16TH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

-MEMORANDUM FOR RESPONDENT-

CASE NO: HKIAC/A18128

PHAR LAP ALLEVAMENTO

Rue Frankel 1,

Capital City,

Mediterraneo

pharlap@allevamento.me

Tel: (0)146 9346359

CLAIMANT

BLACK BEAUTY EQUESTRIAN

2 Seabiscuit Drive,

Oceanside,

Equatoriana

blackbeauty@blackbeauty.eq

Tel: (0)214 669804

RESPONDENT

NALSAR UNIVERSITY OF LAW

ADITI RAMAKRISHNAN • GOPIKA MENON • SATHVIK CHANDRASHEKHAR • SIDDHARTH AIYANNA

TABLE OF CONTENTS

STATEMENT OF FACTS

The parties to this Arbitration are:

PHAR LAP ALLEVAMENTO (**CLAIMANT**) is a company registered and located in Mediterraneo. CLAIMANT is a market leader in racehorse breeding, renowned for its storage and handling of frozen horse semen. The semen was therefore of a superior quality and durability.

BLACK BEAUTY EQUESTRIAN (**RESPONDENT**) is a company located in Equatoriana. To capitalise on the growing racehorse industry in Equatoriana, RESPONDENT contacted CLAIMANT to purchase 100 doses of the frozen semen of Nijinsky III, one of the most successful racehorses of all time.

- **24TH MARCH 2017** – Having considered RESPONDENT's expression of interest, CLAIMANT *raced* to make an offer for the sale of 100 doses of semen. This offer stipulated EXW delivery terms and a cost of USD 99,500 per dose.

- **28TH MARCH 2017** – While RESPONDENT *largely* accepted the terms of this offer, it however raised two specific objections: *first*, to the price and delivery terms (suggesting DDP Incoterms instead); and *second*, to the jurisdiction of Mediterranean courts and the Mediterranean law.

- **31ST MARCH 2017** – CLAIMANT agreed to DDP delivery terms, thereby accepting all the risks associated with this change. In return, it requested for the insertion of a hardship clause. CLAIMANT also suggested exploring dispute resolution through arbitration in Mediterraneo – to address RESPONDENT's concerns with Mediterranean courts.

- **10TH APRIL 2017** – On CLAIMANT's recommendation, RESPONDENT circulated a draft clause providing for arbitration in Equatoriana. This draft incorporated the HKIAC Model Clause with certain material exceptions. RESPONDENT'S draft also chose Equatorianian law to govern the arbitration clause – to avoid disputes over the proper law.

- **11TH APRIL 2017** – CLAIMANT largely accepted RESPONDENT'S draft but for a single amendment: to substitute Equatoriana with Danubia as the seat of arbitration. CLAIMANT stressed that the offer of arbitration was contingent upon RESPONDENT'S acceptance of Mediterranean law as governing the "*Sales Agreements*".

- **12TH APRIL 2017** – The primary negotiators of the FSSA met with an untimely accident and were hospitalised. Negotiations were resumed by different employees of the parties to close the deal.

- **6TH MAY 2017** – The FSSA was concluded at a price of US $100,000 per dose. The shipments were to be delivered on DDP Incoterms in 3 instalments ending in January 2018. Certain specific risks associated with DDP were transferred to RESPONDENT through express clauses in the FSSA. Clause 15 provided for arbitration seated in Danubia but made no mention of the proper law of the arbitration agreement.

- **19TH DECEMBER 2017** – The Equatorianian government imposed a 30% tariff, retaliating to the 25% tariff imposed by the Meidterranean government. This was not the first time the Equatorianian government had resorted to such retaliatory measures.

- **20TH JANUARY 2018** – CLAIMANT chose to notify RESPONDENT only one day before the deadline for performance, *a full month* after the tariff was imposed. Disregarding its contractual obligations, CLAIMANT asked RESPONDENT to bear the costs of the tariff, threatening to stop the shipment until RESPONDENT did so.

- **21ST JANUARY 2018** – RESPONDENT urged that CLAIMANT perform its obligations, on the assurance that a solution might be found *if* the parties had provided for it in the FSSA. Thereafter, CLAIMANT authorised the final shipment.

- **12TH FEBRUARY 2018** –The parties met to negotiate a solution to the retaliatory tariffs imposed. The exercise was futile and no solution was reached.

- **31ST JULY 2018 –** CLAIMANT initiated arbitration for the adaptation of the FSSA.

- **2ND OCTOBER 2018** – CLAIMANT sought to introduce a Partial Interim Award from the 2013 HKIAC Arbitration involving RESPONDENT.

SUMMARY OF ARGUMENTS

I. CLAIMANT seeks the adaptation of the contract price to account for the 30% tariff imposed by the Government of Equatoriana. The power to adapt contracts does not rest with a tribunal merely by virtue of its existence. Adaptation, being an *exceptional* power, requires some form of *express authorisation* by the parties, as confirmed by all relevant jurisdictions. The FSSA however contains no authorisation of the Tribunal's power to adapt the contract. Moreover, the parties took pains to ensure that the scope of the arbitration clause was limited to deliberately exclude adaptation. Given the deliberate exclusion of adaptation from the scope of the arbitration clause, and the absence of any express authorisation of this Tribunal's power to adapt the contract, this Tribunal lacks both the jurisdiction and power to adapt the contract.

II. To justify its claim for adaptation of the contract price, CLAIMANT seeks to introduce in evidence a Partial Interim Award from another arbitration involving RESPONDENT. In those proceedings RESPONDENT had sought the adaptation of the contract for a similarly imposed tariff. RESPONDENT strongly objects to the admission of this evidence because it was illegally procured by hackers employed by CLAIMANT and its authenticity is suspect. Alternatively, the evidence must not be admitted as it may have been procured from Respondent's former employees who are bound by an obligation of confidentiality under the 2013 HKIAC Rules. In any case, CLAIMANT'S failure to discharge its burden to prove the relevance and materiality of this Award must strike at its admission.

III. CLAIMANT is not entitled to any relief under Cl 12 of the FSSA because of its own *decisions* during the pre-contractual negotiations. CLAIMANT *decided* on its own volition to bear the risk of additional tariffs by agreeing to DDP delivery terms. Once CLAIMANT willingly agreed to bear such a risk, the Tribunal cannot compensate it for simply holding up its side of the bargain. Moreover, CLAIMANT once again *decided* to derive Cl 12 from the ICC Hardship Clause. The ICC Hardship Clause provides for the remedy of termination and not adaptation. The parties did not make a modification to this remedy. CLAIMANT cannot subsequently claim a remedy that was not within the contemplation of the parties. In any case, the tariff did not fall within the scope of Cl 12: it cannot be compared to the previous experiences of CLAIMANT, is not foreseeable and did not make performance more onerous. Therefore, the Tribunal must dismiss the claim in its entirety.

IV. CLAIMANT has relied on Art. 79(5) based on a complete misreading of the provision. CLAIMANT has read the *exemption* in Art. 79 as a *remedy*; it has read non-performance as non-

profitable performance. The Tribunal cannot allow such an inexplicable interpretation of Art. 79: it would defeat its very objective. Further, allowing for contractual adaptation would be incompatible with the internationality of the CISG because it is a remedy found only in civil law jurisdictions. In any case, Art. 79 provides relief only for force majeure situations. A hardship event is not covered by Art. 79. Even if this is not the case, the FSSA cannot be adapted because the retaliatory tariff did not fulfill the requirements under Art. 79(1).

ARGUMENTS ADVANCED

ISSUE 1: THE TRIBUNAL LACKS THE JURISDICTION AND POWER TO ADAPT THE FSSA

1 In a desperate bid to establish its case –that adaptation is permitted under the arbitration clause— CLAIMANT argues that Mediterranean law is the law governing the arbitration agreement ("**proper law**"). CLAIMANT argues this because of an *alleged* implied choice by the parties in choosing Mediterranean law to govern the FSSA [*Cl Memo, ¶¶ 18, 19; Cl Ex C5, p. 14*]. RESPONDENT submits that CLAIMANT has mischaracterised the intention of the parties to reach this conclusion.

2 RESPONDENT relies on the parties' emails and maintains that the parties intended for Danubian – and not Mediterranean— law to govern the arbitration agreement **(I)**. Therefore, there was a requirement for express authorisation of the Tribunal's power to adapt the contract. In any case, even if Mediterranean law applies, this Tribunal may not exercise a power that was deliberately excluded by the parties **(II)**. Resultantly, this Tribunal lacks the jurisdiction and power to adapt the contract price.

I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

3 CLAIMANT has argued that Mediterranean law is the proper law by applying the following three-stage test to determine the proper law: (1) an express choice; (2) an implied choice; or (3) the closest and most real connection [*Cl Memo, ¶ 20; Sulamerica; BCY v BCZ; Born, p. 526*]. RESPONDENT will demonstrate through the parties' communicated intentions, that the same test should lead to the conclusion that Danubian law is the proper law.

4 RESPONDENT submits: *first*, that the emails exchanged between the parties reveal an implied choice that Danubian law is the proper law **(A)**. *Second*, in any case, the choice of Danubia as the seat should be presumed to be an implied choice of Danubian law **(B)**. Alternatively, the closest and most real connection test leads to Danubian law as the proper law **(C)**. Consequently, under Danubian law this Tribunal has no power to adapt the contract **(D)**.

A. The parties intended for Danubian Law to govern the arbitration agreement

5 CLAIMANT relies on the *rebuttable* presumption that the law governing the matrix contract must also govern the arbitration agreement to justify the application of Mediterranean law [*Cl Memo, ¶ 24; Sulamerica; Arsanovia*]. The only relevant consideration when determining the proper law, however, is the intention of the parties [*Rau, ¶ 8*].

6 CLAIMANT'S presumption assumes that the parties intended for the law of the matrix contract to be the proper law, unless *"there are other factors present which point to a different conclusion"* [*Sulamerica, ¶ 26*]. To point to the parties' intentions to the contrary, RESPONDENT now draws this Tribunal's attention to the parties' correspondence during contract negotiations [*Bermann, pp. 137, 1017; Born, ¶ 4.04*]. This analysis will lead the Tribunal to conclude that the parties intended to apply Danubian law to the arbitration agreement.

i] CLAIMANT accepted Danubian law as the proper law of the arbitration clause

7 RESPONDENT proposed a draft arbitration clause on 10 April 2017 and solicited CLAIMANT'S objections to the clause [*Resp Ex R1, p. 33*]. In response, CLAIMANT stated *"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 R2, p. 34*]. The only change made was that Equatoriana was substituted for Danubia as the seat [*Resp Ex R2, p. 34*]. The following conclusions may be drawn from this:

a. CLAIMANT having *largely accepted* RESPONDENT'S draft clause, only had *one* objection pertaining to the seat [*Resp Ex R2, p. 34*].

b. CLAIMANT only required the amendment it proposed to be incorporated *"in [the] relevant part [of the draft]"* [*Resp Ex R2, p. 34*]. RESPONDENT was only required to *copy-paste* this amendment into the existing draft upon accepting it. Column B in the table below, represents the clause as on 11 April 2017, when RESPONDENT accepted CLAIMANT'S amendment.

A	**B**
Draft arbitration clause on 10 April 2017	***Draft arbitration clause after CLAIMANT'S amendment on 11 April 2017***
Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre	Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre

(HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana. The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."	(HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Danubia. The law of this arbitration clause shall be the law of Equatoriana. The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."

8 Incorporating CLAIMANT'S amendment would result in Danubia being the seat of arbitration, while the law applicable to the arbitration agreement remained Equatorianian law. However, it is neither parties' case that Equatorianian Law applies. This apparent discrepancy may easily be resolved as follows:

9 RESPONDENT had clearly expressed its desire for a distinct law to govern the arbitration agreement by choosing Equatorianian Law [*Resp Ex R1, p. 33*]. RESPONDENT'S decision to do so aligns with the recommendation of the HKIAC Model Clause – geared to avoid disputes over the proper law [*HKIAC Model Clause*].

10 Therefore, if CLAIMANT intended to apply Mediterranean Law to the arbitration agreement – the onus was on CLAIMANT to expressly object to Equatorianian Law [*Resp Ex R1, p. 33*]. CLAIMANT however stressed that it had only one objection –to the seat of arbitration– amending the same to Danubia [*Resp Ex R2, p. 34*].

11 RESPONDENT submits that CLAIMANT'S non-objection to a separate law applying to the arbitration agreement leads to the conclusion that CLAIMANT had no objections to this effect. RESPONDENT should not suffer adverse consequences for CLAIMANT'S own failure to express its intentions clearly.

12 Therefore, when CLAIMANT accepted Danubia as the seat for its neutrality, RESPONDENT reasonably concluded that CLAIMANT had no objection to applying Danubian law to the arbitration agreement.

13 Moreover, it is rarely observed in practice that the law applicable to the arbitration agreement is from a different legal system than the seat [*XL Insurance v. Owens Corning*]. This is because commercial parties are presumed to prefer simplicity, and the interaction of fewer laws [*Hamlyn v. Talisker*]. This presumption is rebutted if the parties express their intention to the contrary [*Sulamerica,* ¶ *26*]. CLAIMANT has not done so.

ii] RESPONDENT did not accept Mediterranean law as proper law at any point

14 CLAIMANT alleges that RESPONDENT accepted the application of Mediterranean Law to the arbitration agreement as early as 28 March 2017 via email [*Cl Memo,* ¶ *25; Cl Ex C3, p. 11*]. RESPONDENT submits that this conclusion does not follow for two reasons:

15 *First,* CLAIMANT'S allegation is absurd because arbitration was not even contemplated by the parties as on that date! This should have been clear to CLAIMANT, being the first party to propose arbitration only on 31 March 2017 [*Cl Ex C4, p. 12*]. Since the parties had only the jurisdiction of courts at the time, no acceptance of any law could be interpreted as covering the arbitration agreement.

16 *Second*, RESPONDENT'S email on 28 March 2017 could not even be construed as accepting the application of Mediterranean Law to the FSSA at that stage [*Cl Ex C3, p. 11*]. This is because RESPONDENT clearly indicated that Mediterranean Law would be acceptable only *"if the courts of Equatoriana have jurisdiction"* [*Cl Ex C3, p. 11*]. CLAIMANT however rejected this condition precedent to RESPONDENT'S acceptance of Mediterranean Law on 31 March 2017 [*Cl Ex C4, p. 12*].

iii] CLAIMANT made the offer of arbitration contingent upon Mediterranean Law governing the matrix contract and not the arbitration clause

17 CLAIMANT argues that the parties had agreed that Mediterranean Law would govern the arbitration agreement [*Cl Memo,* ¶ *25*]. In support of this, CLAIMANT cites its own statement that allegedly renders the offer of arbitration conditional upon the acceptance of Mediterranean law [*Resp Ex R2, p. 34*].

18 CLAIMANT'S standard Semen Sales Agreement contained a choice of law clause that applied Mediterranean Law to the contract [*Cl Ex C5, p. 14*].

19 On 28 March 2017, RESPONDENT objected to both applying Mediterranean Law to the FSSA, and to the jurisdiction of Mediterranean courts [*Cl Ex C3, p. 11*]. RESPONDENT suggested a

compromise where Mediterranean Law might be acceptable as the governing law of the FSSA, if jurisdiction was conferred on Equatorianian courts [*Cl Ex C3, p. 11*].

20 On 31 March 2017, CLAIMANT did not agree to confer jurisdiction upon Equatorianian courts. CLAIMANT then suggested a compromise to instead adopt arbitration in Mediterraneo [*Cl Ex C4, p. 12*].

21 Although RESPONDENT accepted the proposal for arbitration, it rejected the proposal that arbitration would be in Mediterraneo by proposing Equatoriana as the seat on 10 April 2017 [*Resp Ex R1, p. 33*].

22 On 11 April 2017 CLAIMANT then objected specifically to Equatoriana as the seat, proposing Danubia instead [*Resp Ex R2, p. 34*]. Upon RESPONDENT'S acceptance of this proposal, Danubia was made the seat.

23 In this backdrop, CLAIMANT informed RESPONDENT that arbitration *"was naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo"* [*Resp Ex R2, p. 34*]. RESPONDENT submits that this statement only implied an acceptance that Mediterranean Law would govern the substantive contract and not the arbitration agreement for <u>two</u> reasons.

24 *First,* RESPONDENT had indicated that Mediterranean Law could govern the FSSA only if the Equatorianian courts were conferred jurisdiction in place of Mediterranean courts [*Cl Ex C3, p. 11*]. This condition precedent to accepting Mediterranean Law was therefore not met. Instead the jurisdiction clause was substituted for an arbitration clause [*Resp Ex R2, p. 34*]. CLAIMANT was therefore only confirming that its expectations for making this accommodation – for Mediterranean Law to apply to the contract—would be met.

25 *Second,* on 11 April 2017, CLAIMANT stated arbitration was *naturally* conditional upon the law applicable to the "*Sales Agreements remain[ing] Mediterranean law"*. The use of the word *remain* is telling on CLAIMANT'S part. Mediterranean Law had previously only been contemplated as applying to the agreement and not the arbitration clause. For it to *remain applicable*, it would have to apply even now to the FSSA and not Cl 15.

iv] <u>The inclusion of the hardship clause in Cl 12 of the FSSA does not negatively impact the application of Danubian Law</u>

26 CLAIMANT argues that Danubian Law would make the hardship clause *"lose its significance"* by precluding adaptation as a remedy [*Cl Memo, ¶ 27*]. CLAIMANT'S argument presumes that

adaptation is a *necessary* remedy if the conditions for hardship are met. RESPONDENT submits that this argument should be disregarded:

27 *First*, the parties never contemplated adaptation as a remedy for hardship. This is evident from the drafting history of the provision. CLAIMANT initially proposed that the parties incorporate the ICC Hardship Clause [*Resp Ex R2, p. 34*]. CLAIMANT could not be unaware that the ICC Hardship clause disallows adaptation [*ICC Hardship Clause*].

28 The parties made no attempt to alter its language to accommodate adaptation as remedy despite this. RESPONDENT was the only party to raise objections to this clause – pertaining to the scope of the clause [*Resp Ex R3, p. 35*]. Following RESPONDENT'S objections, the scope of the clause was restricted. Therefore, it is reasonable to conclude that the parties –CLAIMANT in particular— were unconcerned by the fact that adaptation was not allowed under the ICC Hardship Clause.

29 *Second,* it is widely accepted in commercial practice that the most common remedies for hardship are renegotiation or termination [*ICC Hardship Clause; Kröll; Steingruber, ¶ 7.11*]. Adaptation is considered an *exceptional* remedy requiring specific authorisation. This is true even under Mediterranean and Danubian Law [*PO2, ¶¶ 36, 39*]. CLAIMANT therefore could not have been unaware of the prevalence of this rule.

B. The law of the seat must be presumed to govern the arbitration agreement

30 RESPONDENT submits that there are two recognised presumptions that may apply to determine the parties' choice of proper law. CLAIMANT argues that the law chosen to govern the matrix contract is presumed to apply to the arbitration clause contained therein ("**Presumption A**") [*Cl Memo, ¶ 19; Supra, ¶ 3*].

31 CLAIMANT however omits to mention an equally accepted presumption. RESPONDENT submits that where the parties choose the seat themselves, they are presumed to have chosen the law of the seat to govern the arbitration agreement (**"Presumption B"**) [*C v. D; Glick/Niranjan, p. 144; Compagnie d'Armament v. Compagnie Tunisienne*; *Black Clawson v. Papierwerke*].

32 While both presumptions coexist in law, RESPONDENT submits that the facts of this case coupled with the intention of the parties should guide this Tribunal to prefer Presumption B [*Sulamerica, ¶18*]. Presumption B (and the application of Danubian Law) is supported by the following considerations:

33 *First*, the parties deliberately narrowed the scope of the arbitration clause [*Ans. to NoA, p. 31, ¶ 13*]. It is therefore more logical to conclude that the parties wished to submit their arbitration clause to Danubian Law, which is known for interpreting arbitration clauses narrowly [*PO1, ¶ II*].

34 CLAIMANT has relied on a 'theory of validation' to pre-empt this argument [*Cl Memo; ¶¶ 30-33*]. The theory of validation is however strongly contested [*Glick/Niranjan, p. 148*]. RESPONDENT submits that even if the principle is accepted at face value, it is inapplicable to the present case. The theory only applies only where one of the applicable laws invalidates the arbitration agreement [*Sulamerica, ¶ 26*]. Presently, the arbitration agreement is valid under both Danubian and Mediterranean Law. Hence the theory will not assist the Tribunal in establishing a preference between the two laws.

35 *Second,* the presumption is also justified because arbitration agreements are *"procedural contracts"* that deal with matters distinct from the substantive rights and obligations of the parties [*Rau, ¶ 8; Samuel, fn 34*]. For this reason, it is reasonable to conclude that parties expect these distinct obligations under the contract to be governed by separate laws.

36 *Third*, CLAIMANT argues that Danubian Law does not apply "*simply because of Danubia's geographic neutrality*" [*Cl Memo, ¶ 34*]. CLAIMANT advances this argument on the basis that "*the law of [Danubia] is not essentially neutral, although the arbitral seat is neutral"* [*Cl Memo, ¶ 35*]. This is ironic coming from the party that proposed Danubia as the seat because Danubia's neutrality coincided with its *internal policy*! [*Resp Ex R2, p. 34*]. Danubia's neutrality is therefore a relevant consideration in determining the intention of the parties in choosing the proper law. At the very least, this indicates that CLAIMANT was not averse to Danubian Law being the proper law.

C. Danubian Law has the closest and most real connection with the arbitration agreement

37 In CLAIMANT'S best case, this Tribunal may find that Presumption A and Presumption B are equally convincing. In identical situations, courts have treated such a conflict as an absence of an express or implied choice of law [*C v. D; FirstLink*]. Applying the three-stage test espoused by CLAIMANT this Tribunal must then proceed to apply the closest and most real connection test [*Cl Memo, ¶ 20; Sulamerica; Arsanovia; BCY v BCZ*].

38 Applying the closest connection test, this Tribunal should conclude based on both authority and principle that the law of the seat has the closest connection with the arbitration agreement [*ICC Case No. 6162; ICC Case No. 5505; Lew/Mistelis/Kröll, ¶¶ 6-69- 6-71*]. This is because the place of

performance of the arbitration agreement is the seat of the arbitration [*Bernardini – 1, p. 201*]. Therefore, even applying the closest connection test, Danubian Law is the proper law.

D. Consequently, this Tribunal lacks the jurisdiction and power to adapt the FSSA

39 *First*, the Tribunal's competencies are understood to be *in sync* with the courts of Danubia [*Swiss Federal Court*]. Danubian Law requires *express* authorisation for a court to engage in adaptation of contracts – a position that is widely accepted [*PO2, ¶¶ 36, 45; Frick, p. 179; Steingruber, ¶ 7.11; Bernardini – 2, p. 421*]. This requirement should also apply to arbitral tribunals because of the rule of synchronised competencies.

40 *Second*, CLAIMANT may have attempted to introduce RESPONDENT'S *alleged* statement as part of the FSSA. CLAIMANT may then have suggested that there was in fact oral authorisation of the Tribunal's power to adapt [*Cl Ex C8, p. 17*]. Since Danubian Law applies however, the parties have already agreed that such *extraneous evidence* would be disallowed by the four-corner rule of interpretation [*PO1, ¶ II*]. In any case, CLAIMANT has not pressed this point in its memorandum.

II. EVEN UNDER MEDITERRANEAN LAW THE TRIBUNAL LACKS THE POWER TO ADAPT THE FSSA

41 The parties made deliberate efforts to curtail the Tribunal's power to adapt the contract – a fact that CLAIMANT conveniently glosses over in its submissions. CLAIMANT argues that irrespective of which law is applicable, both hardship and its remedy –adaptation— fall within the ambit of Cl 15 of the FSSA because of the inclusion of the word *'performance'* [*Cl Memo, ¶¶ 46, 50*].

42 RESPONDENT submits that this argument should fail for two reasons. *First*, the word '*performance'* itself in Cl 15 does not empower the Tribunal to adapt the contract **(A)**. *Second*, the modifications to the HKIAC Model Clause preclude adaptation even under Mediterranean Law **(B)**.

A. CLAIMANT cannot rely on Cl 15 to justify the Tribunal's power to adapt

43 RESPONDENT submits that '*performance*' cannot be considered out of context. It must therefore be interpreted in line with the language of Cl 15 of the FSSA and the modifications to the HKIAC Model Clause.

44 Cl 15 of the FSSA covers disputes '*arising out of*' the performance of the contract. However, the parties deliberately excluded disputes '*relating to'* the performance of contract. The parties clearly intended to narrow the scope of the arbitration clause [*Hancock v. Rinehart; Bonnell, p. 292*].

Adaptation while relating to performance does not *arise out of* performance of the contract. It has therefore deliberately been excluded by the parties.

45 If the Tribunal was to accept CLAIMANT'S submission, it would open the flood gates for simply any dispute even remotely related to *"performance"*. To illustrate: going by CLAIMANT'S position, Cl 15 covers tortious claims over negligence during performance. Clearly, the parties cannot have intended for this.

46 Further, *"non-contractual disputes"* have also been excluded from the scope of arbitration [*HKIAC Model Clause*]. Since *adaptation* is not covered by any provision of the FSSA, RESPONDENT submits that adaptation is in fact a non-contractual dispute, and only *relates to* performance of the FSSA. Adaptation was thus excluded from the scope of performance.

47 CLAIMANT then pre-emptively argues that the parties as rational businessmen presumptively *"intend[ed] to resolve all disputes related to the contract"* by the same forum [*Cl Memo, ¶ 46; Fiona Trust v Privalov*]. CLAIMANT in making its case based on performance has *completely* failed to appreciate the modifications to the Model Clause –whereby disputes *relating to* the contract were expressly excluded. RESPONDENT therefore submits that this argument be disregarded.

B. Adaptation is precluded by the modifications to the HKIAC Model Clause

48 CLAIMANT'S case rests on the fact that Mediterranean Law does not require the parties to expressly authorise the Tribunal to adapt the contract [*Cl Ex C8, p. 17*]. CLAIMANT does not disclose that under Mediterranean Law, a standard arbitration clause is *sufficient* to empower a tribunal to adapt the contract [*PO2, ¶ 39*]. Crucially, this reveals that contrary to Ms. Napravnik's witness statement, there *is* a basic threshold of authorisation that needs to be met [*Cl Ex C8, p. 17*]. Thus, even under Mediterranean Law, there is a requirement for the parties to confer a Tribunal with the power of adaptation.

49 Cl 15 of the FSSA however is not a standard arbitration clause, given the parties' deliberate deviations from the HKIAC model clause [*Supra, ¶¶ 43-47*]. There is no other indication of the parties having authorised this Tribunal to adapt the contract. Even the minimal standard of authorisation under Mediterranean Law is thus not met.

CONCLUSION: Since Danubian Law is applicable, this Tribunal lacks the jurisdiction and power to adapt the FSSA. This is reinforced by the parties' intentions in restricting the scope of the HKIAC Model Clause. Even under Mediterranean Law, the lack of authorisation would strike at CLAIMANT'S case.

ISSUE 2: THE TRIBUNAL SHOULD REJECT CLAIMANT'S REQUEST TO SUBMIT THE PARTIAL INTERIM AWARD AS EVIDENCE

50 The Tribunal is the absolute and final authority to determine issues regarding the admissibility of evidence. CLAIMANT has sought to introduce an *alleged* Partial Interim Award from the 2013 HKIAC Arbitration as evidence presently [*Cl Memo, ¶ 67; Art.22.2 HKIAC Rules 2018; Art. 9.1 IBA Rules*]. CLAIMANT either procured this Partial Interim Award from an illegal hack of RESPONDENT's computer systems, or because RESPONDENT's former employees breached confidentiality.

51 RESPONDENT therefore contests the admission of this evidence because it was illegally obtained **(I)**. Alternatively, the admission of the Partial Interim Award would violate the rule of confidentiality enshrined under the HKIAC Rules **(II.)**. Even if the Tribunal finds that the evidence was neither illegally obtained nor confidential, it should not be admitted because CLAIMANT has failed to satisfy the Tribunal of its relevance and materiality **(III)**.

I. THE PARTIAL INTERIM AWARD WAS ILLEGALLY OBTAINED

52 While the parties and the Tribunal have not been able to conclusively determine the source of the Partial Interim Award, certain facts are undisputed. *First* this award could have only been obtained by the company either from a hacker or from a former employee of RESPONDENT [*PO2, ¶ 41*]; *Second*, the Partial Interim Award was commoditized; *Third*, the company that has promised to sell the Partial Interim Award to CLAIMANT has a doubtful reputation [*PO2, ¶ 41*].

53 Not only is it apparent that the Partial Interim Award is illegally obtained but it is plausible that such an award may not even be real. Therefore, this Partial Interim Award might not be an accurate representation of the original Partial Interim Award. There have been several concerning instances of fake arbitration involving the "*falsification] [of] documents*" [*GAR Report*]. Therefore, the Tribunal should reject the Partial Interim Award unless CLAIMANT conclusively proves that such evidence is authentic.

54 Unfortunately, in the present arbitration CLAIMANT cannot authenticate this Partial Interim Award because:

1) CLAIMANT has not disclosed the source of this award

2) In any case the Partial Interim Award is protected by confidentiality.

Therefore, even if CLAIMANT alleges that the award is authentic, CLAIMANT cannot prove it. This is abundant reason for the Tribunal to reject the Partial Interim Award.

55 RESPONDENT submits that hacking is akin to theft and is therefore illegal. RESPONDENT submits that on this ground alone CLAIMANT's request to admit this evidence must be rejected [*Redfern/Hunter; EDF v. Romania; O'Malley; Waincymer; Art.13.5 HKIAC Rules*].

56 Further, under the HKIAC Rules this Tribunal and the parties are both required to "*ensure the fair … conduct of the arbitration*" [*Art 13.5, 2018 HKIAC Rules*]. RESPONDENT submits that this requirement of fairness is binding upon both the Tribunal and the parties to preclude the admission of illegally obtained evidence. Furthermore, CLAIMANT is bound by a general duty of good faith under arbitration [*Suad Niazi v. St. Paul Mercury*].

57 CLAIMANT should therefore not be allowed to breach its obligation of good faith by wilfully leading illegally obtained evidence. CLAIMANT approached a company with doubtful reputation for obtaining a copy of the Partial Interim Award [*PO2, ¶ 41*]. This act in itself is enough to cast suspicion on its legality and authenticity of the Partial Interim Award obtained from the company by CLAIMANT [*PO2, ¶ 41*].

58 Further, the Tribunal should not breach its obligation to conduct proceedings in a fair manner. In support of its submissions RESPONDENT draws this Tribunal's attention to the Award in the *Methanex* case wherein the Tribunal refused to admit the illegally obtained Partial Interim Award due to breach of good faith, fundamental principles of justice and fairness [*Methanex Corporation v. United States of America, ¶ 56; Art. 9.2(g) of IBA Rules*].

II. THE PARTIAL INTERIM AWARD IS PROTECTED BY CONFIDENTIALITY

59 The 2013 HKIAC Arbitration is governed by the confidentiality regime of Rule 42 thereunder. Contrary to CLAIMANT'S assertions, the Partial Interim Award is protected by confidentiality under the 2013 HKIAC Rules [*Cl Memo, ¶ 67; Rule 42.1, HKIAC Rules*]. That an award is a *"potentially public document"* does not exempt it from the protection of confidentiality. In fact, this risk is also regulated by Rule 42.3(b) which protects its confidentiality until such time as its disclosure is called upon by law.

60 If the Partial Interim Award was in fact procured from RESPONDENT'S former employees, RESPONDENT submits that its admission as evidence would violate this rule of confidentiality **(A).** Further, CLAIMANT is not entitled to the protection of legal interests' exception under the HKIAC

Rules **(B).** Moreover, the UNRT is inapplicable and does not exempt the Partial Interim Award from confidentiality **(C).**

A. The confidentiality under the 2013 HKIAC Rules extends to RESPONDENT'S former employees

61 CLAIMANT is correct in arguing that it is not bound by the confidentiality agreement in the 2013 HKIAC Arbitration, not being a party to the same [*Cl Memo, ¶¶ 70-71*]. RESPONDENT submits however that this obligation of confidentiality is enforceable against its former employees. The former employees suspected of this breach were witnesses in the 2013 Arbitration and are therefore bound by the rule of confidentiality [*PO2, ¶ 41; Rule 42.2, 2013 HKIAC Rules*]. In the interest of procedural fairness, this Tribunal must honour the obligation of confidentiality imposed by the HKIAC Rules in the other proceedings. The admission of any evidence that breaches it must therefore be disallowed. [*Rule 13.5, 2018 HKIAC Rules*].

B. CLAIMANT is not entitled to the 'protection of legal interests' exception under the 2013 HKIAC Arbitration

62 CLAIMANT seeks to avail the '*protection of a legal right or interest*' exception to the rule of confidentiality under Rule 42.1 [*Cl Memo, ¶ 73-75; Rule 42.3, 2013 HKIAC Rules*]. RESPONDENT submits that this exception is available only to a party to the proceedings in question [*Rule 42.3, 2013 HKIAC Rules*]. CLAIMANT has itself admitted that it was never a party to the 2013 HKIAC Arbitration proceedings [*Cl Memo, ¶¶ 68-72*]. Consequently, only if CLAIMANT was a party to the 2013 HKIAC Arbitration, would it have had the right to cite legal interest as a defence to confidentiality and disclose the award.

63 CLAIMANT relies upon a decision of the High Court of England and Wales to demonstrate how the 'protection of legal interest' exception may be used in its favour [*Hassneh v. Mew*]. CLAIMANT however fails to appreciate *crucial* distinctions between its case and the *Hassneh* case. In *Hassneh*, a *party* to arbitration sought to disclose an arbitral award in separate proceedings against a third party in order to justify its claim. It was allowed to do so. Presently however, CLAIMANT is admittedly not a party to the 2013 HKIAC Arbitration. It cannot therefore rely on the 'protection of legal right or interest' exception to justify a breach of confidentiality. Only RESPONDENT is in a position to do so, if it so chooses.

C. The UNRT does not apply to the present arbitration

64 To overcome the hurdle of confidentiality under the HKIAC Rules, CLAIMANT argues for the admission of the Partial Interim Award relying on principles of *"transparency"* and *"public interest"* [*Cl Memo, ¶ 82*]. To advance this argument, CLAIMANT relies on the UNRT – a treaty *exclusively* made applicable to Treaty based Investor-State Arbitration [*UNCITRAL website; Boisson de Chazournes/Baruti*]. This position is unpersuasive for two reasons:

65 *First*, RESPONDENT maintains that there is no room for the UNRT to be applied to the present arbitration *most significantly* because it is an international commercial arbitration, and not an investor-state arbitration! [*FAQ – UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*]. Consequently, the objective of the UNRT – to make information regarding *investor-state arbitration* accessible to public — cannot be fulfilled in the present case [*UNCITRAL Website; Biwater Gauff v. Tanzania*]. CLAIMANT'S repeated reliance on the UNRT is therefore odious [*Fasttrack-Letter, p. 50; Cl Memo, ¶¶ 80-81*].

66 *Second*, CLAIMANT completely mischaracterizes the dispute at hand in arguing that there is a *public interest* which justifies transparency superseding confidentiality. CLAIMANT has stated that *"the imposition of tariff is a governmental conduct"* which influences *"commercial interest among all market participants"* [*Cl Memo, ¶ 82*]. CLAIMANT'S reasoning is absolutely misconceived.

67 RESPONDENT submits that there is no public interest in the present dispute that might override the duty of confidentiality under the HKIAC Rules:

(a) *First*, the dispute does not pertain to the imposition of tariffs; and only deals with performance under a commercial contract. Likewise, the outcome of this arbitration will not impact the tariffs imposed.

(b) *Second*, this dispute is between two private parties, neither of which is a state.

(c) *Third*, there is no requirement for transparency since the arbitration does not concern public funds, or governmental policy/action [*Esso Australia v The Honourable Sidney James Plowman; O'Malley, p. 90*].

(d) *Fourth*, this Tribunal is only charged with protecting the individual interest of the parties and not the public interest of any other market participants [*Drličková*].

68 Consequently, there is no reason to violate the confidentiality that the parties' opted for by admitting the Partial Interim Award.

69 Moreover, the confidentiality obligation is of special relevance to RESPONDENT and must therefore be respected. RESPONDENT submits that since it intends to become one of the leading breeders for racehorses, confidentiality is a specific and real concern to protect its business by concealing such proceedings from competitors [*Pernt; Cl Ex. C1, p. 9*]. This provision of confidentiality is in fact the reason why business persons in RESPONDENT'S shoes would prefer for the HKIAC Rules.

III. THE PARTIAL INTERIM AWARD IS NEITHER RELEVANT NOR MATERIAL TO THE PRESENT ARBITRATION

70 A party seeking to submit evidence needs to demonstrate to the Tribunal how the evidence is relevant to their case and material to its outcome. Even if CLAIMANT establishes that the Partial Interim Award was neither illegally obtained nor confidential, it has failed to pass this crucial test [*Cl Memo, ¶ 56; Art. 22.2 HKIAC Rules 2018; Art. 9.1 IBA Rules*].

71 RESPONDENT submits that merely stating that both the arbitrations are similar without expounding on the same is insufficient to satisfy the thresholds of relevance and materiality. The mere fact that in both the case parties were affected by unforeseen tariff imposed by the government does not make their case similar [*Cl Memo, ¶ 56*]. Therefore, RESPONDENT submits that the tests of relevance and materiality are not met as CLAIMANT has failed to establish how exactly the Partial Interim Award was necessary to establish its case **(A)**; the present arbitration is fundamentally different from the 2013 HKIAC Arbitration **(B)**.

A. CLAIMANT failed to demonstrate that the Partial Interim Award is necessary to establish its case

72 This Tribunal must be satisfied of the threshold of relevance and materiality respectively when deciding on the admission of Partial Interim Award, as these tests are not only widely accepted in practice but are mandated under the HKIAC Rules [*Art. 22.2 HKIAC Rules 2018; Tidewater v. Venezuela; Art. 9.1 IBA Rules*]. CLAIMANT seeks to satisfy these tests by simply stating that the two arbitrations *"enjoy much resemblance"* [*Cl Memo, ¶ 54*].

73 The relevance of the Partial Interim Award is to be determined from its likelihood to prove the facts that CLAIMANT is alleging in order to justify legal conclusions pertaining to its case. Similarly, materiality of evidence is determined on the basis of its ability to aid the tribunal in its consideration of a legal issue [*Waincymer, p. 859; Raeschke-Kessler, p. 411-430; Kaufmann-Kohler/Bartsch, p. 18*].

74 In vaguely citing "*resemblance*" between the two cases, CLAIMANT fails to demonstrate that the impugned Partial Interim Award will assist in CLAIMANT'S endeavour to discharge its burden of proof [*Cl Memo, ¶ 54*]. Consequently, this Tribunal must reject this request for disclosure.

B. The present arbitration is fundamentally dissimilar from the 2013 HKIAC Arbitration

75 CLAIMANT has argued that since both the cases *"enjoy much resemblance"*, the Partial Interim Award will be relevant and material to the present arbitration [*Cl Memo, ¶ 54*]. While this may appear to be true at first blush, both the arbitrations are significantly different from each other.

76 In *Ali Shipping*, it was held that necessity of an evidence has to be determined by taking into consideration *"the powers and procedures of the tribunal in which the proceedings are being conducted"*. On a perusal of both the arbitrations it can be deduced that the powers and procedures of the tribunal will significantly differ due to the dissimilar arbitration clauses. Therefore, the Partial Interim Award will not aid the Tribunal in deciding the present arbitration.

Comparison of the arbitration clauses

2013 ARBITRATION CLAUSE	**PRESENT ARBITRATION CLAUSE**
Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof ***or any dispute regarding non-contractual obligations arising out of or relating to it*** […] shall be referred to and finally resolved by arbitration	Any ~~dispute, controversy, difference or claim~~ arising out of ~~or relating to~~ this contract, including the existence, validity, interpretation, performance, breach or termination thereof ~~**or any dispute regarding non-contractual obligations arising out of or relating to it**~~ shall be referred to and finally resolved by arbitration

77 In the 2013 HKIAC Arbitration, the HKIAC Model Clause was incorporated along with all its additions. Thus, granting the Tribunal the power to adjudicate both contractual and non-contractual claims. However, Cl 15 of the FSSA in the present case incorporated the HKIAC Model Clause with certain exceptions. The present arbitration clause has been narrowly worded by the parties to exclude the adjudication of non-contractual claims by the Tribunal. Therefore,

the Tribunal cannot decide on adaptation which is a non-contractual dispute since the parties have not expressly provided for it in the FSSA.

78 CLAIMANT has also failed to recognize the fact that as per the law of Mediterraneo only a standard arbitration agreement will confer upon the Tribunal the same powers as a court under Art. 6.2.3 para 4b of Mediterranean Contract Law [*PO2,* ¶ *39*]. Since the exceptions made to the HKIAC Model Clause in the present case deviates from the standard arbitration agreement, this Tribunal is not empowered to adapt the contract. Therefore, CLAIMANT cannot rely on the Partial Interim Award from the 2013 HKIAC arbitration because the Tribunal there had broader powers compared to the present arbitration.

CONCLUSION: This Tribunal should reject the admission of the Partial Interim Award because it was illegally obtained; or was procured in breach of confidentiality. In any case, the Partial Interim Award is neither relevant nor material to the present arbitration.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO USD 1,250,000 UNDER CL 12 OF THE FSSA

79 The entirety of CLAIMANT'S case revolves around one tenuous submission: that the parties agreed to "*partially*" derogate from Cl 12 of the FSSA [*Cl Memo,* ¶. *99*]. On this basis, CLAIMANT has submitted that hardship must be determined solely based on Cl 12 to the exclusion of the CISG [*Cl Memo,* ¶. *99*].

80 The Tribunal must disregard this submission because both routes-Cl 12 and Art. 79, lead to the same inevitable conclusion: The FSSA cannot be adapted. Even if Cl 12 has lowered the threshold for hardship under the CISG, it has no bearing on the case because the FSSA cannot be adapted under Cl 12.

81 RESPONDENT submits that CLAIMANT is not entitled to invoke Cl 12 because it agreed to bear the risk of the retaliatory tariff **(I)**. Even if CLAIMANT can invoke Cl 12, the parties agreed to exclude adaptation as a remedy for hardship **(II)**. Finally, even if adaptation is a remedy under Cl 12, the requirements to invoke Cl 12 have not been met **(III)**.

I. CLAIMANT BORE THE RISK OF ADDITIONAL TARIFFS

82 The parties agreed to DDP delivery terms after protracted negotiations of the FSSA. Under these terms the risk of tariffs was allocated to CLAIMANT. Therefore, CLAIMANT consented to this allocation of risk. CLAIMANT cannot now pass off the cost of the retaliatory tariff to RESPONDENT simply because it became unprofitable to bear the increased costs.

83 A party cannot invoke a hardship clause where it has assumed the risk of changed circumstances [*Brunner, p. 399 & 422; Bischoff, pp. 114-15; Vine Wax Case; Iron Molybdenum Case*]. RESPONDENT submits that CLAIMANT cannot invoke Cl 12 because it impliedly assumed the risk of the retaliatory tariffs.

84 In order to determine a party's sphere of risk, the first point of reference must be the contract [*Schwenzer, p. 715*]. The FSSA contained DDP delivery terms [*Cl Ex C5, p. 14, Cl 9*]. Under DDP Incoterms, the general rule is for the seller to bear all of the costs involved in bringing the goods to the destination, including import duties and taxes [*Cook, p. 50; DDP Incoterms*].

85 The parties agreed to modify the default rule under the DDP Incoterms because CLAIMANT expressed its inability to bear all of the costs associated with DDP [*Cl Ex C4, p. 12*]. CLAIMANT proposed three conditions to mitigate the risk, which were fulfilled by RESPONDENT in the following manner:

a. An increase in the contract price → Additional payment of 500 USD per dose was made

b. The inclusion of a hardship clause → Cl 12 was modified to include hardship

c. The modification of DDP to transfer certain risks to RESPONDENT → Cl 9,10 &13 was inserted into FSSA

86 As stated above, there were certain risks transferred to RESPONDENT. These risks were confined to "*compliance with registry requirements, tank rental and handling fees and insurance for the value of the semen*", without any mention of additional tariffs [*Cl Ex C5, p. 14*]. Therefore, the risk of a tariff was not shifted to RESPONDENT. Given that the risk of tariffs was not transferred to RESPONDENT, there is no modification to the DDP Incoterms with respect to tariffs.

87 The default rule under DDP Incoterms is that the seller bears the cost of any tariff imposed during the transportation of the good [*Cook, p. 50; DDP Incoterms*]. Therefore, CLAIMANT agreed to bear the risk of additional tariffs. RESPONDENT submits that in light of this contractual allocation of risks between the parties, CLAIMANT cannot invoke Cl 12 as it impliedly agreed to bear the cost of the retaliatory tariff.

II. THE PARTIES EXCLUDED ADAPTATION AS A REMEDY

88 The parties agreed to include a hardship clause in the FSSA to mitigate the potential risks that could impact CLAIMANT due to the change in delivery terms to DDP. However, the hardship clause does not expressly provide for a remedy. In the absence of an express remedy under the

hardship clause, CLAIMANT has attempted to argue that the remedy of adaptation was implicitly included.

89 However, RESPONDENT submits that the intention of the parties clearly demonstrates that the remedy of adaption was not included in the FSSA. RESPONDENT submits that the parties' subjective intent was to exclude adaptation as a remedy **(A)**. In the event the Tribunal concludes that the subjective intent of the parties cannot be ascertained, RESPONDENT submits that the objective intent was to exclude adaptation as a remedy **(B)**.

A. Adaptation was excluded by the subjective intent of the parties

90 Under Art. 8(1) of the CISG, the statements and conduct of a party must be construed in terms of their intent where the other party knew or could not have been unaware of such intent [*Art. 8(1), CISG; Huber/Mullis, p. 12*]. RESPONDENT submits that CLAIMANT could not have been unaware of the parties' intent to exclude adaptation as a remedy for hardship.

91 While interpreting a contract under Art. 8, the Tribunal must examine all the relevant circumstances surrounding the formation of the contract [*Art. 8(3), CISG; Schlechtriem/Schwenzer, Art. 8, ¶ 12; Staudinger/Magnus, Art. 8, ¶ 2*]. This includes all the pre-contractual negotiations and communications between the parties [*Schlechtriem/Schwenzer, Art. 8, ¶ 31*].

92 During the pre-contractual negotiations between the parties, CLAIMANT had initially proposed EXW delivery terms [*Cl Ex C2, p. 10*]. RESPONDENT requested a modification from EXW to DDP delivery terms to benefit from CLAIMANT'S experience in the transportation of horse semen [*Cl Ex C3, p. 11*]. CLAIMANT accepted this modification but requested for the insertion of a hardship clause to the FSSA [*Cl Ex C4, p. 12*].

93 RESPONDENT agreed to the proposal of a hardship clause. While discussing the contents of the hardship clause, CLAIMANT suggested reliance on the ICC Hardship Clause [*Resp Ex R4, p. 34*]. Under the ICC Hardship Clause, the only remedy provided is that of termination [*ICC Hardship Clause, ¶ 3*]. It has no provision for adaptation of the contract [*Schwenzer, p. 714; Kessedijian; Brunner, p. 397*].

94 RESPONDENT expressed that the ICC Hardship Clause was "*too broad*" [*PO2, ¶ 12*]. RESPONDENT suggested that the parties "*regulate a number of possible risks directly*" by narrowing the scope of the clause to include a definite set of events, that could constitute hardship [*Ans. to NoA, p. 30, ¶ 4*]. CLAIMANT accepted this proposal and the ICC Hardship Clause was altered accordingly only to

narrow its scope [*PO2, ¶ 12*]. However, RESPONDENT did not object to the remedy offered by the ICC Hardship Clause.

95 Therefore, CLAIMANT itself suggested a clause that did not contain adaptation, but termination as the remedy for hardship. The objective of altering the ICC Hardship Clause was to restrict the scope of the clause. All other aspects of the clause, including the remedy remained the same. As a result, the subjective intent of the parties excluded adaptation because both parties did not find the need to alter the remedy of termination provided by the ICC Hardship Clause.

B. Adaptation was excluded by the objective intent of the parties

96 Where the subjective intention of the parties cannot be ascertained, their objective intention under Art. 8(2) of the CISG can be used in the interpretation of the contract. RESPONDENT submits that the parties objectively intended to exclude adaptation. The standard for interpretation under Art. 8(2) of the CISG is the understanding that a reasonable person of the same kind as the other party would have in the same circumstances [*Huber/Mullis, p. 13; Ferrari/Flechtner/Brand, p. 181*].

97 Once the parties had finalized the wording of the hardship clause, it was added to an existing force majeure clause in Cl 12 of the FSSA [*Resp Ex R3, p. 35; PO2, ¶ 12*]. While Cl 12 itself makes no mention of a remedy, the general remedy for a force majeure clause is termination [*Brunner, p. 387; Fontaine/de Ly, p. 463*].

98 The two main negotiators to the FSSA- Ms. Napravnik and Mr. Antley discontinued their negotiations after an unfortunate accident on 12th April 2017 [*Cl Ex C8, p. 17*]. After the accident, the negotiations between the parties started afresh. The subsequent negotiators of the FSSA finalized the text of the hardship protection and inserted the same within the existing force majeure clause.

99 During the renewed negotiations on the text of the hardship protection, the parties did not alter the remedy available under the existing force majeure clause. Further, both parties did not feel the need to create a distinct remedy for hardship. Most crucially, neither of the parties discussed the possibility of adaptation of the FSSA: either through a process of renegotiation or by an arbitral tribunal.

100 Therefore, a reasonable person in CLAIMANT'S position would believe that the remedy of termination under the force majeure clause would stand extended to the hardship clause. Thus, the parties' objective intention under Art. 8(2) shows that the remedy under Cl 12 of the FSSA is termination.

III. THE REQUIREMENTS FOR INVOKING CL 12 OF THE FSSA HAVE NOT BEEN FULFILLED

101 Cl 12 of the FSSA identifies three requirements to invoke hardship. First, that the event is comparable to additional health and safety requirements. Second, that the event was foreseeable at the time of the conclusion of the contract, and last, that event made the contract more onerous to perform [*Cl Ex C5, p. 14, Cl 12*].

102 CLAIMANT has submitted that the tariff meets the three requirements under Cl 12, and therefore constitutes hardship [*Cl Memo, ¶ 90*]. RESPONDENT submits that these submissions must be dismissed at the threshold because none of the three requirements are met in the present case. The tariff is not comparable to additional health and safety requirements **(A)**. The tariff was foreseeable at the time of completion of the contract **(B)**. The tariff did not make the contract more onerous to perform **(C)**.

A. The tariff is not comparable to additional health and safety requirements

103 CLAIMANT has argued that the retaliatory tariff imposed by Equatoriana is comparable to the additional health and safety requirements it faced previously. CLAIMANT has relied on one similarity between the two impositions: the fact that they are both government regulations [*Cl Memo, ¶ 92*].

104 Going by CLAIMANT'S submissions, even a *reduction* of a tariff would be comparable to the health and safety requirements merely because it constitutes a "*government regulation*". The Tribunal must disregard this submission because it leads to absurd results wherein even favorable measures may be included within the ambit of Cl 12 because they are "*government regulations*".

105 The term "*comparable*" must be interpreted based on the surrounding terms in Cl 12. Since it is used along with the term "*unforeseeable*", a comparable event must be one that is as improbable as the health and safety requirements. Therefore, the Tribunal must base its determination of comparability on the probability of the measure in question.

106 RESPONDENT submits that, on this basis, the retaliatory tariff and the health and safety requirements are not comparable. The health and safety measures adopted by the Danubian government was a response to a rare outbreak of foot-and-mouth disease in Danubia [*PO2, ¶ 21*]. On the other hand, the retaliatory tariff did not arise from such improbable and dire circumstances.

107 RESPONDENT submits that the outbreak of an epidemic such as foot-and-mouth disease is a far more improbable event than the imposition of a custom duty. In fact, custom duties are a routine

occurrence in the course of international trade [*ICAC Case 149/1994*]. Therefore, the retaliatory tariff is not comparable to the previous health and safety requirements imposed on CLAIMANT.

108 CLAIMANT is not entitled to any relief under Cl. 12 of the FSSA because the retaliatory tariff was not comparable to the health and safety requirements.

B. The tariff was foreseeable at the time of completion of the contract

109 RESPONDENT submits that the tariff was foreseeable at the time of the completion of the contract. A foreseeable event is one that is likely to occur at the time of the creation of the contract [*Trimarchi, p. 65; Perillo, p. 122; Brunner, p. 158*]. CLAIMANT has submitted that the retaliatory tariff was unforeseeable because of its breadth: frozen racehorse semen was included within the ambit of animal products [*Cl Memo, ¶ 94*].

110 CLAIMANT has concealed a material fact to make this submission: there was a ban on artificial insemination in Equatoriana [*Cl Ex C1, p. 9*]. Therefore, there is no question of a previous tariff on racehorse semen because the trade of horse semen only began after the ban on artificial insemination was temporarily removed [*Cl Ex C1, p. 9*].

111 RESPONDENT submits that the retaliatory tariff was a foreseeable event. The occurrence of an event even once in the past is enough to hold that the event was foreseeable at the time of contracting [*Sunflower Seeds Case*]. CLAIMANT has once again misrepresented factual information by stating that the Equatorianian government, "*had never relied on retaliations against trade restrictions by other countries*" [*Cl Memo, ¶ 94*].

112 In fact, the Equatorianian government had imposed retaliatory tariffs once in the past, by CLAIMANT'S own admission [*NoA, p. 7, ¶ 19*]. Thus, the tariffs imposed by the Equatorianian government were foreseeable at the time of the formation of the FSSA and had to be taken into account by claimant while entering into the FSSA.

C. The tariff did not make the contract more onerous to perform

113 CLAIMANT has sought to argue that even a 30% rise in the cost of performance would make the performance of the FSSA more onerous. To make this submission, CLAIMANT has argued that the parties have lowered the standard for hardship through Cl 12 of the FSSA [*Cl Memo, ¶ 95*].

114 RESPONDENT submits that the Tribunal must dismiss this submission: the mere inclusion of the term "*more onerous*" does not indicate a lowering of the CISG standard. The parties have not decided

their own threshold for hardship, nor have the defined the term "*onerous*". Therefore, the meaning of the term must be sourced from case law and arbitral practice.

115 In an international sales transaction, even a cost increase of up to 50% has been found to be insufficient to trigger hardship [*Brunner, p. 427; ICC Case No. 6281*; *Nuova Fucinati; Award of 1975, ¶¶ 153, 155; ICC Case No. 2508, ¶¶ 292-94*].

116 Moreover, CLAIMANT had initially suggested that the ICC Hardship Clause should be included in the FSSA [*Resp Ex R2, p. 34*]. The ICC Hardship Clause does not prescribe a standard for hardship [*Brunner, pp. 396-397*]. However, it is based on the UPICC (1994), which prescribes a higher threshold than 30% to constitute hardship [*Comment No. 2 on Art. 6.2.2 UPICC (1994 edition); Brunner, pp. 396-397*].

117 The parties agreed to modify the ICC Hardship Clause only to restrict the scope of the clause, leaving the threshold for hardship unaltered [*Resp Ex R3, p. 35; PO2, ¶ 12*]. Therefore, a 30% rise in the cost of performance does not meet the threshold required under Cl. 12 to constitute hardship.

118 CLAIMANT has further submitted that it faces financial ruin, should it bear the 30% additional cost [*Cl Memo, ¶ 96*]. Based on this, CLAIMANT has argued that performance would become excessively onerous, if it bears the cost of the tariff [*Cl Memo, ¶ 96*]. RESPONDENT submits that first, CLAIMANT must not be allowed to take advantage of its poor financial condition. Second, even if the element of financial ruin is considered, it does not apply in this case.

119 *First*, RESPONDENT submits that CLAIMANT cannot rely on its poor financial condition to trigger hardship. The element of financial ruin must not be used to unduly favour parties with no resources [*Brunner, p. 437*]. In *Alimenta v. Cargill*, it was held that "*the focus of the impracticability analysis is upon the nature of the agreement and the expectations of the parties, not to the size and financial ability of the parties*" [*Alimenta v. Cargill*]. The court held that the party's size and financial condition were irrelevant in deciding the question of hardship, since the obligor guarantees its own financial capacity while entering into a contract [*Alimenta v. Cargill, Brunner, p. 438*]. CLAIMANT entered into the FSSA fully aware of its financial condition, and yet accepted significant contractual responsibilities. Given this, the Tribunal cannot allow CLAIMANT to cite its poor financial condition to obtain adaptation of the FSSA.

120 *Second*, CLAIMANT has submitted that it was facing financial difficulty and that its existence would be endangered should it bear the tariff amount [*Cl Memo, ¶ 96*]. However, RESPONDENT submits

that this is not the case. The loss of one division or business unit is not considered to threaten the existence of an entity [*Brunner, p. 438; BGH NJW (1977)*].

121 CLAIMANT at the most would have to sell one part of its business to procure a new line of credit [*PO2, ¶ 29*]. The company can continue its business with the new line of credit it procures. Therefore, its existence is not under threat. Therefore, CLAIMANT'S situation does not meet the standards of financial ruin required to lower the hardship requirements. Thus, the tariff does not make CLAIMANT'S obligations more onerous.

122 The tariff is thus not comparable to additional health and safety requirements, nor was it unforeseeable at the time of the conclusion of the FSSA. Finally, bearing the cost does not make the contractual obligations of CLAIMANT onerous enough to trigger hardship under Cl 12 of the FSSA. Therefore, CLAIMANT is not entitled to any relief under Cl 12.

CONCLUSION: CLAIMANT is not entitled to any additional payment because it willingly bore the risks of the tariffs. In any case, the parties excluded adaptation as a remedy. Even if adaptation is a remedy, the requirements under Cl 12 have not been met.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO USD 1,250,000 UNDER ARTICLE 79 OF THE CISG

123 CLAIMANT'S reliance on the CISG to derive the remedy of adaptation is misplaced. Art. 79 is based on the principle of *pacta sunt servanda*. Under this principle, CLAIMANT is bound to perform its obligations even if they become unprofitable because of a change in circumstances. Therefore, CLAIMANT cannot avail of any additional payment other than the contractually agreed price for simply performing its obligations under the FSSA.

124 RESPONDENT submits that CLAIMANT is not entitled to the US $1,250,000 as Art. 79(5) is an exemption provision. By its very nature, it does not confer any right on CLAIMANT **(I)**. Even if this is not the case, adaptation is not a remedy available under the CISG **(II)**. Even if adaptation is permissible under the CISG, the Tribunal cannot grant such relief to CLAIMANT, as Art. 79 does not include hardship events but provides relief exclusively for force majeure situations **(III)**. If the Tribunal were to conclude that Art. 79 includes hardship, CLAIMANT is not entitled to any relief as the retaliatory tariff does not fulfil the requirements under Art. 79(1) **(IV)**.

I. CLAIMANT CANNOT RELY ON ART. 79 BECAUSE IT IS AN EXEMPTING PROVISION

125 CLAIMANT has sought to rely on Art. 79(5) to seek an adaptation of the FSSA [*Cl Memo*, ¶¶ *107-111*]. In doing so, CLAIMANT has mischaracterized the purpose of Art. 79; to "*exempt*" a non-

performing party [*Garro, ¶ V.1; Flambouras, ¶ 1*]. In other words, Art. 79 provides a *shield* to parties from damages where they fail to perform their contractual obligations and such failure is attributed to an external impediment outside their control [*Ishida, p. 333*].

126 CLAIMANT has misused Art. 79 by employing it as a *sword*. CLAIMANT is not defending "*non-performance*" but is seeking a positive right of adaptation after performing its contractual obligations [*NoA, Req. for relief, ¶ 1, p. 8*]. Therefore, CLAIMANT'S reliance on Art. 79 must be dismissed by this Tribunal as there is no question of either a "*non-performance*" or "*exemption*".

127 Art. 79 governs the "*extent to which a party is exempted from liability*" for "*non-performance*" [*Tallon, Art. 79, ¶ 1.1*]. This position is strengthened by the text of Art. 79, which opens with the phrase "*a party is not liable for a failure to perform any of his obligations*" [*Art. 79, CISG*]. Therefore, the very first requirement for a claim under Art. 79 is non-performance. The case at hand does not even fulfill this requirement as CLAIMANT has performed its obligations under the FSSA [*NoA, ¶ 13, p. 6*].

128 Most crucially, the objective behind Art. 79 is to make performance as unconditional as possible, by providing a very limited *protection* to the non-performing party in the form of an exemption from a claim for damages [*Magnus/Haberfellner, ¶ 5(b)*]. Therefore, CLAIMANT'S case is based on a complete misreading of Art. 79 and must be dismissed by this Tribunal.

II. THE TRIBUNAL CANNOT ADAPT THE FSSA BECAUSE ADAPTATION IS NOT A RECOGNIZED REMEDY UNDER THE CISG

129 Art. 79(5) allows the parties to the contract to pursue any remedy other than a claim for damages [*Art. 79(5), CISG*]. While it allows a party to pursue "*any*" remedy, it does not make any reference to adaptation. CLAIMANT has exploited this silence as a gap in the CISG, to include the *purely domestic* remedy of adaptation within Art. 79 [*Cl Memo*, ¶¶ *108-111*].

130 If the Tribunal was to accept this submission, it would open the flood gates for claims based on various domestic principles simply because Art. 79 does not mention them. To illustrate,

(a) Art. 79 does not mention the German principle of "*wegfall der geschäftsgrundlage*". Going by CLAIMANT'S position, Art. 79 includes such a principle merely because it is silent on it.

(b) Art. 79 does not mention the Italian principle of "*eccessiva onerosità sopravvenuta*". If the Tribunal were to accept CLAIMANT'S position, Art. 79 would include such a principle merely because it does not mention it.

(c) This would also be the case with other domestic principles such "*impractibility, impossibility and imprévision*". The Tribunal cannot read such principles into Art. 79 simply because it does not mention it.

Therefore, the Tribunal must dismiss CLAIMANT'S case because leads to absurd consequences that undermine the very foundations of the CISG.

131 RESPONDENT submits that the silence in Art. 79 cannot be construed to be a gap. In fact, such silence is deliberate because the issue of adaptation was specifically considered and rejected by the drafters of the CISG **(A)**. Even if there is a gap in the CISG, adaptation is not compatible with the CISG because it is a remedy limited to civil law jurisdictions. Given that adaptation is not a universally accepted remedy, the adaptation of the FSSA under the CISG would undermine the principle of uniformity. **(B)**.

A. Art. 79's silence on adaptation cannot be construed to be a gap

132 RESPONDENT submits that there is no gap in the CISG with respect to the question of adaptation. A gap exists only where a matter is governed but is not settled by the CISG [*Enderlein/Maskow, Art. 7, p. 53*]. A mere silence in the text cannot be construed to be a *gap* in the CISG under Art. 7(2), especially where such silence is deliberate [*Honnold, p. 442; Schlechtriem/Schwenzer, p. 163; Flechtner, p. 92*].

133 RESPONDENT submits that the silence in Art. 79(5) is deliberate, as a provision on adaptation was considered but was expressly excluded by the drafters of the CISG [*Honnold, p. 442; Flechtner, p. 92*]. The proposed article was to provide for an "*adequate amendment of the contract*" on account of "*excessive difficulties*" [*UN Records, p. 350*].

134 The UNCITRAL working group rejected such a proposal, to prevent favoring a purely civil law remedy and to retain the international character of the CISG [*Flechtner, p. 92*]. As the question of adaptation was deliberated upon but rejected, there is no gap in the CISG regarding adaptation. If the Tribunal were to hold otherwise, it would defeat the underlying principle of internationality that the CISG is based on.

B. In any case, adaptation is excluded by the general principles of the CISG

135 Under Art. 7(2) of the CISG, a gap is resolved using the general principles of the CISG. Where such principles cannot be ascertained, the gap must be filled using the applicable domestic law

[*Schlechtriem/Schwenzer, Art. 7,* ¶ *27*]. The FSSA cannot be adapted because adaptation is incompatible with a general principle of the CISG- the principle of uniformity.

136 According to this principle, any court or tribunal applying the CISG must not favor or rely on any national law while interpreting the provisions of the CISG [*Flechtner, p. 36; Nagy, p. 5; Honnold, pp. 207-208*]. Such reliance would give rise to divergent interpretations of the same provisions leading to a *non-uniform* application of the CISG [*Lindström, p. 45; Rimke, p. 242*].

137 RESPONDENT submits that the remedy of adaptation is a "*national*" remedy and is found only in civil law jurisdictions [*Flechtner, p. 84; Schwenzer, pp. 721-725*]. Given that adaptation is "*vehemently rejected in the Common Law*", the same cannot be considered to be a remedy under the CISG because it is not universally accepted [*Flechtner, p. 93*].

138 Enforcement of a domestic remedy such as adaptation, apart from leading to the non-uniform application of the CISG, would also increase its unpredictability [*Nagy, p. 34*]. This would have a perverse effect on the relevance of CISG in international trade [*Nagy, p. 34*]. Therefore, adaptation is not recognized under the CISG.

139 CLAIMANT has also asserted that RESPONDENT had an obligation to renegotiate the FSSA [*Cl Memo,* ¶¶ *110-111*]. Renegotiation, like adaptation, is found only in civil law jurisdictions [*Schwenzer, p. 722; Bridge, pp. 412, 426; Farnsworth, pp. 51-54*]. A remedy which is *national* stands in contrast with the principle of uniformity in Art. 7(1) [*Nagy, p. 34*]. Such a remedy is excluded from the CISG [*Flechtner, p. 93*]. Therefore, RESPONDENT does not have a duty to renegotiate the FSSA under the CISG.

III. ART. 79 EXCLUDES HARDSHIP EVENTS

140 RESPONDENT requests the Tribunal to dismiss CLAIMANT'S case at the threshold, as Art. 79 covers force majeure events but does not provide any relief for situations of hardship [*Honnold, p. 522-524; Slater, p. 253-254; Tomato Concentrate Case*]. Therefore, CLAIMANT cannot rely on Art. 79 even if the performance of the FSSA was made onerous by the retaliatory tariff.

141 RESPONDENT submits that the FSSA cannot be adapted as the legislative history of Art. 79 indicates that hardship is expressly excluded from the ambit of Art. 79. Art. 79 uses a neutral term- "*impediment*" as the basis for exemption from performance [*Baasch, p. 94; Nagy, p. 6*]. The corresponding term in the ULIS was "*circumstances*" [*Art. 74, ULIS*].

142 The shift from "*circumstances*" to "*impediment*" was expressly undertaken to limit the exemptions to the performance of contractual obligations. An "*impediment*" was restricted to events rendering performance impossible such as "*wars, storms, fires, government embargoes and closing of international waterways*" [*Honnold, p. 185; Slater, p. 258; Flambouras, p. 200; Tallon, pg. 59; Nicholas, pp. 231-245; Winship, p. 497*].

143 Hardship situations such as price inflations or any other increase in cost of performance would not provide any relief to the obligors as they were not "*impediments*" [*Honnold, p. 445; UN Records, p. 600*]. The restrictive meaning of "*impediment*" was strengthened by the express rejection of a hardship provision by the UNCITRAL [*UN Records, p. 350*].

144 The proposed hardship provision would grant relief to a party faced with "*excessive difficulties*" [*UN Records, p. 350*]. This proposal was expressly rejected by the UNCITRAL as hardship was recognized only in civil law jurisdictions [*Schwenzer, pp. 721-725*]. Therefore, the UNCITRAL through this measure retained the internationality of the CISG [*UN Records, p. 350*].

145 The Tribunal, like the UNCITRAL must avoid any influence of domestic law while interpreting the CISG [*Flechtner, p. 36; Nagy, p. 5; Honnold, pp. 207-208*]. As stated earlier, any such influence may lead to divergence in interpretation which would be contrary to the principle of uniformity enshrined in Art. 7(1) [*Lindström, p. 45; Rimke, p. 242*].

146 Given that hardship is recognized in select domestic jurisdictions and not universally, and this represents the very reason for its rejection by the UNCITRAL, the Tribunal cannot include hardship within the ambit of Art. 79. Any contrary interpretation would reduce the relevance of the CISG in international trade by making it an unpredictable instrument.

IV. EVEN IF ART. 79 INCLUDES HARDSHIP, THE FSSA CANNOT BE ADAPTED BECAUSE THE TARIFF DOES NOT FULFIL THE REQUIREMENTS UNDER ART. 79(1)

147 CLAIMANT has asserted that the performance of the FSSA became more onerous by virtue of the retaliatory tariff, as it destroyed the profit margin made on the transaction and worsened CLAIMANT'S financial position [*Cl Memo, ¶¶ 96 & 113*]. CLAIMANT was the leading market player in the transportation of horse semen as it operated one of the oldest and most reputed stud farms in Mediterraneo [*RFA, p. 5, ¶ 6*].

148 Given its leading position in the market for horse semen and international repute, CLAIMANT could be considered cognizant of risks that could possibly impact its profit margins. This would be more

so given the unique nature of the transaction, especially the high quantity of semen to be delivered under the FSSA.

149 RESPONDENT submits that even if the Tribunal were to hold that Art. 79 includes hardship events, the retaliatory tariff does not fulfil the requirements under Art. 79(1). First, the retaliatory tariff is not an impediment outside CLAIMANT'S control **(A)**. Second, even if it were an impediment, it could have been taken into account at the time of the conclusion of the FSSA **(B)**. Third, the tariff could be overcome by CLAIMANT **(C)**.

A. The retaliatory tariff is not an impediment beyond the control of CLAIMANT

150 RESPONDENT submits that the retaliatory tariff is not an impediment under Art. 79(1) of the CISG. An impediment includes any objective barrier to performance, which prevents a party from performing its contractual obligations [*Schlechtriem/Schwenzer, Art. 79, ¶ 12; Pirozzi, pp. 207-209; Honnold, pp. 442 & 443*].

151 While the retaliatory tariff increased the cost of performance for CLAIMANT by 30%, it did not actually prevent CLAIMANT from performing its obligations [*NoA, p. 6, ¶ 13*]. CLAIMANT, in fact, was able to perform its obligations on time, despite the imposition of the tariff [*NoA, p. 6, ¶ 13*].

152 Further, a party is not entitled to relief under Art. 79 if its performance is made onerous by a personal circumstance, which is internal to it [*Schlechtriem/Schwenzer, Art. 79, ¶ 12*]. CLAIMANT has submitted that the retaliatory tariff would make the performance of the FSSA more onerous, solely based on its poor financial situation [*Cl. Memo, ¶ 96*].

153 A party's financial situation being a function of its own actions, decisions and strategy is well within its sphere of control [*Schlechtriem/Schwenzer, Art. 79, ¶ 26; Secretariat Commentary, No. 10; Brunner/Brunner/Sgier, Art. 79, ¶.11; Chinese Goods Case*].

154 By claiming an increased price, CLAIMANT is initiating an arbitration simply to improve its own financial situation. Most crucially, RESPONDENT cannot be held liable for the *impact* of the loss on CLAIMANT because such impact was created by CLAIMANT'S own actions in the course of business.

155 Moreover, the retaliatory tariff increased the cost of performance only by 30% [*NOA, p. 7, ¶ 18*]. Such an increase is insignificant during the course of international trade. Even a 100% increase in the cost of performance has been held to be *ordinary* for a company involved in international trade [*Hot-rolled Steel Plates Case; Steel Ropes Case*]. Therefore, CLAIMANT is not entitled to any relief as the increased costs are negligible.

156 Further, CLAIMANT has asserted that the retaliatory tariff would constitute an impediment as it is a "*state intervention*" [*Cl. Memo, ¶ 92*]. The cases cited by CLAIMANT pertain to state interventions that rendered performance impossible, rather than onerous. The Caviar Case involved an "*embargo*" which *prevented* the buyer from making payment [*Caviar Case*].

157 Similarly, in the Sanguinarine Case, the buyer was *prevented* from reselling its goods because of government restrictions [*Sanguinarine Case*]. As stated previously, the tariff did not *prevent* CLAIMANT from delivering the horse semen. In fact, an increase in tariffs in either the buyer's or the seller's country "*have not been recognised*" as impediments under Art. 79(1) [*ICAC Case 149/1994*].

158 In conclusion, the Tribunal cannot adapt the FSSA as the retaliatory tariff is not an impediment under Art. 79(1).

B. The retaliatory tariff could be taken into account at the time of the conclusion of the FSSA

159 Even if the retaliatory tariff constituted an impediment under Art. 79 (1), the FSSA cannot be adapted by the Tribunal, as it could have been taken into account at the time of the conclusion of the FSSA. An impediment is foreseeable where a reasonable person in the shoes of the relevant party, situated in the same circumstances could have foreseen the existence of the impediment [*Zeller, p. 151; Tallon, Art. 79, note 2.6.3; Staudinger/Magnus, Art. 79, ¶ 32; Enderlein/Maskow, Art. 79, note 5.3*].

160 CLAIMANT was a leading market player in the transportation of horse semen as it operated the most reputed stud farm in Mediterraneo [*NOA, p. 4, ¶ 1*]. A party that regularly engages in transborder transactions is considered to be aware of the possibility of "*changing laws and regulations in their partner countries and beyond*" [*Société Romay AG v. SARL Behr France*].

161 At the time of entering the FSSA, CLAIMANT had regularly entered into international transactions for the sale of frozen semen [*PO2, ¶ 15*]. Given its global reputation, CLAIMANT should have considered any possible risk that could possibly impact its profit margins. Therefore, a reasonable person in the shoes of CLAIMANT could have foreseen such a change in the laws and regulations of Mediterraneo.

162 Most crucially, Equatoriana had previously imposed retaliatory measures in response to import restrictions from other countries, rather than invoking the WTO dispute settlement mechanism [*Cl Ex C6, p. 15*]. An event which has occurred previously is foreseeable and must be accounted

for by the parties while concluding the contract [*Sunflower Seeds Case*]. As a similar course of action had been taken by Equatoriana previously, a reasonable person in CLAIMANT'S position would have taken into account a possibility of a retaliatory tariff while entering the FSSA.

163 Therefore, the Tribunal cannot adapt the FSSA as the retaliatory tariff was a reasonably foreseeable event, which should have been taken into account by claimant before taking on its delivery obligations.

C. CLAIMANT could have overcome the retaliatory tariff

164 Even if the impediment was unforeseeable, CLAIMANT is not entitled to any relief under the CISG as the tariff and its consequences could be overcome by CLAIMANT. A party can be expected to overcome an impediment by considering alternative possibilities to perform the contract even if it results in increased costs [*Herber/Czerwenka, Art. 79*, ¶ *13; Schlectriem/Schwenzer, Art. 79,* ¶ *15*].

165 CLAIMANT'S operations were not restricted to the racehorse industry, but included dressage, training in horse care, riding and horse-shoeing [*NoA*, *p. 4,* ¶ *1*]. CLAIMANT could have utilized the revenues from the other sections of its business because only its racehorse section was operating at a loss.

166 Even in the absence of an alternative possibility, a seller is expected to comply with the regulations imposed by the buyer's country even if such performance translates to greater costs [*Brauer & Co Ltd v. James Clark Materials Ltd*]. Therefore, RESPONDENT submits that under the CISG, CLAIMANT was obligated to complete performance. This obligation remains even in the absence of an alternative possibility to overcome the impediment.

CONCLUSION: CLAIMANT is not entitled to any relief under the CISG because Art. 79 is an exempting provision that does not confer any remedy to a *performing* party. Further, adaptation is not a recognized remedy under the CISG. In any case, the retaliatory tariffs did not fulfil the requirements to constitute hardship under Art. 79(1).

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

a. It does not have the jurisdiction and power under the arbitration agreement to adapt the contract;

b. CLAIMANT should not be allowed to submit evidence from the other arbitration proceedings even if such evidence was produced illegally;

c. CLAIMANT is not entitled to the payment of $1,250,000 from an adaptation of the price

   i] Under Cl 12 of the contract and

   ii] Under the CISG

INDEX OF AUTHORITIES

	The Renegotiation of the Investment Contract, Foreign Investment Law Journal, Vol. 13, No. 2, 1998.	
Bischoff	Jacques Bischoff, Vertragsrisiko und clausula rebus sic stantibus: Risikozuordnung in Verträgen bei veränderten Verhältnissen, 1983.	83
Boisson de Chazournes/Baruti	Laurence Boisson de Chazournes, Rukia Baruti, Transparency in Investor-State Arbitration: An Incremental Approach, Bahrain Chamber for Dispute Resolution International Arbitration Review, vol. 2, no. 1, p. 59-76, 2015.	64
Bonnell	Max Bonnell, How elastic is your preposition?, Arbitration International, 34(2), 287–292, 2018.	44
Born	Gary B. Born,	3, 6

	International Commercial Arbitration, Kluwer Law International, 2014.	
Bridge	Michael Bridge, Does Anglo-Canadian Law Need a Doctrine of Good Faith?, 9 Can. Bus. LJ, 1984.	139
Brunner	Christoph Brunner, Julian Lew, Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration, Kluwer Law International, 2009.	83, 93, 97, 109, 115, 116, 119, 120
Brunner/Brunner/Sgier	Christoph Brunner, Angelina Sgier, UN-Kaufrecht - CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980 - Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht, Stämpfli Verlag AG, 2014.	153

Cook	Thomas A. Cook, Mastering the Business of Global Trade: Negotiating Competitive Advantage Contractual Best Practices, Incoterms, and Leveraging Supply Chain Options, CRC Press, 2014.	84, 87
Drličková	Klára Drličková, Arbitrability and Public Interest in International Commercial Arbitration, Int'l and Comparative Law Rev, Vol. 17, No. 2, 2017.	67
Enderlein/Maskow	Fritz Enderlein, Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary, Oceana, 1992.	132, 159
Farnsworth	Allan Farnsworth,	139

	Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws, 3 Tul J Int'l & Comp L 47, 51-54, 1995.	
Ferrari/Flechtner/Brand	Franco Ferrari, Harry Flechtner, Ronald A. Brand, The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, Walter de Gruyter, 2009.	96
Flambouras	Dionysus P. Flambouras, Remarks on the manner in which the PECL may be used to interpret or supplement Article 79 CISG, PACE Database, 2002.	125, 142
Flechtner	Harry Flechtner, Article 79 of the United Nations Convention for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and	132, 133, 134, 136, 137, 139, 145

	Exemption for Delivering Non-Conforming Goods, 19 Pace Int'l Law Rev. pp. 29-51, 2007.	
Fontaine/de Ly	Marcel Fontaine, Filip de Ly, Drafting International Contracts, Brill, 2009.	97
Frick	Joachim G. Frick, Arbitration and Complex International Contracts, Kluwer Law International, 2001.	39
GAR Report	Sebastian Perry, Lawyers charged in Geneva over fake arbitration, GAR, 2018.	53
Garro	Alejandro M. Garro,	125

	Comparison between Provisions of the CISG Regarding Exemption of Liability for Damages and the Counterpart Provisions of the UNIDROIT Principles, Pace Law School Institue of International Commercial Law, 2005.	
Glick/Niranjan	Ian Glick, Niranjan Venkatesan, Choosing the Law Governing the Arbitration Agreement, in: Kaplan/Moser, Jurisdiction, Admissibility and Choice of Law in International Arbitration, Kluwer Law International, 2018.	31, 34
Herber/Czerwenka	Rolf Herber, Beate Czerwenka, Internationales Kaufrecht - Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, C.H. Beck, 2002.	164

Honnold	John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, Kluwer Law International, 1999.	132, 133, 136, 140, 142, 143, 145, 150
Huber/Mullis	Alastair Mullis, Peter Huber, The CISG: A New Textbook for Students and Practitioners, Walter de Gruyter, 2009.	90, 96
Ishida	Yasutoshi Ishida, CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness—Full of Sound And Fury, but Signifying Something, Pace Int'l Law Review, Vol. 30, Issue 2, 2018.	125
Kaufmann-Kohler/Bartsch	Gabrielle Kaufmann-Kohler, Philippe Bartsch, Discovery in international arbitration: how much is too much?, German Arbitration Journal, Vol. 1, p. 13-21,	73

	2004.	
Kessedjian	Catherine Kessedjian, Competing Approaches to Force Majeure and Hardship, 25 Int. Rev. of Law and Economics, 641-670, 2005.	93
Kröll	Stefan Kröll, Ergänzung und Anpassung von Verträgen durch Schiedsgerichte, Carl Heymanns Verlag, 1998.	29
Lew/Mistelis/Kröll	Julian D. M. Lew, L Mistelis, Stefan Michael Kröll, Comparative International Commercial Arbitration, Kluwer Law International, 2003.	38
Lindström	Niklas Lindström, Changed Circumstances and Hardship in the International Sale of Goods,	136, 145

	Nordic Journal of Commercial Law, 2006.	
Magnus/Haberfellner	Ulrich Magnus, Lisa Haberfellner, General Principles of UN-Sales Law, Rabels Zeitschrift, Vol. 59, Issue 3-4, 1995.	128
Nagy	Brandon Nagy, Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?, New York International Law Review, Vol. 26, No. 2, 2013.	136, 138, 139, 141, 145
Nicholas	Barry Nicholas, Force Majeure and Frustration, 7 Am. J. Comp. L., 231, 1979.	142
O'Malley	Nathan D. O'Malley,	55, 67

	Rules of Evidence in International Arbitration: An Annotated Guide (Lloyd's Arbitration Law Library), Informa Law, 2012.	
Perillo	Joseph M. Perillo, Force Majeure and Hardship Under the UNIDROIT Principles, in: Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, pp. 111-132, 1998.	109
Pernt	Victoria Pernt, How Much (More) Transparency Does Commercial Arbitration Really Need?, Kluwer Arbitration Blog, 2017.	
Pirozzi	Roberto Pirozzi, Developments in the Change of Economic Circumstances Debate?, VJ 95-112, 2012.	150

Raeschke-Kessler	Hilmar Raeschke-Kessler, The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence, OUP Oxford, 2014.	73
Rau	Alan Scott Rau, The Agreement to Arbitrate and the "Applicable Law", American Review of Int'l Arbitration, 2017.	5, 35
Redfern/Hunter	Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration, OUP Oxford, 2015.	55
Rimke	Joern Rimke, Force majeure and hardship: Application in international trade practice with specific regard	136, 145

	to the CISG and the UNIDROIT Principles of International Commercial Contracts, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer, 197-243, 1999-2000.	
Samuel	Adam Samuel, Separability of Arbitration Clauses - Some Awkward Questions About the Law on Contracts, Conflict of Laws and the Administration of Justice, 9ADRLJ 36 2000.	35
Schlechtriem/Schwenzer	Peter Schlechtriem, ed. Ingeborg Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), OUP Oxford, 2016.	91, 132, 135, 150, 152, 153
Schwenzer	Ingeborg Schwenzer, Force Majeure and Hardship in International Sales Contracts, 39 VUWLR,	84, 93, 137, 139, 144

	2008.	
Secretariat Commentary	Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, UN DOC. A/CONF. 97/5, Draft Art. 65.	153
Slater	Scott D. Slater, Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG, 12 Florida Journal of International Law 231-262, 1998.	140, 142
Staudinger/Magnus	J. von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, De Gruyter, 2012.	91, 159
Steingruber	Andrea M. Steingruber, Consent in International Arbitration, OUP Oxford,	29, 39

	2012.	
Tallon	Dennis Tallon, Article 79, In: Bianca/Bonell, Commentary on the International Sales Law, 1987.	127, 142, 159
Trimarchi	Pietro Trimarchi, Commercial Impracticability in Contract Law: An Economic Analysis, 11 Int'l Rev. of L. & Ec., 1991.	109
UN Records	Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, U.N. A/Conf. 97/18.	133, 143, 144
Waincymer	Jeffrey Waincymer, Procedure and Evidence in International Arbitration, Kluwer Law International, 2012.	55, 73

Winship	Peter Winship, Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners, 29 Int'l Law 525, 1995.	142
Zeller	Bruno Zeller, Article 79 Revisited, 14 VJ 151-164, 2010.	159

INDEX OF ARBITRAL AWARDS

ARBITRATION COURT OF THE CHAMBER OF COMMERCE AND INDUSTRY OF BUDAPEST

ARBITRATION COURT OF THE JAPAN SHIPPING EXCHANGE

BULGARIAN CHAMBER OF COMMERCE

CIETAC

CITED AS	CITATION	PARAGRAPHS
Hot-rolled Steel Plates Case	CIETAC, 10 May 1996, CISG/1996/22.	155
Sanguinarine Case	CIETAC, 7 May 1997, CISG/1997/11.	157

GERMAN CHAMBER OF COMMERCE

CITED AS	CITATION	PARAGRAPHS
Chinese Goods Case	Schiedsgericht der Handelskammer Hamburg, 21 June 1996, CLOUT case No. 166.	153

ICC

CITED AS	CITATION	PARAGRAPHS
ICC Case No. 2508	ICC Case No. 2508, 1976, in: Collection of ICC Awards I, 292-94.	115
ICC Case No. 5505	ICC Case No. 5505, 1987, in: Yearbook XIII (1988) p. 110.	38
ICC Case No. 6162	ICC Case No. 6162, 1990, in: Yearbook XVII (1992) p. 153.	38
ICC Case No. 6281	ICC Case No. 6281, 1989, in: Yearbook XV (1990) p. 96.	115

ICSID

CITED AS	CITATION	PARAGRAPHS
EDF v. Romania	EDF (Services) Ltd. v. Romania, 8 October 2009, No. ARB/05/13.	55
Tidewater v. Venezuela	Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, 13 March 2015, No. ARB/10/5.	72

UNCITRAL

CITED AS	CITATION	PARAGRAPHS
Methanex Corporation v. United States of America	Methanex Corporation v. United States of America, 3 August 2005.	58

INDEX OF CASES

AUSTRALIA

FRANCE

1 A 199800359.

GERMANY

CITED AS	CITATION	PARAGRAPHS
BGH NJW (1977)	BGH NJW (1977): 2262, 2263, Bundesgerichtshof, 1977 As cited in: Brunner & Lew, Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration.	120
Iron Molybdenum Case	OLG Hamburg, 28 February 1997, CLOUT case No. 277.	83
Tomato Concentrate Case	OLG Hamburg, 4 July 1997, 1 U 143/95 and 410 O 21/95.	140

Vine Wax Case	BGH, 24 March 1999, CLOUT case No. 271.	83

ITALY

CITED AS	CITATION	PARAGRAPHS
Nuova Fucinati	Nuova Fucinati S.p.A. v. Fondmetall International A.B., Tribunale Civile di Monza, 14 January 1993, R.G. 4267/88.	115

SINGAPORE

CITED AS	CITATION	PARAGRAPHS
BCY v. BCZ	BCY v. BCZ, High Court of Singapore, 9 November 2016, [2016] SGHC 249.	3, 37
FirstLink	FirstLink Investment Corp Ltd v. GT Payment Pte Ltd and Ors., High Court of Singapore,	37

	19 June 2014, [2014] SGHCR 12.	

SWITZERLAND

CITED AS	CITATION	PARAGRAPHS
Swiss Federal Court	Bundesgericht, 2001, 4P.114/2001.	39

UNITED KINGDOM

CITED AS	CITATION	PARAGRAPHS
Ali Shipping	Ali Shipping Corporation v. Shipyard Trogir, Court of Appeal, 19 December 1997, [1998] 2 All ER 136 (CA).	76
Arsanovia	Arsanovia Ltd and others v. Cruz City, Queen's Bench Division, 20 December 2012, [2012] EWHC 3702 (Comm).	5, 37

Black Clawson v. Papierwerke	Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., House of Lords, 1982, [1982] 2 Lloyd's Rep. 446.	32
Brauer & Co Ltd v. James Clark Brush Materials Ltd	Brauer & Co., Ltd. v. James Clark (Brush Materials), Ltd., Queen's Bench Division, 1952, [1952] 1 Lloyd's Rep. 385.	166
C v. D	C v. D, Queen's Bench Division, June 2007, [2007] EWHC 1541 (Comm).	31, 37
Compagnie d'Armament v. Compagnie Tunisienne	Compagnie d'Armament v. Compagnie Tunisienne, House of Lords, 1970, [1970] 3 All ER 71.	31

Fiona Trust v. Privalov	Fiona Trust & Holding Corporation & Ors v. Yuri Privalov & Ors, House of Lords, 17 October 2007, [2007] APP.L.R. 01/24.	47
Hamlyn v. Talisker	Hamlyn & Co. v. Talisker Distillery, House of Lords, 30 November 1893, [1894] A.C. 202.	13
Hassneh v. Mew	Hassneh Insurance Co of Israel v. Stuart J Mew, Queen's Bench Division, 22 December 1992, [1993] 2 Lloyd's Rep 243.	63
Sulamerica	Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A., Court of Appeal (Civil Division), 20 March 2012,	3, 5, 6, 13, 32, 34, 37

	[2012] EWCA Civ 638.	
XL Insurance v. Owens Corning	XL Insurance v. Owens Corning, Queen's Bench Division, 28 July 2000, [2000] 2 Lloyd's Rep. 500.	13

UNITED STATES OF AMERICA

CITED AS	CITATION	PARAGRAPHS
Alimenta v. Cargill	Alimenta, Inc. v. Cargill, Inc., Court of Appeals for the Eleventh Circuit, 8 December 1988, 861 F.2d 650 (11th Cir. 1988).	119
Suad Niazi v. St. Paul Mercury	Suad A. Niazi & Anr v. St. Paul Mercury Insurance Co., Supreme Court of Minnesota, 11 April 1963, 265 Minn. 222 (1963).	56

INDEX OF ABBREVIATIONS

¶	Paragraph
¶¶	Paragraphs
Ans. to NoA	Answer to Notice of Arbitration
Art.	Article
BG	Bundesgericht
CISG	United Nations Convention on the International Sale of Goods
Cl Ex	Claimant's Exhibit
CLOUT	Case Law on UNCITRAL Texts
Co.	Corporation
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
etc.	Et cetera
FSSA	Frozen Semen Sales Agreement
ICC	International Chamber of Commerce Court of Arbitration Paris
ICSID	International Centre for Settlement of Investment Disputes
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration
no.	Number
NoA	Notice of Arbitration
NYC	New York Convention
p.	Page

PECL	Principles of European Contract Law
PO	Procedural Order
pp.	Pages
Resp. Ex.	Respondent's Exhibit
S.	Section
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UPICC	UNIDROIT Principles on the Interpretation of Commercial Contracts
v.	Versus

INDEX OF LEGAL SOURCES

S. no.	Rule	Cited as
1.	Convention relating to a Uniform Law on the International Sale of Goods	*ULIS*
2.	Hong Kong International Arbitration Centre Rules 2013	*2013 HKIAC Rules*
3.	Hong Kong International Arbitration Centre Rules 2018	*2018 HKIAC Rules*
4.	Incoterms 2010	*Incoterms*
5.	New York Convention	*NYC*
6.	Principles of European Contract Law	*PECL*
7.	UNCITRAL Model Law	*Model Law*
8.	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration	*UNRT*
9.	UNIDROIT Principles	*UPICC*
10.	United Nations Convention on Contracts for the International Sale of Goods	*CISG*