SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH TO 7 APRIL 2019

MEMORANDUM FOR CLAIMANT

NATIONAL LAW UNIVERSITY, JODHPUR

ON BEHALF OF:	**AGAINST:**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL

ABHINAV GUPTA | ADITYA SURESH | AMAN GUPTA

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LIST OF ABBREVIATIONS

$	Dollar
¶(¶)	paragraph(s)
%	Per cent
§	section
AFCCB	Austrian Federal Chamber of Commercial Business
Ans.	Answer
Arg.	Arguments (Advanced in this Memorandum)
Art(t).	article(s)
BCCI	Bulgarian Chamber of Commerce and Industry
BGH	Bundesgerichtshof
C.	Clause
CEO	Chief Executive Officer
cf.	Confer
Chap.	Chapter
CIETAC	China International Economic & Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cir.	Circuit
Cl.	Claimant
CLOUT	Case Law on UNCITRAL Texts
corp.	Corporation
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
ed.	Edition
et al.	et alia/et aliae/et alii
etc.	et cetra
Ex.	Exhibit
EXW	Ex Works
FSSA	Frozen Semen Sale Agreement

HCCIA	Hungarian Chamber of Commerce and Industry Arbitration
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
id.	Ibidem
INCOTERMS	International Chamber of Commerce, Rules for the Interpretation of Trade Terms, 2010
Letter Fasttrack	Letter by Julia Clara Fasttrack on 3 October 2018
Letter Langweiler	Letter by Joseph Langweiler on 2 October 2018
ltd.	limited
MCPFT	Mexican Commission for the Protection of Foreign Trade
Model Law	UNCITRAL Model Law on International Commercial Arbitration
no.	Number
OLG	Oberlandesgericht
p(p).	page(s)
P.O. 1	Procedural Order No. 1 of 5 October 2018
P.O. 2	Procedural Order No. 2 of 2 November 2018
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts
Res.	Respondent
req.	Request
RFCCI	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

S.C.	sub clause
Sulamerica Case	Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A, [2012] EWCA Civ 638
TF	Tribunal federal, Lausanne
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
v.	Versus
Vis East Rules	The Rules, Sixteenth Annual Willem C. Vis (East) International Commercial Arbitration Moot
Vol.	Volume

STATEMENT OF FACTS

The PARTIES to this arbitration are Phar Lap Allevamento (hereinafter "**CLAIMANT**") and Black Beauty Equestrian (hereinafter "**RESPONDENT"**, collectively "**the PARTIES**").

CLAIMANT is a company based in Capital City, Mediterraneo. It is known for providing champion stallions for breeding purposes in the racehorse section, and it additionally provides frozen semen for artificial insemination in other areas of equine sports.

RESPONDENT is based in Oceanside, Equatoriana. It is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

21 March 2017	RESPONDENT contacts CLAIMANT inquiring about the availability of Nijinsky III for its newly started breeding programme. Since Equatoriana had only temporarily lifted the ban on artificial insemination for race horses, RESPONDENT invites an offer for 100 doses of Nijinsky III's frozen semen.
24 March 2017	CLAIMANT offers 100 doses of the semen at the price of US$99,500 per dose, delivery EXW Capital City.
28 March 2017	RESPONDENT insists on a delivery DDP, and objects to the choice of law and the forum selection clause. RESPONDENT conveys that it could accept the application of the Law of Mediterraneo, if the courts of Equatoriana have jurisdiction.
31 March 2017	CLAIMANT informs the RESPONDENT that it is only willing to accept a delivery DDP against a price increase of US$1000 per dose, transfer of certain risks to the RESPONDENT and inclusion of a hardship clause to temper some of the additional risks taken. CLAIMANT further conveys that it is not acceptable for it to submit to the jurisdiction of the courts in Equatoriana, however the PARTIES can adopt arbitration in Mediterraneo.
10 April 2017	RESPONDENT sends a draft proposal of arbitration clause which provided the seat of arbitration as Equatoriana, and law governing the arbitration clause as Equatoriana.
11 April 2017	CLAIMANT informs the RESPONDENT that its internal policy does not permit it to submit to a foreign law or provide for dispute resolution in country of the counter-party. However, it agrees to submit jurisdiction

	to arbitration in a neutral country, and thus amends the arbitration clause to provide Danubia as the seat of arbitration.
12 April 2017	PARTIES meet in Danubia to discuss the scope of hardship clause and the forum selection in the arbitration clause. However, both the chief negotiators meet with an accident and are replaced for further negotiations and finalization of the Contract.
6 May 2017	PARTIES sign the FSSA, wherein CLAIMANT agree to provide 100 doses of Nijinsky III's semen at the price of US$100,000 per dose to be delivered in 3 shipments delivery DDP. Clause 12 of the Contract protects the CLAIMANT against hardship; Clause 14 provides for the Sales Agreement to be governed by the Law of Mediterraneo, and the CISG; and Clause 15 of the Contract provides dispute resolution by arbitration in Danubia according to the HKIAC rules.
23 November 2017	Mediterraneo imposes 25% tariffs on agricultural products from Equatoriana.
19 December 2017	Equatoriana retaliates by imposing 30% tariffs w.e.f. 15 January 2018, on selected products from Mediterraneo including on animal semen.
20 January 2018	CLAIMANT informs RESPONDENT that the additional tariffs has increased the cost of final shipment of 50 doses by 30%; and accordingly requests RESPONDENT to adapt the price before final shipment is made.
21 January 2018	RESPONDENT'S CEO indicates its intention to maintain a long-term relationship with CLAIMANT, and gives an impression that the PARTIES shall negotiate to increase the price according to changed circumstances. Accordingly, CLAIMANT initiates the final shipment.
12 February 2018	RESPONDENT refuses to pay the additional amount incurred by CLAIMANT on account of additional tariffs and stopped further negotiations.
31 July 2018	Commencement of Arbitration.
2 October 2018	CLAIMANT informs the Arbitral Tribunal of certain information that it has obtained regarding RESPONDENT'S other arbitration proceedings and seeks to submit this as evidence in the current proceedings.
3 October 2018	RESPONDENT objects to submission of such illegally obtained evidence in the current proceedings.

SUMMARY OF ARGUMENTS

Last few years have been financially difficult for CLAIMANT. Therefore, when RESPONDENT asked CLAIMANT to supply 100 doses of frozen semen of its world-renowned racehorse Nijinsky III, CLAIMANT saw it as an opportunity to expand and restructure. Negotiations took place for several months, in order to finally arrive at an agreement which was commercially beneficial for both PARTIES. However, when the Equatorianian government imposed unforeseeable retaliatory tariffs, commercial benefit of the Contract diminished drastically for CLAIMANT, who was already in dire straits financially.

When CLAIMANT sought adaptation of the price, in order to preserve its commercial benefit, RESPONDENT, who had shown willingness to adapt the price during negotiations, being aware of CLAIMANT'S unfortunate financial predicament, refused to do so. However, since the interpretation of the arbitration clause is governed by the Law of Mediterraneo, which is the governing law for the underlying Contract, the Arbitral Tribunal is allowed to adapt the Contract in order to restore the commercial balance. Moreover, the Tribunal has the inherent power to adapt the Agreement on the basis of the arbitration clause as agreed to between the PARTIES **[Issue I]**.

Subsequently, CLAIMANT sought to submit to the Tribunal, the Partial Interim Award from another arbitration where RESPONDENT had sought adaptation of price due to economic hardship, as evidence in the present arbitral proceedings. As the Award in the other arbitration is relevant and material to the present case, its inclusion cannot be denied. Therefore, when RESPONDENT objects to its admissibility because it alleges that the evidence was obtained through an illegal hack or breach of confidentiality, its objections stand devoid of merit, as admissibility cannot be denied on these grounds **[Issue II].**

The additional import tariffs imposed by Equatoriana increased cost of final shipment of 50 doses worth US$5,000,000 by 30%. Since CLAIMANT had a profit margin of 5%, it now suffers a loss of US$1,250,000. It was common ground between PARTIES to transfer some of the risks associated with DDP, including the risk imposed by customs authorities and import restrictions. Accordingly, hardship clause under Clause 12 of the Contract was incorporated, based on which CLAIMANT is entitled to an increase of the purchase price of at least US$1,250,000 due to the higher costs following the imposition of the new tariffs. Alternatively, such a price must be adapted under Art. 79 of the CISG since imposition of additional tariffs is an impediment that was unforeseeable, beyond the control of the CLAIMANT, and has made the Contract more onerous **[Issue III]**.

ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS THE REQUISITE POWER AND JURISDICTION TO ADAPT THE CONTRACT, UNDER THE ARBITRATION AGREEMENT.

1. The arbitration clause in the FSSA (hereinafter **"the contract"**) provides that "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof*" shall be referred to arbitration administered by the HKIAC [*Cl. Ex. 5, ¶15*]. This arbitration clause, which was an addition made by the PARTIES after long negotiations [*P.O. 2, ¶3*], deliberately excluded the sentence concerning the law applicable to the arbitration agreement [*P.O. 2, ¶6*]. This decision was taken, in spite of the new negotiators having full access to the prior emails chain between CLAIMANT'S negotiator Ms. Julie Napravnik and RESPONDENT'S negotiator Mr. Chris Antley [*P.O. 2, ¶5*].

2. CLAIMANT submits that the Arbitral Tribunal must adapt the contract on the basis of this agreement, in light of additional import tariffs of 30% imposed by Equatoriana, as: *first,* the interpretation of the arbitration agreement is governed by the law of Mediterraneo, which allows for adaptation even without the explicit inclusion of an adaptation clause, on the basis of the arbitration agreement **[A]**. *In any case*, the Arbitral Tribunal has the inherent power to adapt the contract in the present case, on the basis of the arbitration clause **[B]**.

A. The interpretation of the arbitration agreement is governed by the Law of Mediterraneo.

3. The application of the choice of law method to the interpretation of the arbitration agreement leads to the conclusion that the rules of law governing the interpretation of the agreement are those which govern its existence and validity [*Fouchard Gaillard Goldman, ¶475*]. This is further affirmed in several decisions, and by various commentators, who note that the material validity, scope, effect and interpretation of an arbitration agreement are governed by its applicable law [*NTPC v. Singer (India), ¶24*; *Dicey, ¶16R-001; see, OLG Dusseldorf (Germany)*].

4. In the present case, the interpretation of the arbitration agreement has to be governed by the Law of Mediterraneo, which governs its material validity, scope and interpretation. This is because: *first,* the three-pronged test as laid down in the *Sulamerica* case is applicable to the present claim **[1]**, and *second,* the application of the test laid down in *Sulamerica* would lead to the conclusion that Mediterranean Law governs the interpretation of the arbitration agreement **[2]. *Third*,** the presumption of separability of the arbitration agreement cannot be extended to cover the present claim **[3].**

1. The three-pronged test in the *Sulamerica* case is the applicable approach to determine the law applicable to the arbitration clause in the present case.

5. The validity, effect and interpretation of the arbitration agreement are governed by its proper law, and such law decides whether the arbitration clause is wide enough to cover the dispute between the parties [*NTPC v. Singer (India), ¶24; see, TS, 825 (Spain), ¶12; see also, Dicey, ¶16R-001*]. In ascertaining this law, the English Court of Appeals laid down a three-pronged test in the *Sulamerica* case, according to which the proper law is to be determined by undertaking a three-stage enquiry into (i) Express choice; (ii) Implied choice; and, (iii) Closest and most real connection, that has to be embarked upon separately and in that order [*Sulamerica v. Enesa (UK), ¶25*].

6. The three-pronged test in the *Sulamerica* case towards ascertaining the applicable law is consistent with the choice-of-law approach of the New York Convention. It is settled position of law that in cases where the New York Convention applies, reference should be made to the law applicable under Article V(1)(a) [*TF, 800 (Switzerland), p. 804*], at the pre-award stage when deciding issues pertaining to the arbitration agreement itself [*see, Della Sanara v. Fallimento (Italy), ¶2; Born, p. 497*]. This is because the application of different criteria at the pre-award stage could entail the danger of divergent decisions [*Lew, Mistelis & Kroll, ¶6-55*]. Therefore, in the present case, where both Mediterraneo and Danubia are parties to the New York Convention [*Vis East Rules, ¶20*], the Convention's choice-of-law rule must be followed.

7. The New York Convention's choice-of-law rules give effect to *express or implied choice* by the parties or, absent such choice, the law of the arbitral seat [*Born, p. 499*]. In this regard, Article V(1)(a) of the New York Convention mentions that recognition and enforcement of an award may be refused where the agreement is "*not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*" [*New York Convention, art. V, c. 1, s.c. (a)*].

8. Furthermore, the three-pronged test in the *Sulamerica* case can also be found under Article 36(1)(a)(i) of the UNCITRAL Model Law, which uses the verbatim phrasing as the New York Convention under Article V(1)(a) in reference to "the *law to which the parties have subjected it (the agreement) to*" [*UNCITRAL Model Law, art. 36, c. 1, s.c. (a), sub-s.c. (i)*]. Accordingly, reasons for applying Article V(1)(a) of the New York Convention have been applied in the context of Art. 36(1)(a)(i) of UNCITRAL Model Law as well [*Lew, Mistelis & Kroll, ¶6-55*]. Since Danubian as well as Mediterranean Arbitration Law is a verbatim adoption of the UNCITRAL Model Law, they further necessitate the application of the *Sulamerica* approach [*P.O. 1, ¶4; P.O. 2, ¶14*].

9. Moreover, even RESPONDENT explicitly acknowledges the application of *the Sulamerica* approach, by making references to express and implied choice have been made in its allegations as to governing law for the arbitration agreement [*Ans. to Notice of Arbitration, ¶14*]. Therefore, applying the three-pronged approach is not only in consonance with rules of law applicable to the PARTIES, but also consistent with their intentions.

2. Mediterranean Law governs the interpretation of the arbitration agreement, according to the *Sulamerica* test.

10. The application of the *Sulamerica* test to the present arbitration agreement, would entail that Mediterranean Law govern its interpretation, as: *first,* there is an express choice of Mediterranean Law as the governing law for the arbitration agreement **[a]**. *Alternatively,* there is an implied choice of Mediterranean Law as the governing law for the arbitration agreement **[b]**. *In any case,* Mediterranean Law has the closest and most real connection to the arbitration agreement **[c]**.

(a) *There is an express choice of the Law of Mediterraneo as the governing law for the arbitration agreement.*

11. Parties can express a choice of law simply by including a choice of law clause in the contract [*Cheshire, North & Fawcett, p. 700*]. Accordingly, where a choice-of-law clause has been inserted, stipulating that the 'agreement' be governed by one country's system of law, parties intend that this express choice of law govern all aspects of the agreement which they signed, including the arbitration agreement [*Arsanovia v. Cruz City (UK), ¶22; Lew, ¶39*]. In the present case, since the contract contains an express provision that the "*Sales Agreement shall be governed by the Law of Mediterraneo*" [*Cl. Ex. 5, ¶14*], this express choice should extend to the arbitration agreement [*Redfern, ¶3.12; Sonatrach v. Ferrell (UK)*]. This is consistent with the ordinary meaning of the term 'Agreement' [*BCY v. BCZ, ¶59*], and reflects the approach of the courts where an express choice of law has been inserted in the underlying contract [*Tzortzis v. Monark Line (UK)*].

12. Further, in the present case, the CISG is applicable as the substantive law to the dispute [*Cl. Ex. 5, ¶15*; *P.O. 1, ¶4*], and governs the interpretation of arbitration clauses in general [*Schlechtriem/Schwenzer, p. 148*]. The CISG represents the most viable transnational option of contract regulation [*Schwenzer/Jaeger, p. 323*], and its principles must be applied as uniformly applicable international law to the present contract [*Hibro v. Trelleborg Industri (Netherlands), ¶2.6*]. This is irrespective of conflicting jurisprudence in Mediterraneo and Danubia as to the applicability of the CISG to the arbitration clause [*P.O. 1, ¶4; P.O. 2, ¶36*]. In this regard, Art. 18(1) of the CISG stipulates that "*silence or inactivity does not in itself amount to acceptance*" [*CISG, art. 18, c. 1*]. Hence, by applying Art. 18 to the present dispute, even if CLAIMANT did not

expressly object to the sentence about the law governing the arbitration clause [*Res. Ex. 2*], its silence cannot be said to amount to acceptance.

13. Also, in instances where there is no unmistakable intention as to a different governing law, the express choice of law has to be applied to the agreement [*NTPC v. Singer (India), ¶25*]. Here, CLAIMANT expressly objected to RESPONDENT's inclusion of the Law of Equatoriana as the law applicable to the arbitration agreement, and clearly put forward in their statement that "*the offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo*" [*Res. Ex. 2; P.O. 2, ¶51(c)*]. Hence, no unmistakable intention as to the contrary can be made out, and thus all suggestions made by RESPONDENT to the contrary were effectively ruled out by CLAIMANT.

14. Lastly, it is settled law that in the presence of an express choice of law, the stipulation of seat of the arbitration should be entirely redundant to determine such a choice of law [*Dicey, ¶16-017; Coal India v. Canadian Commercial Corp. (India), ¶22*]. Therefore, even with the express choice of Danubia as the seat of the arbitration, Mediterranean Law should be applied to the arbitration clause, as an express choice of law in its favour is clearly made out.

(b) *Alternatively, there is an implied choice of Mediterranean Law as the governing law for the arbitration agreement.*

15. While an express choice of law is concerned with the choice that can be directly made out of the clauses in the agreement itself, an implied choice of law concerns itself with the inferred intention of the parties [*Cheshire, North and Fawcett, p. 701*]. There must be some compelling reason to assume that even though a contract contains an express choice of law, there was an implied intention that the arbitration clause (agreement) should be governed by a different law [*Lew, ¶39; ICC Case No. 6379 (1990), ¶¶8, 10*]. Therefore, a search for the implied choice of proper law to govern the arbitration agreement shall conclude that the arbitration agreement is to be governed by the same system of law as the substantive contract [*Sulamerica v. Enesa (UK), ¶26; Svenska v. Geonafta (UK), ¶¶76-77; ICC Award No. 6840 (1991)*]. Accordingly, a presumption of implied choice is made in favor of the governing law of the contract as also the law applicable to the arbitration agreement [*see, BCY v. BCZ (Singapore), ¶55; ICC Case No. 11869 (2011), ¶12*].

16. To determine parties' implied choice with reasonable certainty, it has to be inferred by the terms of the contract, and the circumstances of the case [*Giuliano and Lagarde Report, Title II, ¶3; Jonathan Hill, p. 328; Marubeni Hong Kong v. Mongolian Govt. (UK), p. 885; Aeolian v. ISS Machinery (UK), p. 645*]. Accordingly, the PARTIES' intentions need to be understood in light of the interpretative tools provided by the CISG under Art. 8, which governs the interpretation of the arbitration clause in the present case [*Arg., ¶13*]. The CISG clearly states that contractual

interpretation should be according to the actual subjective intent of the parties [*Fruits and Vegetable Case II (Switzerland)*], and if such intention is not determinable, then it must be interpreted according to the standard of a hypothetical reasonable person of the same kind as of the other party having the same circumstances [*CISG, art. 8, c. 2; Schlechtriem/Schwenzer, p. 155; Honnold, Art. 8, ¶107*].

17. In the present case, the intent of the PARTIES has to be ascertained by an examination of prior negotiations and relevant circumstances [*CISG, art. 8, c. 3*]. RESPONDENT's sole objection to the applicable law and dispute resolution clauses was that it thought it was "*not appropriate that your (Mediterranean) law applied and your courts have jurisdiction*" [*Cl. Ex. 3*][*Emphasis in original*]. Looking into the reasonability of a person of the same kind and understanding of the recipient [*Kroll, p. 150*], the emphasis on the word '*and*' in the aforementioned statement has to be interpreted as an objection solely to the conjunctive application of Mediterranean Law as both, the applicable law and the location of dispute resolution. This objective interpretation of RESPONDENT's statement indicates that RESPONDENT agreed that if the jurisdiction of Mediterranean courts is taken away, Mediterranean Law would still be applicable.

18. Subsequent negotiations between the PARTIES, where RESPONDENT accepted the application of the Law of Mediterraneo and incorporated the same directly into the agreement of 6 May 2017 [*Res. Ex. 2; Cl. Ex. 5, p. 15*], further point to such an implied choice. While the two main negotiators were involved in an accident, the subsequent negotiator for RESPONDENT, Mr. Julian Krone had access to the prior e-mails [*P.O. 2,* ¶5]. Accordingly, if express inclusion of Danubian Law was so desired, the same could have been inferred from the negotiations and drafts exchanged between the PARTIES, particularly those concerned with the applicable law [*Res. Ex., 1, 2, 3; Cl. Ex. 2, 3, 4*], as well as from Mr. Antley's notes [*Res. Ex. 3*]. Even Mr. Krone applied his reasonable understanding of Mr. Antley's notes, and concluded that RESPONDENT desired a neutral venue for the arbitration, and accordingly wanted to clarify the law applicable to the Contract, which would also apply to the arbitration clause [*Res. Ex. 3*].

19. Therefore, in light of these negotiations between the PARTIES, as well as the conscious and explicit exclusion of the sentence concerning the law applicable to the arbitration clause [*P.O. 2, ¶6*], even if Mediterranean Law cannot be read in as an express choice of law for the arbitration agreement, it has to be read in as an implied choice of law. Thus, there is no need for an enquiry into the third stage of the *Sulamerica* analysis, dealing with the closest and most real connection.

(c) *In any case, Mediterranean Law has the closest and most real connection to the arbitration agreement.*

20. Article 4(1) of the Rome I Regulation puts forward a closest connection test when the law applicable has not been chosen in accordance with Article 3, and applies this principle to severable parts of contracts as well [*Rome I Regulation, art. 4, c. 1*]. The closest connection default rule of the Regulations has been applied by both national courts and arbitral tribunals to the choice of the law governing international arbitration agreements [*Born, p. 504; Sulamerica v. Enesa (UK), ¶16; see, BGH, 679 (Germany), ¶15; see also, Owerri v. Dielle (Netherlands), ¶9*].

21. In this regard, there is a rebuttable presumption that the contract is most closely connected with the country in which the party which is to effect the 'performance characteristic of the contract' has its central administration [*Redfern, ¶3.210; see, Rome I Regulation, art. 4, c. 2*]. Characteristic performance in this regard is the performance for which the payment is due, e.g. the delivery of goods [*Giuliano and Lagarde Report, p. 20*]. Particularly, in cases where the contract involves sale of goods, the characteristic performance is that of the seller delivering the goods [*Cheshire, North and Fawcett, p. 712; ICC Case No. 14667 (2011), ¶163*]. In the present case, the delivery DDP put all the obligations on CLAIMANT [*Cl. Ex. 5, ¶8*], and CLAIMANT had to accordingly ship the doses, take care of all import and export documentation, and bear the costs for testing and shipment [*Cl. Ex. 5, ¶¶.4, 8; Cl. Ex. 3*]. Therefore, the characteristic performance of the Contract was performed by CLAIMANT in Mediterraneo, where it is registered and located [*Notice of Arbitration, ¶1*], raising the presumption that the Contract is most closely connected with Mediterraneo.

22. In addition to this, the place of conclusion of the contract has also been identified as a criteria to determine closest connection [*NTPC v. Singer (India), ¶17; Cheshire, North and Fawcett, p. 709*], where the parties are of two different nationalities. In the present case, it can be seen that the Contract was concluded at Mediterraneo [*P.O. 2, ¶13*].Thus, applying the closest connection test, it is established that Mediterranean Law governs the arbitration agreement.

3. <u>The presumption of separability does not extend to cover the present claim.</u>

23. RESPONDENT alleges that under both Danubian and Mediterranean Arbitration Law, which are verbatim adoptions of the UNCITRAL Model Law [*P.O. 1, ¶4; P.O. 2, ¶14*], the arbitration clause is a separate agreement [*Ans. to Notice of Arbitration, ¶14*]. Accordingly, it alleges that the law of the seat of arbitration applies to the arbitration clause, as against the law of Mediterraneo, which is the law governing the underlying contract [*id.*]. However, when RESPONDENT relies on the same to contend that the Danubian Law governs the interpretation of the arbitration clause [*Ans. to Notice of Arbitration, ¶13*], it relies on an erroneous interpretation of the doctrine of separability.

24. This is because Article 16(1) of the UNCITRAL Model Law from which this doctrine of separability is derived, seeks to restrict its application to "*objections with respect to the existence or validity of the arbitration agreement*" [*UNCITRAL Model Law, Art. 16, c. 1*]. Thus, it provides that an arbitration clause which forms part of a contract be treated as an independent agreement "*for that purpose*" [*id.*]. This implies that while a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause [*UNCITRAL Model Law, Explanatory Note, ¶24; Cecrop Co. v. Kinetic Sciences Inc. (Canada), ¶25; Hebdo Mag. Inc. v. 125646 Canada Inc. (Canada)*], the arbitration agreement cannot be separated from the substantive contract for the purpose of merely interpreting it [*Sulamerica v. Enesa (UK), ¶26; Renato Nazzini, p. 684*].

25. Moreover, the 2018 HKIAC Rules, applicable to the conduct of the proceedings in the present case [*P.O. 1, ¶II, point 1*] also provide for the arbitration clause to be treated as an agreement independent of the contract, solely "*for the purposes of Article 19*" [*2018 HKIAC Rules, art. 19, c. 2*]. Since Art. 19 of the HKIAC Rules is concerned with the "*Jurisdiction of the Arbitral Tribunal*" and with the competency of arbitrators to rule on their own jurisdiction [*2018 HKIAC Rules, art. 19, c. 1*], the arbitration clause is separable from the underlying contract only for this purpose, and not for interpreting the clause itself.

26. In the present case, CLAIMANT demands additional remuneration on the basis of adaptation of the Contract, which necessitates ascertaining the governing law of the arbitration clause [*Notice of Arbitration, ¶16; Ans. to Notice of Arbitration, ¶13*]. However, because separability is simply concerned with protecting the validity of the agreement, the arbitration clause cannot be separated from the underlying contract [*Moser, p. 137; Yves Derains, p. 16; see, Ferris v. Plaister (Australia)*]. Accordingly, the arbitration clause which contains no choice-of-law wording as to the law governing its interpretation [*Ans. to Notice of Arbitration, ¶17*], has to be considered part of the underlying contract. Thus, the law of Mediterraneo applies to the interpretation of the arbitration agreement. Consequently, RESPONDENT'S objection to jurisdiction, which solely concerns the jurisdiction to adapt the price [*P.O. 2, ¶48*], must be dismissed.

B. The Arbitral Tribunal has the inherent power to adapt the present contract, on the basis of the arbitration clause in the agreement

27. CLAIMANT submits that it is entitled to higher remuneration on the basis of adaptation of the price [*Notice of Arbitration, ¶18*]. However, RESPONDENT, in challenging the tribunal's jurisdiction to adapt [*Ans. to Notice of Arbitration, ¶; P.O. 2, ¶48*], has raised questions as to whether the arbitrators have the power to adapt, and whether such empowerment is an inherent power of the tribunal under the arbitration agreement [*Notice of Arbitration, ¶13*].

CLAIMANT submits that the Arbitral Tribunal has this inherent power to adapt the present contract.

28. As a transnational rule, arbitrators have a duty to proactively conduct proceedings in order to mitigate damages to either party [*Bentolila, p. 224; Brunner, p. 496*]. Accordingly, the consequences of the commitments entered into by both parties has to be looked into in order to determine whether the tribunal has the power to adapt the contract [*Amco Asia v. Indonesia (ICSID), ¶14; see, Ceskoslovenska v. Slovak Republic (ICSID), ¶34*]. In the present case, RESPONDENT'S negotiator, Mr. Antley explicitly agreed that the arbitrators were to be given the power to adapt the contract [*Cl. Ex. 8*]. He subsequently sought to make this power explicit, by drawing a '*connection of hardship clause with arbitration clause*" [*Res. Ex. 3*]. Therefore, the power to adapt was envisaged as a reasonable consequence, in the case that the PARTIES could not agree on an amendment as to price.

29. Moreover, the broad and general nature of arbitration clauses necessitates that the tribunal adapt contracts based on the needs and intentions of both parties, in the interest of improving the efficacy of the dispute resolution procedure [*Julian Bordacahar (Permanent Court of Arbitration), IBA Arbitration Day Discussions*]. Therefore, the Arbitral Tribunal has the duty to ascertain the rights and obligations of the parties with reference to these particular contractual arrangements [*Himpurna California v. Perusahaan Listruik*], and the scope of these powers are determined by the applicable substantive law [*Nicklisch, pp. 38-39*].

30. In the present case, the CISG undeniably applies to the Contract, as well as to the arbitration agreement [*Cl. Ex. 5; Arg., ¶13*]. Hence, Art. 8 of the CISG can be relied upon to determine the intention of the PARTIES, in order to ascertain the powers of the tribunal [*Fouchard Gaillard Goldman, p. 334*], by ascertaining their express or implied intent. In this regard, prior and subsequent negotiations between the PARTIES must be analyzed [*CISG, art. 8, c. 3; Bentolila, p. 198*]. Here, CLAIMANT indicated its unwillingness to undertake any risks associated with a change in delivery terms, particularly those associated with customs regulations and import restrictions [*Cl. Ex. 4*]. Accordingly, the arbitration clause inserted by the PARTIES after subsequent negotiations, contemplated that "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof*" is to be referred to the HKIAC [*Cl. Ex. 5, ¶15*]. Therefore, the adaptation of the contract, which concerns interpretation of the arbitration agreement as part of the inherent contract [*Arg., ¶2*], is a power that the wording of the arbitration clause contemplates within its ambit of collateral disputes [*see, JLM Industries v. Stolt-Nielsen (USA), p. 172, cited in Brekoulakis, p. 158*].

31. Moreover, Mr. Shoemaker's statement, "*if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price*" [*Res. Ex. 4*], implies that he understands that adaptation is possible and that, given the present situation, would be justified. This led CLAIMANT to believe that both PARTIES were on the same understanding as to the need to adapt the contract based on the PARTIES' present predicament. In acknowledging this need, even Mr. Shoemaker recognized the arbitrators' power to adapt [*cf. Cl. Ex. 8*]. Therefore, even if the arbitration agreement is governed by a different law, an interpretation of RESPONDENT'S conduct under Art. 8 of the CISG, indicates that the tribunal has the inherent power to adapt the contract on the basis of the arbitration agreement [*Belgische v. Distrigas (Belgium), cited in Brunner, p. 495*].

Conclusion to the First Issue

While the arbitration agreement in the present case raises issues pertaining to arbitrators' power to adapt and the law governing the interpretation of the arbitration agreement, it is evidently clear that the nature of the arbitration agreement as agreed upon by both CLAIMANT and RESPONDENT, necessitates the application of Mediterranean Law to the arbitration agreement. This jurisdiction of Mediterranean Law leads to the direct inference that the arbitrators have the power to adapt the contract, even in the absence of an explicit adaptation clause in the agreement.

II. THE PARTIAL INTERIM AWARD OBTAINED FROM THE OTHER ARBITRATION PROCEEDINGS MUST BE ADMITTED AS EVIDENCE.

32. CLAIMANT has received information that RESPONDENT, who is denying adaptation of the price in the present case due to imposition of unforeseeable additional import tariffs [*Answer to Arbitration, ¶12-21*], had itself pleaded for an adaptation of the price due to additional tariffs in a previous arbitration conducted under the HKIAC Rules [*Letter Langweiler, p. 50. ¶2*]. Accordingly, CLAIMANT seeks to admit the Partial Interim Award obtained in that other arbitration on 29 June 2018 [*P.O.2, ¶39*] as evidence in the present case.

33. However, RESPONDENT asserts that the information relied on by CLAIMANT from the other arbitration proceedings has been obtained by either a breach of confidentiality or illegal hacking into RESPONDENT'S systems, and hence should not be admitted as evidence in the current proceedings [*Letter Fasttrack, p. 51, ¶3*]. Contrary to RESPONDENT's assertions, CLAIMANT is entitled to submit the evidence from the other arbitration proceedings, regardless of the source of the information. This is because: *first,* even if the information has been obtained through breach of confidentiality, its admission is not precluded from being admissible as evidence as it is relevant to the present case **[A]**. *Second,* the Arbitral Tribunal is not bound to exclude

evidence, even if it is obtained in an illegal manner so long as it is relevant to the present case **[B]**. *Third*, CLAIMANT should be given full opportunity to present its case, and thus the information must be admitted as evidence **[C]**. *Fourth,* CLAIMANT is entitled to submit the evidence from the other arbitration proceedings based on the principle of good faith **[D]**.

A. The Arbitral Tribunal must admit the evidence, even if the information has been obtained through breach of confidentiality as it is relevant to the present case.

34. The PARTIES have agreed to submit their dispute to arbitration under the 2018 HKIAC Rules [*Cl. Ex. 5, ¶ 15*]. Moreover, the previous arbitration is also governed by HKIAC Rules, 2013 [*Letter Langweiler, p. 50, ¶ 2*]. Here, RESPONDENT contends that since the 2013 HKIAC Rules provide for an express confidentiality obligation, the Partial Interim Award from that arbitration is inadmissible [*Letter Fasttrack, p. 51, ¶ 1*]. However, CLAIMANT submits that the Arbitral Tribunal must admit the evidence as: *first*, existence of a confidentiality provision does not bar the admissibility of the evidence **[1]**, and *second*, the evidence sought to be presented is relevant to the case **[2]**. Moreover, the Arbitral Tribunal should allow the evidence in order to reach consistent arbitral solution on the issue of adaptation of contract due to hardship **[3]**.

1. <u>The mere existence of confidentiality provisions does not bar the admissibility of evidence in the present case.</u>

35. The question regarding admissibility of evidence obtained from a breach of confidentiality has not been specifically dealt with under the 2018 HKIAC Rules [*Connor & Talib, p. 193*]. Generally, Arbitral tribunals have wide discretion to determine the procedure governing such situations, and to accommodate specific and distinct features of each case [*id.; Born, p. 2145; UNCITRAL Model Law, Explanatory Note, ¶35*]. Accordingly, the English Privy Council has permitted relying upon an award obtained from the other arbitration in subsequent arbitral proceedings, even with express confidentiality clause governing such proceedings [*Associated Electric v. European Reinsurance (UK)*]. Thus, even if the provision of confidentiality governed the previous arbitration, it does not create a binding obligation upon the Arbitral Tribunal in the present case, to exclude the evidence on the basis of such confidentiality.

36. Moreover, even though confidentiality of arbitral proceedings is of paramount importance to parties, it is a commonly accepted proposition that parties to an arbitration are not to expect that each and every facet of the arbitral proceedings will be kept confidential in all situations [*Esso Australia v. Plowman (Australia); Hassneh Insurance v. Steuart (UK)*]. In this regard, confidentiality cannot act as an obligation not to disclose the proceedings or documents for the purposes of the arbitration [*AAY v. AAZ (Singapore)*]. Therefore, relevance and due process

requirements should be taken into account by the present tribunal, while determining the admissibility of the evidence.

37. In the present case, RESPONDENT might seek to exclude evidence on grounds of commercial or technical confidentiality, by relying on the IBA Rules [*2010 IBA Rules, art. 9, c. 2, s.c. (e)*]. Generally, parties to an arbitration rely on these grounds of commercial or technical confidentiality so as to protect their trade secrets and other related information [*Marghitola, p. 90, 91*]. In this regard, Art. 9(2)(e) of the IBA Rules provide for the exclusion of evidence by the Tribunal on "*grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling"* [*2010 IBA Rules, art. 9, c. 2, s.c. (e)*]. However, evidence on these grounds can only be excluded if such grounds are compelling, and in determining whether particular grounds are compelling, the tribunal has wide discretion [*IBA Review Subcommittee, p. 26; Marghitola, p. 88*]. In this context, grounds are said to be compelling when the information has high economic value attached to it, or where it would lead to significant damage to the party [*Marghitola, pp. 92, 93; Telesat v. Boeing Satellite (Canada)*].

38. In the present case, the Partial Interim Award that the CLAIMANT seeks to submit simply deals with the power of the tribunal to adapt the contract, and RESPONDENT's claim in favour of the existence of such power [*P.O.2, ¶39; cf, Letter Langweiler, p. 51, ¶2*]. Thus, the information from the other arbitration does not contain any sensitive information such as RESPONDENT'S trade secrets, and hence does not have high economic value. Therefore, there are no compelling grounds for exclusion of evidence, and the Arbitral Tribunal has to accordingly determine admissibility by taking into account the relevant facts and circumstances of the present case.

2. <u>The evidence sought to be presented is relevant to the case and material to its outcome.</u>

39. The IBA Rules have been widely accepted as the best practice for the taking of evidence in international arbitration [*Marghitola, pp. 2,3*]. For evidence to be admitted, the two-pronged standard of relevance and materiality under IBA Rules needs to be taken into consideration [*Born, p. 2362; Marghitola pp. 47,48*]. A similar approach can be found under the 2018 HKIAC Rules, which provide under Art. 22.3, that "*the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome*" [*2018 HKIAC Rules, art. 22.3*]. Accordingly, the evidence has to be *prima facie* relevant and material to the resolution of the case [*Marghitola pp. 47, 48; Waincymer. P. 858*].

40. In this regard, the term 'relevant to the case' implies that the evidence should substantiate the contentions of the party and not necessarily relevant to the decision of the tribunal [*id.*]. And, 'materiality of the evidence' implies that the arbitral tribunal must deem it "necessary" that the document is needed as an element, to allow a complete consideration as to whether a factual

allegation is true or not' [*Hilmar Raeschke-Kessler, p. 427*]. In this context, 'necessary' refers to evidence required so as to enable a party to optimally present the case [*Newman/Hill, p. 321*].

41. In the present case, CLAIMANT makes submissions that both PARTIES agreed for adaptation of contract if position of one party becomes extremely onerous due to occurrence of unforeseen events, including imposition of additional import tariffs [*Arg. ¶¶63-66; Notice of Arbitration, ¶13, 18*]. RESPONDENT, who is Claimant in the other arbitration has made similar claims, however it is vigorously denying CLAIMANT's assertions in the present case [*Letter Langweiler, p. 50, ¶2*]. This indicates that although RESPONDENT recognizes the *need* for adaptation of contract on the basis of hardship in the previous arbitration, it is challenging such adaptation in the present case solely because it is not affected negatively by imposition of tariffs in the present case [*id.*]. Therefore, the Partial Interim Award becomes extremely relevant as it affirms the assertion that both PARTIES had intended and agreed to adapt the contract in the event of hardship.

42. Moreover, it must be noted that Mr. Antley, the prime negotiator from RESPONDENT'S side in conclusion of FSSA [*Cl. Ex. 5*], also negotiated the contract underlying the previous arbitration proceedings, where he explicitly recognized the possibility of adaptation of contract [*P. O. 2, ¶39; Cl. Ex. 8, ¶*]. These facts related to the previous arbitration substantiates CLAIMANT'S submissions that RESPONDENT acknowledged the need for adaptation of price, with its subsequent conduct indicating that the price will be renegotiated in the event of unforeseen import tariffs [*Cl. Ex. 8*]. Therefore, the Partial Interim Award is material to the resolution of the dispute as it is necessary to determine terms of adaptation agreed by the PARTIES.

3. Moreover, the Arbitral Tribunal should allow the evidence in order to reach consistent arbitral solution on the issue of adaptation of contract due to hardship.

43. It has been opined that in cases where either the issue in dispute is similar, or where similar procedural rules are applied, tribunals can refer to past decisions [*Bentolila, p. 155*]. Reliance can be placed on these past arbitral solutions to ensure expediency of the process [*id. p. 164; Ambiente Ufficio v. Argentina (ICSID)*], and to impart legitimacy to the award in the form of consistent arbitral solutions [*Bentolila, pp. 167, 168*]. Also, absolute reliance on confidentiality presents an unacceptable compromise on transparency and inhibits the promotion of consistent arbitral solutions by tribunals [*Waincymer, p. 798*]. Accordingly, previous arbitral decisions can be relied upon by subsequent tribunals in other cases, in furtherance of development of a consistent arbitral solution [*Bentolila, p. 164*].

44. In the previous arbitration, RESPONDENT sought adaptation of the contract due to the unforeseeable tariffs imposed by Mediterraneo [*P.O. 2, ¶39*]. Similarly, in the present case, CLAIMANT seeks adaptation of the contract due to unforeseeable tariffs imposed by

Equatoriana [*Notice of Arbitration, ¶¶18, 19*]. It must be noted that the Partial Interim Award passed in the previous arbitral proceedings established the tribunal's power to adapt the contract due to hardship [*P.O.2, ¶39*]. Here, CLAIMANT makes submissions that the Arbitral Tribunal must adapt the contract in light of unforeseeable additional import tariffs [*Arg. ¶¶56, 83*]. Accordingly, since both the arbitrations are governed by the HKIAC Rules, and present similar facts and circumstances, the Arbitral Tribunal should admit the evidence into the present case, in order to develop consistent arbitral solutions on the issue of adaptation of contract due to hardship.

B. The evidence is not bound to be excluded on the basis that it was illegally obtained.

45. There are no fixed rules governing the character or weight of evidence in international arbitration [*Brower, p. 47*], and the tribunal can adopt its own rules of evidence [*Lew, Mistellis & Kroll, p. 556*]. The technical rules of evidence are not binding upon arbitral tribunals [*Waincymer, p. 792; Born, p. 285; Card v. Stratton (USA)*], and the arbitrators often focus on establishing facts necessary for determination of the issue [*Redfern, p. 377*]. This makes admissibility of illegally obtained evidence a discretionary matter for the tribunal, and such discretion depends entirely on the circumstances of the case [*Methanex v. US(UNCITRAL); EDF v. Romania (ICSID)*]. Therefore, the criteria for admissibility of evidence is of relevance and not of illegality of the source of evidence. [*Ready Bake Foods Inc. v. U.F.C.W (Canada)*]. In the present case, as already established, the information related to the previous arbitration is relevant to the case [*Arg. ¶¶ 41, 42*]. Thus, it must be admitted as evidence irrespective of the illegality of the source of such information.

46. Moreover, tribunals have often admitted evidence where the information is available on WikiLeaks [*Hully Enterprises v. Russian Federation (PCA); ConocoPhillips v. Venezuela (ICSID)*] and information obtained through hack of government's computer system has been admitted as evidence [*Caratube v. Kazakhstan(ICSID)*]. Although involvement of a party in hacking can be considered as a bar on admissibility [*Libananco v. Turkey (ICSID); EDF v. Romania (ICSID)*], in the present case, the information was obtained from an agency which provides intelligence in horseracing industry and can be accessed by the public on payment of a certain fee [*P.O.2, ¶41*]. More importantly, CLAIMANT itself was neither involved in obtaining evidence in an illegal manner as alleged by the RESPONDENT, nor did it have any information regarding the source of the information [*cf. P.O. 2, ¶] 41*]. Thus, CLAIMANT has approached the Tribunal with clean hands, and the Tribunal should admit the evidence without having any due regard to the objections of the RESPONDENT related to illegality of the evidence.

C. CLAIMANT should be given full opportunity to present its case, and thus the information must be admitted as evidence.

47. Art. 13.5 of the 2018 HKIAC Rules, which are the applicable rules for the conduct of arbitral proceedings in the present case [*P.O.1, ¶II, point 1*], provides that the arbitral tribunal and the parties "*shall do everything necessary to ensure fair and efficient conduct of the arbitration*" [*2018 HKIAC Rules*]. Similarly, Art. 18 of both Mediterranean Arbitration Law and the DAL, which are verbatim adoptions of the UNCITRAL Model Law [*P.O. 1, ¶4; P.O. 2, ¶14*], provides that the parties to the arbitration should be treated equally and should be given fair opportunity to present their case [*UNCITRAL Model Law, art. 18*]. This requirement under Art. 18 is mandatory in nature and cannot be overridden by the principle of party-autonomy [*Lew, Mistelis & Kroll, pp. 525, 526; Waincymer, p. 754*]. Accordingly, if an award is rendered in violation of the right to fair hearing, it is liable for annulment [*Sheldon v. Vermonty (USA); Generica Ltd v. Pharm. Basics (USA); Shroff, p. 801*].

48. Thus, parties have the right to be heard on all the issues which are relevant and material to the resolution of the dispute [*Soh Beng v. Fairmount (Singapore)*], and this right is a crucial element of fair hearing [*Commentary, Model Law, p.47; Lew, Mistellis & Kroll, p. 559*]. Therefore, in case a party is not given full opportunity to present its case, it results in denial of its right to fair hearing.

49. As already established, the information under question is relevant and material to the outcome of the case, as RESPONDENT recognises the need for adaptation on the basis of hardship [*Arg., ¶¶ 41*]. Therefore, in the interest of fair conduct of arbitral proceedings as per Art.13.5 of the rules and Art. 18 of DAL, the Arbitral Tribunal must admit the Partial Interim Award from the previous arbitration as evidence.

D. CLAIMANT is entitled to submit the evidence from the other arbitration proceedings based on the principle of good faith.

50. The duty to cooperate in good faith in the resolution of the dispute, is a fundamental aspect of parties' agreement to arbitrate [*Born, p. 2025; Waincymer, p. 799*]. This includes cooperation in getting access to the documents necessary to ensure prompt resolution of the dispute [*Born, p. 386; Preamble, IBA Rules, ¶ 3*]. By virtue of such duty, the parties must not attempt to obstruct the arbitral proceedings [*Methanex v. US (UNCITRAL)*]. The evidence from the previous arbitration makes it clear that RESPONDENT recognised the need for contract adaptation where there is an unforeseeable change of circumstances [*Letter Langweiler, p. 50, ¶ 2*]. However, RESPONDENT is objecting to the admissibility of the evidence only to avoid bearing the burden of increased tariffs, because unlike in the previous arbitration, RESPONDENT is not negatively

affected by the tariffs in the present case. Therefore, RESPONDENT failed in its duty to cooperate in good faith and getting access to information related to other arbitral proceedings.

51. Moreover, the attempts made to gain access to the information can be considered to determine if a party acted in good faith or not [*Vasani & Jones, p. 147; Methanex v. USA(UNCITRAL); Libananco v. Turkey(ICSID)*]. CLAIMANT has acted in good faith and did not commit any unlawful act while collecting evidence since the information about the arbitral proceeding was received by Mr. Kieron Velazquez, who was not involved in said proceedings [*P.O. 2, ¶40*].

52. Further, the obligation to maintain confidentiality extends solely to parties, the arbitral tribunal, Emergency Arbitrators, experts, witnesses, secretary of the arbitral tribunal and HKIAC [*cf. 2013 HKIAC Rules, artt. 42.1, 42.2*]. Since Mr. Velasquez resigned on 30 May 2018, and the Award was rendered on 29 June 2018, he was not part of CLAIMANT'S company at the time of institution of the arbitral proceedings. Accordingly, the requirement of confidentiality cannot be extended to him [*P.O.2, ¶¶39, 40*]. Moreover, CLAIMANT had no knowledge of the source of the information procured by the intelligence agency and was in itself, not involved in obtaining it from the source [*Id, ¶ 41*]. As a result, the evidence cannot be excluded on the basis of the misconduct on part of CLAIMANT. Therefore, based on the principle of good faith, the Arbitral Tribunal must admit the evidence from previous arbitration proceedings.

Conclusion to the Second Issue

RESPONDENT'S objections regarding admissibility of evidence are solely strategic and founded on bad faith, in how it seeks to exclude relevant evidence solely on grounds of self-interest and personal gain. Accordingly, since the information is relevant to the present case and RESPONDENT lacks genuine reasons to exclude the admissibility of this evidence, the tribunal must allow for the same to be admitted in the interest of commercial prudence and good faith.

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE.

53. RESPONDENT entered into FSSA to buy 100 doses of Nijinsky III's frozen semen at the price of US$ 100,000 per dose from CLAIMANT on 6 May 2017 [*Cl. Ex. 5*]. According to the Contract, the PARTIES had agreed upon a DDP delivery against a moderate price increase, transfer of certain risks to RESPONDENT and inclusion of a hardship clause to temper some of the additional risks taken by CLAIMANT [*cf. Cl. Ex. 5, ¶¶8, 12; cf. P.O. 2, ¶8*]. In light of Mediterraneo's newly imposed 25% tariffs on agricultural products from Equatoriana [*Notice of*

Arbitration, ¶*9*], the Equatorianian government retaliated by imposing 30% tariffs on selected products from Mediterraneo, including animal semen [*Cl. Ex. 6*].

54. The unexpected import tariffs increased the cost of final shipment of 50 doses by 30%, and CLAIMANT had to bear an additional amount of US$ 1,500,000 [*cf. Cl. Ex. 7*]. Since CLAIMANT had a profit margin of 5%, it now suffers a loss of US$ 1,250,000 from the transaction [*Notice of Arbitration,* ¶*18*]. However, CLAIMANT and RESPONDENT have opposing views on whether the price should be adapted in light of the tariffs, thereby leading to a disagreement between the PARTIES.

55. CLAIMANT submits that it is entitled to an increase in the purchase price of 25% of the final shipment amounting to US$ 1,250,000 under Clause 12 of the Contract **[A]**. In any case, CLAIMANT is entitled to such adaptation of the price under Art. 79 of the CISG **[B]**.

A. CLAIMANT is entitled to an increase in the purchase price of 25% of the final shipment amounting to US$ 1,250,000 under Clause 12 of the contract.

56. CLAIMANT is entitled to US$ 1,250,000 due to the higher costs as: *first,* Clause 12 of the Contract covers the imposition of such additional tariffs **[1]**. *Second*, CLAIMANT is entitled to an increase in the purchase price based on the principle of 'commercial common sense' or theory of business efficacy **[2]**. *Third,* CLAIMANT is also entitled to an increase in the purchase price based on the principle of '*pacta sunt servanda*' **[3]**.

1. Clause 12 of the Contract covers imposition of such additional tariffs.

57. Clause 12 of the Contract provides that the "*Seller shall not be responsible for any hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Cl. Ex. 5,* ¶*12*]. Price must be increased under Clause 12 of the Contract as: *first,* the express language of the clause protects the SELLER (CLAIMANT) against the imposition of such import tariffs **[a]**. *Second,* the PARTIES intended to include imposition of additional tariffs under Clause 12 of the Contract **[b]**. *Third,* the contextual interpretation of clause 12 also indicates that SELLER (CLAIMANT) is protected against the imposition of tariffs **[c]**. *Alternatively,* an objective interpretation of Clause 12 indicates inclusion of imposition of such additional tariffs **[d]**.

(a) *The express language of the clause protects SELLER (CLAIMANT) against the imposition of such import tariffs.*

58. The CISG provides that while interpreting a contractual provision, regard must first be given to the PARTIES' express agreement [*Schwenzer (2010), p.156*]. Clause 12 of the Contract expressly protects the SELLER against any hardship caused by additional health and safety requirements,

and against such "unforeseen" events that are "comparable" to additional health and safety requirements which make the Contract more "onerous" [*Cl. Ex. 5, ¶12*].

59. Equatoriana had always been an ardent supporter of free trade and had except for one occasion, never retaliated with direct measures against other countries' import restrictions affecting Equatorianian imports [*Cl. Ex. 6*]. The 30% import tariffs imposed by the Equatorianian government came as a surprise even to the informed circles, and were therefore completely "unforeseen" [*cf. id.*].

60. Further, the import tariffs are imposed by the custom authorities in a similar manner as health and safety requirements [*Customs*]; and both the additional health and safety measures, and additional import tariffs increase the cost/price of imported goods [*Cl. Ex. 4; P.O. 2, ¶21; Cl. Ex. 7*]. This indicates that import tariffs are similar and "comparable" to additional health and safety requirements.

61. Lastly, a contract is "onerous" when the obligations attached to it counter-balances or exceeds the advantage to be derived from it [*Black's law, "onerous"*]. In the present case, the additional import tariffs of 30 % not only destroys CLAIMANT'S profit margin of 5% but causes a loss of US$ 1,250,000 to CLAIMANT [*Notice of Arbitration, ¶18*]. Thus, due to these import tariffs, CLAIMANT'S obligation of shipping 50 doses of semen to RESPONDENT far exceeds the advantage that CLAIMANT derives from the Contract [*cf. id.*]. In other words, the additional import tariffs have made the Contract more "onerous" for CLAIMANT [*id.*].

62. Since the import tariffs are "comparable" to additional health and safety requirements [*Arg., ¶60*], were completely "unforeseen" [*Arg., ¶59*], and has made the Contract more "onerous" [*Arg., ¶61*], the tariffs are covered squarely within the express wording of Clause 12 of the Contract [*cf. Arg., ¶58*].

(b) *The PARTIES intended to cover imposition of import tariffs under Clause 12 of the Contract.*

63. In spite of the express language of Clause 12 of the Contract, RESPONDENT insists on an interpretation that excludes the imposition of additional import tariffs from its ambit. However, RESPONDENT'S claim is not in consonance with the rules of contractual interpretation under the CISG. Art. 8(1) of the CISG provides that contractual provisions must be interpreted on the basis of subjective intent of the parties, where the other party knew or could not have been unaware of what that intent was [*Schwenzer (2010), pp.154,156; Honnold, p.116; Fruits and Vegetables Case (Switzerland)*]. To establish this subjective intent, it is necessary to consider all relevant circumstances, such as the purpose of the contract and preliminary negotiations, including any practices established between the parties, usages and any subsequent conduct of the parties [*Schwenzer (2010), p. 152; CISG, Art. 8(3)*].

64. In this regard, the preliminary negotiations between the PARTIES regarding the change in delivery terms and inclusion of Clause 12 of the Contract to protect SELLER against certain risks must be considered to determine the PARTIES' intention behind such clause. It was RESPONDENT who had requested CLAIMANT to change the delivery terms to DDP as against CLAIMANT'S standard terms of delivery EXW [*Cl. Ex. 3; P.O. 2, ¶9*]. RESPONDENT wanted this change because it required the delivery urgently, and because CLAIMANT had much greater experience in the shipment of frozen semen including the necessary import and export documentation [*Cl. Ex. 3*]. Accordingly, CLAIMANT was able to make the transportation at commercially much more favourable terms than RESPONDENT [*Notice of Arbitration, ¶18*]. Thus, PARTIES' intention while adopting DDP delivery instead of the standard EXW delivery was to ease the conveyance, and not to burden CLAIMANT with additional risks that are normally associated with DDP.

65. Moreover, while accommodating such an extraordinary request, CLAIMANT'S negotiator, Ms. Napravnik in her email dated 31 March 2017, made it clear to RESPONDENT that it was not willing to accept any further risks associated with the change in delivery terms, "*particularly those associated with customs regulations or import restrictions*" [*Cl. Ex. 4*]. Accordingly, CLAIMANT asked for a hardship clause to be included into the Contract to address such subsequent changes [*id.*]. Although RESPONDENT'S counsel told CLAIMANT'S counsel that the ICC Hardship clause suggested by Ms. Napravnik was too broad, it was willing to accommodate the risks mentioned by Ms. Napravnik in her email dated 31 march 2017 [*id.*]. Thus, Clause 12 of the Contract was drafted to accommodate such risks as mentioned in Ms. Napravnik's email [*cf. id.; P.O. 2, ¶12*]. These negotiations between the PARTIES indicate that RESPONDENT knew CLAIMANT'S intention of not assuming any risks, particularly those associated with customs regulations and import restrictions, and that RESPONDENT agreed to draft the hardship clause accommodating such risks [*cf. id.*].

66. Moreover, while asking RESPONDENT for inclusion of a hardship clause, CLAIMANT had specifically expressed its concerns over past experiences with DDP delivery, where unforeseeable additional health and safety requirements increased the cost up to 40% and thereby destroyed the commercial basis of the deal [*Cl. Ex. 4*]. Since CLAIMANT'S aforementioned past experience with the DDP delivery had nearly resulted in its insolvency, the incident was widely reported in the press [*P.O. 2, ¶21*]. Thus, RESPONDENT could not have been unaware of CLAIMANT'S inherent intention not to bear any additional risks associated with customs regulations and import restrictions that can destroy the commercial basis of the

deal. Accordingly, additional import tariffs that are direct import restrictions [*Marceau, p.7-10*], were intended by the PARTIES to be covered under Clause 12 of the Contract [*Arg.* ¶¶*65, 66*].

(c) *The contextual interpretation of the clause 12 also indicates that the SELLER (CLAIMANT) is protected against the imposition of tariffs.*

67. CISG requires the contracts be interpreted as a whole [*Brunner (2004), Art. 8,* ¶*14; Schwenzer (2010), p. 159*]. The individual clauses are to be understood as an integral part of the contract, and are to be interpreted within the whole context of the contract [*Cobalt Sulphate Case (Germany); Heaters Case (CIETAC); Schwenzer (2010), p. 159*]. Although there is no hierarchy in the contract as such, contextual interpretation of the contract provides for precedence of individually agreed-upon terms over standard terms, and precedence of a more specific provision [*Schwenzer (2010), p. 159*]. This is because of primary importance given to the intent of the parties as it is generally presumed that individually agreed upon terms are more likely to reflect such intent than standard terms [*cf. Schwenzer(2010), p. 179*].

68. Clause 12 of the Contract must be interpreted in context of other clauses, while giving due regard to the interest of the PARTIES. In this regard, it must be noted that the PARTIES had taken the Standard Industry template (hereinafter **"template"**), usually used by CLAIMANT for sale of frozen semen and added individually agreed-upon terms to conclude the final Contract [*cf. P.O. 2,* ¶*3*]. It can be seen that the italicized parts in Clauses 8, 10, 11, 12, and 13 have been specifically added after negotiations between the PARTIES and were not part of the template [*id; Cl. Ex. 5*]. Specifically, Clause 12 of the Contract contains an addition made by the PARTIES to the existing *force majure* clause, in the form of a hardship clause [*cf. P.O. 2,* ¶*3*]. All these clauses of the Contract reduce SELLER'S (CLAIMANT) liability and transfers substantial risks associated with the delivery of the shipment to BUYER [*cf. id.*]. Thus, the contextual interpretation of Clause 12 indicates that the PARTIES had intended to reduce SELLER'S liability to the maximum account possible, and hence Clause 12 of the Contract was wide enough to cover import tariffs as well.

(d) *Alternatively, a reasonable person's interpretation of Clause 12 of the Contract as per Art. 8(2) of the CISG indicates inclusion of such import tariffs.*

69. The CISG clearly states that contractual interpretation should be according to the actual subjective intent of the PARTIES [*Fruits and Vegetable Case II (Switzerland)*], and if such intention in not determinable, then it must be interpreted according to the standard of a hypothetical reasonable person of the same kind as of the other party having the same circumstances [*CISG, Art. 8(2); Schwenzer (2010), p.155; Honnold, Art. 8,* ¶*107*]. Since it is always difficult to determine what the parties' had in their minds at the time of contract negotiation and conclusion, for

practical reasons, the objective interpretation under Art. 8(2) of the CISG predominates the subjective interpretation under Art. 8(1) of the CISG [*cf. id.*].

70. In the present case, even if there is any disagreement between the PARTIES as to the subjective intention of Clause 12 of the Contract, a reasonable person's interpretation under Art. 8(2) of the CISG shall solve the issue. In determining this hypothetical understanding of a reasonable man, regard must be given to all relevant circumstances, including the negotiations between the parties [*CISG, Art. 8(3)*].

71. As already submitted above, RESPONDENT had requested CLAIMANT to change the delivery terms to DDP, as against CLAIMANT'S standard terms of EXW delivery [*Cl. Ex. 3; P.O. 2, ¶9*]. It must be noted that under a DDP delivery the seller is burdened with all the costs and risks involved in delivering the goods to the buyer [*INCOTERMS 2010; Murray*]. In contrast to EXW delivery where seller has the least burden of risks among all the INCOTERMS, the DDP delivery imposes the highest burden of risk upon the seller [*cf. id.*]. Reasonably, CLAIMANT would not have agreed to such a departure from its standard terms, and thus CLAIMANT asked RESPONDENT for a modest increase in the price by US$ 1000 per dose and transfer of certain risks to BUYER (RESPONDENT) [*Cl. Ex. 4*].

72. When the PARTIES met in Danubia on 12 April 2017, RESPONDENT vehemently argued to reduce the overall price of the semen [*P.O. 2, ¶8*] in lieu of removal of certain risks associated normally with a DDP delivery [*id.*]. Thus, while CLAIMANT wanted to increase the price of semen by US$ 1000 due to DDP delivery [*Cl. Ex. 4*], RESPONDENT asked to reduce this price in exchange for relieving CLAIMANT of additional risks associated with DDP [*P.O. 2, ¶8*]. The exact price that was finally increased per dose in lieu of assuming risks associated with a DDP delivery by CLAIMANT can be determined in the following manner:

Final Contract Price per dose	US$ 100, 000	
Originally Quoted Price at EXW delivery	US$ 99, 500	[*Cl. Ex. 2*]
Price increase due to DDP delivery	US$ 500	[US$ 100, 000 – US$ 99, 500]
Direct Monetary costs associated with DDP	US$ 200	[*P.O. 2, ¶8*]
Price increase due to additional risks assumed by CLAIMANT	**US$ 300**	[US$ 500 – US$ 200]

73. Since the price increased by CLAIMANT for assuming risks associated with DDP was only US$ 300 per dose as against its original demand of US$ 1000 [*Arg., ¶72*], a reasonable person's interpretation of the above negotiation would be that the PARTIES had agreed to remove

substantial amount of risks associated normally with DDP delivery. Moreover, the actual financial burden that CLAIMANT faced due to imposition of tariffs is an additional sum of US$ 30, 000 per dose [*cf. Cl. Ex. 7*], which is 100 times the additional sum of US$ 300 per dose that CLAIMANT had increased while accepting risks associated with DDP delivery [*Arg., ¶72*]. Clearly, a reasonable person's interpretation would be that such "substantial" risks posed by additional tariffs were removed from CLAIMANT'S basket of risks and obligations under DDP delivery. Accordingly, CLAIMANT is protected against such import tariffs under Clause 12 of the Contract.

74. Moreover, while asking RESPONDENT for inclusion of a hardship clause, CLAIMANT expressly conveyed that it was not willing to accept any further risks associated with the change in delivery terms, "*particularly those associated with customs regulations or import restrictions*" [*Cl. Ex. 4*]. Clause 12 of the Contract contains express reference only to additional health and safety requirements and not import tariffs because CLAIMANT could not have anticipated or foreseen imposition of additional tariffs in a highly stable WTO regime [*cf. Cl. Ex. 6*]. In fact, no reasonable person could have expressly included the term "tariffs" in Clause 12 of the Contract since the tariffs were completely unforeseen during contract negotiation [*cf. id.*]. Thus, in light of preliminary contract negotiations between the PARTIES [*Arg., ¶¶71-74*], and surrounding circumstances, an objective interpretation of Clause 12 of the Contract would indicate that imposition of such additional tariffs was covered under the hardship clause.

2. CLAIMANT is entitled to an increase in the purchase price based on the principle of 'commercial common sense'.

75. The CISG embodies the principle of *favor contractus* i.e. favouring continuation of the contract whenever possible, having due regard to the international character of the convention [*cf. Cobalt Sulphate Case (Germany); Kroll, p. 152*]. An extension of this principle is the theory of 'business efficacy' [*id.*], and the principle of 'commercial common sense' [*Antaios Cia v. Salen (UK), p.201*], whereby contractual terms are construed in a commercial way, with sensitivity to business common sense [*id.*]. It is presumed that the PARTIES did not intend to impose on one side all the perils of the transaction [*The Moorcock (UK)*]. Accordingly, where there are two suggested interpretations of the contract, one which defies commercial common sense shall be rejected to adopt the other interpretation which fulfils the commercial purpose of the contract [*Rainy Sky v Kookmin (UK)*].

76. This principle is also supported by the objective interpretation approach provided under Art. 8(2) of the CISG wherein it must be considered if the contract imposes obligations that are commercially unreasonable for the seller's interest, and thus do not meet the reasonable

standard test [*Chan Leng*]. Consequently, the contractual provisions must be interpreted in the way in which a reasonable commercial person would construe them [*Mannai Investment v. Eagle Star (UK); Investment Comp. v. West Bromwich (UK)*].

77. In the present case, due to the additional import tariffs of 30%, not only does CLAIMANT'S profit margin of 5% is destroyed, but it has caused a loss of US$ 1,250,000 to CLAIMANT [*Notice of Arbitration, ¶18; P.O. 2, ¶31*]. This is demonstrated by the table below-

CLAIMANT'S terms	Contractual terms before new tariffs	Contractual terms after new tariffs
Price per dose	US $100,000	US $100,000
Amount due on last shipment (Price x50)	US$5,000,000	US$5,000,000
Cost per dose	US$95,000 [*P.O. 2, ¶31*]	US$95,000 [*P.O. 2, ¶31*]
Cost of Shipment (inclusive of import tariffs)	US$4,750,000	US$6,250,000
Profit/Loss	US$250,000 = Profit	US$1,250,000 = Loss

The above table indicates that if Clause 12 of the Contract does not protect CLAIMANT against imposition of additional tariffs, it shall suffer a loss of US$1,250,000, thereby destroying the commercial basis of the transaction. Moreover, in light of these losses, it shall be extremely difficult for CLAIMANT to sustain and extend its credit line from the creditors [*cf. P.O. 2, ¶29*]. On the contrary, RESPONDENT shall not be financially endangered if it was to bear the additional US$1,250,000 [*P.O. 2, ¶30*]. Moreover, RESPONDENT is making a profit of 20% (US$20,000) per dose for resale of the semen sold to it by CLAIMANT [*P.O.2, ¶20*].

78. Thus, there are two possible interpretations of Clause 12 of the Contract: one where CLAIMANT shall suffer a loss of US$1,250,000 and where RESPONDENT shall make a profit of US$20,000 on each dose it resells; and the other where CLAIMANT shall cover its costs without any profit/loss and RESPONDENT does not face any financial difficulty. Clearly, the Arbitral Tribunal should adopt the latter interpretation since it ensures parity between the PARTIES and fulfils the commercial purpose of the contract [*Arg., ¶¶75, 76*]. Thus, the additional tariffs are to be incorporated under Clause 12 of the Contract to ensure that the contract between the PARTIES upholds the principle of 'commercial common sense'.

3. CLAIMANT is also entitled to an increase in the purchase price based on the principle of *'pacta sunt servanda'.*

79. The principle of *pacta sunt servanda* is an underlying principle of the CISG, embodied in Art.7, according to which parties to a contract must adhere to contractual promises once made [*Zeller*]. This principle of good faith is recognized as a principle of the CISG and, also acts as a mean to interpret it [*id.*]. Moreover, this principle of good faith imposes an obligation on the parties to fulfil their contractual obligations in a fair and just manner [*Powers, pp. 333-353*], in order to ensure that the interests of the other party are sufficiently protected [*id.*].

80. In the present case, CLAIMANT had never sold its racehorse stallion's semen before, and for other areas of equine sports, it would not sell more than 10 doses of frozen semen to a single breeder [*P.O. 2, ¶15*]. Even RESPONDENT acknowledged that its request for 100 doses of frozen semen was extraordinary [*Cl. Ex. 3*]. However, CLAIMANT expressed its interest in having a long-term relationship and made an exception to its normal policy by agreeing to sell 100 doses [*Cl. Ex. 2*]. CLAIMANT again made an exception in its standard delivery terms, and agreed for DDP delivery [*Cl. Ex. 4*]. Even after imposition of tariffs that had increased the cost of final shipment by 30%, CLAIMANT authorized the transportation even before the final price adaptation was achieved so as to protect RESPONDENT'S interest in urgent delivery [*Notice of Arbitration, ¶12*]. This conduct of CLAIMANT indicates that it acted in good faith throughout contract negotiations, as well as in performance of its contract obligations, paying due regard to RESPONDENT'S interests.

81. On the other hand, RESPONDENT, while having knowledge about CLAIMANT'S financial instability [*P.O. 2, ¶22*], acted in bad faith in carrying out its obligations. Despite CLAIMANT'S unequivocal intention to prohibit resale or any other use of frozen semen [*Cl. Ex. 2*], and expression provision in the Contract delineating the specific use of semen [*cf. Cl. Ex. 5*], RESPONDENT resold the semen to other breeders [*P.O. 2, ¶20*] to whom CLAIMANT would not have sold directly. RESPONDENT needed the final shipment for fulfilling its obligation to third parties, clearly in breach of the express prohibition of resale of semen [*cf. id.; P.O. 2, ¶11*]. Consequently, RESPONDENT deliberately used a statement to deceive CLAIMANT into believing that it agreed to price adaptation, so that the final shipment is made [*cf. Res. Ex. 4*]. These conducts of RESPONDENT indicate that it had acted in bad faith in fulfilling its obligations, without paying due regard to CLAIMANT'S interests.

82. Moreover, after the imposition of tariffs, CLAIMANT called for a meeting to discuss adaptation of price in good faith [*P.O. 2, ¶35*]. However, when RESPONDENT'S CEO was confronted with the request to pay the additional amounts, it stopped all the negotiations and refused to pay

any amount for the tariffs [*Cl. Ex. 8, p.18*]. CLAIMANT still acknowledges that no party is directly responsible for the additional tariffs, thus has requested RESPONDENT to pay an additional amount of only US$1,250,000, in order to break even on such a transaction [*Notice of Arbitration, ¶18*]. Thus, since CLAIMANT has sincerely fulfilled its contractual obligations in utmost good faith, and RESPONDENT has effectively acted in bad faith, the Arbitral Tribunal should allow CLAIMANT to claim an additional amount of US$ 1,250,000 based on the principle of "*pacta sunt servanda*".

B. Alternatively, Claimant is entitled to an additional sum of US$ 1,250,000 based on adaptation of price under the CISG.

83. CLAIMANT is entitled to an additional sum of US$1,250,000 based on adaptation of price, under Art. 79 of the CISG **[1]**, and *alternatively* by virtue of application of general principles of the CISG and tools of interpretation under Art. 6.2.3 of the UNIDROIT PICC **[2]**.

1. CLAIMANT is entitled to an additional sum of US$1,250,000 based on adaptation of the price under Art. 79 of the CISG.

84. Art. 79 of the CISG envisage that a party can seek exemption from performance due to an impediment i.e. a changed circumstance and, provides for subsequent remedy to overcome it. In present case, RESPONDENT alleges that since the PARTIES included a specific hardship clause in the contract, it shall amount to derogation from CISG and inapplicability of Art. 79 [*Ans. to the Notice of Arbitration, ¶20*]. However, CLAIMANT submits that the inclusion of hardship clause in the contract does not constitute derogation under Art. 6 of the CISG, and hence Art. 79 applies to the present dispute **[a]**.

85. Further, CLAIMANT submits that the price must be adapted, under Art. 79 of the CISG as: *firstly,* the circumstances of the present case fulfil the requirements of Art. 79 **[b]**; and *secondly*, the remedies prayed by CLAIMANT are covered under Art. 79 **[c]**.

(a) *Art. 79 of the CISG applies to the present dispute as the inclusion of the hardship clause in the contract does not constitute derogation under the ambit of Art. 6 of the CISG.*

86. It is settled law that the CISG itself governs the issues related to the way in which CISG may be excluded, modified or derogated from [*CISG-AC Opinion 16*]. In this regard, Art. 6 of the CISG provides that derogation from any provision(s) of the CISG is possible through incorporation of a clause in the contract that expressly excludes the application of such provision(s). Thus, the settled way to opt-out of the CISG is by express exclusion in a detailed contract [*Bridge, p. 277*], and it cannot be effected impliedly as per the language of the CISG in the absence of an express clause to this effect [*Sport clothing case (Germany); Orbisphere Corp. v. US*

(USA)]. In the present case, the PARTIES did not incorporate any clause into the contract that expressly excludes the application of Art. 79 [*cf. Cl. Ex. 5*]. Thus, in the absence of an express clause, it cannot be construed that the hardship clause i.e. clause 12 of the Contract implies a derogation from Art. 79, under Art. 6 of the CISG.

87. Moreover, since Art.79 of the CISG has been construed in tandem with *force majeure* clauses that are part of the contract, and it has been observed that that parties' agreeing to such *force majeure* clauses do not pre-empt the application of Art. 79 [*OLG Hamburg (Germany)*]. In a case, it was also held that since the parties' contract did not cover the exhaustive listing of *force majeure* situations, it cannot amount to derogation of Art. 79 [*CLOUT case No. 142 (RFCCI)*]. Similarly, in the present case, clause 12 of the contract that includes *force majeure* clause, and a hardship clause do not cover the exhaustive listing of hardship situations as it is narrower than the ICC hardship clause [*P.O. 2, ¶12*]. Thus, the inclusion of a hardship clause in clause 12 of the contract shall not be constituted as an exclusion of Art. 79 under the ambit of Art. 6 of the CISG. Therefore, Art. 79 of the CISG is applicable to the present case.

(b) *Price must be adapted under Art. 79 of the CISG as the circumstances of the present case fulfil the requirements of Art. 79.*

Art. 79(1) of the CISG exempts a party from performance of its obligations if it is due to an "impediment" beyond the party's control, and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences [*Kroll, p. 1057*]. In the present case, the pre-requisites for seeking an exemption under Art. 79 are fulfilled as: *first,* the hardship caused by additional tariffs is an impediment within the meaning of Art. 79 **[i]**; *second,* the impediment was beyond CLAIMANT's control **[ii]**; *third,* CLAIMANT could not have reasonably foreseen such an impediment at the time of the conclusion of the contract **[iii]**; *fourth,* CLAIMANT could not reasonably be expected to avoid or surmount the consequences of the unforeseeable event by any alternative means **[iv]**; and *fifth*, due to this impediment, CLAIMANT'S burden was increased in a disproportionate manner **[iv]**.

i. *The hardship caused by additional tariffs is an impediment within the meaning of Art. 79 of the CISG.*

88. An impediment is defined as an unimaginable risk or totally exceptional event, such as *force majeure*, economic impossibility or excessive onerousness [*Chinese Goods case (Germany)*]. Even though Art. 79 does not expressly mention the term "hardship", situation of hardship or change of circumstances is considered to be a part of Art. 79 of the CISG as a specific case of

risk allocation [*Herber/Czerwenka, Kommentar ¶8; Schlechtriem/Schwenzer, (2013), ¶678*]. On this point, the CISG Advisory Council has observed that hardship is a part of Art. 79 of the CISG [*CISG-AC Opinion 7*]. This is because, leaving the hardship issue outside the purview of Art. 79 will make the CISG incompatible to its objective of uniform application [*Schwenzer, FS Bucher, p. 723; Schlechtriem/Schwenzer (2005), ¶31*].

89. Thus, the situations of hardship are addressed either by direct application of Art.79 by subsuming facts causing hardship under it [*CISG-AC Opinion 7*; *Schlechtriem/Schwenzer pp. 826, 827*], or by identifying a gap in the CISG and filling it as per analogy or reference to the PICC [*Fischer, p.213; Bonell (2005), p. 323*]. Therefore, in either way, it is established that hardship situations are covered under Art. 79 of the CISG.

90. Moreover, the term "impediment" referred to in Art. 79(1) of the CISG includes within its ambit, changed circumstances that have made a party's performance a matter of economic hardship. In order to qualify as an "impediment", the change of circumstances ought not to have been reasonably foreseeable at the time of the conclusion of the contract [*Scafom International v. Lorraine (Belgium)*], and it must cause performance of contract as extraordinary and disproportionate burden on a party [*id.*].

91. In the present case, the additional tariffs were completely unforeseeable at the time of contract conclusion [*Arg. ¶94-97*]. Moreover, such tariffs resulted in putting a highly disproportionate burden on CLAIMANT i.e. it had to not only forego its profit margin of 5%, but also suffer a loss of US$1,250,000 [*Arg. ¶77, 78*]. Thus, additional import tariffs that made CLAIMANT'S performance of the Contract i.e. the delivery of final shipment of 50 doses an economic hardship for it, is an impediment under Art. 79 of the CISG.

ii. *The impediment in the present case was beyond CLAIMANT'S control.*

92. For a party to claim an exemption under Art. 79, it is necessary that the impediment must have been beyond the control of the disadvantaged party [*UNCITRAL Digest of Case Law, p.377*]. In this regard, an impediment is considered to be beyond the control of a party when it is due to natural disasters [*Raw Materials v. Manfred (USA)*], man-made disasters, or acts of authorities [*Magnus, p.260*]. Particularly, governmental regulations or actions of government officials are considered to be impediments beyond the control of a party [*Arbitral Award No. 1155/1998; Arbitral Award 56/1995 (BCCI)*]. In the present case, the imposition of the 30% tariffs on animal products including horse semen was done by the government authorities of Equatoriana [*Cl. Ex. 6, 7*], and was thus beyond the control of CLAIMANT.

93. Moreover, the risk of State intervention is identified as one of the specific cases of risk allocation in international sales contract [*Kroll, p. 1067*]. Accordingly, an impediment is

considered to be beyond the control of a party if the definitive and unexpected embargoes or import/export bans are introduced by a State [*Caviar Case (HCCIA)*]. In the present case, the 30% import tariffs imposed on animal semen by Equatoriana in retaliation to Mediterraneo's additional tariffs of 25%, were influenced by Equatoriana's Economics Ministry, and therefore was an action of the State [*Cl. Ex. 6; cf. P.O. 2 ¶23*]. Thus, the additional tariffs of 30% imposed by Equatoriana is an impediment beyond CLAIMANT'S control.

iii. *CLAIMANT could not have reasonably foreseen the impediment at the time of the conclusion of the contract.*

94. To satisfy the pre-requisites for application of Art. 79, it is necessary that the party claiming the exemption could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract [*UNCITRAL Digest of Case Law*]. This determination of foreseeability is to be objectively based upon the criteria of *bonus pater familias* i.e. standard of a reasonable person [*Scafom International v. Lorraine (Belgium)*]. The common law jurisdiction recognizes this principle as the standard of a reasonable person, which is based upon the situation proper to the other party and its statements, conduct for the purposes of interpretation [*Tunc, A., p. 26*]. Thus, it is crucial to consider the relation between the parties, terms of the contract and all the circumstances surrounding contract formation [*Lloyd v. Murphy (USA)*].

95. Similarly, the civil law jurisdiction equivalent of the doctrine is *exempli causa,* i.e. the conduct of the person of the same kind in same business, trade, etc. [*Homenaje, pp.1440,1441; Pace Review, p.31, ¶124*]. Thus, this principle of reasonableness, specifies the consideration of all relevant factors such as circumstances, nature, scope, practices, usages of the trade, etc. in determining the foreseeability of an impediment [*Ole Lando & Hugh Beale, pp. 126,128*].

96. In the present case, to determine the foreseeability of additional import tariffs, it is crucial to consider circumstances surrounding the contract negotiations. It must be noted that the Contract was concluded on 6 May 2017 [*Cl. Ex. 5*], and at that time there were no import tariffs on agriculture products between Equatoriana and Mediterraneo [*P.O. 2, ¶25*]. Although there had been few countries in the past which had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size, but Mediterraneo was not one of them [*P.O. 2, ¶23*]. However, merely two months prior to the last shipment, the newly elected President of Mediterraneo imposed 25% tariffs on agricultural products from Equatoriana, which was neither a part of any strategy papers released earlier by the new President nor part of the election manifesto [*Notice of Arbitration ¶9; cf. Cl. Ex. 6*]. Thus, the tariffs imposed by Mediterraneo were highly unforeseeable at the time of contract negotiation.

97. Moreover, the government of Equatoriana was an ardent supporter of free trade and had always tried to resolve trade disputes amicably and had except for once, never relied on retaliatory measures against other countries [*Notice of Arbitration ¶10; Cl. Ex. 6*]. Thus, Equatoriana's retaliation to tariffs imposed by Mediterraneo, as well as the size of tariffs imposed by it came as a surprise even to informed circles [*Cl. Ex. 6*]. Moreover, Equatoriana did not only impose tariffs on agricultural products but also on "animal products", including horse semen [*Cl. Ex. 7*]. This came as a surprise to both PARTIES [*Notice of Arbitration ¶10*]; in fact, RESPONDENT'S person in-charge for the development of the racehorse breeding program, did not know that the additional tariffs were applicable to the final shipment until he was informed by CLAIMANT'S counsel [*Res. Ex. 4, ¶2*]. In light of abovementioned circumstances, it was incredibly unlikely for CLAIMANT to have known or reasonably foreseen imposition of these additional tariffs.

iv. *CLAIMANT could not be reasonably expected to avoid or surmount the consequences of the unforeseeable event by any alternative means.*

98. To avail of the exemption under Art. 79 of the CISG, the impediment must be one that cannot be reasonably avoided or whose consequences cannot be surmounted by the party through alternative means [*UNCITRAL Digest of Case Law, pp.377, 378*]. Thus, parties are obligated to put reasonable efforts to overcome the effects of an impediment [*Brunner, p. 321*]. In this regard, parties must do everything in their capacity to prevent timely performance from being affected by the occurrence of an unforeseen event [*Kroll, p. 1060*]. In the present case, CLAIMANT could not have been exempted from or obtained a reduction in the additional tariffs charged in the last shipping [*P.O. 2, ¶27*], and thus, could not have reasonably avoided the impediment caused by additional import tariffs.

99. Moreover, it must be noted that for two years prior to entering into the contract, CLAIMANT had been facing financial difficulties, and has only been able to stay in business by resorting to extensive restructuring measures and a considerable cut of the work force [*Cl. Ex. 8, ¶7*]. Further, in light of these losses incurred by payment of additional tariffs amounting to US$ 1,250,000, it shall be extremely difficult for CLAIMANT to sustain and extend its credit line from the creditors [*cf. P.O. 2, ¶29*]. Therefore, CLAIMANT shall not be able to bear these losses, and thus could not have reasonably overcome the consequences of the impediment caused by additional tariffs.

100. Further, Art. 79(4) of the CISG stipulates that the seller is duty bound to inform the buyer about the impediment and its subsequent effect [*PICC, Art. 7.1.7(3)*]. Here, CLAIMANT informed RESPONDENT about the additional tariffs of 30% that have been imposed on the

final shipment, and the subsequent hardship that it has caused to CLAIMANT [*Cl. Ex. 7, ¶1*]. In pursuance of this, CLAIMANT even requested RESPONDENT to find a solution as to the adaptation of price [*id.*]. Thus, CLAIMANT fulfilled its obligations under Art. 79(4) of the CISG.

v. *CLAIMANT'S burden was increased in a disproportionate manner due to the impediment.*

101. For the application of Art. 79, it is required that the performance of the contract becomes excessively onerous because of change of circumstances, which qualifies as an impediment [*UNCITRAL Digest of Case Law, p.375; Chinese Goods case (Germany)*]. In the present case, as already established above [*Arg., ¶¶77, 78*], the additional tariffs increased the cost of final shipment by 30% and made the Contract excessively onerous for CLAIMANT.

(c) *The remedy prayed by CLAIMANT is within the scope of Art. 79 of the CISG.*

102. CLAIMANT seeks an additional sum of US$1,250,000 that is not provided in the Contract *per se*, it has sought the remedy of adaption of contract due to changed circumstances. Art. 79(5) of the CISG that provides for alternative remedies other that damages. It must be noted that the purpose of unifying the law of sales, as articulated in Art. 7(1), is to exhaust all the technically available means to respond to the hardship problem within the four corners of the Convention, rather than resorting to the application of potentially disparate domestic legal rules and doctrines [*Peter Schlechtriem, pp.236,237; CISG-AC Opinion No. 7; Joseph Lookofsky*]. Therefore, Art. 79(5) of the CISG can be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to parties *vis a vis* each other, thus *"adapting"* the terms of the contract to the changed circumstances [*id.*].

103. Moreover, the Roman doctrine of *rebus sic stantibus*, as recognized under the CISG provides a scope of revision or adaptation of the contract or one of its clauses [*Tallon, p. 592*]. This doctrine is based on the notion that the unforeseeable and extraordinary change of circumstances renders a contractual obligation extremely burdensome for a party [*Honnold, 434*]. Reading Art. 79 of the CISG in context of various national laws and legal doctrines such as *imprévision* (*French law*), frustration of contract (*English law*), commercial impractibility (*United States law*), *Wegfall der Geschäftsgrundlage* (*German law*), *eccesiva onerosita sopravvenuta* (*Italian and Dutch law*), indicates that Art. 79 has wider ambit to deal with instances of economic impossibility and thus, it allows for adaptation of contract [*Tallon, p. 592*].

104. Accordingly, instances of economic impossibility, and consequent adaption of the contract according to the new circumstances have been recognized in many jurisdictions [*PICC, Art. 6.2.3; ¶313; Art. 6:258 Dutch Civil Code; German Civil Code*]. This remedy is also in consonance with both the principles of *pacta sunt servanda* and *equity* [*Fletcher, p.99*], that serve as the

fundamental principles of CISG. Thus, the remedy of adaptation of the Contract due to changed circumstances, as prayed by CLAIMANT is covered under Art. 79(5) of the CISG.

2. *Alternatively*, Claimant is entitled for adaptation of the price by the application of general principles of the CISG and tools of interpretation under Art. 6.2.3 of PICC.

105. Art. 7 of the CISG specifically mentions that for matters that are not expressly settled by the Convention must be interpreted, *first* by using the general principles of the CISG, and *alternatively*, by using external tools for interpretation keeping in mind the uniform characteristic of the Convention [*CISG, Art. 7(2); Kroll, p. 113*]. CLAIMANT submits that even if Art. 79 of the CISG does not come to aid in the present case, CLAIMANT is still entitled for an additional sum of US$ 1,250,000 based on adaptation of the price, *first,* by the application of general principles of the CISG **[a]**, and *second, in any case* by application of tools of interpretation under Art. 6.2.3 of PICC **[b]**.

(a) *CLAIMANT is entitled for adaptation of the price by application of general principles of the CISG.*

106. The general principles of the CISG are good faith and uniform application of the Convention [*CISG, Art. 7(1)*], and on similar lines, the principle of *estoppel* or the prohibition of contradictory behaviour is embodied in the CISG [*Rolled metal sheets case (AFCCB)*]. The principle of good faith is an autonomous concept, and its substantive role is derived from the CISG itself [*Dulces Luisi v. Seoul International (MCPFT); Amran v. Tesa, (Netherlands); Kroll, p. 123*]. Accordingly, this principle of good faith is observed so as to protect the weaker party [*Bonell, p.223*], based on the presumption of equal or similar bargaining power of the parties in international trade [*Martinez Canellas, p.145*]. As a result, principles of *pacta sunt servanda* and good faith provides for adaptation of contracts in light of changed circumstances [*Fletcher, p.99; cf. Arg. ¶79*].

107. In the present case, it is established that due to imposition of additional tariffs of 30%, CLAIMANT has not only lost its profit margin of 5%, but has incurred a loss of US$1,250,000 [*Arg. ¶77*]. RESPONDENT must bear the additional sum of US$1,250,000 since the principle of good faith necessitates RESPONDENT to protect CLAIMANT, who in light of these losses shall face financial endangerment [*P.O. 2, ¶29*]. Moreover, since CLAIMANT has consistently acted in good faith while RESPONDENT showcased utmost bad faith [*Arg. ¶80-82*], CLAIMANT is entitled to an additional sum of US$ 1,250,000 based on the principle of good faith.

(b) *In any case, CLAIMANT is entitled for an additional sum of US$1,250,000 based on adaptation of the price, by application of tools of interpretation under PICC.*

108. Art. 7(2) of the CISG provides that any shortcomings that might arise in the provisions of the CISG over "matters governed but not expressly settled by the CISG", shall be overcome by outside interpretative aid [*Kroll, p. 134; Honnold, Document History (1989), pp. 62, 87, 476*]. Thus, even if the hardship situation is not settled by CISG, it is nevertheless governed by it and thus, allows for application of the general principles of the CISG [*Joseph Lookofsky (2011)*]. In this regard, UNIDROIT Principles are considered as 'general principles' on which the CISG is based, and are an interpretative aid to fill the gaps in the CISG [*Comment 3, Model Clause 4; Scafom International v. Lorraine (Belgium); Stefan Vogenauer, p.110*]. Particularly, Art. 6.2 of the PICC acts as a supplement to Art. 79 of the CISG as it specifically governs the issue of dealing with hardship situations [*id.*].

109. Under the PICC, hardship is defined as occurrence of events that fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished [*PICC,* Art. *6.2.2*]. It further lays down certain prerequisites for an event to be called hardship, and these prerequisites are analogous to the requirements of exemption under Art. 79 of the CISG [*id.*]. As it has already been established, under Art. 79 [*Arg.* ¶¶*92-101*], the additional tariffs shall amount to hardship under the PICC as well.

110. Further, in cases of hardship where substantial increase in the cost of performance of obligations for one party causes the fundamental alteration in the equilibrium of the contract, Art. 4(b), 6.2.3 of PICC allows adjudicating authority to restore the equilibrium by furthering a fair distribution of losses [*PICC, Art. 6.2.3*]. Thus, the PICC gives the disadvantaged party the right to request a court or arbitral tribunal, as the case may be, for a renegotiation of the contract by adapting the same, upon failure to reach an agreement [*PICC, Art. 6.2.3; Schmidt-Kessel, ¶26; CISG-AC, Opinion 7*].

111. In the present case, CLAIMANT requested RESPONDENT to renegotiate the price in light of additional tariffs that increased the cost of final shipment by 30%, and offered to authorize the shipment upon such price renegotiation [*Cl. Ex. 7,* ¶¶*1,3*]. However, currently CLAIMANT suffers a loss of US$1,250,000 after imposition of additional tariffs which has caused fundamental disequilibrium of the contract against CLAIMANT and in favour of RESPONDENT [*Arg.* ¶*77-78*]. Thus, the Arbitral Tribunal must restore this equilibrium by adapting the price of the Contract.

Conclusion to the Third Issue

Since parties in a contract are bound by the terms and clauses present in their contract, clause 12 of the Contract was added precisely to ensure that RESPONDENT would bear the cost in case of any event which makes the Contract more onerous. Thus, CLAIMANT is entitled to an additional sum of US$1,250,000 due to the higher costs following the imposition of the new tariffs under clause 12 of the Contract, as it has made the Contract more onerous for CLAIMANT. Alternatively, CLAIMANT is entitled to an additional sum of US$1,250,000 under Art. 79 of the CISG as the additional import tariffs is an impediment that was unforeseeable, beyond the control of CLAIMANT, and has caused disproportionate burden on CLAIMANT.

REQUEST FOR RELIEF

In light of the submissions made above, CLAIMANT respectfully requests the tribunal to find that:

I. The Tribunal has the requisite power and jurisdiction to adapt the FSSA, under the arbitration agreement;

II. CLAIMANT is entitled to submit evidence from the other arbitration proceedings;

III. CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under Clause 12 of the contract or, alternatively under the CISG.

Respectfully submitted,

COUNSELS-

Abhinav Gupta

Aditya Suresh

Aman Gupta

Mayuri Manwani

Sarthak Singla

Certificate and Choice of Forum

To be attached to each Memorandum

I Abhinav Gupta, on behalf of the Team for (name of School) National Law University, Jodhpur hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☑ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☑ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) National Law University, Jodhpur

Name Abhinav Gupta

Signature