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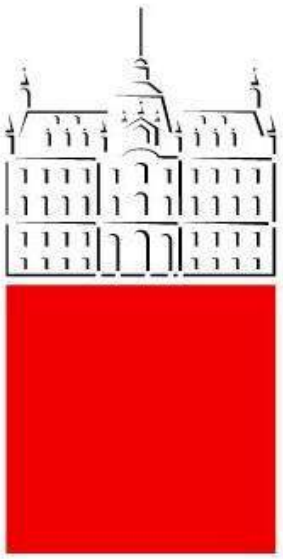

MEMORANDUM FOR RESPONDENT

On Behalf of:	Against:
Black Beauty Equestrian	Phar Lap Allevamento
2 Seabiscuit Drive	Rue Frankel 1
Oceanside, Equatoriana	Capital City, Mediterraneo
- RESPONDENT -	- CLAIMANT -

ANJA GABROVŠEK • MONIKA JEJČIČ • ŠPELA MIHELIN
TEJA PIRNAT • MARUŠA POLAK • ŽAN ŠPORN KRAJNC • TONE TOMAŽIČ

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TABLE OF ABBREVIATIONS

%	Per cent
¶/¶¶	Paragraph/Paragraphs
AC	Advisory Council
AnA	Answer to Notice of Arbitration
Apr	April
Art./Arts.	Article/Articles
AT	Austria
BEL	Belgium
C Memo	CLAIMANT's Memorandum
C-email	CLAIMANT's Email from 2 October 2018
CEO	Chief executive officer
Ch	Chapter
CHE	Switzerland
CIETAC	China International Economic and Trade Arbitration Commission
CISG	CISG United Nations Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
DE	Germany
Dec	December

Document	The Partial Interim Award rendered from the other RESPONDENT's arbitration
DSU	Dispute Settlement Understanding
e.g.	Exempli gratia; for example (Latin)
eds.	Editors
et al.	Et alii; and others (Latin)
et seq.	Et sequens; and the following one (Latin)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
Feb	February
FRA	France
GR	Greece
HKIAC	Hong Kong International Arbitration Center
HKIAC AR	Hong Kong International Arbitration Center Arbitration Rules recommended by HKIAC since 1 November 2018
HKIAC AR 2013	Hong Kong International Arbitration Center Arbitration Rules recommended by HKIAC until 1 November 2018
i.e.	Id est; that is (Latin)
IBA Rules	IBA Rules on Taking Evidence
ibid.	Ibidem; in the same place (Latin)
ICC	International Chamber of Commerce

ICSID	International Cent for Settlement of Investment Disputes
infra	Below (Latin)
IT	Italy
Jan	January
Jul	July
Jun	June
lex arbitri	Law of the seat of arbitration
Mar	March
Mr.	Mister
Ms.	Miss
No.	Number
NoA	Notice of Arbitration
NYC	New York Convention - The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Oct	October
p./pp.	Page/Pages
PECL	Principles on European Contract Law
PO2	Procedural Order from 2 November 2018
R-email	RESPONDENT's Email from 3 October 2018
Sales Agreement	Frozen Semen Sales Agreement
Sep	September

supra	Above (Latin)
TICARFCCI	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
ULIS	Uniform Law for International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
USA	United States of America
USD	United States Dollar
v.	Versus
Vol.	Volume
VT	Vietnam
WTO	World Trade Organization

STATEMENT OF FACTS

Phar Lap Allevamento ("**CLAIMANT**") is a company registered and located in Capital City, Mediterraneo. It operates as a stud farm, which provides stallions for breeding programs and offers frozen semen of champion stallions for artificial insemination.

Black Beauty Equestrian ("**RESPONDENT**") is a company located and registered in Oceanside, Equatoriana. It is famous for its broodmare lines and it has newly started a breeding program.

21 March 2017	RESPONDENT requested CLAIMANT to provide an offer for 100 doses of Nijinsky III's frozen semen.
31 March 2017	The Parties agreed on Delivered Duty Paid according to Incoterms 2010 edition ("**DDP**").
11 April 2017	When concluding the arbitration agreement, CLAIMANT and RESPONDENT ("**the Parties**") agreed to reduce the broad wording of the Model Clause of the HKIAC and chose Danubia as a neutral seat of arbitration. However, in the final version of arbitration agreement ("**the Arbitration Agreement**") the Parties did not include a choice of law clause.
25 April 2017	Mr. Bouckaert who has been an outspoken protectionist for years was elected President of Mediterraneo.
6 May 2017	The Parties included a narrow hardship clause into the *force majeure* clause ("**Clause 12**") and added the Arbitration Agreement to CLAIMANT's standard sales agreement template. This became the final contract ("**the Sales Agreement**") in which the Parties agreed to three instalments of frozen semen; the first one of 25 doses, the second one of 25 doses and the third one of 50 doses.
5 November 2017	Government of Mediterraneo imposed a 25% tariff on foreign agricultural products.
19 December 2017	Government of Equatoriana imposed a 30% tariff on Mediterranean agricultural products ("**the imposed tariff**") as retaliation. The tariff took effect from 15 January 2018 onwards.

20 January 2018	CLAIMANT informed RESPONDENT that the third shipment of 50 doses was affected by the imposed tariff just two days before the third shipment was due.
21 January 2018	RESPONDENT said that according to DDP CLAIMANT had to bear the imposed tariff and that the price would be adapted only if the Sales Agreement provides for price adaptation.
12 February 2018	RESPONDENT stopped negotiations as CLAIMANT's request for price adaptation was without merits.
31 July 2018	CLAIMANT submitted the Notice of Arbitration ("**NoA**").
24 August 2018	RESPONDENT submitted the Answer to the Notice of Arbitration ("**AnA**").
12 September 2018	RESPONDENT's computer system was hacked, the hackers managed to retrieve a considerable amount of data.
2 October 2018	CLAIMANT informed the arbitral tribunal ("**the Tribunal**"), that it received information that RESPONDENT itself asked for an adaptation of the contract in another arbitration. CLAIMANT wants to submit the Partial Interim Award rendered in that arbitration ("**the Document**").
3 October 2018	RESPONDENT objected to the submission of the Document as it was obtained by illegal means.

APPLICABLE LAW: The Sales Agreement is subjected to the UN Convention on Contracts for the International Sale of Goods ("**the CISG**") and Mediterranean contract law ("**the Mediterranean Contract Law**"), which is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("**the UNIDROIT Principles**"). In the Arbitration Agreement, the Parties subjected the arbitral proceedings to the 2018 HKIAC Administered Arbitration Rules ("**the HKIAC AR**"). As Danubia is the seat of arbitration, Danubian Arbitration Law ("**the DAL**"), which is a verbatim adoption of the UNCITRAL Model Law, applies as *lex arbitri*. Furthermore, Danubian contract law ("**the Danubian Contract Law**") is a largely verbatim adoption of the UNIDROIT Principles.

INTRODUCTION

1. If wishes were horses, beggars would ride just like CLAIMANT would not bear the imposed tariff. Wish as it may, this does not change the fact that CLAIMANT's claim is baseless. RESPONDENT contacted CLAIMANT in high hopes of establishing a mutually beneficial business relationship with the purchase of 100 doses of Nijinsky's III frozen semen. These hopes were however misplaced, as CLAIMANT, a supposedly well experienced company in international shipping of frozen semen, now wants to pin its own mistakes on RESPONDENT.

2. CLAIMANT conveniently states that the law of Mediteraneo applies to the Arbitration Agreement since its claim must be dismissed under the law for which the Parties agreed, i.e. the law of Danubia. CLAIMANT's arguments are based on its interest instead of reality. RESPONDENT will prove that the law of Danubia is applicable to the Arbitration Agreement and that the Tribunal lacks the jurisdiction and the power to adapt the Sales Agreement (**Issue I**).

3. In its quest to prove the case, CLAIMANT now maliciously wants to buy the Document that was clearly stolen from RESPONDENT. Not only is CLAIMANT presenting the facts of the other arbitration out of context and therefore misleading the Tribunal, but it is also willing to purchase the Document even though it is considered confidential. In order to stop this corrupt behaviour and to dismiss CLAIMANT's allegations RESPONDENT will prove that the Document from the other arbitration is not admissible (**Issue II**).

4. In the light of the foregoing, it is evident that CLAIMANT is willing to cross all boundaries to sell the idea that it should not bear the imposed tariff. It is therefore not surprising that CLAIMANT is trying to convince the Tribunal that its erroneous interpretation of Clause 12 and the CISG entitle it to an adaptation of the price. RESPONDENT will prove that neither of the aforementioned sources provide for price adaptation in the present case (**Issue III**).

ISSUE I: THE LAW GOVERNING THE ARBITRATION AGREEMENT IS THE LAW OF DANUBIA, AND THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT

5. In the Sales Agreement, amicable dispute resolution was agreed upon by the Parties [*Exh. C5, p.14, ¶15*]. While drafting the Arbitration Agreement, RESPONDENT suggested inclusion of the Model clause of the HKIAC, in which RESPONDENT explicitly narrowed down the broad wording of it [*Exh. R1, p.33*]. Furthermore, the Parties chose Danubia as the seat of arbitration but did not include an express provision determining the law applicable to the Arbitration Agreement.

6. Once the dispute between the Parties arose, CLAIMANT conveniently started alleging that the law of Mediterraneo, which is governing the main contract, governs the Arbitration Agreement as well [*NoA, p.7, ¶15*]. The latter is supposedly due to the broad interpretation of the arbitration agreements that the law of Mediterraneo provides for [*NoA, p.7, ¶16*]. CLAIMANT alleges that under the law of Mediterraneo the Tribunal has the jurisdiction and the power to adapt the Sales Agreement [*C Memo, p.12, ¶25*].

7. However, RESPONDENT will show that the Arbitration Agreement is governed by the law of the seat of arbitration, which is the law of Danubia (**1.**). What is more, the Tribunal lacks the jurisdiction and the power to adapt the Sales Agreement (**2.**).

1. The Arbitration Agreement is governed by the law of Danubia

8. CLAIMANT erroneously alleges that the law of the main contract governs the Arbitration Agreement [*C Memo, p.10, ¶19*]. On the contrary, RESPONDENT will prove that the Parties made an implied choice of the law of the seat of arbitration to govern the Arbitration Agreement (**1.1.**). In addition, the law of the seat of arbitration prevails over the law governing the Sales Agreement (**1.2.**).

1.1. The Parties made an implied choice of the law of the seat of arbitration to govern the Arbitration Agreement

9. CLAIMANT asserts that the choice of Danubia as the arbitral seat is not a sufficient indicator that the Parties chose the law of Danubia as the law governing the Arbitration Agreement [*C Memo, p.10, ¶21*]. However, by choosing the seat of arbitration, the parties impliedly agree that the arbitration agreement is governed by the law of the arbitral seat [*House of Lords (UK), 5 May 1894; Queen's Bench Division, 9 Apr 1981; ICC Award No. 7373, 2001; Commercial Court Brussels (BEL), 20 Sep 1999; Born III, p. 471*].

10. During negotiations RESPONDENT proposed to CLAIMANT an arbitration agreement based on the Model clause of the HKIAC, which provided that the arbitration agreement is governed by the law

of the seat of arbitration [*Exh. R1, p.33*]. Contrary to CLAIMANT's allegations [*C Memo, p. 10, ¶20*], CLAIMANT refused to accept Equatoriana as the seat of arbitration but did not object to the law of the seat of arbitration to govern the arbitration agreement [*Exh. R2, p.34*]. CLAIMANT accepted RESPONDENT's proposal of the modified Model clause of the HKIAC and only changed the seat of arbitration to Danubia [*Exh. R2, p.34*]. This was the final proposal that was later included in the Sales Agreement [*Exh. C5, p.13, ¶15*].

11. Therefore, by choosing Danubia as the seat of arbitration and according to the negotiations, the Parties impliedly agreed on applying the law of Danubia as the law governing the Arbitration Agreement. For this reason, the Tribunal should find that the Arbitration Agreement is governed by the law of Danubia, as the law of the seat of arbitration.

1.2. The law of the seat of arbitration prevails over the law governing the Sales Agreement

12. RESPONDENT will demonstrate that the choice of law clause in the Sales Agreement does not extend to the Arbitration Agreement (**a.**). In addition, as the Arbitration Agreement and the Sales Agreement are separate, the law of Danubia governs the Arbitration Agreement (**b.**). In any case, the validation principle provides for the law of Danubia as the law governing the Arbitration Agreement (**c.**).

a. The choice of law clause in the Sales Agreement does not extend to the Arbitration Agreement

13. CLAIMANT made unsubstantiated claims that due to textual and functional relationship of the arbitration agreement and the main contract, the law governing the main contract can be extended to the arbitration agreement [*C Memo, p.11, ¶22*]. However, arbitration agreement is a distinct agreement, therefore an express choice of law in the main contract cannot replace the choice of the seat as a choice of the law governing the arbitration agreement [*Glick/Venkatesan, in Kaplan/Moser, p.146, ¶3*].

14. As the arbitration agreement is accessory to the underlying contract, its only function is to provide machinery to resolve disputes for the obligations arising under that contract [*Court of Appeal (UK), 12 May 1999*; *House of Lords (UK), 1981*; *Born II, p.350*]. In addition, the so-called concept of *dépeçage* provides that different systems of law govern different parts of a single contract [*Glick/Venkatesan, in Kaplan/Moser, p.139, ¶3*]. Therefore, the choice of the seat is to be regarded as the choice of law governing the arbitration agreement, irrespective of whether the main contract is expressly or impliedly governed by a different law [*ibid., p.140, ¶1*].

15. In the case at hand, there is no express choice of law governing the Arbitration Agreement as CLAIMANT states [*C Memo, p. 11, ¶22*]. An implied choice provides for the law of the seat to apply to the arbitration agreement [*supra ¶¶9-11*], therefore an express choice of the law of Mediterraneo, as the law governing the Sales Agreement [*Exh. C5, p.13, ¶14*], cannot invalidate the implied choice of the law of Danubia.

16. In conclusion, the Tribunal should find that the law of Danubia, as the law of the seat of arbitration, governs the Arbitration Agreement irrespective of the fact that the law of Mediterraneo governs the Sales Agreement.

b. In addition, as the Arbitration Agreement and the Sales Agreement are separate, the law of Danubia governs the Arbitration Agreement

17. Contrary to CLAIMANT's statements [*C Memo, p.11, ¶23*], the separability doctrine is not a limited doctrine [*Born II, p.351*]. Therefore, it also resolves issues relating to the choice of law as well as the issue of contractual validity [*ibid.*] to which CLAIMANT refers [*C Memo, p.11, ¶23*].

18. The separability presumption is the first step in analysing the choice of law governing the arbitration agreement [*Born II, p.473; Glick/Venkatesan, in Kaplan/Moser, p.137, ¶2*]. Since arbitration agreement is categorized as a different type of agreement than the underlying contract, it is assumed that the agreement is separate [*Born II, p.473*]. Therefore, it is possible for the parties' arbitration agreement to be governed by a different law than the one governing their underlying contract [*ICC Award No. 1507, 1990*; *High High Court of Jurstice (UK), 31 Jul 1991*; *Born II, p.476*; *Glick/Venkatesan, in Kaplan/Moser, p.137, ¶2*]. This is especially so, when parties already made an implied choice of governing law and their intention was to apply different laws to govern their underlying contract and arbitration agreement [*Born II, p.473*].

19. Although CLAIMANT states the contrary [*C Memo, p.11, ¶22*], the choice of law clause referring to the law of Mediterraneo in the Sales Agreement [*Exh. C5, p.13, ¶14*] does not extend to the Arbitration Agreement, since the Arbitration Agreement and the Sales Agreement are considered as separate. Therefore, a separate choice of law analysis applies to the Arbitration Agreement. As it is evident from the Parties' intention and their implied agreement [*supra ¶¶9-11*], the law of Danubia applies to the Arbitration Agreement. Thus, the Tribunal should find that, due to the doctrine of separability, the law governing the Arbitration Agreement is the law of Danubia.

c. In any case, the validation principle provides for the law of Danubia as the law governing the Arbitration Agreement

20. RESPONDENT agrees with CLAIMANT that when the choice of law lies between two systems of law, the law governing the arbitration agreement should be the one that makes the latter agreement valid [*C Memo, p.12, ¶¶26 et seq.*]. However, in the case at hand, the Arbitration Agreement will not be invalid, if the law of Danubia applies.

21. It is established that arbitral seats tend to have pro-arbitration rules, therefore parties would not have chosen a specific place to be the arbitral seat if there was a serious risk that the law of the seat would invalidate the arbitration agreement [*Miles/Goh, in Kaplan/Moser, p.394; Mustill/Boyd, ¶63*]. When choosing the law governing arbitration agreements, the validation principle provides for a fundamental approach which takes into regard the parties' intentions and the purpose of the New York Convention [*Born II, p.543*]. This principle also requires an analysis of the choice of law under Art. V(1)(a) NYC [*ibid. p.542*]. The aforementioned article and corresponding provision in Art. 36(1)(a)(i) DAL contain a default choice-of-law rule, that provides for the application of the law of the arbitral seat [*ibid.; Art.V(1)(a) NYC*]. This rule is applicable in cases where the parties have not expressly or impliedly chosen the law governing their arbitration agreement [*Born II, p.495*].

22. In the case at hand, the Parties made an agreement that Danubia is the seat of arbitration [*Exh. C5, p.14, ¶15*]. DAL in Art. 8 contains a rule of presumptive validity of arbitration agreement. The said presumption allocates the burden of proof of invalidity of an arbitration agreement to the opposing party [*Art. 8 DAL*]. However, CLAIMANT failed to demonstrate that the Arbitration Agreement would be invalid under the law of Danubia.

23. Pursuing the validation principle, as the Parties did not make an express choice of the law governing the Arbitration Agreement, the implied choice of the Parties provides for the law of Danubia [*supra ¶¶9-11*]. If the Tribunal finds that the Parties did not make an implied agreement, the rule in *lex arbitri* and NYC provides for the law of Danubia to apply. Therefore, the Tribunal should find that the law of Danubia is the law governing the Arbitration Agreement.

2. The Tribunal lacks the jurisdiction and the power to adapt the Sales Agreement

24. The Tribunal should find that it lacks the jurisdiction to adapt the Sales Agreement, as the scope of the Arbitration Agreement is narrow (**2.1.**). In addition, contrary to CLAIMANT's allegations, the Parties did not impliedly agree on granting the Tribunal the power to adapt the Sales Agreement (**2.2.**). In any case, as the principle of synchronized competence and the Principles on European

Contract Law ("**the PECL**") do not apply to the case at hand, the Tribunal lacks the power to adapt the Sales Agreement (**2.3.**).

2.1. The Tribunal lacks the jurisdiction to adapt the Sales Agreement, as the scope of the Arbitration Agreement is narrow

25. Contrary to CLAIMANT's assertions [*C Memo, p.13, ¶30*], the adaptation of the contract does not fall within the jurisdiction of the Tribunal. The scope of the arbitration agreement depends upon the interpretation of the words of the arbitration agreement [*Blackaby/Partasides/Redfern, et al., p.109, ¶2.59*].

26. Firstly, if parties want to have their arbitration agreement broadly scoped, a descriptive clause submitting "*all disputes, claims, controversies and agreements*" to arbitration, rather than a simple reference to "*any disputes*", should be included [*Born I, Ch.3, ¶9*]. Secondly, phrases such as "*relating to*" and "*in connection with*" are generally held to extend the scope of an arbitration agreement [*ibid.*]. Thus, arbitration agreements that do not contain these phrases are considered to have a narrow scope [*ibid.*]. Furthermore, the pro-arbitration principle does not apply to narrow arbitration agreements [*Born II, p.1329; Court of Appeal (USA), 1 May 2009; District Court New York (USA), 26 Feb 2009*].

27. In the case at hand, RESPONDENT proposed a Model clause suggested by the HKIAC to be included in the Parties' Sales Agreement [*Exh. R1, p. 33*]. However, due to the broad wording of the Model clause, RESPONDENT expressed its wish to narrow down the clause and excluded the phrases "c*ontroversy, difference or claim*" and "*relating to*" from the Model clause, leaving only "*any dispute*" in the Arbitration Agreement [*ibid.*]. With this, RESPONDENT clearly reduced the broad wording of the Model clause suggested by the HKIAC [*AnA, p.31, ¶13*]. What is more, CLAIMANT signed the contract containing the Arbitration Agreement in a modified form [*Exh. C5, p.14, ¶15*]. Additionally, as the Arbitration Agreement is considered to be narrow, the pro-arbitration principle does not apply to it.

28. In conclusion, as the pro-arbitration principle does not apply to the case at hand and the scope of the Arbitration Agreement is narrow, CLAIMANT's claim for the increased remuneration does not fall into the scope of the Arbitration Agreement. Therefore, the Tribunal lacks the jurisdiction to decide on the adaptation of the Sales Agreement.

2.2. The Parties did not impliedly agree on granting the Tribunal the power to adapt the Sales Agreement

29. Contrary to CLAIMANT's allegations [*C Memo, p.13, ¶31*], the Parties did not provide the room for the Tribunal to adapt the Sales Agreement. Firstly, the preceding negotiations between the Parties are not relevant under the law of Danubia, due to the "*four corners rule*" (**a.**). In any case, the required express authorization for the Tribunal to adapt the Sales Agreement is missing from the Arbitration Agreement (**b.**).

a. The negotiations are not relevant under the law of Danubia due to the four corners rule

30. The concept of supplementary contract interpretation is applied when, after the contract has been concluded, circumstances, which parties did not contractually regulate, arise [*Beisteiner, p.80*]. The resulting gap in the contract may be filled on the basis of a hypothetical intent of the parties [*ibid., p.80*]. This concept, however, is a purely judicial act where the court shapes the contract according to its own ideas of what would be a reasonable settlement of the parties' opposing interests [*ibid., p.88*]. Due to the latter, supplementary contract interpretation is highly criticized as the court lacks the special expertise to make such a decision [*ibid., p.99; Kessedjian, p.422*]. An arbitral tribunal should therefore not engage in such decision-making either [*Beisteiner, p.99*].

31. Moreover, the law of Danubia adheres to the four corners rule regarding the interpretation of contracts including arbitration agreements [*AnA, p.32, ¶16; PO1, p.51, ¶II*]. This rule determines that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [*Rosengren, p.6; Merriam-Webster Dictionary*]. Drafting history and preceding communication should therefore not be relevant if the wording of the arbitration agreement is clear [*Rosengren, p.6*].

32. According to CLAIMANT, the supplementary interpretation has to be applied to indicate the Parties' hypothetical intent [*C Memo, p.14, ¶32*]. What is more, CLAIMANT asserts that the Parties intended to include a reference to the Arbitration Agreement, giving the Tribunal the power to adapt the Sales Agreement [*C Memo, p.14, ¶33; C Memo, p.15, ¶36*]. However, neither courts nor arbitral tribunals have the necessary skills to make such a decision and to adapt the contract. Furthermore, the law of Danubia and the four corners rule forbid taking into account the drafting history and preceding communication in order to determine parties' intent. As the wording of the Arbitration Agreement in the current case is clear [*supra ¶¶26,27*], the interpretation of the Arbitration Agreement is limited to itself.

33. To conclude, due to the four corners rule and the concept of supplementary interpretation being purely a judicial act, the negotiation process between the Parties is not relevant to the case at hand. Therefore, the Tribunal should find that the wording of the Arbitration Agreement does not empower the Tribunal to adapt the Sales Agreement.

b. In any case, the required express authorization is missing from the Arbitration Agreement

34. It is generally accepted that an arbitral tribunal has the power to change the terms of a contract only if the arbitration agreement contains an express authorization [*Brunner, p. 493*]. Such authorization is needed irrespective of the law applied to an arbitration agreement [*ibid.*].

35. Furthermore, a similar requirement can also be found in the law of Danubia and its jurisprudence, which is applicable to the case at hand [*supra pp. 4 et seq.*]. Therefore, Art. 28(3) DAL must be considered when determining the power of an arbitral tribunal [*PO2, p.60, ¶36*]. Danubian courts are of the view that Art. 28(3) DAL contains a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal. Thus, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required [*ibid.*].

36. Additionally, when CLAIMANT referred to UNIDROIT Principles in its submission [*C Memo, p.16, ¶38*], CLAIMANT most likely meant to refer to the Mediterranean Contract Law which is a verbatim adoption of the UNIDROIT Principles [*PO1, p.52, ¶4*]. RESPONDENT does not contest that Art. 6.2.3 Mediterranean Contract Law governs the effects of hardship [*C Memo, p.16, ¶38*]. The latter article is, however, not regarded as a jurisdictional rule and thus does not grant the arbitral tribunal the jurisdiction to adapt the contract [*Kessedjian, p.422*]. It should only be considered as a possibility for the parties to resort to the dispute resolution mechanism agreed upon in the contract [*ibid.*].

37. Moreover, as the law of Danubia applies [*supra pp.4 et seq.*] and the Danubian Contract Law is a largely verbatim adoption of the UNIDROIT Principles, it contains an exception relevant to the case at hand [*PO2, p.61, ¶45*]. Pursuant to Art. 6.2.3 (4)(b) Danubian Contract Law, a court has the power to adapt the contract only if authorized [*PO2, p.61, ¶45*].

38. According to CLAIMANT, RESPONDENT itself proposed the adaptation of the contract [*C Memo, p.13, ¶31*]. Contrary to CLAIMANT's statements, RESPONDENT only acknowledged the possibility for the Tribunal to have the power to adapt the Sales Agreement but did not conclude the discussion on the issue [*Exh. C8, p.17*]. However, after the car accident, the discussion on the issue was never brought up by CLAIMANT. Furthermore, as CLAIMANT also recognises in its submission,

a reference for the Tribunal to have the power to adapt the contract is indeed missing from the Arbitration Agreement [*C Memo, p.13, ¶31*]. Since an express authorization is needed, not only according to the law of Danubia, but as a general rule as well, the Parties did not authorize the Tribunal to adapt the Sales Agreement regardless of the preceding negotiation process. In addition, as explained above [*supra ¶¶30-33*], the four corners rule prohibits the reliance on preceding negotiations. Therefore, even if RESPONDENT expressed the possibility for arbitrators to adapt the contract, as CLAIMANT is alleging [*C Memo, p.13, ¶31*], its statements should not be relied upon.

39. In conclusion, the Arbitration Agreement does not contain any provisions that would give the Tribunal the power to adapt the contract. The Tribunal should therefore find that it lacks the power to adapt the contract in the case at hand.

2.3. As the principle of synchronized competence and the PECL do not apply in the case at hand, the Tribunal lacks the power to adapt the Sales Agreement

40. RESPONDENT will show, that contrary to CLAIMANT's assertions, the principle of synchronized competence does not apply in the case at hand (**a.**). What is more, the PECL are not relevant to the present case (**b.**).

a. The principle of synchronized competence does not apply in the case at hand

41. Pursuant to the principle of synchronized competence, courts and arbitral tribunals should not be treated differently [*Brunner, p.495*]. However, the level of competence for the adaptation of contracts by arbitrators should be determined through a two-step analysis [*Brower, p.18*]. Firstly, if arbitral tribunals are empowered to fill contractual gaps under the applicable substantive law rules of the state of the arbitral tribunal's seat, arbitral tribunals should have the same powers [*Brunner, p.495; Brower, p.18*]. Secondly, the process of gap-filling has to be qualified as arbitration under the governing procedural law [*Brower, p.18*].

42. CLAIMANT did not consider all the relevant facts when applying the principle of synchronized competence [*C Memo, p.16, ¶37*]. As established above [*supra ¶¶36,37*], the substantive law of the seat of arbitration only gives the court the power to adapt the contract when it is expressly authorized to do so by the parties [*Art. 6.2.3 (4)(b) Danubian Contract Law; PO2, p.61, ¶45*]. Furthermore, although procedural law in the case at hand allows for adaptation to be performed by arbitral tribunals, an express authorization is needed [*Art. 28(3) DAL; PO2, p.60, ¶36*].

43. Consequently, because the Parties did not include the substantive and procedural law requirements in the Arbitration Agreement, the conditions for applying the principle of synchronized

competence are not fulfilled. The Tribunal should therefore find it lacks competence to adapt the contract.

b. The PECL are not relevant to the present case

44. According to CLAIMANT, the PECL are governing adaptation of the contract by an arbitral tribunal in case of changed circumstances [*C Memo, p.16, ¶39*]. However, CLAIMANT failed to demonstrate that PECL is applicable in the case at hand.

45. Pursuant to Art. 1:101, PECL apply in the European Communities or when parties in any way agree to incorporate them into their contract. The PECL can also be applied to the contract when rules of law chosen by the parties, do not provide a solution for the raised issue [*Art. 1:101 PECL*].

46. As neither Equatoriana nor Mediterraneo are countries of the European Community [*European Union*], the first condition for the application of the PECL is not fulfilled. Furthermore, the Parties never discussed the incorporation of the PECL in their Sales Agreement, neither expressly nor impliedly. Additionally, since the law governing the Arbitration Agreement and the Sales Agreement offer several solutions for the raised issue [*supra pp. 4 et seq.*], the last requirement for the application of the PECL is not fulfilled.

47. For reasons stated above, the Tribunal should find, that the PECL are not relevant in the case at hand, as the conditions for its application are not fulfilled.

CONCLUSION ON ISSUE I

48. The law governing the Arbitration Agreement is the law of Danubia. What is more, the Tribunal lacks the jurisdiction and the power to adapt the Sales Agreement.

ISSUE II: THE TRIBUNAL SHOULD NOT ADMIT THE DOCUMENT

49. On 2 October CLAIMANT informed the Tribunal that RESPONDENT was involved in another arbitration in which it asked for the adaptation of the contract price when it was itself negatively affected by the imposition of tariffs [*C-email, p.50*]. To prove this, CLAIMANT wants to submit a partial interim award ("**the Document**") from the other arbitration which CLAIMANT intends to buy from a company that provides intelligence on the horse racing industry [*ibid.*]. This company has a doubtful reputation and refuses to comment on the source from which it obtained the Document [*PO2, pp.60,61, ¶41*]. Either way, the Evidence was illegally obtained.

50. There are only two possible sources from which the company could have obtained the Document [*R-email, p.51*]. Firstly, the Document could have been stolen by a hacker who then sold it to the company, given the fact that RESPONDENT's computer system was recently hacked [*ibid.*]. The second possible source are two RESPONDENT's former employees, which could have broken their confidentiality obligation [*ibid.*]. Either way, the Evidence was illegally obtained.

51. RESPONDENT objects to the submission of the Document and will demonstrate that the Document should be excluded, firstly, as it is neither relevant nor material to the outcome of the case (**1.**) and as it is protected by confidentiality (**2.**). Thirdly, on the grounds of the IBA Rules (**3.**) and lastly, as it was illegally obtained (**4.**).

1. The Document is neither relevant nor material to the outcome of the case and should therefore be excluded

52. When an arbitral tribunal considers the evidence, it shall determine the relevance, materiality and admissibility of the evidence [*Art. 22(2) HKIAC AR; Art 19(2) DAL*]. The evidence shall be admitted only when all of the three criteria are met [*Alozn/Galadari, p.3; Pilkov, p.148, ¶3*]. The relevance criterion is a logical connection between the proposed evidence and what the evidence alleges to prove in a particular case [*Pilkov, p.148, ¶5*]. Hence, the evidence is relevant when it intends to prove the asserted facts on which a legal claim is based [*Raeschke-Kessler, p.427; Waincymer, p.858*]. Furthermore, the materiality of the evidence is mostly determined in the relation to the outcome of the case [*O'Malley, ¶3.76*]. Thus, the evidence is considered material if the arbitral tribunal's final decision is likely to be influenced by it [*Born II, p.2362; Marghitola p.53; Kaufmann-Kohler/Bärtsch, p.18*].

53. CLAIMANT alleges that the Tribunal should admit the Document considering its high relevance [*C Memo, p.21, ¶58*]. However, CLAIMANT does not provide any explanation as to why the Document is relevant to the case at hand. Nevertheless, RESPONDENT will demonstrate that the Tribunal should exclude the Document, as it is neither relevant nor material to the outcome of the case. This is due to the fact that the situation in both arbitral proceedings and both arbitration agreements are different. The other arbitration was conducted under the Model clause suggested by the HKIAC with all its additions [*PO2, p.60, ¶39*]. Current arbitration, however, is conducted under a modified Model clause as the Parties wanted to narrow down the scope of the Arbitration Agreement [*Exh. R1, p.33, supra ¶¶25 et seq.*]. Additionally, the law governing the other arbitration agreement is the law of Mediterraneo [*PO2, p.60, ¶39*], while, in the case at hand, the Arbitration Agreement is governed by the law of Danubia [*supra pp.4 et seq.*]. Lastly, arbitrations are conducted under different arbitration rules [*R-email, p.50*].

54. Further, the contract concluded between RESPONDENT and a third party is different from the Sales Agreement. The contract in the other arbitration contains the ICC Hardship Clause 2003 [*PO2, p.60,* ¶*39*], which covers all of the events that make the contract excessively onerous, including tariffs [*infra* ¶*104*]. On the other hand, the Sales Contract contains a narrowly worded hardship clause in Clause 12 [*AnA, p.30,* ¶*9, Exh. R3, p.35*], which does not cover tariffs [*infra* ¶*104*].

55. Since both arbitral proceedings differ in some important aspects, CLAIMANT cannot prove facts on which a legal claim is based in current arbitration with the Document from the other arbitration. Furthermore, the Document cannot prove that RESPONDENT believes that the price should be adapted in the present case. Whether the buyer should compensate the seller, depends upon the content of the contract. The contract concluded between RESPONDENT and the third party is substantially different from the Sales Contract concluded between the Parties. The fact that RESPONDENT requested a compensation for the tariff in another proceeding cannot prove facts on which a legal claim is based in the current arbitration.

56. To conclude, the Document is irrelevant. Because the Document is irrelevant, it is also immaterial, since it cannot prove facts that are important for the Tribunal's decision. Consequently, the Tribunal should not admit the Document.

2. CLAIMANT should not submit the Document as it is protected by confidentiality

57. CLAIMANT argues that the Document is not protected by confidentiality and can therefore be admitted as evidence [*C Memo p.18,* ¶*44*]. To disprove this, RESPONDENT will show that, firstly, there is an express confidentiality provision in the HKIAC AR 2013 that limits the use of the Document (**2.1.**). Secondly, the confidentiality of the arbitration outweighs the consistency of arbitral awards (**2.2.**). Lastly, although the Document may be in the possession of hackers, the Document is still confidential (**2.3.**).

2.1. An express confidentiality provision in the HKIAC AR 2013 limits the use of arbitral materials

58. The previous arbitration in which RESPONDENT was involved, has been conducted under the HKIAC AR 2013 [*R-email, p.51*] that contain an express confidentiality provision [*Born I, p.2803*]. According to Art. 42 HKIAC AR 2013, information relating to the arbitration under the arbitration agreement or an award made in the arbitration shall remain confidential. Although the confidentiality provisions only bind parties and other participants in the arbitration, it also reflects parties' expectations that the arbitral proceedings are absolutely confidential [*High Court Australia, 7 Apr 1995*]. Additionally, international practice follows the approach that arbitral tribunals remain

the guardians of confidentiality even in cases when the arbitration rules do not contain any express confidentiality provisions [*Smeureanu, p.85, ¶2; Singapore High Court, 2011*]. In the *Ali Shipping* case the court affirmed that the private nature of arbitration proceedings necessarily involves an obligation not to make use of arbitral material outside the four walls of the arbitration, even when required for use in other proceedings [*Court of Appeal (UK), 19 Dec 1997*].

59. Contrary to CLAIMANT's allegations [*C Memo, p.18, ¶45*], Art. 42 of the HKIAC AR 2013 contains an express confidentiality provision which limits the use of confidential arbitral materials. Therefore, RESPONDENT committed its arbitration to privacy and confidentiality. The Tribunal as the guardian of the confidentiality should respect RESPONDENT's legitimate expectations that the previous arbitral proceeding is absolutely confidential and should therefore exclude the Document.

2.2. The confidentiality of the Document outweighs the consistency of arbitral awards

60. The consistency of arbitral awards is highly correlated with a precedent which is defined as "*a previous case or legal decision that may be [...] followed in subsequent similar cases*" [*English Oxford Dictionary*]. However, there is no rule of precedent neither in international arbitration nor in commercial one [*Béguin, p.7*]. Additionally, commercial arbitration is a private process wholly confidential and thus arbitration rules generally contain provisions against the publication of the awards [*Born II, p.2802; Art. 45 HKIAC AR*]. As the arbitral awards are generally not publicly available, precedents in arbitration cannot develop [*Bentolila, p.158, ¶2; Kaufmann-Kohler, p.363*].

61. Due to CLAIMANT's misrepresentation of the precedents in arbitration, it erroneously asserts that the consistency of arbitral awards should prevail over confidentiality [*C Memo, p.18, ¶49*]. The Document that CLAIMANT would like to submit, was produced in the arbitration conducted under the HKIAC AR 2013. These arbitration rules contain specific provision against the publication of awards [*Art. 42.1. HKIAC AR 2013*]. While awards may be published with the consent of both parties [*Art. 42.5 HKIAC AR 2013*], RESPONDENT has never given such consent. Since the Document has not been published, it cannot develop the precedent. Therefore, the Tribunal should respect RESPONDENT's expectation that the previous arbitration is absolutely confidential [*supra ¶¶58,59*] and should not use the Document as a precedent.

62. In any case, RESPONDENT has already established that both arbitration agreements and arbitral proceedings differ in important aspects [*supra ¶¶53,54*]. Therefore, it would not be inconsistent if the Tribunal makes a decision different from the one taken in the other arbitration.

2.3. Although the Document may be in the possession of hackers, the Document is still confidential

63. CLAIMANT argues that the Document obtained by hackers is now nearly in the public domain [*C Memo, p.20, ¶53*] and thus its confidentiality may be limited [*C Memo, p.20, ¶53*]. However, it is well established that the document is considered to be in the public domain only if it is realistically accessible to the members of general public [*ICO, Information in the Public Domain, p.5, ¶16*]. The document is realistically accessible when anyone wishing to access it can easily do so [*High Court of Justice (UK), 24 Jul 2008*]. In other words, the document is not in the public domain if it would require unrealistic persistence or special knowledge to obtain it, even if it is theoretically available somewhere on the internet [*ICO, Information in the Public Domain, p.5, ¶19*]. Moreover, an arbitral award which is available on the internet only to a limited number of persons is not in the public domain [*Court of Appeal (UK), 19 Dec 1997*], thus it is preserving a sufficient degree of confidentiality [*Smeureanu, p.58, ¶1*].

64. In the case at hand, the Document was originally obtained by a criminal offense, i.e. illegal hacking or illegal expropriation of the Document by the former employees. It was then acquired by a company which provides intelligence on the horseracing industry [*PO2, p.60, ¶41*]. There are no indications that the Document could be uploaded on the internet where it would be realistically accessible to the general public, since the company sells the Document [*ibid.*] and thus generates profits from it. Therefore, obtaining the Document would require special knowledge or a lot of resources. Consequently, the Document did not enter into the public domain and should therefore not be admitted as evidence.

65. In any case, even if the Tribunal finds that the Document is in the public domain, the Tribunal should still deny the Document's admission. Arbitral tribunals are against the admission of documents which are in the public domain but were unlawfully obtained at some point [*UNCITRAL Ad hoc Tribunal, 3 Aug 2005*]. The admission of the Document would encourage unlawful activities, i.e. illegally obtaining the other parties' documents and then leaking those documents out by a third entity in order to gain publicity for the purpose of using it in an arbitration procedure. As the Document was unlawfully obtained [*PO2, p.61, ¶41*], it should therefore not be admitted, regardless of it being in the public domain. This would prevent any party from trying to unlawfully obtain documents and would maintain fairness among the parties in the proceeding.

3. The Document should be excluded on the grounds of the IBA Rules

66. CLAIMANT correctly points out that there is a gap in the HKIAC AR, but incorrectly assumes that this allows for the submission of the Document at issue [*C Memo, p.18, ¶46*]. RESPONDENT will demonstrate that the IBA Rules should be applied to fill the gap in the HKIAC AR.

67. In case of gaps in the applicable law, arbitral tribunals use their discretion and fill these gaps by applying the IBA Rules [*Zuberbühler et al., p.4, ¶11*]. As the most widely acknowledged and commonly used standard on the taking of evidence [*IBA Guidelines, p.22, ¶55; Meier, p.185*], the IBA Rules guarantee efficient proceedings [*Born II, p.2348; Marghitola, p.33; Von Segesser, p.1*]. Additionally, the IBA Rules also reflect international practice and can be used even if not agreed on by the parties directly [*Gunter, p.129; Kaufmann-Kohler II, p.14*].

68. Although the Parties did not explicitly agree on the IBA Rules, the Tribunal should use its broad discretion and apply the IBA Rules. This would be in line with the IBA Rules gap filling function, since neither the HKIAC AR nor the DAL contain specific provisions on the admissibility of the evidence. The IBA Rules in Art. 9(2) offer specific provisions regarding the admissibility of evidence. These provisions would assist the Tribunal to make an appropriate decision and would therefore guarantee the efficient proceeding. Thus, the application of the IBA Rules is the most adequate manner for the Tribunal to use its discretion. RESPONDENT will show that the Document from the other arbitration should be excluded on the grounds of the IBA Rules due to a legal impediment preventing its admission (**3.1.**) and on the grounds of fairness (**3.2.**).

3.1. The Document should be excluded due to the legal impediment preventing its admission

69. The IBA Rules in Art. 9(2)(b) provide that evidence should be excluded if there is a legal impediment preventing evidence from being admitted. A legal impediment is defined as "*a rule of law [...] which prohibits disclosure"* [*Marghitola, p.90*]. Since institutional arbitration rules are rules of law, they can be considered as legal impediments [*Kuitkowski, p.80*]. In addition, arbitral tribunals should, when considering issues of legal impediment, take into account the expectations of the parties at the time the legal impediment arose, according to Art. 9(3)(c) IBA Rules.

70. In the present case, CLAIMANT wants to submit the Document that was produced in another arbitral proceeding conducted under the HKIAC AR 2013 [*R-email, p.51*]. These rules impose an obligation on the arbitrating parties that no information concerning the arbitral proceedings can be communicated to third parties [*Art. 42 HKIAC AR 2013*], i.e. must be kept confidential. In

addition, both parties expected that the other arbitration would be kept confidential as they both agreed on using the HKIAC AR 2013 [*R-email, p.51*].

71. Art. 42 HKIAC AR 2013 presents a legal impediment in the sense of Art. 9(2)(b) IBA Rules. This legal impediment is one of the reasons why the Tribunal should exclude any evidence from the other arbitration in the current proceeding. The Tribunal should also take into account the expectation of the parties as provided by Art. 9(3)(c) IBA Rules and exclude the Document as the parties to the other arbitration intended to keep it confidential. The Tribunal should therefore not admit the Document.

3.2. The Document should be excluded on the grounds of fairness

72. Art. 9(2)(g) IBA Rules calls for the exclusion of evidence if the admission of it would raise compelling considerations about the fairness of the arbitral proceeding. Such compelling considerations about fairness would arise if evidence that was obtained in bad faith was admitted [*O'Malley, p.321, ¶¶9.118,9.119; ICSID Award, 8 Oct 2009; UNCITRAL Ad hoc Tribunal, 3 Aug 2005*]. As evidence obtained in bad faith includes illegally obtained evidence the admission of such evidence would raise compelling considerations [*Cremades, p.786*].

73. In the present arbitration, Claimant requests the Tribunal to admit the Document that Claimant intends to buy from a company with doubtful reputation [*R-email, p.51*]. This company acquired the Document by unlawful actions and Claimant is well aware of it [*PO2, p.60, ¶41*]. The aforementioned fact means that Claimant wants to request for the Tribunal to admit the evidence that was obtained in bad faith.

74. As the admission of evidence, that was obtained in bad faith, would raise a compelling consideration about the fairness of the arbitral proceeding, the Tribunal should exclude the Document.

4. The Document is not admissible as it was illegally obtained

75. RESPONDENT will prove that the Document should be excluded as it was illegally obtained. Firstly, CLAIMANT will not have "clean hands" when obtaining the Document (**4.1.**). Secondly, the exclusion of the Document is in line with the international practice (**4.2.**). Thirdly, the interest of pursuing the truth does not override the right to privacy and thus the Document should be excluded (**4.3.**).

4.1. CLAIMANT will not have "clean hands" in obtaining the Document

76. CLAIMANT wrongfully asserts that the Document can be admitted because CLAIMANT will have "*clean hands*" when obtaining the evidence due to the misguided belief that buying illegally obtained evidence cannot constitute a violation of good faith [*C Memo, p.17, ¶¶41 et seq.*]. The clean hands doctrine is "*the principle that one cannot [...] assert an equitable defense if that party has violated an equitable principle, such as good faith*" [*Herstein, p.173; Black's Law Dictionary*]. Any conscious conduct that is unfair, dishonest, performed in bad faith, or violates ethics and morality, constitutes unclean hands [*Herstein, p.173*]. Consequently, conduct that violates the clean hands doctrine does not need to be illegal [*ibid.*]. Yet, just being in possession of illegally obtained goods can be a violation of law [*Weller, pp.283-290; Green, pp.35 et seq.*]. Arbitral tribunals refuse to admit evidence into the proceedings if the submitting party has "*unclean hands*" [*ICSID Award, 8 Oct 2009; ICSID Award, 7 May 2012; Cremades, p.786*].

77. In the current proceedings CLAIMANT wants to obtain and submit the Document that will be bought from a third party that recently obtained this Document with unlawful actions [*R-email, p.51*]. CLAIMANT is willing to use this Document in spite of knowing that it was obtained either by an illegal hack that violated constitutional rights [*infra ¶¶82-84*] or by a breach of confidentiality [*PO2, pp.60, 61*]. This means that CLAIMANT will obtain the Document in an unfair and dishonest way that violates at least ethics and morality.

78. CLAIMANT will not be acting with "*clean hands*" if it obtains and submits the Document as buying stolen documents, i.e. the Document, constitutes unethical, immoral and unconscionable conduct. The Tribunal should therefore exclude the Document on the ground of "*unclean hands*" of CLAIMANT.

4.2. The exclusion of the Document is in line with the international practice

79. CLAIMANT erroneously argues that there is no practice of excluding illegally obtained evidence in international practice [*C Memo, p.19, ¶¶50 et seq.*]. Contrary to this belief, there are grounds that provide for the exclusion of illegally obtained evidence that can be recognized in international practice [*Boykin/Havalic, p.33*]. Arbitral tribunals have to determine if the unlawfully obtained evidence was obtained by a breach of the rights of a party to arbitration. If the evidence was obtained in this way, it has to be excluded regardless of whether the party, that wants to submit such evidence, was involved [*ibid., p.35*]. Evidence that was illegally obtained commonly violates the right to privacy to which every legal subject is entitled to [*infra ¶¶82-84*]. This right is infringed upon by computer hacking [*Marmor, pp.2,3; Sison/Fontrodona, p.3*] and when a person passes on documents not belonging to him [*Thomson, pp.299-303*].

80. In the case at hand, CLAIMANT wants to buy the Document, that was recently unlawfully obtained by a third party, and submit it during the arbitration proceedings [*R-email, p.51*]. This third party acquired the Document by either buying it from a computer hacker who hacked RESPONDENT's computer system or from ex-employees who handed over the Document, which they unlawfully took from RESPONDENT [*PO2, p.60, ¶41*].

81. RESPONDENT has shown that there are rules in international practice that exclude illegally obtained evidence that apply in this case. The Document that CLAIMANT wants to procure and later submit was obtained with a breach of the RESPONDENT'S rights, regardless of whether it was bought from the hacker or received from former employees who unlawfully took the Document from RESPONDENT. The Tribunal should therefore exclude the Document in accordance with international practice.

4.3. The interest of pursuing the truth does not override the right to privacy, thus the Document should be excluded

82. CLAIMANT mistakenly claims that the interest of pursuing the truth prevails over the right to privacy due to the misconception that the right to privacy is not a constitutional right [*C Memo, p.20, ¶¶56 et seq.*]. The right to privacy is a right "*to be free from unwarranted intrusion and to keep certain matters from public view*" [*Peck, p.899,900*; *Oxford Dictionary of Law*] and is universally recognized by all constitutions [*Peck, p.897,898; Schabas Oc Mria, pp.401-417*]. Moreover, the right to privacy has been elevated to the status of a basic human right [*Art.12 UDHR*; *Art.17 ICCPR*; *Art. 8 ECHR*] and extends not only to natural persons, but to legal persons as well [*Bygrave, pp.130 et seq.; European Court of Human Rights, 16 Dec 1992; High Court Australia, 15 Nov 2001*]. Computer hacking violates this right to privacy as does expropriating documents from others [*Thomson, pp.299-303; Marmor, pp.2,3*]. Any evidence obtained by such a violation is deemed inadmissible due to the "*exclusionary rule*" [*Pitler, p.579*]. This rule prevents the use of evidence that was obtained by an unlawful activity [*Thaman pp.339,341; Worster, p.455*] and is known to be used in arbitration [*Pilkov p.154*]. This doctrine was established to protect constitutional rights from unauthorized infringements and as such demonstrates that the constitutional rights cannot be overridden by the interest of truth [*Thaman pp.337,338; Pitler, p.580*].

83. In the case at hand, the Document was acquired by the company, that is now selling it, from computer hackers who breached the computer system of RESPONDENT or from the former employees [*R-email, p.51*]. By hacking the RESPONDENT's computer system, the hackers violated RESPONDENT's right to privacy as did the former employees if they expropriated the Document

from RESPONDENT [*ibid.*]. As the information obtained is irrelevant and immaterial to the case at hand [*supra* ¶¶*52-56*], the interest of pursuing the truth would not be endangered since the Document cannot provide any facts relevant to the case [*ibid*].

84. In conclusion, due to the fact that constitutional rights cannot be overridden by the interest of pursuing the truth and due to the "*exclusionary rule*", the Tribunal should exclude the Document.

CONCLUSION ON ISSUE II

85. The proposed Document should not be admitted, since the Document is neither relevant nor material to the outcome of the case. In addition, CLAIMANT should not submit the Document as it is protected by confidentiality. Lastly, the Document should be excluded on the grounds of the IBA Rules and as it was illegally obtained.

ISSUE III: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000.00

86. CLAIMANT and RESPONDENT concluded the Sales Agreement, by virtue of which they agreed on the sale of 100 doses of Nijinsky III's frozen semen [*Exh. C5, pp.13,14*]. Furthermore, they agreed on DDP and on the inclusion of an extremely narrow hardship clause in Clause 12 [*Exh. C3, p.11; Exh. C5, p.14*]. On 19 December 2017, before the shipment of CLAIMANT's last 50 doses, Equatoriana announced the imposition of a 30% tariff on agricultural products [*PO2, p.58, ¶25*]. In this regard, CLAIMANT contacted RESPONDENT more than a month later, just two days before the last shipment was due [*Exh. C7, p.16*]. During this discussion, RESPONDENT indicated, that according to its understanding, DDP covered the risk of the imposed tariff, so it had to be borne by CLAIMANT [*Exh. R4, p.35*]. Nevertheless, CLAIMANT is now seeking remuneration for the imposed tariff, which goes beyond the contractually agreed price.

87. RESPONDENT requests the Tribunal to find that CLAIMANT is not entitled to the payment of USD 1,250,000.00. Contrary to CLAIMANT's submissions, CLAIMANT is subject to the imposed tariff under DDP (**1.**). Furthermore, CLAIMANT is not entitled to the payment of USD 1,250,000.00 under Clause 12 (**2.**) or under the CISG (**3.**).

1. CLAIMANT is subject to the imposed tariff under DDP

88. CLAIMANT argues that it did not assume any additional DDP risk, that did not exist at time of the conclusion of the Sales Agreement [*C Memo, pp.22,23, ¶¶63-65*]. However, RESPONDENT will show that CLAIMANT is not entitled to the payment of USD 1,250,000.00 as it bears the risk of tariffs under DDP according to the Sales Agreement. First, the Sales Agreement is a sufficient agreement

and allocates the risk of tariffs to CLAIMANT (**1.1.**). Second, the Parties did not exclude the risk of tariffs from CLAIMANT's obligation under DDP (**1.2.**). Alternatively, should the Tribunal find that the Parties excluded the risk of tariffs from DDP clause, Parties' exclusion would, in any case, be invalid (**1.3.**).

1.1. The Sales Agreement is a *sufficient agreement* according to which CLAIMANT bears the risk of tariffs

89. The interpretation of contracts is regulated by Art. 8 CISG [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.147, ¶3; Digest of Art. 8*]. When determining the content of the contract, the starting point is always a *sufficient agreement* of the parties i.e. an agreement that sufficiently regulates the contract content [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.156, ¶1*]. The actual intent of the parties only has to be taken into account in so far as the contract has no clear provision, since the contract precedes the CISG in the hierarchy of rules [*Appellate Court Antwerp (BEL), 24 Apr 2006; Digest of Art. 8*].

90. The Parties agreed on DDP in the Sales Agreement [*Exh. C5, p.13, ¶8; PO2, p.56, ¶10; C Memo, p.23, ¶63*]. Under DDP the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities [*Incoterms 2010*]. Thus, it is clear that DDP allocates the risk of tariffs to CLAIMANT.

91. The Tribunal should therefore find that under DDP, CLAIMANT is the one responsible for the risk of tariffs as the Sales Agreement has no provision, which would transfer this risk to RESPONDENT. Consequently, CLAIMANT has to bear the costs of the imposed tariff and is not entitled to USD 1,250,000.00.

1.2. The Parties did not exclude the risk of tariffs from CLAIMANT's obligation under DDP

92. CLAIMANT wrongfully asserts that the Parties agreed on a modified DDP in such a way, that the risk of tariffs was excluded [*C Memo, p.23, ¶63; C Memo, p.15, ¶36*]. It erroneously argues that while the Parties agreed on the inclusion of a hardship clause, RESPONDENT also accepted CLAIMANT's proposal to be relieved of any further risks associated with a change in the delivery terms and thus the Parties agreed on a modified DDP, which only covered duties existing at the time of the conclusion of the Sales Agreement [*C Memo, p.24, ¶64*]. However, RESPONDENT will demonstrate that CLAIMANT's statements are not true.

93. According to Art. 8 CISG, the scope of a contractual obligation is to be analysed through the subjective and objective interpretation of the parties' statements [*Schmidt/Kessel, in*

Schlechtriem/Schwenzer, p.151, ¶10]. When determining common intent, due consideration is to be given to all relevant circumstances of the case such as negotiations and subsequent conduct of the parties [*Art. 8(3) CISG; Zuppi, in Kröl/Mistelis/Perales Viscasillas, p.150, ¶25; Schmidt/Kessel, in Schlechtriem/Schwenzer, p.152, ¶¶13,32; Digest of Art. 8, ¶21*].

94. RESPONDENT insisted on DDP [*Exh. C3*, *p.11*]. CLAIMANT was prepared to accept DDP on the condition it is either completely relieved from the risks associated with such a change in the delivery terms or at least to be protected against certain risks by a hardship clause [*Exh. C4*, *p.12, ¶4*]. As CLAIMANT's proposal to be relieved from all the additional risks was not acceptable to RESPONDENT, the Parties concentrated their following discussions on the inclusion of a hardship clause [*Exh. R2*, *pp.34,35*].

95. The Parties agreed to allocate only certain DDP risks to RESPONDENT; they expressly agreed that RESPONDENT is responsible for all tank rental and handling fees, that the purchase price has to be paid before the shipment and that RESPONDENT is responsible for additional insurance fees [*Exh. C5*, *p.14, ¶¶8-13*]. Additionally, the Parties agreed on the inclusion of a narrow hardship clause [*Exh. C5*, *p.14, ¶12*]. As the Parties further discussed allocation of DDP risks, RESPONDENT did not accept CLAIMANT's proposal to be relieved from all the risks associated with DDP.

1.3. In any case, the Parties exclusion of the risk of tariffs is invalid as it was not expressly agreed

96. Whenever DDP is agreed upon, any taxes payable upon import have to be paid by the seller unless expressly agreed otherwise in the sales agreement [*Ramberg, p.149*]. The charges that are intended to be excluded should be written in conjunction with the DDP term in the sales agreement [*ibid., p.150*]. Tariffs fall within the category of taxes payable upon import, hence, their exclusion has to be expressly agreed in the sales agreement [*ibid.*].

97. In the present case, no provision in the Sales Agreement regulates the duty to pay tariffs or any other taxes covered by DDP [*Exh. C5, pp.13,14*]. An exclusion of this duty was therefore not expressly agreed upon by the Parties. Moreover, tariffs were never mentioned by any of the Parties in the correspondence prior to the conclusion of the Sales Agreement. Thus, even if the Tribunal finds that the Parties agreed on the exclusion of the duty to pay tariffs, such exclusion is invalid, as it was not agreed upon expressly in the Sales Agreement.

2. CLAIMANT is not entitled to the payment of USD 1,250,000.00 under Clause 12

98. CLAIMANT submits that it is entitled to the payment of USD 1,250,000.00 under Clause 12 as it

applies to the imposed tariff and provides for price adaptation [*C Memo, p.21, ¶¶59-62*]. Contrary to CLAIMANT's statements, CLAIMANT is not entitled to the payment of USD 1,250,000.00 resulting from price adaptation under Clause 12 as the imposed tariff does not fall within the scope of Clause 12 (**2.1.**) and as Clause 12 does not provide for price adaptation (**2.2.**).

2.1. The imposed tariff does not fall within the scope of Clause 12

99. For a hardship clause to be applicable, the impediment has to be one of the triggering events, i.e. events that are to be considered within the hardship clause and must have contractually defined consequences to the obligation [*Frick, p.177; Rimke, p.135*].

100. The Parties agreed on the inclusion of a hardship clause in Clause 12, which provides that CLAIMANT "*shall not be responsible [...] for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" CLAIMANT submits that the imposed tariff constitutes hardship within the meaning of Clause 12 [*C Memo, pp.21-23*]. Contrary to CLAIMANT's allegations [*C Memo, p.21, ¶¶59-62*], Clause 12 does not cover the imposed tariff as the imposition of tariffs is not comparable to the additional health and safety requirements (**a.**). Furthermore, the imposed tariff does not constitute an unforeseen event (**b.**). Lastly, the imposed tariff did not fulfil the contractually agreed hardship standard (**c.**).

a. The risk of tariffs is not comparable to the risk of additional health and safety requirements

101. CLAIMANT submits that Clause 12 is applicable as the risk of tariffs is comparable to the additional health and safety requirements [*C Memo, p.21, ¶59*]. On the contrary, RESPONDENT submits that there was no common intent of the Parties for Clause 12 to cover the risk of tariffs (**i.**). In any event, a reasonable third person would understand that the risk of tariffs is not comparable to the risk of health and safety requirements, thus Clause 12 is not applicable (**ii.**).

i. The Parties did not intend for Clause 12 to cover the risk of tariffs

102. CLAIMANT submits that it was Parties' common understanding that the risk of tariffs is comparable to the risk of health and safety requirements and thus covered by Clause 12 [*C Memo, p.23, ¶¶59-62*]. However, there was no such common intent of the Parties. When determining parties' intent, due regard must be given not only to the text of the contract, but also to the surrounding circumstances [*Art. 8(3) CISG; Schmidt/Kessel, in Schlechtriem/Schwenzer, p.152, ¶¶13,32; Digest of Art. 8, ¶21*].

103. When discussing the hardship clause, CLAIMANT mentioned both the possible risk of changes in customs regulation or import restriction and the risk of additional health and safety requirements in its email [*Exh. C4, p.12*]. However, the Parties decided to include only the risk of additional health and safety requirements and events comparable to additional health and safety requirements.

104. Finally, as the ICC Hardship Clause applies to all kinds of the events that make the performance excessively onerous [*ICC Hardship Clause 2003*], RESPONDENT considered the suggested ICC Hardship Clause to be too broad [*Exh. R2, p.34*]. CLAIMANT agreed to provide for narrower hardship wording [*Exh. R3, p.35*], therefore, the Parties limited Clause 12 only to additional health and safety requirements and events that are comparable to additional health and safety requirements [*Exh. R2, p.34*]. Thus, the Parties' intent was to provide for an extremely narrow hardship clause. As the Parties deliberately made an express reference only to the risk of additional health and safety requirements, there was no common intent for the risk of tariffs to be covered by Clause 12.

ii. In any event, a reasonable third person would not have understood the risk of tariffs as an event comparable to the risk of additional health and safety requirements

105. Under objective test of Art. 8(2) CISG, in the absence of common subjective intent of the Parties, the hypothetical understanding of a reasonable third person of the same kind is decisive [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.155, ¶20; Huber/Mullis, p.12; ICC Award No.8324, 1995*].

106. Under DDP the seller has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import, and to carry out all customs formalities [*Incoterms 2010; Ramberg, p.149*]. Firstly, while the tariffs are one of the duties payable upon import, health and safety requirements fall within a group of other customs formalities [*ibid.*]. Secondly, while the tariffs pursue an increase of public funds, the goal of health and safety requirements is to protect the community from public health and safety risks [*Department of Home Affairs*]. As the Parties did not list a duty of obtaining customs clearance in general but only additional health and safety requirements, they clearly indicated their intent for duties such as the tariffs not to be covered by Clause 12. Consequently, a reasonable third person would have understood that the risk of tariffs is not comparable to the risk of health and safety requirements.

b. The imposed tariff does not constitute an unforeseen event

107. An unforeseen event is an event which could not be taken into account at the time of the conclusion of the contract [*Gordley, p.524; Court of Cassation (BEL), 19 Jun 2009*]. An event can be taken into account if there is a realistic possibility that it will occur [*Da Silveira, p.225*]. CLAIMANT

asserts that the imposed tariff was unforeseen since both the tariff by the government of Mediterraneo and the tariff by the government of Equatoriana were imposed after the conclusion of the Sales Agreement [*C Memo, pp.21,22, ¶60*]. However, the fact that the imposed tariff occurred after the conclusion of the Sales Agreement is not enough for the conclusion that the imposed tariff was unforeseen.

108. Additionally, the imposed tariff could have been taken into account due to the political situation in Mediterraneo. Four months before the conclusion of the Sales Agreement, the later elected President of Mediterraneo, announced in its election programme, a preference for a protectionist approach to international trade, in particular in relation to agricultural products [*Exh. C6, p.15*; *PO2, p.58*]. Animal semen is covered with the term agricultural product according to the WTO's Harmonized Tariff System as it is a product of animal origin [*WTO Tariff Analysis Online*]. What is more, Ms. Frankel, one of the most ardent critics of free trade, was appointed as minister for agriculture, trade and economics in Mediterraneo on 5 May 2017, one day before the Sales Agreement was signed [*AnA, p.58, ¶23*].

109. Furthermore, CLAIMANT submits that the imposed tariff was unforeseen as Equatoriana is a member of the WTO and has always tried to solve disputes by invoking the WTO dispute settlement system [*C Memo, p.22, ¶60*]. Nevertheless, the WTO dispute settlement system allows the state to impose retaliatory tariffs as countermeasures that would otherwise be inconsistent with the WTO Agreement as a response to a violation [*Art. 3.7 of the DSU; WTO Dispute Settlement System, ¶6.10*]. Consequently, even if Equatoriana would, in the present case, invoke the WTO dispute settlement system, the retaliatory tariffs are provided by it.

110. Finally, the parties naturally associate international sale with more risks [*Dai, p.139*]. Based on its awareness of risks present in an international sale and its experience with DDP [*Exh. C4, p.12*], CLAIMANT could have been aware that one of the risks one faces in an international sale are also the tariffs. When considering the risks connected with DDP, CLAIMANT could have taken the tariffs into account, therefore the imposed tariff was foreseen.

c. The imposed tariff did not fulfil the contractually agreed hardship standard

111. CLAIMANT asserts that the Parties agreed that Clause 12 applies to events that make the contract *more onerous* and that the imposed tariff fulfilled the agreed hardship standard [*C Memo, pp.21,22 ¶¶59,61*]. Contrary to CLAIMANT's assertions, RESPONDENT will demonstrate that the Parties intended for Clause 12 to be applicable when the performance has to become *excessively onerous* (**i.**).

As the imposed tariff does not constitute *excessively onerous* burden, the hardship standard was not fulfilled (**ii.**).

i. According to the Parties' intent, the hardship standard of Clause 12 is *excessively onerous*

112. The general hardship standard requires the occurrence of fundamental alteration or an excessively onerous burden [*Brunner, p.514; Da Silveira, p.323; Schwenzer, p.714*]. If the parties provide for a hardship clause with a less strict wording, the assessment of the relevant threshold has to be made in view of an evaluation of the circumstances of the case [*Brunner, p.515*]. If the wording of a contract does not correspond with the parties' actual intent, priority shall be given to the latter [*Canton Appellate Court Thurgau (CHE), 12 Dec 2006; Schmidt/Kessel in Schlechtriem/Schwenzer, p.149, ¶6*]. In Clause 12, the Parties included both a general hardship reference and the wording *more onerous,* which does not correspond with the general hardship test [*Exh. C5, p.14, ¶12*]. The hardship standard of Clause 12 must therefore be determined according to Art. 8(1) CISG.

113. While negotiating the hardship clause, CLAIMANT itself suggested reliance on the ICC Hardship Clause [*Exh. R2, p.34; C Memo, p.26, ¶137*]. ICC Hardship Clause provides that a party is bound to perform its contractual duties even if events have rendered performance *more onerous* [*ICC Hardship Clause 2003*]. The required degree of severity to invoke the ICC Hardship Clause is *excessively onerous* [*ibid.*]. RESPONDENT objected to the inclusion of ICC Hardship Clause as it considered it to be too broad [*Exh. R3, p.35*], thus in the following discussion the Parties' intention was to agree on a hardship clause that will cover less events and not to broaden its scope with a more relaxed standard. Furthermore, the Parties agreed on the inclusion of a word hardship in Clause 12, which also indicates Parties' intention to include the general hardship standard [*Exh. C5, p.13, ¶12*]. As the Parties intended to provide for a narrower hardship clause, which would cover less events, their intention was not to deviate form the general *excessively onerous* hardship test. Therefore, the Parties intended for hardship standard of Clause 12 to be *excessively onerous*, and not merely *more onerous*.

ii. The imposed tariff did not make the contract *excessively onerous*

114. CLAIMANT claims that the imposed tariff constitutes hardship [*C Memo, p.22, ¶61*]. Furthermore, it mentions its financial difficulties, alleging that the imposed tariff is so high that it will be impossible for CLAIMANT to bear it [*ibid.*].

115. In order for hardship to exist, there needs to be an event which makes the contract excessively onerous [*Da Silveira, p.323; Schwenzer, p.714; Brunner, p.397*]. Only if the cost of party's performance increases substantially, the contractual balance is altered [*ibid.*]. Normal fluctuations in costs of performance are not enough, a very strict test must be applied to determine if hardship exists

[*McKendrick, in Vogenauer, p.719; Off Cmt to Art. 6.2.2 UNIDROIT Principles; Da Silveira, p.326*]. For instance, cost increases of 50% were held to be insufficient to amount to hardship [*Arbitration Court Japan Shipping Exchange, 20 Sep 1975; District Court Monza (IT), 14 Jan 1993; Court of Appeals (USA), 4 Jun 1979*]. Furthermore, a party's financial situation is its own problem[*Brunner, p.436*]. The party cannot transfer this risk to the other parties [*ibid.*]. The parties without resources should not be favoured [*ibid. p.437*]. The parties without resources should not be favoured [*ibid., p.437*]. The decisive element should only be the consequences an event has on the contract [*Zweigert/Kotz, p.520; Oftinger, p.135; ibid.*].

116. In the present case, the cost of performance increased by 30% due to imposition of the tariff [*Exh. C7, p.16*]. Such a low change in cost did not make the Sales Agreement excessively onerous and thus hardship in the present case does not exist. The contractually agreed hardship standard is not fulfiled, thus CLAIMANT cannot invoke Clause 12.

2.2. Clause 12 does not provide for price adaptation

117. Even if the imposed tariff is covered by Clause 12, CLAIMANT cannot base its claim on it, since the wording of Clause 12 limits the provided remedies (**a.**). Furthermore, there was no common Parties' intent for the inclusion of an adaptation mechanism (**b.**).

a. The remedy of price adaptation cannot be implied in the present case

118. Clause 12 does not include any adaptation mechanism [*Exh. C5, p.14, ¶12*]. An adaptation or termination clause regarding future events can not be implied [*Brunner, p.421*]. The finding of a remedy of price adaptation requires that the contract includes a sufficiently specific and comprehensive indication as to how the parties would have dealt with a particular event [*ibid.*]. Consequently, hardship situations should be dealt with on the basis of objective criteria of a reasonable third person rather than subjective criteria of the parties' intent [*ibid., p.422*].

119. In the present case, the Parties did not agree on the inclusion of an express reference to adaptation mechanism neither in Clause 12 nor in the Arbitration Agreement. Furthermore, the remedy of price adaptation cannot be added based on subjective interpretation. Consequently, Clause 12 does not provide for a remedy of price adaptation.

b. In any event, there was no common intent of the Parties for the inclusion of adaptation mechanism

120. When determining parties' intent, regard must be given to the negotiations [*Art. 8(1) CISG, Digest of Art. 8, ¶21*]. Contrary to CLAIMANT's allegations [*C Memo, pp.14,17, ¶¶34,40*], the Parties did not

reach an agreement and did not have common intent for the inclusion of adaptation mechanism in Clause 12. RESPONDENT never consented to the inclusion of a remedy of price adaptation and it considered the remedy as an issue which has to be further discussed [*Exh. R3, p.35*]. The fact that the Parties did not reach an agreement, can be seen in RESPONDENT's negotiation file [*Exh. R3, p.35*], where RESPONDENT's negotiator wrote "*connection of hardship clause with arbitration clause,"* on the list of issues for further negotiations [*ibid.*]. When finalizing the contract, an express reference was not included [*Exh. C5, p.14, ¶12*], which indicates that the Parties decided for Clause 12 not to provide for price adaptation. As the Parties decided not to provide for adaptation mechanism, the Tribunal should find that there was no common intent of the Parties for the inclusion of an adaptation mechanism, thus Clause 12 does not provide for price adaptation.

3. CLAIMANT is not entitled to the payment of USD 1,250,000.00 under the CISG

121. CLAIMANT asserts that it is also entitled to the payment of USD 1,250,000.00 resulting from price adaptation under the CISG [*C Memo, p.21 et seq.*]. It supports its claim with numerous arguments without any merits. Firstly, the Parties did not modify the price in the Sales Agreement according to Art. 29(1) CISG (**3.1.**). Secondly, RESPONDENT did not act contrary to the principle of good faith (**3.2.**). Thirdly, RESPONDENT cannot rely on estoppel (**3.3.**). Furthermore, RESPONDENT cannot invoke frustration of purpose (**3.4.**). Lastly, the price cannot be adapted by USD 1,250,000.00 due to the imposed tariff under Art. 79 CISG (**3.5.**).

3.1. The Parties did not modify the price in the Sales Agreement according to Art. 29(1) CISG

122. CLAIMANT asserts that the Parties have reached an implied agreement on the modification of the Sales Agreement according to Art. 29(1) CISG [*C Memo, p.24, ¶67*]. This alleged agreement in CLAIMANT's opinion happened because RESPONDENTs representitve Mr. Shoemaker did not immediately object to price adaptation proposed by CLAIMANT's representative Ms. Napravnik [*C Memo, p.25, ¶68*]. Art. 29(1) CISG permits modification of the contract provided that the parties have agreed to it [*Perales Viscasillas, p.169*]. However, silence or inaction cannot constitute an agreement on modification of the contract [*2012 UNCITRAL Digest of Art. 29, ¶4; Appellate Court Köln (DE), 22 Feb 1994*]. Additionally, it cannot be said that a party impliedly agreed to the other party's unilateral attempts to alter an agreement by failing to object [*Court of Appeals (USA), 5 May 2003; ibid.*].

123. CLAIMANT informed RESPONDENT that the third delivery is affected by the imposed tariff just two days before the last shipment was due [*Exh. R4, p.36*]. During the discussion RESPONDENTs representitve Mr. Shoemaker informed CLAIMANT that he had no authority to consent to additional

payments outside the contract [*ibid.*]. Furthermore, he indicated that according to his understanding CLAIMANT had to bear the risk of tariffs under DDP and that the price would only be adapted "*if the contract provides for an increased price*" [*ibid.*].

124. The fact that RESPONDENT did not object to CLAIMANT's request right away, cannot constitute an implied agreement on modification of the Sales Agreement. Furthermore, CLAIMANT's request was only unilateral attempt to modify the Sales Agreement, which was not accepted by RESPONDENT. Consequently, the Parties did not agree on adaptation of the price in the Sales Agreement according to Art. 29(1) CISG.

3.2. RESPONDENT did not act contrary to the principle of good faith

125. CLAIMANT erroneously argues that RESPONDENT promised CLAIMANT that it would bear the imposed tariff [*C Memo, p.26, ¶71*]. It further argues that Respondent now acts contrary to the principle of good faith of Art. 7(1) CISG, as it is not willing to adapt the price [*ibid.*]. CLAIMANT supports its argument by referring to *Ysiem Corp. v. Commercial Net Lease Realty, Inc.* case [*Court of Appeal (USA), 1 Mar 2003*].

126. Nevertheless, the aforementioned case deals with a duty of good faith during contract negotiations and *culpa in contrahendo* doctrine. However, it does not deal with the contracts governed by the CISG [*Court of Appeal (USA), 1 Mar 2003*]. The CISG does not impose a duty to act in good faith during contract negotiations and does not recognise *culpa in contrahendo* doctrine [*Schlechtriem, in Transcript, pp.228-230*]. This is due to the fact that the principle of good faith can only be used when interpreting the CISG's provisions [*Art. 7(1) CISG; Farnworth, p.56; Honnold, p.99; Felemegas, p.401; Walt, p.68*]. Thus, it does not oblige contracting parties to observe it in their contractual relationship [*ibid.*].

127. In the case at hand, when CLAIMANT contacted RESPONDENT with the purpose to discuss the issue of the imposed tariff, RESPONDENT's representative Mr. Shoemaker merely stated that the Parties will find an agreement on the price "*if the contract provides for an increased price*" [*Exh. R4, p.36*]. RESPONDENT's statement was therefore conditional. RESPONDENT only referred to obligations which already existed under the Sales Agreement. Since the Sales Agreement does not allow for price adaptation due to the imposition of tariffs [*supra pp.24 et seq.*], CLAIMANT's statement cannot be interpreted as a promise to bear the cost of the imposed tariff.

128. To conclude, there is no obligation under the CISG for RESPONDENT to act in good faith during negotiations. In any case, even if the duty of good faith was imposed on the Parties while

negotiating on the adaptation of the Sales Agreement, RESPONDENT did not promise to bear the cost of the imposed tariff. Thus, it is not acting contrary to the principle of good faith by refusing to bear the cost of the imposed tariff. Therefore, RESPONDENT should not bear the cost of the imposed tariff.

3.3. CLAIMANT cannot rely on estoppel

129. CLAIMANT asserts that RESPONDENT should be estopped from opposing the price adaptation [*C Memo, p.26, ¶72*]. In its opinion, action of RESPONDENT's CEO who stopped the negotiations and refused to pay any additional amount for the imposed tariff is contradictory to RESPONDENT's prior "promise" that the Parties would find an agreement on the price [*ibid.*]. The purpose of estoppel is to provide protection against the disadvantage which would arise from a party's change of position [*Supreme Court Utah (USA), 17 May 1966; Uçarılmaz, p.107*]. However, estoppel cannot be used to modify the terms of the contract [*Zeller II, p.641; Schmidt/Kessel, in Schlechtriem/Schwenzer, p.172, ¶52; Appeal Division Ho Chi Minh City (VT), 5 Apr 1996*].

130. Even if the Sales Agreement can be modified based on estoppel, RESPONDENT's representitve Mr. Shoemaker only promised that the Parties would find an agreement on the price "*if the contract provides for an increased price*" [*Exh. R4, p.36*]. As the Sales Agreement does not provide for an increased price [*supra pp.24 et seq.*], RESPONDENT had the right to stop the negotiations. Therefore, RESPONDENT never changed its position regarding the need to negotiate on increase of the price. RESPONDENT's position was always the same, it only acknowledged the need to negotiate on increase of the price only if the Sales Agreement provides for it. Consequently, CLAIMANT cannot rely on estoppel.

3.4. CLAIMANT cannot base its claim on frustration of purpose

131. CLAIMANT alleges that the imposed tariff frustrated the purpose of the Sales Agreement, because CLAIMANT's purpose of making a profit would not be realized, if it bears the imposed tariff [*C Memo, p.27, ¶73; C Memo, p.15, ¶36*]. However, frustration of purpose is not recognized under the CISG since the term impediment from Art. 79 CISG does not include frustration of purpose [*CIETAC, 2 May 1996; DiMatteo, pp.296-297*]. Furthermore, even if the arbitral tribunal does not grant an excuse on the grounds of frustration of purpose, the principle of good faith would not be violated [*ibid.*]. Therefore, as the Sales Agreement is governed by the CISG [*Exh. C5, p.14*], frustration of purpose cannot be applied.

132. Even if the CISG recognizes frustration of purpose, it only occurs when an unforeseen event destroys party's initial reasons for entering into a contract [*High Court Australia, 11 May 1982;*

Restatement (Second) of Contracts, Sec. 265]. However, party cannot rely on frustration of purpose only because its purpose of making a profit will not be realized [*Brunner, p.408; House of Lords (UK), 1952*]. Frustration of purpose does not extend to situations where performance could be rendered with more expenses [*ibid.; Treitel, pp.208 et seq.*]. Therefore, CLAIMANT cannot rely on frustration of purpose as the loss of profit is not enough. Further, even if the loss of profit is enough to invoke frustration of purpose, the imposition of tariff was not an unforeseen event [*supra ¶¶107-110*].

133. In any case, frustration of purpose does not provide for price adaptation [*Weiskopf, p.240; District Court Ohio (USA), 27 Jan 1984*]. Frustration of purpose is the defense to an enforcement of the contract, and if the defense is successfully invoked, the contract is terminated [*ibid.*]. Therefore, CLAIMANT cannot base its claim for the price adaptation on frustration of purpose.

3.5. Price cannot be adapted due to the imposed tariff under Art. 79 CISG

134. In the Notice of Arbitration CLAIMANT asserts that the price can be adapted under Art. 79 CISG along the lines of the hardship provision in Art. 6.2.3 UNIDROIT Principles and that the conditions for such adaptation are met [*NoA, p.9, ¶20*]. Contrary to this, RESPONDENT will prove that the application of Art. 79 CISG was excluded with Clause 12 (**a.**). Furthermore, even if the Tribunal finds that the application of Art. 79 CISG was not excluded, the term impediment from Art. 79(1) CISG does not cover hardship (**b.**). Additionally, even if hardship can be considered as an impediment, the conditions for invocation of Art. 79 CISG are not fulfilled (**c.**). Besides, Art. 6.2.3 UNIDROIT Principles cannot be used to provide for price adaptation (**d.**). Lastly, adaptation of the price by USD 1,250,000.00 would mean an unfair distribution of the loss between the Parties (**e.**).

a. Clause 12 excludes the application of Art. 79 CISG

135. According to Art. 6 CISG the parties may derogate from or vary the effect of any of the CISG's provisions [*Schwenzer/Hachem, in Schlechtriem/Schwenzer, p.115, ¶27*]. A provision in a contract that regulates a specific issue covered also by the CISG clearly points that the parties have waived the application of the CISG on that issue [*Appellate Court Linz (AT), 23 Jan 2006*]. Therefore, when the parties define a *force majeure* or hardship in the contract, their intention is to derogate from Art. 79 CISG [*Saidov, pp.55,56*]. Furthermore, where the parties provide for a list of *force majeure* and hardship events, such list must be deemed as exhaustive [*TICARFCCI, 17 Oct 1995; High Arbitration Court Russian Federation, 16 Feb 1998*].

136. The Parties have agreed on Clause 12, which is a *force majeure* and hardship clause and provides for a list of *force majeure* and hardship events [*Exh. C5, p.14*] which should be deemed as exhaustive by

the Tribunal. Consequently, Clause 12 constitutes a derogation from Art. 79 CISG in the sense of Art. 6 CISG, thus Art. 79 CISG cannot be applied.

b. In any case, the term impediment from Art. 79(1) CISG does not cover hardship

137. CLAIMANT cannot rely its claim on the CISG, especially not on Art. 79 CISG [*NoA, p.9, ¶20*], since the term impediment does not cover hardship and hardship is not recognized under the CISG. When interpreting articles of the CISG legislative history should be taken into account to determine what was intended with a particular provision [*Schwenzer/Hachem, in Schlechtriem/Schwenzer, p.130, ¶22*]. The drafters rejected the proposal that a relief should be granted in situation in which performance has become more burdensome, thus the drafting history of the CISG makes it clear that the drafters did not intend to introduce hardship into the CISG [*Berger, p.535; Carlsen, ¶IV.D.; Tallon, in Bianca/Bonell, p.594*]. Furthermore, the drafters intended to narrow down the grounds that could justify an exemption by replacing the term "*circumstances*" from Art. 74 ULIS, which is the predecessor of Art. 79 CISG, with the word "*impediment*" [*Honnold, p.627; Rimke, p.222; Da Silveira, p.333; AC Opinion No.7, ¶33*].

138. Furthermore, the CISG's silence regarding situations of hardship should be interpreted as a deliberate omission, which implies that no relief is available under the CISG to a party affected by subsequent changes in market conditions that constitute hardship [*District Court Monza (IT), 14 Jan 1993; Berger, p.544; Da Silveira, p.329*]. Consequently, hardship recognized in some domestic legal systems is not available under the CISG [*ibid.*].

139. To conclude impediment under Art. 79 CISG points to an obstacle leading to physical impossibility to perform and is unrelated to hardship [*Berger, p.534; Zeller I, p.156*]. Therefore, Art. 79 CISG cannot be invoked due to hardship [*ibid.; Court of Appeals Lamia (GR), 2006; Commercial Court Hasselt (BEL), 6 Jan 2004*]. Consequently, as the imposed tariff did not make CLAIMANT's performance physically impossible, CLAIMANT cannot base its claim on Art. 79 CISG.

c. Even if hardship can be an impediment, the conditions of Art. 79 CISG are not fulfilled

140. Even if the Tribunal finds that application of Art. 79 CISG was not excluded and that Art. 79 CISG covers hardship, the price in the Sales Agreement cannot be adapted as the conditions of Art. 79 CISG are not fulfilled in the present case. Art. 79(1) CISG explicitly places the burden of proving that its conditions are fulfilled on the party seeking to rely on it [*Da Silveira, p.201; District Court Vigevano (IT), 12 Jul 2000; Schwenzer, in Schlechtriem/Schwenzer, p.1087, ¶59*]. CLAIMANT failed to prove that the coditions of Art. 79 CISG are fulfilled.

141. The imposed tariff cannot constitute an impediment within the meaning of Art. 79 CISG, even if this term covers hardship, as the imposed tariff did not make the Sales Agreement excessively onerous [*supra* ¶¶*114-116*]. Furthermore, Art. 79(1) CISG requires that the party could not have taken the impediment into the account at the time of the conclusion of the contract [*Schwenzer, in Schlechtriem/Schwenzer, p.1068,* ¶*13*]. However, CLAIMANT could have taken the imposed tariff into the account at the time of the conclusion of the Sales Agreement [*supra* ¶¶*107-110*].

142. To conclude, even if the Tribunal finds that hardship can be an impediment under Art. 79(1) CISG, the imposed tariff did not result in hardship for CLAIMANT and CLAIMANT could have taken it into account. Therefore, conditions of Art. 79 CISG are not fulfilled. Consequently, CLAIMANT should not be provided with relief under Art. 79 CISG and its claim should be rejected.

d. Art. 6.2.3 UNIDROIT Principles cannot be used to provide for price adaptation

143. CLAIMANT states that there is an internal gap in the CISG regarding the issue of price adaptation [*C Memo, p.26,* ¶*69*]. In CLAIMANT's opinion the mentioned gap has to be filled with application of Art. 6.2.3 UNIDROIT Principles [*NoA, p.8,* ¶*20*].

144. Art. 79 CISG is only applicable when a party has breached the contract. This is evident from the wording which states "*failure to perform any of his obligations"* [*Berger, p.539; Honnold, pp.629-630; Zeller I, p.153*]. Therefore, Art. 79 CISG only provides exemption from liability for damages and deals exhaustively with remedies [*ibid.*]. The proposal to include a provision, which would provide for an adaptation of the price in cases of hardship was rejected [*Berger, pp.535,536; Rimke, p.197 et seq.*]. This reveals that there is no gap regarding remedies provided by Art. 79 CISG [*ibid.*].

145. However, even if the Tribunal decides that there is a gap in Art. 79 CISG, the Tribunal cannot use Art. 6.2.3 UNIDROIT Principles to fill the gap in accordance with Art. 7(2) CISG. The UNIDROIT Principles are an external instrument and therefore have no relevance to the determination of the general principles underlying the CISG mentioned in Art. 7(2) CISG [*Herber, pp.1 et seq.; Veneziano, pp.140,141*]. Additionally, the UNIDROIT Principles as a later product of soft law could not be used to interpret an earlier, hard law text such as the CISG [*Veneziano, p.140; Slater, pp.231 et seq.*]. Consequently, the Tribunal cannot use Art. 6.2.3 UNIDROIT Principles to provide for price adaptation.

e. Adaptation of the price by USD 1,250,000.00 would mean an unfair distribution of the loss between the Parties

146. Even if the Tribunal finds that the price should be adapted due to the imposed tariff, the price for the third delivery in the Sales Agreement cannot be increased by 25%. When adapting the price, arbitral tribunal has to seek to make a fair distribution of the losses between the parties. Therefore, adaptation of the price should not reflect in full the loss occurred because of the change in circumstances [*Off Cmt to Art. 6.2.3 UNIDROIT Principles, p.226*]. Consequently, the increase of price by USD 1,250,000.00 would mean an unfair distribution of the loss between the Parties, as the Parties would not equally share the burden of the imposed tariff.

CONCLUSION ON ISSUE III

147. CLAIMANT bears the risk of the imposed tariff according to its obligations under DDP. Furthermore, neither Clause 12 nor the CISG entitle CLAIMANT to the payment of USD 1,250,000.00.

REQUEST FOR RELIEF

Counsel, on behalf of RESPONDENT, respectfully requests that the Tribunal:

1) Finds that it does not have the jurisdiction and the power under the Arbitration Agreement to adapt the Sales Agreement;
2) Excludes the Document as evidence; and
3) Rejects CLAIMANT's claim for price increase by an amount of USD 1,250,000.00.

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WORLD TRADE ORGANIZATION (WTO)	Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement Available at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3	Cited as: *DSU* Cited in: ¶*109*
WORLD TRADE ORGANIZATION (WTO)	World Trade Organization Tariff Analysis Online Product Groups Available at: http://tao.wto.org/ProductGroupList.aspx	Cited as: *WTO Tariff Analysis Online* Cited in: ¶*108*

WORLD TRADE ORGANIZATION (WTO)	WTO Dispute Settlement System Training Module, Countermeasures by the prevailing Member (Suspension of Obligations) Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm	Cited as: *WTO Dispute Settlement System* Cited in: ¶*109*

CERTIFICATE

We hereby certify that this Memorandum was written only by persons whose names are listed below and who signed this certificate:

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