SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG
2019

MEMORANDUM FOR RESPONDENT

FACULTY OF LAW
UNIVERSITY OF COLOMBO
SRI LANKA

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

SENITH ABEYANAYAKE | **RASARA** JAYASURIYA | **VINESHKA** MENDIS | **HASINI** RUPASINGHE

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

§/§§	Paragraph/paragraphs
ANoA	Answer to the Notice of Arbitration (24 August 2018)
Art./ Arts.	Article/Articles
Ass.	Association
ch.	Chapter
cir.	Circuit
Co.	Company
Corp.	Corporation
DDP	Delivered Duty Paid (INCOTERMS 2010)
DRC	Dispute Resolution Clause
ed.	Editor
edn.	Edition
Eds	Editors
et al.	*et alii* (and others)
Exhibit C	CLAIMANT's Exhibit
Exhibit R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
i.e.	*id est* (that is)
ibid	*ibīdem* (in the same source)
Inc.	Incorporation
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice

ICSID	International Centre of Settlement of Investment Disputes Tribunal
Letter by Fasttrack	Letter by Fasttrack of 3rd October 2018
Letter by Langweiler	Letter by Langweiler of 2nd October 2018
No.	Number/numbers
NoA	Notice of Arbitration of 31st July 2018
p./ pp.	Page/pages
PO1	Procedural Order No. 1 of 5th October 2018
PO2	Procedural Order No. 2 of 2nd November 2018
Cl. Memo	Alexandria University, Memorandum for Claimant
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law (Institut international pour l'unification du droit privé)
ULIS	Convention Relating to Uniform Law of International Sales of Goods (1964)
Vol.	Volume

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METZLER, Elisabeth ***Chapter II: The Arbitrator and the Arbitration Procedure, The Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration – An Austrian Perspective*** In: *Austrian Yearbook on International Arbitration* Klausegger, Christian et al. Manz and C.H. Beck (2017)	*Metzler*	57, 59
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ROTH, H. ***Munich Commentary on the Civil Code*** 4th edn. C.H. Beck (2003)	*Roth*	92
SCHERER, Maxi **RICHMAN,** Lisa ***Arbitrating under the 2014 LCIA Rules: A User's Guide*** Kluwer Law International (2015)	*Scherer & Richman*	12
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TETLY, W. ***Good Faith in Contract*** In: *Good Faith in Contract and Property Law* Forte, A.D.M. (ed.) Hart Publishing (1999)	*Tetly*	73
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AWARDS AND CASES

ICC Court of Arbitration

Arbitral Award No. 11295 (2001)	*ICC No. 11295*	78
Arbitral Award No. 11849 (2003)	*ICC No. 11849*	33

International Ad-Hoc Tribunals

Austria

Belgium

Canada

Ukraine

United Kingdom

Mastrobuono v. Shearson Lehman Hutton Inc. England and Wales Court of Appeal (7th Cir.) (06.05.1995)	*Mastrobuono*	37
Miller v. Whitworth Street Estates Ltd. 1 Lloyd's Rep. 269 (1970)	*Miller*	19
Mosley v. News Group Newspapers Ltd. England and Wales High Court (Queen's Bench Division) (09.04.2008)	*Mosley*	48
National Iranian Oil Company v. Crescent Petroleum Company International Ltd. & Another England and Wales Commercial High Court (18.07.2016)	*NIOC*	12
Proforce Recruit Limited v. The Rugby Group Ltd. Court of Appeal (Civil) (17.02.2006)	*Proforce Recruit Ltd.*	18, 40
Scotia Homes (South) Ltd. v. Mr James Maurice McLean and Mrs. Linda Isabella McLean A216/10 Sheriffdom of Tayside Central and Fife (30.11.2012)	*Scotia Homes Ltd.*	18, 40
SulAmérica Cia Nacional de Seguros S.A. and Others v. Enesa Engenharia S.A. A3/2012/0249 Court of Appeal (16.05.2012)	*SulAmérica*	13, 14, 17, 18, 19
Tzortzis and Sykias v. Monark Line A/B 1 W.L.R. 406 Court of Appeal (1968)	*Tzortzis and Sykias*	17
Williams v. Information Commissioner and Cardiff and Vale NHS Trust EA/2008/0042 (22.09.2008)	*Williams*	48
XL Insurance Ltd. v. Owens Corning England and Wales Commercial High Court (28.07.2000)	*XL Insurance Ltd.*	17, 21, 25

COMMENTARIES AND OPINIONS

ENDERLEIN, Fritz **MASKOW,** Dietrich ***United Nations Convention on Contracts for the International Sale of Goods and Convention on the Limitation Period in the International Sale of Goods: Commentary*** Oceana Publications (1992)	*Enderlein & Maskow*	90
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JAN VAN DEN BERG, Albert ***Consolidated Commentary Cases Reported in Volumes XXII (1997) - XXVII (2002)*** Vo. 28, Yearbook Commercial Arbitration Kluwer Law International (2003)	*Jan van den Berg*	12
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ARTICLES

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CHATTERJEE, Charles ***The Reality of The Party Autonomy Rule In International Arbitration*** Vol. 20, Journal of International Arbitration (2003)	*Chatterjee*	53
FLAMBOURAS, Dionysios P. ***The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis*** Vol. 13, Pace International Law Review (2001)	*Flambouras*	70
FERRARI, Franco ***Homeward Trend and Lex Forism Despite Uniform Sales Law'*** Vol. 13(2), Vindobona Journal of International Commercial Law & Arbitration (2009)	*Ferrari*	85
FOUNTOULAKIS, Christiana ***The Parties' Choice of 'Neutral Law' in International Sales Contracts*** Vol. 7, European Journal of Law Reform (2005)	*Fountoulakis*	83
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HENRIQUES, Duarte Gorjão ***The role of good faith in arbitration: Are arbitrators and arbitral institutions bound to act in good faith?*** Vol. 33(3), Kluwer Law International (2015)	*Henriques*	73

HWANG, Michael **CHUNG,** Katie ***Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*** Vo. 26, Journal of International Arbitration (2009)	*Hwang & Chung*	50
IRETON, Jessica O. ***The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence*** Vol. 30, ICSID Review (2015)	*Ireton*	59
JENKINS, Sarah Howard ***Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles -- A Comparative Assessment*** Vol. 72, Tulane Law Review (1998)	*Jenkins*	80
KAROLLUS, Martin ***Judicial Interpretation and Application of the CISG in Germany 1988-1994*** Cornell Review of the Convention on Contracts for the International Sale of Goods (1995)	*Karollus*	83
KENNY, William ***Transparency in Investor State Arbitration*** Vol. 33, Journal of International Arbitration Kluwer Law International (2016)	*Kenny*	53
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KULL, Andrew ***Mistake, Frustration, and the Windfall Principle of Contract Remedies*** Vol. 43, Hastings Law Journal (1991)	*Kull*	80
LANDOLT, Philip ***The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*** Vol. 30, Journal of International Arbitration, (2013)	*Landolt*	12
MUDRIC, Miso ***Incoterms 2010: Risks and Costs Defined*** Vol. 2, Copan School of Natural Law (2011)	*Mudric*	79
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PERILLO, J. ***Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts*** Vol. 5(5), Tulane Journal of International and Comparative Law (1997)	*Perillo*	86, 92
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QUIGLEY, Leonard V. ***Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*** Vol. 70, Yale Law Journal (1961)	*Quigley*	23

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REYMOND, Clabooksude ***Where is an Arbitral Award Made?*** Vol. 108, Law Quarterly Review (1992)	*Reymond*	19
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TUÑÓN, Arnau Muriá ***The Actio Quanti Minoris and Sales of Goods Between Mexico and the US: An Analysis of the Remedy of Reduction of the Price in the UN Sales Convention, CISG Article 50 and its Civil Law Antecedents*** Available at: <https://cisgw3.law.pace.edu/cisg/biblio/muria.html> Last accessed on: 22nd January 2019	*Tuñón*	87
Understanding the WTO ***Understanding the WTO: The Agreements*** Available at: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm> (2012) Last accessed on: 21st January 2019	*Understanding the WTO*	67

STATEMENT OF FACTS

1. CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company in Mediterraneo which operates Mediterraneo's most popular stud farm. Its racehorse section is well reputed for providing stallions for the breeding of English thoroughbreds and Anglo Arabs. Nijinsky III is one of the most successful and sought-after stallions for breeding. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Equatoriana, is famous for its broodmare lines. In 2015 it embarked upon breeding racehorses, as horseracing was an extremely popular and growing sport in Equatoriana.

2. On 21st March 2017, Black Beauty invited Phar Lap to submit an offer for 100 doses of Nijinsky III's frozen semen if available. An offer was made by Phar Lap to which Black Beauty agreed, except that it objected to the choice of law and forum selection clause and insisted on DDP.

3. Black Beauty insisted on DDP, in order to benefit from Phar Lap's experience in the transportation of frozen semen. Therefore, they included a hardship reference to the existing force majeure clause in the standard Frozen Semen Sales Agreement to address the increased risk through DDP.

4. Black Beauty also considered it inappropriate for the applicable law of the contract to be the Mediterranean Law and for Mediterraneo's courts to have jurisdiction. Phar Lap in turn suggested that any dispute be resolved through arbitration and suggested Danubia as the seat of arbitration and the Mediterranean Law to govern the contract.

5. Clauses 1-5 of the contract were conclusively agreed upon by the initial negotiators of the contract, Phar Lap's Ms. Napravnik and Black Beauty's Mr. Antley. However, they were unable to finalize on the rest of the clauses, as they were hospitalized due to an unfortunate car accident following their brief meeting on 12th April 2017. This task was taken over by the two heads of the legal departments of the Parties.

6. On 19th December 2017, the Government of Equatoriana imposed a 30% tariff on all agricultural goods imported from Mediterraneo, retaliating to the President of Mediterraneo's protectionist economic policies. To the surprise of both Parties, the said tariff scheme also applied to frozen horse semen; Ms. Napravnik was informed of this as the final shipment was being prepared.

7. Mr. Shoemaker, the person responsible for the racehorse breeding program, assured Phar Lap that the Parties will find an agreement on the price in light of the additional tariff. Phar Lap authorized the final shipment before coming into an agreement on the renegotiation of the price.

8. Pursuant to HKIAC Rules 2018 Art. 4, CLAIMANT filed a Notice of Arbitration requesting the Tribunal to order RESPONDENT to pay an additional amount of US$ 1,250,000 following an

adaptation of the purchase price, which is made necessary due to the imposition of the retaliatory tariff by the government of Equatoriana.

ARGUMENTS

ISSUE 01: THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADAPT THE CONTRACT

9. CLAIMANT argues that the Parties' agreement empowers the Tribunal to adapt the contract under the Mediterranean Law ***[Cl. Memo, §§1-7, p.3]***. However, the law of the seat of arbitration must govern the DRC as opposed to law of the Sales Agreement and the mandate of the Arbitral Tribunal which is prescribed in the DRC, must not be interpreted expansively to include the jurisdiction and power to adapt the contract. As such, RESPONDENT argues that the Danubian Law governs the DRC and its interpretation **(I)** and the DRC does not allow the Tribunal to adapt the contract under the Danubian Law **(II)**.

I. The Danubian Law governs the DRC and its interpretation

10. The Parties agreed that the law governing the Sales Agreement shall be the Mediterranean Law, including the CISG ***[Exhibit C5, §14, p.14]***. The law of the seat of arbitration as specified in the DRC is the Danubian Law ***[Exhibit C5, §15, p.14]***. However, the choice of law clause in the Model Clause of the HKIAC Rules has been omitted by the Parties ***[HKIAC Rules 2013, p.2; Exhibit C5, §15, p.14]***. In the absence of an express choice of law clause in the DRC, the CLAIMANT asserts that the clause 'This contract shall be governed by the Mediterranean Law' applies to the Sales Agreement as well as to the interpretation of the DRC contained therein ***[Cl. Memo, §9, p.4]***. Contrary to CLAIMANT's assertion, the Danubian Law governs the DRC and its interpretation because the law governing the DRC is different from the law governing the main contract **(A)**; the conflict of law rules affirm that the law governing the DRC is the law of the seat of arbitration **(B)**; and application of Danubian Law to the DRC will not render the award unenforceable under the NY Convention **(C)**. Additionally, the Danubian contract law fulfils the underlying objectives of the international arbitral process **(D)**.

A. <u>The law governing the DRC is different from the law governing the Sales Agreement</u>

11. CLAIMANT asserts that the law governing the main contract must apply to all clauses of the contract including the DRC [Cl. Memo, §9, p.4]. To the contrary, the Doctrine of Separability

applies to detach the DRC from the Sales Agreement (i); and even if the Doctrine of Separability does not apply, the DRC must not be governed by the law governing the Sales Agreement (ii). Therefore, the Danubian Law must apply to the DRC.

i. The Doctrine of Separability applies to detach the DRC from the Sales Agreement

12. According to CLAIMANT the purpose of the Doctrine of Separability is to ensure the autonomy of the DRC in case of invalidity, inexistence or termination of the contract ***[Cl. Memo, §§39-40, p.10]***. As such, CLAIMANT asserts that the Doctrine of Separability does not operate to elect the law of the seat of arbitration as the law governing the DRC ***[Cl. Memo, §36, p.9]***. However, Art. 16 of the Danubian Arbitration Law and Art. 16 of the Mediterranean Arbitration Law, as verbatim adoptions of UNCITRAL Model Law Art. 16 ***[PO2, §14, p.56]***, explicitly acknowledge the Doctrine of Separability ***[ANoA, §14, p.31; Model Law Case Digest, p. 75; Scherer & Richman, §22]***. Here, the doctrine is presented as applicable to the extent that it serves the purpose of the Tribunal determining its own jurisdiction, *including* any objections with respect to the existence or validity of the DRC ***[Model Law, Art. 16(1); Model Law Case Digest, p. 75]***, suggesting that the doctrine applies to other forms of objections to its jurisdiction, like the applicable law ***[Model Law Explanatory Note, §26; UNGA Official Records, §150; Model Law Case Digest, p.75; Quintette Coal Ltd; Ace Bermuda Insurance Ltd.; Insigma Technology Co. Ltd.; Born, p.464; Jan van den Berg, p.627]***. Even for the purposes of the NY Convention, the DRC can be governed by a different law from that which governs the Sales Agreement ***[Redfern & Hunter, p.159; Born, p.478; NY Convention, Art. 5(1)(a); Model Law, Art. 34(2)(a)]***. Accordingly, the DRC is treated as autonomous not only in relation to the contract, but also to any applicable law ***[Landolt, p.513; Sonetex; NIOC; Fiona Trust, §§26-27]***. Thus, disproving CLAIMANT's position, the law governing the Sales Agreement does not extend to the DRC under the Doctrine of Separability.

ii. Even if the Doctrine of Separability does not apply, the DRC must not be governed by the law governing the Sales Agreement

13. CLAIMANT argues that the Doctrine of Separability cannot be used to exclude the application of the choice of law clause of the Sales Agreement to the DRC ***[Cl. Memo, §§ 35-40, pp.9-10]***. The fact that the DRC is not an agreement distinct from the matrix contract for the purposes of choice of law as per the Doctrine of Separability, still does not mean that it is necessarily governed by the same law ***[Glick & Venkatesan, pp.139-140; Hamlyn; SulAmérica, §25]***. The Doctrine of Dépeçage makes it lawful for different parts of the contract to be governed by different laws

[Glick & Venkatesan, p.139-140; Kohler-Kaufmann, p.42; Goldman, pp.794-798; Jones, p.308]. According to this principle it is not necessary for the Parties to justify that certain parts of the contract can be separated, if the parties show an *intention* for it to be governed by different laws ***[Goldman, p.794; ARAMCO]***. In this case the Parties intended that the DRC and the main contract must be governed by different laws. From the time RESPONDENT submitted the initial draft of the DRC which was to be governed by the Law of Equatoriana, Parties considered it 'appropriate in light of the fact that the Sales Agreement was governed by the Mediterranean Law' ***[Exhibit R1, p.33]***. Therefore, even if the Doctrine of Separability does not apply, the DRC must not be governed by the law governing the Sales Agreement.

B. <u>The conflict of law rules affirm that the law governing the DRC is the law of the seat of arbitration</u>

14. According to CLAIMANT, the conflict of law rules affirm that the law governing the DRC should be the law of contract, which is the Mediterranean Law ***[Cl. Memo, §11, p.4]***. In this respect, CLAIMANT has identified the conflict of law rules laid down in the Hague Convention, NY Convention and in the case of *SulAmérica* ***[Cl. Memo, §§12-13, pp.4-5]***. Hague Convention Art. 4 identifies that the choice of law can be made either expressly or impliedly ***[The Hague Principles, Art. 4]***. In addition to 'express choice' and 'implied choice' as rules of law determining the law applicable to the DRC, it is necessary to identify the system of law with which the contract has the closest and most real connection ***[SulAmérica; Dicey & Morris, p.605-607; Weeramantry, p.111; Redfern & Hunter, pp.221-222; Berger, §1417; ICC No. 7071]***. Even under HKIAC Rules 2018 Art. 36(1), the Tribunal must decide on the law that governs the DRC by applying the rules of law which it determines to be appropriate. In this situation, there is no express agreement between the Parties as to the law governing the DRC **(i)**; the implied choice of law governing the DRC is the Danubian Law **(ii)** and even if there is no implied choice, the closest connection test indicates that the law of the seat of arbitration must govern the DRC **(iii)**. As such, contrary to the argument raised by CLAIMANT, according to the choice of law analysis, the law governing the DRC must be the law of the seat of arbitration and not the law governing the Sales Agreement.

i. There is no express agreement between the Parties as to the law governing the DRC

15. The DRC agreed to by the Parties does not include the choice of law provision in the HKIAC Model Arbitration Clause ***[Exhibit C5, §15, p.14; HKIAC Rules 2018]***. However, the draft DRC

included a choice of law provision in favour of the law of Equatoriana ***[Exhibit R1, p.33]*** which was subsequently omitted by CLAIMANT when amending the DRC to provide for arbitration in Danubia ***[Exhibit R2, p.34]***. Therefore, there is no express choice for the Danubian Law to govern the DRC. There is also no express choice of law in favour of the Mediterranean Law ***[Exhibit R2, p.34]***. Furthermore, the express choice of law clause of the Sales Agreement which CLAIMANT heavily relies upon is considered to be displaced by the choice of a different law, i.e. the choice of the law of the seat for the DRC ***[Glick & Venkatesan, p.144]***. Contrary to CLAIMANT's assertion, the express choice of law governing the Sales Agreement cannot be extended to govern all the clauses of the contract including the DRC, under recent developments relating to the separability of DRC from the substantive contract ***[Arsanovia Ltd., §22]***. As such, there is no express choice of law clause in the DRC in favour of either Danubia or Mediterraneo, and the express choice of law clause of the Sales Agreement which is the Mediterranean Law must not extend to the DRC.

ii. The implied choice of law governing the DRC must be the Danubian Law

16. CLAIMANT argues that in the absence of an express choice of law, the 'Host Theory' and the Parties' negotiations and intentions imply that the law governing the DRC governs the Sales Agreement ***[Cl. Memo, §23, p.6]***. However, according to the 'Seat Theory' **(a)** and the 'Parties' intention' **(b)** the Danubian Law must govern the DRC.

a. Danubian Law must govern the DRC according to the 'Seat Theory'

17. According to CLAIMANT, the express choice of law of the 'host contract' must be an implied choice for the law of the DRC ***[Cl. Memo, §§24-29, pp.7-8]***. However, the RESPONDENT never expressly or impliedly agreed to have the DRC governed by the law of the Sales Agreement ***[ANoA, §14, p.31]***. In the case of *SulAmérica*, the parties' express choice of Brazilian Law to govern the substantive contract was not sufficient evidence of an implied choice for the same law to govern the DRC, because it would significantly undermine that agreement ***[SulAmérica, §31; Redfern & Hunter, p.160]***. If there is any implied choice of the law governing the DRC, it must be the law of the seat of arbitration by virtue of the presumption that the law governing the validity of the DRC is the law where the award is to be made ***[Mustill & Boyd., p.63; Redfern & Hunter, p.168; XL Insurance Ltd.; Bulgarian Foreign Trade Bank Ltd.; Model Law, Art. 31(3); Redfern & Hunter, p.178]***. Even in other common law jurisdictions such as England, the decision to resort to arbitration in its own jurisdiction is a strong indication that English Law has been chosen as the applicable law by the parties ***[Goldman, p.788; Tzortzis and Sykis]***.

Therefore, according to the Seat Theory the Parties' implied choice is for the Danubian Law to govern the DRC ***[Redfern & Hunter, p.171; Park; Born, pp.1530–1531; Kohler-Kaufmann]***.

b. Danubian Law must govern the DRC according to the Parties' intention

18. CLAIMANT assumes the implied choice of the Parties' by referring to the intention of the Parties' and the negotiations between them ***[Cl. Memo, §31, p.8]***. Here, CLAIMANT interprets Clause 15 in light of its drafting history ***[Cl. Memo, §31, p.8]*** and asserts that the Parties intended for the Mediterranean Law to govern Clause 15 from the very beginning of negotiations ***[Cl. Memo, §31, p.8]***. The contractual laws of both Danubia and Mediterraneo allow the Parties to take pre-contractual negotiations into account to *interpret* the written agreement ***[ANoA, §16, p.32; UNIDROIT Principles 4.3 (a); Proforce Recruit Ltd.; Scotia Homes Ltd.]***. Even though CLAIMANT asserts that an express choice of law for the Sales Agreement can be regarded as an implied choice of law for the DRC according to the Host Theory, it can only be so if there are no indications to the contrary ***[Glick & Venkatesan, p.135, SulAmérica, §26]***. The intention of the Parties in this arbitration, however, is an indication to the contrary. When RESPONDENT stated that the law applicable to the Sales Agreement 'remains' the Mediterranean Law notwithstanding the amendments proposed by CLAIMANT ***[Exhibit R2, p.34]***, it was an indication as to the state of affairs before the proposed amendment, which is that the law of the seat of arbitration must govern the DRC ***[Exhibit R2, p.34]***. Even CLAIMANT did not suggest any amendments to the effect that the law of the seat of arbitration must not govern the DRC, when they suggested having a neutral country as the seat of arbitration ***[Exhibit R1, p.33]***. As such, even if pre-contractual negotiations and the intention of the Parties' is taken into account, in light of indications contrary to the application of the law of Sales Agreement to the DRC as reflected from such negotiations, the Danubian Law must govern the DRC ***[Glick & Venkatesan, p.135]***.

iii. The 'closest connection test' indicates that the law of the seat of arbitration must govern the DRC

19. Even though CLAIMANT mentions the 'closest connection test' under the choice of law rules, they have not made an argument on this basis ***[Cl. Memo, §§19-22, p.6]***. If there is no express nor implied choice of law made by the Parties, as per the 'closest connection' test the Danubian Law should apply to the DRC ***[Berger, §1417; Weeramantry, p.111]***. It is common for the law of the DRC to replicate the law of the seat of arbitration because '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.' ***[C v. D, §26; Miller]***. The

agreement to arbitrate has the closest connection with the seat of arbitration because of the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective, whereas the law of the substantive contract has a different purpose and nature altogether ***[SulAmérica, §32; Redfern & Hunter, p.173; Reymond, p.3]***. As such, even according to the closest connection test, the Danubian Law must govern the DRC.

C. Application of Danubian Law to the DRC will not render the award unenforceable under the NY Convention Art. V(1)(a)

20. CLAIMANT asserts that NY Convention Art. V (1)(a) sets three choice of law standards: the DRC must be primarily governed by the express choice of law; or implied choice of law; and in the absence of such a choice, by the law of the country where the award is made ***[Cl. Memo, §41, p.11]***. Thereby it claims that since the Parties have agreed that the DRC is governed by the Mediterranean Contract Law, there is no requirement to resort to the third standard of choice of law analysis ***[Cl. Memo, §§42-43, p.11]***. It has already been established that there is no express agreement as to any law that must govern the DRC ***[See §15]***. Then, the implied choice of law governing the DRC is the Danubian Law both according to the Seat Theory ***[See §17; XL Insurance Ltd.; Bulgarian Foreign Trade Bank Ltd.]*** and the intention of the Parties ***[See §18]***. According to NY Convention Art. V(1)(a), recognition and enforcement of the award may be refused if the DRC is *not valid* under the law to which the parties have subjected it, and failing any such indication, 'under the law of the country where the award was made' ***[Berger & Kellerhals, §2060; Nacimiento, p.225; Fox & Wilske, §116]***. Here, even if the Tribunal does not accept that the implied choice of law governing the DRC is the Danubian Law, it still applies to the DRC for the purposes of NY Convention Art. V(1)(a) being the *lex arbitri* ***[Exhibit C5, Cl. 15, p.14; Paulsson, p.70; See §19]***.

21. CLAIMANT then argues that if the Danubian Law governs the DRC, the award is at risk of being denied enforceability for disregarding the applicable law ***[Cl. Memo, §41, p.11]***. The condition based on which an award can be rendered ineffective under the NY Convention Art. V(1)(a) is the *invalidity* of the DRC in itself under the applicable law ***[Girsberger & Voser, p.439]***. What is contested here is the law governing the DRC and not its validity ***[PO1, § III (1)(a), p.51]***. Thus the law governing the DRC becomes relevant under Art. V(1)(a) only for the purposes of determining whether the DRC is valid. NY Convention Art. V(1)(a) refers to the law applicable to the DRC as agreed by the Parties, and in the absence of such an agreement, it resorts to the *lex arbitri* in order to determine the validity of the DRC ***[UNCITRAL Guide on NY Convention,***

Art. V(2)(a), §14, p.231; Girsberger & Voser, p.439]. As such, the Danubian Law applies to the DRC for the purposes of NY Convention Art. V(1)(a).

22. CLAIMANT further argues that in applying the 'four corners rule' the award will be unenforceable under Art. V(1)(a) as it would exclude the use of extraneous evidence in interpreting the agreement, which will then disregard the 'implied choice' of the Parties ***[Cl. Memo, §63, p.14]***. However, the implied choice is a reference to the choice of law of the DRC and not the criteria that determines the validity or invalidity of the DRC ***[NY Convention, Art. V(1)(a); Born, pp.3448-3450; Catz Int'l BV; O Ltd., §254; A/SI Likvidation]***. The Tribunal cannot render the award unenforceable without a challenge to the award based on incapacity of the parties or invalidity of the arbitration agreement ***[NY Convention, Art. V(1)(a); Born, p.3452-3470; Quigley, p.1066]***.

23. The implied choice of the Parties is determined by the seat theory and it is not mandatory to consider the pre-contractual negotiations between the Parties for this purpose ***[See §17; Redfern & Hunter, p.171; Park; Born, pp.1530–1531; Kohler-Kaufmann]***. Therefore, the award will not be rendered unenforceable in Danubia under NY Convention Art. V(1)(a).

D. <u>The Danubian contract law fulfils the underlying objectives of the international arbitral process</u>

24. CLAIMANT makes use of the 'Validation Principle' to assert that the Parties' choice of law clause governing their underlying contract should be applied to the Parties' DRC where it would give effect to that agreement ***[Cl. Memo, §§59-60, p.13]***. As such CLAIMANT argues that the Mediterranean Contract Law gives effect to Clause 15 of the contract ***[Cl. Memo §61, p.14]***. The Validation Principle looks to the purposes of the agreement and the legal instruments for enforcing them, and provides for application of the law of the jurisdiction that will give effect to the Parties' agreement to arbitrate and their commercial objectives, rather than applying the 'closest connection test' ***[Born, p.361; Miles & Goh, p.391].*** In the present case, the Parties' commercial objective and purpose in entering into international arbitration rather than litigation was to resort to effective means of *neutrally* resolving international disputes ***[PO2, §14, pp.56-57; Exhibit R2, p.34]***. Therefore, without regard to differing national choice of law and substantive law rules, the Danubian Law must govern the DRC by looking at the purpose of the DRC according to the Validation Principle, as such a choice would give effect to the Parties' agreement to arbitrate ***[Born, p.545; Hamlyn; ICC No. 6162; ICC No. 4381]***.

25. CLAIMANT holds that applying the Four-corners Rule under the Danubian Law would render the award unenforceable pursuant to NY Convention Art. V (1)(a), which states that the Parties'

implied choice should be considered, to reach the law to which the Parties subjected the agreement ***[Cl. Memo, §63, p.14; Born, p.545]***. CLAIMANT argues that the DRC would be ineffective in Danubia and as such that the Mediterranean Law must govern the DRC ***[Cl. Memo, §§57-64, pp.13-14]***. However, the DRC remains effective under the Danubian Law despite the application of the Four-corners Rule ***[See §§20-23]***. Furthermore, the Mediterranean Law would not govern the DRC as the choice of law because of the emerging rule of arbitral jurisprudence and the pro-validation approach that 'the validity and scope of an arbitration agreement are to be assessed independently of the law governing the contract' ***[Born, p.487; Miles & Goh, pp.391-394; Abuja Int'l Hotels Ltd.]***. The purpose of the Validation Principle is to facilitate the enforceability of such agreements ***[Born, p.487; Miles & Goh, p.391; Pearson, p.115; XL Insurance Ltd.]***. Therefore, the Danubian Law must govern the DRC as it would give effect to the Parties' agreement according to the validation principle.

26. CLAIMANT argues that according to the Validation Principle, the Mediterranean Law must govern the DRC as it gives effect to it ***[Cl. Memo, §61, p.14].*** This principle was introduced to minimize the defects of the closest connection test ***[Born, pp.540-545]***. As such, if the choice of law is determined at the second stage of the three-step process ***[See §§16-19]***, there is no need to resort to the closest connection test and thereby the Validation Principle would minimize the defects of that approach. The specialized choice of law provisions of NY Convention Arts. II and V, which CLAIMANT heavily relies on, were introduced to enhance the validity and enforceability of international dispute resolution clauses and seek to minimize the impact of national choice of law rules, resting on the premise that the DRC is separate from the main contract ***[Born, p.478; NY Convention, Arts. II, V]***. Therefore, even if the Validation Principle is resorted to, the DRC should still be governed under the Danubian Law.

II. The DRC does not allow the Tribunal to adapt the contract

27. In the Notice of Arbitration, CLAIMANT requested the Tribunal to increase the purchase price by at least 25% due to the higher cost associated with DDP following the imposition of the new tariff ***[NoA, §18, p.7]***. The DRC of the contract states that 'any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be resolved by arbitration' ***[Exhibit C 5, §15, p.14]***. Although CLAIMANT submits that the above clause allows for the Tribunal to adapt the contract, it must not allow the Tribunal to adapt the contract as there has been no express conferral of such power ***[ANoA, §13, p.31]***. In the written submission made by CLAIMANT, it was submitted that that the Parties have 'empowered' the Tribunal to adapt the contract by subjecting the DRC to the HKIAC Rules 2018 and the

Mediterranean Contract Law, pursuant to the Competence-competence Principle ***[Cl. Memo, §§45-48, p.11]***. To the contrary, the Competence-competence Principle does not allow the Tribunal to adapt the contract **(A)**. The interpretation of the DRC does not allow adaptation of the contract by the Tribunal **(B)**. The Danubian Contract Law does not allow the Tribunal to adapt the contract **(C)**.

A. <u>The Competence-competence principle does not allow the Tribunal to adapt the contract</u>

28. The dispute between the Parties is whether the Tribunal has jurisdiction to adapt the contractual price due to the 25% cost increase following the new tariffs imposed by the Equatorian Government ***[PO1, § III (1)(a), p.51]***. CLAIMANT wrongfully asserts that the Tribunal has jurisdiction to adapt the contract under the Competence-competence Principle ***[Cl. Memo, §§ 46-48, p.11]***. As correctly asserted by CLAIMANT, the principle states that the Tribunal is able to rule on its own competence ***[Cl. Memo, §46, p.11; Alvarez, pp.2-4; Ontario Medical Ass'n]***. CLAIMANT is also correct in submitting that HKIAC Rules 2018 Art. 19(1) and Art. 16(1) of the Danubian Arbitration Law (which is a verbatim adoption of Model Law Art. 16 (1)), include the Competence-competence Principle. However, CLAIMANT is mistaken as to the *effect* of the Competence-competence Principle as it must apply only to decide whether the Tribunal can adapt the contract **(i)**. Accordingly, HKIAC Rules 2018 Art. 19(1) and Model Law Art. 16(1) do not allow the Tribunal to adapt the Contract **(ii)**.

i. Competence-competence principle must apply only to decide whether the Tribunal can adapt the contract

29. CLAIMANT asserts that by virtue of the Competence-competence Principle, which states that the Tribunal is allowed to rule on its own competence, the Tribunal is allowed to adapt the contract ***[Cl. Memo, §46, p.11]***. Here, the dispute is whether the Tribunal has *jurisdiction to adapt* the contract and not whether the Tribunal has jurisdiction to decide whether it should adapt the contract ***[PO1, p.51, § III (1)(a)]***. The Competence-competence Principle is concerned with the competence of the Tribunal to look at the DRC and any relevant evidence in order to decide whether or not a particular claim comes within its jurisdiction ***[Redfern & Hunter, p.340; First Options Inc., pp.942-43; Howsam, pp.79, 84]***. The principle is concerned with the question of *who* decides, rather than empowering the Tribunal to exercise its jurisdictions on matters which are not prescribed ***[Born, p.1048; Berger Model Law, p.122; Goldman, p.263]***. From a practical standpoint, a delay in the arbitral proceedings (pursuant to an allegation that the DRC is invalid) is avoided by allowing the arbitrators to rule on their own jurisdiction ***[Gaillard & Savage, p.401]***.

As such, although the Competence-competence Principle might empower the Tribunal to decide on the extent of its jurisdiction (i.e., *whether* it encompasses the power to adapt the contract), it does not go to the extent of automatically conferring the Tribunal with a power which is not prescribed.

ii. HKIAC Rules 2018 Art. 19(1) and Model Law Art. 16(1) do not allow the Tribunal to adapt the contract

30. CLAIMANT submits that it was the Parties' intention to include adaptation of the contract within the Tribunal's jurisdiction ***[Cl. Memo, §46, p.11]***. CLAIMANT bases this on the Parties' agreement for the arbitration proceedings to be governed under the HKIAC Rules 2018, which bears the Competence-competence principle ***[HKIAC Rules 2018, Art. 19(1)]***. Following its misperception that the Competence-competence principle allows the Tribunal to adapt the contract, CLAIMANT submits that the Tribunal must adapt the contract pursuant to HKIAC Rules 2018 ***[Cl. Memo, §§47-48]***. HKIAC Rules Art. 19(1) which states that the tribunal may 'rule on its own jurisdiction' and the Model Law which adopts the same wording, as correctly asserted by CLAIMANT, bear the Competence-competence principle ***[Born, p.1061; Model Law Explanatory Note, §25]***. However, the effect of the said clauses carry the same effect of the Competence-competence principle as submitted above ***[See §29]***. Accordingly, HKIAC Rules 2018 Art. 19(1) must not grant the Tribunal the power to adapt the contract.

31. CLAIMANT asserts that even under the Danubian Arbitration Law, the Tribunal is allowed to adapt the contract ***[Cl. Memo, §47, p.11]***. To the contrary, as explained by the UNCITRAL Secretariat, the Competence-competence Principle means that the Tribunal may independently rule on the 'question of *whether* it has jurisdiction… i.e. on the foundation, content and extent of its mandate and power' ***[Model Law Explanatory Note, §§25-26; Fung Sang Trading Ltd.]***. Moreover, drafting history of the Model Law, while recognizing the ability of a tribunal to adapt the contract, states that it must only be done by an agreement which is demonstrated by *express conferral* of such a power on the tribunal; and that usual arbitration clauses may not be interpreted to extend its mandate to adapt the contract between the parties ***[Model Law 3rd & 4th Sessions, §§7-8]***. Accordingly, it is either following an affirmative decision by the Tribunal that it can adapt the contract, taken by virtue of the Competence-competence Principle, or by an express conferral of the power to adapt, that the Tribunal can adapt the contract under the Model Law Art. 16.

B. Interpretation of the DRC does not allow adaptation of the contract by the Tribunal

32. CLAIMANT wrongfully asserts that an interpretation of the DRC according to CISG Art. 8(3) by giving due regard to the negotiations between Phar Lap's Ms. Napravnik and Black Beauty's Mr. Antley show that the Parties intended for the Tribunal to adapt the contract ***[Cl. Memo, §§50-51, p.12]***. Further, CLAIMANT incorrectly submits that the wording of the DRC also allows the Tribunal to adapt the contract ***[Cl. Memo §§52-54, p.12]***. To the contrary, interpretation of the DRC both under CISG Art. 8 **(i)** and under general interpretation principles **(ii)** show that the Tribunal is not empowered to adapt the contract.

i. Interpretation of the DRC under CISG Art. 8 does not allow adaptation of the contract by the Tribunal

33. Based on its mistaken contention that it is the Mediterranean Law that governs the DRC, CLAIMANT wrongfully asserts that according to CISG Art. 8, which is generally used in Mediterraneo to interpret arbitration clauses in sales contracts ***[PO1, §III(4), p.52]***, the Parties have intended for the Tribunal to adapt the contract ***[Cl. Memo, §49, p.11]***. CLAIMANT relies on CISG Art. 8 which obliges parties to a contract to give due regard to all relevant circumstances of the case including negotiations in order to determine the intent of a party or the understanding of a reasonable person ***[Schwenzer, §13; CISG Official Records, p.18; ICC No. 11849]***.

34. Under CISG Art. 8(1), the intent that is to be discerned is the intent of the party making the statement ***[Fabrics Case]***, in this case RESPONDENT's Mr. Antley, and it is first necessary to look at the actual words used by him ***[Secretariat Commentary: CISG Art. 8, §5]***. Contrary to CLAIMANT's assertion that Mr. Antley, during negotiations, stated that the Tribunal 'should have the power to adapt the contract' ***[Cl. Memo, §51, p.12]***, the actual words used by Mr. Antley was that 'it should *probably* be the task of the arbitrators to adapt the contract, if the Parties could not agree' ***[Exhibit C8, p.17]***. There is evidently no certain intention on the part of Mr. Antley as to whether the Tribunal must adapt the contract, which CLAIMANT's Ms. Napravnik could not have been unaware of. Her suggestion to include an express reference into the hardship clause or arbitration clause clarifying the issue of whether the Tribunal can adapt the contract further shows that she was aware of the fact that Mr. Antley did not with certainty intend for the Tribunal to adapt the contract ***[Exhibit C8, p.17]***.

35. Even if CISG Art. 8(1) does not apply, a reasonable person of the same kind as Ms. Napravnik as per CISG Art. 8(2) ***[G.W.A. Bernards; Heaters Case; CISG Official Records, p.243]*** would understand that Mr. Antley had no intention for the Tribunal to adapt the contract short of a

proposal to which both Parties agreed (which in fact he offered to bring back the next morning) ***[Exhibit C8, p.17; Office Furniture Case]***. In taking into account all relevant circumstances under CISG Art. 8(3), recourse must be made to Mr. Antley's negotiation file, in which he has listed the 'connection of the hardship clause with the arbitration clause' as an issue which was still open after the short discussion with Ms. Napravnik on 12th April 2017 ***[Exhibit R3, p.35]***. It is a clear indication of Mr. Antley's intention to further discuss the issue of adapting the contract by the Tribunal in case of a hardship; and thus by no means was there common intention of the Parties for the Tribunal to adapt the contract.

ii. Interpretation of the DRC under general interpretation principles does not allow adaptation of the contract by the Tribunal

36. CLAIMANT vaguely claims that the 'wording of Clause 15' shows intention of the Parties to submit a wide category of disputes except for a dispute concerning the existence of the contract itself to arbitration ***[Cl. Memo, §§52-54, p.12]***. Not only is this assertion erroneous as the DRC clearly extends to disputes regarding the existence of the contact ***[Exhibit C5, Clause 15; Judgment of 27th Feb 1970, p.86]***, but it also attempts to mislead the Tribunal as Phar Lap isolates the terms *'any* dispute' from the rest of the clause claiming it to be in favour of a broad remedial authority ***[Cl. Memo, §53, p.12]***. To the contrary, the DRC was a narrowed down and streamlined version of the fairly broad wording of the HKIAC Rules 2018 model arbitration clause ***[Exhibit R1, p.33; ANoA, §13, p.31]***. Moreover, the pro-arbitration presumption of arbitrability does not apply to narrow DRCs ***[Cummings, p.1261; Hartford Aircraft Lodge, p.208]***. Given that the DRC here is intentionally made narrow following the understanding of both Parties ***[Exhibit R1, p.33]***, it cannot be treated as encompassing a collateral matter such as adaptation, which only a broad arbitration clause can be *presumed* to include ***[United Steel; Int'l Ass'n of Machinists]***.

37. CLAIMANT wrongfully asserts that the wording of Clause 15 generally indicates the intention of the Parties to submit more issues than those prescribed in the DRC to arbitration ***[Cl. Memo, §52, p.12]***. It further contends that the formula 'any disputes' has been granted broad interpretation in German and Swiss courts ***[Cl. Memo, §54, p.12]***. What is of direct application here is the national arbitration Danubian Law, which is largely a verbatim adoption of the Model Law like the arbitration laws of Mediterraneo and Equatoriana ***[PO2, §14, p.55].*** As the Model law is silent on the issue of construction of the DRC ***[Born, p.1320]***, resort must be made to general principles of contract interpretation i.e. seeking the real and common intention of the Parties, and based on the wording of the DRC ***[ICC No. 7929, p.317; Mastrobuono, p.62; Fleetwood Enters. Inc., p.1073]***. The term 'arising out of' have been considered as a narrow

formulae evidencing restrictive language ***[Tracer Research Corp., p.1295; Texaco Inc., p.115; Reddam]***. As such, the wording of the clause does not allow the Tribunal to adapt the contract.

38. Further, if an actual meeting of the minds is not possible to be derived, then the DRC is to be interpreted objectively ***[Judgment of 29th Feb 2008, p.379]***. Here, there has been no common intention of the Parties concerning whether the Tribunal must have the power to adapt the contract as it was an unresolved point of negotiation between the Parties ***[See §34]***. Accordingly, the common intention of the Parties does not indicate that the Tribunal is allowed to adapt the contract.

C. Danubian Contract Law does not allow the Tribunal to adapt the contract

39. CLAIMANT asserts that the DRC is governed by the Mediterranean Law, and accordingly, consistent practice by the courts of Mediterraneo of adapting the contract if reasonable, shows that the Tribunal has the jurisdiction to adapt the contract ***[Cl. Memo, §§55-56, pp.12-13]***. However, under the Contract Danubian Law, which is also largely a verbatim adoption of the UNIDROIT Principles, Art. 6.2.3(4)(b) is worded differently, granting the Tribunal the power to adapt the contract *only if authorized* ***[PO2, §45, p.61]***. Accordingly, an *express* conferral of such a power is required to empower the Tribunal to adapt the contract, which is missing presently ***[NoA, §13, p.6; Exhibit C5, §15, p.14]***. Although the Parties open-endedly discussed the need for a mechanism in place to adapt the contract and agreed on the requirement of an express reference to that effect in the hardship clause or arbitration clause, no such reference was made ***[Exhibit C8, p.17]***. Mr. Krone and Mr. Ferguson who finally negotiated on the DRC and the hardship clause have not included such a reference ***[Exhibit R3, p.35]***. As such, under Art. 6.2.3(4)(b) of the Danubian Contract law, the Tribunal is not allowed to adapt the contract.

40. Apart from the modification to UNIDROIT Principles Art. 6.2.3 (4)(b), the interpretation rule in Art. 4.3 is also replaced by the four-corners rule, which has largely the same effect as a merger clause under UNIDROIT Principles Art. 2.1.17 ***[PO2, §45, p.59]***. Accordingly, the contract between the Parties is considered as completely embodying the terms on which they have agreed, and cannot be supplemented by evidence of any prior statement or agreements ***[UNIDROIT Principles, Art. 2.1.17]***. Accordingly, statements exchanged between the negotiators for the Parties – Ms. Napravnik and Mr. Antley - cannot in any way be admitted to impute an additional agreement that the Tribunal is able to adapt the contract, in the absence of any written statement to that effect in the contract ***[ICC No. 9117]***. However, the conduct and statements of Parties prior to the conclusion of the contract are not prevented from being considered in *interpreting* the

wording of the DRC ***[Joseph Charles Lemire; Proforce Recruit Ltd; Scotia Homes Ltd.].*** Since the principal field of application of UNIDROIT Principles Art. 4 corresponds almost literally to CISG Art. 8 ***[UNIDROIT Principles, p.189]***, the same analysis followed in interpreting the DRC under CISG Art. 8 can be applied here ***[See §§33-35]***. As such, interpretation of the DRC even under UNIDROIT Art. 4.3, by taking into consideration pre-contractual negotiations does not show common agreement between Parties that the Tribunal is able to adapt the contract. As such, pre-contractual negotiations cannot be used to impute an additional agreement by the Parties to adapt the contract beyond what can be interpreted from the wording of the DRC ***[Cl. Memo, §49, p.11]***.

CONCLUSION: The Danubian Law governs the DRC, according to which the Tribunal does not have jurisdiction or powers to adapt the contract.

ISSUE 02: CLAIMANT MUST NOT BE ALLOWED TO ADMIT EVIDENCE FROM THE OTHER ARBITRATION

41. CLAIMANT asserts that material from another arbitration RESPONDENT is involved in, must be admitted as evidence in this arbitration ***[Cl. Memo, §§66-98, pp.14-20; PO2, §39, p.60]***. However, the Tribunal is required to balance CLAIMANT's need to obtain and access the evidence allegedly necessary to prove their case, with their obligation to respect confidential and privileged information ***[Reisman & Freedman, p.738]***. Therefore, such information is not material and relevant to the outcome of this dispute **(I)** and is inadmissible in this arbitration **(II)**.

I. Information from the other arbitration is not relevant and material to the outcome of this arbitration

42. CLAIMANT submits that the Tribunal must allow the admittance of information from the other arbitration because it is material and relevant to the outcome of this dispute ***[Cl. Memo, §§ 72-74, p. 16; HKIAC Rules 2018, Art. 22.3]***. To the contrary, the Partial Interim Award which the CLAIMANT seeks to admit into evidence is irrelevant **(A)** and immaterial to the outcome of this arbitration **(B),** because, as verified even by the other party to the other arbitration, the allegations by CLAIMANT do not reflect reality and are taken out of context ***[Letter Fasttrack, p.51]***.

A. The Partial Interim Award is irrelevant

43. CLAIMANT attempts to establish the Partial Interim Award's relevance to this arbitration, asserting that it confirms the power of the Tribunal to adapt the contract, should the tariff result

in hardship ***[Cl. Memo, §76, p.16; PO2, §39, p.60]***. However, it has been suggested that a tribunal looks for prima facie relevance and not a mere possibility of relevance ***[Brower & Sharpe, p.320; BNP Paribas].*** Although Mediterranean Law was declared to be applicable to the arbitration agreement in the other arbitration ***[PO2, §39, p.60]***, here, Danubian Law must govern the arbitration agreement ***[See §§14-19]*** and as such the Partial Interim Award that is in keeping with Mediterranean Law is not relevant to this arbitration.

B. The Partial Interim Award is immaterial to the outcome of this arbitration

44. CLAIMANT argues that the Partial Interim Award is material to the outcome of this arbitration because such evidence would provide a basis upon which the arbitrators could make their decision ***[Cl. Memo, §78, p.17]***. A material document is one which would have a tendency to influence the tribunal's determination of issues in dispute ***[Yoon & Richardson, p.139]***. The Partial Interim Award has been made in relation to the jurisdiction and not the merits of the case as the Tribunal only decided that it has the 'power to adapt' under Mediterranean Law ***[PO2, §39, p.60; Kaplan & Morgan, p.81]***. Even if the Tribunal determines that it has the power to adapt the contract under Mediterranean Law in the present arbitration, the Partial Interim Award is immaterial to the outcome of the *merits* of this arbitration in determining whether the Tribunal should adapt the contract under Clause 12 and CISG ***[See §26]***. Furthermore, seeing as how even a Partial Final Award can be challenged ***[Emirates Trading Agency LLC]***, the real possibility of the Partial Interim Award being challenged or amended must be taken into consideration by the Tribunal. As such, inconclusive evidence in the other arbitration proceeding is not material to the outcome of this arbitration.

II. Information from the other arbitration is inadmissible in this arbitration

45. The company sourcing the copy of the Partial Interim Award has obtained it either from two former employees of the RESPONDENT who were under a duty of confidentiality, or from an illegal hack of the RESPONDENT's computer system ***[Letter Fasttrack, p.51]***. CLAIMANT argues that information from the other arbitration must still be admitted as evidence in this arbitration regardless of how it was obtained ***[Cl. Memo, §§66-98, pp.14-22]***. However, information from the other arbitration is inadmissible in this arbitration whether it has been obtained by a breach of confidentiality **(A)** or by an illegal hack of RESPONDENT's computer system **(B)**.

A. Information from the other arbitration is inadmissible if it has been obtained by a breach of confidentiality

46. CLAIMANT argues that information from the other arbitration must be admitted in this arbitration asserting that CLAIMANT has not breached a confidentiality agreement ***[Cl. Memo, §§80-83, pp.17-18]***. RESPONDENT asserts that the information from the other arbitration must not be admitted because CLAIMANT is bound by confidentiality in the other arbitration **(i)** and the Tribunal would allow a breach of confidentiality if it were to allow the admittance of such information **(ii)**.

i. CLAIMANT must maintain confidentiality of the other arbitration

47. CLAIMANT asserts that it is neither bound by nor in breach of the other arbitration's confidentiality agreement, as it was not a party to that arbitration ***[Cl. Memo, §§81-83, p.18]***. CLAIMANT further argues that it would be unfair to prohibit the admittance of such information that is in the 'public domain' ***[Cl. Memo, §§84-89, pp.18-19]***. To the contrary, information must not be admitted as evidence by the Tribunal as it is not in the 'public domain' and should be treated as 'confidential information' **(a)**. In any case, CLAIMANT is under an implied duty to maintain confidentiality of the award **(b)**.

a. Such information is not in the public domain and must be treated as 'confidential information'

48. The company sourcing the copy of the Partial Interim Award could have received it either from the hacker or one of the two former employees of the RESPONDENT who had been witnesses in the other arbitration and were bound to preserve confidentiality ***[PO2, §41, pp.60-61].*** CLAIMANT argues that the evidence aimed to be submitted is in the possession of a company which is willing to provide such evidence against a payment of US$ 1000 ***[PO2, §41, pp.60-61]***, and such availability at a price signifies that the evidence is in the public domain ***[Cl. Memo, §70, p.15].*** Evidence will be in the public domain only if anyone can 'easily access' it ***[Mosley]*** and the test to be applied is whether the information is 'realistically accessible' to members of the public ***[Greater Manchester Newspapers]***. Evidence from the other arbitration is not 'easily accessible' nor 'realistically accessible' by the general public as access is restricted by the condition imposed by the company to make a payment of US$ 1000 ***[PO2, §41, pp.60-61]***. It has been held that even information held in a public library does not qualify as being in the public domain as it would not be realistically accessible to the public unless someone was aware that such information was available and if it is published on a government website, had some basic degree of knowledge to

obtain it ***[Greater Manchester Newspapers].*** In the present arbitration, the CLAIMANT only knew of the company which provides intelligence on the horseracing industry and that it had possession of a copy of the Partial Interim Award through Mr. Velazquez ***[PO2, §41, pp.60-61]***. As such, information is not in the public domain simply because it is available to the requester, if it cannot be accessed by an interested member of the public ***[Williams].***

49. Further, information that is available through a limited leak is distinguished from information that is in the public domain because the latter is widely publicized or disseminated to the public ***[Craven].*** Therefore, the evidence that is requested to be submitted is not in the public domain, contrary to the submission made by the CLAIMANT. As such, it remains confidential information and must be excluded from evidence by the Tribunal on the ground of commercial or technical confidentiality ***[IBA Rules, Art. 9. 2 (e)]***.

b. CLAIMANT is under an implied duty to maintain confidentiality of the award

50. According to CLAIMANT, it is not bound by the confidentiality agreement in the other arbitration because it is not a party to it ***[Cl. Memo, §81, p.17].*** CLAIMANT further argues that it is not in breach of confidentiality as it is not responsible for the source of information of the company that is willing to provide information ***[Cl. Memo, §81, p.17].*** However, the purpose of arbitration is to ensure confidentiality in resolving disputes ***[Cook & Garcia, p.230-231]***. In the absence of an express term in an arbitration clause providing for confidentiality, the presumption of confidentiality applies as an implied duty arising out of the very nature of the arbitral process; thereby, the obligation of confidentiality attaches to the award ***[Emmott; Hassneh Ins. Co.; Ali Shipping Corp.; Hwang & Chung, pp.613-614].*** The award of a previous arbitration must be refused admittance as it is not relevant to the issues in the present arbitration and even if it was, production of the award is not necessary for fair disposal of the issues ***[Dolling-Baker]***. The disclosure of an award would be irrelevant and unnecessary to the establishment of the CLAIMANT's legal rights, and it would breach the CLAIMANT's implied duty of confidentiality, despite the persuasive effect which the award may carry ***[Insurance Co. (Colman J)].*** As such, CLAIMANT must not be allowed to admit the partial interim award in this arbitration, as it is covered by confidentiality.

ii. Tribunal must not allow a breach of the confidentiality required by HKIAC Rules 2013 by allowing the admittance of such information

51. It is CLAIMANT's position that it is not bound by the confidentiality agreement in that arbitration ***[Cl. Memo, §81, p.17]***. However, the Parties to the other arbitration have intended that among

other things, its Partial Interim Award should be subjected to the protection of confidentiality provided by HKIAC Rules 2013 Art. 42 ***[Letter by Fasttrack, p.50]***. The Parties to this arbitration have agreed, pursuant to UNCITRAL Model Law Art. 19 (1), that the HKIAC Rules 2018 are to be followed by the Tribunal when determining the procedure ***[C5, §15, p.14]***. As such, it is the Tribunal who will decide on the question of admissibility of such evidence ***[HKIAC Rules 2018, Art. 22.2]***. Accordingly, the Tribunal must find that admittance of such evidence must not be allowed as it would violate HKIAC Rules 2013 Art. 42 **(a)** and the exceptions to confidentiality are inapplicable to this situation **(b)**. Furthermore, admittance of such evidence would also violate the spirit of the HKIAC Rules 2013 **(c)**.

a. Admitting such evidence would violate HKIAC Rules 2013 Art. 42

52. CLAIMANT's endeavours go against the very nature of arbitration, which is to ensure the highest degree of confidentiality over private disputes ***[Cl. Memo, §§81-83, p.17-18; G. Aïta]***. The drafters of the UNCITRAL Model Law intended that "confidentiality may be left to the agreement of the parties or the *arbitration rules chosen by the parties*" ***[Model Law 14th Session]***. The Parties in the other arbitration, have thus established a regime of confidentiality by their choice of a procedural law, i.e. the HKIAC Rules 2013, which has a provision in that respect ***[Letter by Fasttrack, p.50; HKIAC Rules 2013, Art. 42; Smeureanu, p.25]***. HKIAC Rules Art. 42 deals with confidentiality and specifically prohibits parties from publishing, disclosing or communicating any information relating to the specific arbitration or the arbitral award ***[Tung & Lin, p.87]***. As such, material from the other arbitration must not be admitted in this arbitration if they contravene HKIAC Rules 2013, Art. 42, as those parties have clearly intended for confidentiality of proceedings.

53. In the absence of a published award, the only way for information of an award to be revealed would be in accordance with HKIAC Rules 2013, Art. 42.1. Admittance of the copy of the award as intended by the CLAIMANT would violate HKIAC Rules 2013 Arts. 42.1 and 42.2, which provide that it is only based on party agreement that the listed or 'covered' individuals may reveal any information relating to the arbitration under the arbitration agreement or the award made in the arbitration. Here, an 'award' includes the Partial Interim Award as well ***[HKIAC Rules 2013, Art. 3.9]***. Under HKIAC Art. 42.2, any information regarding the award, even if obtained from a company which provides intelligence on the horseracing industry ***[PO2, §41, pp.60-61]***, would be in violation of HKIAC Rules 2013 Art. 42.1 and 42.2. This is because such information will be obtained from a *witness* in that proceeding ***[PO2, §41, pp.60-61]***, but without agreement of one of the parties, i.e. RESPONDENT in this case. Similarly, information gained through hacking of the

RESPONDENT's computer would also violate said articles relating to confidentiality and disclosure, as the essential element of *party agreement* is lacking ***[Chatterjee, p.540; Kenny, p.485; Methanex Corp]***. As such, the Tribunal must not allow admittance of material from the other arbitration, as it would violate HKIAC Rules 2013 Arts. 42.1 and 42.2.

b. Exceptions to the rule of confidentiality in the HKIAC Rules 2013 are inapplicable

54. While confidentiality may be the general rule as seen in HKIAC Rules 2013 Art. 42.1 ***[Kenny, p.485]***, these Rules make allowances for the publication, disclosure or communication of information referred to in Art. 42.1 by a party ***[HKIAC Rules 2013, Art. 42.1]***. Confidentiality must not be compromised on, as none of the various situations envisioned by HKIAC Rules 2013 Art. 42.3 are applicable in the current arbitration: neither party of the other arbitration is attempting to protect or pursue a legal right or interest ***[HKIAC Rules 2013, Art. 42.3 (a)(i)]***, or enforce the award ***[HKIAC Rules 2013, Art. 42.3 (a)(ii)]***; neither party is being obliged by law to make such a publication, disclosure, or communication ***[HKIAC Rules 2013, Art. 42.3 (b)]***; and the information is not required by an individual who would need to be informed for the sake of that arbitration ***[HKIAC Rules 2013, Art. 42.3 (c)]***. As such, the Tribunal must not allow such evidence to be admitted as it would violate the general agreement on confidentiality in the other arbitration, and the exceptions to this rule of confidentiality are inapplicable.

c. Admitting evidence obtained in violation of a confidentiality agreement would violate the spirit of the HKIAC Rules

55. CLAIMANT has asserted that despite being the product of a violation of a confidentiality agreement, the copy of the award it has made arrangements to procure should be made admissible in the present arbitration, as evidence against the RESPONDENT ***[Cl. Memo, §81, p.17]***. The Tribunal must reject this contention because admitting evidence obtained in violation of a confidentiality Agreement would be in violation of the spirit of the HKIAC Rules 2018. The Tribunal is mandatorily bound to act in accordance with the spirit of the Rules, in all matters not expressly provided for in these Rules ***[HKIAC Rules 2018, Art. 13.9]***. Since the current situation has not been expressly dealt with, when determining admissibility, the Tribunal must have regard to HKIAC Rules, Art. 45, which deals with confidentiality. It establishes that any information relating to the arbitration under the arbitration agreement and an award made in the arbitration are confidential, as are the deliberations of the arbitral tribunal ***[HKIAC Rules 2018, Art. 45.1 (4)]***. As the scope of confidentiality rests to a great extent, if not entirely, on the agreement of the parties ***[Smeureanu, p.133]***, it is significant that the ultimate source of the material that

CLAIMANT is attempting to introduce into evidence is a former employee of the RESPONDENT; this individual had not only been a witness in the other arbitration before he was fired on 6th July 2018, but had also been under a contractual obligation to keep all information about the other arbitral proceedings confidential ***[PO2, §41, pp.60-61; HKIAC Rules 2013, Art. 42.3]***. Such action by this former witness is a clear violation of the Parties' intention to maintain confidentiality. Taken together, it is clear that the Tribunal must recognize the spirit of the HKIAC Rules 2018, which is to ensure confidentiality of proceedings, both under the 2013 and 2018 regimes. As such, it must not then violate said spirit by allowing such material, obtained in violation of a confidentiality Agreement, to be admitted.

B. Information from the other arbitration is inadmissible if it has been obtained by an illegal hack

56. CLAIMANT argues that information from the other arbitration is inadmissible in this arbitration even if received in an unfair manner by an illegal hack of RESPONDENT's computer system ***[Cl. Memo, §84, p.18]***. To the contrary, information obtained by an illegal hack must not be allowed to be admitted into evidence under IBA Rules Art. 9.2 (b) **(i)** and arbitral practice does not allow the submission of such evidence that has been sourced by unlawful means **(ii)**.

i. IBA Rules do not allow admittance of evidence that has been obtained by an illegal hack

57. CLAIMANT argues that all information available to them must be admitted as evidence in this arbitration under IBA Rules Art. 3.1 ***[Cl. Memo, §§92-94, pp.19-20]***. IBA Rules Art. 9. similar to HKIAC Rules 2018 Art. 22, tasks the Tribunal with determining the admissibility, relevance, materiality and weight of evidence and it further goes on to grant the Tribunal the authority to exclude from any document evidence ***[IBA Rules, Arts. 9 (1), (2)]***. As such, the Tribunal must exclude from evidence the copy of the partial interim award from the other arbitration that CLAIMANT is attempting to submit ***[Metzler, p.233]*** under the IBA Rules Art. 9.2 (b) **(a)** and IBA Rules Art.9.2 (g) **(b).**

a. The evidence must be excluded under IBA Rules Art. 9.2 (b)

58. CLAIMANT has put forward the proposition that the Tribunal need not consider arguments relating to the illegality or inadmissibility of how the evidence was obtained, as it asserts that a Tribunal is not being bound as a court is, by technical rules of procedure ***[Cl. Memo, §70, p.15]***. CLAIMANT gives the impression that situations concerning illegality can only be considered by

the national courts ***[Cl. Memo, §79, p.15].*** However, IBA Rules Art. 9(b) grants the Tribunal the authority to exclude from evidence any document in a situation where there is a legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable. Here, information from the other arbitration must be disallowed from admittance, based on the legal impediment which is the violation of HKIAC Rules 2013 Art. 42, and because they may have been obtained illegally through a cybercrime.

b. The evidence must be excluded under IBA Rules Art. 9.2 (g)

59. CLAIMANT argues that prohibiting the admittance of information from the other arbitration could lead to violation of the principle of 'fairness' as CLAIMANT respected the principles of equal treatment and procedural fairness ***[Cl. Memo, §84, p.16]***. CLAIMANT makes this assertion while conceding that this would be unfair as the copy of the Partial Interim Award has been obtained by illegal means ***[Cl. Memo, §84, p.16].*** To the contrary, allowing information that has been obtained by an illegal hack to be evidence in this arbitration would violate the principle of 'fairness' ***[IBA Rules Art. 9.2 (g); Waincymer, p.870; Estavillo, p.397]***. As such, the Tribunal must look at the circumstances in which the CLAIMANT attempts to bring in evidence, and decide if it will be in conformity with fairness, equality and ethics ***[IBA Rules, Art. 9.2 (g); HKIAC Rules 2018 Art. 13.5]***. In this situation, despite its intention in Mr. Langweiler's letter of 2nd October 2018 to produce both a copy of the award and a relevant submission in order to discredit RESPONDENT, it later becomes apparent that CLAIMANT does not possess either ***[PO2, §41, pp.60-61]***. Having failed to procure the copy of the award, CLAIMANT then resorted to conducting a deal with a business of bad reputation, but has still not gained possession of the copy of the award ***[PO2, §41, pp.60-61]***. As such, admitting such doubtful evidence, which has violated not only confidentiality but corporate privacy, would be contradictory to the Tribunal's duty as per the IBA Rules, to act with fairness and with sensitivity to violations of ethical standards ***[Metzler, p.235; IBA Rules, Art. 9(3)(e)]***. This is because confidentiality is in itself a safeguard to the fairness and integrity of the arbitral process ***[Blavi, p.87]***. Furthermore, this Tribunal must take a strict approach as that taken in the case of *Libananco Holdings Co.* where it was decided that any illegally obtained evidence procured by Turkish surveillance, even if not obtained in bad faith, should be excluded in order to uphold the principles of procedural fairness, respect for confidentiality and legal privilege ***[Libananco Holdings Co.; Ireton, p.238]***. As such, the Tribunal must not allow the submission of evidence obtained by an illegal hack in order to avoid contravention of the principles of procedural fairness.

ii. Arbitral practice does not allow the submission of evidence that has been sourced by unlawful means

60. In any case, this information that CLAIMANT seeks to submit must not be admitted as it has been obtained through an illegal hack of RESPONDENT's computer system ***[Letter by Fasttrack, p.50].*** Admittance of evidence has been disallowed even where it has been the sole method of the plaintiff proving its case, where such evidence had been obtained illegally ***[Iranian Hostages Case].*** This has been so, because allowing such unlawfully obtained evidence would have disrupted the world order and set a bad precedent ***[Ireton, p.234].*** Additionally, Parties' wish for confidentiality and privacy outweighs the public interest in public hearings ***[Department of Economics]***.

61. CLAIMANT has further referred to *ConocoPhilips* in order to establish that disentitling it to submit such information would 'lead to a travesty of justice' ***[Cl. Memo, §86, pp.60-61]***. However, this is a misrepresentation of what the Tribunal in this case has held, as this was merely a comment made in the dissenting opinion ***[ConocoPhilips]***. The Tribunal in fact failed to make any mention of the illegally obtained evidence or their admissibility ***[Ireton, pp.239-240]***. As such, it is clear that arbitral practice does not allow for the submission of such evidence that has been obtained by illegal means.

CONCLUSION: CLAIMANT must not be entitled to submit evidence from the other arbitration as it would violate confidentiality of the other arbitration, and because such evidence has not been sourced in a lawful manner.

ISSUE 03: CLAIMANT IS NOT ENTITLED TO PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM THE ADAPTATION OF THE PRICE

62. CLAIMANT contends that it is entitled to an increase of the purchase price of at least 25% due to the higher costs following the imposition of the new tariffs, which requires adaptation of the contract by the Tribunal pursuant to Clause 12 of the contract and if not, under the CISG. ***[Cl. Memo, §99, p.20; NoA, §18, p.7]***. To the contrary, RESPONDENT only agreed to a narrow reference of the hardship clause and regulated some other risks associated with DPP directly in the contract ***[Exhibit R3, p.35; Exhibit C5, §10-11, p.14].*** In the event that the Tribunal decides that it has the power to adapt the contract based on the Mediterranean Law, CLAIMANT is not entitled to be paid US$ 1,250,000 or any other amount resulting from the adaptation of the price either pursuant to Clause 12 of the Contract **(I)**, or under the CISG **(II)**.

I. The purchase price must not be adapted pursuant to Clause 12 of the Contract

63. CLAIMANT argues that the Tribunal must consider the tariffs imposed by the Equatorian Government as constituting hardship under Clause 12 of the Sales Agreement, necessitating payment of additional costs borne, by an adaptation of the price by the Arbitral Tribunal ***[Cl. Memo, §100, p.21]***. While the CLAIMANT is correct in asserting that the hardship reference sets the threshold test through which circumstances which trigger the right to invoke hardship is determined ***[Cl. Memo, §100, p.21]***, the tariffs do not satisfy the hardship requirement under Clause 12 **(A)**. Furthermore, CLAIMANT is not entitled to any amount as a result of adaptation of the price as Clause 12 does not provide for adaptation as a remedy **(B)**. Additionally, CLAIMANT assumed the risk of tariffs under DDP **(C)**.

A. The Tariffs do not satisfy the hardship requirement under Clause 12

64. CLAIMANT puts forward that the hardship reference in Clause 12 was intended to cover not only the risk of changes in the health and safety requirements, but also other risks including the present tariff ***[Cl. Memo, §105, p.22; NoA, §18, p.7]***. To the contrary, Clause 12 of the Sales Agreement does not extend to the present impediment so as to allow an adaption of the purchase price, as imposition of taxes by governments or any comparable economic sanction have not been enumerated in the list of circumstances from which the seller is exonerated from liability ***[Exhibit C5, §12, p.14]***. As such, the present impediment is not a 'comparable unforeseen event' under Clause 12 **(i)**; and the tariffs do not drastically alter the equilibrium of the parties to satisfy hardship **(ii)**.

i. The present impediment is not a 'comparable unforeseen event' under Clause 12

65. The hardship reference under Clause 12 provide for two instances which make the contract more onerous, in the event of which the seller is not responsible: additional health and safety requirements, and comparable unforeseen events ***[Exhibit C5, §12, p.14]***. The tariff does not qualify as a 'comparable unforeseen event' since the present tariff is neither a 'comparable event' **(a)**; nor was it unforeseen **(b)** under Clause 12.

a. The Tariff is not a comparable event under Clause 12

66. Under Clause 12 of the Sales Agreement, the event to which the present tariff must be comparable is the CLAIMANT's past experiences of strict new health and safety requirements which involved highly expensive tests including long quarantine time that amounted to a 40% increase of the sales price ***[PO2, §21, p.56]***. Such a legal impediment was confronted by the CLAIMANT because of

an outbreak of a rare aggressive type of foot and mouth disease which killed a quarter of the cow population ***[PO2, §21, p.56]***. As opposed to vague impressions such as 'undue hardships' and 'disproportionate prejudice ***[Bernardini, p.213; Italian Civil Code, Art. 1467]***, this particular event provides a precise and detailed set of conditions to be taken into consideration when determining whether the present event is 'comparable' in order to be considered as a situation of hardship ***[Exhibit C5, §12, p.14]***. Accordingly, the hardship inquiry under Clause 12 narrows down to its interpretation ***[Schwenzer, p.715; Brunner, pp.147-148; CISG AC Opinion No. 7, §39]***.

67. CLAIMANT asserts that both tariffs and health and safety requirements are 'customs regulations' and that by such means, must be considered comparable to each other ***[Cl. Memo, §§5-7, p.3]***. Further, it attempts to argue that the absence of any objection by RESPONDENT's Mr. Antley when Ms. Napravnik expressed CLAIMANT's unwillingness to undertake risks associated with customs regulations ***[Exhibit C4, p.12]***, amounts to a common agreement between the Parties that all customs regulations are risks excluded under the hardship reference ***[Cl. Memo, §5-6, p.3]***. However, after negotiations were taken over by Mr. Krone and Mr. Ferguson, it is with reference to Ms. Napravnik's email on 31st March 2017 ***[Exhibit C4, p.12; PO2, §12, p.55]*** that a narrow hardship reference was included ***[Exhibit R3, p.35]***. The omission of the terms 'customs regulations' after considering Ms. Napravnik's email, which, if included could have attracted a wide range of circumstances under Clause 12, shows the deliberate intention of both Parties to restrict the meaning of the hardship reference to the bounds prescribed in the Clause ***[Exhibit R3, p.35]***. A reasonable person in the same position as CLAIMANT would understand accordingly ***[Guang Dong; Entreprise Alain Veyron]***. As such, CLAIMANT has misinterpreted the Parties' common intention at the time of concluding the contract. It also fails to identify the significant difference between tariff-barriers like the present government-imposed tariff of 30% which is an economic policy decision and non-tariff barriers such as health and safety regulations which are clearly administrative in nature ***[Understanding the WTO]***.

68. An understanding of Clause 12 with reference to the surrounding circumstances requires an inquiry into the *effect* of the event specified under it ***[CISG, Art. 8(3)]***. The effect of the additional health and safety requirements in the previous experience of CLAIMANT resulted in a 40% cost increase ***[PO2, §21, p.56]***. However, here, the tariff has resulted in only a 30% increase in cost and hence is considerably different to the threshold set by Clause 12 ***[Exhibit C6, p.15]***. Moreover, the 40% cost increase resulted in a loss of US$ 8, 000, 000 to the CLAIMANT ***[Exhibit C4, p.13; PO2, §21, p.56]*** which is almost *three times* the loss by the present tariff. As such, with reference to these

circumstances surrounding Clause 12, a reasonable person would *not* consider the two events as comparable ***[ICC No. 8213; TETA Case]***. As such, the tariff is not a comparable event under Clause 12.

a. The hardship was not a comparable unforeseen event under Clause 12

69. CLAIMANT asserts that since Equatoriana is known to be a supporter of free trade ***[Exhibit C6, p.15]***, neither party expected the tariffs imposed by the Equatorian government, and it is therefore a comparable unforeseen event ***[Cl. Memo, §102, p.21]***. To the contrary, the requirement under Clause 12 is that the unforeseen nature must be comparable to the specified past experience of CLAIMANT ***[Exhibit C5, Cl. 12, p.14]***; thus just any unforeseen event does not suffice to meet the standard of hardship under Clause 12. Accordingly, although the imposition of additional health and safety requirements by Danubia in the previous situation due to spread of an epidemic caused by an outbreak of a rare type of foot and mouth disease was clearly an unforeseen event, the present impediment, triggered by political and policy reasons must not be perceived as comparable to the former ***[Exhibit C6, p.15]***. Additionally, even in the past, the Equatorian government has reacted with direct retaliatory measures ***[Exhibit C6, p.15]***.

70. Whether the present impediment has been foreseen by CLAIMANT must be assessed by placing the diligent merchant in the same circumstances as CLAIMANT at the time of conclusion of the contract ***[da Silveira, p.205; Schwenzer, p.1068; Tallon, pp.580-581; Kessedjian, p.418]***. The basis for RESPONDENT's request for increased dosages was to gain advantage of a temporary lifting of a ban on artificial insemination ***[Exhibit C1, p.9]***. These were the circumstances within which CLAIMANT agreed to exceptionally supply 100 doses, or rather any dose of frozen semen for racehorse breeding for the first time ***[Exhibit C2, p.10; PO2, §14, p.55]***. This suggests that CLAIMANT was aware of the instability of the market for horse semen in Equatoriana at the time of conclusion of the contract and was exposed to obvious signs of a tariff, which allows it to foresee the occurrence of this impediment ***[Brunner p.160; Flambouras, p.271]***. CLAIMANT, being the 'oldest and most renowned' stud farm in the market is a competent business entity possessing unmatched market experience and knowledge which must then have foreseen any consequences that may result from such instability ***[NoA, §1, p.4]***. As such, the present situation must not be considered unforeseen by the Parties so as to render the consequences a hardship, justifying adaptation of price.

ii. The Tariff does not drastically alter the equilibrium of the Parties to satisfy hardship

71. CLAIMANT contends that being allocated the 30% tariff will cause it to lose its profit margin and suffer a material loss of 25% given the financial constrains that CLAIMANT is in, it asserts that this alters the contract's equilibrium and commercial basis ***[Cl. Memo, §109, p. 3].*** In situations where there is no specific risk assumption by the parties and the existence of the obligor would not be seriously and effectively endangered if it were to perform the contract under its original terms, the contractual equilibrium must be altered by at least 100% to be deemed fundamental ***[Brunner, p.432; Enderlein & Maskow, p.325]***. Schwenzer suggests a 150-200% margin ***[Schwenzer, p.717]***. As such, it is clear that the cost increase borne by the CLAIMANT due to the tariff falls far short of the accepted stipulated standards.

72. Supervening events resulting in an alteration of somewhat less than 100% may arguably also constitute hardship, in a case in which the obligor's financial ruin is impending and it must fully perform the contract ***[Brunner, p.435; Himpurna California Energy Ltd., §211]***. Yet in absolute figures, the financial impact on the obligor may become disastrous, especially if it is a relatively small company for which the affected contract represents a significant part of its revenue ***[Brunner, p.435]***. It is recognized that an alleviation of the 100% alteration thumbnail rule is only conceivable in extreme situations ***[Brunner, p.434]***. However, being the largest stud farm in the country, the CLAIMANT hardly fits in to the criteria which require a lowering of the threshold test ***[NoA, §§1-2, p.4]***. Furthermore, since the loss of profits due to the tariff will only impact the dressage part of CLAIMANT, it can hardly be equated to financial ruin ***[PO2, §2, p.57]***. As such, there is no drastic alteration of the equilibrium as asserted by the CLAIMANT so as to lead to adaptation of price.

73. CLAIMANT asserts that the principle of good faith ***[UNIDROIT Principles, Art. 7(1)]*** requires the RESPONDENT to inform the CLAIMANT about its intention to not adapt the price before the delivery of the goods ***[Cl. Memo, §§112-113, p.23]***. It alleges that RESPONDENT has 'manipulated' its way to the last shipment ***[Cl. Memo, §113, p.23]***. Contrary to such assertions, RESPONDENT did not lack good faith, as Mr. Shoemaker, although not a negotiator, but only the veterinarian responsible for the development of the racehorse breeding programme made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs but that he would verify that with the persons involved in drafting ***[Exhibit R4, p.36]***. He also pointed out that he had no authority to agree on an adaptation ***[ANoA, §10, p.30; Exhibit R 4, p.36]***. Despite good faith being an overarching general principle in international

commercial transactions ***[Henriques, p.514]***, it is important that the principle does not impinge on non-legal criteria, such as morality, which can render law uncertain and unpredictable ***[Tetly, p.12; Styles, p.161]***. Accordingly, RESPONDENT cannot be expected to ignore its interest in delivery of the outstanding doses ***[ANoA, §10, p.30; Al-Khalifa, p.30]*** in complying with the obligation of good faith. As such, RESPONDENT's Mr. Shoemaker has clearly acted in conformity with the principle of good faith.

B. Express sanction is required to adapt the contract under the Danubian Law

74. CLAIMANT asserts that the absence of a sanction in Clause 12 to adapt the contract does not prevent it from requesting price adaptation ***[Cl. Memo, §116, p.24]***. Yet, in the absence of any express provision as to further steps that can be taken by the Parties in a situation of hardship either under Clause 12 or the DRC, CLAIMANT cannot be entitled to payment of any sum as a result of any purported adaptation of the purchase price ***[Thurn and Taxis]***. In a hardship clause it is important to stipulate when and how the parties will rearrange the contractual terms in case the contract loses its economic balance ***[Alfons, pp.53-54]***. In the case of the silence of the hardship clause on the further steps which may be taken, an adaptation or termination clause regarding future events can *normally not be implied* ***[Brunner, p.421; Farnsworth, p.860]***. As such, in the absence of a remedial measure under Clause 12 which was reduced to writing after deliberation by the two heads of legal departments of the Parties ***[PO2, §4, p.54]***, CLAIMANT cannot impose an implied duty on the RESPONDENT to renegotiate the price.

75. CLAIMANT further relies on the principle of good faith to assert that RESPONDENT is obliged to renegotiate the contract price on account of the present impediment, based on ICC Award No. 9994 ***[Cl. Memo, §116, p.24]***. According to the Award, good faith imposes on a party, the duty to seek out adaptation of its agreement with another *if performance will cause ruin of one of the Parties* ***[ICC No. 9994]***. As established above, the loss of profits due to the tariff will only impact the dressage part of Phar Lap Allevamento which is susceptible to sale as a condition for the entry into a new credit ***[PO2, §27, p.57]***; hence it will not cause the ruin of CLAIMANT as a whole. Accordingly, CLAIMANT cannot allege lack of good faith on the part of RESPONDENT for not renegotiating the contract price.

76. Additionally, it has already been established that the Tribunal does not have jurisdiction to adapt the contract under the Danubian Law in the absence of an express conferral of power to that effect in the DRC ***[See §39]***. The modified UNIDROIT Principle Art. 6.2.3 (4)(b) in keeping with the

four-corners rules as adopted by the Danubian courts must prevent the Tribunal from assuming powers which have not been expressly provided in the contract ***[PO2, §45, p.59]***.

C. CLAIMANT assumed the risk of tariffs under DDP

77. CLAIMANT's position is that the Parties have agreed to modify certain conditions of DDP (INCOTERMS 2010) pursuant to which the risk of the costs of the tariffs have been allocated to the RESPONDENT ***[Cl. Memo, §120, p.25]***. While the RESPONDENT agrees that CLAIMANT was exonerated from certain risks associated with DDP **(i)**, they did not include the import tariffs under Clause 12 of the Sales Agreement **(ii)**.

i. Parties agreed to exonerate CLAIMANT of certain risks associated with DDP

78. CLAIMANT asserts that by virtue of the principle of party autonomy under CISG Art. 6, the conditions of DDP have been varied ***[Cl. Memo, §120, p.25]***. RESPONDENT agrees that the Parties may adjust INCOTERMS to suit their specific needs ***[Mekki-Kaddache & Nemsi]***. However, in this instance, the Parties agreed to relieve the CLAIMANT from certain risks associated with DDP only so far as they are set forth in the Sales Agreement. This is because Mr. Ferguson and Mr. Krone (the heads of legal departments of the Parties) negotiated and agreed on the inclusion of a *narrow* hardship reference into the force majeure clause and regulated some other risks directly in the contract after having decided that the ICC hardship clause suggested by Ms. Napravnik to be too broad ***[Exhibit R3, p.35]***. Here, the contract must be interpreted in accordance with the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances ***[UNIDROIT Principles, Art. 4.1; CISG, Arts. 8(1) & 8(2); ICC No. 11295, §49; Airplane Case; UAB]***. As such, the Parties jointly agreed that Clauses 10, 11 and 12 of the Sales Agreement conclusively encompass the specific exemptions from risks associated with DDP awarded to the CLAIMANT ***[PO2, §21, p.56; Exhibit R3, p.35]*** and the exemptions from DDP must be limited to those agreed by the Parties.

ii. Risk of tariffs was not transferred to the RESPONDENT under modified INCOTERMS

79. CLAIMANT asserts that the risk of taxes payable upon import must be borne by the buyer ***[Cl. Memo, §121, p.25]***. To the contrary, under DDP (INCOTERMS 2010), by virtue of choosing delivery DDP, the obligation of clearing the goods for imports, paying duty, VAT and other taxes and charges levied upon import of goods is explicitly placed on the seller ***[Ramberg, p.61, Brunner, p.131]***. It represents the maximum obligation on the seller, including responsibility for

border control activities ***[Bergami, p.3; Mudric, p.7]***. This is unlike DAP (Delivery At Place) or DAT (Delivery At Terminal), where the risk transfers from seller to buyer when the goods are available for unloading and when the goods have been unloaded respectively ***[Ramberg, p.50]***. Here, Parties have agreed on DDP, Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery and INCOTERMS 2010 edition ***[PO2, §10, p.55]***, according to which the risk of the tariffs are solely placed on the CLAIMANT.

80. CLAIMANT argues that the principle of superior risk-bearer can be used to determine which of the two Parties should bear the risk of loss resulting from the tariff ***[Cl. Memo, §110, p.23; Brunner, p.183]***. While this principle is not ideal to govern situations comparable to the one at hand, the approach of risk allocation raises a number of concerns and must not be recognized as a general standard to allocate the risk of the occurrence of force majeure events or changed circumstances ***[Brunner p.144]***. There are also cases where the empirical factors relevant under the rule of superior risk-bearer point in different directions ***[Posner & Rosenfield]***. In addition to the inadequacies of the principle, if the parties have expressly assigned the risk to one of them, there is no occasion to inquire which the superior risk-bearer is ***[Kull, pp.43-44; Jenkins, p.2018]***. As was established above, there is no ambiguity as to where the risk of the tariff lies in the present situation given that the Parties have agreed for DDP ***[see §71; PO2, §10, p.55]***. Hence there is no basis for the application of the principle of superior risk-bearer.

II. CLAIMANT cannot request any payment following adaptation of the contract under the CISG

81. In addition to claiming adaptation of the contract under Clause 12, CLAIMANT further asserts that the CISG requires an adaptation of the contract price entitling it to a sum of US$ 1,250,000 or any other payment ***[Cl. Memo, §128, p.27]***. To the contrary, CLAIMANT is not entitled to any payment through an adaptation of the contract since the CISG does not provide for it **(A)**; additionally, even the UNIDROIT Principles do not require any payment following adaptation **(B)**.

A. CISG does not require any payment following adaptation

82. CISG does not require any payment following adaptation since Art. 79 is not applicable to the contract **(i)**; and even if it is, CLAIMANT cannot rely on CISG Art. 79 to request adaptation **(ii)**; and CISG Art. 50 cannot be applied to infer price adaptation in situations of hardship **(iii)**.

i. CISG Art. 79 is not applicable

83. Since RESPONDENT rejected the ICC Hardship clause and deliberately narrowed down the scope of Clause 12 to meet the specific concerns of both Parties ***[Exhibit R3, p.35]***, Clause 12, in effect, provides for narrower and more specific situations of force majeure and hardship. CISG Art. 79 covers the force majeure exceptions to non-performance of a contract ***[CISG AC Opinion No. 7, §5]***. Even though it applies to all parties contracting under the CISG, it is still bound by the exception in CISG Art. 6 which allows the contracting parties to choose the law to govern the contract, and furthermore to derogate from certain articles based on the principle of party autonomy ***[Schlechtriem, p.7; Winship, p.32; Fountoulakis, p.4]***. If a clause is included in the contract which contradicts or provides a different solution than such provisions as found in the CISG, then the latter is considered derogated ***[Schlechtriem, p.9; Karollus, p.76]***. Clause 12 of the contract explicitly governs situations of force majeure by default and has been amended by the Parties to incorporate hardship as well ***[Exhibit R3, p.35]***. CISG Art. 79 not being a mandatory provision has accordingly been derogated from and replaced by Clause 12. As such, its application will directly contradict the intention of the Parties based on their negotiations ***[Farnsworth, p.87]*** to narrow the force majeure and hardship clauses to specific situations.

ii. Even if CISG Art. 79 is applicable, CLAIMANT cannot rely to request price adaptation

84. Even if the Tribunal deems CISG Art. 79 to be applicable to the contract, it cannot be relied upon by the CLAIMANT to request price adaptation. The scope of application of CISG Art. 79 is considerably contested, and as such, hardship must not be included within its purview ***[CISG AC Opinion No. 7, §27]***.

85. Drafting history of CISG Art. 79 indicates that there was support for the proposition that CISG does not favour an exemption from non-performance and that the notion of 'impediment' under CISG Art. 79 points to an extraordinary circumstance that is unrelated to the more flexible notions of hardship, impracticability and frustration. ***[CISG Legislative History; Honnold p.629-630; Bonell, p.320; Ziegel & Samson]***. The UNCITRAL Working Group's adoption of the term 'impediment' in CISG Art. 79 was to exclude the scenario envisioned under ULIS Art. 74, in which the obligor could escape liability when performance had become unexpectedly difficult for reasons beyond his control ***[CISG AC Opinion No 7, §28; Bonell, p.322]***. In addition, a proposal aimed at incorporating an Article allowing a party to 'claim an adequate amendment of the contract or its termination' on account of 'excessive difficulties' was expressly rejected by the UNCITRAL

Working Group ***[Honnold, p.252; Ferrari, p.65]***, leading to the conclusion that hardship was to be excluded from the purview of the Article.

86. Even if CISG Art. 79 should be interpreted to include situations of hardship, it is established that they should be of exceptional nature ***[CISG AC Opinion No. 7, §37; Schlechtriem p.102-103; Schlechtriem & Jones, p.98; Perillo, p.21]***. However, the CISG does not define the *extent* of hardship needed for the qualification of an exemption of obligation, thus rendering it an adequate guide, which is even agreed to by the CLAIMANT ***[Cl. Memo, §130, p.27]***. In addition, even if CISG Art. 79 is deemed applicable, it is ineffective in determining a price adaptation since it only excludes a claim for damages ***[Kröll, p.45; Lookofsky, p.121]***; as such, CISG Art. 79 must not be relied upon to demand price adaptation.

iii. CISG Art. 50 cannot be applied to infer price adaptation for hardship

87. CLAIMANT wrongfully asserts that price adaptation as a remedy can be inferred from the application of CISG Art. 50 ***[Cl. Memo, §144, p.29]***. According to CISG Art. 50, a reduction in price is available only when the goods do not conform to the contract ***[CISG, Art.50]***. CISG Art. 50 confers on the buyer a right to reduce the price of non-conforming goods in lieu of claiming damages ***[Ziegel & Samson; Will, p.43; Bergsten & Miller, p.39]***, based on the notion that it is unjust to require the buyer to pay the full price for non-conforming goods. Therefore, it is clear that the basis for price adaptation justified under CISG Art. 50 is completely different to the present hardship situation ***[Enderlein, p.154; Ziegel & Samson; Gartner, p.4; Tuñón]***. Even if CISG Art. 50 is applicable, it equips the *buyer* against the risks of transactions, thus essentially favouring the RESPONDENT's position. As such, CISG Art. 50 must not be used to justify price negotiations under the current circumstances.

iv. Other general principles underlying the CISG are displaced by Party Autonomy

88. CLAIMANT contends that despite the inadequacy of CISG Art. 79, Parties are duty-bound to renegotiate the price through an analogy to certain generally recognised principles underlying the CISG ***[Cl. Memo, §137, p.29]***. Both Parties discussed the *possibility* of the inclusion of a price adaptation clause to the contract during initial negotiations but it was finally not included in Clause 12 ***[Exhibit C8, p.17]***. Though Mr. Antley's notes indicated the need to address such matters, there is no evidence of the reason for the subsequent exclusion of such clause ***[PO2, §§6-7, p.54]***. Party autonomy has been referred to not only as a general principle, ***[Secretariat Commentary: CISG Art. 12, §3]*** but as the overriding principle and the dominant theme of the Convention ***[Honnold, p.342]***. Furthermore, when judging reasonability, the policy of the Convention should

be followed; such as, in contrast to ULIS, never requiring a party to act promptly ***[Eörsi, pp.2-5]***. Therefore, prior to recourse to any general principle, one must give priority to the contract. It is evident that although price adaptation was discussed by the original negotiators for the Parties ***[Exhibit C8, p.17]***, the succeeding negotiators who drafted Clause 12 did not include the remedy of adaptation ***[PO2, §12, p.55]***. Thus, contrary to the CLAIMANT's contention, general principles underlying CISG resorted to by CLAIMANT are overridden by Party Autonomy in favour of excluding price adaptation as a remedy.

B. UNIDROIT Principles do not require any payment due to adaptation

89. CLAIMANT wrongfully asserts that it is entitled to an amount of at least US$ 125, 000 following an adaptation of the contract under the UNDIROIT Principles ***[Cl. Memo, §§153-158, pp.31-32]***. Due to the inadequacy of CISG Art. 79 to govern the present circumstances, the general contract laws of both countries, being verbatim adoptions of the UNIDROIT Principles, ***[PO1, §4, p.52]***, can be used to fill in the gaps of the CISG ***[Kotrusz, p.140]***. Contrary to CLAIMANT's assertions, the contract price does not require adaptation under UNIDROIT Principles Art. 6.2.2 **(i)**; and CLAIMANT is not entitled to any amount pursuant to UNIDROIT Principles Art. 6.3.3 **(ii)**.

i. The contract does not require adaptation under UNIDROIT Principles Art. 6.2.2

90. CLAIMANT attempts to lay down the criteria required to be fulfilled in order to establish hardship under UNIDROIT Principles Art. 6.2.2 ***[Cl. Memo, §§153-158, pp.31-32]***. Under the first criterion ***[UNIDROIT Principles, Art. 6.2.2(a)]***, CLAIMANT submits that a fundamental alteration of the equilibrium of the contract has been caused because it experienced a cost increase of 30% due to the taxes ***[Cl. Memo, §§153-158, pp.31-32]***. To the contrary, the alteration of cost required to establish hardship is not even 50% as given under the 1994 edition of the Official Comment on UNIDROIT Principles, but is generally proposed to be at least 100% ***[Enderlein & Maskow, §6.3; Berger, §§24-66]***. The most commonly awarded instances operate at the range of 80 - 100 % cost increase ***[CISG AC Opinion No. 7; Lookofsky, p.86]***. As such, the 30% cost increase due to the tariffs is well below the standard threshold of consideration for hardship.

91. The second requirement to establish hardship as per UNIDROIT Principles Art. 6.2.2 is that the event occurs or becomes known to the CLAIMANT after the conclusion of the contract ***[UNIDROIT Principles Art. 6.2.2(b)]***. This requirement is not challenged by the RESPONDENT as the tariffs were imposed only before the third shipment, which is a considerable time after the conclusion of the contract ***[Exhibit C6, p.16]***. However, the third

requirement to establish hardship, which is that the tariffs must not have been reasonably taken into account by the CLAIMANT at the time of the conclusion of the contract ***[UNIDROIT Principles, Art. 6.2.2(c)]***, is not addressed by CLAIMANT. As it has been established above ***[See §70]***, by placing the diligent merchant in the shoes of the CLAIMANT at the time of conclusion of the contract, it is clear that CLAIMANT has foreseen adverse consequences stemming from the merely temporary lift of the ban of artificial insemination in Equatoriana ***[Exhibit C1, p.9; da Silveira, p.205; Schwenzer, p.1068]***. Accordingly, the present imposition of the tariffs is an event that must have been reasonably taken into account by the CLAIMANT, and as such does not contribute to establish hardship to the CLAIMANT under UNIDROIT Principles Art. 6.2.2 (c).

92. Seeking to satisfy the last criterion ***[UNIDROIT Principles, Art. 6.2.2(d); Brunner, p.424; Roth, §§35-40]***, CLAIMANT asserts that it has not assumed the risk of the present tariff ***[Cl. Memo, §§157-158, p.32]***. Contrary to such assertion, by agreeing to DDP, it in fact incorporated the present risk, as reflected by the high profit margin ***[See §78-79]***. CLAIMANT agreed to DDP on the condition of an increase of US$ 1000 per unit for the additional cost ***[Exhibit C4, p.12]***. However, observing the fact that only US$ 200 is the direct cost per unit for DDP ***[PO2, §8, p.54]***, it is clear that there is an 80% profit margin per unit. When determining the level of the risk, the profit margin can be a useful indicator to measure the actual intention to assume risks of a particular scale ***[Brunner, p.425; Perillo, §86].*** An extremely high profit margin of 80% and it could only mean that the CLAIMANT assumed the risks associated. As such, the present impediment does not qualify as a hardship situation under UNIDROIT Principles Article 6.2.2 in order to require adaptation of the price.

ii. CLAIMANT is not entitled to any amount pursuant to UNIDROIT Principles Art. 6.3.3

93. CLAIMANT further asserts that it has the right to request renegotiation of the contract under UNIDROIT Principles Art. 6.3.3 ***[Cl. Memo, §§158-161, pp.32-33]***. Even if the Tribunal decides that the present tariffs amount to hardship under UNIDROIT Principles Art. 6.2.2, although CLAIMANT may not be prevented from requesting renegotiation, the RESPONDENT has the right to refuse such a request for no stated reasons without assuming contractual liability for damages under UNIDROIT Principles, Art. 6.2.3(4) ***[Brunner, p.482]***. As such, the Tribunal must not adapt the contract price and entitle the CLAMAINT to the requested amount merely by virtue of its request to renegotiate.

CONCLUSION: CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Clause 12 of the contract or under the CISG.

PRAYER FOR RELIEF

On the basis of the foregoing arguments and CLAIMANT's prior written pleadings, RESPONDENT respectfully requests to the Tribunal, while dismissing all contrary requests and submissions by CLAIMANT,

i. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
ii. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;
iii. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

CERTIFICATION

24.01.2019
Colombo,
Sri Lanka.

We hereby confirm that this memorial was written by the undersigned.

Senith Abeyanayake

Rasara Jayasuriya

Vineshka Mendis

Hasini Rupasinghe