26th Annual Willem C. Vis

International Commercial Arbitration Moot

2018 – 2019

Memorandum for Claimant

— PHAR LAP ALLEVAMENTO —

Against

— BLACK BEAUTY EQUESTRIAN —

MONASH UNIVERSITY

Melbourne • Australia

Harrison Frith • Ariella Gordon • Cameron Inglis

Sarala Baskaran • Lachlan Cameron • Genevieve Trinh

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INDEX OF ABBREVIATIONS

%	per cent
Answer	Answer to the Notice of Arbitration
Arbitration Agreement	Clause 15 in the FSSA
Art.	Article
Arts.	Articles
c.f.	*contra* (against)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Cl. Ex.	CLAIMANT'S Exhibit
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ed.	Edition
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Ltd.	Limited
No.	Number
Notice	Notice of Arbitration
NYC	New York Convention 1959
Other Arbitration	Previous Arbitration Proceeding involving RESPONDENT and the Mediterranean buyer
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
P.O.	Procedural Order
Resp. Ex.	RESPONDENT'S Exhibit
ML ICA	UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments adopted in 2006

UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, Rome, 2016
US$	US-Dollar
v.	*versus* (against)

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Rules and Laws

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.
Hague Principles	Principles on Choice of Law in International Commercial Contracts 2015.
HKIAC Rules 2013	Hong Kong International Arbitration Centre Administered Arbitration Rules 2013.
HKIAC Rules 2018	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018.
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010.
NYC	New York Convention 1959.
PICC	UNIDROIT Principles of International Commercial Contracts, Rome, 2016.
Transparency Rules	UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration, New York, 2014.
ML ICA	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 21 June 1985.
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, Rome, 2016.

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STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento (**'CLAIMANT'**) and Black Beauty Equestrian (**'RESPONDENT'**). CLAIMANT is a company based in Mediterraneo who offers frozen semen of its stallions for artificial insemination. RESPONDENT operates a racehorse stable located in Equatoriana and has recently started a breeding programme.

21 March 2017	CLAIMANT and RESPONDENT (**'Parties'**) enter discussions concerning the purchase of Nijinsky III's frozen semen.
24 March 2017	CLAIMANT offers RESPONDENT 100 doses of frozen semen.
28 March 2017	RESPONDENT accepts the law of Mediterraneo if the courts of Equatoriana have jurisdiction.
31 March 2017	CLAIMANT rejects that Equatorianian courts can have jurisdiction and suggests the Parties opt for arbitration in Mediterraneo.
10 April 2017	RESPONDENT suggests the seat and law of the arbitration should expressly be in Equatoriana.
11 April 2017	CLAIMANT refuses arbitration in Equatoriana and suggests Danubia as the seat of arbitration.
12 April 2017	The lawyers for the Parties are severely injured in an accident.
6 May 2017	The Parties conclude the contract (**'FSSA'**) providing for the purchase of 100 doses of frozen semen for US$ 10 million in three instalments.
20 May 2017	The first shipment of 25 doses is complete.
3 October 2017	The second shipment of 25 doses is complete.
23 November 2017	The Mediterranean government imposes a 25% tariff.
19 December 2017	The Equatorianian government imposes a 30% tariff.
20 January 2018	Ms Napravnik (CLAIMANT) alerts Mr Shoemaker (RESPONDENT) to the effect of the tariff.
21 January 2018	Mr Shoemaker gives CLAIMANT the impression a solution would be found regarding the 30% tariff.
23 January 2018	The third and final shipment of 50 doses is complete.
31 July 2018	CLAIMANT initiates proceedings and submits Notice of Arbitration.
24 August 2018	RESPONDENT submits Answer to the Notice of Arbitration.
2 October 2018	Mr Langweiler requests evidence of RESPONDENT'S other arbitration to be admitted to the Tribunal.

INTRODUCTION

1 Whilst CLAIMANT fulfilled their part of the bargain, RESPONDENT'S capricious conduct has forced CLAIMANT to bear substantial expenses. The decision by the Equatorianian government to impose a 30% tariff directly affected the cost of exporting the frozen semen to RESPONDENT. As a measure beyond CLAIMANT'S control, RESPONDENT should bear the increased shipping cost.

2 RESPONDENT sought out CLAIMANT because of their reputation as a reliable commercial party that is able to perform efficiently. CLAIMANT has met this standard by fulfilling their contractual obligations. Despite CLAIMANT'S efforts, RESPONDENT has acted in bad faith. As a result of their inconsistent behaviour, three key issues have arisen.

3 *Firstly*, the Tribunal has jurisdiction and power to adapt the contract under Clause 15 (**'Arbitration Agreement'**). This is on the basis that the law of Mediterraneo governs the Arbitration Agreement and its interpretation. Application of this law allows for the Arbitration Agreement to be interpreted broadly, which, in turn, gives the Tribunal scope to adapt the contract (**Issue 1**).

4 *Secondly*, the Tribunal should accept CLAIMANT'S evidence from the prior arbitral proceeding, including a copy of the '**Partial Interim Award'** and the relevant submissions. Despite the fact the evidence may have been obtained through a breach of confidentiality or through an illegal hack of RESPONDENT'S computer system, there are sufficient justifications outweighing any argument that the evidence is inadmissible. The Tribunal should apply its broad discretion to admit CLAIMANT'S evidence (**Issue 2**).

5 *Thirdly,* the Tribunal should find that CLAIMANT is entitled to the payment of US$ 1,250,000 as a consequence of an adaption of the price. On a proper construction of the contract, the tariff event falls under the scope of Clause 12. Additionally, CLAIMANT relied on RESPONDENT'S representation that RESPONDENT agreed to pay an increased contract price. Even if the Tribunal rejects CLAIMANT'S entitlement under the contract, CLAIMANT is entitled to payment under the CISG or the hardship provisions of the UNIDROIT Principles (**Issue 3**).

6 CLAIMANT therefore respectfully requests the Tribunal to award compensatory relief amounting to US$ 1,250,000, plus costs, based on an adaptation of the contract price ('**Adaptation Price**').

ARGUMENT

ISSUE 1: THE TRIBUNAL HAS JURISDICTION AND POWER TO ADAPT THE CONTRACT

7 CLAIMANT respectfully requests the Tribunal to find that it has jurisdiction to adapt the contract between the Parties pursuant to the Arbitration Agreement contained in Clause 15 of the FSSA. Clause 15 expressly specifies Danubia as the seat of arbitration, and the Parties have agreed that arbitration is to be administered by the HKIAC Rules 2018 [*P.O. No. 1, para. II*]. However, there is no express choice of law applicable to the Arbitration Agreement. Additionally, by virtue of Clause 14, the Parties have expressly selected the law of Mediterraneo as the law governing the FSSA.

8 As it is not in contention that Clause 15 is valid [*Art. II NYC*], this dispute concerns a partial challenge of the Tribunal's jurisdiction as to whether it has the power to adapt the contract price [*Redfern 2015, pp. 335–6*]. Whether the Tribunal has such power depends on the interpretation of the scope of the Arbitration Agreement. Interpretation of the Arbitration Agreement hinges on the law governing the Arbitration Agreement [*Born 2014, pp. 635, 1397–8; Fouchard 1999, p. 475*]. There is 'consistent jurisprudence' in Mediterraneo and Danubia that the ML ICA (as adopted in both jurisdictions) applies to the interpretation of arbitration clauses, rather than the CISG [*P.O. No. 1, para. 4; P.O. No. 2, para. 36*]. The law which rightly governs the Arbitration Agreement is the law of Mediterraneo, as opposed to the law of Danubia.

I. <u>The Legal Framework for International Arbitration Allows the Tribunal to Decide Upon its Own Jurisdiction.</u>

9 The doctrine of competence-competence enshrined in Art. 16(1) ML ICA and Art. 19.1 HKIAC Rules 2018 permits the Tribunal to decide upon its own jurisdiction, including RESPONDENT'S objections regarding the scope of Clause 15 [*Redfern 2015, pp. 339–40*]. To determine jurisdiction, Clause 15 is treated as a separate and independent agreement from the FSSA [*Redfern 2015, p. 341*], so as to ensure any invalidity of the FSSA does not affect the validity of the Arbitration Agreement [*Art. 16(1) ML ICA; Art. 19.2 HKIAC Rules 2018*].

10 Art. V(1)(a) NYC recognises that the Parties have the ability to expressly or impliedly select the law governing the Arbitration Agreement [*Born 2014, p. 495*]. However, as the parties have failed to expressly choose which law governs Clause 15, a conflict of laws

issue arises. The NYC and ML ICA provide no specific guidance on which choice-of-laws rules should be applied by the Tribunal [*Choi 2015, p. 105; Born 2014, p. 479*]. Hence at the outset, the Tribunal must select the conflict of laws method it considers most appropriate to determine the law of the Arbitration Agreement [*Lew 2003, p. 425; Waincymer 2012, p. 982*], so as to ascertain the basis of its own jurisdiction [*Born Cases and Materials 2015, pp. 92–3; Berger 2007, pp. 305–6*].

11 Thus, by **(II-A)** utilising suitable conflict of laws rules, namely the Hague Principles, **(II-B)** the law that the Parties intended to govern the Arbitration Agreement can be ascertained. Alternatively, **(II-C)** this can be shown by utilising a denationalised approach.

II. <u>The Law of Mediterraneo Governs the Arbitration Agreement and its Interpretation.</u>

A. The Hague Principles are the most suitable conflict of laws rules for the Tribunal to apply.

12 The legal systems of Mediterraneo, Equatoriana and Danubia all have conflict of laws rules that are a verbatim adoption of the Hague Principles [*P.O. No. 2, para. 43*]. Consequently, there is no real conflict. In any event, the rules provide a fair and consistent method for resolving the conflict of laws issue, and produce a result which will be recognised in any of the three forums [*Lew 2003, pp. 432–3*]. Moreover, Art. 2 Hague Principles upholds party autonomy in line with the ML ICA and NYC, in allowing different parts of the FSSA to be governed by the law chosen by the Parties. Therefore, it is appropriate for the Tribunal to apply these Principles to determine which law applies.

B. Applying the Hague Principles shows that the Parties impliedly selected Mediterranean law as the law governing the Arbitration Agreement.

13 According to Art. 4 Hague Principles, a choice of law can appear clearly from either the provisions of the FSSA or from the circumstances, where the real intention of the Parties is present [*Comment 4.6 Hague Principles*]. Consequently, the Tribunal should consider both the terms of the FSSA and evidence of the surrounding circumstances, to conclude that a tacit choice of law was based either individually or cumulatively on these factors [*Comment 4.7 Hague Principles*].

14 Whilst no express choice of law was made within Clause 15, the other terms of the FSSA (**'Main Contract'**) indicate the Parties **(1)** tacitly selected the law of Mediterraneo as the law governing the Arbitration Agreement. Alternatively, **(2)** the choice of Mediterranean

law is clearly implied from the circumstances. In any event, the Tribunal can consider both factors cumulatively to find a conclusive indication that the Parties tacitly selected Mediterranean law [*Comment 4.7 Hague Principles*].

(1) The terms of the FSSA indicate a tacit choice that the law of Mediterraneo was intended to govern the Arbitration Agreement.

(a) The law of the FSSA was tacitly chosen as the law of the Arbitration Agreement.

15 In general, parties rarely specify the law that expressly applies to their arbitration agreement [*Born 2014, p. 491*]. Nevertheless, the fact the substantive contract has been expressly subjected to the law of Mediterraneo under Clause 14 leads to the conclusion that both Parties intended this law would also govern the Arbitration Agreement [*Comment 4.6 Hague Principles*]. Where an express choice of law governs a substantive contract, it is a strong indicator that the same law governs the Arbitration Agreement [*Redfern 2015, p. 99; Lew 1999, p. 143; Thermal Power, para. 7*]. Hence, whilst Clause 15 is treated as a separate agreement, it does not necessarily follow that the law applicable to it differs from that of the underlying contract [*Born 2014, p. 476*].

16 RESPONDENT'S claim that the separability doctrine prevents the law of the Main Contract from being an implicit choice of law for the Arbitration Agreement is therefore misguided [*Answer, para. 14*]. The autonomy of the Arbitration Agreement and the Main Contract does not necessarily mean the two are mutually exclusive [*Derains 1995, pp. 16–7*]. The concept of separability simply reflects the Parties' presumed intention that the Arbitration Agreement would remain effective even if the Main Contract were rendered invalid. Its purpose is to give effect to that intention, rather than to insulate the Arbitration Agreement from the Main Contract for any purpose [*Sulamerica, para. 26*].

17 The foundation of the contract was based upon CLAIMANT'S standard form Semen Sales Agreement [*Cl. Ex. C2*], which always contained an arbitration clause [*P.O. No. 2, para. 4*] and was to be generally used in the context of Mediterraneo's particular system of law [*Comment 4.9 Hague Principles*]. Even though this standard form had not previously been used for a racehorse breeding contract [*P.O. No. 2, para. 15*], this does not mean it had not been used in the past for other related purposes. Moreover, given the Parties' mutual desire to develop a long-term relationship [*Cl. Ex. C2, C3*], it is clear the standard form was intended to be used on an ongoing basis. Hence, the use of this standard form with its connection to Mediterranean law is another factor indicating the Parties tacitly chose this law to govern the Arbitration Agreement.

18 It therefore follows that a tacit choice of Mediterranean law appears clearly from the provisions of the FSSA [*Comment 4.7 Hague Principles*]. Where only the law governing the Main Contract is specified, the same law can be found to govern the Arbitration Agreement on the basis this was the real intention of the Parties [*ICC Case No 6850, para. 3; Born 2014, p. 476*]. It is unlikely the Parties intended their tacit choice of law would be overruled by the doctrine of separability, when the rationale for this doctrine is merely to preserve the Arbitration Agreement where validity of the Main Contract is in issue, and not to completely shield the Arbitration Agreement from the law of the Main Contract [*Sulamerica, para. 26*]. Hence, the Tribunal should find that the provisions of the FSSA indicate the Parties' tacit choice of Mediterranean law for the Arbitration Agreement.

(b) *The seat of arbitration does not indicate a tacit choice of Danubian law.*

19 The Tribunal should find that the Parties' decision to specify the seat of arbitration in Danubia does not automatically deem Danubian law to govern the Arbitration Agreement. The Hague Principles establish that an expressly specified seat is merely one factor in deciding whether a tacit choice of law has been made and is not determinative [*Comment 4.12 Hague Principles*].

20 In general, the international nature of arbitration enables tribunals to conduct proceedings in different locations for convenience [*Art. 20(2) ML ICA; Art. 14.2 HKIAC Rules 2018*]. As such, the seat does not prima facie assist the Tribunal to ascertain the real intention of the Parties and is not indicative of a tacit choice of Danubian law. Initially, each Party demonstrated a strong preference for their own country to be the seat of arbitration, and Danubia was not contemplated [*Cl. Ex. C4; Resp. Ex. R1*]. CLAIMANT only suggested making Danubia the seat as a compromise during negotiations because of its neutrality [*Resp. Ex. R2*]. Evidently, there is a disconnect between the venue of arbitration and the applicable law, whereby the latter was not contingent on the former. The argument that the law of the seat has a close connection to the Arbitration Agreement to ensure the arbitral procedure is effective [*Sulamerica, para. 32*] should be outweighed by the real intention of the Parties. Hence, the Tribunal should find that the seat was merely fortuitous and has no real connection to the Parties, the arbitrators, or the facts in dispute [*Lew 1999, p. 138*].

21 Furthermore, the selection of Danubia as the seat should not determine the applicable law because the Parties did not consider the finer details of the separability presumption when drafting their choice of law clause [*Born 2014, p. 592*]. Therefore, the express choice of

law for the underlying contract is the strongest indication of the Parties' tacit choice of law, rather than the seat of arbitration [*Redfern 2015, p. 99*].

(c) The application of Danubian law would undermine the validation principle.

22 If Danubian law applies to the Arbitration Agreement, it is highly likely the Tribunal will not have jurisdiction to decide this dispute pursuant to a narrow interpretation under the 'four-corners rule' *[P.O. No. 1, para. II*]. Hence, applying Danubian law here would undermine the Parties' intention to arbitrate.

23 During negotiations, both Parties deliberately agreed not to have disputes resolved by courts [*Cl. Ex. C3, C4*], evidencing their intention to resolve disputes only via arbitration. Thus, to apply Danubian law would likely prevent arbitration from proceeding, contrary to the real intention of both Parties. As such, there is 'every reason to apply the law governing the [P]arties' underlying contract' to the Arbitration Agreement to give effect to the Parties' desire for arbitration [*Born 2014, p. 592*].

24 Doing so would align with the validation principle, which holds that when confronted with multiple laws that produce different results about the validity of an arbitration clause, a tribunal should choose to apply the law that upholds its validity [*Born 2014, p. 546*]. Whilst Danubian law may not invalidate the Arbitration Agreement per se, the consequence of applying it would nonetheless inhibit arbitration by severely restricting the jurisdiction of the Tribunal and the scope of its mandate. This would contravene what the Parties clearly intended to accomplish in entering the Arbitration Agreement, in good faith, as commercially sound parties [*Born 2014, p. 593*].

25 The Parties' choice of arbitration reflects their desire for a single and efficient mechanism for dispute resolution to avoid disputes in multiple fora [*Born 2014, pp. 1343–4*]. Therefore, applying Mediterranean law to give effect to the Arbitration Agreement would truly reflect the Parties' intentions in line with Arts. II and V(1)(a) NYC [*Born 2014, p. 594*]. To do otherwise would plainly undermine the Parties' autonomy to utilise arbitration for dispute resolution [*Born 2014, p. 594*].

(2) Alternatively, the choice of Mediterraneo law is implied from the circumstances.

26 The Tribunal should find that, in addition to the terms of the Main Contract, a tacit choice of law appears clearly from the circumstances [*Art. 4 Hague Principles*]. CLAIMANT argues the Parties' pre-contractual negotiations demonstrate it was their intention for the law of Mediterraneo to apply to the Arbitration Agreement.

27 On considering the circumstances, communications between the Parties reveal that each issue relating to Clause 15 was negotiated individually. After RESPONDENT stated it could not allow the courts of Mediterraneo to have jurisdiction over disputes [*Cl. Ex. C3*], CLAIMANT suggested arbitration in Mediterraneo, thereby setting Mediterraneo as the original seat of arbitration [*Cl. Ex. C4*]. In its reply on 10 April 2017, RESPONDENT'S draft arbitration clause only asked for Equatorianian law to apply, and never explicitly contemplated the application of Danubian law [*Resp. Ex. R1*]. Thus, RESPONDENT never expressed that arbitration should always be governed by the law of the seat [*c.f. Answer, paras. 5–6*]. Nor did RESPONDENT express any intention that shifting the seat of arbitration to a location other than Equatoriana would make the law of that new location automatically applicable. Hence CLAIMANT'S proposal to move the seat to Danubia as a neutral venue on 11 April 2017, without any suggestion that Danubian law should apply [*Resp. Ex. R2*], demonstrates CLAIMANT did not consent to having the law of the new seat apply to the arbitration. Therefore, it is spurious to conclude that the Parties intended any change of the seat would automatically equate to a change in the law governing the arbitration [*c.f. Answer, para. 6*]. This conclusion is strengthened for two reasons.

28 *Firstly*, RESPONDENT noted that further drafting was required to address the choice of law [*Answer, para. 7; Resp. Ex. R3*]. Thus, RESPONDENT could not have been convinced that CLAIMANT'S silence amounted to consent to the application of Danubian law.

29 *Secondly*, CLAIMANT'S response on 11 April 2017 evidenced its intention for Mediterranean law to apply [*Resp. Ex. R2*]. CLAIMANT flagged two internal policies. Namely, that CLAIMANT cannot submit the contract to a foreign law, and special approval would be required for dispute resolution to be held in the counterparty's country. The latter policy justified the shift in location of arbitration to Danubia as a neutral venue. However, the former policy justified both the Main Contract and Arbitration Agreement being subject to Mediterranean law. This is because a 'contract' under CLAIMANT'S policy does not differentiate between the Arbitration Agreement and the Main Contract [*Resp. Ex. R2*]. In effect, CLAIMANT expressed an intention not to submit the Arbitration Agreement to a foreign law and for the law governing the agreement to follow the Main Contract.

30 Consideration of these circumstances reinforces that it makes commercial sense for the law of Mediterraneo to apply to the Arbitration Agreement. In any event, the circumstances and terms of the contract can be viewed cumulatively [*Comment 4.7 Hague Principles*]. In doing so, CLAIMANT respectfully requests that the Tribunal find the real intention of the Parties was for Mediterranean law to govern the Arbitration Agreement.

C. Alternatively, applying a denationalised approach shows that the law of Mediterraneo governs the Arbitration Agreement.

(1) It is appropriate for the law of the Arbitration Agreement to be resolved using a denationalised approach.

31 Alternatively, the Tribunal can apply a denationalised approach to determine the law applicable to the Arbitration Agreement according to the Parties' intentions. This approach, derived from general principles of international law, holds that the 'validity of an arbitration agreement depends only on the common intention of the [P]arties' [*Dalico, p. 117; Born 2014, p. 481; Lew 2003, pp. 126–7*]. This approach should be adopted as there is no institutional reason for the Tribunal to apply the conflict of laws rules or substantive rules of a given country [*Lew 2003, p. 127; Fouchard 1999, p. 234*]. Indeed, there is a need to shift away from applying purely academic solutions, and place importance on the Parties' behaviour in all the circumstances [*Blessing 1999, p. 168*]. This would avoid the adverse effects of idiosyncratic rules of domestic law, such as the four corners rule [*Born 2014, p. 506*]. In doing so, the Tribunal can give effect to party autonomy by deciding on its own jurisdiction without being bound to apply a specific law [*ICC Case No. 4131, p. 137*].

(2) The paramount intention of the parties was for the law of Mediterraneo to apply to the Arbitration Agreement.

32 As outlined above, both the terms of the FSSA (see *supra* **Issue 1, II-B(1)**) and the surrounding circumstances (see *supra* **Issue 1, II-B(2)**) show the Parties' intention was for the law of the underlying contract to govern the Arbitration Agreement, notwithstanding the effect of the separability principle. Ultimately, the weight of evidence shows the Parties' had a mutual desire to develop a long-term relationship in which all disputes would be resolved by arbitration. The Tribunal should therefore find that the cumulative weight of this evidence demonstrates it was the true intention of the Parties that the law of Mediterraneo applies to the Arbitration Agreement.

III. The scope of the Arbitration Agreement permits adaptation of the contract price by the Tribunal.

33 Assuming the interpretation of the Arbitration Agreement is governed by the law of Mediterraneo [*Born 2014, pp. 635, 1397–8; Fouchard 1999, p. 475; Thermal Power, para. 8*], Clause 15 must be interpreted broadly to enable the Tribunal to adapt the contract price.

A. Extrinsic evidence shows the Parties intended the Tribunal would have jurisdiction to adapt the contract price in the event of a dispute.

34 The law of Mediterraneo permits the consideration of extrinsic evidence to determine the scope of the Tribunal's powers beyond the four corners of the agreement [*Notice, para. 15–6; c.f. Answer, para. 16*]. Therefore, the Tribunal is not confined to the terms of the contract and can refer to extrinsic evidence to ascertain the intention of the Parties.

35 In the meeting between Ms Napravnik and Mr Antley on 12 April 2017, it was agreed and clarified that it should be 'the task of the arbitrators to adapt the contract if the Parties could not agree' on an amendment in the event of hardship [*Cl. Ex. C8*]. Although an adaptation clause was not expressly included in the final contract, it was a mutual understanding between the two Parties that the Tribunal would have such power [*Cl. Ex. C8*].

36 RESPONDENT may argue that if Mr Krone knew Mr Antley had referred in his note to the law applicable to the Arbitration Agreement, rather than to the Main Contract, he would have 'objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion' [*Resp. Ex. R3*]. However, the Tribunal should give very little weight to Mr Krone's testimony given it is clouded by hindsight. Mr Krone's statement contradicts what was commonly understood between Ms Napravnik and Mr Antley. This inconsistency should not be relied upon by the Tribunal to interpret the scope of Clause 15.

37 Moreover, if the Tribunal finds that evidence from the other arbitration RESPONDENT was involved in is admissible (see *infra* **Issue II**), the Partial Interim Award constitutes highly relevant extrinsic evidence. Notably, it confirms that the Tribunal has the power to adapt the contract if Mediterranean law applies to the Arbitration Agreement [*P.O. No. 2, para. 39*]. The RESPONDENT claimed this specific type of dispute is subject to arbitration in another forum, before subsequently denying the Tribunal's jurisdiction here. This shows RESPONDENT'S narrow interpretation of the Arbitration Agreement is inconsistent [*Born 2014, p. 1325*], as such contradictory conduct is an attempt to deprive CLAIMANT of all its procedural rights in violation of the principle of good faith [*Judgement 30/04, para. 12*].

38 In conclusion, this extrinsic evidence shows the Parties intended for the Tribunal to have jurisdiction to adapt the contract price in the event of hardship.

B. The language of the Arbitration Agreement impliedly authorises the Tribunal to adapt the contract price in the event of a dispute.

39 Notwithstanding the extrinsic evidence, the broad wording of Clause 15 impliedly allows the Tribunal to intervene in the event of a dispute in relation to hardship. The Parties agreed under Clause 15 that 'any dispute arising out of this contract, including … [its] interpretation' would be resolved by the Tribunal. This non-exhaustive drafting and inclusive language indicates the Tribunal has a broad mandate to resolve *any* dispute.

40 RESPONDENT'S argument that the Parties narrowed the scope of the HKIAC Model Clause to the extent of excluding adaptation is incongruous with the Parties' intentions [*Answer, para. 13*]. The removal of references to 'non-contractual obligations' and disputes 'relating to' the contract from the Model Clause is irrelevant. The Parties' issue still falls within the scope of the final wording of Clause 15 as a 'dispute arising out of this contract'. As the Arbitration Agreement must be construed in light of the contract in which it appears, the conflict between the Parties concerning how to adjust the contract price clearly constitutes a 'dispute' [*Ferrario 2017, p. 146*].

41 The purpose behind Clause 12 is to exonerate CLAIMANT from being 'responsible … for hardship' where certain events make the contract more onerous to perform. Clause 12's intended function was to allow the Parties to re-assess the value of the contract in the event of hardship. Hence, Clause 12 would be rendered futile if the contract could not be adapted by the Parties. If the Parties subsequently failed to agree on a price adaptation, it is clear the Tribunal was the intended mechanism through which such a dispute would be conclusively resolved [*Okta, para. 69*]. Therefore, Clauses 15 and 12 impliedly confer power onto the Tribunal to adapt the contract, to ensure it would remain on foot and give effect to the Parties' desire for a long-term relationship.

C. Policy considerations demonstrate that the Tribunal is empowered to adapt the contract.

42 A broad interpretation of the Arbitration Agreement will place the ability to decide on the dispute in question within the jurisdiction of the Tribunal. This will uphold fundamental principles of party autonomy and advance the arbitral process. It should be presumed the Parties intended all issues to be resolved by arbitration in a single forum, to avoid disputes

being heard in separate venues at the risk of additional expense and inconsistent results [*Fiona Trust, para. 7; Judgement 27/02, p. 82*]. The best approach is to apply an expansive interpretation that promotes jurisdiction [*Born 2014, p. 1343; Berger 2003, p. 1375*]. Restricting jurisdiction would be incongruous with the Parties' desire for long-term relations. Instead, policies underlying the ML ICA support a liberal interpretation of Clause 15 in favour of upholding arbitration, to promote the Parties' intentions and maximise the efficacy of the arbitral process [*Born 2014, p. 1320*]. The broad interpretation mandated by Mediterranean law also favours granting the Tribunal jurisdiction to adapt the contract.

43 RESPONDENT may argue the Tribunal is limited to only deciding on the Parties' existing rights and cannot re-write the contract for the Parties on the basis of the *pacta sunt servanda* principle. This argument holds no weight because adaptation of the contract price is not a future obligation which violates the sanctity of the Parties' contract. Rather, it merely reshapes and modifies their existing rights [*Ferrario 2017, p. 146*]. The Tribunal should exercise the power impliedly conferred on it by the Parties to adapt the contract, to uphold party autonomy and give full effect to the clear consent of the Parties [*Redfern 2015, pp. 524–5; see supra paras. 35, 41*].

44 Moreover, interpreting the Arbitration Agreement in light of commercial common sense yields numerous benefits associated with arbitration [*Fouchard 1999, p. 25; Ferrario, p. 147*]. This is demonstrated by the Parties' clear intention to avoid being subjected to the jurisdiction of courts, as evinced by the negotiations of Clause 15 [*Cl. Ex. C3, C4*], to obtain an efficient, predictable and neutral means of resolving disputes relating to their transaction [*Born 2014, p. 592*]. As such, the fundamental purpose and principles of arbitration are upheld if the Tribunal is held to have the power to adapt the contract price, pursuant to any determination it makes in relation to **Issue 3**.

45 In conclusion, if the Tribunal finds in favour of CLAIMANT on **Issue 3**, it should give effect to the Parties' intentions and advance the arbitral process by exercising the jurisdiction conferred on them to adapt the contract price.

CONCLUSION OF ISSUE 1

46 The Tribunal is respectfully requested to find that the law of Mediterraneo applies to the Arbitration Agreement in the circumstances, in lieu of Danubian law. Consequently, the Tribunal has jurisdiction and power to adapt the contract price in the event of hardship.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER PROCEEDINGS TO THE TRIBUNAL

47 CLAIMANT has obtained evidence from the other arbitral proceedings (**'Other Arbitration'**) including a copy of the Partial Interim Award and relevant submission [*Letter by Langweiler, 2 October 2018, p. 49*]. In the Other Arbitration, RESPONDENT argued an unforeseen tariff of 25% was sufficient to justify an adaptation to the contract [*Letter by Langweiler, 2 October 2018, p. 49*]. The Partial Interim Award declared that the Tribunal had power to adapt the contract where an unforeseen tariff resulted in hardship [*P.O. No. 2, para. 39*].

I. <u>The Tribunal has Broad Discretion to Consider a Multiplicity of Factors When Determining the Admissibility of Evidence.</u>

48 Under Art. 22.2 HKIAC Rules 2018, the Tribunal can determine the admissibility, relevance, materiality and weight of evidence. In determining whether to admit evidence, the Tribunal may also consider factors including efficiency, fairness and equality [*Art. 9.3(e) IBA Rules; Born 2014, p. 1022; Redfern 2015, p. 353*]. This grants it broad discretion to admit evidence from prior proceedings even when it is obtained **(I)** in breach of confidentiality or **(II)** through illegal means. This is consistent with Art. 19(2) ML ICA and Art. 9.1 IBA Rules. The IBA Rules, although not binding, are commonly adopted in HKIAC Arbitration [*Moser 2017, para. 9.155*].

49 It is conclusive across common and civil jurisdictions that tribunals hold broad discretion with respect to determining the admissibility of evidence and approach the question of admissibility 'pragmatically' [*Redfern 2015, p. 377*]. The United States has held that 'arbitrators possess great latitude … to control evidentiary submissions' [*Supreme Oil, p. 8*]. Similarly, a Scottish decision upheld the arbitrator's power to determine admissibility [*Arbitration Application No. 3 of 2011, para. 29*]. A Dutch decision also held that 'arbitrators are free to act and rule as they see fit' [*Case No. R06/005HR; Born 2014, p. 2309*]. Therefore, strict rules of evidence are not typically observed in arbitration [*Moser 2017, para. 9.153; Redfern 2015, p. 377*]. This enables the Tribunal to 'err substantially' on the side of admitting evidence [*Born 2014, p. 2311; Parker, p. 39*].

50 Therefore, CLAIMANT argues there is a high threshold for rejecting evidence given the flexibility the Tribunal possesses in admitting evidence [*Parker, p. 39*].

II. The Tribunal Can and Should Admit Into Evidence Documents Obtained From a Breach of a Confidentiality Agreement.

51 CLAIMANT argues that **(A)** they are not bound by the express duty of confidentiality, and **(B)** the prevailing principles of transparency (**'Prevailing Principles'**) apply to CLAIMANT'S evidence. The Prevailing Principles derive from the UNCITRAL Rules of Transparency 2014 **('Transparency Rules'**). In any event, CLAIMANT contends that **(C)** a series of public policy factors collectively justify admission of CLAIMANT'S evidence.

A. CLAIMANT is not bound by a duty of confidentiality in relation to the Other Arbitration proceedings.

(1) CLAIMANT is not bound by an express duty of confidentiality.

52 Under Art. 45.1 HKIAC Rules 2018, parties to an arbitration owe a duty of confidentiality with respect to any information relating to the arbitration. This includes the Partial Interim Award and relevant submission [*Moser 2017, para. 12.30*]. However, the entrenched statutory duty in the HKIAC Rules 2018 is confined to the parties in dispute in the Other Arbitration, namely RESPONDENT and the Mediterranean buyer. Thus, Art. 45.1 does not impose a duty of confidentiality on CLAIMANT with respect to evidence from the Other Arbitration [*Smeureanu 2011, p. 31*].

(2) CLAIMANT is not bound by a contractual duty of confidentiality.

53 Similarly, CLAIMANT should not be bound by the contractual duty of confidentiality owed by the former employees of RESPONDENT [*P.O. No. 2, para. 41*], as it was neither privy to their contract and did not commit the breach in question.

(3) CLAIMANT is not bound by an implied duty of confidentiality.

54 For the same reasoning that CLAIMANT was not a party to the Other Arbitration, CLAIMANT does not owe an implied duty of confidentiality with respect to the evidence. In any event, the existence of an implied duty of confidentiality is uncertain, as there are differing views across jurisdictions. Historically, English law recognised the existence of an implied duty of confidentiality in international commercial arbitration [*Dolling-Baker; Hassneh; Ali Shipping*]. This duty was, however, subject to exceptions. Notably, *Hassneh* established that disclosure could be required in the interests of justice or where it is necessary for the protection of parties' rights [*Hassneh, pp. 275–6; Emmott, p. 27*]. This was extended by the Court of Appeal in *Ali-Shipping* which added an additional public interest exception [*Ali Shipping, pp. 147–8*]. Similar exceptions are endorsed in Singapore

[*AAY, paras. 62–4; AZT, paras. 8–14; Kristle Trading, paras. 82–4*]. In any event, more recent English decisions have cast doubt on the existence of a 'blanket' implied duty [*City of Moscow, p. 41; Aegis, p. 20*]. Equally, an implied duty of confidentiality has been rejected in numerous other jurisdictions [*Esso Australia (Australia); Nafimco (France); Bulbank (Sweden); Panhandle & Contship Containerlines (United States); Langley (New Zealand)*]. Consequently, CLAIMANT should not be bound by an implied duty of confidentiality due both to the uncertainty as to its existence, and the fact CLAIMANT has not itself breached confidentiality.

55 In any event, even if CLAIMANT is bound by an implied duty of confidentiality, this is not absolute [*Moser 2017, para. 12.32*]. Its application must be assessed on a case-by-case basis [*City of Moscow, para. 40; Smeureanu 2011, p. 122*] and be guided by the myriad of common law exceptions to confidentiality. Thus, the analysis under **(B)** and **(C)** is applicable to override any implied duty of confidentiality.

B. The Tribunal should find that the Prevailing Principles apply to CLAIMANT'S evidence.

56 In order for the Tribunal to apply the Prevailing Principles, CLAIMANT must establish the principles are **(1)** not confined to investor-state arbitration and **(2)** the express confidentiality provision in HKIAC Rules 2018 is not a bar. Lastly, CLAIMANT submits **(3)** Prevailing Principles should form best practice in international commercial arbitration.

(1) The Prevailing Principles are not confined to investor-state arbitration and should extend to international commercial arbitration.

57 Strictly, the Transparency Rules are confined to investor-state arbitration and do not directly apply to international commercial arbitrations [*Art 1.1 Transparency Rules*]. As such, RESPONDENT may argue there is no principled basis to extend the Prevailing Principles beyond investor-state arbitration.

58 However, CLAIMANT respectfully requests the Tribunal to apply the Prevailing Principles to the present proceedings. Although international commercial arbitration prima facie does not attract the same sovereignty and public policy issues and involves different parties to investor-state arbitration, the distinction between them is blurred [*Argen 2015, p. 207; Carmody 2016, p. 106; Allsop 2018, para. 1*]. Born argues that the justifications for limiting transparency only to investor-state arbitration are unpersuasive [*Born 2014, pp. 2827–8*]. Transparency, as a fundamental concept, was developed to establish a harmonised legal framework for a fair and efficient settlement of disputes [*Carmody 2016, p. 120*]. This

purpose for transparency is not divorced from international commercial arbitration. Further, the notion of 'public interest' is not restricted to issues faced in investor-state arbitration but includes enhancing efficiency and supporting the fair resolution of disputes [*Argen 2015, p. 235; Allsop 2018, para. 44*]. As the boundary between international commercial arbitration and investor-state arbitration is ill-defined, there is no justification for cloaking CLAIMANT'S evidence in confidentiality [*Partasides 2017, pp. 200–2*]. Therefore, the Tribunal should extend transparency principles to these proceedings.

59 Remaining unconditionally faithful to confidentiality comes at the expense of consistency and fairness by creating an 'obscure' and 'opaque' decision-making process [*Waincymer 2012, p. 798; Carmody 2016, p. 169; Pislevik 2018, p. 243; Poorooye 2017, pp. 313–4*]. Prior proceedings should not be kept in the secretive realm of commercial arbitration where it allows parties to take unfair advantage, or stifles the development of jurisprudence [*Poorooye 2017, pp. 301–3; Allsop 2018, para. 45; Carmody 2016, pp. 106, 171–3*]. Consequently, it is in the public interest to ensure arbitrators adopt similar logic to similar factual situations. Enforcing prevailing principles of transparency is 'the cure for genuine inequities' [*Rogers 2006, p. 1335*] and in order to uphold the rule of law, the Tribunal should not 'pull the curtains around the system and turn out the lights' [*Rogers 2006, p. 1337*]. To do so would enable RESPONDENT to enjoy an unfair advantage derived from continued secrecy. Therefore, transparency should be employed as a crucial means of quality control to create a level playing field for CLAIMANT in the arbitral process [*Carmody 2016, pp. 105, 150; Poorooye 2017, p. 299*].

(2) The express confidentiality provision under Art. 45.1 HKIAC Rules 2018 is not a roadblock to the application of the Prevailing Principles.

60 RESPONDENT argues the express confidentiality provision under Art. 42 HKIAC Rules 2013 (equivalent to Art. 45.1 HKIAC Rules 2018) excludes the Prevailing Principles from application [*Letter by Fasttrack, 3 October 2018, p. 50*].

61 The conflict between the Prevailing Principles and the HKIAC Rules 2018 can be resolved pursuant to Arts. 1.7 and 1.8 of the Transparency Rules. Art. 1.7 provides that the Transparency Rules shall prevail in any conflict with the applicable arbitration rules. Nevertheless, Art 1.8 provides that where the parties cannot derogate from a provision in the applicable arbitration rules, that provision will prevail. CLAIMANT submits Art. 45.1 HKIAC Rules 2018 is not absolute by virtue of the exceptions listed in Art. 45.3 and the Tribunal's inherent flexibility to deal with confidentiality (see *supra* paras. 49, 50).

Therefore, the Parties can derogate from Art. 45.1. As a result, the Tribunal should find that the Prevailing Principles apply to CLAIMANT'S evidence.

(3) Transparency should form best practice in international commercial arbitration.

62 The momentum behind transparency in international commercial arbitration justifies its adoption by the Tribunal [*Partasides 2017, p. 198–9*]. Arbitral institutions have significantly embraced transparency procedures by more readily publishing arbitral awards, favouring objective interpretations of arbitral rules and co-operating together to contribute to increased transparency reform [*Rogers 2006, pp. 1314, 1319, 1323; Poorooye 2017, pp. 304–7, 309–10*].

63 In effect, changes in the rules and processes adopted by arbitral institutions demonstrate a shift from conservatism to pragmatism with regard to confidentiality [*Born 2014, p. 2820; Poorooye 2017, p. 304, 310; Allsop 2018, para. 46; Rogers 2006, pp. 1318–9*]. Consequently, the frequent disclosure of arbitral documentation shows the traditional preference for confidentially is giving way to transparency [*Carmody 2016, pp. 96, 113, 128–9; Argen 2015, p. 226*]. This is particularly the case where, as here, it is in the public interest and interests of justice to do so.

C. The Tribunal should admit CLAIMANT'S evidence based on a multifactorial public policy analysis.

64 The Tribunal has inherent flexibility with respect to determining the admissibility of evidence under Art. 22.2 HKIAC Rules 2018. Even where the prevailing principles of transparency are inapplicable, public policy factors can guide the Tribunal in determining whether to uphold confidentiality or admit CLAIMANT'S evidence. Based on **(1)** the Prevailing Principles, **(2)** the arbitral process, **(3)** the interests of justice and **(4)** the interests of the arbitrating parties, the Tribunal should admit CLAIMANT'S evidence.

(1) The Prevailing Principles require disclosure despite any need for confidentiality.

65 Where the Tribunal finds that the Prevailing Principles apply under **(B)** they should be given paramount importance despite any breach of confidentiality. Art. 3 of the Transparency Rules permits publication of arbitral documents to the public. Thus, to give effect to the Prevailing Principles, the Tribunal should employ their broad discretion to admit CLAIMANT'S evidence.

66 RESPONDENT may argue that under Art. 7.2(a) of the Transparency Rules, disclosure of CLAIMANT'S evidence is not permitted because it is confidential. This may function as an exception to the Prevailing Principles [*Carmody 2016, p. 151*].

67 However, Art. 7.2(a) is confined to 'confidential business information'. It can be inferred that CLAIMANT'S evidence is not commercially sensitive as RESPONDENT merely objects to its admission on the basis that it is irrelevant and has been taken out of context [*Answer, para. 11; Letter by Fasttrack, 3 October 2018, p. 50*]. Consequently, the Tribunal should find in favour of transparency in lieu of confidentiality.

(2) The public interest in the arbitral process requires disclosure despite any need for confidentiality.

68 The public interest in the arbitral process as a predictable, efficient and transparent dispute resolution process necessitates disclosure [*Ali Shipping, p. 146*].

(a) *Disclosing the evidence will promote predictability within the arbitral process.*

69 Notwithstanding prior arbitral awards are only persuasive in future arbitration proceedings, the development of guiding precedent promotes consistency and predictability [*Poorooye 2017, p. 303*]. This will not only improve the quality of decision-making by tribunals [*Pislevik 2018, p. 257*], but will preserve the legitimacy and integrity of the arbitral process [*Carmody 2016, pp. 173–4; Poorooye 2017, p. 314*]. By allowing arbitrators to consult previous arbitral awards where the facts are sufficiently similar and measure the outcome against that objective yardstick, it is more likely that tribunals can deliver fair, consistent and predictable outcomes for parties. The development of a catalogue of reasoned, accessible awards yields a persuasive precedential system [*Pislevik 2018, p. 254; Poorooye 2017, p. 306*]. Thus, promoting uniformity across similar cases inherently builds public trust and confidence in the arbitral process [*Carmody 2016, pp. 173–4; Poorooye 2017, p. 299; Pislevik 2018, p. 254*].

70 RESPONDENT may argue disclosure undermines privacy, as an inherent characteristic of arbitration. However, it is important that the parties and the public see and believe that justice is being achieved [*Poorooye 2017, pp. 304, 314*]. Therefore, privacy should not serve as a safe haven to hide evidence that might otherwise assist a party or tribunal [*Poorooye 2017, p. 300*]. With a more complete picture of the facts, the Tribunal will be placed in a stronger position to assess the evidence. In effect, this will improve the 'degree of acceptance of arbitral decisions whilst lessening the possibility of awards being challenged' [*Pislevik 2018, pp. 249, 257*]. It is not submitted that disclosure is required in

all circumstances or that confidentiality is overruled conclusively. Thus, evidence from the Other Arbitration should be admitted as this will assist the Tribunal to achieve consistency and predictability by adopting similar reasoning to that of the Other Tribunal.

71 RESPONDENT may also argue that unlike in common law jurisdictions, arbitral awards lack precedential value given the absence of a hierarchical tribunal structure. However, precedent has a dual-pronged role to play in arbitration. It benefits parties reactively by assisting the preparation of their argument, and proactively by establishing a knowledge base to warn parties of potential legal issues. Over time 'there will be an increase in overlap and contradiction in reasoning and results' [*Pislevik 2018, p. 255*]. As the Other Arbitration overlaps with the present facts, the Tribunal should endorse CLAIMANT'S evidence as highly persuasive precedent.

(b) *Disclosing the evidence will promote efficiency within the arbitral process.*

72 Disclosure of CLAIMANT'S evidence is in the public interest as it promotes the efficient resolution of disputes [*Waincymer 2012, p. 789; Carmody 2016, pp. 171–3, 178–9*]. Broadly, the disclosure of prior arbitral proceedings allows for the development of jurisprudence [*Carmody 2016, pp. 171–3*], which creates a reference point that arbitrators can turn to in analogous cases [*Poorooye 2017, p. 313*].

73 RESPONDENT may counter that disclosure broadly may hinder the efficiency of the arbitral process by over-complicating the decision-making process and requiring arbitrators to explain their reasons to depart from other decisions. Nevertheless, the creation of a consistent line of reasoning can prevent 'commercial parties repeatedly having to arbitrate to resolve similar disputes' [*Pislevik 2018, p. 259*]. This would act to 'bolster finality' to the Tribunal's decision, 'shorten the length of submissions', and expedite 'the time an arbitrator takes to hand down an award' [*Pislevik 2018, p. 259*]. In any event, the consistency and fairness advantages of transparency should outweigh any impact on the speed of the arbitral process [*Poorooye 2017, p. 315*].

74 Given the Other Arbitration involving RESPONDENT is highly analogous to the present case, the Partial Interim Award would increase efficiency by allowing the Tribunal to apply similar reasoning [*Letter by Langweiler, 2 October 2018, p. 49*]. As the scope of disclosure sought by CLAIMANT does not constitute a fishing expedition [*Born 2009, p. 1907*], it is in the public interest for the Tribunal to exercise their broad discretion to allow relevant evidence, despite its confidential character.

(3) The interests of justice require disclosure despite any need for confidentiality.

75 The Tribunal should accept CLAIMANT'S evidence in the interests of justice in the present circumstances [*Ali Shipping, p. 148; London & Leeds Estate, para. 2; Smeureanu 2011, p. 124*]. Although the Parties are not under a disclosure obligation [*HKIAC Rules 2018; IBA Rules; Born 2009, p. 1898*], confidentiality should not be misused to mask unethical or inconsistent behaviour [*Westwood Shipping Lines, paras. 13–5; Poorooye 2017, p. 300*].

76 Mance J in *London & Leeds Estate* established that providing materially different evidence in different arbitrations concerning similar issues contravenes the interests of justice because it would lead to contradictory outcomes [*London & Leeds Estate, p. 109*]. In the Other Arbitration, RESPONDENT sought to enforce the hardship clause to adapt the contract, compelling the Mediterranean buyer to pay the costs incurred as a result of a tariff imposition. Allowing CLAIMANT to submit the Partial Interim Award and relevant submission from the Other Arbitration will inform the Tribunal of RESPONDENT'S contradictory assertions and selectivity in approaching the hardship clause. As in *London & Leeds Estate*, the evidence should be admitted to undermine the veracity of RESPONDENT [*Waincymer 2012, p. 789*].

77 To permit RESPONDENT to apply the hardship clause only when it suits their position severely inhibits consistency and justice. There would be no external impact to RESPONDENT'S reputation, given these proceedings are protected by a duty of confidentiality. If the Tribunal deems necessary, the evidence can be sanitised [*Waincymer 2012, p. 800*]. Consequently, the Tribunal should admit the evidence to deliver fairness, consistency and trust in the arbitral process [*Symbion Power, para. 90*].

78 In addition, an analogy can be drawn to the situation in *Teekay Tankers* where the court overruled confidentiality in favour of the interests of justice. In that case, STX challenged Teekay Tanker's use of arbitral awards, to which only STX was a party. This question of confidentiality extending to a third party is analogous to the facts. The court held that 'if it is necessary to disclose confidential information … in support of a particular argument … it would inimical to the doing of justice if the litigant were liable for breach of confidence' [*Teekay Tankers, para. 414*]. Given CLAIMANT has advanced their argument in 'good faith' [*Teekay Tankers, para. 414*], it is in the interests of justice to override any breach of confidentiality to admit CLAIMANT'S evidence.

79 RESPONDENT may also argue that without their consent, disclosure by CLAIMANT should be denied Under Art. 45.5 HKIAC Rules 2018. However, this restriction only applies to disclosures made to the world at large and does not apply to disclosure within

these confidential proceedings. Consent is therefore an irrelevant consideration and, in any event, should be overridden by the interests of justice.

(4) Protection of CLAIMANT'S legitimate interests requires disclosure despite any need for confidentiality.

80 The Tribunal should admit CLAIMANT'S evidence to protect CLAIMANT'S legitimate interest of optimally presenting its claim [*Waincymer 2012, p. 859; Ali Shipping, p. 147–51; Emmott, paras. 27, 107; Hassneh, pp. 275–6; Westwood Shipping Lines, paras. 13–5; Lloyd's Syndicate; Smeureanu 2011, p. 125*]. Flaux J in *Westwood Shipping Lines* established that where 'it is reasonably necessary for the protection of legitimate interests of the arbitrating party', disclosure is permitted [*Westwood Shipping Lines, para. 13*].

81 In *Westwood Shipping Lines*, the court admitted all documents from a prior arbitration because the claimant's argument was stifled without access to such evidence. Similar to the present facts, CLAIMANT'S evidence is materially relevant and necessary as it pertains to a highly analogous arbitration involving RESPONDENT where it was held the tribunal had power to adapt the contract [*Letter by Langweiler, 2 October 2018, p. 49; P.O. No. 2, para. 39*]. Therefore, the Tribunal should support CLAIMANT'S legitimate interests in submitting evidence with strong probative value. Notably, both the Partial Interim Award and the relevant submissions are required, as when read together, they paint a complete picture of the Other Arbitration.

82 RESPONDENT has asserted that CLAIMANT'S allegations with respect to the Other Arbitration 'do not reflect reality and are taken out of context' [*Letter by Fasttrack, 3 October 2018, p. 50*]. However, RESPONDENT provides no basis for the claim that the evidence lacks any probative value. To the contrary, the Other Arbitration is likely to carry significant material weight as it enables CLAIMANT to establish RESPONDENT'S contradictory behaviour, and proves that the Tribunal has jurisdiction [*Moser 2017, para. 9.162*]. The evidence is not tainted by any commercial sensitivity [*Born 2014, p. 2780*] and will enable CLAIMANT to present its case optimally in the absence of an appeals process [*Waincymer 2012, p. 859*]. Both factors may assist the Tribunal when determining the award.

83 In conclusion, the Tribunal should hold that CLAIMANT's evidence is admissible. Any issue of the weight to be given to the evidence is a matter for the Tribunal to determine, such that the level of probative value can be taken into account following its admission.

III. The Tribunal Should Admit The Evidence Even If It Has Been Stolen Or Unlawfully Obtained Through Hacking.

84 The HKIAC 2018 Rules and the ML ICA do not obligate the Tribunal to exclude illegally obtained evidence. Conversely, it is well recognised in international law that there are certain instances when the Tribunal can exercise its discretion to admit illegally obtained evidence [*Corfu Channel; Caratube, para. 669; Yukos; c.f. Iranian Hostages, p. 106*]. Notwithstanding there is no clear view in international arbitration law as to whether illegally obtained evidence should be admitted [*Blair 2018, p.235; Waincymer 2012, p. 797*], the fact evidence may have been obtained illegally is insufficient in and of itself to deny disclosure [*Methanex, para. 56; Corfu Channel; Blair 2018, p.251*].

85 The Tribunal should exercise its broad discretion to admit both the Partial Interim Award and relevant submission [*Born Law and Practice 2015, p. 830; Blair 2018; Art. 9.1 IBA Rules*], as CLAIMANT obtained the evidence with clean hands. It is in the public interest and interests of justice to admit the evidence [*Blair 2018, p.256; Persia International Bank, para. 95*]. In determining admissibility, the Tribunal must also consider the materiality and probative value of the evidence [*Methanex, para. 59; Ireton 2015, p. 236*].

A. The Tribunal should admit the evidence even if it has been obtained illegally as CLAIMANT has clean hands.

86 CLAIMANT acted in good faith, as it obtained the information with clean hands by neither encouraging nor facilitating the hacking, and arguably had no knowledge of the alleged wrongdoing [*Iranian Hostages; Persia International Bank; Methanex; Blair 2018, p. 256*]. Rather, CLAIMANT acquired the evidence through a disinterested third party (**'the Hacker'**) who stood to gain or lose nothing from the outcome of the Other Arbitration [*Nicaragua, para 69*]. The information was passed onto a second independent disinterested party (**'the Intelligence Company'**), who promised to on-sell the Partial Interim Award to CLAIMANT for US$ 1,000 [*P.O. No. 2, para. 41*]. Thus, CLAIMANT was two steps removed from the alleged illegality. Moreover, neither the hacker nor the Intelligence Company stood to benefit from the outcome of the Other Arbitration, despite the fact the company was promised payment by CLAIMANT for the illegally obtained evidence. Accordingly, CLAIMANT should be deemed to have acquired the evidence with clean hands [*Blair 2018, p. 256*], satisfying the good faith element outlined in Art. 9.7 IBA Rules.

87 Even if CLAIMANT had actual or constructive knowledge of the illegality, computer hacking falls far below the threshold for inadmissibility [*Blair 2018, p. 256*]. In *Corfu*, the

ICJ admitted evidence pertaining to Albanian mines obtained in breach of Albanian sovereignty. Whereas the ICJ refused to admit illegally obtained evidence in *Iranian Hostages*, the decision in *Corfu* turned on the 'particular gravity' of the matter and the need to maintain international peace and security [*Iranian Hostages, para. 92; Blair 2018, p. 241*]. Clearly, computer hacking falls far short of this threshold.

88 Similarly, the ECJ [*Persia International Bank, para. 95; Al Matri*], ECHR [*El-Masri*] and ICSID [*Yukos; ConocoPhillips*] have expressly allowed admission of illegally obtained information published through Wikileaks. ICSID refused to admit evidence obtained illegally in *Methanex*, where Methanex themselves committed the illegality, and in *EDF*, where the evidence was obtained in bad faith through a breach of privacy and was deemed to be unreliable. As these issues do not arise in the instant arbitration, the threshold for inadmissibility has not been met.

89 Whereas RESPONDENT has argued the evidence does not reflect reality and has been taken out of context [*Letter by Fasttrack, 3 October 2018, p. 51*], CLAIMANT'S evidence accurately depicts RESPONDENT'S arguments in the Other Arbitration. In any event, the value of the evidence should be tested when evaluating its credibility and weight, and not when determining admissibility [*Born 2014, p. 2311*].

90 In particular, the present arbitration is highly analogous to *Caratube*, an ICSID arbitration in which the Tribunal admitted documents obtained through an illegal hack of a computer network. As in the current arbitration, *Caratube* did not hack RESPONDENT'S computer network, and instead retrieved these documents from a third party, namely the Mediterranean Buyer [*c.f. Methanex & Libananco*]. CLAIMANT therefore has clean hands and must be deemed to be acting in good faith as it was not involved, nor did it facilitate, the hacking [*Persia International Bank, para. 95*]. Moreover, in determining whether CLAIMANT was acting in good faith when it retrieved the hacked documents, the tribunal in *Caratube* noted [*Caratube, para. 318*] that it can consider the fact that RESPONDENT withheld the documents, thereby preventing CLAIMANT from presenting its case optimally in determining the character of CLAIMANT'S conduct [*Art. V(1)(b) NYC; Born 2014, p. 3494*]. Consequently, CLAIMANT should not be prohibited from submitting the evidence to the Tribunal.

B. The public interest favours admitting the evidence even if obtained illegally.

91 The public interest in finding the truth to enable CLAIMANT to present their optimal argument outweighs the gravity of the alleged illegality. To establish the contrary,

RESPONDENT must establish the alleged illegality contravenes, and is inconsistent with, public policy [*Decision 4A_362/2013, para. 3.3*]. Disclosure is in the public interest as it would promote the arbitral process as a predictable, efficient and transparent mechanism for dispute resolution [*Ali Shipping p. 148; see supra, paras. 54, 68*]. Moreover, it limits the possibility of contradictory outcomes being reached in substantially similar arbitrations enhancing the predictability and reliability of arbitral tribunals (see *supra* para. 75).

92 RESPONDENT will argue the illegally obtained evidence should not be admitted as it encourages criminality and thus is incompatible with the public interest. However, CLAIMANT is two steps removed from the criminality and did nothing to directly encourage the alleged illegality, only purchasing the evidence after it had been obtained. In any event, the fact CLAIMANT knew the company from which it had arranged to acquire the Partial Interim Award had a 'doubtful reputation' [*P.O. No. 2, para. 41*] does not amount to knowledge of the illegality. Hence, CLAIMANT'S case should not be hampered for the possibly unlawful means by which the evidence was obtained [*Persia International Bank, para. 95*].

C. The interests of justice favour admissibility even if it was illegally obtained.

93 The Tribunal should accept CLAIMANT'S evidence in the interests of justice [*ConocoPhillips, para.67; Ali Shipping, p. 148; London & Leeds Estate, para. 2*]. Applying the principle from *London & Leeds Estate* (see *supra* para. 76), RESPONDENT'S inconsistent conduct contravenes the interests of justice as it would lead to contradictory outcomes. Arbitrator Abi Saab's dissent in *ConocoPhillips* [*paras. 64-7*] extended this principle, arguing that the overriding legal and moral task of a tribunal is to seek the truth and dispense justice. Failure to consider all relevant evidence, even if illegally obtained, would result in unjust and incorrect decisions. Hence, denying disclosure would mask RESPONDENT'S unethical and inconsistent behaviour [*Poorooye 2017, p. 300; London & Leeds Estate; Westwood Shipping Lines, paras. 13–5; Poorooye 2017, p. 300; see supra para. 75*]. In conclusion, CLAIMANT'S evidence should be admitted by the Tribunal.

CONCLUSION OF ISSUE 2

94 The Tribunal is respectfully requested to admit into evidence the Partial Interim Award and relevant submission despite a breach of confidentiality. In exercising its broad discretion, the Tribunal should admit the evidence even if obtained illegally as the interests of the public, justice and the Parties cumulatively justify lifting the cloak of confidentiality.

ISSUE 3: CLAIMANT IS ENTITLED TO PAYMENT FROM RESPONDENT FROM AN ADAPTATION OF THE CONTRACT PRICE

95 As the FSSA is governed by Mediterranean law under Clause 14, the Tribunal should apply the interpretative rules of the CISG as the default law pursuant to Art. 28(1) ML ICA. Where relevant, it is submitted that interpretation of the CISG may be supplemented by UNIDROIT as a matter of interpretative guidance. Alternatively, for matters beyond the scope of the CISG, UNIDROIT should be applied pursuant to Art. 28(2) ML ICA. Conduct such as parties' negotiations is relevant in determining contractual intent [*Art. 8(3) CISG*].

I. CLAIMANT is Entitled to US$ 1,250,000 Under the FSSA.

A. Interpretation of Clause 12 entitles CLAIMANT to the Adaptation Price.

96 The words used in Clause 12 shift the financial burden of the changed delivery terms to RESPONDENT. Imposition of the 30% tariff by Equatoriana on 19 December 2017 ('**Tariff**') falls within the scope of hardship contemplated in Clause 12 for three reasons.

97 *Firstly*, the Tariff amounts to an unforeseen event comparable to 'hardship caused by additional health and safety requirements', rendering the contract more onerous [*Cl. Ex. C5*]. The '*ejusdem generis*' presumption states that where references to specific things are followed by reference to a general category to which they belong (genus), the general category must be confined to include only things of 'the same kind' [*Spagnolo 2016, para. 77*]. The genus 'additional health and safety requirements' is broadened by the words 'comparable unforeseen events'. Health and safety requirements are regulations imposed by government authorities that increase customs related expenditure. Hence, an export tariff meets these criteria, such that the Tariff falls within the genus in Clause 12.

98 *Secondly,* in negotiations, CLAIMANT explicitly sought to avoid assuming risk associated with changes in delivery terms, with particular regard to changes in customs regulations or import restrictions [*Cl. Ex. C4*]. Even if the Tribunal finds the language of Clause 12 ambiguous, it should be interpreted in light of CLAIMANT'S intention that risks including unforeseen tariffs were covered by the hardship clause [*Cl. Ex. C4*]. In particular, Ms Napravnik expressed to Mr Antley the importance of having a 'mechanism in place which would ensure an adaptation of the contract …' [*Cl. Ex. C8*], to which Mr. Antley expressed his agreement to allow adaptation, albeit by arbitrators rather than the Parties. This intention was manifested such that a reasonable person in RESPONDENT'S position would have understood that this was the basis upon which they were prepared to change the delivery terms [*Art. 8(2) CISG; Art. 4.2 UNIDROIT*].

99 *Thirdly*, the phrase '[s]eller shall not be responsible …' mean CLAIMANT is not liable for costs caused by the Tariff. CLAIMANT argues the cost impliedly falls to RESPONDENT in light of the negotiations. CLAIMANT clearly refused to assume further risks associated with a change in delivery terms [*Cl. Ex. C4*]. RESPONDENT knew or could not have been unaware that this is what CLAIMANT intended [*Art. 8(1) CISG; Art. 4.2(1) UNIDROIT*]. In any event, reasonable commercial parties in RESPONDENT'S position would have understood CLAIMANT'S intention [*Art. 8(1) CISG; Arts. 4.1(2), 4.2(1) UNIDROIT*]. Due to the Equatorianian government's imposition of the Tariff on 19 December 2017, hardship as contemplated by Clause 12 actually eventuated. Given Clause 12 provides for adaptation on the basis of unforeseen customs-related shipping costs, CLAIMANT respectfully requests that the Tribunal adapt the contract in accordance with Clause 12.

100 In conclusion, the Tribunal should exercise its power to adapt the contract price, ordering RESPONDENT to pay US$ 1,250,000 to CLAIMANT.

B. In the alternative, CLAIMANT is entitled to the Adaptation Price as Clause 12 amounts to a mistake that may be rectified.

101 The narrow drafting of the hardship clause does not reflect the true intention of the Parties. Consequently, Clause 12 constitutes a mistake that fails to reflect the Parties' intention when it was drafted [*Article 3.2.2 UNIDROIT*]. Due to the accident on 12 April 2017, the prime negotiators, Ms Napravnik and Mr Antley, were not involved in the final contract negotiations in which a narrow hardship clause was ultimately drafted [*Notice, para. 8*].

102 However, from their negotiations it is clear that CLAIMANT sought a hardship clause that was sufficiently broad to at least encompass 'customs regulation[s]' [*Cl. Ex. C4*]. This is further demonstrated by their initial proposal to rely on the ICC-Hardship Clause [*Resp. Ex. R2*]. It is also clear that RESPONDENT understood Clause 12 to be sufficiently broad so as to allow the Parties to adapt the contract in the event of unforeseen circumstances, due to its initial willingness to enter into negotiations with CLAIMANT regarding the price increase after the Tariff was imposed [*Cl. Ex. C8*].

103 Thus, Clause 12 is an incorrect expression of the Parties' intent. In interpreting the clause, the Tribunal should consider the real intention of the Parties [*Arts. 4.1, 4.2 UNIDROIT*]. It should take into account evidence of the Parties' conduct during negotiations and the subsequent conduct of RESPONDENT [*Art. 8(3) CISG; Arts. 4.3(a), (c), (d) UNIDROIT*] in determining the true intent of the Parties. This is reflected in the tribunal's decision in *Zurich* [*Zurich, para. 20*].

104 RESPONDENT knew or could not have been unaware that CLAIMANT intended Clause 12 to be broad [*Art. 8(1) CISG; Art. 4.2(1) UNIDROIT*], due to negotiations between the prime negotiators (see *supra* para. 102), demonstrating the common intention between the Parties [*Art. 4.1(1) UNIDROIT*]. In any event, a party in RESPONDENT'S position would have reasonably understood this to be CLAIMANT'S intention [*Art. 8(2) CISG; Arts. 4.1(2), 4.2(2) UNIDROIT*]. Due to the mistake of the last-minute negotiators, the written document did not reflect this intent.

105 CLAIMANT was entitled to relief under *Art. 3.2.2 UNIDROIT*, but was precluded from exercising this right because RESPONDENT gave CLAIMANT the impression RESPONDENT was willing to adapt the price in line with their discussions on 21 January 2018 [*Resp, Ex. R4*]. This consequently led to CLAIMANT fulfilling its remaining delivery obligations. As performance has now been rendered and CLAIMANT can no longer avoid the FSSA under *Art. 3.2.2*, CLAIMANT seeks restitutionary relief under *Art. 3.2.15(2) UNIDROIT* in lieu, constituting the $1,250,000 paid by CLAIMANT to cover the tariff.

C. In the alternative, the Tribunal should find that the parties agreed to adapt the contract price pursuant to Art. 29 CISG.

106 The Tribunal should uphold the Adaptation Price that was agreed upon by the Parties [*Art. 29 CISG*]. This agreement was effective notwithstanding it only affected the obligations for RESPONDENT to pay more [*Björklund in Kröll 2011, p. 382*]. Since Art. 29 CISG does not outline when an agreement is struck, the Tribunal should therefore use the CISG provisions on contract formation as guidance [*Björklund in Kröll 2011, p. 383; Spagnolo 2011, pp. 191, 205; CISG Op No. 16, para. 2*].

107 CLAIMANT began discussions about the amendment by email, stating they would only ship if they found 'a solution' to the Tariffs [*Cl. Ex. C7*]. This joint understanding to 'find a solution' meant that RESPONDENT would pay for the Tariffs. CLAIMANT had previously communicated that such costs would otherwise 'destroy the commercial basis of the deal' for CLAIMANT, and RESPONDENT understood this was fundamental to maintaining a long-term relationship [*Cl. Ex. C4, C8*; *Resp. Ex. R4*].

108 Negotiations regarding amendment to the FSSA continued on 21 January and throughout delivery stage [*Cl. Ex. C8*; *Resp. Ex. R4*]. The agreement to re-negotiate the contract price was finalised through RESPONDENT'S collective conduct of **(1)** acceptance of the shipment, **(2)** use of the goods, and **(3)** the 22-day silence in response to the offer. RESPONDENT'S extended silence is illustrative of their failure to cooperate, which is

considered a duty under UNIDROIT [*CME Cooperative Maritime*] and CISG. In light of these factors, the agreement to amend was accepted before 12 February, the day RESPONDENT purportedly stopped negotiations [*Cl. Ex. C8*].

109 The terms are sufficiently certain because, despite not expressly discussing the exact figure of US$ 1,250,000, this amount was implicit [*Art. 14 CISG*] in order to fulfil the promise that a reasonable solution would be reached. In the alternative, a specific amount was not required, as a contract may be 'validly concluded but does not expressly or implicitly fix or make provision for determining the price' [*Art. 55 CISG*; *Art. 5.1.7 UNIDROIT*]. Therefore, the failure to state the price is not a 'fatal gap' in the contract [*Amato 1993, p. 7*]. Professor Sono states that the price does not have to be 'calculable at the time of contract' [*Amato 1993, p. 7*].

110 RESPONDENT may argue that Mr Shoemaker did not have authority to enter into contracts on behalf of RESPONDENT, rendering the agreement invalid. However, Mr Shoemaker was introduced as 'the person responsible for … all questions concerning the [FSSA]' [*P.O. No. 2, para. 32*]. In holding him out to have authority to act on behalf of RESPONDENT regarding all aspects of the FSSA [*Art 2.2.2 UNIDROIT; P.O. No. 2, para. 32*], Mr Shoemaker had authority to bind RESPONDENT in effecting the agreement. Alternatively, RESPONDENT caused CLAIMANT to 'reasonably believe' that he had authority, by remaining silent [*Art. 2.2.5 UNIDROIT*] and, additionally or alternatively, Mr Shoemaker's conduct was ratified by RESPONDENT, through their silence [*Art. 2.2.9 UNIDROIT*].

111 CLAIMANT respectfully requests the Tribunal to find that the contract was amended by agreement, entitling CLAIMANT to US$ 1,250,000.

D. In the alternative, the Tribunal should adapt the contract price under by virtue of RESPONDENT'S inconsistent behaviour.

112 The general principles of the CISG include an obligation on each party not to contradict a representation on which the other party relied [*Art. 7(2) CISG; Amato 1993, p. 7*]. CLAIMANT therefore argues that **(1)** RESPONDENT caused an understanding which **(2)** CLAIMANT reasonably relied upon. Consequently, **(3)** RESPONDENT acted inconsistent to that understanding, **(4)** which resulted in detriment to CLAIMANT [*Art. 1.8 UNIDROIT*; *Vogenauer 2009, p. 186; Zeller 2007, p. 647*].

(1) RESPONDENT caused an understanding in CLAIMANT that the contract price was adapted.

113 CLAIMANT understood that RESPONDENT would conduct themselves with the interest of a long-term business relationship at the forefront of their negotiations, including those relating to the Tariff [*Cl. Ex. C3, C4*]. Consequently, CLAIMANT had an understanding that the contract price would be adapted [*Art. 1.8 UNIDROIT; Vogenauer 2009, p. 188*]. RESPONDENT'S failure to rectify CLAIMANT'S understanding by remaining silent thereby constituted a binding representation [*Mitchell 2006, p. 348*]. Thus, CLAIMANT reasonably expected RESPONDENT to correct the misunderstanding that the Parties would reach an agreement, and in doing so, maintain good relations by adapting the contract price [*Vogenauer 2009, p. 188*].

114 Despite Mr Shoemaker's caveat that the price would be adapted 'if the contract provides' [*Resp. Ex. R4*], it was not sufficiently clear such that it precluded CLAIMANT'S understanding that RESPONDENT was willing to pay the increased price owing to the tariff [*Vogenauer 2009, p. 188*; *Arbitral Award 2008*]. Namely, his assertions that RESPONDENT would find a solution, compounded by his act of urging the shipment and stressing the desire for good relations, created an overwhelming impression that they would pay. It was therefore reasonable for CLAIMANT to have understood that an understanding had been reached.

115 Read with **(2)** and **(3)**, this understanding that RESPONDENT would cover the increased costs induced CLAIMANT to deliver the final shipment [*Cl. Ex. C8*].

(2) CLAIMANT reasonably acted in reliance on this understanding.

116 CLAIMANT acted reasonably in reliance on this understanding, as RESPONDENT held Mr Shoemaker out as the person responsible for all questions concerning the FSSA (see *supra* para. 110). Mr Shoemaker's strong representation demonstrated RESPONDENT'S intent to reach a mutually beneficial agreement regarding the Tariff. This reasonableness is further demonstrated by RESPONDENT'S understanding of the financial pressures that the tariff imposed upon CLAIMANT would create. Namely, RESPONDENT knew that this further cost would 'destroy the commercial basis of the deal' due to CLAIMANT'S low 5% profit margin [*Cl. Ex. C4*]. This would subsequently destroy the purpose of the relationship, which both Parties had desired to continue long term, as it would no longer be financially viable for CLAIMANT to carry out their obligations under the FSSA. Therefore, it was reasonable for CLAIMANT to rely on Mr Shoemaker's representations.

(3) RESPONDENT acted inconsistently with this understanding.

117 RESPONDENT'S CEO stated she would 'no longer be interested in further cooperation' and refused to pay any additional amount for the Tariff [*Cl. Ex. C8*]. This is inconsistent with the understanding that the Parties would have a long-term business relationship. RESPONDENT'S inconsistent behaviour is further demonstrated by their reselling of the frozen semen, despite contrary affirmations to CLAIMANT [*Cl. Ex. 2, C8; P.O. No. 2, paras. 20, 33*]. Such acts are clearly repugnant to RESPONDENT'S earlier representations.

(4) CLAIMANT has suffered detriment from reliance on this understanding.

118 As a result of RESPONDENT'S inconsistent behaviour, CLAIMANT has suffered a 25% loss [*Notice, para. 18*]. Therefore, all elements of Art. 1.8 UNIDROIT are satisfied and the Tribunal should adapt the contract price to uphold RESPONDENT's representations [*Zeller 2007, p. 647; Vogenauer 2009, p. 187*].

II. Even if the Tribunal Rejects CLAIMANT'S Contractual Entitlement to the Adaptation Price, CLAIMANT'S Entitlement Arises Under the CISG.

A. CLAIMANT is entitled to the Adaptation Price under Article 79 CISG.

(1) CLAIMANT is not precluded from recourse under Art. 79 CISG.

119 If the Tribunal finds that the Tariff is not hardship under Clause 12, CLAIMANT argues that Clause 12 is not an exhaustive list of instances of hardship that allow the contract to be modified. Therefore, Clause 12 amounts to a supplement to the CISG, and thereby amounts to partial, rather than full, derogation from CISG [*Art. 6 CISG*; *Mistelis in Kröll 2011, p. 107*]. RESPONDENT may argue that the Parties' agreement to a clause narrower than the ICC-Hardship Clause means that Clause 12 is an exhaustive list of circumstances amounting to events constituting to hardship. The Tribunal should reject this argument, as Art. 79 CISG operates differently to the ICC-Hardship Clause. The surrounding circumstances show that the Parties did not knowingly consent to excluding the CISG, as they never discussed it [*Art. 8(1); CISG Op No. 16, para. 3; Mistelis in Kröll 2011, p. 107*].

120 The Parties' conduct is decisive [*Schlechtriem 2016, para. 20*]. The Parties expressly state that the FSSA is governed by Mediterraneo law, including the CISG [*Cl. Ex. C5, Clause 14*]. The Parties' express choice to include the CISG can only be overridden by 'manifestly clear' conduct [*Gasoline and Gas Oil Case; CISG Op No. 16, para. 3*]. There is no 'manifestly clear' exclusion of Art. 79, as Clause 12 should be interpreted to avoid conflict with Clause 14 by finding that Clause 12 is a non-exhaustive list of instances of hardship.

(2) CLAIMANT'S hardship amounts to an 'impediment' under Art. 79 CISG.

121 Paragraph 3.1 of CISG Op No. 7 provides that a change of circumstances which could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an 'impediment' under Art. 79(1) CISG [see also, *Schlechtriem 2016*]. The language of Art. 79 does not expressly equate the term 'impediment' with an event that makes performance absolutely impossible. Thus, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Art. 79 CISG.

122 The imposition of the Tariff could not reasonably have been expected to have been taken into account at the conclusion of the contract for two main reasons. *Firstly*, the imposition of the 25% tariff by the Mediterranean government was itself extraordinary. This was compounded by the breadth of goods, countries covered, and the speed at which it was imposed. *Secondly*, the reaction of the Equatorianian government was completely inconsistent with its past behaviour, as they 'had always tried to resolve trade disputes amicably and had not relied on retaliatory measures' [*Cl. Ex. 6*]. Their entrenched support of free trade heightened the surprise of the retaliation even to 'informed circles' [*Cl. Ex. 6*]. Moreover, notwithstanding the Mediterranean government's initial imposition of a 25% tariff, the reaction was beyond reasonable foreseeability.

123 Further, if CLAIMANT were to bear the entire risk for the final shipment, CLAIMANT would suffer a loss of US$ 1,250,000. This renders performance of the contract excessively onerous, amounting to hardship. This should constitute an 'impediment' to performance under the CISG, entitling CLAIMANT to a price adaptation. Alternatively, if this threshold is not met, CLAIMANT argues bearing such a loss constitutes economic unreasonableness, amounting to an impediment [*Honnold 1999, para. 432.2*].

124 Lastly, truly exceptional circumstances are required to satisfy hardship [*CISG Op No. 7, para. 37*]. Despite the principle of *pacta sunt servanda*, there exists a 'limit of sacrifice' beyond which an obligor cannot reasonably be expected to perform [*CISG Op No. 7, para. 38; Garro 2005*]. This limitation accords with the principle of good faith [*Art. 7(1) CISG*; *Schlechtriem 2016*]. To assume risk for the 30% Tariff is beyond the CLAIMANT'S limit of sacrifice because of their narrow 5% profit margin. Not only has CLAIMANT lost their opportunity to profit, they now face 'impending financial ruin' due to the 25% loss [see *infra* para. 133]. The nature of this loss is beyond CLAIMANT'S commercial risk [*c.f. BCCI Award No. 11/1996*].

(3) The Tribunal has power to adapt terms of the contract under Art. 79 CISG.

125 Art. 79(5) CISG makes it possible for a court or arbitral tribunal to determine what each party owes the other, thus 'adapting' the terms of the contract to the changed circumstances. [*CISG Op No. 7, para. 40*]. This conforms with the principle of good faith under Art. 7(1) CISG. CLAIMANT respectfully requests the Tribunal to order RESPONDENT to pay CLAIMANT the Adaptation Price.

B. In the alternative, CLAIMANT is entitled to the Adaptation Price under Art. 79 CISG read with the UNIDROIT Principles.

(1) The Tribunal should find that the UNIDROIT Principles apply to supplement the interpretation of CISG.

126 CLAIMANT argues that since the CISG is silent on hardship, an internal gap exists. Therefore, the UNIDROIT Principles should serve a gap-filling role for the interpretation of the CISG as representing the general principles underlying it [*Art. 7(2) CISG; Zeller 2011; Perillo 1997*]. Subsequently, hardship events should be examined under the force majeure exemption of Art. 79 CISG [*Brunner 2008, p. 218*]. Given that Art. 79 CISG provides for an exemption of liability on account of 'impossibility' or force majeure, an alteration in the fundamental equilibrium of the contract should be constructed as an impediment to performance of a contract for the international sale of goods [*Garro 1995,*]. These prevailing views in scholarship were affirmed in *Scafom* where the Belgian Court of Cassation considered the UNIDROIT Principles as a substitute for general CISG principles, in order to fill gaps in a uniform manner, in relation to circumstances that fundamentally disturb the contractual balance.

(2) The Tribunal should adapt the terms of the contract.

127 The contractual equilibrium has been fundamentally altered enabling the Tribunal to adapt the contract (see *infra* **Issue III-C**). Based on the Tariff Event making performance excessively onerous for CLAIMANT, the Tribunal should exercise their power to interpret the CSIG Art. 79 consistently with the principles in Art. 6.2.3(4)(b) UNIDROIT Principles to allow adaptation of the contract in such circumstances [*Brunner 2008, p. 218*]. Notably, Art. 7(2) CISG allows internal gaps to be settled in conformity with the general principles on which the CISG is based [*CISG Op No. 7, para. 40*]. Such a finding aligns with the principle of good faith [*Art. 7(1) CISG*]. Therefore, if the Tribunal finds hardship it should adapt the contract with a view to restoring its equilibrium.

C. Even if the Tribunal finds CISG does not govern hardship, CLAIMANT is entitled to the Adaptation Price under the UNIDROIT Principles.

128 External gaps in the CISG should be filled with the residual law of Mediterraneo that governs the FSSA [*Cl. Ex. C5, Clause 14*]. Under Art. 6.2.2 UNIDROIT, hardship occurs where events fundamentally alter the equilibrium of the contract, provided that those events meet the requirements which are laid down in sub-paras. (a) to (d).

(1) The Tariff fundamentally altered the equilibrium of the contract.

129 A substantial increase in the cost of CLAIMANT'S performance fundamentally altered the contractual equilibrium [*Art. 6.2.2 UNIDROIT; Bonell 2002, p. 248*]. Whether or not an event can be described as 'fundamental' depends on the facts and circumstances of the particular case including the onerous nature of performance [*Vogenauer 2009, p. 719*], and whether the financial ruin of the obligor is impending [*Schwenzer 2008, p. 716*].

130 Upon consideration of the circumstances, the cost of executing the third shipment was onerous because the Tariff increased the cost by US$ 1,250,000. Generally, a greater profit margin may indicate the supplier assumed a greater risk with regard to contingencies. This would justify a higher threshold percentage for a fundamental change [*Brunner 2008, p. 433*]. Given the CLAIMANT'S appreciably small 5% profit margin [*Cl. Ex. C8*], a 30% increase in performance cost resulted in CLAIMANT'S financial loss being equivalent to five times the profit margin (a 25% loss). The close correlation between the cost of performance and the contract price means that any change has a more significant impact on CLAIMANT and therefore constitutes a fundamental change [*c.f. Tsakiroglou; Brunner 2008, pp. 325–6*]. The Tariff has upset the equilibrium of the contract because it has destroyed the commercial basis of the deal for CLAIMANT.

131 RESPONDENT may argue that a 30% increase in cost of performance is unlikely to amount to a fundamental alteration in the equilibrium in light of arbitral awards such as *Nuova*, and the comments in the first edition of the PICC to the effect that alterations amounting to 50% or more would likely amount to a fundamental alteration.

132 However, 'where an obligor faces impending financial ruin, the threshold of hardship may be somewhat lowered' [*Brunner 2008, p. 439*]. This is a subjective assessment based on the impracticability of performance upon the nature of the agreement and expectations of the parties [*Alimenta; Brunner 2008, p. 437; Schlechtriem 1999, p. 138*]. In any case, a percentage threshold is merely a guide that establishes a reference point to determine a

fundamental change. Notably, the 50% threshold in the first edition of the UNIDROIT has been removed in later versions. Analysis of the factual matrix remains the focus of the test.

133 At the time the Tariff was imposed, CLAIMANT'S financial ruin was impending. In 2014, payment of unforeseen government health and safety requirements amounting to 40% of the sales price resulted in CLAIMANT'S near insolvency. Since that event, CLAIMANT'S racehorse section had been operating at a loss for four years, relying upon extensive restructuring measures and a considerable cut of the work force to stay in business [*Cl. Ex. C8; P.O. No. 2, paras. 15, 21*]. In light of these strained financial circumstances, impracticability of bearing a loss five times greater than what CLAIMANT had expected to gain from the contract justifies a lowering of the hardship threshold.

(2) The factors in sub-paras. (a) to (d) Art. 6.2.2 UNIDROIT are satisfied.

134 Factors (a) and (c) are uncontentious and satisfied on the facts. Under Art. 6.2.2(a) UNIDROIT (articles hereafter derived from UNIDROIT), the event must have occurred after the conclusion of the contract. This is satisfied given the Tariff occurred on 19 December 2017 [*P.O. No. 2, para. 25*] after the FSSA was concluded on 6 May 2017 [*Cl. Ex. C5*]. Art. 6.2.2(c) states that the events must have been beyond the control of the disadvantaged party. It is agreed that the imposition of the Tariff by the Equatorianian government was beyond the control of the Parties.

135 Art. 6.2.2(b) excludes hardship events that 'could not reasonably have been taken into account by [CLAIMANT] at the time of the conclusion of the contract'. As discussed (see *supra* para. 122), the Tribunal should find the Tariff was not reasonably foreseeable.

136 Art. 6.2.2(d) states that a party cannot invoke hardship where the risk has been assumed by the disadvantaged party. RESPONDENT may argue by agreeing to DDP delivery, CLAIMANT impliedly assumed the risk associated with delivery. However, CLAIMANT only agreed to DDP delivery in principle on request of RESPONDENT to facilitate expeditious shipping of goods [*Cl. Ex. C4*]. Under Art. 8(1) CISG, conduct of a party is to be interpreted according to their intent where the other party is aware, or could not be unaware of that intent. CLAIMANT'S insistence on including a hardship clause at minimum to address such unforeseeable changes affecting DDP manifests an intention to contractually limit their liability for unforeseen events including Tariffs [*Cl. Ex. C4*]. Therefore, CLAIMANT explicitly sought to reject assumption of the risk.

137 The purpose behind agreeing to DDP delivery was based on CLAIMANT'S significant export experience. In particular, their capacity to negotiate commercially favourable

shipping terms, compliance with import and export formalities, ability to deliver expeditiously and with a lower risk of damage to the goods, collectively justified DDP delivery. The adoption of risk regarding unforeseen events of hardship was not intended on the basis of DDP delivery. CLAIMANT explicitly stated they were 'not willing to [assume] any further risks associated with such a change in the delivery terms'. Thus, the Tribunal should find that CLAIMANT has not assumed the risk.

138 CLAIMANT requests the Tribunal to order RESPONDENT to pay the Adaptation Price, as it has power to adapt the FSSA and the factors in Art. 6.2.2 UNIDROIT are satisfied.

D. In the alternative, the Tribunal should void the FSSA as it gave rise to a gross disparity in favour of RESPONDENT.

139 RESPONDENT induced CLAIMANT to enter into the FSSA that unjustifiably gave them an excessive advantage, by exploiting Mr Ferguson's inexperience in international contracting [*Article 3.2.7 UNIDROIT; Yildirim 2008, p. 94; Cl. Ex. C8*]. This was achieved through RESPONDENT'S lawyer, Mr Krone, misusing his relative advantage as the head of their legal department to convince Ferguson to agree to a narrow hardship clause. This was despite the fact he knew or ought to have known, through access to prior emails, that CLAIMANT strongly favoured a broad clause [*P.O. No. 2, para. 5; ICC Case No. 9029*]. Thus, CLAIMANT respectfully requests the Tribunal order that RESPONDENT pay the adaptation price to rectify this disparity [*Art. 3.2.7(2) UNIDROIT; ICC Case No. 2291/75*].

CONCLUSION OF ISSUE 3

140 CLAIMANT respectfully requests that the Tribunal order RESPONDENT to pay US$ 1,250,000, plus costs, to CLAIMANT based on Clause 12 of the FSSA. Alternatively, the Tribunal is requested to adapt the contract to provide relief to CLAIMANT regarding the imposition of the Tariff under the CISG and UNIDROIT Principles, in isolation or together.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests that the Tribunal finds that:

(1) the Tribunal has jurisdiction and power to adapt the FSSA;

(2) evidence from the Other Arbitration is admissible in this arbitration; and

(3) RESPONDENT be obliged to pay US$ 1,250,000, plus costs, to CLAIMANT based on an adaptation of the contract price.

CERTIFICATE

Melbourne, 6 December 2018

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

(Harrison Frith)

(Genevieve Trinh)

(Lachlan Cameron)

(Ariella Gordon)

(Sarala Baskaran)

(Cameron Inglis)