SIXTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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**THAMMASAT UNIVERSITY**

# MEMORANDUM FOR RESPONDENT

ON BEHALF OF

**PHAR LAP ALLEVAMENTO**
RUE FRANKEL 1
CAPITAL CITY
MEDITERRANEO

AGAINST

**BLACK BEAUTY EQUESTRIAN**
2 SEABISCUIT DRIVE
OCEANSIDE
EQUATORIANNA

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| Answer to the Notice of Arbitration | ANoA |
| CISG | United Nations Convention on Contracts for International Sale of Goods |
| Cl. Ex | Claimant Exhibit |
| Cl. Memo | Claimant Memorandum |
| ed. | Edition |
| Jan | January |
| Lr. | Letter |
| No. | Number |
| NoA | Notice of Arbitration |
| p./pp. | page/pages |
| PO | Procedural Order |
| Q. | Question |
| Res. Ex | Respondent Exhibit |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Model Law | Model Law |
| UNIDROIT | International Institute for the Unification of Private Law |
| v. | versus |

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**ICC Arbitration Cases**



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## STATEMENT OF FACTS

1. The parties to this arbitration are Pharlap Allevamento (**"CLAIMANT"**) and Black Beauty Equestrian (**"RESPONDENT"**, collectively "**The Parties**")

2. CLAIMANT is a renown stud farm company located in Capital City, Mediterraneo. Its racehorse section offers frozen semen of its champion stallions for artificial insemination. Nijinksy III, one of CLAIMANT's racehorses, has won the Triple Crown of Danubia, Equatoriana Oceanside Cup and has successfully sired a number of racehorse champions. This has made Nijinsky III one of the most sought-after stallions for breeding

3. RESPONDENT is a famous equestrian sports company based in Oceanside, Equatoriana. Three years ago, RESPONDENT decided to establish a racehorse stable. Horse racing is extremely popular in Equatoriana, and in the last five years, the growth rate in the business sector has never gone below 4 per cent per year.

4. On **21 March 2017**, RESPONDENT contacted CLAIMANT for the availability of Nijinsky III's semen. At that time, the ban on artificial insemination in Equatoriana had been temporarily lifted. There was a ban due to restrictions on animal transportation which caused by foot and mouth disease. Seeing this as an opportunity, RESPONDENT had requested a high number of doses from CLAIMANT.

5. On **24 March 2017**, CLAIMANT offered RESPONDENT 100 doses of Nijinsky's frozen semen. RESPONDENT was satisfied with the most of the terms of the offer but objected to the choice of law and forum selection clause and insisted on a delivery DDP.

6. CLAIMANT accepted delivery DDP and asked for a price increase and to be relieved from risks of delivery or at least be protected against the risk of changing health and security requirements and the inclusion of hardship clause.

7. RESPONDENT did not agree to pay a higher price for receiving nothing in return. RESPONDENT also suggested the hardship clause was too broad.

8. In Mr. Antley's draft on 10 April 2017, RESPONDENT also wished for an arbitration agreement to be governed by the law of the place of the arbitration and not by the law of the

contract. On 11 April 2017, CLAIMANT changed suggested place of arbitration but did not condemn the proposal that the law of the place of arbitration shall govern the arbitration agreement. Thus, Mr. Antley decided to discuss the choice of law governing the arbitration agreement in the final contract.

9. During the negotiation on **12 April 2017**, two of the Parties' main Negotiators, Mr. Napravnik and Mr. Antley were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia. Because of this, Mr. Krone continued the negotiation who was not involved in the negotiation previously and had no knowledge of such plan. This caused the contract to be finalized later than expected on **6 May 2017**.

10. The negotiation resulted with a narrow clause which was included into the existing force majeure clause and did not provide for an adaptation by the arbitral tribunal.

11. Both CLAIMANT and RESPONDENT agreed on three shipments. The first shipment was 25 doses on 20 May 2017. The second was on the 25th doses on 3 October 2017. Two months before the last shipment, the government of Equatoriania imposed 25% tax on agricultural goods imported from Mediterraneo. After unsuccessful discussions with the government, the president retaliated with 30% tariffs on selected agricultural goods including animal semen from Mediterraneo on 19th December 2017. The tariffs took effect on 15th January onwards.

12. CLAIMANT now made 5% loss from the sales contract and asked for the adaptation of the price by increasing the amount to US dollars 1,250,000. CLAIMANT delivered remaining doses on 23 January 2018.

13. Ms. Kayla Espinoza (RESPONDENT's CEO) stopped the negotiations and refused to pay any additional amount for the tariffs.

14. Additionally, CLAIMANT implied that RESPONDENT acted in bad faith concerning the RESPONDENT's investors. There was no resale disallowance. Even if the RESPONDENT sold doses and at what price is irrelevant to the case. There is no evidence that RESPONDENT resold the doses and made profit.

15. On the 4th of October 2018, both parties agreed to conduct proceedings according to Hongkong Arbitration Rules (HKIAC Rules 2018) - Hong Kong International Arbitration Centre.

16. CLAIMANT designated Ms. Wantha Davis - 14 Churchill Downs, Capital City, Mediterraneo as the first co-arbitrator in this case. RESPONDENT designated Dr Francesca Dettorie - Circus Maximus Avenue 1, Derby Equatoriana as second co-arbitrator in this arbitration. Lastly, Dr. Dettorie and Ms. Wantha Davis designated Prof.Calvin de Souza as Presiding Arbitrator.

## ARGUMENTS

## ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE ANY JURISDICTION OR POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

### I. ARBITRATION AGREEMENT IS NOT GOVERNED BY MEDITERRANEAN LAW BUT BY DANUBIAN LAW

17. It is widely accepted that the parties to a contract with an arbitration clause has various arbitral relationships governed by separate laws, namely the proper law of contract, the proper law of arbitration agreement and *lex arbitri* [*Mustill/Boyd, p. 61*]. The law governing the interpretation of the arbitration is the same question as the one concerning the validity of the arbitration agreement [*Born 2009, p. 561*]. It is the common ground between the parties that, in absence of agreement on the law governing the arbitration agreement, it is widely accepted that the proper law of an arbitration agreement is determined by a three-stage enquiry: (i) express choice; (ii) implied choice; and (iii) closest and most real connection examined in separately and in respective order [*SulAmérica Case, para 25; Born 2014*].

18. Applying such test, CLAIMANT asserts that Mediterranean law should apply to determine the jurisdiction and power of the Tribunal [*NoA, p. 7, para 15*] stating that it is either an express choice of law [*Cl. Memo., para 17-20*] or, in the alternative, an implied choice derived from the law governing the Sale Agreement [*Cl. Memo., para 21-30*]. On the contrary, RESPONDENT submits that the Tribunal shall apply Danubian law as the proper law of an arbitration agreement as no express choice of law was identified as Mediterranean law (**A.**); the implied choice of law is Danubian law (**B.**); and, in any event, Danubian law is the most real and closely connected to the arbitration agreement.

#### A. No express choice of law for arbitration agreement can be identified in favor of Mediterranean law

19. The Parties to the present proceeding did not make any express proper choice of law governing the arbitration agreement was agreed by the parties. In determining the choice of law governing the arbitration agreement, the separability presumption governs that an arbitration agreement is not necessarily the same as the law applicable to the contract as a whole [*Interim Award in ICC case No. 4131, p. 132; SulAmérica Case, para 11*]. The parties may expressly agree on the choice of law applicable to the arbitration agreement. An express

agreement is established when the parties have explicitly designated the law governing within the contract [*Fiona Case, para 5; BGY Case, para 41*; *Leong /Tan, p. 90, para 44*].

20. In the present case, while the law underlying the contract and lex arbitri was agreed, the Parties has never explicitly agreed on the proper law of the arbitration agreement [*Cl. Ex.5, p. 14, para 15*] It was erroneously argued by CLAIMANT that the choice of law was expressed as the Mediterranean law through the term 'Sale Agreement' [*Cl. Memo., p. 4, para 17*]. Such term is not sufficient to illustrate an express designation of the law governing the arbitration agreement. In such case, the presumption of separability remains. While the Tribunal in the *BCY Case* found that the doctrine of separability did not "insulate the arbitration agreement from the substantive contract for all purposes" [*BCY Case, para 60; Cl. Memo., p. 5, para 19*], it did not find that the agreement had an express choice of law to be the law governing the substantive contract. [*BCY Case, para 41*]. Therefore, there presents no express choice of law applicable to the arbitration agreement.

**B. The implied choice of law for arbitration agreement can by no means be Mediterranean law but, instead, Danubian law**

21. Danubian law, as the law at the seat, is an implied choice of law applicable to the arbitration agreement. As the second stage of the SulAmérica test, the Tribunal must enquire into the implied choice of law designated by the Parties [*SulAmérica Case, para 25*]. It is Respondent's submission that Danubian law is presumed to be an implied choice of law (**i**); and even though there is an assumption in favor of Mediterranean law, such presumption is rebutted (**ii**).

**i. Danubian law as the law at the seat is presumed to be an implied choice of law**

22. There is a presumption in favour of Danubian law as an implied choice of law. Given the circumstances of the case, the law at the seat of the arbitration reflects an implied choice of law governing law of the arbitration agreement [*FirstLink Case, para 17, Infowares, para 15; Dicey et al, para 16-020*]. This is derived from the separability of the arbitration agreement [*Redfern/Hunter, p. 159, para 3.14*] supported by the provisions relating to its enforcement [*New York Convention, Article V(1)(a)*]. In a similar vein, some arbitral tribunals also apply the governing law of the arbitration agreement in favor of the law at the place of arbitration [*Bulbank Case, p. 293; Justice Mustill in Black-Clawson, p. 483; Morrissey/Graves, p. 408].* Furthermore, the purpose of the arbitration agreement is for the disputes to be decided by

the tribunal commonly selected by them [*Fiona Case, para 6*]. On this account, the law at the seat reflects the parties' desire to resolve their commercial disputes at a place entrusted with neutrality [*FirstLink Case, para 13*].

23. In the case at hand, the arbitration agreement specifies Danubia as the seat or place of arbitration [*Cl. Ex.5, Clause 15*]. Such designation establishes the presumption of an implicit choice of law chosen by the party to govern the arbitration agreement [*FirstLink Case, para 17*]. There is no indication pointing to the contrary of this presumption. This is supported by the doctrine of separability acknowledged by both Mediterranean and Danubian law [*ANoA, p 31, para 14*]. It is particularly true in the light of the circumstances of this case which pointed out that it was indeed the question of neutrality that led to the choosing of Danubia as the seat [*Res. Ex.2, p 34*]. Thus, taken it procedural nature, Danubian law is an implicit choice of law governing the arbitration agreement.

**ii. Even if the presumption in favor of Mediterranean law is found, there is a contrary indication which will negate the presumption**

24. Should the Tribunal find that the implied choice of law is the law underlying the substantive contract, that is Mediterranean Law, there is an indication that will negate such presumption. While an implied choice of law in *SulAmerica* was, the law governing the substantive contract, the Tribunal found that there were factors pointing out to the different conclusion [*SulAmérica Case, para 31*]. Such factors may include the 'consequences for its effectiveness' of choosing the law underlying the substantive contract [*SulAmérica Case, para 26*].

25. It is asserted by CLAIMANT, in line with *BCY*, that the seat law rather governs the procedure of the arbitration and that the seat's substantive law would not necessarily be neutral [*BCY Case, para 62; Cl. Memo, p 6, para 26*]. It is the RESPONDENT's contention that such an argument is a mere observation and should not trump over the intention of the Parties in choosing a neutral third country as the seat. The Tribunal should not predetermine that the Parties choose the seat of arbitration merely because of the neutrality of the arbitral procedural law. The Parties had indeed foreseen and intended that in choosing the Danubia as the seat would result in another system of law even with substantive nature being applied to arbitral proceeding [*SulAmérica, para 29*] including the consistent jurisprudence on the doctrine of separability [*PO2 Q36*]. It follows that the consequence of choosing Mediterranean law would

be ineffective, provided the intention of the Parties for the neutrality [*Res. Ex.2, p 34; Res. Ex. p 3*].

26. CLAIMANT additionally argues that the drafting history of the arbitration clause, removing the choice of law as the law of Equatoriana, does not indicate contrary presumption in favor of Danubian Law [*Cl. Memo, p 7, para 28*]. The removal of such term did not necessarily suggest that the Parties intended that Mediterranean law applies to arbitration agreement, as the reason for the removal of such term was to remove any prejudice against the Parties' domestic laws in the arbitration agreement for the purpose of neutrality [*Res. Ex.1, p 33; Res. Ex.2, p 34*]. Moreover, RESPONDENT did not accept that the arbitration agreement was governed by Mediterranean law as evidenced in Mr. Antley's negotiation file [*Res. Ex.3, p 35*]. Therefore, the presumption on Parties' implicit intention in favour of Mediterranean, if any, would be negated. The question would then turn to the third enquiry [*SulAmérica Case, para 31-32*].

### C. In any event, the law with which arbitration agreement has the closest and most real connection shall be Danubian law

27. Should the Tribunal find that there is no implied proper choice of law governing the arbitration agreement, the law of Danubia shall be applied as the closest and most real connection to the arbitration agreement. The Tribunal shall examine the closest and most real connection test as a third stage in the case that an implied choice is unfound [*SulAmérica, para 26*]. It has long been established that, in a rare case, the law governing the arbitration would differ from the law of the seat or place of arbitration [*Black-Clawson Case, p 438*]. Where the parties deliberately chose separate sets of laws, the law which has 'the closest and most real connection' with the place where the parties chose to arbitrate than with the place of the law underlying the contract [*C v D Case, para 26*].

28. Presently, the Parties chose the Danubia as the seat of arbitration separated from the law underlying the substantive contract [*Cl. Ex.5, p 14, para 15*]. Although it may be plausible that, in an exceptional case, the governing law can be different from that of the seat, the mere fact that Mediterranean law is the governing law of the main contract is not sufficient to substantiate that the arbitration agreement so governed [*Abuja Case, para 22*]. It still remains that that Danubian law, the law at the seat of arbitration shall apply as the law that is the most real and closely connected with the arbitration proceeding.

## II. UNDER DANUBIAN LAW, ARBITRATION AGREEMENT PROVIDES NO JURISDICTION FOR THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

29. Danubian law that applies in this case shall not only mean any specific law of Danubia yet the entire "common law system" of Danubia [*PO2, Q44*]. As evidenced by consistent jurisprudence in Danubian courts applying with "legal force" in common law system [*Morrissey/Graves*, *p 24 para 3*], "CISG does not apply to the interpretation of arbitration agreement" [*PO2, Q36*]. CLAIMANT's broad interpretation of arbitration agreement under CISG [*Cl. Memo., para 33*] should thus be disregarded. Arbitration agreement is interpreted under Danubian Contract Law to provide no jurisdiction for the Arbitral Tribunal over contract adaptation, because the common intention of the Parties cannot be so established by wording of arbitration agreement and hardship clause (**A.**); the negotiation history cannot be used to contradict such common intention of the Parties (**B.**).

### A. The common intention of the Parties cannot be established to provide jurisdiction for the Arbitral Tribunal to adapt the Contract

30. CLAIMANT argued that "the wording of the arbitration clause contains contract adaptation" [*Cl. Memo., paras 39-41*]. Though any contract is to be interpreted according to the common intention of the parties [*Danubian Contract Law, Art. 4(1); PICC, Art. 4(1); PO2, Q45*] as suggested by CLAIMANT [*Cl. Memo., para 33*], the wording of arbitration agreement does not exhibit any common intention of the Parties to provide jurisdiction for the Arbitral Tribunal to adapt the Contract (**i.**). Moreover, if one was to consider hardship clause in Clause 12 as it may imply the common intention of the Parties whether to allow any contract adaptation, the wording of hardship clause does not establish such common intention of the Parties (**ii.**).

#### i. The wording of the arbitration agreement establishes the common intention of the Parties not to provide any jurisdiction for the Arbitral Tribunal to adapt the Contract

31. First, the chosen wording of the arbitration agreement does not opt for the standard arbitration clause of HKIAC Model Clause, which contains the broad wording with all additions [*HKIAC*, *para 2*]. Rather, it employs such clause by deleting the terms which could be construed as providing jurisdiction for the Arbitral Tribunal to adapt the Contract [*Cl. Ex. 5, Clause 15*]. Of these deleted terms, the term "relating to the contract", if employed, will

significantly label the arbitration agreement as a "broad arbitration clause" [*Michele Amoruso Case, para 1080; McDonnell Case, para 1019*], extending an arbitration clause to reach claims that are not under the contract but however "touch matters covered by the contract" [*Pennzoil Case, para 1061*]. Whereas, in the absence of this term, the term "[a]ny dispute arising out of the [Contract]" as standing alone will be considered "narrow" [*Tracer Case, para 1292*] and, *vice versa*, will by no means extend to touch the matters not under but still covered by the contract, including the matter of contract adaptation going beyond interpretation of the contract [*ANOA, para 12*] as in this case.

32. Second, CLAIMANT argued that the wording of arbitration agreement supports the Arbitral Tribunal's jurisdiction over the dispute of contract adaptation, because "the term "performance" is enumerated in the arbitration [agreement] and the dispute over contract adaptation arose out of the performance of [the Contract by] CLAIMANT" [*Cl. Memo., paras 39-40*]. Apparently, CLAIMANT did not even seek to argue that the dispute in this case arose out of the Contract but argued only that it "arose out of the performance of the Contract", consequently proving no jurisdiction of the Arbitral Tribunal to adapt the Contract. Also, CLAIMANT's argument on the term "performance" in the arbitration agreement is incorrectly substantiated. The dispute at hand does not concern any performance of the Contract, as it does not concern the non-performance; the performance in delay; the incorrect performance of duties under the Contract. Moreover, the fact that the contract adaptation is located under the chapeau of "Performance" cannot conclusively indicate that the dispute of contract adaptation can be arbitrated as the "dispute concerning performance of the Contract". This is simply because there are other conventions as well where the matter of contract adaptation is not placed under the "Performance". For example, the PECL where the contract adaptation is placed under the chapter of "Contents and Effects" instead of being placed under the chapter of "Performance" [*PECL, Art. 6:111*] as misconstrued by CLAIMANT [*Cl. Memo., para 40*].

**ii. The wording of hardship clause establishes the common intention of the Parties not to provide any jurisdiction for the Arbitral Tribunal to adapt the Contract**

33. Given its connection with arbitration agreement [*Res. Ex. 3*] in a manner that may reflect any intention of the Parties in regards to the adaptation of the Contract [*], the hardship clause in this case contains a very narrow wording reduced from the broad ICC Hardship Clause 2003

suggested by CLAIMANT's Ms. Napravnik [*Res. Ex. 2*]. Unlike the ICC Hardship Clause - which, if incorporated into the Contract - will allow the negotiation for alternative contractual terms in the face of hardship event [*ICC Hardship Clause 2003*], the hardship clause finalized by CLAIMANT's Mr. John Ferguson and RESPONDENT's Mr. Krone is a mere reference into the force majeure clause allowing only the exemption of liability [*Cl. Ex. 5, Clause 12*], while this clause does not stand on its own as the hardship clause to allow any adaptation of the Contract as is the case with the ICC Hardship Clause. The significance of this clause not standing on its own separately from the force majeure clause can demonstrate that what is needed by the Parties is not any adaptation of the Contract, but rather the exemption of liability as once became the conversation in the preparation of the PICC in 1986 [*Report on the 1986 Meeting, p 13*]. Therefore, the hardship clause chosen by the Parties also supports that the common intention of the Parties not to provide any jurisdiction for the Arbitral Tribunal to adapt the Contract in this case.

### B. The drafting history cannot be used to contradict the established common intention of the Parties

34. CLAIMANT argued that the negotiation history of the arbitration agreement shows the common intention of the Parties to allow the contract adaptation [*Cl. Memo., para 34*].

35. However, Danubian Contract Law as the law governing the interpretation of arbitration agreement constitutes a four corners rule, prohibiting the use of any negotiation history in a manner that contradicts the established common intention of the Parties [*Danubian Contract Law, Art. 4.3; PO2, Q45*]. By the effect of the four corners rule having the same effect as the merger clauses [*PICC, Art. 2.1.17*], the negotiation history between CLAIMANT's Ms. Napravnik and Mr. Antley raised by CLAIMANT regarding CLAIMANT's desire for the adaptation clause in the Contract and the response RESPONDENT's Mr. Antley [*Cl. Ex. 8*] shall not be construed in any way that will contradict the established common intention of the Parties which provides no jurisdiction for the Arbitral Tribunal to adapt the Contract. CLAIMANT's argument that this negotiation history suggests otherwise to provide jurisdiction for contract adaptation can thus not be sustained.

## III. SHOULD THIS CASE BE DECIDED *EX AEQUO ET BONO*, ARBITRAL TRIBUNAL HAS NO POWER TO ADAPT THE CONTRACT IN THE ABSENCE OF THE PARTIES' EXPRESS AUTHORIZATION

36. Apart from the lack of jurisdiction to adapt the Contract, the Arbitral Tribunal's power to adapt the Contract can also not be established in this case should the case be decided *ex aequo et bono*. The power to adapt the Contract on the *ex aequo et bono* basis must be derived from the Parties' express authorization as required under Danubian Arbitration Law (**A.**); and that Parties' authorization is, inopportunely, missing in this case (**B.**).

### A. The contract adaptation based on *ex aequo et bono* requires Parties' express authorization under Danubian Arbitration Law

37. CLAIMANT argued that "[t]he law governing arbitration regulates the procedural conduct of the arbitral proceedings, while the power of adaptation is related to substantive rights of parties", and accordingly, that "Danubian Arbitration Law does not restrict the [Arbitral] Tribunal's power to adapt the contract" [*Cl. Memo., para 43*]. RESPONDENT do not contest CLAIMANT's understanding regarding such scope of applying the *lex arbitri*. But, in order for any Party to legitimately exercise its substantive rights, the Party is required to exercise its rights in a manner that "follows" the arbitral procedural law [*Redfern/Hunter, p 171*], which is in this case also Danubian Arbitration Law, given that no other law was agreed upon by Parties to be the arbitral procedural law instead [*Born, Ch. 6 p 80*].

38. Even if the power of adaptation is substantive rights of Parties, the adaptation by the Arbitral Tribunal must however be done in line with Danubian Arbitration Law, especially in respect of Article 28(3) which serves in Danubian Court's view as the "general standard" requiring Parties' express authorization of the Arbitral Tribunal for contract adaptation [*PO2, Q36*].

### B. The Parties' express authorization as required under Danubian Arbitration Law is missing in this case

39. CLAIMANT alternatively argued that "Clause 15 of the [Contract] is an arbitration clause with standard wording and is sufficient to authorize the [Arbitral] Tribunal to adapt the [Contract] when there exists hardship" [*Cl. Memo., para 44*]. Apparently, there are at least two problems with this argument, especially in regards to the threshold introduced by CLAIMANT in order to consider the sufficient authorization: the threshold of "an arbitration clause with standard wording and the existence of hardship".

40. First, CLAIMANT derived this threshold from the other arbitration case with the seat different from that of the present case [*PO2, Q39*]. While it is comprehensible to see the other Arbitral Tribunal set such threshold in line with Mediterranean consistent jurisprudence, it is difficult to understand how this threshold should be upheld in this case where the seat of arbitration is Danubia and Danubian courts themselves also have the contrary view that "the express conferral of power is required" [*PO2, Q36*].

41. Second, CLAIMANT erred in considering Clause 15 the "arbitration clause with standard wording"; this is not true, for the wording of Clause 15 was already "reduced from the HKIAC Model Clause" [*The 2018 HKIAC Model Clause*] as earlier submitted by RESPONDENT in its Answer to the Notice of Arbitration [*ANOA, para 13*]. Therefore, Clause 15 shall not be considered an arbitration clause with standard wording.

42. In this case, RESPONDENT submits that the Parties' express authorization is missing, as there is no fact at all indicating that the Parties did expressly authorize the Arbitral Tribunal under arbitration agreement for contract adaptation. For this, it can be concluded that the Arbitral Tribunal has no powers to adapt the Contract in the absence of such Parties' express authorization.

## ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE ASSUMPTION THAT IT HAS BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

43. CLAIMANT mainly argued that it should be entitled to submit the Award of the other arbitration proceedings as evidence in this case. Yet, it fell short to demonstrate how the Award should be admissible, given that the Award was obtained either in breach of confidentiality agreement or through illegal means [*Letter Fasttrack 3 October 2018, p 51*]. In either of these two ways, RESPONDENT submits that the breach of confidentiality agreement (**I.**) and the illegal means of obtainment (**II.**) constitute grounds for inadmissibility of the Award. In any event, RESPONDENT submits that the Award is of no relevance and materiality (**III.**) due to the following reasons:

## I. THE EVIDENCE OBTAINED FROM THE OTHER ARBITRATION PROCEEDINGS IN BREACH OF THE CONFIDENTIALITY AGREEMENT IS INADMISSIBLE IN THIS CASE

44. As concurred by CLAIMANT itself [*Cl. Memo., para 62*], there was an express confidentiality agreement concluded between RESPONDENT and its opponent in the other proceedings in a form of "a confidentiality provision included in the chosen arbitration rules" [*Smeureanu, p 10*; *HKIAC Rules 2013, Art 42*]. This confidentiality agreement, by its effect, imposes on those two parties as well as the witnesses of that proceedings [*HKIAC Rules 2013, Art 42.2*] the confidentiality duties not to "publish, disclose or even communicate any information relating to [the Award]" [*HKIAC Rules 2013, Art 42.1(b)*]. Provided that these confidentiality duties were breached by the witness of that proceedings, RESPONDENT submits that the Award concerned should not be admissible because its obtainment stems from such breach of confidentiality agreement (**A.**). If CLAIMANT were to invoke any prevailing principles of transparency that remained untouched in its Memorandum, RESPONDENT maintains that such principles cannot, in any event, lead to the admissibility of the Award (**B.**).

### A. The breach of confidentiality agreement renders the Award inadmissible as evidence in this case

45. CLAIMANT firstly sought to argue that there is a presumption whereby any evidence should be accepted in arbitration by reasoning that "the international tribunals only focus on the questions of evidentiary weight rather than spending their time ruling on admissibility of the evidence" [*Cl. Memo., para 60*]. However, if one was to thoroughly read the authority cited by CLAIMANT in supports of this presumption, then one could find that such authority does not propose to create any of such presumption, but to simply propose that "the issue of evidentiary weight can be done at the same time when analysing the admissibility of the evidence" [*Waincymer, p 793*]. Basing its reasoning on the distorted content of the authority, CLAIMANT's proposed presumption should not be upheld.

46. CLAIMANT further argued that the admission of the Award as an evidence into this proceeding would not infringe upon any confidentiality rights of RESPONDENT [*Cl. Memo., paras 61-64*]. In fact, the question at hand does not turn on whether the admission of this Award will violate any confidentiality rights of RESPONDENT, as incorrectly framed by CLAIMANT. Rather, it turns on whether this Award - which was already obtained in breach

of the confidentiality agreement of the other proceedings - should still be treated as admissible in this arbitration [*PO1, Point III para 1 b.*]. Thus, focusing solely on the latter question, RESPONDENT submits that the Award should not be admissible in this arbitration. Even an unpublished arbitral award from one arbitration proceedings shall not be admissible as an evidence in the other proceedings [*Hassneh Insurance Case; Lincoln National Life Case*] if its use or its disclosure breaches the confidentiality agreement of the former arbitration [*Aegis Case*]. Thus, applying this test with greater force in our circumstance where the confidentiality agreement had been breached, the Award shall by no means be admissible in this case.

47. Finally, what is left in CLAIMANT's Memorandum for us to counter-argue is CLAIMANT's alternative argument that the use of the Award as an evidence in this case will not damage the confidentiality veil of the other proceedings [*Cl. Memo., paras 65-67*]. In this regard, CLAIMANT compared this case to the ruling of *Aegis Case* (referred to as *"Associated Electric Case*" in CLAIMANT's Memorandum). However, RESPONDENT submits that our present case is to be distinguished from *Aegis case* in that, first, the Parties (i.e. "CLAIMANT" and "RESPONDENT") in this present proceeding are not the same arbitrating parties in the other proceedings (i.e. "RESPONDENT" and "the Mediterranean buyer of RESPONDENT's mares") under the same disputed contracts, as was the case in Associated Electric. Second, the content of confidentiality agreement in the other proceedings and that of this present proceeding are different in its scope of protection. While the express confidentiality agreement in *Aegis case* has its special purpose to prevent the third party from relying on any evidence used in the earlier proceedings against the two arbitrating Parties [*Kyriaki, p 104*], the confidentiality agreement at hand does not contain any of such special purpose [*Kyriaki, p 107*] but only general standard purpose to prevent the unfavorable publication of the Award not in accordance with the confidentiality agreement [*HKIAC Rules 2013, Art 42*]. Therefore, if CLAIMANT is to apply the rationale of *Aegis case* in this context, such rationale will apply with greater force in favor of RESPONDENT's submission.

### B. The prevailing principles of transparency invoked by CLAIMANT cannot, in any event, lead to the admissibility of the Award

48. While the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "**Transparency Rules**") is inapplicable in this context [*Transparency Rules, Art 1(1)*], CLAIMANT seems to rely on the prevailing principles of transparency reflected through the Transparency Rules in order to justify the admissibility of the Award [*Letter Langweiler, p 49*].

However, RESPONDENT submits that the prevailing principles of transparency cannot be transposed to the context of international commercial arbitration to allow for submission of evidence in breach of confidentiality agreement. Yet, since CLAIMANT completely omitted this issue in Memorandum, RESPONDENT will briefly substantiate its argument with only two reasons:

49. First, there is no prevailing principles of transparency in international commercial arbitration that would entitle CLAIMANT to submit evidence obtained in breach of confidentiality agreement, as "the confidentiality persists" and thus "should genuinely be considered ahead of transparency" [*Poorooye/Feehily, pp 310, 319*]. As the principles of transparency has not developed in the contradictory [*Feiciano, p 11*] but co-existent manner [*Tang/Lin, p 1*] with such pillar of international commercial arbitration as confidentiality [*Ruscalla, p 6*], the principles of transparency shall in no case be construed as a rivalry of the confidentiality of arbitration. Therefore, CLAIMANT shall find no support in these principles of transparency in such a way that will justify the breach of confidentiality and allow the Award to be admissible in this case.

50. Second, even if the Arbitral Tribunal would find that there exists the prevailing principles of transparency in international commercial arbitration in the form of 'public interest exception' [*Kyriaki, p 105*], RESPONDENT submits that this concept of public interest deeply rooted in investor-state arbitration should be taken into account in a lesser degree in this context of international commercial arbitration where no public element is involved [*Ruscalla, p 3*; *Yu/Giupponi, p 352; Rogers, p 1312*]. Hence, the public interest in promoting transparency shall be outweighed by the confidentiality protection of the Award. This argument is supported by the several academic views [*Ruscalla, p 8; Buys, p 135 para 1*].

## II. THE EVIDENCE OBTAINED FROM THE OTHER ARBITRATION PROCEEDINGS THROUGH ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

51. Pursuant to Article 22.2 of the 2018 HKIAC rule, the Tribunal has a discretionary power to determine the admissibility of evidence including whether to apply strict rules of evidence. While the issues concerning the obtainment of evidence through an illegal mean was left unaddressed by CLAIMANT, it is RESPONDENT's submission that the Tribunal should find the evidence obtained from the other arbitration proceedings through illegal hack of

RESPONDENT'S Computer's system shall be inadmissible (**A**). In the alternative, even if illegally obtained (**B**).

### A. The Award obtained other arbitration shall be inadmissible on the ground of illegally obtained evidence

52. The Tribunal should reject the admissibility of the Award on the ground that such evidence is illegally obtained. The general principles of on fairness and equality of the parties support the denial of admissibility of evidence on the ground of it being obtained illegally [*IBA Rules, Article 9(2)(g)*]. The Tribunal may exclude non-privileged documents from the evidence if the situation would create unfairness [*IBA Commentary, 2010, p 26*] among the parties depending on the circumstances of the case [*Waincymer, p 797*].

53. A piece of evidence is illegal obtained when it was *prima facie* obtained in violation of a law [*Methanex Case, p 27, para 55*]. Presently, the Award is obtained through an illegal mean by hacking into RESPONDENT's computer [*Letter Fasttrack, p 50; PO2 Q41*]. It is generally accepted, as a matter of fact, that hacking into one's computer is indeed an illegal conduct in violation of the law, such as the right to privacy [*EDF Case, para 4*]. Such illegal obtainment should taint the admissibility of such evidence as 'a fruit of poisonous tree' [*Nardon Case, p 308*]. Rendering illegally obtained evidence inadmissible is significant consideration in compliance with public policy [*Pilkov, p 154; Waincymer, p 793*]. Furthermore, should the Tribunal admit the illegally obtained evidence, the commercial interests on confidentiality of future disputing parties international commercial arbitration will be jeopardized.

54. Although in illegally obtained evidence was admitted in various international tribunals [*Corfu Channel Case, p 34-36; Caratube Award, para 156*]. Distinction can be made to the case at hand that, in the *Corfu Channel Case*, no objection was made to the admissibility of the illegally obtained evidence [*EDF Case, para 36*]. In *Caratube Case,* where the Tribunal relied on non-privileged leaked documents, it was owing to the fact that the leaked documents are 'publicly available information' [*Caratube Decision in GAR, p 3*]. Here, the Award to be obtained by CLAIMANT is confidential and not made publicly available [*PO2 Q41*]. Such 'confidential' Award, though classified as privileged documents, should be respected in accordance with the principle of procedural fairness because of its confidential nature [*Libananco Case, para 78*]. Therefore, this Tribunal should find the evidence obtained from unlawful hacking of

RESPONDENT's computer system in admissible in accordance with Article 9(2)(g) of IBA Rules [*EDF Case, para 47*].

**B. In the alternative, CLAIMANT's involvement in obtainment of evidence through illegal mean renders the evidence inadmissible**

55. Even if the Tribunal were to find illegally obtained evidence admissible, CLAIMANT's involvement on obtaining the evidence from an illegal hacking of Respondent's computer system shall prevent CLAIMANT from submitting such evidence under the principle of good faith. The principle of good faith as manifested the procedural rules of evidence forms the basis for exclusion of the evidence [*IBA Rules, Preamble para 3; Waincymer, p 797*]. Where the party adducing evidence is involved in an unlawful act to obtain such evidence, such party should not be allowed to benefit from his own wrong in accordance with the principle of *nullus commodum capere potest de sua iniuria propria* stemming from the border good faith principle [*Cheng, p 149*].

56. While the Tribunal in *Caratube Case* admitted the illegally obtained non-privileged documents, it finds that "*if a party to an arbitration has had a part in the hacking of the documents, this would be an irresistible reason to bar that party from profiting from its own misconduct and thus to refuse the production of these documents*" [*Caratube Decision in GAR, p 4*]. The Tribunal should deny the admissibility of the evidence obtained illegally by the Parties based on principle of good faith and procedural fairness given that the adducing party involved in illegally obtainment of evidence [*Methanex, paras 58-59*].

57. In this case, the evidence should be inadmissible because of CLAIMANT's involvement in obtaining the evidence. CLAIMANT made the US$ 1000 payment to an intelligence company to obtain a copy of the award [*PO2 Q41*]. In turn, RESPONDENT's computer system was hacked [*Letter Fasttrack, p 50*]. Based on the presumption that the Award was obtained through the illegal hack, the involvement of CLAIMANT in buying the Award from the ill-reputed source conveys the lack of good faith of CLAIMANT in submitting such evidence. Similarly, in *Methanex* Case, Methanex, the Tribunal also denied to admit the evidence as that Methanex obtained through private detective as well as the one obtained by the United States through her intelligence asset [*Methanex, paras 7 and 54*]. Hence, it is RESPONDENT's submission that this Tribunal should find that the Award from the other arbitration, through illegal

hacking with involvement of CLAIMANT contrary to its good faith duty, inadmissible [*Methanex, paras 59*].

## III. IN ANY EVENT, THE EVIDENCE OBTAINED FROM THE OTHER ARBITRATION IS IRRELEVANT AND IMMATERIAL AND, THUS, SHOULD BE EXCLUDED FROM THIS PROCEEDING

58. The evidence obtained from the other arbitration proceedings should be excluded because of its lack of relevance and materiality in this case. The Arbitral Tribunal shall exclude any document due to its lack of sufficient relevance to the case or material to its outcome [*IBA Rules, Article 9(2)(a); HKIAC Rules, Art. 22.3*]. While relevancy "concerns the general relationship between evidence and the case", materiality is when such evidence as "having connection to the outcome of the case" [*Pilkov, p 149*]. A piece of evidence is relevant when it is useful in order to establish the truth of the factual allegation and is material when it is necessary to allow for the complete consideration of facts [*Moser/Bao, p 193; Raeschke-Kessler; p 22*].

59. In the present case, the evidence to be obtained from the other arbitration is neither relevant nor material to the present dispute. While the Award is alleged to concern the same issue of contract adaptation as a result from the increase of tariffs, it cannot establish any truth, factual allegation or the complete consideration whether any factual allegation is accurate, given that the Award was rendered in light of a set of facts and laws different from this present case [*PO2, Q39*]. For this, RESPONDENT submits that such evidence should in no circumstance be admissible in this case.

# ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,2500,000 OR ANY OTHER AMOUNT FROM AN ADAPTATION OF THE PRICE

## I. CLAIMANT IS NOT ENTITLED TO ADAPT THE PRICE UNDER CLAUSE 12, THE HARDSHIP CLAUSE OF THE SALES AGREEMENT

60. The CLAIMANT is not entitled to a price adaption of US$ 1,250,000 under Clause 12 of the Sales Agreement because of the 30% higher tariffs on the frozen race horse semen. There is no situation of hardship given **(A)** and hence the legal consequence of price adaptation is not applicable **(B)**.

## A. The new tariff regime is not a situation of hardship and does not fulfil the requirements of Clause 12 of the Sales Agreement

61. The Frozen Semen Sales Agreement contained three shipments of frozen horse semen *[Cl. Ex 6]*. Before the third and last shipment, the government of Equatoriana imposed a new tariff regime with 30 % higher tariffs on agricultural products. Frozen horse semen are covered by the published list of products *[Cl. Ex 7]*. The CLAIMANT claimed that he is entitled to get US$ 1,250,000 because of the situation of hardship *[ANoA, para 22]*.

62. Under Clause 12, the hardship clause in the Sales Agreement, the CLAIMANT "shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" *[Cl. Ex 5]*. Hence the new tariff regime must have been an additional health and safety requirement or a comparable situation **(i)**, unforeseeable **(ii)** and must have been more onerous for the CLAIMANT **(iii)**.

### i. The new tariff regime is not an additional health and safety requirement or a comparable situation

63. The 30% higher tariffs on agricultural products from Equatoriana that include the frozen race horse semen must be an additional health and safety requirement or a comparable situation to cover the situation of Clause 12, the hardship clause of the Sales Agreement. Terms and expressions shall be interpreted in the light of the whole contract *[PICC, Art. 4.4]*. (*a*) It must also be interpreted in line with parties' common intention and, (*b*) in case that such intention cannot be established, in accordance with the meaning that reasonable persons of the same kind would give *[PICC, Art. 4.1]*. So the textual content of the document represents the contract's interpretation, when the contract is clear, which is to decide by the court *[Vogenauer, para 6]*.

#### a. *Increase of tariffs is not intended by parties to be governed under additional health and safety requirement*

64. In determining the terms of contract, common intention of the parties must be considered. *[UNIDROIT Institute, Article 4.1, Comment 1]* Further taking in all relevant circumstances. *[UNIDROIT Institute, Article 4.3]*.

65. CLAIMANT and RESPONDENT had agreed to use the DDP is terms of delivery. This ensures that CLAIMANT has the duty to pay for any customs, duties and charges. In prior negotiations, the CLAIMANT had expressly stated they are not willing to accept risk associated with any customs regulations *[Cl. Ex 4]*. However, this was not acceptable by RESPONDENT as the extra charges incurred from DDP would be rendered pointless. *[ANoA, para 4]* At the time of conclusion of contract, no wording suggests increase of tariff to be risk govern under Clause 12. Therefore, it can be inferred that parties had the common intention that increase of tariff is not comparable to additional health and safety requirement.

*b. Increase of tariffs is not comparable to additional health and safety requirement objective interpretation*

66. Alternatively, if the court rejects the subjective interpretation, the understanding of a reasonable person must be taken as decisive to interpret the PARTIES' intention agreeing on Clause 12 *[UNIDROIT Institute, Article 4.1, para 4]*.

67. Taking the language of the contract into account, the objective interpretation leads to a non-comparability of the increased tariffs with a "additional health and safety requirements" (Clause 12). Health and safety measures *[Alberta Case]* are responsible for guaranteeing the wellbeing and security of the people that are touched by the measure *[Schlechtriem/ Schwenzer]*. The term comparable means the confrontation of two or more items or products and placing them side by side is a comparability analysis. If the characteristics are common enough they are 'comparable' *[Black's Law Dictionary: "Comparability Analysis"]*.

68. However, the CLAIMANT raised the claim that the situation is just comparable to a health and safety requirement *[Cl. Memo., para 75]*. Here, the new tariff regime contains 30% higher tariffs for frozen racehorse semen. The increase tariffs as retaliatory reaction to the higher tariffs of Mediterraneo's government on agricultural products from Equatoriana. The intent behind the higher tariffs was a trade equilibrium between the two countries and not the welfare of the people *[Cl. Ex 6]*. Consequently, a reasonable person would not compare the new tariff regime with additional health and safety requirements because nature, content and conditions of the situation are totally different *[Schlechtriem/ Schwenzer]*. Concluding this, the 30% higher tariffs are not comparable to a health and safety requirement.

**ii. The new tariff regime was foreseen by the CLAIMANT**

69. Contrary to the CLAIMANT's opinion, the 30% higher tariffs were foreseen by the PARTIES. To fulfil the requirements of Clause 12, the hardship clause of the Sales Agreement, the event must be *inter alia* unforeseen. An unforeseen event means a circumstance that cannot be reasonably expected at the time of the conclusion of contract *[Schlechtriem/Schwenzer, p. 1134, para 14]*.

70. Here the differentiation between unforeseen and unforeseeable events must be made. Unforeseen are events that were not expected or predicted before they occurred *[Oxford Dictionary: "unforeseen"]*. Unforeseeable are, on the other hand, events that are incapable of being predicted or anticipated *[Oxford Dictionary: "unforeseeable"]*.Hence, in the first case there is a possibility and in the second there is no possibility of foreseeing the event. In some cases "unforeseeable" can be used instead of "unforeseen", but "unforeseen" can always be used instead of "unforeseeable". Consequently, foreseeability is the wider term and should be examined first because whether an event is foreseen by a party or not depends on the parties' knowledge and is hence part of the general foreseeability test *[Saidov, p. 101] [Fabric Case]*.

71. The longer the duration, the more like the foreseeability arises *[Fucci, p. 2]*. In the given case, the Sales Agreement contains 3 shipments of the frozen horse semen. Hence, the performance is extended and the contract's conditions can be modified by changes of laws and regulations leading to a higher possibility of unpredicted event occuring after conclusion of contract *[Cl. Ex 5]*. The PARTIES' knowledge about the long period of contract performance must be taken into account by examining the conclusion of the contract. So, the contract must be seen as a whole *[Schulze, p. 312]* instead of focussing on the third shipment of the frozen horse semen. The aim is to understand the contract's overall commercial purpose *[Calnan, p. 35, para 3.03]*.

72. In addition, the parties that agree on international long term contracts must be aware of economic adversities that can come up *[Himpurna Case] [Fucci, p. 19]***.** This includes currency fluctuation as well as a general country risk *[CMS Gas Case, para 225]*. Although RESPONDENT's government was always a supporter of free trade and there have not been any changes concerning trade tariffs during the past, *[Cl. Ex 6]* but the Parties agreed on three shipments, knowing that their side effect is a longer period of time for the fulfilment of the delivery obligations. Consequently, the risk of possibly upcoming events was for the PARTIES, when they agreed on the Sales Agreement, a long term contract.

73. However, due to the wording of Clause 12 and the narrower meaning of "foreseen" the real question is whether or not the new tariff regime was foreseen by the parties. To examine if an event reasonably could have been foreseen, the test *"what a normally diligent person could reasonably have foreseen (...) in the ordinary course of things and the particular circumstances of the contract, such as the information supplied by the parties or their previous transactions" [Vogenauer, p. 277]* must be taken into consideration, thus the knowledge of the PARTIES before agreeing on the contract and the assessment of how the situation will develop is deciding.

74. By negotiating via email and adding the hardship clause to the contract the CLAIMANT mentioned that *both* PARTIES know that unforeseeable events (here health and safety requirements as an example) can occur *[Cl. Ex 4]*. This is the basis for the hardship clause that got added to the Frozen Semen Sales Agreement and proves that both PARTIES were aware of possible upcoming events. Hence they took it into account while negotiating. They **have foreseen** it.

75. On top of that, the CLAIMANT showed interest in a long-term relationship *[Cl. Ex 4]*. Especially in long term contracting situation, it is important whether an adjustment agreement (hardship clause) should be added to the contract or not *[Fucci, p. 2]*. In the given case, the parties added a well defined hardship clause giving a list of cases that shall be applicable to this clause. This list includes the criterion that the event must be unforeseen and due to the fact that representing lawyers negotiated (and not the PARTIES themselves) the legal representation should have taken into account all the possibly upcoming event, including the other parallel arbitration case that the RESPONDENT has with a third party because of increased tariffs by the government of Mediterraneo *[PO 2]*. The negotiating lawyers **should** the, therefore, **have foreseen** that such events can occur due to changing laws, tax regulations and tariffs.

76. Consequently, the tariffs were not unforeseeable and the PARTIES have foreseen or should have foreseen the upcoming events before concluding the contract.

### iii. The new tariff regime did not create a more onerous situation for the CLAIMANT

77. The contractual situation is not more onerous as raised by the CLAIMANT. Under Clause 12, the hardship clause of the Sales Agreement, the "Seller", in this case the CLAIMANT,

shall not be responsible for any hardship situation that is more onerous *[Cl. Ex 5]*. More onerous is a situation for a party, when there is *inter alia* an increased (financial) obligation or a higher burden *[UNIDROIT Institute, p. 271]*.

78. Terms and expressions shall be interpreted in the light of the whole contract *[PICC, Art. 4.4]*. It must also be interpreted in line with parties' common intention and, in case that such intention cannot be established, in accordance with the meaning that reasonable persons of the same kind would give *[PICC, Art. 4.1]*. However, by observing the contract as a whole, Clause 8 of the Sales Agreement contains the DDP shipments *[Cl. Ex.5, p. 14, Clause 8]*. DDP ("Delivery Duty Paid") an agreement whereby the seller assumes all the duties and responsibilities until the delivery is completed including *inter alia* import and export duties *[Ramberg, p. 61]*. It is argued by CLAIMANT that RESPONDENT must pay additional costs resulting from the increase of tariff because it would otherwise make the contract more onerous *[Cl. Memo., para 85-87]*. This would lead to an unfair situation because RESPONDENT would pay all the cost due to the increased import tariffs. This should be avoided by the DDP clause (Clause 8), which would get missed otherwise.

79. By agreeing on the DDP clause, the CLAIMANT acknowledges that all the risk concerning additional costs (due to import and export regulations) that could come up would be on his side *[Vogenauer, p. 812]*. Having this knowledge and agreeing on the DDP clause, performance must be rendered regardless of the increase burden. Even with CLAIMANT's loss of profit they had already accepted the risk under the DDP, therefore the contract does not become more onerous *[Article 6.2.1 UNIDROIT Principles Comment 1]*.

## B. In any event, the legal consequence of Clause 12 does not result in price adaptation of the contract

### i. The interpretation of the contract does not result in price adaptation

80. Under Article 8 intentions of the Parties are interpreted to establish the general duties *[UNCITRAL Digest, p. 55]*. It is RESPONDENT's contention that the remedy for Clause 12 is not an adaptation of the contract under the interpretation of Article 8. The intentions of parties can be interpreted with the subjective intentions of the parties **(*a*)** and in any event objective intentions of the parties **(*b*)**.

*a. Subjective interpretation*

81. To interpret the contract, the court must take into account the subjective intent of the parties. This is governed under Article 8 (1) of the CISG which states that the contract shall be interpreted along with the conducts or statements of party as long as the other party knew or could not have been unaware of such intent *[CLOUT case No. 1034; CLOUT case No. 851]*. Moreover, all surrounding circumstances must be taken into considerations *[Marizpan Case]*.

82. Prior to the conclusion of contract, CLAIMANT had proposed to insert a mechanism for adaptation of contract which RESPONDENT viewed was unnecessary *[Cl. Ex 8]* and had made clear to CLAIMANT. However, before any further proposals had been made, both parties' representatives were involved in a car accident. The conclusion of contract was made by the CEO of the CLAIMANT, with support of Mr. Ferguson, and Ms. Krone. During the final negotiations for the Contract, neither party had expressly mentioned for the remedy of Clause 12 to be adaption of contract *[Res. Ex 3]*. Therefore, it shows that the Parties did not intend to use adaption of contract as a remedy.

83. CLAIMANT stated that the parties had common intentions that adaptation of contract remedy for hardship due to the fact that both Mediterranean Contract Law and Equatorianian Contract law adopts PICC *[PO1 para 4]*. Further, under the PICC, "adaptation of contract is generally accepted as the legal remedy for hardship" *[Cl. Memo., para 92]*. The RESPONDENT contends that PICC Article 6.2.3 only give the right to renegotiate the contract, however PICC 6.2.3 does not lead directly to adaptation of contract, unless there is an explicit adaptation clause *[Article 6.2.3 UNIDROIT Principle Comment 1]*. In this case there was no such clause, therefore CLAIMANT cannot infer both Parties' had the intention to that adapt the contractual terms if the event in Clause 12 were to occur. Even so, if renegotiations were to fail, generally, the Tribunal would rarely exercise discretion to judicially modify the contract content *[Schlechtriem/Schwenzer, p. 149, para 9]*.

*b. Objective interpretation*

84. Alternatively, if the intention of parties cannot be established, the court shall take into to consideration of the objective interpretation of contract under Article 8(2) *[UNCITRAL Digest, p. 56]*. Statement or conducts of the parties' are interpreted to the understanding of a *reasonable third person of the same kind* as the party in the given circumstance. *[Electro-erosion machine*

*case; CLOUT case No. 844]*. Furthermore, all relevant circumstances shall be taken into consideration under Article 8(3). Thus, the exact wording *[Fruit and Vegetables Case]* of the contract shall be taken into consideration by the court *[Surface protective film case]*. Standard terms of the contract shall be sufficient to a reasonable person *[Mobile car phones case]*.

85. Under the Contract, the terms used in Clause 12 states "party shall not be *responsible*...", which is a similar to the wording of Article 79 of CISG and standard force majeure clauses which states that "party is not liable for failure to perform" *[Article 79 CISG]* and "party is relieved from duty" *[ICC 2003, p. 10]*. Thus a reasonable business man in the same circumstance would interpret such Clause 12 as one similar to a force majeure clause. The consequence of such clause would be that in an event of an impediment, the party who breach the contract would be exempted from liabilities *[Lookofsky, p. 166, para 307]*. Similarly, in our case, if the events governed under Clause 12 had taken place, the remedy shall be exemption from any liabilities. Furthermore, the language of Clause 12 does not suggest not made any reference for any changes on contractual terms to be remedy. The standard hardship term would be "parties are bound to negotiate alternative contractual terms" *[ICC 2003, p. 15]*. When viewing the language of the Clause 12, a reasonable person would not conclude that the remedy of Clause 12 is adaptation of contract.

86. Additionally, though it is true that a reasonable business man would want to keep a long-term relationship with its counterpart. However, the business relationship is not always dictated by a particular contractual relationship. In this case, the contract is a one-time sales contract which the nature merely a short-term *[Article 1.11 UNIDROIT 2016 Principle Comments 3 p. 30]*. Generally the question of adaptation of contract arises with complex long-term contracts. *[Horn, p. 3; Burkhardt, p. 3]* Therefore, a reasonable businessman dealing with a short-term contract would not opt for the remedy of adaption of contract.

87. In conclusion, in interpreting Clause 12 in light of Article 8 of the CISG, the remedy under Clause 12 is not adaption of contract.

## II. CLAIMANT CANNOT RELY ON ARTICLE 79 OF THE CISG TO CLAIM FOR REMEDY OF PRICE ADAPTATION.

### A. CLAIMANT cannot rely on Article 79 of the CISG to claim for remedy of price adaptation

88. CLAIMANT raised that the contract is subject to price adaptation under Article 79 of the CISG. RESPONDENT raises that CLAIMANT cannot claim for remedy of price adaptation under this Article due to the following reasons: **(i)** Both Parties have agreed on DDP within the Agreement and deviation from such agreement constitutes a derogation under Article 6 of CISG.

**i. Both Parties have agreed on DDP within the Agreement and deviation from such agreement constitutes a derogation under Article 6 of CISG**

89. Under Article 6 of the CISG, parties are allowed to have selective derogation of the CISG *[Schlechtriem and Schwenzer, p. 88, para 12]*. RESPONDENT and CLAIMANT have chosen to apply Delivered Duty Paid (DDP) INCOTERMS regarding the liability of the delivered product. As both Parties have agreed on the application of DDP, this excludes the CLAIMANT to rely on the application of Article 79.

90. From the facts, both Parties have agreed on the application of DDP. According to Article 8 of the CISG, the statement made by the parties is to be interpreted by the parties' intention *[Coetzee Incoterms p. 287]*. This intention has been expressed by CLAIMANT and RESPONDENT in their email correspondent *[Cl. Ex 3; Cl. Ex 4]*, therefore, this constitutes an expressed statement of intention to apply DDP.

91. In addition, INCOTERMS can be applied via Article 9 (1) of the CISG as a binding 'usage' agreed upon by the parties. As such, the requirement is whether DDP is a usage and whether the parties have agreed on its usage *[Johnson p. 379-430]*. In this case, both Parties have expressly agreed to use DDP in their contract and thus constituting a binding 'usage' between the Parties *[ Johnson 379-430]*.

92. Consequently, the application of DDP means that both Parties have agreed to exclude the application of Article 79 *[INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk, Juana Coetzee, p. 305; Schlechtriem and Schwenzer para 12]*. As stated by Berman and Ladd *[Coetzee Incoterms p. 310]*, the application of the chosen INCOTERMS in itself should already cover the passing of risk and the responsibility, thus the use of certain provisions of the CISG would not be necessary.

### B. Even if the Tribunal finds that Article 79 applies, it does not regulate hardship and CLAIMANT cannot receive a remedy under this article

93. Article 79 of the CISG does not regulate nor cover the area of hardship clause *[Schlechtriem/ Schwenzer p. 824, para 30]*. Therefore, even if the Tribunal finds that application of Article 79 is valid in this case, such application does not allow CLAIMANT to claim for adaptation of contract due to hardship as this concept is not covered under Article 79, nor in any other articles of the CISG.

#### i. The principle of hardship is not covered under Article 79 of the CISG

94. CLAIMANT has stated that Article 79 of the CISG intends to include the principle of contract adaptation. RESPONDENT contends that such principle is not covered. First, Article 79 itself does not provide the right to renegotiate nor does it affect the existence of the obligation to perform but rather, it ceases the promisor from being further liable to pay damages *[Schlechtriem/ Schwenzer, para 32]*.

95. A party may not be entitled to the exemption of hardship because a party received profits less than planned during the conclusion of the contract *[Girsberger et al., 2012]*. The risk of performance becoming more expensive even if the impediment was unforeseen is to be in the responsibility of the obligor *[Brunner, Force Majeure and Hardship Under General Contract Principles, p. 214]*. Furthermore, the articles under CISG has to be interpreted in uniformity towards the international principle of law, the fact that common law jurisdictions do not recognize hardship would mean that economic hardship is not recognised as international principle of law *[Professor Larry DiMatteo, Pace Law Int. Law Review, p. 284]*.

96. It has been proven in several cases that hardship cannot be subsumed under Article 79. In the case of, *Nuova Fucinati S.p. A. v. Fondmetall Int'l A.B,* the seller claimed that they did not deliver the goods because of hardship. The seller claimed that the price of goods increased by 30% after the conclusion of the contract. Although CISG did not apply to the case, the Court found that even if CISG applied, the seller could not have relied on hardship for the avoidance of delivery. The court established that hardship does not count as a remedy under Article 79.

97. Similarly, in the Maple Forms case, the supplier endured a price increase of 23% for raw milk due to "inflation, unanticipated crop failures, and governmental reforms."[8] The Court did not accept the supplier's request to be relieved because a price increase cannot be deemed as unexpected. In American cases, no cases less than 100% cost increase makes a seller's performance unfeasible *[David et.al, 2016, p. 8]*.

98. In this case, the CLAIMANT was in charge of the delivery. Before the last shipment of semen, CLAIMANT had a 5% profit margin. After the imposition of 30% tariffs on agricultural goods by the Equatorianian government, CLAIMANT makes a loss of 25% *[Notice of Arbitration, 18, p. 7]*. The increase in tariffs, in this case, may not grant the CLAIMANT to call for a price adaptation due to hardship as it does not fulfill the requirement to be considered onerous. Furthermore, a price increase is expected as the economy is always susceptible to change. In accordance with the findings of the courts above, it can be concluded that hardship does not fall under the scope of Article 79.

99. CLAIMANT inappropriately referred to some cases *[Cl. Memo para 102],* however these cases do not deal directly with economic hardship under Article 79 which is the crux of this case *[ Flambouras, 2002]*.

100. Furthermore, the UNCITRAL debates also show that drafters of the CISG were against having commercial or economic hardship as a cause for an exemption *[Flambouras, 2002] [Bridge et al, 2014]* as UNCITRAL outline for CISG articles for economic impediment and hardship were not found. The 2012 UNCITRAL case law digest also discharges any results of any case law permitting hardship exempting liability *[David et.al, 2016, p. 5-6]*. Hardship is not explicitly stated in Article 79 and neither has it initially been designed to refer to hardship or provide results for contract adaptation.

**ii. Alternatively, if the Tribunal finds that Article 79 covers hardship, the conditions of Article 79(1) have not been met, therefore, CLAIMANT cannot claim for damages under Article 79**

101. For CLAIMANT to be exempted under Article 79, all the criteria under Article 79(1) must be fulfilled. If one criteria is not fulfilled then CLAIMANT will not be able to rely on Article 79. Here, RESPONDENT will prove that the increase of tariff (a) was reasonably foreseeable and (b) is an impediment that CLAIMANT could have been overcome.

*a. The tariffs imposed by the RESPONDENT's government was foreseeable.*

102. Before the last shipment of semen, the RESPONDENT's government imposed 30% tariffs on agricultural goods which resulted in an additional cost of 1,250,000 million dollars for the CLAIMANT. The CLAIMANT claims that the tariffs were unforeseeable *[Cl. Memo., p. 3, para 12]*.

103. In the case of *Vital Berry Marketing NV v. Dira-Frost NV* at Rechtbank van Koophandel, Hasselt, the court concluded that the substantial drop in price after the contract had been concluded is not counted as force majeure. Price fluctuations are to be expected in international trade as a typical business activity, even 100% fluctuation is considered foreseeable *[Schwenzer, p. 1143-1444, para 31]*. An exemption under Article 79 should be considered only when the 'limit of sacrifice' has been surpassed.

104. Consequently, it can be seen that the tariffs were foreseeable because previously the RESPONDENT's government had already imposed restrictions on transportation of living animals. At the time of conclusion of the contract, there was only a *temporary* lift of the ban for artificial insemination *[Notice of arbitration, p. 5, para 5]*. This shows that the situation regarding the issue was already unstable. Moreover, the RESPONDENT advocated for limiting foreign agricultural products *[PO2, para 23]*. Therefore, the RESPONDENT's government imposition of tariffs was expected and CLAIMANT was reasonably able to predict such fluctuation in price.

105. Furthermore, in accordance with Article 7(2) of CISG, in an event that the promisor had or should have known about the event, such knowledge shall be taken into account by the promisor. The promisor's sphere of risk and external impediments shall be derived from the allotment of risks in the contract. The risks shall include responsibility of his own sphere, such as his financial capacity, personal circumstances, and so on. Because the CLAIMANT is the party that made the promise of delivery, CLAIMANT is responsible for the risk due to the delivery being in CLAIMANT's sphere of control *[Schwenzer, p. 1134, para 14]*.

106. For the delivery of goods, CLAIMANT accepted delivery DDP and asked to be protected against the risk of changing health and security requirements by a hardship clause *[ANoA, p. 30, para 4]*. The tariffs could have reasonably taken into account at the conclusion of the contract and could have been prevented by reasonable precautions.

*b. The tariffs could have been overcome after the announcement of the tariffs.*

107. The tariffs were announced by RESPONDENTs government on 19th December. CLAIMANT could have overcome the tariffs by delivering the horse semen before 15th January 2018, before the regulations came into effect *[PO2, para 25]*. Thus, it makes it irrelevant whether the impediment was foreseeable or not *[Schlechtriem et al., p. 817]*.

**iii. Alternatively, if the Tribunal finds that requirements of Article 79 were to be met, Article 79 does not lead to price adaptation.**

108. CLAIMANT calls for the price adaptation under Article 79 due to the imposition of tariffs by the RESPONDENT's government and claims that the performance had become more onerous for the CLAIMANT *[Cl. Memo p. 20, para 86]*.

109. In the case of The Bulgarian Chamber of Commerce and Industry (11/1996) the buyer deviated from the agreed contractual terms of the sales contract. The Arbitration Court found that the buyer's request to stop the delivery of steel ropes were considered attempts to adapt the contract. The Tribunal ruled that seller was not compelled to accept the request for adaptation of contract under CISG because CISG does not allow adaptation of the contract *[UNIDROIT Institute]*. Article 79 is restricted to exempting a party from liability. Many legal systems establish various grounds for an exemption but none, including the CISG, provide the ability to adapt the contract.

110. In this case, there is no liability or performance that CLAIMANT needs an exemption from under Article 79. Even more, RESPONDENT is not obliged to adapt the contract as CISG does not provide the remedy of contract adaptation.

## C. PRICE ADAPTATION CANNOT BE MADE ON THE BASIS OF PICC

### i. Price adaptation cannot be made on the basis of PICC as a gap-filler of the CISG

111. CLAIMANT has raised that PICC can be used as a 'gap filler', via Article 7 (2) of CISG, in this case as Article 79 of the CISG does not address the situation of hardship. RESPONDENT purports that CLAIMANT cannot use PICC as the applicable law in this

case because under Article 7 (2) of CISG, the interpretation must be consistent and exist within the framework of 'principles underlying the CISG'. As such, PICC cannot be used because it did not exist when the CISG was being drafted and promulgated *[Michales]*, nor does the principle of hardship exist ;under its framework. Furthermore, in accordance with an overriding view amid commentators, there is no gap in the CISG that allows a party to resort to the PICC to assist in the supplement of hardship in the CISG *[Slater, 1998]*.

112. RESPONDENT recognizes that the general principles of contract law which existed when the CISG was being drafted can be used for interpretation under Article 7 (2) and as such, accepts that certain principles of the PICC can be applied. However, the principle of hardship is not a general principle of contract law under the CISG nor did it exist during the creation of it, and cannot be used to interpret Article 79 of CISG in this case *[Michales]*.

### ii. CLAIMANT cannot claim for hardship under the PICC as the requirements of Article 6.2.2 PICC are not met

#### *a. The tariffs do not constitute to hardship as they did not fundamentally alter the equilibrium of the contract.*

113. The imposition of tariffs by the RESPONDENT's government does not fall into the scope of 6.2.2 of the PICC. Under this Article, hardship is an occurrence that fundamentally impacts the equilibrium of the contract. Here, the tariffs does not fundamentally alter the equilibrium of the contract.

114. In circumstances such as economic crisis *[Girsberger et al., 2012]*, sudden drop of market demands *[Arbitral Award September 1996 Zurich]***, or even significant drop of shares prices** *[Supreme Court of Lithuania 19 May 2003]* cannot constitute as fundamental alteration of equilibrium of a contract *[Girsberger et al., 2012]*. By the measurement of performances in financial terms, a "fundamental alteration" of the contract shall amount to 50% or more of the cost or value of the performance *[Official Comment 1994 edition of PICC]*. Though the party experiences losses from the contract instead of profits it expected, the contract still shall be respected *[Vogenauer, 2015]*.

115. From the above cases, increase in price due to the tariffs do not constitute the alteration of the equilibrium of the contract. CLAIMANT experienced an increase of 30%, which does not

suffice to fundamentally alter the equilibrium of the contract. The cases mentioned above incurred larger losses than the CLAIMANT and yet did not benefit from hardship. Even though the CLAIMANT expected to make more profits, the CLAIMANT shall respect the terms of the contract. The requirements of Article 6.2.2, in this case, are not met to constitute that CLAIMANT suffered from a fundamental alteration in the contract. Therefore, CLAIMANT cannot call for the adaptation of the price.

### iii. Even if the requirements under Article 6.2.2 were met, the Tribunal does not need to adapt the contract as a result of hardship under Article 6.2.3

116. Under Article 6.2.3 of the PICC, the initial action that must be renegotiations with regarding the contractual terms *[UNIDROIT Principles Article 6.2.3 p. 223]*.Only in the case where renegotiations had occurred in good faith and had failed could CLAIMANT resort to requesting the Tribunal to take actions *[UNIDROIT Principles Article 6.2.3 p. 225]*.

117. Thus, RESPONDENT contends that renegotiations had to occur before CLAIMANT could resort to request the Tribunal for contract adaptation. CLAIMANT had raised that the fact that Mr. Shoemaker has consented to the request to delivery of products *[Res. Ex4]* which equates to renegotiation being fulfilled. RESPONDENT contends that the mere fact that Mr. Shoemaker consented to the delivery does not mean that renegotiations under Article 6.2.3 of PICC has been conducted. Rather, as he is not a reasonable person of the same circumstance as Ms. Napravnik *[Article 8 (2) CISG]* and his statement cannot be interpreted to be equivalent to a renegotiation as they would not equate to the same understanding with Ms. Napravnik.

118. To conclude, the Tribunal does not need to adapt the Contract under Article 6.2.3 or the PICC.

## PRAYER FOR RELIEF

In the light of the foregoing submissions, RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal has no jurisdiction nor power under the arbitration agreement to adapt the contract.
2. CLAIMANT is not entitled to submit evidence from the other arbitration proceeding on the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system.
3. CLAIMANT is not entitled to an increase in the purchase price by 1,250,000 US dollars or any other amount resulting from an adaptation of the price either under Clause 12 of the Contract or under the CISG.

Akira Manuskiattikul

Tilman Lakämper

Nattachaat Urairong

Deeksha Lalwani

Deeksha Lalwani

Teetach Sarakhet

Irene Ittisarnronnachai

Nantaporn Suvannathat