SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION

MEMORANDUM FOR RESPONDENT

CASE NO. HKIAC/A18128

UNIVERSITAS PADJADJARAN

INDONESIA

On behalf of:

Phar Lap Allevamento

Rue Frankel 1

Capital City

Mediterraneo

Against:

Black Beauty Equestrian

2 Seabiscuit Drive

Oceanside

Equatoriana

COUNSELS

JORRYN ALEXANDER ROTTY • MICHAEL CHRISTOPHER FERDIAN •

MUHAMMAD LAZUARDY THARIQ MAKMUN • RAFI ADRIAN RAHAD

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INDEX OF ABBREVIATIONS

&	And
¶/¶¶	paragraph/paragraphs
%	Percent
§	Section
2013 Rules	2013 HKIAC Rules
Ans. NoA.	Answer to Notice of Arbitration
Arbitration Clause	Clause 15 of the Frozen Semen Sales Agreement
Art.	Article
Choice of Law Clause	Clause 14 of the Frozen Semen Sales Agreement
CISG	United Nations Conventions on Contracts for the International Sales of Goods 1980
Cl.	CLAIMANT
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo	CLAIMANT's Memorandum
the Contract	The Frozen Semen Sales Agreement concluded by the Parties
the Convention 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DDP (INCOTERMS 2010)	Delivery Duty Paid
the Doctrine	The doctrine of separability
the Evidence	The partial interim award and the relevant submissions from the other arbitration
the Goods	The frozen horse semen
Hardship Clause	Hardship clause incorporated under Clause 12 of the Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association Rules on Taking of Evidence
Ibid	ibidem (in the same place)

ICC	International Chambers of Commerce
ICSID	International Centre for Settlement Investment Dispute
INCOTERMS	International Commercial Terms
Intel	Intelligence company that provides information on the horseracing
Letter of Langweiller	The letter issued by RESPONDENT concerning the Evidence
Ltd.	Limited.
MAL	Mediterranean Arbitration Law
MCL	Mediterranean Contract Law
Model Law	The 2006 UNCITRAL Model Law
NoA	CLAIMANT's Notice of Arbitration
p. / pp.	Page / Pages
the Parties	CLAIMANT and RESPONDENT
PO 1	Procedural Order 1
PO 2	Procedural Order 2
PICC	UNIDROIT Principles of International Commercial Contracts
Resp. Ex.	RESPONDENT's Exhibition
the Theory	The seat theory
the Tribunal	The arbitral tribunal in the present dispute
UNCITRAL	United Nations Commission on International Trade Law
US$	United States Dollar
v.	Versus

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Sweden

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Swedish Supreme Court
Case No. T 1881-99
Cited as: Bulgarian Foreign Trade Bank Ltd v. Al Trade Finance Inc
Cited in: ¶7

INDEX OF LEGAL SOURCES, RULES, AND TREATIES

CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2016
HKIAC Rules 2013	Hong Kong International Arbitration Centre Administered Arbitration Rules 2013
HKIAC Rules 2018	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration 1985 with amendments as adopted in 2006
New York Convention	The New York Convention of 1958
ICC Rules	International Chamber of Commerce Rules 1998

UN Doc. A/CN/WG.II/WP.41	Travaux Préparatoires UNCITRAL Model Law
UN Doc. A/CN/9/245, ¶21, p. 6 & ¶18, pp. 5-6	Travaux Préparatoires UNCITRAL Model Law
INCOTERMS Rules 2010	International Commercial Terms Rules 2010
A/CONF.97/19	Official Records Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees on United Nations Conference on Contracts for The International Sales of Goods: Vienna, 10 March-10 April 1980
IBA Rules	IBA Rules on The Taking of Evidence in International Arbitration

STATEMENT OF FACTS

The Parties to the present arbitration are Black Beauty Equestrian [**"RESPONDENT"**] and Phar Lap Allevamento [**"CLAIMANT"**].

RESPONDENT is a world-famous equestrian farm located in Equatoriana
CLAIMANT is Mediterraneo's oldest and most renown stud farm

CLAIMANT and RESPONDENT [**"the Parties"**] have finished performing all of their obligations which consist of three delivery terms and two payment terms

21 March 2017	RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III for its newly started breeding program and requested 100 doses of Nijinsky III' frozen semen
24 March 2017	CLAIMANT accepted RESPONDENT's request under the condition that it shall be picked up at CLAIMANT's premises. CLAIMANT also proposed the law of Mediterraneo shall govern the Contract
28 March 2017	RESPONDENT accepted the offer, with a condition that the delivery shall be on the basis of DDP and the dispute resolution shall be under the jurisdiction of the courts of Equatoriana
31 March 2017	CLAIMANT accepted the DDP and requested to include a hardship clause. CLAIMANT rejected RESPONDENT' s dispute resolution offer and proposed for arbitration in Mediterraneo. CLAIMANT suggests a personal meeting in Vindobona on 12 April 2017.
10 April 2017	RESPONDENT rejected CLAIMANT's seat of arbitration offer and proposed a draft based on HKIAC model clause with the conditions that the seat and the law of the arbitration is Equatoriana.
11 April 2017	CLAIMANT rejected RESPONDENT's offer and agreed to exclude the law of Mediterraneo to apply and proposed that the seat of arbitration to be in Danubia as a neutral country and also proposed to adopt the ICC-Hardship Clause.
12 April 2017	The Parties held a personal meeting at Vindobona to discuss the seat of arbitration and its applicable law RESPONDENT rejected the reliance on the ICC-Hardship Clause as it was considered to be to broad Ms. Napravnik and Mr. Antley, suffered a car accident and got severely injured prior to the annual colt auction in Vindobona.

6 May 2017	The Parties conclude the Frozen Semen Sales Agreement (**hereinafter "the Contract"**).
18 May 2017	The first payment installment from RESPONDENT
20 May 2017	The first shipment from CLAIMANT in the amount of 25 doses under DDP basis.
3 October 2017	The second shipment from CLAIMANT in the amount of 25 doses under DDP basis.
19 December 2017	The president of Equatoriana imposed a 30% import tariff on agricultural products in response to 25% import tariff imposed by the government of Mediterraneo.
20 December 2017	The Parties acknowledged the import tariff through an article from Peak Business News.
15 January 2018	The import tariff from the Equatorianan government took effect.
20 January 2018	CLAIMANT discovered the Frozen Semen (**hereinafter "the Goods"**) was affected by the 30% import tariff and requested for a renegotiation of the purchase price.
21 January 2018	RESPONDENT completed the second payment installment and requested CLAIMANT to deliver the third instalment of the frozen semen. RESPONDENT accepted CLAIMANT's request to renegotiate the purchase price with a condition only if provided by the Contract.
23 January 2018	The third shipment from CLAIMANT in the amount of 50 doses under DDP basis
12 February 2018	The Parties had a meeting to renegotiate the purchase price which was ended by RESPONDENT's CEO due to CLAIMANT's allegation that RESPONDENT had resold the frozen semen
31 July 2018	CLAIMANT submits its Notice of Arbitration
2 October 2018	CLAIMANT received reliable information at the annual breeder conference about another arbitration between RESPONDENT and another arbitration concerning the sale of a mare and tariff imposition. CLAIMANT seeks to introduce the partial interim award and its relevant submission into the arbitration.
3 October 2018	RESPONDENT objects CLAIMANT's intention to introduce the partial interim award and the submissions since they are confidential documents.

SUMMARY OF ARGUMENTS

1. The scope of the Arbitration Agreement does not extend to adaptation of contract since DAL restricts its interpretation. Furthermore, the Arbitration Agreement does not confer the power of Contract adaptation upon the Tribunal. As if this were not enough, Contract adaptation is not provided by the procedural and substantive law of the dispute. Even if the Tribunal authorizes an adaptation of the Contract, the award would be rendered as unenforceable, defeating the Parties' purpose to even arbitrate in the first place (**ISSUE I**). Even so, jurisdictional matters are just the tip of the iceberg.
2. CLAIMANT is still not entitled for remuneration in the first place since the situation at hand falls beyond the ambit of the Hardship Clause. Even if it does, the Contract does not authorize the Tribunal to adapt the purchase price as it is not provided under the Hardship Clause. Furthermore, CLAIMANT's divergence to CISG would only be futile since it does not govern matters concerning hardship and its consequences. Even if hardship is governed by CISG, the remedy that CLAIMANT seeks does not even exist (**ISSUE III**).
3. Additionally, CLAIMANT seeks to introduce an evidence derived from another arbitration between RESPONDENT and a party from Mediterraneo in order to prove the Tribunal that it possesses the power for contract adaptation. Accordingly, CLAIMANT is completely neglecting the fact the Evidence is inadmissible. Based on the content, the Evidence irrelevant and immaterial since the information confined in the Evidence does not grant the Tribunal contract adaptation. Even so, the Evidence is confidential and therefore, should be excluded from this proceeding. Furthermore, CLAIMANT argues that excluding the Evidence amounts to a violation of due process. Such proposition is only a hyperbole, since CLAIMANT is fully capable of presenting their case without the Evidence (**ISSUE II**).

ARGUMENTS

I. ISSUE A: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND/OR THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. As laid out in Procedural Order No. 1 regarding the first issue of jurisdiction [*PO No. 1, §III, ¶1(a), p. 52*], RESPONDENT submits that the present arbitral tribunal (**hereinafter "the Tribunal"**) lacks the jurisdiction and the power under Clause 15 of the Frozen Semen Sales Agreement (**hereinafter "Arbitration Agreement"**) to adapt the Contract. The Tribunal's power to adapt the contract shall be determined through a simultaneous analysis of the arbitration agreement, the *lex arbitri*, and the applicable substantive law to the dispute (*lex causae*) [*Berger, pp. 7-8*].
2. Applying the aforementioned, the Tribunal should refrain from ruling on the dispute for it lacks the jurisdiction and power to adapt the Contract based on the interpretation of the Arbitration Agreement as seen through Danubian arbitration law (**hereinafter "DAL"**), which is the applicable *lex arbitri* **(A).** Additionally, the Tribunal lacks the conferral power from the Arbitration Agreement **(B)** and under both the procedural and substantive law of the dispute **(C)**. Should the Tribunal still decide to rule on the adaptation of contract, the award would be rendered unenforceable under Art. V(1)(c) of New York Convention (**hereinafter "the Convention"**) **(D)**.

A. Danubian Arbitration Law Applies as the *Lex Arbitri,* Through Which Application Denies the Tribunal's Power to Adapt the Contract

3. As a repudiation to CLAIMANT's allegations, the Arbitration Agreement must be narrowly interpreted as a direct result of the application of DAL. RESPONDENT submits that DAL directly governs the Arbitration Agreement **(ii)** as a consequence of the Doctrine of Separability **(i)** and is in accordance with the Parties' intention **(iii)**. Ultimately, the award remains enforceable under DAL **(iv)**.

i. The Doctrine of Separability allows for the application of Danubian arbitration law

4. Contrary to CLAIMANT's contention [*Cl. Memo, ¶17-8, p. 8*], the Doctrine of Separability is clearly applicable in a choice of law analysis regardless of Art. 16(1) of UNCITRAL Model Law (**hereinafter "the Model Law"**). The Doctrine of Separability creates the possibility for the

application of a different law to apply to the arbitration agreement than that to the contract [*Born/Practice, §2.04; Born/Commentary, pp. 67-68; Born, §4.02, pp. 47 5-476; Lew/Mistelis/Kröll, ¶6.23, p. 107; Kaplan/Moser, §5.05, p. 80*]. This is proven from international practices that have applied laws different from that which applies to the underlying the contract, with the autonomy of the arbitration agreement as consideration [*Interim ICC, No. 4367; ICC, No. 4131*].

5. With this in mind, it remains possible for DAL to apply to the Arbitration Agreement due to the Doctrine of Separability.

ii. Danubian Arbitration Law directly governs the Arbitration Agreement by virtue of the Seat Theory in the absence of an expressed choice of law

6. It is widely accepted that the law of the seat applies directly to the Arbitration Agreement in the absence of parties' choice of law **(a)**. Bearing the Doctrine of Separability in mind, DAL directly governs the Arbitration Agreement by virtue of the presumption of the Seat Theory **(b)** as well as the "Closest Connection" principle **(c)**.

a. The direct application of the law of the seat is widely accepted

7. The application of the law of the seat has acquired the recognition and acceptance in international arbitration [*Redfern/Hunter, ¶3.53, p. 172*], as it avoids the difficulties that might arise at the stage of enforcement or recognition under the Convention [*Jarvin/Lew, p. 142; ICC, No. 4392; ICC, No. 4472*]. It is proven from the conflict of law rules provided by the Convention and the Model Law, both of which directly apply the law of the seat in the absence of parties' choice of law [*Art. V(1)(a), New York Convention; Art. 34(2)(a)(i) & 36(1)(a)(i), Model Law*]. Furthermore, the general stance of the practices of international arbitration is to uphold the primacy of the law of the seat [*ICC, No. 1507; ICC, No. 7453; ICC, No. 5730; Bulgarian Foreign Trade Bank Ltd v. Al Trade Finance Inc; XL Insurance Ltd. v. Owens Corning; Matermaco SA v. PPM Cranes Inc. and Legris Industries SA; Kaplan/Moser, §5.04, ¶¶A-C, pp. 77-9*].

8. At hand, Danubia, Equatoriana, and Mediterraneo are all contracting states of the New York Convention (**hereinafter "the Convention"**) and has incorporated the Model Law in their respective arbitration laws [*PO 1, ¶4, p. 53; PO 2, ¶14, pp. 56-7*]. Therefore, the application of the Seat Theory in the present dispute would be appropriate since it has gained the recognition and is widely accepted throughout the practice of international arbitration.

b. The presumption of the Seat Theory prevails over the law underlying the Contract, leading to the application of Danubian arbitration law

9. DAL directly applies by virtue of the presumption of the Seat Theory. The law of the seat of arbitration directly applies in silence of the parties' choice of law [*Onyema, p. 23; Kaplan/Moser, §5.03, p. 76-7 & §9.07, p. 145; Ferrario, p. 84; Blessing, p. 174; ICC, No. 5505; Hotels Ltd v. Meridien SAS; C v. D*], regardless of the law governing the underlying contract [*ICC, No. 3879; ICC, No. 4381; ICC, No. 7453; ICC, No. 6149; Kaplan/Moser, §9.07, p. 146*].
10. Whether CLAIMANT adopts an express or implied choice approach is immaterial since both would still lead to the application of the law of the seat [*Kaplan/Moser, §§5.03, 9.07, pp. 76, 146*]. This is in accordance with the precedent in *Firstlink Investment Corp v. GT*, which stipulated that the law of the seat would prevail as an implied choice over the law underlying the contract contained in the choice of law clause [*Firstlink Investment Corp v. GT*]. In conjunction with the fact that the Seat Theory is widely accepted, DAL as the law of the seat shall govern the arbitration agreement regardless of the existence of the choice of law clause in the Contract.

c. Danubian arbitration law has the "Closest Connection" to the Arbitration Agreement

11. RESPONDENT share CLAIMANT's view that the "Closest Connection" principle shall determine the law governing the Arbitration Agreement [*Cl. Memo., ¶15, p. 7*]. However, this principle leads to the application of DAL in the present dispute.
12. CLAIMANT have falsely alleged that Mediterranean law applies by virtue of the place of the conclusion and the performance of the contract [*Ibid*]. While the place of conclusion of the contract i.e. Mediterraneo is indeed one of the connecting factors, it shall not be regarded as a strong factor as it is "*frequently chosen by chance*" and even considered as an "*extremely minor*" factor [*Gaillard/Savage, ¶427, p. 224*]. Moreover, the place of performance of the contract is one of the connecting factors to determine the substantive law of the contract, instead of the law governing the arbitration agreement [*Blessing, p. 414*]. Cumulatively, Mediterranean law lacks the connecting factors to govern the Arbitration Agreement.
13. On the other hand, DAL yields two stronger connecting factors. *First*, it has been well established that the main connecting factor to the arbitration agreement is the seat of arbitration [*Gaillard/Savage, ¶431, p. 226*] as it serves as the place of the performance of the arbitration agreement [*Ibid., ¶429, p. 225; Lew/Mistelis/Kröll, ¶6.23, p. 107*]. Arbitral tribunals have abundantly endorsed the law of the seat as the closest connection [*Interim ICC, No. 4367; ICC, No. 6162; ICC, No. 1507*]. At hand, the arbitration is seated in Danubia [*Cl. Ex. C 5, ¶15, p. 14*]. *Second* is the legal system of the country where the arbitration institution resides, from which the parties adopts the

model clause [*Gaillard/Savage, ¶428, p. 225*]. While it is undisputed that the Arbitration Agreement is modeled from HKIAC Model Clause **(hereinafter "Model Clause")** [*Ans. NoA., ¶13, p. 31*], Danubia shares the same legal system with Hong Kong, i.e. common law [*PO2, ¶44, p. 61*].

14. As the connecting factors have been cumulatively satisfied, DAL has the closest connection to the Arbitration Agreement. Thus, DAL directly governs the Arbitration Agreement through the "Closest Connection" principle.

iii. The Parties intended to have Danubian arbitration law as the law governing the Arbitration Agreement

15. CLAIMANT have disregarded the application of DAL and claimed that RESPONDENT accepted the governing law proposed by CLAIMANT [*Cl. Memo., ¶¶10-1, p. 6*], while their subsequent statements and conducts show the contrary [*Art. 8(1), CISG*].

16. While CLAIMANT rejected the former seat of arbitration i.e. Equatoriana [*Resp. Ex. R 2, p. 34; PO 2, ¶14, pp. 56-7*], they fully accepted the fact that the applicable law to the Arbitration Agreement should follow the law of the seat as clearly seen in the first draft proposed by RESPONDENT on 10th April 2017 (**hereinafter "the First Draft"**) [*Resp. Ex. R 1, p. 33*]. In accordance with CLAIMANT's assertion [*Cl. Memo., ¶10, p. 6*], the First Draft is subject to changes as it depends on CLAIMANT's response.

17. On 10th April 2017, RESPONDENT offered CLAIMANT to have the seat of arbitration in Equatoriana as well as the applicable law for the Arbitration Agreement to follow the former [*Resp. Ex. R 1, p. 33*]. CLAIMANT then accepted RESPONDENT's proposal by stating that "*we would **largely accept** your proposal with an **amendment as to the place of arbitration**, so that the clause would read in its **relevant part***" [*Resp. Ex. R 2, p. 34*]. That particular phrase indicates that the draft proposed by CLAIMANT was merely a partial form of RESPONDENT's draft, which consist only the part that has been changed to CLAIMANT's preference [*Ibid*]. In light of that, CLAIMANT have agreed to apply the law of the seat i.e. DAL in governing the Arbitration Agreement.

18. Given the present circumstances, any reasonable person who receives similar email on 11th of April 2017 would have understood that the counterparty would like to apply DAL to govern the Arbitration Agreement [*Art. 8(2), CISG; Resp. Ex. R 2, p. 34*]. In that regard, RESPONDENT has clearly indicated that the law governing the Arbitration Agreement should follow the seat. Consequently, DAL governs the Arbitration Agreement.

iv. The award remains enforceable under Danubian arbitration law

19. The award remains enforceable under DAL. In accordance with the email on 11th April 2017, CLAIMANT would require special approval by the creditor's committee under two circumstances: if they intended to submit the Contract to a foreign law or to have the dispute resolution in the country of the counterparty [*Resp. Ex. R 2, p. 34*]. According to CLAIMANT's allegations [*Cl. Memo., ¶9, pp. 5-6; Cl. Memo., ¶¶19-20, p. 8*], CLAIMANT heavily relied on the first requirement imposed by the creditor's committee; consent to submit the contract to a foreign law, where CLAIMANT argued that not only would CLAIMANT not be of capacity to enter into the Contract, but that the Arbitration Agreement would also be invalid under DAL. This would consequently render the award unenforceable under Art. V(1)(a) of the Convention.
20. Recognition and enforcement of an award may be refused either through the incapacity of the parties to enter into a contract or the invalidity arbitration agreement [*Art. V(1)(a), the Convention*]. However, incapacity to enter into the Contract or an invalid Arbitration Agreement is not even an obstacle that CLAIMANT must overcome.
21. In repudiation of CLAIMANT's allegation, submitting the Arbitration Agreement to a foreign law does not require special approval from the creditor's committee. The term 'contract' here does not extend to the Arbitration Agreement, referring only to the main contract. It is proven as declared by the creditors' committee that "*there was* ***no need to seek approval for the consent to arbitration clauses*** *as long as the place of arbitration was in* ***a neutral country with a functioning judicial system***" [*PO 2, ¶14, pp. 56-57*], in which Danubia is found to be a neutral country with a functioning judicial system at hand [*Ibid*]. Thus, in the present case, CLAIMANT is relieved from the requirement to seek for special approval in order to submit the Arbitration Agreement to a foreign law, by providing the arbitration in Danubia [*Ibid, ¶14, p. 57*].
22. Conclusively, CLAIMANT is in capacity to enter into the agreement and the Arbitration Agreement is valid under DAL, rendering the award enforceable.

B. The Arbitration Agreement Limits the Conferral Power of Contract Adaptation Upon the Tribunal

23. CLAIMANT argued that the Arbitration Agreement extends to claims for remuneration [*Cl. Memo., ¶21, pp. 8-9*]. However, that is impossible since the Parties have intended to limit the Tribunal's power for contract adaptation **(i)** as further proven from the wording of the Arbitration Clause **(ii)**.

i. The Parties' intention leads to the limitation of the Tribunal's power for contract adaptation

24. The Parties had intended to limit the Tribunal's power for contract adaptation. Pursuant to Art. 8(1) and 8(3) CISG as applicable in the present dispute [*Cl. Ex. C 5, ¶14, p. 14*], interpretation shall be made in accordance with the parties' intention as evident to their subsequent conducts and statements. Alternatively, interpretation shall be made in accordance with a reasonable person's understanding as pursuant to Art. 8(2) CISG.

25. CLAIMANT contended that the Parties had intended to confer the power of contract adaptation upon the Tribunal [*Cl. Memo., ¶23, p. 9*]. *Au contraire*, the situation at hand proves that the Parties had limited the Tribunal's power to adapt the Contract according to their subjective intention **(a)** as well as their objective intention **(b)**.

a. The Subjective Intention of the Parties leads to the limitation of the Tribunal's power to adapt the Contract

26. In light of Art. 8(1) CISG, the interpretation of parties' intention could only prevail if made known to the other party [*CISG Digest, ¶6, p. 54*], where it is proven to the contrary at hand. Whereas Mr. Antley's statement has been made to Ms. Napravnik in conversation [*Cl. Ex. C 8, p. 17*], both being the former negotiators, it did not reach to the 'new' negotiators whom also finalized the Contract due to the following accident [*Ibid*]. Ultimately, CLAIMANT's intention to confer the power of contract adaptation upon the Tribunal should be deemed as insufficient.

27. Even if proven on the contrary, the subsequent conducts and statements of a party would be irrelevant unless manifested in some fashion *inter alia* a contract [*CISG Digest, ¶8, p. 55*]. *In casu*, CLAIMANT's intention has not been manifested in the Contract as there has been an absence of any express conferral power upon the Tribunal both in the Hardship clause as well as the Arbitration Agreement [*Cl. Ex. C 5, ¶¶12,15, p. 14*]. In conclusion, the intention to authorize the Tribunal for contract adaptation would be irrelevant.

b. Any reasonable person given the same circumstances would have concluded that the Parties limited the power of the Tribunal to adapt the Contract

28. Pursuant to Art. 8(2) CISG, interpretation on the objective intention of a party through a reasonable person's understanding shall be made in failure of the former – subjective intention. As proven above, the 'new' negotiators, whom also finalized the Contract, have never known the intention to authorize the Tribunal for contract adaptation from the former negotiators due to the accident [*Resp. Memo., ¶26, p. 9*]. There were no prior statements by the Parties in the email to give the Tribunal the power to adapt the Contract [*Cl. Ex. C 1-4, pp. 9-12; Resp. Ex. R 1-2, pp.*

33-4]. This resulted to the 'new' negotiators being clueless regarding the conferral power of contract adaptation upon the Tribunal even with the access to the subsequent emails [*PO 2, ¶5, p. 55*]. Further, neither the main contract nor the Arbitration Agreement provide an express conferral power upon the Tribunal to adapt the Contract [*Cl. Ex. C 5, ¶12, 15, p. 14*].

29. Given the present circumstances where absent of express conferral power as well as prior statements both in the email and conversation, any reasonable person would also have concluded that the Parties had not authorized the Tribunal to adapt the Contract. Thus, limiting the power of the Tribunal to adapt the Contract.

ii. The wording of the Arbitration Clause limits the power of the Tribunal to adapt the Contract

30. Arbitrators are bound by the wording of the arbitration agreement as they derive their power from it [*Jarvin/Lew, p. 53*]. CLAIMANT alleged that the Tribunal is empowered to adapt the Contract through the wording of the Arbitration Agreement. As opposed to that, the power of the Tribunal for performing contract adaptation is not covered by the Arbitration Agreement, as non-contractual disputes are excluded **(a)**. In any event, the original wording of an arbitration agreement does not cover claims for adaptation of contract **(b)**.

a. The reduced wording of the Arbitration Agreement does not cover claims for an Adaptation of Contract

31. Adaptation of the Contract does not fall within the scope of the Arbitration Agreement. CLAIMANT have failed to realize the fact that the Parties have excluded adaptation of the Contract from the reduced wording of the Arbitration Agreement [*Cl. Ex. C 5, ¶15, p. 14*]. As opposed to CLAIMANT's contention [*Cl. Memo., ¶¶26-27, p. 10*], adaptation of a contract does not constitute contractual dispute. While contractual disputes contemplate matters governed in a contract [*ICSID, No. ARB/02/6*], adaptation of the Contract falls to the contrary due to the absence of an expressed mandate from the Parties for the Tribunal to adapt the Contract [*Cl. Ex. C 5, ¶¶12, 15, p. 14*]. Also, neither breach nor non-performance is found at hand [*Resp. Memo., ¶146, p. 32*]. Hence, adaptation of the Contract should be considered as non-contractual claim.

32. In adjunction to that, non-contractual claims are excluded from the Arbitration Agreement. As agreed by the Parties, the Arbitration Agreement is an adoption of the HKIAC Model Clause (**hereinafter "the Model Clause"**) [*Ans. NoA., ¶13, p. 3*]. There are generally two types of dispute or claim that are stipulated by the Model Clause i.e. contractual disputes and non-

contractual disputes [HKIAC Rules, *p. 2*]. However, the Parties have narrowed down the scope of the Arbitration Agreement by omitting the phrases "*controversy, difference or claim*…" as well as "*any dispute regarding non-contractual obligations*" [*Ans. NoA., ¶13, p. 3; Cl. Ex. C 5, ¶15, p. 14; HKIAC Rules, p. 2*]. In light of the aforementioned omissions, it is apparent that Tribunal could not interpret the scope of the Arbitration Agreement broadly [*Born, pp. 1356-7*].

33. Therefore, CLAIMANT could not bring any non-contractual disputes, including adaptation of contract in the present dispute.

b. In any event, the original wording of the Arbitration Agreement does not cover claim for an Adaptation of Contract

34. Should the Tribunal deem that the adaptation of the Contract includes contractual claims, it is still not covered by the original wording of Arbitration Agreement. The original wording of the Arbitration Agreement only covers claims for non-performance and breach [*UN Doc. A/CN/WG.II/WP.41, ¶1 0, p. 86*]. Additionally, the traditional phrase of "*all disputes arising out of or in connection with this dispute*" does not suffice in covering adaptation of contract [*Berger, p. 8*].

35. Furthermore, the Tribunal could not imply the consent merely from reference to arbitration in case of failure from reaching an agreement [*Faruque, p. 155*]. In order to possess such power of adaptation of contract, a tribunal "requires a specific contract clause that contains an express authorization by the parties in addition to the usual arbitration agreement" [*Berger, p. 8; Craig/Park/Paulsson, p. 144; Bernini, p. 421; Beisteiner/Klausegger/Klein, p. 109*]. Such view is also endorsed in *Aminoil* where the tribunal ruled that "a tribunal could not substitute itself for the parties" to adapt and fill the gaps in the contract unless "that right is conferred upon it … by the express consent of the parties" [*Aminoil, ¶967, p. 1016*]. While on the contrary, express consent by the Parties is absent in the present dispute [*Cl. Ex. C 5, ¶¶12, 15, p. 14*]. For these reasons, adaptation of contract remains excluded under the original wording of the Arbitration Agreement.

C. The Procedural Law and Substantive Law of the Dispute Do Not Confer the Power of the Tribunal for Contract Adaptation

36. CLAIMANT alleged that the Tribunal is authorized to adapt the Contract through the procedural law and the substantive law [*Cl. Memo., ¶¶28-34, pp. 10-2*]. In contrary, RESPONDENT submits that both procedural law **(i)** and substantive law **(ii)** of the dispute do not confer the power of the Tribunal for contract adaptation.

i. The procedural laws of the dispute do not authorize the Tribunal to adapt the Contract

37. The Tribunal's power to adapt contracts could be derived from the *lex arbitri* [*Berger, p. 10*]. However, in the absence of a specific provision in the *lex arbitri*, parties shall seek the substantive law of the seat [*Ibid*]. In light of this notion, DAL and Mediterranean arbitration law (**hereinafter "MAL"**) do not authorize the Tribunal to adapt the Contract **(a)**. In addition to that, Danubian substantive law (**hereinafter "DCL"**) does not confer any power for the Tribunal to adapt the Contract **(b)**.

a. Danubian Arbitration Law and Mediterranean Arbitration Law do not authorize the Tribunal to adapt the Contract

38. CLAIMANT have mistakenly alleged that the MAL and DAL authorize the Tribunal to adapt the Contract, as opposed to the facts given, under the following reasons.

39. *First,* DAL contains Art. 28(3) of Model Law which requires an express authorization for exceptional powers of the Tribunal such as adaptation of contract [*PO 2, ¶36, p. 60*]. At hand, an express authorization is absent, both in the Hardship Clause of Clause 12 (**hereinafter" Hardship Clause"**) and Arbitration Agreement [*Cl. Ex. C 5, ¶¶12, 15, p. 14*]. Consequently, the Tribunal is not authorized to adapt the Contract under DAL.

40. *Second*, MAL and DAL, both being verbatim adoptions of Model Law [*PO 2, ¶14, pp. 56-7*], are silent on the rules regulating adaptation of contract. Veritably, the drafters of Model Law had refrained from providing any rules concerning adaptation of contract due to the difficulty "to separate the questions pertaining to procedural law" and "substantive law" [*UN Doc. A/CN/9/245, ¶21, p. 6; Berger, §III, p. 7*]. Furthermore, it was considered that, practically, adaptation of contract might be used to the advantage of suppliers i.e. sellers [*Ibid, ¶22, p. 7*].

41. Even if the Parties had applied the article recommended by the drafters [*UN Doc. A/CN/9/245, ¶18, pp. 5-6*], MAL and DAL remain silent on the Tribunal's authorization to adapt the Contract. As discussed in the report of the working group, Model Law allows arbitral tribunals to adapt contracts if "the parties expressly authorized him or them /in writing/ to do so" [*Ibid*], which is absent in the present dispute [*Cl. Ex. C 5, ¶15, p. 14*].

42. *Third*, CLAIMANT have incorrectly applied Art. 7 of DAL to determine the scope of the Arbitration Agreement, relying on the term "*dispute"* which encompasses adaptation of contracts. However, this is incorrect since Art. 7 of DAL merely stipulates the constitutive elements for the validity of the arbitration agreement in general that parties **may** refer to arbitration in the

event of disputes [*MAL Digest, ¶12, p. 28*]. Furthermore, adaptation of contract does not fall within the term "*dispute*" as neither breaches nor non-performance exist in the present case [*Cl. Ex. C 8, p. 17*].

43. In conclusion, MAL and DAL do not authorize the Tribunal to adapt the Contract.

b. Danubian substantive law does not confer any power for the Tribunal to adapt the Contract

44. In the silence of MAL and DAL in regulating the adaptation of contracts, parties shall refer to the substantive law of the seat – DCL – to derive the Tribunal's power [*Berger, p. 10*]. CLAIMANT alleged that Art. 6.2.3(4)(b) of DCL confers the power of contract adaptation upon the Tribunal [*Cl. Memo., ¶34, p. 12*]. However, the existence of such article does not in itself *ipso facto* provide adaptation of the contract unless authorized by the parties expressly.

45. As conceded by RESPONDENT, DCL, which is a verbatim adoption of UNIDROIT Principles of International Commercial Contracts (**hereinafter "PICC"**), provides for contract adaptation by the Tribunal regulated in Art. 6.2.3(4)(b). However, that particular article has been modified as for now it allows the Tribunal to adapt the Contract only if authorized [*PO 2, ¶45, p. 61*]. This authorization requires to be made expressly as the four corner rules embed in DCL, restricting the interpretation only within the confine of the wording [*PO 2, ¶45, p. 61*]. As proven before, the Arbitration Agreement, from which the Tribunal derives its power, remains silent on the adaptation of contract [*Resp. Memo., ¶¶30-5, pp. 10-1*]. Hence, the DCL neither provides nor confers any power of contract adaptation upon the Tribunal. Consequently, the Tribunal is not authorized to adapt the Contract.

ii. Mere stipulation of contract adaptation in Mediterranean contract law does not authorize the Tribunal to adapt the Contract

46. CLAIMANT alleged that Mediterranean contract law (**hereinafter "MCL"**) provides the power for the Tribunal to adapt the Contract [*Cl. Memo., ¶29, p. 11*]. However, in determining the power of the Tribunal to adapt the contract, it must be simultaneously subjected to the *lex causae* i.e. the applicable substantive law, the arbitration agreement, and the *lex arbitri* [*Berger, pp. 7-8; Kröll, p. 3*]. In fact, the authorization by substantive law does not directly give the tribunal neither sufficient power nor jurisdiction to adapt the contract if it lacks "a corresponding procedural authority" [*Berger, p. 12; Peter, p. 257*]. As apparent in the present dispute, MAL and DAL – both being verbatim adoption of Model Law – do not provide for adaptation of contract [*Resp. Memo., ¶¶38-43, pp. 11-3*]. Additionally, the Arbitration Agreement also does not authorize the Tribunal

to adapt the Contract [*Ibid, ¶¶30-5, pp. 10-1*]. Conclusively, MCL does not authorize the Tribunal to adapt the Contract.

D. Should the Tribunal Decide on the Adaptation of Contract, It Would Render the Award Unenforceable Under Art. V(1)(c) of the Convention

47. As conceded by RESPONDENT, CLAIMANT have addressed that the Tribunal should be in favor of the pro arbitration approach, which "*gives effect to the Parties' presumed intention to arbitrate*" [*Cl. Memo., ¶¶13-4, pp. 6-7*]. However, pro arbitration approach would be pointless if it renders the award unenforceable. In this respect, RESPONDENT submits that the award would be unenforceable should the Tribunal decide on the adaptation of contract. Pursuant to Art. V(1)(c) of the Convention, refusal of recognition and enforcement of an arbitral award are allowed in the case when the arbitral tribunal acts beyond the jurisdiction defined by the parties. In determining the ground for refusal in Art. V(1)(c) of the Convention, parties could refer the subject matter directly to the arbitration agreement, whether it is within or beyond the jurisdiction given to an arbitral tribunal [*Guide on NY Convention, p. 177*].

48. It is well established that the power of arbitral tribunal to adapt the contract by modifying the terms in the contract, which amounts to re-writing the contract or creating a new contract, legitimately goes beyond its jurisdiction [*Faruque, p. 153*]. Such power to modify the contract by arbitrator is deemed to be "*against the autonomy and spirit of co-operation of the parties*" [*Ibid, p. 154; York Airconditioning & Refrigeration Inc. v. Lam Kwai Hung; Four Seasons Hotels And Resorts B.V. et al. v. Consorcio Barr, S.A.*]. It is further proven as not only absent on the provision pertaining adaptation of contracts in the arbitration law, the procedural law, and the substantive law of the seat of arbitration [*Resp. Memo., ¶¶32-8, pp. 9-11*], but also absent on any expressed conferral power both in the Arbitration Agreement and Hardship Clause [*Cl. Ex. C 5, ¶¶12, 15, p. 14*].

49. In such circumstances, the arbitrators are deemed to be acting as "*third party interveners outside the procedural realm of arbitration, irrespective of the fact that the parties wanted the contrary*" [*Berger, p. 10*]. Consequently, the award would be unenforceable. Therefore, the Tribunal should not decide the case in order to avoid refusal of enforcement and recognition of the award.

CONCLUSION TO ISSUE A

50. The scope of the Arbitration Agreement does not extend to claims for adaptation of contract since DAL governs the interpretation of the Arbitration Agreement. The Arbitration Agreement does not confer the power of adaptation of contract upon the Tribunal. Furthermore, the law

of the dispute, both procedurally and substantively, does not authorize the Tribunal to adapt the Contract. Should the Tribunal decide on the adaptation of contract, it would render the award unenforceable. Conclusively, the Tribunal does not have the jurisdiction and the power to adapt the Contract.

II. ISSUE B: CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION

51. CLAIMANT discovered that RESPONDENT was involved in another arbitration with a party from Mediterraneo under the 2013 Hong Kong International Arbitration Centre Administered Arbitration Rules (**hereinafter "2013 Rules"**) pertaining price adaptation of a contract due to the tariff imposition by the government of Mediterraneo. In the partial interim award that was decided, the tribunal confirmed its jurisdiction to adapt the contract based on MCL [*PO 2, ¶39, p. 60*]. Knowing this information from the CEO of CLAIMANT's regular customer [*PO 2, ¶40, p. 60*], CLAIMANT seeks to introduce the partial interim award and the relevant submissions (**hereinafter "the Evidence"**) into this arbitration in order to allege RESPONDENT of "contradictory behavior" and subsequently, prove that the Tribunal possesses the power to adapt the contract [*Letter of Langweiler, p. 50*].

52. In that regard, CLAIMANT is turning a blind eye on the fact that by all means, the Evidence is inadmissible. Even if CLAIMANT was wholly uninvolved in its procurement, CLAIMANT is able to attain the Evidence from a company which collects intelligence on the horseracing industry (**hereinafter "the Intel"**). The Intel was able to get their hands on the Evidence from two scenarios: an illegal hack into RESPONDENT's computer system, or a breach of confidentiality by the witnesses in the other arbitration [*PO 2, ¶41, pp. 60-61*].

53. Irrespective of the method of obtainment, the Evidence should not be admitted in the first place since it is neither relevant nor material to the case **(A)**. Furthermore, the nature of the Evidence renders it as inadmissible **(B)**. Additionally, excluding the Evidence does not jeopardize CLAIMANT from their opportunity to present its case **(C)**.

A. The Evidence Is Neither Relevant nor Material to The Case

54. CLAIMANT is correct in highlighting the fact that the Evidence is an authentic copy of the original documents [*Cl. Memo, ¶40, p. 14*]. However, in determining the admissibility of an evidence, tribunals should assess its probative value based on the relevance and materiality of

the evidence [*Art. 22.3 HKIAC Rules*; *Art. 9.1 IBA Rules; Martinez-Fraga, p. 399-400*; *Pilkov, pp. 147-150*].

55. In the event that an evidence possesses no degree of relevance or materiality, tribunals should opt for its exclusion [*IBA Rules Commentary, p. 25; X__ v. Y__ & Z__*]. Presently, the Evidence is inadmissible since it is neither relevant **(i)** nor material **(ii)** to the outcome of the case and therefore, its admission is unnecessary contrary to CLAIMANT's claims [*Cl. Memo, ¶¶54-55, p. 17*].

i. The Evidence is not Relevant to the Case

56. The Tribunal should declare the Evidence as inadmissible since it is not relevant to the case. Relevance refers to a document which may convince a tribunal of a party's claims [*Grenig/Scanza, p. 5*] and subsequently, discharge it of its burden of proof. [*O'Malley, pp. 55-56*]. Even if a tribunal possesses the broad discretionary power to determine the admissibility of an evidence, it may exclude evidence bereft of any relevance at its own motion [*Art. 9.2(a) IBA Rules; Helnan International Hotels v. the Arab Republic of Egypt, ¶22*].

57. Furthermore, transporting an evidence rendered in a different proceeding would require the parties to firmly establish the difference and commonalities with the subsequent proceeding [*Giovanna Beccara v. Argentina, ¶146; Orient Shipping v. Sealift Inc*]. Presently, CLAIMANT argues that their burden of proof lies within the Evidence since the circumstances of the other arbitration is parallel to that of the present dispute [*Cl. Memo, ¶¶48-49, p. 16*]. On the contrary, admitting the evidence is only futile in supporting CLAIMANT's submission.

58. Even if if both proceedings were governed by MCL, utilizing the Evidence would only be taken out of context [*Letter of Fasttrack. p 51*]. Since the other arbitration was seated in Mediterraneo, it can be inferred that the MAL functions as the *lex arbitri* [*PO 2, ¶39, p. 60*]. This indicates leniency in providing the tribunal the jurisdiction to adapt the contract, as the tribunal was able to adapt the contract based on the consistent jurisprudence of the courts of Mediterraneo and Art. 6.2.3(4)(b) of Mediterranean Contract Law.

59. The same outcome is inapplicable in the present dispute, for the *lex arbitri* of this arbitration as to DAL entitles contract adaptation **only if an express conferral power** is laid out [*PO 2, ¶36, p. 60*]. Conversely, neither the Arbitration Agreement nor the hardship clause indicates an express authorization for contract adaptation [*Resp. Memo ¶39, p. 12*].

60. Additionally, the Arbitration Agreement of the Contract had been modified narrowly. The present circumstances are not covered by the Arbitration Agreement [*Resp. Memo ¶31-3, p. 10-*

1], unlike the contract from the other arbitration which utilizes the Model Clause, granting the Tribunal a broader degree of interpreting disputes [*PO 2, ¶39, p. 60*].

61. In conclusion, the Tribunal should not admit the Evidence since it is does not discharge CLAIMANT of their burden of proof.

ii. The Evidence is not material to the outcome of the case

62. The Evidence should not be admitted into this arbitration since it yields no value in materiality. The yardstick of materiality is whether a tribunal considers a proffered evidence as decisive in reaching a final award [*Art. 22.2, HKIAC Rules*; *Art. 9.2(a), IBA Rules*; *O'Malley, pp. 57, 273*]. In discerning this standard, parties should prove that an evidence could significantly influence a tribunal's decision [*Aguas del Tunari v. Bolivia*]. If proven to be insignificant, the tribunal should corollarily confer its power to exclude the evidence [*Glamis Gold v. USA, ¶208*; *ABB v. Hochtief, ¶85*], even though the evidence may possess a degree of relevance [*Aguas del Tunari v. Bolivia*].

63. Presently, CLAIMANT contends that the Evidence is conclusive for the Tribunal to rule its jurisdiction [*Cl. Memo, ¶50, p. 16*]. Again, CLAIMANT have erred in their proposition.

64. Regardless of whether the Tribunal decides in favor for CLAIMANT or RESPONDENT, determining the jurisdiction of the current proceedings from the Evidence is useless. The Tribunal cannot consider the Evidence in its deliberation, since the other arbitration was decided based on the *lex arbitri* of Mediterraneo and its consistent jurisprudence for contract adaptation [*PO 2, ¶39, p. 60*]. The Tribunal in the present dispute cannot conform to the said motion, as the *lex arbitri* of this arbitration as to DAL do not authorize contract adaptation due to the absence of an "express conferral" power.

65. Accordingly, the substantive law of the seat of arbitration [*Berger, p. 10*] as to DCL subscribes to the "four corners rule", renderring any interpretation of Mr. Antley's intentions as immaterial. In *Lumunus Global Amazonas v. Aguaytia*, the tribunal excluded an evidence based on the "four corners rule" of New York, the substantive law of the arbitration since the said rule does not permit contract interpretation based on an evidence [*Lumunus Global Amazonas v. Aguaytia, p. 602*]. As such RESPONDENT cannot interpret Mr. Antley's intention concerning contract adaptation based on the Evidence.

66. Furthermore, it is not peculiar for a tribunal to deviate from the decision of another arbitration since it concerns two different disputes with differing parties, evidences and circumstances [*Sacor Maritima SA v. Repsol Petroleo; Woolhouse, p. 151; Noussia, p. 69*].

67. Conclusively, the immaterialism of the Evidence does not affect the Tribunal's decision in any manner and subsequently, its exclusion is justifiable.

B. The Nature of The Evidence Renders It as Inadmissible

68. RESPONDENT shares CLAIMANT'S view that the Tribunal possesses the broad discretionary power to consider the admissibility of evidence [*Cl. Memo, ¶37-39, pp. 13-14*]. The *lex arbitri* as to DAL confers power to the Tribunal to determine the admissibility, relevance and materiality of an evidence. [*Art. 19.2 Model Law*]. The HKIAC Rules and commentators alike further consolidate this stance, stipulating that tribunals possesses broad discretion in determining the admissibility of an evidence [*Art. 22 HKIAC Rules; Moser/Bao, ¶9.153; Born, p. 2310*]. Despite the unrestricted power that the Tribunal possesses, the circumstances at hand calls for an exclusion of the Evidence.

69. Despite its non-binding character, the IBA Rules on the Taking of Evidence in International Arbitration (hereinafter **"IBA Rules"**), which has been recognized as the "best practice", [*Marghitola, p. 33*] is commonly applied in the practice of HKIAC arbitrations [*Moser/Bao, ¶9.155*]. The IBA Rules permit the exclusion of an evidence if derived from the grounds of "technical confidentiality" [*Art. 9.2(e) IBA Rules; Waincymer, p. 869*] *inter alia,* documents subjected to confidentiality agreements [*Marghitola, p. 94; O'Malley, ¶9.87*]. Furthermore, international adjudication clearly indicate that evidence procured through illegal means should not be deemed as admissible [*Thirlway, p. 631; Methanex v. USA, p. 25; EDF v. Romania,* ¶47].

70. Notwithstanding the absence of a specific legislation on obtainment of evidence through illegal means in Danubia, Mediterraneo or Equatorriana [*PO 2, ¶46, p. 61*], there is no room for admitting the Evidence regardless of CLAIMANT's uninvolvement in its procurement **(i)**. Furthermore, the Evidence should not be admitted into this arbitration since it is covered by a provision pertaining confidentiality **(ii)**. Even if CLAIMANT relies on the Principles of Transparency, its application in the present dispute is inappropriate **(iii)**.

i. CLAIMANT's clean hands do not vindicate the admission of the Evidence

71. In their memorandum, CLAIMANT asserted that admission of the Evidence is justifiable since CLAIMANT did not indulge in its procurement i.e illegal hacking and the Evidence resides in public domain [*Cl. Memo, ¶¶42-44, pp. 14-15*]. However, CLAIMANT is misguided in their assessment. Conceding to the practice of international arbitration, tribunals do rely upon evidence obtained from leaked documentary cables [*Hulley Enterprises v. Russia, ¶1221; RosInvestCo*

UK v. Russia, ¶621]. However, such reliance may only be legitimate if bereft of any objection of the parties [*Kilic v. Turkmenistan; Ireton, p. 240*].

72. Furthermore, even if the documents bound to be submitted in an arbitration reside in public domain, there is no justifiable grounds for the admission of documents subjugated to confidentiality [*Caratube v. Kazakshtan, ¶¶157-158; Blair/Vidak, p. 254*].

73. Presently, CLAIMANT is not unfounded in highlighting the fact that the Evidence is in the possession of the Intel. However, admitting the Evidence into this arbitration would be inappropriate since it is cloaked in a veil confidentiality, as it was arbitrated under the 2013 Rules which provide a confidentiality provision [*PO 2, ¶39, p. 60*].

74. Conclusively, the Evidence is inadmissible regardless of the fact that CLAIMANT was uninvolved in its obtainment, or whether the Evidence resides in public domain.

ii. Exclusion of the Evidence is justifiable since it is a confidential document

75. The Tribunal should exclude the Evidence since it is covered by the 2013 Rules' confidentiality provision. In convincing a tribunal that an evidence must be excluded due to concerns of confidentiality, a pre-existing confidentiality agreement that covers the disputed document must be proven [*Nafimco v. Foster Wheeler Trading Company; Bilcoin Delaware v. Canada, ¶2; Chemtura v. Canada ¶¶1-5*]. Accordingly, a tribunal may dismiss an evidence subjected to "technical confidentiality" [*Art. 9.2(e) IBA Rules; Waincymer, p. 869*] *inter alia,* confidentiality owed to a third party [*Jardine Lloyd Thompson Canada v. Western Oil Sands; Merrill & Ring Forestry v. Canada, ¶31; Marghitola p. 94*].

76. Furthermore, the tribunal in *Giovanna Beccara v. Argentina* refused to admit evidence from another arbitration shrouded in a confidentiality agreement, even if the purpose of introducing the evidence was to reveal a presumed contradictory behavior [*Giovanni Beccara v. Argentina, ¶¶139, 146*]. Presently, there is no situation in which the Evidence could be subject to admission as for the following reasons:

77. *First*, the Evidence was derived from an arbitration under the 2013 Rules between RESPONDENT and another party. By arbitrating under the said rule, both parties have expressly agreed to keep the proceedings and award confidential [*Art. 42.1 2013 Rules; Moser/Bao, ¶12.30*]. Furthermore, it can be inferred that the parties in the other arbitration specifically chose the 2013 Rules since it is one of the few arbitration rules that expressly provide a confidentiality provision [*Moser/Bao, ¶12.28*]. By default, the parties are entitled to the rights of confidentiality,

and any information arising out of the other arbitration should not be disclosed into the current proceeding.

78. *Second*, exceptions to the Evidence's disclosure under the 2013 Rules were not met here. Neither parties of the other arbitration consented to its disclosure, with RESPONDENT strongly objecting to it [*Art. 42.3, 42.5 2013 Rules*]. Furthermore, evidentiary disclosure may be possible if it is reasonably necessary to pursue a legal right [*Hassneh Insurance v. Mew; Dolling Baker v. Merrett; Ly/Friedman/Brozolo, p. 364; Smeureanu, pp. 64-65*]. Presently, the Evidence does not confer CLAIMANT's legal rights *vis-à-vis* price adaptation of the contract since the Evidence yields no information that grants the Tribunal jurisdiction to adapt the Contract.

79. In conclusion, revelation of any alleged "contradictory behavior" by disclosing the Evidence should be rejected, since it is covered by a provision that entails confidentiality.

iii. CLAIMANT cannot rely on the Principles of Transparency in order to justify admission of the Evidence

80. Contrary to CLAIMANT's submission [*Cl. Memo., ¶53, p. 17*], the Principles of Transparency cannot be applied in this present case, bearing in mind that this is a commercial dispute. Application of the Principles of Transparency would be justifiable in the context of investor-state arbitration since it involves states or state-controlled entities against private investors [*Poorooye/Feehilly, p. 309*]. It is only corollary for the aforementioned type of dispute to require a greater degree of transparency, as it may serve as a decisive mechanism in ensuring state accountability [*Kenny, p. 489*]. The practice of investor-state tribunals has reflected this notion, as arbitrations have been rendered transparent if it directly impacts a state's regulatory and policy considerations [*Methanex v. USA, pp. 4-5; Esso Australia Resources v. Plowman, ¶¶39-40; Weidemaier, p, 1946*]. Therefore, transparency is justifiable in investor-state arbitrations if derived from public interest [*Pooroye/Feehilly, p. 311*].

81. However, its application would not be pertinent to international commercial arbitration. International commercial arbitration does not mandate transparency, since the disputes purely concern parties attempting to resolve private disagreements [*Ibid, p. 284*]. Furthermore, transparency is not a justifiable ground for overriding a confidentiality agreement shrouding a document [*Giovanna Beccara v. Argentina, ¶73*]. Presently, CLAIMANT cannot use the Principles of Transparency in order to lift the veil of confidentiality for two reasons:

82. *First*, this arbitration is a private dispute concerning the sales of frozen horse semen. The issues which arise out of this dispute are devoid of any concerns which may resonate public interest,

since it is purely a commercial dispute concerning of the sales of frozen horse semen and its implication with the tariff imposition.

83. *Second*, the Evidence is covered by the 2013 Rules which contain an express confidentiality provision. By default, invocation of the Principles of Transparency is rendered null. In conclusion, the Principles of Transparency cannot be utilized as a mechanism for lifting the veil of confidentiality surrounding the Evidence.

C. Exclusion of the Evidence does not Jeopardize CLAIMANT's Due Process

84. CLAIMANT subscribes to the notion that exclusion of the Evidence amounts to a violation of due process [*Cl Memo., ¶¶58, 60, p. 18*]. However, such proposition is an exaggeration.

85. As a mandatory aspect to the conduct of an arbitration, due process providing parties the opportunity to fully present its case [*Art. 18. Model Law; Atul R. Shah v. Vrijlal Lalloobhai, ¶¶2-3; Born, p. 2164*]. One of the ways a tribunal may fail to provide parties with the opportunity to present its case is by excluding relevant and material evidence. This may serve as a justifiable cause for the annulment of an award [*Art. V(1)(b) NY Convention; Karaha Bodas v, Pertamina, ¶300; Generica v. Pharmaceutical Basics, ¶1130; Prudential Securities v. Dalton; Prevot, p. 4*].

86. Relevance and materiality is the key here; a tribunal's refusal of an evidence does not necessarily deprive a party from its right to present their case if proven that the evidence is neither relevant nor material to the case [*Giovanna Beccara v. Argentina, ¶147*; *X__ v. Y__ & Z__; ICC , ¶1131; Glamis Gold v. USA, ¶208; ABB v. Hochtief Airport ¶85, Germany 84, pp. 648-9*]. An award may only be set aside if the parties were gravely deprived from the expected arbitral process [*Latvian Shipping v. ROSNO, ¶144; Areca Inc v. Oppenheimer*]. As the Evidence is neither relevant nor material to the case, it follows that CLAIMANT is by no means deprived from their opportunity to present their case since the Evidence does not discharge CLAIMANT from their burden of proof nor will it be decisive for the Tribunal in rendering its final decision [*Resp. Memo, ¶54-67, pp 15-8*].

87. In addition, it should be highlighted that invocation of due process infringement is not a justifiable premise for overriding an evidence enclosed in confidentiality. [*M+H v. Dongwoo; Beale/Goh, ¶¶14-15*]. Even if CLAIMANT were to lose the current arbitration, the fact that CLAIMANT had the opportunity to present their case means that due process was not violated. It may well be the result of substandard arguments [*Jung Science Information Technology v. ZTE Corp, ¶74*].

88. In conclusion, excluding the Evidence from the arbitration does not violate CLAIMANT's opportunity to present their case.

CONCLUSION TO ISSUE B

89. The Evidence is inadmissible since it is irrelevant and immaterial to the case at hand. Even if it were relevant and material, the nature of the Evidence ultimately justifies it exclusion. Furthermore, Excluding the Evidence does not infringe upon CLAIMANT's opportunity to present their case. Hence, admission of the evidence would be unfounded and in the words of the party from the other arbitration, "do not reflect reality and taken out of context".

III. ISSUE C: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 FROM ADAPTATION OF THE PURCHASE PRICE

90. Prior to CLAIMANT's delivery of the last shipment of the Goods, they discovered that the Goods has been affected by the import tariff imposed by the Equatorianan government [*Cl. Ex. C 6, p. 15; Cl. Ex. C 7, p. 16*]. In response, CLAIMANT requested to be relieved from bearing the import tariff [*Cl. Ex. C 8, p. 18*]. Acting on good faith, RESPONDENT complied with CLAIMANT's request and conducted renegotiations with CLAIMANT to decide on the new purchase price [*ibid*]. The renegotiations quickly went into a stalemate after CLAIMANT falsely alleged that RESPONDENT resold the Goods [*Ibid; Ans. NoA., ¶11, p. 31*].

91. In an effort to escape its contractual obligations, CLAIMANT brought this matter into arbitration by requesting remuneration of the purchase price [*NoA, p. 8*]. Furthermore, CLAIMANT attempted to utilize the Hardship Clause and CISG so that they are relieved from bearing the import tariff [*Cl. Memo., ¶66, p. 21*]. On the contrary, CLAIMANT should not be entitled to the payment of US$ 1,250,000 from neither Clause 12 of the Sales Agreement **(A)** nor CISG **(B)**.

A. CLAIMANT Is Not Entitled to The Payment of US$ 1,250,000 under Clause 12 of the Sales Agreement

92. If a party were to be allowed to depart from their contractual obligation regardless of the circumstance that has altered their contractual obligation, then the certainty of law would collapse and the decline of faith in the contract would be inevitable [*Zaccaria, p. 135*]. The Hardship Clause does not provide any means of adaptation. If the Tribunal were to grant

CLAIMANT adaptation of the purchase price from Hardship Clause, then the certainty of the Contract would collapse.

93. Thus, CLAIMANT should bear the cost from the import tariffs as required from the DDP obligation since the Hardship Clause is not applicable **(i)**. Even if the Hardship Clause is applicable it does not govern the present circumstance **(ii).** Finally, if the Hardship Clause governs the present circumstance, CLAIMANT is still unable to request the remedy of adaptation since it is not provided **(iii)**.

i. CLAIMANT should bear the cost of the changed import tariffs as required from the DDP obligation

94. In their written memorandum, CLAIMANT contends that they have intended to be relieved from any responsibilities and risks despite the DDP obligation through interpreting their statement as provided by Art. 8(1) CISG [*Cl. Memo., ¶70, p. 22; Cl. Ex. C 2, p. 10*]. However, CLAIMANT should still bear the changed import tariffs from the DDP obligation since their intention to be relieved from the risks of DDP delivery is not sufficient.

95. Under CISG, a party may interpret a statement or contract to prove their subjective intention [*Art. 8(1), CISG*]. However, such interpretation should also be supported by an objective test or an objective standard [*CISG Digest, ¶¶7-11, pp. 54-55*]. This objective standard can be found within Art. 8(2) & 8(3) CISG, which refers to a reasonable person's opinion or from any negotiations or subsequent conduct established between the parties in question [*Huber/Mullis, pp. 12-13*].

96. Presently, CLAIMANT have failed to provide any objective reasons to support their intention since there had been a contradiction between the intention that CLAIMANT speaks of and their subsequent actions. CLAIMANT stated that they wanted the goods to be picked up at their premises, indicating their refusal to bear the risks from delivering the Goods [*Cl. Ex. C 2, p. 12*]. Nevertheless, they still negotiated and accepted RESPONDENT's request for delivery on a DDP basis [*Cl. Ex. C 4, p. 12; Cl. Ex. C 5, ¶8, p. 14*]. By accepting the delivery on a DDP basis, CLAIMANT should be unilaterally responsible to deliver the goods from CLAIMANT's origin place to the named destination while bearing all the costs from permits and customs regulations, contrary to what CLAIMANT requested earlier [*2010 INCOTERMS*].

97. Thus, CLAIMANT's mere reference to their spoken intention to be relieved from the DDP obligation is insufficient to be seen as evidence since their subsequent conduct does not reflect that intention.

ii. The Hardship Clause is not applicable to the present circumstance since it does not cover the present change of import tariffs.

98. Even with the inclusion of the Hardship Clause in the Contract [*Cl. Memo., ¶70*], CLAIMANT should still bear the tariffs since it falls outside the scope of the Hardship Clause. Despite CLAIMANT's contentions [*Cl. Memo., ¶72, p. 22*], CLAIMANT is unable to invoke the Hardship Clause since it must be interpreted in a strict manner **(a)** and as a result of the strict interpretation, the present circumstance does not constitute as hardship under Hardship Clause **(b)**.

a. The Hardship Clause must be interpreted in a strict manner

99. Through their misleading and ambiguous statement, CLAIMANT intentionally misinterpreted the Hardship Clause [*Cl. Memo., ¶¶74, 76, 77, pp. 22, 23*]. Hardship clauses as a part of a contract should be interpreted under general contract principles [*Brunner, p. 99*]. It follows that the current Hardship Clause should be interpreted under the internationally recognized principle of *rebus sic stantibus* [*van Houtte, p. 111; Iran-US Claims Tribunal*].

100. In practice, arbitral tribunals usually interpret this principle in a very strict and limited manner since they consider the change of circumstances to be a hazardous exception to the principle of sanctity of contract. [*van Houtte, p, 116*]. Applicably, the present Hardship Clause should also be applied in a strict manner, only considering changes that is specifically mentioned in the Contract [*van Houtte, p.110; ICC, No. 2291; ICC, No. 2216*]. None of the changes present within the Hardship Clause covers the current circumstance [*Cl. Ex. C 5, ¶12, p. 14*].

101. However, this interpretation does not mean the Hardship Clause loses its essence. The existing Hardship Clause should still be considered as sufficient to protect CLAIMANT from the occurrence of unforeseen events that may alter the Contract. As the parties of international commercial contract are expected to be skilled and competent enough to strictly include the necessary risks to the hardship clause [*Ferrario. p. 139*].

102. Thus, conforming to the practices of international arbitration, the current Hardship Clause should be interpreted strictly.

a. The current circumstances must be comparable to CLAIMANT's previous experience with hardship

103. The applicable threshold test of hardship clauses can be determined through the interpretation of the terms of clause [*Brunner, p. 102*]. The present Hardship Clause suggests that the threshold should be comparable to CLAIMANT's previous experience with hardship [*Cl. Ex. C 4, p. 12*].
104. As reflected from the negotiations of the Contract, CLAIMANT made it clear that they wanted to be fortified from any unforeseeable risk arising out of DDP involving additional health and safety requirements and makes the Contract more onerous [*Art. 8(1), CISG; Cl. Ex. C 4, p. 12*]. From this intention, the Parties then inserted the specific risk mentioned by CLAIMANT in the wordings of "*caused by additional health and safety requirements or comparable….*" [*Cl. Ex. C 5, ¶12, p. 14*; *Art 8(3), CISG; Ans. NoA., ¶4, p. 30; PO 2, ¶12, p. 56*].
105. Thus, under a strict interpretation of the Hardship Clause, the event must only be comparable to CLAIMANT's previous experience with hardship i.e it must be unforeseeable and makes the Contract more onerous [*PO 2, ¶21, p. 58*].
106. Therefore, by comparing the current circumstances with Claimant's previous experience, it can be seen that the imposition of import tariffs does not fall within the scope of the Hardship Clause since it was foreseeable to CLAIMANT (a) and it does not amount to hardship (b).

    a. <u>The current imposition of import tariff was foreseeable to CLAIMANT</u>

107. The present tariff imposed by the Equatorianean government was foreseeable since it was imposed in December 2017, a whole month before CLAIMANT received the clearance of the tariffs in January 2018 [*Cl. Ex. C 6, p. 15; PO 2, ¶25, p. 58*]. CLAIMANT contend that it is unforeseeable since the Parties did not expect the Equatorianean Government to impose such tariff and did not expect the Goods to fall within the scope of "*agricultural products*" [*Cl. Memo., ¶80, p. 24; PO 2, ¶26, p. 58*]. However, this should not be considered as unforeseeable.
108. The *Borregard Indus v Amri* case illustrates the point very clearly. In that case, AMRI was denied the invocation of the hardship clause under several reasons, one being that the event was foreseeable. In that case, when the worldwide bank crisis happened, AMRI was optimistic that they would not be affected from the crisis. When the crisis actually affected AMRI, the tribunal adjudged that AMRI was unable to claim for hardship since the event was foreseeable [*Borregard Indus v Amri*]. The crisis was considered as foreseeable since AMRI should have taken reasonable measures to ensure that they would not be affected by the crisis.
109. Similarly, it should be CLAIMANT's obligation to request clarification of the tariff since it may affect their DDP obligation. Knowing how significant the newly imposed regulation could affect

its business and having a whole month to study and submit a clarification. CLAIMANT ignored to even consider the measures that should have been taken by that time [*PO 2, ¶26, p. 58*]. Thus, CLAIMANT simply cannot contend that the tariff is unforeseeable despite its own act of omission.

110. Finally, the current tariff is not comparable to CLAIMANT's previous experience with the additional health and safety requirements. The additional health and safety requirements were immediately imposed by the Danubian government soon after they discovered the infectious disease in their country [*PO 2, ¶21, p. 58*]. Compared to the current circumstance, the import tariff had been imposed for a month before CLAIMANT discovered it. Thus, in light of the facts above, the current circumstance does not fall within the scope of the Hardship Clause since it was foreseeable [*ICC, No. 8486*].

b. Alternatively, the 25% loss created from the import tariff does not amount to hardship

111. In the event the Tribunal deems that the current import tariff is unforeseeable, the resulted 25% loss from the tariff does not amount to hardship. CLAIMANT is correct to point out that the event must be "*more onerous*" for it to be constituted as hardship [*Cl. Memo, ¶74, p. 22*]. However, they have completely disregarded the fact that the event must also be comparable to CLAIMANT's previous experience.

112. The current threshold to determine hardship provided in the Hardship Clause consists of two standards, the event must be more onerous to perform and more importantly, it must be comparable to CLAIMANT's experience [*Resp. Memo, ¶105, p. 25*]. With CLAIMANT only applying the "*more onerous*" terms, this should only be considered as a subjective standard and is not significant to describe hardship due to their vagueness and the excessive range of the wordings that might lead the Parties to take such extreme advantage of the Clause [*Liu, §22.3.2; Zaccaria, p. 151*].

113. The Parties should also look at the objective standard of the Hardship Clause which is the term "*comparable*". With the term "*comparable*", then for the current circumstances to be considered as hardship, it must indicate a loss comparable to the 40% loss CLAIMANT experienced beforehand [*PO 2, ¶21, p. 58*]. Compared to the present circumstance, CLAIMANT have only experienced 25% loss from the import tariff [*NoA., ¶18, p. 7*]. Thus, the standard provided in the Hardship Clause is not fulfilled and the Tribunal should not grant the invocation of the Hardship Clause [*van Houtte, p. 117; ICC, No. 8486*].

114. Furthermore, even if CLAIMANT have suffered loss from the import tariffs, it still does not amount as hardship since a hardship clause cannot be invoked by a party merely because the contract turns out to be unprofitable [*ICC Publ, No. 421*]. As such, the raised import tariffs do not amount to hardship.

iii. The Hardship Clause does not provide CLAIMANT's requested remedy of adaptation.

115. Even if the Hardship Clause is applicable to the present dispute, the Tribunal should not grant adaptation of the purchase price since an expressed reference of adaptation on the Hardship Clause is required to authorize adaptation **(a)** and the Parties' intention does not indicate their consent for adaptation **(b).**

a. An expressed reference of adaptation from the Parties is needed for the Tribunal to be authorized to perform adaptation of the purchase price

116. In spite of CLAIMANT's request [*Cl. Memo, ¶83, p. 24*], adaptation of the Contract by the Tribunal cannot be authorized unless there is an expressed detailed wording of adaptation included in the Hardship Clause [*Berger, p. 8*; *Ferrario, p. 139; Bernardini, p. 214; Stalev, p. 200*]. Without express reference, most tribunals would generally refrain from adapting a contract [*ICC, No. 8873*; *Aminoil, ¶967, p. 1016*].

117. Presently, the current Hardship Clause lacks the expressed detailed wording required for adaptation [*Cl. Ex. C 6, p. 14*]. If the Tribunal were to perform adaptation from the Hardship Clause, then they would not respect the terms of the Contract and would violate the principle of sanctity of the contract [*van Houtte, p. 109; Liamco v. Libya*]. Thus, CLAIMANT should not be able to request for adaptation from Clause 12 since it does not provide any form of adaptation by virtue of its wordings.

b. The Parties did not intend to authorize adaptation

118. Furthermore, CLAIMANT's mere subjective intention itself should not be a sufficient ground to request for adaptation since it does not represent the Parties' will [*Kroll, p. 3; Cl. Memo., ¶84, p. 24*]. Additionally, the subsequent conduct of the Parties reveal that they did not intend for adaptation.

119. CLAIMANT is not mistaken in stating that Mr. Shoemaker did act on behalf of RESPONDENT when encouraging Ms. Napravnik to authorize the shipments [*Cl. Memo., ¶85, p. 25*]. However, as can be seen by his and Ms. Napravnik's witness statements, the Parties did

not agree for any adaptation of the purchase price by the Tribunal. What the Parties agreed on is only negotiations of the purchase price, if provided in the Contract [*Cl. Ex. C 8, p. 18; Resp. Ex. R 4, p. 36*]. Thus, it would be too assumptive to interpret that the Parties have agreed for adaptation by the Tribunal.

120. Even with the inclusion of a Hardship Clause and the selection of MCL as the substantive law, it does not indicate any intention for the Parties to provide adaptation [*Cl. Memo., ¶87, p. 25*].

121. *First*, the inclusion of the Hardship Clause, although an explicit demonstration of the Parties' intent to revise the contract, does not entitle for an adaptation of the purchase price. Generally, hardship clauses confer their power to adapt a contract from their wordings or from the arbitration agreement [*Berger, p. 8*]. Based on the strict interpretation of its wordings, the current Hardship Clause and the Arbitration Agreement does not provide the Tribunal any mechanism for adaptation [*Cl. Ex. C 5, p. 14; Resp. Memo, ¶35, p. 11*].

122. *Second*, by referring to MCL for adaptation, it does not indicate any intention since the Parties have already selected the Hardship Clause to govern the hardship without any means of adaptation [*Cl. Ex. C 5, p. 14*]. In conclusion, CLAIMANT should not be able to request the adaptation of the purchase price.

B. CISG Does Not Entitle CLAIMANT to the Payment of US$ 1,250,000

123. Provisions within CISG that would entail CLAIMANT to the payment of US$ 1,250,000 in the form of contract adaptation does not exist. There are no specific provisions in CISG that governs hardship and its consequences [*Liu, §21.2.3; Slater, p. 238*]. Consequently, it shall be beyond the scope of CISG to adapt a contract [*Schlechtriem/Butler, §7.1.3, ¶291, pp. 203-204*]. Hence, invoking CISG for the payment of US$ 1,250,000 would only be futile [*Bianca/Bonell, ¶3.1, p. 592*].

124. Furthermore, pursuant to Art. 6 CISG, the inclusion of a *force majeure* clause with a narrow hardship reference under Clause 12 of the Contract excludes the application of Art. 79 CISG **(i)**. In addition, should Art. 79 CISG be applicable in the present dispute, it would not reverse the fact that CISG remains silent on hardship **(ii)**. Subsequently, there is no remedy for hardship under CISG **(iii)**.

i. Clause 12 of the Contract excludes the application of Art. 79 CISG

125. In their memorandum, CLAIMANT have made a narrow and erroneous statement that in order to exclude the application of Art. 79 CISG, this must be done through the exclusion of the entire CISG [*Cl. Memo., ¶90, p. 26*]. In fact, parties may exclude the application of CISG or exclude

one of its articles by including standard contract terms and it will be a matter of interpretation of the parties' intent to decide on which provisions prevail [*Schlechtriem, p. 35; Huber/Mullis, §3, p. 66*].

126. Furthermore, Art. 79 CISG is a non-compulsory provision, from which the parties may derogate contractually, pursuant to Art. 6 CISG, through the inclusion of a *force majeure* clause [*Silveira, §8.01, ¶397, p. 253; Huber/Mullis, §13, p. 259*]. In cases of non-performance caused by an impediment satisfying the requirements of Article 79(1) CISG, the parties' agreement should prevail over the terms of the Convention [*Silveira, §8.01, ¶397, p. 254; CISG AC No. 17, ¶2.29, p. 14*].

127. Contrary to CLAIMANT's allegation [*Cl. Memo., ¶91, p. 26*], the Parties have intended to exclude the application of CISG. This can be seen during the negotiations since it was CLAIMANT who requested the inclusion of the *force majeure* clause with a hardship reference that could exempt them from any additional risk from the delivery, which was subsequently accepted by RESPONDENT that is manifested under Clause 12 of the Contract [*Cl. Ex. C 4, p. 12; Cl. Ex. C 5, ¶12, p. 14*]. The Parties have included a list of events that could exempt CLAIMANT if such events occur and that list must be deemed as exhaustive by the Parties [*RFCCI, No. 123*]. This should be seen as the Parties intentionally setting aside Art. 79 CISG by incorporating a clause within the Contract that directly modify Art. 79 CISG [*ICC, No. 7660*]. By requesting such clause, CLAIMANT have precluded themselves from any possibility to claim an exemption under Art. 79 CISG [*ICC, No. 9978*].

128. Further, the former argument is consolidated by the preparatory work of CISG. A provision within CISG may be excluded if there is a clause under a contract that modify its legal effect [*A/CONF.97/19, Art. 5, Comment, ¶1, p. 17*].

129. In light of the above-mentioned reasons, Clause 12 of the Contract shall be deemed adequate and shall be the only reference to settle the present dispute.

ii. CISG does not govern matters concerning hardship

130. In the event Art. 79 CISG is applicable in the present dispute, it would not reverse the fact that hardship does not fall under the scope of Art. 79 CISG **(a)**. Furthermore, even if hardship is governed by Art. 79 CISG, the present circumstance does not amount to hardship **(b)**.

a. Hardship does not fall within the scope of Art. 79 CISG

131. CLAIMANT argued that the preparatory work of CISG does not favor the exclusion of hardship in Art. 79 CISG [*Cl. Memo., ¶98, p. 28*]. However, the utmost important thing is not

the discussion during the preparatory work of CISG, but rather the wording and the final meaning of the article that must be examined [*Lindstrom, V*].

132. Furthermore, CLAIMANT contested that hardship is included under the wording of *"impediment"* on Art. 79 CISG [*Cl. Memo., ¶96, p. 27*]. However, CLAIMANT failed to address the concept of impediment and its requirements to be constituted as an impediment under Art. 79 CISG.

133. The critical factor that separates the concept of hardship and impediment is that the performance must be impossible under impediment [*Schwenzer/Hachem/Kee, §45, ¶45.12*]. The word "*impediment"* on Art. 79(1) CISG must not only be observed by the nature of the event, yet it must also result in non-performance [*Lindstrom, §4.1*]. Meaning, the aggrieved party is not in any way able to overcome the impediment [*Schwenzer/Hachem/Kee, §45, ¶45.39*]. A mere increase on costs of performance cannot be construed as *"impediment"* under Art. 79(1) CISG, if the increase did not cause the performance to be impossible [*Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*]. Hence, *"impediment"* under Art. 79 CISG only encompasses an event that is adequate to render a performance as impossible [*Felemegas, p. 504*].

134. In the present dispute, the tariff imposed by the government of Equatoriana does not stop CLAIMANT from performing their obligation. CLAIMANT have even managed to bear the import tariff, meaning that the imposed tariff is not an impediment as defined by Art. 79(1) CISG, rendering the event to fall beyond the scope of Art. 79(1) CISG [*Rimke, p. 224; Bianca/Bonell, ¶2.6.4, p. 581*].

135. Therefore, the present circumstance falls outside the ambit of Art. 79 CISG since it has failed to satisfy the requirements to be construed as an impediment under Art. 79 CISG.

b. The present circumstance does not amount to hardship

136. In the event that hardship is governed by Art. 79 CISG, the present circumstance does not amount to hardship, neither according to Art. 79 CISG nor Art. 6.2.2 PICC. One of the thresholds of hardship is that the parties may not allocate the risk of the event if they want to be exempted [*DiMatteo, §C, p. 25*]. Further, as defined by PICC, there can be no hardship if the risk of the event had been assumed by the disadvantaged party [*Art. 6.2.2 PICC, Comment 3d, p. 221*].

137. If a particular risk is specifically addressed in the contract, it shall be deemed as exhaustive and leaves no room for the application of the concept of hardship [*Brunner, §12, p. 440*]. Even to the

extent that the event was unforeseen by the parties, it becomes irrelevant if the risk of the event had already been allocated under the contract [*Egyptian Cotton Case*].

138. Under Clause 8 of the Contract, the delivery was on a DDP basis, burdening all of the expenses on the delivery, including the risk of customs regulation on CLAIMANT, until the goods arrive at RESPONDENT's disposal [*Cl. Ex. C 5, ¶8, p. 14; 2010 INCOTERMS*]. Subsequently, claiming hardship cannot be derived from losses arising out of customs regulations [*Australia Cotton Case*].

139. Therefore, pursuant to Clause 8 of the Contract, the present circumstance shall not be construed as hardship.

iii. Remedy for hardship does not exist under CISG

140. In the most unlikely event that the present circumstance is construed as hardship and is governed by Art. 79 CISG, CLAIMANT would still be unable to acquire remedy for hardship since the remedy for an adaptation of the Contract does not exist under CISG.

141. This can be proven under the following reasons. First, the principle of good faith does not entitle CLAIMANT for an adaptation of the purchase price **(a)**. Second, there are no provisions within CISG that entails adaptation of Contract by the Tribunal **(b)**.

a. The principle of good faith does not entitle CLAIMANT for an adaptation of purchase price

142. CLAIMANT contested that they are entitled for an adaptation of the Contract by the Tribunal since RESPONDENT have not acted in good faith by halting the renegotiation process [*Cl. Memo., ¶¶122-123, p. 32*]. However, RESPONDENT is not under the duty to act on good faith (a). Even if RESPONDENT is bound to act on good faith, RESPONDENT have already acted on good faith (b).

a. <u>RESPONDENT is not under the duty to act on good faith</u>

143. Art. 7 CISG does not oblige any party to act on good faith during the performance of contract [*Schlechtriem/Butler, ¶44, p.* 49]. It only stipulates the obligation to interpret the provisions within CISG with good faith, not in regard to the conduct of the parties during the performance of the contract [*Ibid; Schlechtriem/Schwenzer, Art. 7, ¶6, p. 122; ICC, No. 8611*]. In addition, the drafters of CISG supports this by intentionally excluding the obligation to act on good faith [*Honnold, §94, p. 99*]. Consequently, RESPONDENT is not under any duty to act on good faith [*Farnsworth, p. 55*].

144. Therefore, even if RESPONDENT violated the good faith principle as alleged by CLAIMANT [*Cl. Memo., ¶122, p. 32*], it would not give CLAIMANT the entitlement for an adaptation of the purchase price.

b. RESPONDENT has acted in good faith

145. Even if the Parties are bound to act on good faith through their contractual relations [*Cl. Memo., ¶120, p. 32*], RESPONDENT did not violate the principle of good faith. CLAIMANT contested that it would be against the principle of good faith if CLAIMANT have to bear the additional payment resulting from the tariff [*Cl. Memo., ¶122, p. 32*].

146. In contrary, the facts do not support CLAIMANT's allegation. At hand, CLAIMANT have delivered the Goods and RESPONDENT have completed the payment according to the Contract which subsequently ended the contractual relation between the Parties [*Cl. Ex. C 5, ¶¶6, 8, p. 14*]. Hence, RESPONDENT is no longer bound to act on good faith [*Dulces Luici v. Seoul International*]. However, rather than rejecting CLAIMANT's request, RESPONDENT was still willing to provide the renegotiation as requested by CLAIMANT [*Resp. Ex. R 4, p. 36*]. This shows RESPONDENT's good faith even when they are not obliged to do so. Further, it is CLAIMANT's undoing that made the negotiation broke down, when they alleged RESPONDENT for breaching an agreement that does not even exist on the Contract [*Cl. Ex. C 5, pp. 13-14; Cl. Ex. C 8, p. 18*].

147. In addition, pursuant to Art. 30 CISG, a violation on the principle of *pacta sunt servanda* would occur if RESPONDENT have to bear the additional payment when in fact, it should be CLAIMANT's obligation to do so [*Art. 30, CISG; Cl. Ex. C 5, ¶8, p. 14*].

148. Therefore, RESPONDENT have acted in good faith and the principle of *pacta sunt* servanda obliges CLAIMANT to bear the tariff.

b. There are no provisions within CISG that allow adaptation of the Contract by the Tribunal

149. CLAIMANT contested that Art. 79 CISG allows for an adaptation of contract and such adaptation is envisaged as "*relief specially tailored"* for hardship, which is provided by Art. 50 CISG [*Cl. Memo, ¶119, p.* 32]. Furthermore, CLAIMANT also argued with the observance of good faith, adaptation of price is available under CISG [*Cl. Memo, ¶120, p. 32*]. However, CLAIMANT is not entitled for any adaptation of price under two reasons. First, there are no reliefs for the present hardship (a). Second, CISG does not allow adaptation of Contract by the Tribunal (b).

a. There are no reliefs for the present hardship

150. The word *"relief specially tailored"* for hardship actually refers to the court to seek further relief under the general principle of CISG, which leads to the application of Art. 7(2) CISG [*Lookofsky, p. 162*]. The reference to Art. 7(2) CISG is due to the lack of further relief for hardship under CISG which contain no rules for adaptation of contract [*Ibid*; *Scafom International BV v. Lorraine Tubes S.A.S*]. In *Steel Tubes*, the court referred to PICC to settle the hardship [*Scafom International BV v. Lorraine Tubes S.A.S*].

151. At hand, CLAIMANT did not make any claim for adaptation under PICC; rather, they only addressed that the present circumstance amounts to hardship under PICC [*Cl. Memo., ¶¶104-118, p. 29-31*]. However, should CLAIMANT or the Tribunal resort to PICC to seek solutions in settling the present dispute, it would not bring any difference towards the outcome of the case.

152. Under PICC, the tribunal may only adapt a contract under the grounds of hardship if it is reasonable [*Art. 6.2.3 (4)(b) PICC*]. The term "reasonable*"* can be interpreted as appropriate to adapt a contract by considering the circumstances of the case [*Bonell, p.* 120]. As declared in *J.G. v. AB SEB Bankas*, the court denied an adaptation of a contract on the basis of a party's truancy in requesting the other party for renegotiation [*J.G. v. AB SEB Bankas*]. In the case at hand, CLAIMANT's request for renegotiations was not made as soon as the hardship occurred, which is not appropriate according to Art. 6.2.3(1) PICC [*Rimke, p. 239*].

153. CLAIMANT discovered that the tariff is also applied to the Goods on 20th January 2018 [*PO 2, ¶26, p. 58*]. Upon that discovery, CLAIMANT immediately contacted RESPONDENT and requested renegotiation for a new purchase price [*Cl. Ex. C 8, p. 17*]. However, CLAIMANT was actually aware of the tariff after they read an article regarding the tariff on 20th December 2017, which is 31 days prior to CLAIMANT's notification to RESPONDENT that the Goods were affected [*PO 2, ¶25, p. 58*]. From the moment CLAIMANT were aware of the tariff, they did not make any effort to clarify its application to the Goods [*Ibid*]. Consequently, the request for renegotiation was not done as soon as the hardship occurred as how it should be [*Art. 6.2.3 PICC, Comment 2, p. 224*].

154. Therefore, pursuant to CLAIMANT's failure to claim hardship as soon as the tariff was imposed, CLAIMANT is not entitled for an adaptation of the purchase price by the Tribunal [*J.G. v. AB SEB Bankas*].

b. <u>CISG does not allow adaptation of Contract by the Tribunal</u>

155. In contrary to CLAIMANT's submission [*Cl. Memo., ¶123, p. 32*], the principle of good faith must not be used to override any provisions within CISG to solve a particular problem that is not even within the scope of its provision [*Huber/Mullis, §2, p. 8; Schlechtriem/Schwenzer, ¶19, p. 129*]. CISG clearly does not provide any kind of adaptation of contract by the tribunal [*Liu, §21.2.3*].
156. In the event Art. 79 CISG governs hardship, its consequences shall not be an adaptation [*Bianca/Bonell, ¶3.1, p. 592*]. If the principle of good faith is to be used to solve the present hardship by giving adaptation of Contract, it would bypass the legal effect of exemptions under Art. 79(5) CISG [*Rimke, p. 224*].
157. To conclude, there is no plausible situation in which CISG authorizes the Tribunal to adapt the Contract [*Schwenzer/Hachem/Kee, §45, ¶45.117*].

CONCLUSION TO ISSUE C

158. CLAIMANT is not entitled for remuneration of the purchase price through adaptation by the Tribunal. The present circumstances do not fall within the scope of the Hardship Clause. Even if it does, the Contract does not authorize the Tribunal to adapt the purchase price as it is not provided under the Hardship Clause. Furthermore, adaptation of the purchase price under CISG is also not possible. CISG does not governs matter concerning the present hardship and its consequences. Even if hardship is governed by CISG under the wording "*impediment"* on Art. 79 CISG, the remedy that CLAIMANT seek does not exist within CISG.

REQUEST FOR RELIEF

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. The respective counsels would like to submit that for the reasons stated above, RESPONDENT respectfully request the Tribunal to find that:

1. The Tribunal does not have the jurisdiction to adapt the Contract;
2. The Tribunal shall not admit the Partial Interim Award as evidence;
3. CLAIMANT is not entitled to the payment in the amount of US$ 1,250,000 through adaptation of the purchase price.

Bandung, January 2019

Jorryn Alexander Rotty

Michael Christopher Ferdian

Muhammad Lazuardy Thariq Makmun

Rafi Adrian Rahadi