of arbitration to govern the agreement, such presumption points toward the Law of Danubia.

2. In the event the Tribunal determines that the implied choice of law should presumptively be the law of Mediterraneo, this presumption should be set apart.

23 Should the Tribunal depart from the view developed above, the choice of Danubia as the seat of arbitration, combined with the drafting history of the arbitration clause, is sufficient to refute CLAIMANT's position that the Parties are presumed to have impliedly chosen the law of Mediterraneo as the law of the arbitration agreement [**a**]. Moreover, the "validation principle" referred to by CLAIMANT does not apply to the interpretation of the arbitration agreement [**b**].

a. The express choice of the seat of arbitration in Danubia, combined with the drafting history of Article 15, rebuts the presumption that the Parties intended the arbitration clause to be governed by the Law of Mediterraneo.

24 CLAIMANT follows the view developed in relatively recent decisions that in the absence of any indication to the contrary, parties are assumed to have intended the whole of their relationship to be governed by the same system of law (*Sulamérica, BCY, BMO)*. However, it should be noted, that even in those cases, the law of the seat of arbitration was considered as one of the main factors contributing to departure from that presumption.

25 In the leading case of *Sulamérica*, the Court noted that the "choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings" and that it tended to suggest that the parties intended the law of the seat of arbitration "to govern all aspects of the arbitration

agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators" [*Sulamérica, § 29*].

26 In *Sulamérica*, the Court seemed to suggest, as did CLAIMANT, that the choice of a seat of arbitration should be combined with other factors in order to displace the presumption that the law of the main contract applies to the arbitration agreement. In that regard, it is crucial to underline that the Parties relied on a model clause suggested by an International Arbitration institution. RESPONDENT expressly employed the HKIAC model clause in its communication of 10 April 2017, which provides for a specific provision regarding the law governing the arbitration clause [*Resp. Ex. 1, p. 33*]. At the time, RESPONDENT clearly established that the law of the seat of arbitration should govern the law of the arbitration agreement [*Resp. Ex. 1*].

27 Answering to RESPONDENT, CLAIMANT described the time-consuming procedure required to select Equatoriana as the seat of arbitration and accepted the proposal with an amendment "as to the place of arbitration" [*Resp. Ex. 2*]. No reference was made to an amendment "as to the law governing the arbitration clause". Thus, it is reasonable to understand that it would have followed the same model as the first clause offered by RESPONDENT.

28 Furthermore, Mr. Antley's "negotiation file", which he had prepared after his short meeting with Ms. Napravnik in the morning of 12 April, demonstrates that RESPONDENT was willing to clarify this point and to designate the law of Danubia as the law of the arbitration agreement [*Resp. Ex. 3*].

29 In light of the drafting history of Article 15, there is no doubt that the presumption argued by CLAIMANT must be set apart and that the Parties intended Danubian Contract Law to govern the agreement.

b. The "Validation principle" referred to by CLAIMANT does not apply to the interpretation of the arbitration agreement.

30 According to CLAIMANT, the presumption that the law of Mediterraneo applies to the arbitration agreement should only be displaced if it lead to the non-application of the arbitration agreement [*Cl. Mem. No.23, §8*]. Such supposition, often referred to as the "Validation principle", is based on the presumed intent of the Parties to preserve the validity of their clause, but this principle does not apply to the interpretation of the arbitration agreement.

31 First, it should be noted that an application of the validation principle was illustrated in *Sulamérica*. The Court determined that negative "consequences" would have followed the application of the law of the underlying contract on the arbitral process in order to depart from its application

[*Sulamérica, §30*]. However, the "consequences" were only *one factor* used by the Court in order to depart from the basic presumption. It does not follow that it is the *only* factor to take into consideration while assessing the law applicable to the agreement.

32 Moreover, neither the Law of Mediterraneo nor the Law of Danubia harms the validity of the arbitration agreement contained in Article 15. The issue facing the Parties is directly related to the interpretation of the clause. It would be contrary to the principle of the autonomy to determine that, in *any* case, the law which provides for the broader interpretation of the agreement should prevail. As such, the validation principle is not "intended to apply universally to all issues pertaining to the arbitration agreement. For other questions, such as the interpretation or waiver of the arbitration agreement, the validation principle may not pinpoint the exact law to be applied [...]" *[Leong H., Tan J.-H, p. 84*].

C. In Case The Intent Of The Parties Cannot Be Ascertained, The Law Of Danubia Applies To The Arbitration Agreement Because The Seat Of The Arbitration, *I.E.* Danubia, Has The Closest And Most Real Connection With The Arbitration Clause.

33 In the absence of express or implied intent of the Parties, the Law of Danubia applies to the arbitration agreement because the Danubian system of law has the closest and most real connection with the arbitration agreement. Indeed, it is commonly recognized that the law of the seat of arbitration is presumed to have a closer connection to the agreement than the law of the underlying contract [*Sulamérica, §32; Arsanovia, §12, 24 ; C v. D, §26*, *XL Insurance Ltd*] [**1**]. The designation of the Law of Mediterraneo to govern the FSSA is not sufficient to rebut that presumption [**2**].

1. The arbitration agreement contained in Article 15 is presumed to have a closest and most real connection with the Law of Danubia.

34 The presumption that an arbitration agreement has its closest and most real connection to the law of the arbitration seat was clearly affirmed by Judge Longmore L.J. in the case of *C v. D*:

> "[...] an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate, than with the place of the law of the underlying contract, in cases where the parties have *deliberately chosen [emphasis added]* to arbitrate in one place, disputes which have arisen under a contract governed by the law of another place" [*C v. D, §26*]

35 RESPONDENT agrees that in the absence of an express choice by the parties of the seat of arbitration, the seat's value as a connecting factor is not sufficient to identify the legal system to which the parties intended to subject their agreement [*A. Sklenyte, p.43*]. However, the fact that the Parties *deliberately* chose to elect a seat of arbitration, *i.e.* Danubia, in a country different than the country which law governs the underlying contract, *i.e.* Mediterraneo, is the most significant indicator of the closest and most real connection between the agreement and the seat of arbitration.

36 This presumption was further supported in the leading case of *Sulamérica,* as well as subsequent cases [*Arsanovia, XL Insurance Ltd*], which established that the arbitration agreement "has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective," *i.e.* the law of the seat of arbitration [*Sulamérica, §32*].

37 Following those observations, "it appears sufficiently certain that in the absence of an (express or implied) choice of law [governing the arbitration agreement], a court or tribunal will find that an arbitration agreement is most closely connected to the law of its seat" [*A. Moody & C. Forsaith, p.4*], so that the Law of Danubia applies.

2. The choice of the Law of Mediterraneo to govern the FSSA is not in itself sufficient to displace the basic presumption that the law of Danubia has the closest and most real connection with the arbitration agreement.

38 In *Sulamérica*, it was made clear that the arbitration agreement had a close and real connection with the law of Brazil, being the law governing the substantive contract in which the agreement itself was embedded. However, it was established that this argument failed "adequately to distinguish between the substantive contract and the system of law by which it is governed" [*Sulamérica, §32*]. Judge Moore-Bick noted that there is "no doubt the arbitration agreement has a close and real connection with the contract of which it forms part, *but its nature and purpose are very different [emphasis added]*".

39 Following Moore-Bick L.J.'s view, an agreement to resolve disputes by arbitration in a specific place does not have a close juridical connection with the system of law governing the underlying contract, "whose purpose is unrelated to that of dispute resolution" [*Sulamérica, §32*]. Following this reasoning, the choice of the law of Meditteraneo to govern the FSSA is not sufficient to displace the presumption that the law of Danubia has the closest and most real connection with the arbitration agreement contained in Article 15.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADAPT THE CONTRACT PURSUANT TO THE LAW OF DANUBIA WHICH GOVERNS THE ARBITRATION AGREEMENT

40 Under Danubian Law, the arbitration agreement must be interpreted following the "four corners rule", i.e.the interpretation is limited to the wording of the agreement and no external evidence may be relied upon. Moreover, the law of Danubia only allows the Tribunal to adapt the contract "if authorized" [P.O. 2, §45]. Read in conjunction, the arbitration agreement does not provide for an express authorization to the Tribunal to adapt the contract and that such authorization cannot be found outside the textual content of Article 15.

A. There Is No Authorization Made By The Parties That The Tribunal Can Adapt The Contract

41 Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with two relevant exceptions. First, Article 6.2.3 (4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized". Even though the there is no consistent case law as to the meaning of the addition "if authorized", the authorization should literally refer to an express empowerment. In the present case, neither in the FSSA nor in the arbitration process has Respondent ever agreed to authorize the Tribunal to adapt the contract. RESPONDENT emphasized continuously that express conferral of power is missing in the present case [*A.N.A, para.13*].

B. Authorization Given To The Tribunal To Adapt The Contract Cannot Be Implied Under The Four Corners Rule

42 The four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles [*PO2, para. 45*] which provides that :

> "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."

43 Pursuant to the aforementioned provision, no authorization to adapt the contract can be given to the Tribunal by referring to Parties' negotiation history. Moreover, the meaning of the term "arising out of", referred to in Article 15, should not be unreasonably broadened by referring to external circumstances. On the contrary, RESPONDENT explicitly reduced the broad wording of the Model Clause of the HKIAC when suggesting the arbitration clause by deleting the reference to "or relating to" which might have been interpreted as an empowerment for contract adaptation.

44 Such authorization should have expressly be stated in the FSSA. It is important to notice that the Parties are aware of this particular feature of the Danubian law and agreed in the telephone conference of 4 October 2018 that "there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal" [P.O. 1, § II].

CONCLUSION OF ISSUE I

45 Accordingly, the law of Danubia governs the separate arbitration agreement contained in Article 15 and its interpretation thereof, because it reflects the implied intent of the Parties. If the implied intent is considered absent, the law of Danubia shares the closest and most real connection with the arbitration agreement, and consequently, must govern it. Under the law of Danubia, the arbitration agreement must be interpreted narrowly and regardless of any external evidences, in line with the "four corner rule". Since no express authorization has be given to the tribunal to adapt the contract, the wording of Article 15 ("dispute(s) arising out of this contract") does not extend to the adaptation of the contract by the Tribunal which is respectfully requested to find that it has no jurisdiction in the case at issue.

ISSUE II: CLAIMANT IS NOT ENTITLED TO SUBMIT THE DOCUMENTS.

46 In the present case, CLAIMANT is not entitled to submit the documents from the other arbitration considering its lack of sufficient relevance **[I]**; confidentiality of evidence itself **[II]**; illegal obtaining method **[III]**.

I. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE DUE TO LACK OF SUFFICIENT RELEVANCE.

47 Article 9.2(a) of the IBA Evidence Rules provides that Arbitral Tribunal shall exclude evidence which lacks sufficient relevance to the case. In a decision made by the Swiss Federal Court, it was

determined that the ICC arbitral tribunal's refusal to admit additional documentary and expert evidence would not violate party's fundamental right to be heard if the Tribunal finds the evidence to lack relevance. [*Swiss Federal Court 4P.196 / 2003*]. For a document to be of "relevance", it should be "in order to discharge the burden of proof" of the submitting party. [*Nathan, p.269*] This criterion was adopted in a US case, which decided that the Tribunal shall stop the line of questioning on points that "bear no direct connection to a contention a party is tasked with proving" [*Generica Ltd v Pharmaceutical Basics*]. Moreover, the "relevance" is this phase of arbitration is not the ultimate relevance, but a "likely or prima facie relevance" [*Nathan, p. 55*].

48 In the present case, CLAIMANT claims an additional amount of US$ 1,250,000 for the price of the third delivery. Thus, CLAIMANT is tasked with proving whether this payment is allowed under the FSSA or under CISG. But what the CLAIMANT seeks to submit is an award and submissions from the another arbitral proceeding between RESPONDENT and a third party. That case concerns a separate contract between different parties, in which even the product sold is different. The only similarity is that two transactions are both affected by tariff increases of Equatoriana and Mediterraneo. But as is found in the *Sun Life* case [*Sun Life v The Lincoln National Life*], "different arbitrations on closely inter-linked issues, may as a result, lead to different results". Hence, CLAIMANT cannot find any support of its claim on the payment from a case of different contract of different transaction. Therefore, the documents CLAIMANT wishes to submit "bears no direct connection" to its burden of proof, thus not even prima facie relevant to the case and should be excluded.

II. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE BECAUSE IT IS CONFIDENTIAL.

49 CLAIMANT is not entitled to submit the evidence because the document CLAIMANT seeks to submit is protected under the obligation of confidentiality [**A**]. And our case does not fall within any exception to such confidentiality. [**B**].

A. The Document At Issue Should Be Excluded For The Protection Of Confidentiality.

50 As is found in the Dolling case [*Dolling Baker v Merrett*] and reaffirmed in the Hassneh case [*Hassneh Insurance Co of Israel v Mew*], "the requirement of privacy" of arbitration proceedings "must be in principle extended to the documents which are created for the purpose of that hearing".

Because "disclosure of such documents to a third party would be almost equivalent to opening the door of the arbitration room for that party". Therefore, the evidence CLAIMANT seeks to submit, i.e., the award and relevant submission of the other arbitral proceedings, is confidential in nature. Such confidentiality is further strengthened by the HKIAC 2013 which govern that arbitration. Article 42 of the HKIAC 2013 set out strict and comprehensive obligation to the relevant persons of confidentiality. According to Articles 42.1 and 42.2 of the HKIAC 2013, unless the parties agree otherwise, persons including the parties, secretary, witness, and tribunals shall not disclose, publish, or communicate any information in relating to the arbitration and the award. Since there is no indication that RESPONDENT and the other party agreed otherwise, the documents produced in that arbitration proceedings are well protected under the obligation of confidentiality.

B. This Case Does Not Fall Within Any Exception Of The Confidentiality.

51 Article 42.3 of the HKIAC 2013 provides three situations where publication, disclosure, and communication (PDC) of information in relation to the arbitration and award are allowed. These situations include those where: first, the PDC is made by a party in legal proceedings before a court or other judicial authority to protect or pursue a legal right or interest of the party, or to enforce or challenge the award; second, such PDC is required by law to be made to any government body, regulatory body, court, or tribunal; and third, the PDC was made to a professional or any other adviser of any of the Parties. However, in the present case, it is CLAIMANT, a non-party to that arbitration, who seeks to disclose the documents from that arbitration, not falling within the first permissible situation. Moreover, neither is the submission of the documents required by any law, nor is it made to any professional or other adviser. Thus, the latter two situations are not relevant.

52 Notably, it seems to be a trend that the confidentiality of the arbitration may be eroded where there is a genuine public interest, in the sense that the decision of the Tribunal would in some way affect the general public. [*Redfern, p. 134*] This understanding is acknowledged in an Australian case [*Commonwealth of Australia v Cockatoo*], which decided that though private arbitration has a high level of confidentiality, where one of those parties is a government, the regime of confidentiality or secrecy cannot destroy or limit the general governmental duty to pursue the public interest. In this regard, CLAIMANT's assertion of the, so called, "prevailing principles of transparency as now evidenced in the Transparency Rules of UNCITRAL" is ill-suited. Since the Transparency Rules of UNCITRAL only cover investor-state arbitration, in which a party is a country, a public interest

may prevail over the confidentiality of the arbitration. However, the case at issue is a genuine private arbitration, the decision of which will in no way affect the general public. Therefore, neither the exception of public interest nor the principal of transparency is applicable.

III. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE SINCE ITS METHOD OF TAKING EVIDENCE IS ILLEGAL.

53 Although CLAIMANT argues that prior arbitral award is not barred from being admitted into evidence even though it may have been obtained through disgruntled employees or illegal hacking. [*Cl. Me. para.14*] However, in the present case, the documents have manifested from a company which is of doubtful reputation and may have obtained the documents through the former employees of RESPONDENT or illegal hacking. But both of these ways are illegal. Thus, the CLAIMANT is not entitled to submit the evidence for failure to conduct in good faith in taking of evidence **[1]**. But even if the Tribunal deems that the taking of evidence is legal, the Tribunal should still exclude the evidence because the evidence is not in a public domain **[2]**.

A. Evidence Should Be Excluded Because CLAIMANT Failed To Act In Good Faith.

54 CLAIMANT is not entitled to submit the evidence for failure to conduct itself in good faith and, further, the evidence cannot be justified by its relevance and materiality.

55 When it comes to a tribunal's authority to enforce confidentiality, "the failure by a party to observe the confidentiality of documentary evidence submitted into the arbitration could be viewed as a breach of good faith" [*Nathan. para. 3. 165*] Article 9.7 of IBA Evidence Rules provides that Tribunal may take any measure available under the IBA Evidence Rules when it discovers a party's failure to conduct itself in good faith in the taking of evidence. In common practice, tribunals deny the admissibility of evidence obtained through illegal means. One leading example is the Methanex case [*Methanex v. United States of America*], decided by an UNCITRAL tribunal. In this case, agents acting for the claimant had obtained documents by trespassing into the office of the head of a lobbying organization and searched through internal trashcans and dumpsters. Through this "search", Methanex obtained personal notes, private correspondences, and material expressly subjected to legal privilege. The tribunal held that claimant had acted with reckless disregard for the law. Hence, the improperly attained evidence was declared inadmissible. In tribunal's view, parties owed each other duties to conduct themselves in good faith and respect equality of arms

between them to ensure fairness. Therefore, it would be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully. Similarly, CLAIMANT failed to conduct itself in good faith in taking of evidence because the document CLAIMANT seeks to submit is obtained in unlawful way.

56 There are some specific circumstances in which illegal evidence may be admitted according to the discretion of Tribunal, but it requires high level of relevance or materiality. Nevertheless, in the present case, such illegal evidence does not meet this requirement to be admitted. The facts disclosed by the documents in the other arbitration does not have direct relevance to the dispute. Moreover, there is little connection with the outcome of the case, and the evidence does not fit into the resolution of the dispute. Consequently, it does not meet the requirement of justification in present case. The evidence obtained by CLAIMANT illegally cannot be justified for its relevance or materiality.

B. Even If CLAIMANT Acts Legally, It Is Still Not Entitled To Submit The Evidence Because It Is Not Available In The Public Domain.

57 CLAIMANT mentioned several cases related to WikiLeaks, where tribunals allowed documents obtained by cyber hack to be admitted as evidence. [*Cl. Me. para.21*] Nevertheless, in admitting the leaked information as evidence, the main consideration of these tribunals is that those documents were already in public domain. As for the issue of public domain, Article 3.13 of the IBA Evidence Rules provides that any document submitted, not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties. Thus, evidence is treated differently depending on whether it is in the public domain. In the most recent decision in Caratube, the tribunal accepted the leaked information as evidence on the basis that the information was public, and thus, no longer privileged or confidential. [*NYU Transnational Notes*]. Although the ICSID tribunal admitted some emails and documents obtained from a hacked computer network as evidence, this was due to special circumstances. Documents that Caratube relied on had been leaked and publicized on the WikiLeaks page after Kazakhstan government's computer network was hacked. The tribunal observed that the documents were now in the public domain. [*Caratube v. Kazakhstan*] Thus, the tribunal found that the balance tipped in favor of admitting the documents [*Caratube v. Kazakhstan*], placing special emphasis on the fact that they were "lawfully available to the public."

58 In the case, documents from the other arbitration are not available in the public domain. CLAIMANT has arranged an opportunity to acquire the "Partial Interim Award" against payment of 1,000 USD from a company which provides intelligence on the horse racing industry. The company, which had promised to sell CLAIMANT a copy of the award, has a doubtful reputation as to the source of its information and has refused to disclose its sources in the case at hand. [*PO2, p. 61*] CLAIMANT's actions, either the illegal hacking or conducted former employees to breach their confidentiality obligation, do not justify the purchase of this information. Differ from previous cases where documents were disclosed by Wikileaks so that every netizen has access to it, the company in our case made a deal with CLAIMANT in secret. Documents from previous arbitration were not leaked or publicized, but they were ascertained exclusively by the company. Only when CLAIMANT pays the price will the company provide the award. Thus, these documents are in private domain rather than available to public and thus should not be admitted as evidence.

CONCLUSION OF ISSUE II

59 CLAIMANT is not entitled to submit the documents from the other arbitration due to lack of sufficient relevance; legal impediment; and illegal obtainment.

ISSUE III: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT UNDER CLAUSE 12 OF THE CONTRACT OR THE CISG.

I. CLAIMANT IS NOT ENTITLED TO PAYMENT OF ANY AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT.

60 In considering the clear language of the contract and the record of negotiation, the tariff is not a hardship as contemplated under Clause 12 of the FSSA [**A**]. Even if it is determined that the tariff is a hardship under the contract, the adaptation of the contract by the Tribunal is not a remedy available under the FSSA [**B**].

A. The Tariff Is Not A Hardship As Defined In Clause 12 Of The FSSA.

61 The FSSA clearly reflects the Parties' intent to specifically derogate the DDP delivery term according to definite negotiated terms [**1**]. Furthermore, the Parties intentionally excluded language in the FSSA that would shift certain risks to RESPONDENT [**2**]. The tariff is not a hardship caused by additional health and safety requirements or a comparable unforeseen event [**3**].

1. The Parties intentionally and specifically derogated the DDP delivery term to reflect definite negotiated terms, which did not shift the risk of the tariff.

62 The Parties reached a consensus to specifically derogate the standard DDP term and that "CLAIMANT would not bear all the shipping risks" [*Cl. Me. para. 75-80*]. In fact, it is based upon this consensus that the Parties were so specific in the derogation as to include "tank rental" in Clause 10 of the contract, and "additional insurance fees" in Clause 13 [*Cl. Ex. 5 p. 14*]. However, the fact that the Parties made specific derogations from the standard DDP delivery term is not, in itself, enough to show that the Parties intended to shift *all* or even *most* risks associated with DDP delivery. Therefore, this issue hinges on whether the tariff falls within one of the specific derogations reflected in the contract. CLAIMANT shared the same opinion by analyzing specially the "hardship clause" in the contract, i.e. Clause 12 [*Cl. Me. para. 80*].

63 Since CLAIMANT based their arguments upon Clause 12, the specific issue here is whether the tariff in this situation constitutes a hardship under Clause 12 and whether the adaptation of the price was intended as a remedy.

2. The Parties intentionally excluded language in the FSSA that would shift the risk of tariffs to RESPONDENT.

64 Though "customs regulation and import restrictions" were mentioned in negotiations, they were intentionally excluded from the hardship clause [**a**]. Moreover, evidence from the negotiations that the ICC Hardship Clause was too broad further indicates the Parties' intent to narrow the definition of hardship in the FSSA [**b**].

a. "Customs regulation and import restrictions" were intentionally excluded from the hardship clause.

65 Article 8.1 of the CISG provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew ore could not have been unaware of what that intent was." Here, the the FSSA reflects the Parties' agreement to shift certain costs and risks. In cases where the the subjective intent of the parties is unknown, CISG Article 8.2 and 8.3 instruct interpreters to apply an objective reasonable person standard, which includes the negotiations and the interests of the parties [*Art. 8.3 CISG; Court of Appeal (Obergericht) of the Canton of Thurgau*]. CLAIMANT argues that CLAIMANT "never agreed to [bear] the risks… associated with changes in customs regulation or import restrictions" [*Cl. Me. No. 32, para. 68*]. But this view does not reflect the FSSA that was the *result* of the Parties' developing negotiations.

66 The final form FSSA reflects RESPONDENT's agreement to pay more for the benefit of CLAIMANT's shipping expertise *and* the precise bargain on the risk assumption of hardships born by RESPONDENT which expressly excludes "customs regulations and import restrictions". In the email to RESPONDENT dated 31 March 2017, CLAIMANT accepted the DDP delivery term on condition that the price per dose would be increased USD 1,000 [*Cl. Ex. 5 p. 14*]. In this same email, CLAIMANT made an additional proposal to shift the risks of the DDP delivery term to RESPONDENT, namely, those "associated with changes in customs regulation or import restrictions", and "unforeseeable additional health and safety requirements" [*Cl. Ex. 4 p. 12*].

67 The operative fact of the negotiations resulting in the final agreement is that "customs regulations and import restrictions" were *not* included in the hardship clause of the FSSA but "additional health and safety requirements" were *expressly* present [*Cl. Ex. 5 p. 14*]. Therefore, "customs regulation and import restrictions" were intentionally excluded from the hardship clause.

b. The Parties elected to define hardship more narrowly than the ICC Hardship Clause.

68 Moreover, the record of negotiations shows that CLAIMANT proposed the use of the ICC Hardship for the purposes of risk allocation in the FSSA [*Re. Ex. 3 p. 35*]. Specifically, the note taken by Mr. Antley suggests that the Parties were negotiating the precise scope of the hardship clause.

69 In relevant part, the ICC clause defines hardship as "events [that] have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract" [*ICC Hardship 1*]. Considering this unqualified definition in contrast to the relatively narrow definition of hardship in Clause 12 of the FSSA, it is evident that the Parties' intention was to narrowly stipulate the types of events that would constitute a hardship in their agreement.

3. The tariff is not a hardship caused by additional health and safety requirements or a comparable unforeseen event.

70 Clause 12 defines "hardship" in this transaction as that "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Cl. Ex. 5 p. 14*]. This clear language exhibits the Parties' intent, the analysis should be based upon the contract instead of other judicial instruments including some similar expressions.

71 According to the clear language of the contract, supplemented by the record of negotiations, the tariff is not a hardship caused by additional health and safety requirements [**a**]. It is not unforeseen in this transaction [**b**], and it only caused a 30 percent increase in cost which is not enough to

constitute a hardship under the contract, or widely accepted bodies of international law [**c**]. Furthermore, the tariff is not comparable to "additional health and safety requirement" [**d**].

a. The tariff was not an "additional health and safety requirement".

72 The imposition of the 30% tariff on all agricultural products by Equatoriana was widely understood, and stipulated by CLAIMANT, as a retaliatory measure for the restrictions imposed by Mediterraneo [*N.A. para. 9, Cl.Ex. 6 p.15*]. Furthermore, it is a fact that Equatoriana had historically regulated, and even banned the artificial insemination of horses and recently lifted the ban, citing the "latest foot and mouth disease crisis in Equatoriana [*Cl. Ex. 1 p. 9*]. Thus, Equatoriana was perfectly positioned to impose expressly regulatory requirements on the import of horse semen, but instead enacted a purely retaliatory, economic measure. It stands to reason that when the Parties included "additional health and safety requirements" in the hardship clause of the FSSA, they were contemplating requirements that were explicitly related to health and safety, not purely economic measures with merely tangential health and safety implications.

b. The tariff was not "unforeseen".

73 According to UNIDROIT Principles, "unforeseen" represents that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract" [Comment of Art. 6.2.3 UNIDROIT Principles]. With the general contract law of Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1*], it's reasonable to assume that the Parties intended the same standard through this language. It is known the President of Mediterraneo elected on 25 April 2017 showed a protectionist attitude to international trade, in particular in relation to agricultural products [*Cl. Ex. 6*]. Furthermore, the President Bouckaert appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his "superminister" for agriculture, trade and economics on 5 May 2017, who has been an outspoken protectionist for years advocation limiting the access of foreign agricultural products to the Mediterranean market [*Q23, PO2*]. These events happened before the finalization of the contract. Although they may not lead directly to the imposition of the tariff, they posed an important risk on international trade that professional businessmen as the Parties should have noticed, especially considering the importance of this transaction. Therefore, the tariff was not unforeseen.

c. The tariff was only 30 percent.

74 CLAIMANT argues that the tariff constitutes a hardship under Clause 12 of the FSSA, in part, because it caused a 25 percent loss of profit for CLAIMANT [*Cl. Me. para. 82*]. In the Witness

Statement of Ms. Napravnik, she further explains that "the last 2 years have been financially difficult for CLAIMANT for several reasons" [*Cl. Ex. 8 p. 17*]. However, the 30 percent tariff does not reach the threshold for hardship under the contract or according to widely accepted systems of international and domestic law. Moreover, CLAIMANT's internal business difficulties are entirely irrelevant to this issue.

75 According to the Official Comment on the UNIDROIT Principles, in relevant part, if "the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration" [*UNIDROIT Principles, 1994 edition*]. Even more, some legal commentators on the CISG propose that the required alteration should be at least 100 percent [*Brunner p. 4*].

76 Even though the Parties developed their own hardship clause, CLAIMANT's position on the threshold for hardship in performance of the FSSA is evidence by the 31 March email in which they described risks that "can increase the cost by up to 40 percent and thereby destroy the commercial basis of the deal" [*Cl. Ex. 4 p. 12*]. It stands to reason that CLAIMANT's meaning of this statement was that if an unforeseen event increased the cost of performance by 40 percent, *then* it would destroy the commercial basis of the deal and reach the threshold of hardship. Because the tariff was only 30 percent, it does not reach the threshold for hardship according to CLAIMANT's own stated position, and it does not even come close to reaching the threshold for hardship according to most systems of international and domestic law.

d. The tariff was not "comparable" to "additional health and safety requirements".

77 As outlined above, the hardship clause in the FSSA reflects the Parties' agreement to shift specific risks associated with DDP in light of the unsettled disposition of the Equatoriana's health and safety regulations affecting the import of horse semen. The further inclusion in the clause of "comparable unforeseen events" is the result of the Parties' negotiations which were initiated by CLAIMANT's 31 March proposal to include "customs regulations and import restrictions" and subsequently became more narrow [*Cl. Ex. 4 p. 12*].

78 The operative word in the Clause 12 of the FSSA is "comparable", which reflects the Parties' intent to anchor the definition of hardship to health and safety, or like regulations. It is reasonable to surmise that because RESPONDENT clearly rejected CLAIMANT's proposal to include the broad language of "customs restrictions and import restrictions", that the Parties' intended meaning of "comparable unforeseen events" was events linked to a real, regulatory purpose. Here, because the

imposition of the tariff was purely economic, political retaliation, with no real regulatory purpose, it is not the type of comparable unforeseen event that is contemplated in the hardship clause of the FSSA [*Cl. Ex. 6 p. 15*].

B. Even If The Sudden Imposition Of Tariff Falls Within The Realm Of Clause 12, The Adaptation Of The Contract By The Tribunal Is Not A Remedy Intended By The Parties.

79 Assuming that the sudden imposition of the tariff is a hardship under Clause 12, this does not lead to the conclusion that the Tribunal has the power to adapt the contract. Adaptation is not a remedy incorporated into the text of FSSA [**1**]. Furthermore, it is evidenced by the negotiation history, Parties did not consider adaptation of contract as a remedy for hardship [**2**].

1. Adaptation of contract is not provided for in the text of contract.

80 Concerning the effect of a "hardship", the precise language adopted in the FSSA is that "seller shall not be responsible for […] hardship […]" [*Cl. Ex. 5*]. Unlike Art. 6.2.3 of UNIDROIT Principles, the adaptation of contract is not explicitly provided as a remedy, neither in Clause 12 concerning hardship, nor in the arbitration clause [*Cl. Ex. 5*]. Therefore, assuming the tariff constitutes a hardship under Clause 12, it does not lead naturally to the effect of price adaptation.

81 Instead of a positive right for price adaptation, it is more reasonable to view the language of "not responsible for" as a reference for a defensive right. Firstly, this language demonstrates a negative nature which usually relates to defensive rights. Art.79(1) of CISG could be a perfect example: by adopting the language of "is not liable", this provision only relieves a party of liability for "a failure to perform any of his obligations" if certain requirements are fulfilled [*UNCITRAL Digest of Case Law, Art. 79, p. 374*]. Furthermore, the structure of Clause 12 is quite special with the combination of force majeure and hardship in one clause. That's the consequence of negotiation upon hardship clause: "an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause" [*A.N.A. para.4*]. Thus, it is reasonable to surmise that the Parties intended the same remedy for all situations covered by Clause 12, and considering the high similarity between Clause 12 and Art. 79(1), that should be the exemption form liability for a failure to perform contractual obligations. Therefore, the Parties intended not to empower the Tribunal to adapt the contract.

2. The record of negotiations shows the Parties' consideration of the ICC Hardship Clause which further supports the view that adaptation was not a remedy intended by the Parties.

82 The preclusion of an adaptation remedy in the contract is further supported by the negotiation history which demonstrates the Parties reliance on the ICC hardship clause when drafting Clause 12 [**a**]. Consequently, the remedies provided by ICC hardship clause do not include the adaptation of the contract by the Tribunal [**b**].

a. The Parties formulated Clause 12 with reliance on ICC hardship clause.

83 Due consideration is to be given to all relevant circumstances of the case including the negotiations in determining the intent of the Parties [*Art.8(3) of CISG*]. In the present case, it is evident that the Parties chose the ICC hardship clause as a starting point to formulate Clause 12. In the email from CLAIMANT to RESPONDENT on 11 April 2017 [*Re. Ex. 2*], CLAIMANT suggested reliance on the ICC Hardship Clause. Therefore, the Parties intended available remedies within the ICC Hardship Clause when formulating Clause 12.

b. The Tribunal is not empowered to adapt the contract under ICC hardship clause.

84 The ICC Hardship Clause provides "one formulation with clear alternative consequences, negotiation or termination, the latter of which would in most cases provide an incentive towards the former" [*ICC Clauses*]. This clause, by offering only these two consequences when invoking it, deviates from the UNIDROIT Principle/PECL where a court-ordered adaptation of the contract in the failure of renegotiation is contemplated [*Mercedeh Azerdo, p. 338; Brunner, p. 506*].

85 Although the general contract law of Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1*], party autonomy, the supreme principle in contract law, entitles the Parties to adjust the rules to fit in the specific circumstance where their contract is concluded and performed. As well argued above, by basing Clause 12 upon ICC Hardship Clause, the Parties demonstrated a strong intent to derogate from the rules concerning hardship provided in UNIDROIT Principles and to exclude the remedy of court-ordered adaptation of the contract. Moreover, RESPONDENT's consistent objection to the adaptation of the contract price by the Tribunal also supports this interpretation of Parties' conduct in relation to hardship clause [*para.10, A.N.A; Re. Ex. 3*].

86 In conclusion, as evidenced by the text of the contract and the negotiation history, even if the imposition of the tariff falls within the realm of Clause 12, the adaptation of the contract by the Tribunal is not a remedy intended by the Parties.

II. UNDER CISG, CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE CONTRACT BY THE TRIBUNAL.

87 CLAIMANT is not entitled to an adaptation of the contract since CISG offers no remedy for the present circumstances and precludes the application of UNIDROIT Principles **[A]**. However, even if the Tribunal comes to the conclusion that the UNIDROIT Principles apply, the conditions under its Article 6.2.2 and 6.2.3 have not been fulfilled to entitle CLAIMANT an adaptation of price **[B]**.

A. The CISG Is Silent On The Present Case And Also Precludes The Application Of The UNIDROIT Principles.

88 Art. 79 CISG is not applicable to the case at hand as the tariff does not constitute an impediment and CLAIMANT performed its obligations under the contract [**1**]. Considering the insufficiency of Art. 79, CLAIMANT turns to the UNIDROIT Principles. However, pursuant to Art. 7 CISG, the application of the UNIDROIT Principles is precluded in the present case and, furthermore, the UNIDROIT Principles lack the remedy requested by CLAIMANT [**2**].

1. Art. 79 CISG is not applicable to the imposition of the tariff.

89 Though Art. 79 CISG regulates changed circumstances after the conclusion of a contract, the conditions for its application are strict. The article only applies to situations in which a party, disadvantaged by an impediment, fails to perform its obligation(s) [**a**]. In the present case, CLAIMANT has successfully performed all its obligations under the FSSA, which proves that a tariff does not constitute an impediment. Hence, Art. 79 CISG is not applicable [**b**].

a. Article 79 only applies to circumstances in which a party, disadvantaged by an impediment, fails to perform its obligation(s).

90 CLAIMANT argues that Clause 12 merely constitutes a modification of (or supplement to) the Art. 79 CISG [*Cl. Me., para. 91*]. This argument only asserts that Art. 79 is not excluded by the parties pursuant to Art. 6 CISG. It does not lead to the conclusion that Art. 79 is applicable to the circumstance of the case at hand and provides the remedy required by CLAIMANT.

91 Art. 79 CISG deals with one of the most delicate questions in contract law: "the effects of the impossibility to perform the obligation(s) of the contract" [*Tallon*]. According to the article, "for an exemption to be granted, the non-performance of the contract must be due to an impediment" [*Tallon*]. Pursuant to the Article 79, an impediment is (i) reasonably unforeseeable at the time of the conclusion of the contract, (ii) reasonably impossible to overcome, and (iii) indeed induces the non-performance of the party [*Art. 79(1) CISG; Tallon*]. Therefore, Art. 79 CISG is applicable only under the circumstances in which all of these conditions are met.

92 In determining the definition of an impediment, many decisions have suggested that Art. 79 requires the satisfaction of something akin to an "impossibility" standard [*UNCITRAL Digest of Case Law, Art. 79, p. 374*]. In the *Nouva* case, the court stated that Article 79 of the CISG only provides for "release from an obligation made impossible by a supervening impediment" [*Nouva Fucinati S.p.A*]. The *Iron molybdenum* case reveals a consistent attitude of the court that a seller can be exempt from liability for failure to deliver only if suitable goods were no longer available in the market. Even though acquiring the goods elsewhere would lead to considerable financial loss, the seller could not be exempted [*Iron molybdenum*]. In another case named *Tomato Concentrate*, the court similarly denied the seller's declaration of inability to deliver the goods due to a bad harvest. The court believed that the goods were "undoubtedly not exhausted" [*Tomato Concentrate*]. The interpretations of Article 79 given by the courts indicate that a party cannot be excused as long as performance had not been made physically impossible; consequently, a party cannot be excused in cases of severe price increases because performance is always possible in these cases [*Carlsen, p.5*]. Moreover, although Article 79 can apply to both economic and physical impediments, according to the general view in the UNCITRAL discussion, economic difficulties and dislocations can be regarded as an impediment only if they constitute a barrier to performance that is comparable to other types of exempting causes [*Honnold, p.485*]. Otherwise, those economic difficulties are merely part of the risks that belong to commercial activities.

93 Moreover, the fact that it indeed results in the non-performance of the party is also significant to the proper invocation of Article 79. Art. 79 is only applicable in cases in which a party has already breached the contract [*Carlsen, p.7*].

94 In conclusion, Art. 79 CISG is limited to impediments that result in the impossibility of the performance, excluding the circumstances where performance is possible but unduly burdensome and difficult [*Jenkins*]. The Article only applies to a situation in which non-performance of the

party has become a solid fact. Pursuant to Art. 79, when all these conditions are satisfied, "a party is not liable for a failure to perform any of his obligations", which indicates that the only remedy provided by Art. 79 is the exemption from the liability of non-performance.

b. CLAIMANT has successfully performed its obligations under the FSSA and thus, Article 79 is not applicable.

95 The changed circumstance in the present case obviously does not fulfill the conditions of an impediment under Art. 79 CISG, and thus, this article is inapplicable.

96 As analyzed in detail in para.73, the tariff imposed by Equatoriana as a retaliation could have been reasonably taken into account by CLAIMANT considering all the evident traces before the policy came out. Hence, the requirement of "unforeseeability" is not satisfied.

97 More importantly, CLAIMANT's performance of delivery proves that a 30% tariff did not make the performance impossible. First, it is the fact that the government never prohibited the import of frozen animal semen. Considering that the supply of frozen semen is entirely controlled by CLAIMANT and is not in shortage, the performance is far from "impossible" for CLAIMANT. Second, CLAIMANT delivered the remaining 50 doses on 23 January 2018 at which point, the total 100 doses of frozen semen had been shipped to RESPONDENT [*N.A., §13*]. Hence, CLAIMANT successfully performed its obligations and such performance is driven by its true intention rather than any fraud or threat.

98 In summary, there is no impediment in present case and Art. 79 CISG cannot be invoked when CLAIMANT has successfully performed its obligations.

2. Pursuant to Art. 7 and Art. 9 CISG, the UNIDROIT Principles cannot be triggered in the present case and, even if they were applicable, fails to provide the remedy requested by CLAIMANT.

99 While Art. 79 CISG is not applicable in the present case, CLAIMANT seeks remedy from the imposition of the tariff under the UNIDROIT Principles. Although the UNIDROIT Principles normally regulate hardship and provide remedy, the application of the Principles in the present case must be accorded by the CISG. However, the CISG deliberately omits the remedy for hardship [**a**]. Thus, the application of the UNIDROIT Principles is precluded because Art. 7 CISG only applies to the "internal gaps" in the Convention [**b**].

a. The CISG does not provide the remedy requested by CLAIMANT, which is a deliberate omission.

100 A hardship is an event which "fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished" [*Art. 6.2.2 The UNIDROIT Principles*]. There is no equivalent to a hardship clause in the CISG [*Kessedjian, p.419*] and Art. 79 does not offer remedy for hardship as the only remedy provided in this article is exemption for non-performance due to an impediment.

101 The CISG's silence regarding situations of hardship is a deliberate omission. This means that no relief is available to a party disadvantaged by subsequent change in market conditions that do not satisfy the conditions of Article 79 [*Mercedeh Azerdo, p.329*]. This position is confirmed by some authors of the CISG who claim that, under the CISG, there is no implicit right to seek renegotiation in case of hardship. Carlsen, for instance, argues that "the rejection of a hardship provision indicates the CISG never intended that hardship should exist side by side with Article 79" [*Carlsen, p.7*]. For Tallon, "it is clear that the Convention has opted for a unitary conception of exemption and has thus set aside the theory of 'changed circumstance'" [*Tallon*]. Furthermore, in the decision of *Nouva*, the court held that Article 79 CISG does not address situations of excessive onerousness and also interpreted the CISG's silence as a deliberate omission [*Nouva Fucinati S.p.A*]. Therefore, the argument made by CLAIMANT that the "hardship" exception is included in the Art. 79 CISG is actually contrary to the fact and neither supported by the wording of the article itself nor by the relevant authorities [*Cl. Me, para. 93*]

102 Thus, the remedy for hardship was not an issue forgotten by the drafters by accident when formulating the CISG. On the contrary, the attitude of the Convention is clear in that it refuses to provide any relief for the party advantaged by a hardship. Therefore, CLAIMANT is not entitled to any remedy under the CISG itself, let alone the adaptation of the contract.

b. Art. 7 and Art.9 CISG are not applicable and cannot trigger the UNIDROIT Principles.

103 Article 7 serves as a mechanism to supplement the CISG when its provisions are not sufficient to address the circumstances at issue. Art. 7(2) provides the settlement of questions concerning matters "*governed by this Convention*" and "*not expressly settled in it*" can be interpreted as "internal gaps" in the CISG.

104 Besides the existing controversy about whether hardship is a valid issue which is excluded from the scope of the CISG [*Art.4 CISG*], hardship fails to fulfill the condition of "*not expressly settled*

in it". "*Not expressly settle*" means that the settlements of certain issues are not regulated in the present version and the disposition of the Convention remains absent or unclear. However, previously outlined, the CISG deliberately omits the remedy for hardship, which indicates that this issue is already settled and the Convention's unwillingness to provide any remedy is clear.

105 As the situation of hardship fails to fulfill the conditions under Art. 7(2), the supplementary mechanism cannot be invoked. Therefore, CLAIMANT is not entitled to the remedy of the adaptation under the Principles and CISG.

106 Considering the failure of Art. 7(2) CISG, CLAIMANT argues that UNIDROIT Principles can be regarded as "a trade usage" under Art. 9(2) CISG and therefore, the Principles are applicable to the contract [*Cl. Me, para. 92-94*]. However, UNIDROIT Principles are not "trade usages" because "trade usages" are only certain practices recognized by everyone in the market [*G. Born ICA, p. 2666*] and not the rules of the law derived from comparative law or other international sources [*Brunner, p.36*]. Meanwhile, CLAIMANT's argument is also contradictory to opinions of the arbitral tribunals. In the ICC Case No. 9029, the tribunal noted that "recourse to the [UNIDROIT] Principles is not purely and simply the same as recourse to an actually international commercial usage" [*ICC Case No. 9029*]. A more clear attitude is expressed in the award of ICC Case No. 8873. The tribunal held that the UNIDROIT Contract Principles on hardship do not correspond to the current practices in international trade [*ICC Case No.8873*]. Moreover, trade usages cannot take precedence over the applicable law or the terms of the contract [*G. Born, ICA p. 2666; Brunner, p.36*]. Concerning the remedy in the present case, the contract and CISG should have the priority. Thus, UNIDROIT Principles are not applicable to the case at hand.

B. Even If The Tribunal Comes To The Conclusion That UNIDROIT Principles Are Applicable, The Conditions Under Article 6.2.2 And 6.2.3 UNIDROIT Principles Have Not Been Fulfilled To Entitle Claimant To A Payment From An Adaptation Of Price.

107 Even if the Tribunal should, against all expectations, come to the conclusion that UNIDROIT Principles are applicable, CLAIMANT is still not entitled to a payment from an adaptation of price, since the conditions under Chapter 6 of the UNIDROIT Principles are not fulfilled. First, the present situation does not meet the requirements of Article 6.2.2 to constitute a real case of hardship **[1].** Second, CLAIMANT is not entitled by Article 6.2.3 to a payment of USD 1,250,000 **[2].**

1. Under Article 6.2.2, the tariff does not constitute a hardship.

108 As is shown in Article 1.3 UNIDROIT Principles, the principle *pacta sunt servanda* is one of the most basic fundamental principles of contract law and of UNIDROIT Principles itself. Thus, even if UNIDROIT Principles offers remedy in case of hardship as an exception of *pacta sunt servanda*, the phenomenon of hardship should only emerge in exceptional cases to make sure the backbone of the contract law not being encroached upon too much. [*Comments of Art. 6. 2. 1 UNIDROIT Principles*] Even more, although the hardship principle is accepted in several national legal systems, it appears that, "the case law… show that courts and arbitral tribunals apply the concept with much caution and only under very stringent and narrow conditions." [*Brunner, p. 420*] Art. 6.2.2 sets stringent conditions for the constitution of hardship: on the one hand, the equilibrium of the contract should be fundamentally altered, and on the other hand, four additional conditions should be simultaneously and cumulatively met [*Art. 6. 2. 2 UNIDROIT Principles*].

109 In present case, the rise of tariff shall not constitute hardship for at least three reasons: First, it has not fundamentally altered the equilibrium of the contract [**a**]; Second, the rise of the tariff could be foreseen by CLAIMANT who is a professional and experienced international trader [**b**]. Lastly, the risk of tariff increase was assumed by CLAIMANT according to the FSSA [**c**].

a. The equilibrium of the contract was not fundamentally distorted by the tariff.

110 CLAIMANT asserts that the imposition of the tariff fundamentally altered the equilibrium of the contract without giving any further arguments or evidence [*Clai. Memo, para. 96*], however, a 30% increase is not enough to constitute a "fundamental" alternation. Fundamental alterations of contracts must be beyond those caused by normal economic risks - only exceptional changes in the market that lie far beyond normal economic development can be considered a hardship. [*Carlsen, p. 3; see also Dawwas, p. 9*] In its 1994 edition, the UNIDROIT Principles adopted a threshold test to clarify the quantity requirement of a hardship: "an alternation amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alternation." [*Comment of Art.6. 2. 2 UNIDROIT Principles 1994*]. 2004 edition deleted this requirement because "50% or more" was criticized as being too low [*Working Group for PICC, p. 15*]. What's more, many authors also believe that it's reasonable to require over 50% to make an alternation fundamental [*see Brunner, p. 426-428; Carlsen, p. 3; Dawwas, p. 10; Maskow, p. 662; Doudko, p. 496*].

111 This threshold test of more than 50% has also been widely reflected in relevant court decisions and arbitral awards. Different national courts and arbitral tribunals showed that a 30% [*Nouva Fucinati*

S.p.A], 43.71% [*see Brunner, footnote 2135*], or even 25-50% [*see Brunner, footnote 2135*] increase is insufficient to constitute a fundamental alternation of the contract equilibrium. Some jurisdictions have ruled that it requires a change no less than 100% [*Doudko, p. 496*].

112 In present case, the imposition of the 30% tariff is far from sufficient to fundamentally alter the equilibrium of the contract. Moreover, CLAIMANT's financial difficulty is irrelevant to the equilibrium of the contract as the financial difficulty it declared happened from 2014, three years before the conclusion of the contract [*PO2, para. 29*].

b. The imposition of the tariff could have reasonably been foreseen by CLAIMANT.

113 Art.6.2.2(b) requires that the hardship must be unforeseeable at the time of conclusion of the contract. However, as we agrued above in para.73, in present case, the tariffs imposed by Equatoriana Government as a retaliatory measure to the import policy of Mediterraneo could have been reasonably taken into account by CLAIMANT, who is an experienced international trader.

c. The risk of tariffs increase is assumed by CLAIMANT.

114 Art.6.2.2(d) requires that the risk of the event was not assumed by the disadvantaged party. As argued above, the risk of the tariff increase was assumed by CLAIMANT. Therefore, CLAIMANT is not entitled to payment because it assumed the risk of the tariff itself.

2. Under Article 6.2.3, CLAIMANT is not entitled to an adaptation of the contract.

115 Since present case does not constitute a case of hardship according to Article 6.2.2 UNIDROIT Principles, it will not trigger the effect of hardship under Article 6.2.3. However, even under Article 6.2.3 CLAIMANT is not entitled to an adaptation of the contract because CLAIMANT did not send its request for renegotiation without undue delay **[a]**, and its criticism about RESPONDENT acting in bad faith is baseless **[b]**. Furthermore, the Tribunal has full discretion to decide not to grant an adaptation of the contract **[c]**.

a. CLAIMANT did not send its request for renegotiation "without undue delay".

116 According to Art.6.2.3, the request for renegotiations should be sent as quickly as possible after the time at which hardship is alleged to have occurred [*Comment of Art. 6. 2. 3 UNIDROIT Principles*]. Although the disadvantaged party would not lose its right to request renegotiations if it fails to act without undue delay, it may however "affect the finding as to whether hardship actually existed" and its legal consequences [*Comment of Art. 6. 2. 3 UNIDROIT Principles*].

117 Here, the tariff was imposed on 19 Dec. 2017, more than one month before the due date of last shipment. However, CLAIMANT did not contact RESPONDENT until 20 Jan 2018, which pushed

RESPONDENT into a difficult position as it was only two days before the date of shipment and the breeding season was about to start [*Re. Ex. 4*]. Taking advantage of RESPONDENT's urgent need, CLAIMANT even threatened to withhold the final shipment to pressure Mr. Shoemaker [*Cl. Ex. 7; A.N.A para. 10*]. CLAIMANT argues that it did not realize that the racehorse semen was covered under "animal products" until 19 Jan 2017 [*Clai. Memo. para. 98*], however, even if this was true, it would prove that CLAIMANT, who has the obligation of customs clearance, did not pay due diligence to check after it acknowledged that the tariff was imposed.

118 Taking the one-month undue delay and CLAIMANT's threat to stop performance into consideration, it is reasonable to believe that the tariff was not actually a hardship for CLAIMANT. Instead, CLAIMANT's behavior is consistent with the tactical manipulation of RESPONDENT's agent in order to avoid its duty to pay the tariff.

b. CLAIMANT's criticism about RESPONDENT acting in bad faith is baseless.

119 CLAIMANT's contention that RESPONDENT should bear its loss because RESPONDENT acted in bad faith during the renegotiation process [*Clai. Memo., para. 99 - 101*] is baseless.

120 First, RESPONDENT acted quickly on 21 Jan 2017, after being informed by CLAIMANT of the tariff [*Cl. Ex. 8; Re. Ex. 4*]. Before the final shipment, when CLAIMANT threatened to stop performance, RESPONDENT's employee Mr. Shoemaker tried to negotiate, showing a constructive attitude and emphasizing that he had no authority to agree additional payments [*Re. Ex. 4*]. He even stated with great prudence that an agreement may be made ***only if*** "the contract provides for an increased price in such a high tariff" [*Re. Ex. 4*]. Thus, CLAIMANT's claim that RESPONDENT accepted to bear the additional tariff costs lacks a factual foundation. Instead, the threat to stop performance actually shows its own bad faith since Art.6.2.3 provides that even in case of a real hardship, the request does not entitle CLAIMANT to withhold performance [*Comment of Art. 6.2.3 UNIDROIT Principles*]. Considering RESPONDENT's urgent need of the final shipment before breeding season, CLAIMANT's threat is actually an abuse of its contractual position.

c. Even if the present case does constitute a real hardship, the Tribunal has full discretion to decide not to grant an adaptation of the contract.

121 The Comment of Article 6.2.3 UNIDROIT Principles shows that there are actually four remedies for a court or tribunal requested by the disadvantaged party to grant: (1) termination of the contract; (2) adaptation of the contract; (3) direct the parties to resume negotiations; or (4) confirmation of

the terms of the contract as they stand. All four options stand on equal footing and there is no preference for any particular option [*Dawwas, p. 21*]. The Tribunal has not to make a choice between termination of the contract or adaptation of the contract. Although only these two are listed in the text of Article 6.2.3, it is clearly stated by the Comment that there may be circumstances under which neither termination nor adaptation is appropriate and the Tribunal could adopt the latter two remedies.

122 Moreover, an adaptation of the contract may be granted only if it is reasonable, and the party invoking the hardship clause should bear the burden of proof [*Brunner, p. 464*]. As argued before, there is no real hardship in present case and CLAIMANT fails to prove the elements of hardship, it is not reasonable to grant them a payment of USD 1,250,000 from an adaptation of price.

CONCLUSION OF ISSUE III

123 CLAIMANT is not entitled to the payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under neither Clause 12 of the contract nor the CISG.

REQUEST FOR RELIEF

Pursuant to the Tribunal's Procedural Orders, Counsel submits this memorandum on behalf of the RESPONDENT. With respect, and in accordance with the aforementioned reasons, Counsel requests the Arbitral Tribunal to find that:

1. The Tribunal does not have jurisdiction under the arbitration agreement to adapt the contract, since the law of Danubia governs the arbitration agreement and its interpretation;
2. CLAIMANT is not entitled to submit evidence from other arbitration proceedings; and
3. CLAIMANT is not entitled to the payment of USD 1,250,000 resulting from the adaptation of the price under neither Clause 12 of the contract nor the CISG.

TABLE OF COURT DECISIONS

AUSTRALIA

Cited as	Reference	Cited in
Commonwealth of Australia v. Cokatoo	Commonwealth of Australia v. Cokatoo Dockyard Pty Ltd. 01 November 1994 Case No. [1995] 36 NSWLR 662	§ 87; 105

GERMANY

Cited as	Reference	Cited in
Iron molybdenum	Seller (Germany) v. Buyer (United Kingdom) Appellate Court Hamburg 28 Feb 1997 Case No. 1 U 167/95 available at http://cisgw3.law.pace.edu/cases/970228g1.html	§ 92
Tomato concentrate	Seller (France) v. Buyer (Germany) Appellate Court Hamburg 4 Jul 1997 Case No. 1 U 143/95 and 410 O 21/95 available at http://cisgw3.law.pace.edu/cases/970704g1.html	§ 92

ITALY

Cited as	Reference	Cited in
Nouva Fucinati S.p.A	Nuova Fucinati S.p.A. v. Fondmetal International A.B. Tribunale Civile di Monza 14 Jan 1993 available at http://www.unilex.info/case.cfm?id=21	§ 92; 101; 111

SINGAPORE

Cited as	Reference	Cited in
BCY	BCY vs. BCZ High Court of the Republic of Singapore 16 August 2016 Case No.: [2016] SGHC 249	§ 24
BMO	BMO v BMP High Court of the Republic of Singapore 26 May 2017 Case No.: [2017] SGHC 127	§ 24
Firstlink	FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others High Court of the Republic of Singapore 19 June 2014 Case No.: [2014] SGHCR 12.	§ 16; 17; 18; 22

SWITZERLAND

Cited as	Reference	Cited in
Swiss Federal Court 4P.196 / 2003	Unknown Parties Jurisdiction: Swiss 1st Civil Court 7 Jan, 2004 Case No.: 4P.196 / 2003	§ 47
Court of Appeal (Obergericht) of the Canton of Thurgau	Seller (Italy) v. Buyer (Switzerland) Court of Appeal (Obergericht) of the Canton of Thurgau 12 December 2006 Case No.: ZBR.2006.26	§ 65

UNITED KINGDOM

Cited as	Reference	Cited in
Arsanovia	Arsanovia Ltd and others v Cruz City High Court Queen's Bench Division (Commercial Court) 20 December 2012 Case No.: [2012] EWHC 3702 (Comm)	§ 33; 36
C v. D	C v. D Supreme Court of Judicature Court of Appeal (Civil Division) 05 December 2017 Case No.: [2007] EWCA Civ 1282.	§ 33; 34
Hassneh Insurance Co of Israel v Mew	Hassneh Insurance Co. of Israel & Ors v. Steuart J. Mew 22 December 1992 Case No. [1993] 2 Lloyd's Rep. 243	§ 50
Sulamérica	Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others Court of Appeal (Civil Division) 16 May 2012 Caes No.: [2012] EWCA Civ 638	§ 17; 24; 25; 26; 31; 33; 36; 38; 39
XL Insurance Ltd	XL Insurance Ltd v Owens Corning High Court of Justice Queen's bench divisions (Commercial Court) 28 July 1999 Case No.: [2001] 1 All E.R. (Comm) 530	§ 33; 36
Sun Life v The Lincoln National Life	Lincoln National Life Insurance Company v. Sun Life Assurance Company of Canada and others 26 Feb 2004 Case No.: [2004] EWHC 343 (Comm)	§ 48

UNITED STATES OF AMERICA

Cited as	Reference	Cited in
Generica Ltd v Pharmaceutical Basics	GENERICA LIMITED v. PHARMACEUTICAL BASICS, INC. Jurisdiction: United States Court of Appeals, Seventh Circuit. 29 Sep, 1997 Case No.: No. 96-4004	§ 47

TABLE OF ARBITRATION AWARDS

ICC Awards

Cited as	Reference	Cited in
ICC Case No. 9029	ICC Case No.9029 of 1998 Unknown Parties available at http://www.unilex.info/case.cfm?id=660	§ 106
ICC Case No. 8873	ICC Case No.8873 of 1997 Unknown Parties available at http://www.unilex.info/case.cfm?id=641	§ 106

ICSID AWARDS

Cited as	Reference	Cited in
Methanex v. USA	METHANEX CORPORATION v. UNITED STATES OF AMERICA 3 August 2005	§ 55
Caratube v. Kazakhstan	Caratube international Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan ICSID Case No. ARB/13/13 27 September 2017	§ 57

TABLE OF AUTHORITIES

	Uniform Law Review, vol.3, Issue 3, 2000, p. 483-509	
G. Born	Born, Gary B., *The Law Governing International Arbitration Agreements: An International Perspective*, Singapore Academy of Law Journal, vol. 26, no. Special (2014): pp. 814-848	§ 5
G. Born ICA	Born, Gary B., *International Commercial Arbitration*, 2nd edition Kluwer Law International	§ 106
Harisankar K.S	Harisankar K.S., *International Commercial Arbitration in Asia and the Choice of Law Determination*, Journal of International Arbitration, vol.30 issue 6 (2013): pp. 621-636	§ 21
Honnold	John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* 3rd edition (1999), Kluwer Law International	§ 92
Kaufmann-Kohler	Gabrielle Kaufmann-Kohler, Antonio Rigozzi, *International arbitration, Law and Parctice in Switzerland*. Oxford Press 2015	§ 19
Kessedjian	Catherine Kessedjian, *'Competing Approaches to Force Majeure and Hardship'* (International Review of Law and Economics (September 2005) 641-670)	§ 100
Leong H., Tan J.-H	Leong, Hoi Seng Victor; Tan, Jun Hong., *The Law Governing Arbitration Agreements: BCY v BCZ and beyond*, Singapore Academy of Law Journal, vol30, no. 1 (March 2018): pp. 70-96.	§ 15; 32
Maskow	Dietrich Maskow, *Hardship and Force Majeure*, American Journal of Comparative Law, vol.40, Issue 3, 1992, p. 657-670	§ 110

Mercedeh Azerdo	Mercedeh Azerdo Da Silveira, *Part IV, Chapter 11: Adaptation of the Contract on Grounds of Hardship, Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation*, Kluwer Law International 2014	§ 84; 101
Nathan	NATHAN D. O'MALLEY. *Rules of Evidence in International Arbitration: An Annotated Guide*. para.3.165 pp.96	§ 47; 55;
NYU Transnational Notes	New York University, Admissibility of Hacked Emails as Evidence in Arbitration In: Transnational Notes (2016) Available at: https://blogs.law.nyu.edu/transnational/2018/05/admissibility-of-hacked-emails-as-evidence-in-arbitration/	§ 57
Redfern	Nigel Blackaby, Constantine Partasides QC, Alan Redfern, Martin Hunter: *Redfern & Hunter on International Arbitration*, Sixth Edition(2015), Oxford University Press	§ 52
Working Group for PICC	Working Group for the Preparation of Principles of International Commercial Contracts, *Consolidated Edition of Part I and Part II of the Principles of International Commercial Contracts: Decided Amendments & Open questions (Memorandum prepared by the Secretariat),* Available at https://www.unidroit.org/english/documents/2003/study50/s-50-085-e.pdf (last seen at Jan 8 2019)	§ 110

TABLE OF LEGAL SOURCE

CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
HKIAC 2013	2013 Administered Arbitration Rules of Hong Kong International Arbitration Center
HKIAC 2018	2018 Administered Arbitration Rules of Hong Kong International Arbitration Center
IBA Evidence Rules	IBA Rules on the Taking of Evidence in International Arbitration
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts

TABLE OF ABBREVIATION

%	percent
§	paragraph
A.N.A	Answer to the Notice of Arbitration
Art(s).	Article(s)
Cl. Ex.	CLAIMANT's Exhibit Number
Cl. Me.	Memorandum for CLAIMANT (Team John Marshall Law School)
DDP	Delivery Duty Paid
ed(s).	editor(s)
i.e.	id est (that means)
Incoterm	International Commercial Term
Ltd.	Limited
N.A.	Notice of Arbitration
No.	number
p.	page(s)
pacta sunt servanda	Agreement must be kept
para.	paragraph
PDC	publication, disclosure, and communication
PO	Procedure Order
Re. Ex.	RESPONDENT's Exhibit Number
USD	United States Dollar
USA	United States of America
v.	versus
vol.	volume