16TH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

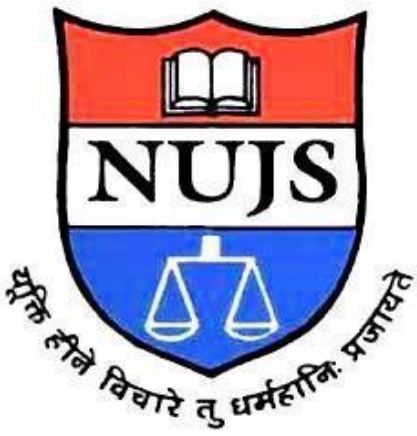
HONGKONG
MARCH 31- APRIL 7, 2019

MEMORANDUM FOR RESPONDENT

CASE NO.: HKIAC/A18128

THE WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES

KOLKATA | INDIA



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

KAIRA PINHEIRO | SHREYAS SHRIDHAR | SAURAV RAJURKAR | VISHAKHA KADAM

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	Tribunale Civile [District Court] di Monza R.G. 4267/88 *in para* ¶¶77, 91.
Fraport AG Frankfurt Airport Services Worldwide* v *The Philippines	2003, Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I) ICSID Case No. ARB/03/25 *in para* ¶53.
Gantry	19th September 1995 Gantry v. Research Consulting Marketing Tribunal [District Court] de commerce Nivelles R.G. 1707/93 *in para* ¶61.
Gravenhage	7th June 1995 Apple Trees Arrondissementsrechtbank 's-Gravenhage 94/0670 *in para* ¶58.
Graz	7th March 2002 Pork case OLG Graz [OLG = Oberlandesgericht = Provincial Court of Appeal 2 R 23/02y *in para* ¶61.

Guardian Insurance	26th March 2002 St. Paul Guardian Insurance Co., et al. v. Neuromed Medical Systems & Support, et al. U.S. District Court 00 Civ. 9344 (SHS) *in para* ¶58.
Habas Sinai	2013 Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd EWHC 4071. *in para* ¶15.
Hamburg	28th February 1997 Iron Molybdenum Oberlandesgericht Hamburg 1 U 167/95 *in para* ¶91.
Hamm	12th November 2001 Memory Module case OLG Hamm [OLG = Oberlandesgericht = Provincial Appellate Court] 13 U 102/01 *in para* ¶¶64, 104.
Handelskammer	21st March 1996 Chinese Goods case Schiedsgericht der Handelskammer [Arbitral Tribunal] Hamburg

	in para ¶58.
Hassneh Insurance	22nd December 1992 Hassneh Insurance Co of Israel v Stuart J Mew High Court • [1993] 2 Lloyd's Rep. 243 *in para* ¶43.
Helsinki	26th October 2000 *Plastic carpets case* Helsingin hoviokeus S 00/82 *in para* ¶61
Hof van Beroep	24th April 2006 GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International Hof van Beroep, Antwerpen 2002/AR/2087 *in para* ¶82.
Hof van Beroep Gent	15th May 2002 N.V. A.R. v. N.V. I. Hof van Beroep, Gent 2001/AR/0180 *in para* ¶58.
ICC Arbitral Award 11333	2002

	Machine case Court of Arbitration of the International Chamber of Commerce 11333 of 2002 *in para* ¶87.
ICC Arbitral Award 2478	1974 French buyer v. Rumanian seller ICC Award No. 2478 YCA 1978 *in para* ¶112.
ICC Award No. 8453/1995	October 1995 Medical Machine case Court of Arbitration of the International Chamber of Commerce 8453 of October 1995 *in para* ¶81.
ICC Case 7844/1994	1994 Radio Equipment case Court of Arbitration of the International Chamber of Commerce 7844 of 1994 *in para* ¶58.
ICC Case 8324/1995	1995 Magnesium case Court of Arbitration of the International Chamber of Commerce

	8324 *in para* ¶58.
ICC Case 9187/1999	June 1999 Coke case Court of Arbitration of the International Chamber of Commerce 9187 of June 1999 *in para* ¶58.
ICC Case 9448/1999	July 1999 Roller Bearings case Court of Arbitration of the International Chamber of Commerce 9448 of July 1999 *in para* ¶58.
ICC Case No 4145/1984	1984 ICC Case No 4145 of 1984 ICC International court of Abritration. *in para* ¶18.
ICC Case No. 1000	ICC Case No. 1000 Procedural Order No.8, 2006 (unpublished). *in para* ¶41.
ICC Case No. 5082	ICC Case No. 5082

	Procedural Order No.1, Collection of procedural decision on ICC Arbitration 1993-1996, 2nd ed. 1998 *p.130* *in para* ¶53.
ICC Case No. 5103/1988	1988 ICC Award No. 5103, Clunet 1988. *in para* ¶18.
ICC Case No. 6653/1993	26th March 1993 Steel Bars case Court of Arbitration of the International Chamber of Commerce 6653 of 1993 *in para* ¶58.
ICC Case No. 7565/1994	1994 Coke case Court of Arbitration of the International Chamber of Commerce 7565 of 1994 *in para* ¶58.
ICC Case No. 7660/1994	23rd August 1994 *Battery machinery case* Court of Arbitration of the International Chamber of Commerce 7660 of 1994

	in para ¶58.
Insulating materials	15th April 1997 Thermal insulation material Landgericht München I 18 HKO 11092/96 *in para* ¶58.
Insurance Co	27th October 1994. Insurance Company v Lloyd's Syndicate Queen's Bench Division (1994) 392 LMLN 2 *in para* ¶43.
Kassel	15th February 1996 Marble steps Landgericht Kassel 11 O 4185/95 *in para* ¶58.
Koblenz	17th September 1993 Computer Chip case OLG Koblenz 2 U 1230/91 *in para* ¶58.
Köln	16th July 2001 Farm Animals case

	OLG Köln [OLG = Oberlandesgericht = Provincial Court of Appeal] 16 U 22/01 *in para* ¶64.
Lathrop	4th April 1913 Estate of Lathrop Supreme Court 165 Cal. 243 (Cal. 1913). *in para* ¶104.
LG Hamburg	26th September 1990 Textiles case LG Hamburg [LG = Landgericht = District Court] 5 O 543/88 *in para* ¶61.
LG Oldenberg	28th February 1996 Egg case LG Oldenburg 12 O 2943/94 *in para* ¶61.
Lotel	19th September 1977 Richard A. Baragry v. Barbara A. Baragry Court of Appeals of California Civ. No. 51050. *in para* ¶104.
Machinery	31st October 2001

	Machinery case Bundesgerichtshof VIII ZR 60/01 *in para* ¶64.
MCC-Marble	29th June 1998 *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino* U.S. Circuit Court of Appeals 97-4250 *in para* ¶61.
Methanex Corporation	3rd December 1999 Methanex Corp. v. United States of America, UNCITRAL *in para* ¶48.
Mitsubishi	2nd July, 1985 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. U.S. Supreme Court No.83-1569 *in para* ¶58.
Molybdenum	28th February 1997 Iron Molybdenum case Oberlandesgericht Hamburg 1 U 167/95 *in para* ¶91.

Moscow	13th May 2002 Clearages Trading Group LLC v. Gaskomplektinpex Ltd. Federal Arbitration Court for the Moscow Circuit KG-A40/2790-02 *in para* ¶77.
München	29th May 1995 Computer Hardware case LG München 21 O 23363/94 *in para* ¶81.
Namur	15th January 2002 SA P. v. AWS Tribunal de commerce [District Court] Namur R.G. no. 985/01 *in para* ¶87.
Nidwalden	3rd December 1997 Furniture case Kantonsgericht Nidwalden 15/96 Z *in para* ¶58.
OGH	18th June 1997 Shoes case Oberster Gerichtshof [Supreme Court]

	in para ¶61.
OGH	22nd October 2001 Gasoline and Gas Oil case OGH [= Oberster Gerichtshof = Supreme Court] 1 Ob 77/01g *in para* ¶87.
OGH	31st August 2005 Tantalum case OGH [= Oberster Gerichtshof = Supreme Court] 7 Ob 175/05v *in para* ¶61.
OLG Hamburg	4th July 1997 Tomato Concentrate case OLG Hamburg 1 U 143/95 and 410 O 21/95 *in para* ¶91.
Otis Elevator	2nd July 2014 The Islamic Republic of Iran v. United States of America United States Claim Tribunal Case Number A15(IV) and Case Number A24 *in para* ¶53.

Panhandle Eastern Corp.	23rd February, 1988 United States v. Panhandle Eastern Corp. US District Court 681 F. Supp. 229 (D. Del. 1988). *in para* ¶40.
Plastic	8th February 1995 Plastic Granules case OLG München 7 U 3758/94 *in para* ¶58.
Popular	16th November 2000 Shoes case Audiencia Provincial [Appellate Court] de Alicante *in para* ¶81.
Protective Film	25th November 1998 Foil Bundesgerichtshof VIII ZR 259/97 *in para* ¶58.
Rechtbank	2nd May 1995 Frozen rasberries Rechtbank van Koophandel AR 1849/94 *in para* ¶91.

Roll of Rubber	14th July 2010 Rolls of Rubber case Audiencia Provincial de Cöceres *in para* ¶61.
Romay	12th June 2001 Société Romay AG v. SARL Behr France CA Colmar [CA = Cour d'appel = Appellate Court] 1 A 199800359 *in para* ¶91.
Russian Federation	24 January 2000 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 54/1999 *in para* ¶58.
Scafom	19th June 2009 Court of Cassation of Belgium Scafom International BV v. Lorraine Tubes s.a.s. C.07.0289.N *in para* ¶99.
Scrap Steel	17th November 2000 Scrap Steel case

	Supreme Court of Queensland SC No 10680 of 1996 *in para* ¶58.
Sperry	12th September 1958. Rudolph S. Victor V. John C. Sperry Et Al., Court Of Appeals 163 Cal.App.2d 518 (1958) *in para* ¶104.
Sulamerica	16th May 2012 Sulamerica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A. Queen's Bench Division [2012] EWCA Civ 638. *in para* ¶¶13, 15, 16.
Sunflower	5th February 1997 Sunflower Oil case HG Zürich HG 95 0347 *in para* ¶58.
Sunprojuice	20th February 2007 Sunprojuice DK, Als v. San Sebastian, S.c.A. Audiencia Provincial de Madrid, sección 14ª Recurso No. 683/2006 *in para* ¶61.

Supermicro	30th January 2001 Supermicro Computer v. Digitechnic U.S. District Court, Northern District of California, San Francisco Division C-00-02214-CAL *in para* ¶61.
Thompson	27th March 2002 Thompson v. Cameron High Court, AP 117/SW99 and B 12571M01 *in para* ¶77.
Travelers Property Casualty Company	31st January 2007 The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v. Saint-Gobain Technical Fabrics Canada Ltd U.S. District Court, Civ. 04-4386 ADM/AJB *in para* ¶58.
Tribunale Civile de Monza	14th January 1993 ferrochrome Tribunale Civile di Monza *in para* ¶91.
UCC	23rd January 2012 Corn case

	International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade 218y/2011 *in para* ¶91.
Vigevano	12th July 2000 Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.. Tribunale [District Court] di Vigevano *in para* ¶81.
Vital Berry	2nd May 1995 *Vital Berry Marketing v. Dira-Frost* Rechtbank [District Court] van Koophandel Hasselt A.R. 1849/94, 4205/94 *in para* ¶91.
Von Hamm	3rd September 1927 Hudson v Von Hamm Court of Appeal 85 Cal. App. 323 (Cal. Ct. App. 1927). *in para* ¶104.
Weinfelden	23rd November 1998 Milking machinery case BG Weinfelden *in para* ¶81.

Window Elements	27th April 1999 Car (Ford Escort Cabrio) Oberlandesgericht Naumburg 9 U 146/98 *in para* ¶58.
Wirtschaft	15th June 1994 Cold-rolled metal sheets Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich SCH-4366 *in para* ¶58.
Yarn	30th August 2000 Twisted Yarn Oberlandesgericht Frankfurt am Main 9 U 13/00 *in para* ¶58.
Yugoslav	25th May 2001 Berries case Foreign Trade Arbitration Court attached to the Yugoslav Chamber of Commerce in Belgrade, Serbia T-15/01 *in para* ¶61.

LIST OF ABBREVIATIONS

§	Section
¶/¶¶	Paragraph/ Paragraphs
$	United States Dollar
&	And
AC	Advisory Council
Agreement	The sales agreements between the PARTIES
Ans.	Answer
Art.	Article
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods,1980
CISG A.C.	CISG Advisory Council
CLAIMANT	Phar Lap Allevamento
CLAIMANT	Memorandum for CLAIMANT [National University of Management Phnom Penh, Cambodia]
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
Corp.	Corporation
Comm.	Commercial
Contract	The 'Frozen Semen Sales Agreement' formed between the PARTIES
Convention	United Nations Convention on Contracts for the International Sale of Goods,1980
DDP	Delivered Duty Paid
ed./ eds.	Editor(s)
e.g.	for example

et al.	and others
etc.	et cetera
Ex. C	Exhibit of the CLAIMANT
Ex. R	Exhibit of the RESPONDENT
EXW	Ex Works
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
Ibid	previous citation
ICSID	International Centre for Settlement of Investment Disputes
ICC	International Chamber of Commerce
ICC clause	ICC-Hardship Clause, 2003
ICC Rules 2012	International Chamber of Commerce Rules of Arbitration, 2012
INCOTERMS 2010	International Commercial Terms, 2010
inter alia	Among other things
Int'l	International
J.	Journal
i.e.	that is
LCIA	London Court of International Arbitration
lex arbitri	Law of the place where the arbitration is to take place
lex fori	Substantive Law governing the arbitral dispute
Ltd.	Limited
Mr.	Mister
Ms.	Miss

Ltd.	Limited
No.	Number
NYC	Convention on the Recognition and Enforcement of Arbitral Awards, 1956 (New York Convention)
Ors.	Others
p./pp.	Page(s)
PARTIES	CLAIMANT & RESPONDENT
PCA	Permanent Court of Arbitration
PECL	The Principle of European Contract Law, 2002
PICC	UNIDROIT Principles on International Commercial Contracts
prima facie	On first appearance
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Pub.	Publication
Rep.	Report
RESPONDENT	Black Beauty Equestrian
Rev.	Review
SCC Rules 2010	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010
status quo	Existing state
Supp.	Supplement
Swiss Rules 2012	Swiss Rules of International Arbitration, 2012
SZIER	Swiss Review of International & European Law
The problem	The moot problem of the twenty-sixth Vis Moot Competition
Tribunal	The Tribunal seated in Danubia constituted by the PARTIES to resolve the present dispute

UN/U.N.	United Nations
UNIDROIT	Institut International pour L'Unification du Droit Prive (International Institute for the Unification of Private Law
UNCITRAL	United Nations Convention on Contracts for the International Sale of Goods
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration Law 1985 with 2006 amendments
UNCITRAL Rules	UNCITRAL Arbitration Rules, 2010
U.S.	United States of America
USD	United States Dollar
v	versus (against)
vis-à-vis	In relation to/ counterpart
viz	in other words

STATEMENT OF FACTS

The PARTIES to this arbitration are Phar Lap Allevamento [*Phar Lap* or "**CLAIMANT**"] and Black Beauty Equestrian [*Black Beauty* or "**RESPONDENT**"; together the "**PARTIES**"]. CLAIMANT is one of the oldest and renowned stud farms in Mediterraneo covering all areas of the equestrian sport. RESPONDENT is famous for its broodmare lines, incorporated in Oceanside, Equatoriana.

21 Mar 2017	RESPONDENT sent an offer of 100 doses of frozen semen of Nijinsky III, star stallion of *Phar Lap*.	*Ex. C1, p.9*
24 Mar 2017	CLAIMANT accepted the offer along with its terms and conditions.	*Ex. C2, p.10*
28 Mar 2017	RESPONDENT agreed to the general terms of sale, however requested negotiation for the price and delivery terms and applicable law for dispute resolution clause.	*Ex. C3, p.11*
31 Mar 2017	CLAIMANT accepted a delivery DDP in exchange for increased price and at minimum a hardship clause. It suggested arbitration in Mediterraneo as dispute resolution mechanism.	*Ex. C4, p.12*
10 April 2017	RESPONDENT suggested a narrowed version of arbitration clause, where the seat and law applicable to the arbitration clause was Equatoriana.	*Ex. R1, p.33*
11 April 2017	CLAIMANT proposed the seat of arbitration as Danubia.	*Ex. R2, p.34*
6 May 2017	The PARTIES formulated the Frozen Semen Sales Agreement ('Agreement' or 'Contract'). It was signed by Mr. Ferguson and Mr. Krone who were the new set of negotiators, replacing Ms. Napravnik and Mr. Antley respectively.	*Ex. C5, p.13*
19 Dec 2017	Government of Equatoriana retaliated by imposing 30% tariffs on selected products from Mediterraneo which included animal semen.	*Ex. C6, p.15*

20-21 Jan 2018	PARTIES engaged in negotiations for the adjustment of price for the last shipment to offset the increase in tariffs.	*Ex. C8, p.18*
23 Jan 2018	CLAIMANT completed the delivery of the last shipment of 50 doses based on the promise of a solution by RESPONDENT.	*Ex. C8, p.18*
12 Feb 2018	The renegotiations initiated by CLAIMANT failed due to the tension between the PARTIES.	*Ex. C8, p.18*
31 July 2018	CLAIMANT filed a Notice of Arbitration claiming that *first*, the Tribunal has the power to adapt the contract based on the law governing the arbitration agreement in the Contract, *second,* it should be allowed to submit evidence from another arbitration proceeding and *third,* it is entitled to a payment of US$ 1,250,000 resulting from an adaptation of the price under clause 12 of the Contract and under the CISG.	*Notice of Arbitration, p.4*
24 Aug 2018	RESPONDENT submits the Answer to Notice of Arbitration rebutting the claims of CLAIMANT on procedural as well as substantive grounds.	*Answer to the Notice of Arbitration, p.29*
2 Oct 2018	CLAIMANT informed the Tribunal about another arbitration proceedings where RESPONDENT had itself asked for adaptation of price invoking hardship. CLAIMANT seeks to introduce evidence from the other arbitral proceedings.	*Letter by Langweiler, p.49*
3 Oct 2018	RESPONDENT disputed admissibility of such an evidence. It contended that submission of this evidence will be in breach of confidentiality agreement. Further, RESPONDENT alleges illegality of evidence and contends that such evidence is not admissible.	*Letter by Fasttrack, p.50*

INTRODUCTION

RESPONDENT entered into the Frozen Semen Sales Agreement with CLAIMANT hoping CLAIMANT would be its running mate for many more races. However, in the home stretch of their very first contract, CLAIMANT sought to *saddle* RESPONDENT with the burden of tariffs that were imposed by Equatoriana. This was when the realization dawned upon RESPONDENT that it was always a one-horse race for CLAIMANT.

By acceding to price increases and volunteering to undertake additional delivery risks, RESPONDENT went out of its way in view of establishing a long-term relationship with CLAIMANT. Despite RESPONDENT's efforts to foster an enduring commercial partnership, CLAIMANT's actions were only aimed at serving its own financial interests. While RESPONDENT promptly paid the agreed amount, CLAIMANT sought additional remuneration on the basis of a one dimensional and incorrect understanding of the contractual terms.

Desperately looking to establish its claim for increased remuneration, CLAIMANT argues that the law of Mediterraneo is applicable to the arbitration clause. Contrary to CLAIMANT's allegations, RESPONDENT establishes that the law applicable to the arbitration agreement is the law of Danubia. Accordingly, express authorization is required for the Tribunal to adapt the contract. However, there is no such authorization in the present arbitration clause **(I)**.

In an attempt to undermine the veracity of RESPONDENT's claims, CLAIMANT seeks to introduce illegal evidence from the previous arbitration. However, the confidentiality of the previous arbitration proscribes disclosure since the evidence sought to be admitted is neither relevant nor material to the present arbitration. Moreover, CLAIMANT's bad faith in obtaining the illegal evidence also results in admissibility of evidence **(II)**.

CLAIMANT's request for remuneration is uncalled for. The present situation of import tariffs does not fall within the narrowly worded hardship clause. Moreover, DDP delivery obligation specifically entails that tariffs and the corresponding duty has to be borne by the seller, herein CLAIMANT. CLAIMANT seeks adaptation of price as a remedy which in the present case was never envisaged by the drafters of the contract, neither under the hardship clause of the contract nor under the CISG **(III & IV)**.

ARGUMENTS

ARGUMENTS ON PROCEDURAL ISSUES

I. TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

1. The PARTIES to the present dispute entered into a contract for the sale of Nijinsky III's frozen semen [*Ex. C5, p.13*]. Under the contract, CLAIMANT was obligated to ship three instalments of frozen semen doses to RESPONDENT for a price of US$ 10 million with a delivery DDP. However, before the delivery of the last instalment, the Government of Equatoriana imposed 30% additional tariffs on agricultural products including animal semen [*Ex. C6, p.15*]. With increased financial obligations and no solution in sight, CLAIMANT now looks to pass the buck of additional tariffs on RESPONDENT. However, RESPONDENT has no contractual obligation to pay the additional remuneration. The buck stops with CLAIMANT.

2. RESPONDENT urges the Tribunal to hold that it does not have the power to adapt the contract under the arbitration agreement. Contrary to CLAIMANT's contentions, [*CLAIMANT,* ¶11] RESPONDENT argues that the law governing the arbitration agreement is the law of Danubia **(A)**. Consequently, application of the law of Danubia precludes adaptation of the contract by the Tribunal **(B)**.

A. Law of Danubia governs the interpretation of the arbitration agreement

3. The interpretation of the arbitration agreement is governed by the law applicable to the arbitration agreement [BORN, *p.1398*; DICEY/MORRIS, *p.591*; REDFERN ET AL., *pp.137, 237*]. In the present case, however, the arbitration clause in the contract does not contain an express reference to the law governing the arbitration agreement [*Ex. C5, p.13*]. Seeking to exploit this loophole in the arbitration clause, CLAIMANT contends that the law of contract *viz* law of Mediterraneo applies to the arbitration clause since it allows for broad interpretation of the arbitration clause [*CLAIMANT,* ¶23].

4. Contrary to CLAIMANT's submission [*CLAIMANT,* ¶17], RESPONDENT argues that the Hague Principles are inapplicable in order to determine the law governing the arbitration agreement **(1)**. Even if the Tribunal were to apply the Hague Principles, the PARTIES intended the law of Danubia to govern the arbitration agreement as it is the seat of arbitration **(2)**. Similarly, even if the Tribunal were to apply the *Sulamerica* choice-of-law test, law of the seat will govern the arbitration agreement **(3)**.

1. The Hague Principles are inapplicable for determining the law governing the arbitration agreement

5. The Tribunal is at liberty to apply any suitable conflict of law rules to determine the law governing the arbitration agreement [*Lew*; *UNCITRAL MODEL LAW, Art. 28*]. However, this discretion is not unfettered, and it should be exercised in a reasonable manner [*Wortmann*]. CLAIMANT argues that the Tribunal should apply the Hague Principles to determine the applicable law governing the arbitration agreement [*CLAIMANT,* ¶16]. However, this contention is completely fallacious.

6. Art. 1.3(b) of the Hague Principles clearly states that the Hague Principles do not extend to the law governing the arbitration clause [HAGUE PRINCIPLES, *Art. 1.3(b)*]. CLAIMANT argues that this exclusion is not mandatory since the Hague Principles can be applied to "*jurisdiction(s) where law governing the arbitration agreement is subject to parties' agreement*" [*CLAIMANT,* ¶21]. This contention is misleading. Contrary to CLAIMANT's contention, the Hague Principles do not derecognize parties' choice of law applicable to the arbitration agreement [HAGUE PRINCIPLES, *Art. 1.3(b)*]. Otherwise, as far as determining the law governing the arbitration is concerned, the Hague Principles are inapplicable. Therefore, by applying the Hague Principles the Tribunal would be acting in derogation of an express exclusion.

2. In the event that the Tribunal applies the Hague Principles, law of Danubia governs the arbitration agreement

7. Assuming that the Tribunal applies the Hague Principles to determine the law governing the arbitration agreement, CLAIMANT argues that the PARTIES intended Mediterraneo Law to govern the arbitration agreement [*CLAIMANT,* ¶23]. To the contrary, RESPONDENT will establish that the PARTIES in fact intended that the law of Danubia govern the arbitration agreement.

8. Under the doctrine of separability, the law applicable to the arbitration agreement *may* be governed by a law other than the law of contract [BORN, *p.475*]. In fact, Art. 4 of the Hague Principles recognize tacit choice of law by the parties [*HCCH, p.44*]. In order to determine this tacit choice, the real intention of the parties vis-à-vis the applicable law is a necessary prerequisite [*HCCH, p.44*]. With regard to establishing the real intention, the circumstances of the case may conclusively indicate a tacit choice of law [*HCCH, p.44*].

9. *First*, RESPONDENT had clearly expressed its intention to apply the law of the seat to the arbitration clause. In the email dated 10th April 2017, RESPONDENT's proposed arbitration clause included an express reference to the law of seat (Equatoriana in that draft) as the applicable law [*Ex. R1, p.33*]. However, in its response on 11th April 2017, CLAIMANT merely changed the seat of arbitration [*Ex. R2, p.34*]. CLAIMANT's response did not include any reference to the law applicable to the

arbitration clause [*Ex. R2, p.34*]. In fact, the "law governing arbitration clause" provision is one of the highlights of the HKIAC Model Law and CLAIMANT stated that it "*largely*" accepted RESPONDENT's proposal "*but for*" the place of arbitration [*Ans. NoA,* ¶15; *Ex. R2, p.34*]. Despite having largely agreed to the proposed clause including the "law governing the arbitration agreement" clause, CLAIMANT now attempts to favourably twist its inadvertence. Indeed, CLAIMANT had a problem *only* with the place of arbitration, which was in any case addressed by choosing Danubia as the seat of arbitration.

10. *Second*, the PARTIES never made a deliberate choice in favour of the law of Mediterraneo as the applicable law to the arbitration clause. At the outset, RESPONDENT was in favour of keeping the dispute resolution clause distinct from the law of the contract. In fact, that was one of the two main grounds of objection for RESPONDENT [*Ex. C3, p.11*]. Further, even in the proposed arbitration clause, RESPONDENT treated the law applicable to the arbitration clause separate from the contract governed by Mediterranean law [*Ex. R1, p.33*]. Crucially, even CLAIMANT in its response offered a change of place in the arbitration clause on the *condition* that the law of the contract is governed by Mediterranean law [*Ex. R2, p.34*]. Evidently, CLAIMANT also treated the contract as distinct from the arbitration agreement and hence governed by a different law.

11. Further, CLAIMANT's reliance on Mr. Krone's statement is misplaced and its interpretation is based upon an incorrect premise [*CLAIMANT,* ¶28]. Regarding the note written by Mr. Antley, the original negotiator, Mr. Krone was unclear about point one concerning the law applicable to the arbitration clause [*Ex. R3, p.35*]. Despite this, according to Mr. Krone's understanding of the contract, he would have definitely made an express reference to law of Danubia in the arbitration agreement [*Ex. R3, p.35*]. This statement should be read in light of the fact that the final negotiators had access to prior email correspondence [*PO2,* ¶5]. Accordingly, Mr. Krone understood that the law of the seat is the law applicable to the arbitration clause, even though the negotiators did not expressly include it in the contract. Therefore, the PARTIES never intended the law of Mediterraneo to be applicable to the arbitration clause.

12. In conclusion, the PARTIES intended the law of the seat *viz* Danubian law to govern the arbitration agreement.

3. Even if the Tribunal applies the Sulamerica choice-of-law test, law of Danubia will govern the arbitration clause

13. Although not argued by this CLAIMANT, a claimant could have contended that the *Sulamerica* choice-of-law test should be used in order to determine the law applicable to the arbitration agreement. In *Sulamerica*, the English Court of Appeal laid down the following test to determine

the law applicable to the arbitration clause [*Sulamerica*]. *First*, the Court must give effect to the express choice-of-law clause. *Second*, in the absence of express choice, the implied choice of the parties should be taken into consideration. Here, the rebuttable presumption is that the law of the underlying contract governs the arbitration agreement. Finally, if it is not possible to determine the implied choice of law, the system of law to which the arbitration clause has the closest and most real connection should be considered [*Sulamerica*].

14. In the present case, it is evident that the PARTIES have not made an express choice-of-law concerning the arbitration agreement [*Ex. C5, p.14*]. In fact, as has been established previously, the PARTIES intended that the arbitration clause to be governed by the law of the seat [*Issue I(A)(2),* ¶7]. Therefore, the implied choice, as ascertained from the PARTIES' intention, is the law of the seat.

15. Even if the Tribunal does not consider the law of the seat as the implied choice of the PARTIES, a different choice of seat from the main contract is a factor that contributes in dislodging the presumption of the law of contract governing the arbitration agreement [*Habas Sinai*]. Additionally, as far as the applicable law is concerned, the PARTIES have treated the contract differently from the arbitration clause [*Issue I(A)(2)* ¶7]. These factors sufficiently displace the presumption that the law governing the contract is the implied choice of the PARTIES. Therefore, since the implied choice cannot be ascertained, the Tribunal must determine the applicable law based on *the real and close connection* test [*Habas Sinai*]. As the place of arbitration will exercise supporting and supervisory jurisdiction to ensure efficacy of procedure, it has the closest and most real connection to the arbitration agreement [*Abuja International Hotels*; *Habas Sinai*; *Sulamerica*].

16. In conclusion, even under the choice-of-law test laid down in *Sulamerica*, the law of Danubia is the law applicable to the arbitration agreement.

B. Under the law of Danubia, this Tribunal is not empowered to adapt the contract

17. The arbitration agreement does not include an express authorization for the Tribunal to adapt the contract [*Ex. C5, p.14*]. CLAIMANT unjustifiably argues that the arbitration clause is broad enough to empower the Tribunal to adapt the contract [*CLAIMANT,* ¶48]. In this regard, RESPONDENT submits that under the law of Danubia, the Tribunal cannot adapt the contract without express authorization **(1)**. Further, the rule of *contra proferentem* has no application to the arbitration agreement **(2)**.

1. The Tribunal cannot adapt the Sales Agreement without express authorization

18. An accurate construction of the terms of the arbitration agreement forms the basis of determining

the jurisdiction and powers of the arbitral tribunal [*Brasserie du Pêcheur*; *ICC Case No. 5103/1988*; *ICC Case No. 4145/1984*]. Here, CLAIMANT contends that absence of the term "adaptation" in the arbitration agreement does not preclude the Tribunal from adapting the contract [*CLAIMANT,* ¶49]. Additionally, CLAIMANT relies on prior negotiations between the PARTIES in an attempt to demonstrate their common intention to provide an adaptation mechanism [*CLAIMANT,* ¶50]. Refuting these allegations, RESPONDENT will establish that the Tribunal requires express authorization in order to adapt the contract **(a)**. Further, the four corners rule precludes reliance on prior correspondence between the PARTIES **(b)**.

a) Express authorization is a pre-requisite to adapt the contract

19. Danubia, the seat of arbitration, has adopted the UNICTRAL Model Law with the 2006 amendments [*PO1,* ¶6]. Danubian Arbitration Law is the *lex arbitri* [*Ex. C5, p.14*]. Therefore, Model Law is the *lex arbitri.* Art. 28(3) of the Model Law requires express authorization for the Tribunal to act as *amiable compositeur* [*UNCITRAL MODEL LAW, Art. 28(3)*]. There is consistent jurisprudence in Danubia that the same standard of express authorization extends to conferring other exceptional powers on the Tribunal, including the power to adapt the contract [*PO2,* ¶36]. Despite this, CLAIMANT argues that the language of the arbitration agreement extends to the dispute concerning the power of Tribunal to adapt the contract [*CLAIMANT,* ¶49]. However, this argument is completely baseless.

20. In order to empower the Tribunal to adapt the contract, the PARTIES have the responsibility of including provisions to that effect in the contract [*ICC Award 1990/1974*; *ICC Award 6281/1990*]. Express authorization may be given by the parties through the arbitration agreement, a separate agreement or even orally before the arbitrators [CARON/CAPLAN, *p.120*]. Therefore, the standard terms of the arbitration agreement are not sufficient to empower the Tribunal to adapt the contract. In the present case, the PARTIES have not included any such express authorization [*Ex. C5, p.14*]. Therefore, the Tribunal is not empowered to adapt the contract based solely on the language of the arbitration agreement.

b) CLAIMANT cannot interpret the arbitration clause to empower the Tribunal to adapt the Sales Agreement

21. Danubian Contract Law is largely a verbatim adoption of UNIDROIT Principles with a few exceptions [*PO2,* ¶45]. One of the exceptions is that the interpretation rules for written contracts is based on the four corners rule [*PO2,* ¶45]. CLAIMANT argues that the arbitration agreement should be interpreted in light of the prior discussion between Ms. Napravnik and Mr. Antley, the original negotiators of the Sales Agreement [*CLAIMANT,* ¶51]. In response, RESPONDENT will

establish that the prior communication between the PARTIES cannot be relied on to interpret the arbitration clause.

22. The substance of the four corners rule under Danubian Contract Law has largely the same effect as the merger clause under Art. 2.1.17 of UNDROIT Principles [*PO2,* ¶45]. Accordingly, prior discussion between the PARTIES cannot be admitted to supplement the interpretation of contractual terms [*UNIDROIT PRINCIPLES, Art. 2.1.17*]. This rule also extends to the interpretation of the arbitration agreement [*Ans. NoA,* ¶16]. Therefore, CLAIMANT cannot rely on prior discussion to vest power of adaptation in the arbitration agreement.

23. Further, CLAIMANT contends that the four corners rule, by disregarding PARTIES' unwritten intention, will undermine the PARTIES' intention to arbitrate their disputes [*CLAIMANT,* ¶42]. This contention is completely fallacious. Rather, the application of the four corners rule is in furtherance of the PARTIES' intention to apply Danubian law which encompasses the four corners rule [*Issue I(A)(2)* ¶7].

24. Additionally, CLAIMANT could have argued that prior discussion between the PARTIES can be used to broadly *interpret* the terms "*Any dispute arising out of the contract*" to include adaptation of contract [*UNIDROIT PRINCIPLES, Art. 2.1.17*]. However, such exceptional powers can only be conferred only through express authorization under Danubian Arbitration Law [*PO2,* ¶36] and not by an unreasonable interpretation of the arbitration clause. Therefore, even this contention would fail.

25. In conclusion, CLAIMANT by relying on prior discussion, cannot interpret the arbitration agreement to empower the Tribunal to adapt the contract.

2. The rule of contra proferentem cannot be applied to the arbitration clause

26. CLAIMANT contends that the arbitration agreement is unclear and by application of the rule of *contra proferentem* the arbitration agreement should be interpreted against RESPONDENT [*CLAIMANT,* ¶52]. According to CLAIMANT, RESPONDENT has not explained the objective behind narrowing down the model clause [*CLAIMANT,* ¶52]. Consequently, this rendered the arbitration clause unclear as to the power of the Tribunal to adapt the contract [*CLAIMANT,* ¶52]. These contentions are illogical and must be rejected.

27. Art. 4.6 of Danubian Contract Law lays down the rule of *contra proferentem*. However, this rule is applicable only when, *first*, the contractual terms were supplied by one party and *second*, these terms are ambiguous [*UNIDROIT PRINCIPLES, Article 4.6*].

28. In the present case, the arbitration clause was merely a suggestion and CLAIMANT played an equally definitive role in determining the final arbitration clause [*Ex. R1, p.34*]. In fact, CLAIMANT even

suggested the change of place of arbitration [*Ex. R2, p.34*]. Further, Mr. Antley's failure to inform regarding CLAIMANT's objective does not render an otherwise plainly worded arbitration clause ambiguous. Therefore, the rule of *contra proferentem* has no application to the arbitration agreement in dispute.

C. Even if the law of Mediterraneo were to the arbitration clause, the Tribunal will not have power to adapt the contract

29. Mediterraneo Contract Law is a verbatim adaptation of UNDIROIT Principles [*PO1,* ¶4]. Unlike Danubian Contract Law, Mediterranean Contract Law takes into account the prior communications between parties in order to interpret the arbitration clause [*UNIDROIT PRINCIPLES, Art. 4.2*]. Accordingly, relying on prior negotiations between the PARTIES, CLAIMANT argues that the common intention of the PARTIES was to adapt the contract. However, CLAIMANT here has erred in applying Mediterraneo Contract Law to interpret the arbitration clause. Instead, CISG should have been applied **(1)**. Under CISG, the common intention to confer power of adaptation on arbitrators cannot be established **(2)**.

1. CLAIMANT has erred in applying Mediterraneo Contract Law to interpret the arbitration clause

30. There is consistent jurisprudence in Mediterraneo that when a contract is governed by CISG, the conclusion and the interpretation of the arbitration clause will also be governed by the CISG and not by Mediterranean Contract Law [*PO1,* ¶4]. Here, CLAIMANT has relied on Mediterranean Contract Law to interpret the arbitration agreement [*CLAIMANT,* ¶44]. As a result, CLAIMANT has erred in applying its own laws and has armed itself with the most convenient yet incorrect manner of empowering the Tribunal to adapt the contract. CLAIMANT argues that by virtue of application of Mediterranean Contract Law, the Tribunal can then simply adapt the contract in face of hardship [*UNIDROIT PRINCIPLES, Art. 6.2.3*]. However, this is wrong in law. As regards interpretation of statements, RESPONDENT agrees with CLAIMANT that the criteria for interpreting the statement under Art. 8 CISG literally corresponds to Art. 4.2 of the Mediterraneo Contract Law [*UNIDROIT PRINCIPLES, Art. 4.2*]. Therefore, the manner of interpreting statements is exactly the same under either CISG or Mediterranean Contract Law.

31. In conclusion, Mediterranean Contract Law should be disregarded as it misleads the Tribunal about its power of adaptation. Instead, the Tribunal should interpret the arbitration clause using the CISG.

2. Under the CISG, common intention of the PARTIES to empower the Tribunal to

adapt the contract cannot be established

32. Under CISG, Art. 8(1) states that a party's statement must be interpreted based on the intention of the party provided that the other party could not have been unaware of that intention [*CISG, Art. 8(1)*]. Alternatively, Art. 8(2) states that a reasonable person standard will be taken into account to interpret the statement [*CISG, Art. 8(2)*].

33. In the present case, the original negotiators briefly discussed the question concerning adaptation of the contract [*Ex. C8, p.17*]. When confronted with the question of adaptation, Mr. Antley stated that it was "*probably the task of arbitrators*" [*emph. add.*] to adapt if the PARTIES cannot agree on an amendment of the contract [*Ex. C8, p.17*]. Evidently, Mr. Antley was unsure of the arbitrator's power to adapt the contract. In fact, in order to clear the confusion, even Ms. Napravnik sought to "*clarify that issue and include an express reference"* concerning adaptation of the contract [*Ex. C8, p.17*]. Accordingly, Ms. Napravnik was not unaware that Mr. Antley was unclear about the arbitrator's power to adapt. Alternatively, a reasonable person in the position of Ms. Napravnik would clearly understand that in the brief exchange of views between the negotiators, Mr. Antley simply expressed a cursory opinion about something he could not confirm at that point in time. Therefore, there was no common intention between the PARTIES to confer a power of adaptation on the Tribunal. In conclusion, even if prior negotiations are taken into consideration, the Tribunal is not empowered to adapt the contract.

Conclusion to Issue 1: The PARTIES intended for the law of Danubia to govern the arbitration agreement. Accordingly, without express authorization, the Tribunal is not empowered to adapt the Sales Agreement. Further, under the four-corner rule, CLAIMANT is also precluded from relying on prior discussion to interpret the arbitration agreement. Even if the prior discussion of the PARTIES is considered, the PARTIES were unsure about the Tribunal's power to adapt the contract.

II. CLAIMANT IS PRECLUDED FROM SUBMITTING EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

34. RESPONDENT urges the Tribunal to hold that the "Partial Interim Award" ("evidence") from the previous arbitration proceeding is inadmissible in the present arbitration. Contrary to CLAIMANT's contention, RESPONDENT will establish that the evidence is not admissible because it was obtained either through the breach of an express confidentiality agreement **(A)** or through an illegal hack of RESPONDENT's computer system **(B)**. Further, inadmissibility of evidence does not contravene the principles of fairness and equality **(C)**.

A. Evidence is not admissible since it is obtained through breach of express

confidentiality in the previous arbitration

35. CLAIMANT relies on the IBA Rules on Taking Evidence ("IBA Rules") to argue that confidentiality of evidence under Art. 42 of the HKIAC Rules is not compelling [*CLAIMANT,* ¶67]. Accordingly, it alleges that the evidence is admissible. Further, CLAIMANT contends that Art. 42 of the HKIAC Rules does not preclude the admissibility of evidence [*CLAIMANT,* ¶79]. Contrary to CLAIMANT's contentions, RESPONDENT will establish that the Tribunal should not apply the IBA Rules to determine the admissibility of the evidence **(1)**. Alternatively, even if IBA Rules become applicable, RESPONDENT argues that the confidentiality of "Partial Interim Award" is indeed compelling **(2)**. In any case, evidence cannot be admitted in contravention of the express confidentiality provision **(3)**.

1. Tribunal should not apply the IBA Rules to determine the admissibility of evidence

36. CLAIMANT argues for the Tribunal to apply the IBA Rules in order to determine the admissibility of evidence [*CLAIMANT,* ¶64]. However, this argument is untenable. *First*, IBA Rules are not applicable in an arbitration unless the parties have consented to its application [WAINCYMER, *p.757*; LEW/MISTELIS/KRÖLL, ¶¶22-29]. Here, the PARTIES never agreed to apply the IBA Rules to the arbitration proceedings. Even though it is well-established that the IBA Rules represent international best practices, [*CLAIMANT,* ¶65] they can be applied only when the parties agree to the same. It is not mandatory for the Tribunal to apply these rules [BORN, *p.2122*].

37. *Second*, CLAIMANT argues that the absence of "party agreement on evidentiary rules" will place the arbitral proceedings at the risk of inefficiency [*CLAIMANT,* ¶64]. CLAIMANT alleges that the IBA Rules should *necessarily* supplement the HKIAC Rules to ensure efficiency of arbitral proceedings [*CLAIMANT,* ¶65]. However, the PARTIES expressly chose the HKIAC Rules to govern their arbitration [*Ex. C5, p.14*]. Further, these rules extensively cover the procedure for admissibility of evidence [*HKIAC RULES, Art. 22*]. Also, the HKIAC Rules reflect the best practices in ICA and have been reviewed through extensive consultation with users, stakeholders and practitioners [*HKIAC News Alert, 18th October 2018*]. Accordingly, it is fallacious to suggest that the HKIAC Rules are not adequate for the Tribunal to determine the admissibility of the evidence.

38. In conclusion, RESPONDENT urges the Tribunal to refrain from applying the IBA Rules to the present proceedings.

2. The "Partial Interim Award" satisfies the compelling confidentiality threshold under the IBA Rules.

39. Alternatively, even if the Tribunal decides to apply the IBA Rules, the compelling confidentiality threshold is still satisfied. Art. 9(2)(e) of IBA Rules empowers an arbitral tribunal to exclude documents on the ground of "compelling commercial or technical confidentiality" [*IBA RULES, Art. 9(2)*]. The confidentiality associated with the evidence must be overwhelming so as to satisfy the "compelling confidentiality" standard [ASHFORD, *p.146*]. CLAIMANT contends that confidentiality under Art. 42 of HKIAC Rules is not compelling and "*additional confidentiality protection*" is a requisite [*CLAIMANT,* ¶70]. Thus, RESPONDENT urges the Tribunal to disregard this contention.

40. *First*, party autonomy is the guiding principle for the procedure to be followed in an arbitration proceeding [REDFERN ET AL., *p.319*]. In exercise of their party autonomy, RESPONDENT and the opposing party in the previous arbitration expressly chose the HKIAC Rules to govern their arbitration [*PO2,* ¶39]. The rules also include an express confidentiality provision [*PO2,* ¶39]. The inclusion of an express confidentiality provision is indicative of the PARTIES' intention to keep the proceedings confidential without an additional need for confidentiality protection. Contrary to CLAIMANT's contention, there is no need for additional protection since the PARTIES themselves chose the HKIAC Rules to govern all aspects of their arbitration including confidentiality. Moreover, CLAIMANT's reliance on the case of *Panhandle Eastern Corp.* is misguided [*CLAIMANT,* ¶68]. Contrary to CLAIMANT's interpretation, in *Panhandle Eastern Corp.*, the Court allowed the disclosure of evidence since the applicable institutional rules neither contained rules concerning confidentiality of arbitration nor was there an explicit confidentiality agreement [*Panhandle Eastern Corp.*]. Evidently, the interpretation provided by CLAIMANT is incorrect and aims to mislead the Tribunal. Therefore, the confidentiality provision under the HKIAC Rules is adequately compelling for the Tribunal to disallow the admission of evidence.

41. *Second*, the circumstances also indicate that there are overwhelming grounds to favour confidentiality of the evidence. Art. 9(2)(e) of the IBA Rules prescribes the reproduction of seriously confidential information whose disclosure a party would want to prevent [*IBA RULES, Art. 9(2)(e)*; O'MALLEY, *p.301*; *ICC Case No. 1000*]. Information in arbitral filings can be vital as it could compromise a company's image before crucial stakeholders [BORN, *p.2782*; *Meza-Salas*]. Here, RESPONDENT is a recent entrant in the racehorse breeding industry [*Ex. C1, p.9*]. It would not want its reputation to be affected on account of the award made in the prior arbitration. RESPONDENT's entry in this industry is widely broadcasted by the media and any information leak would have adverse effects in its pursuit to become an industry leader [*Ex. C1, p.9*]. In order to guard its interests, RESPONDENT ensured that adequate security measures are placed to keep the evidence confidential. This is evidenced by the fact that RESPONDENT's employees were bound

by contractual confidentiality obligations [*PO2,* ¶41]. Additionally, RESPONDENT even used a firewall to protect its computer system [*PO2,* ¶42]. The aforementioned facts clearly establish RESPONDENT's extensive commercial interest in keeping the award confidential. In fact, RESPONDENT's opposing party in the previous arbitration also intended to ensure confidentiality of the evidence [*PO2,* ¶41]. It declined the request for a copy of the award by Mr. Velazquez, a former employee [*PO2,* ¶41]. This is because a leak of such sensitive information would have been equally detrimental to the opponent's reputation. Therefore, both the parties involved in the previous arbitration, over and above the confidentiality obligation under Art. 42 of HKIAC Rules intended to keep the "Partial Interim Award" confidential.

42. In conclusion, the confidentiality of the evidence is compelling, and the Tribunal should not admit it as evidence.

3. In any case, confidentiality of "Partial Interim Award" extends to the present arbitration proceedings

43. Admittedly, Art. 42.1(b) of the HKIAC Rules prohibits parties to the arbitration from disclosing or communicating information about the award [*HKIAC RULES, Art. 42.1(b)*]. CLAIMANT relies on this express confidentiality clause to argue that the confidentiality obligation is limited to the PARTIES in the prior arbitration and does not extend to CLAIMANT in the present arbitration [*CLAIMANT,* ¶79]. However, this argument is completely baseless. Implied duty of confidentiality in an arbitration extends to third parties as well [*Dolling-Baker*; *Hassneh Insurance*; *Insurance Co*]. In *Dolling-Baker*, the Court held that a third party to an arbitration can seek to disclose an award only if the award is *first*, relevant to the case at hand and *second*, its disclosure is necessary for fair disposal of action [*Dolling-Baker, p.891*].

44. In the present case, CLAIMANT seeks to admit the evidence in order to emphasise RESPONDENT's alleged contradictory position towards the issue of price adaptation [*Letter by Langweiler, p.49*]. This contention is without any merit. In the present arbitration, the law of Danubia governs the arbitration agreement [*Issue I(A),* ¶3] as opposed to the law of Mediterraneo in the previous arbitration [*PO2,* ¶39]. Consequently, as established above, the Tribunal is not empowered to adapt the contract in the present arbitration [*Issue I(B)* ¶17]. Whereas, in the previous arbitration, the arbitral tribunal was empowered to adapt the contract under Art. 6.2.3 Mediterranean Contract Law. Evidently, RESPONDENT's change in position vis-à-vis price adaptation is justified in light of the application of law of Danubia to the arbitration agreement. Therefore, admission of evidence is clearly redundant because there is no contradiction in the first place. Further, the evidence does not undermine the veracity of RESPONDENT's claims. Due to significant difference in the

applicable law, the evidence does not even have a persuasive value in the present dispute.

45. Although this CLAIMANT has not raised this contention, a claimant could have argued that the award is in public domain and therefore, the evidence must be admissible [REDFERN ET AL., *p.381*; SMEUREANU, *p.112*]. For information to be in public domain, it should be publicly accessible and the parties should acknowledge the external sources from which that information was obtained [SMEUREANU, *p.111*]. Here, the evidence was obtained from an investigation company and was not publicly accessible [*PO2,* ¶41]. Further, CLAIMANT cannot even acknowledge the source of the information as it was obtained through dubious sources by the investigation company [*PO2,* ¶41]. Therefore, the evidence is not available in public domain and cannot be admitted as evidence.

46. In conclusion, the evidence is neither relevant nor necessary for a fair disposal of action in the present arbitration proceedings.

B. The evidence is not admissible since it was obtained through an illegal hack of RESPONDENT's computer system.

47. The Tribunal has wide discretion over the admissibility and weight of evidence under the HKIAC Rules as well as the *lex arbitri* [*HKIAC RULES, Art. 22*; *UNCITRAL MODEL LAW, Art. 19(2)*]. CLAIMANT contends that since it was not involved in the illegal hack, the Tribunal can admit the evidence [*CLAIMANT,* ¶83]. However, this contention is baseless and legally incorrect.

48. Parties in an arbitration owe a duty of good faith to each other [*Methanex Corporation*; WAINCYMER, *p.797*]. This principle of good faith precludes a party from relying on illegally obtained evidence if it has played a role in obtaining it [*Blair/Gojkovic*; *Methanex Corporation*]. Further, it must be noted that there is a presumption against admissibility, if the disclosure occurred during the arbitration through illegal means [*Boykin/Havalic*].

49. In the present case, CLAIMANT played an active role in obtaining the evidence that it knew was leaked illegally [*PO2,* ¶41]. In its letter on 3rd October 2018, RESPONDENT informed CLAIMANT and this Tribunal about the information leak which was possibly due to an illegal hack of its computer systems [*Letter by Fasttrack, p.50*]. Eyeing for an opportunity to attack RESPONDENT's veracity, CLAIMANT initially attempted to procure the copy of award from the opposing party in the prior arbitration but to no avail [*PO2,* ¶41]. Nevertheless, CLAIMANT intended to obtain the evidence by hook or crook. Consequently, despite being aware of the illegal origins of the evidence, CLAIMANT proceeded to obtain the award from an investigation company with dubious sources [*PO2,* ¶41]. Evidently, the "Partial Interim Award" is the fruit of a poisonous tree. Accordingly, CLAIMANT breached the duty of good faith it owed RESPONDENT and now seeks to take undue advantage of that breach. In light of such bad faith, the evidence should not be admitted.

50. Even if it is assumed that CLAIMANT was not involved in unlawfully obtaining the evidence, the evidence is still inadmissible. A file obtained illegally from a party to arbitration is presumptively inadmissible, unless it is the sole evidence that a party has to rely on to establish its case [*Boykin/Havalic*]. While the CLAIMANT could have argued that the "Partial Interim Award" is absolutely necessary to prove its case, this contention would be baseless. This is because the evidence is neither material nor relevant to the present arbitration proceedings [*II(A)(3)* ¶44]. Accordingly, the evidence does not contribute value to the present arbitration and is merely CLAIMANT's strategy to discredit RESPONDENT's claims by alleging contradictory positions. Therefore, the evidence does not fall within the exception for it to be admissible and it accordingly cannot be admitted as evidence.

51. In conclusion, the illegality of evidence renders the "Partial Interim Award" inadmissible.

C. Inadmissibility of evidence does not undermine the principles of fairness and equality.

52. Procedural fairness and equality in arbitration are fundamental rules of arbitration [O'MALLEY, *p.319*]. According to the principle of procedural fairness, each party must be afforded an equal opportunity to present its evidence [SCHWARZ/KONRAD, ¶¶20-017; *Dombo Beheer*]. Further, the principle of equality requires that each party should be given a fair opportunity to establish its case. CLAIMANT argues that non-admission of evidence will breach CLAIMANT's right to be heard and its right to fair opportunity to present its case [*CLAIMANT,* ¶87]. However, these contentions are entirely fallacious.

53. An arbitral tribunal "does not violate equality where it finds, on separate, justifiable grounds that one party's evidence should be admitted, whereas another's denied" [*ICC Case No. 5082*; *Otis Elevator*]. Further, the relevancy of evidence is an important consideration in order to determine the equality of opportunity afforded to the parties [O'MALLEY, *p.320*; *Fraport AG Frankfurt Airport Services Worldwide*]. In the present case, the confidentiality of the evidence or the illegal hack of RESPONDENT's computer system should preclude admission of evidence [*Issue II(A),* ¶35; *Issue II(B),* ¶47]. Moreover, the evidence is neither relevant nor material to the outcome of the present arbitration. Accordingly, the Tribunal is well within its rights to disregard the admissibility of the illicit evidence without violating CLAIMANT's right to be heard or its right to fair opportunity.

54. In conclusion, contrary to CLAIMANT's submission, inadmissibility of evidence does not undermine the principles of procedural fairness or equality.

Conclusion to Issue 2: The evidence sought to be admitted is neither relevant nor material to

the present proceedings. Accordingly, the confidentiality of the previous arbitration proceedings precludes admission of evidence in the present arbitration. Further, CLAIMANT's bad faith in obtaining the illegal evidence also renders the evidence inadmissible. In any case, inadmissibility of evidence does not breach CLAIMANT's right to be heard and right to equal opportunity.

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT

55. When the PARTIES signed their contract, they agreed to a narrow hardship clause [*Ex. C5, p.14*]. It regulated specific and specialised unforeseen events [*Ex. C5, p.14*; *Ex. R3, p.35*]. The retaliatory tariff imposed by Equatoriana does not fall within the scope of the hardship clause. However, CLAIMANT now alleges that the PARTIES had agreed on a broad hardship clause [*NoA, p.7*]. By doing so, CLAIMANT is conveniently trying to shift the burden of tariffs when it is clearly not envisaged. On the basis of this contention, it argues that RESPONDENT must remunerate CLAIMANT for the cost of the tariffs incurred during delivery [*NoA, p.8*].

56. Contrary to CLAIMANT'S allegations [*CLAIMANT,* ¶99], RESPONDENT urges the Tribunal to recognize that reliance on the UNIDROIT Principles by CLAIMANT is fallacious **(A)**. Further, the PARTIES agreed to a narrow hardship clause which excludes the import tariffs **(B)**. Moreover, the risk flowing from change in tariff rates was for CLAIMANT to bear **(C)**. Finally, the requested remedy of adaptation is not envisaged under the hardship clause **(D).**

A. CLAIMANT'S reliance on the UNIDROIT Principles is fallacious

57. CLAIMANT has relied on the UNIDROIT Principles to argue that the interpretation of clause 12 of the contract would entail that it covers import tariffs [*CLAIMANT,* ¶¶109-112]. This reliance is completely misguided. The CISG applies to international contracts between businesses from Contracting States by default [*CISG, Art. 1(a)*]. In the present case, the PARTIES are Contracting States of the CISG [*PO1,* ¶4]. Further, clause 14 of the contract states "*this Sales Agreement shall be governed by the law of Mediterraneo*, *including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)*" [*Ex. C5, p.15*]. RESPONDENT asserts that the UNIDROIT Principles cannot be applied in the present case as the UNIDROIT Principles *viz* law of Mediterraneo constitutes domestic law which is subordinate to the CISG [FERRARI/FLECHTNER/BRAND, *p.170*; SCHLECHTRIEM/SCHWENZER, *p.141*; *Kotrusz*; *Viscasillas*; *ICC Case No. 7565/1994*].

58. Most court decisions [*Benetton*; *Cables*; *Cooling*; *Cucumbers*; *Fitness*; *Gravenhage*; *Hof van Beroep Gent*; *Insulating materials*;*Kassel*; *Koblenz*; *Nidwalden*; *Plastic*; *Protective Film*; *Scrap Steel*; *Sunflower*; *Window elements*; *Yarn*] and arbitral awards [*Handelskammer*; *ICC Case 7844/1994*; *ICC Case 8324/1995*; *ICC*

Case 9187/1999; *ICC Case 9448/1999*; *Mushrooms*; *Wirtschaft*] confirm that CISG is the substantive law governing international sales contracts between the PARTIES in Contracting States. National law may only be used when the Convention has no solution [BRUNNER, *p.34*; *Povrzenic*; *Waincymer*; *B.P. Petroleum*; *CCA*]. Thus, choosing the law of a Contracting State does not exclude the Convention's applicability. The Convention forms an integral part of the national law of that State and acts as lex specialis for international sales contracts [FERRARI, *p.138*; KRÖLL/MISTELIS/VISCASILLAS, *p.105*; SHAUGHNESSY/TUNG, *p.316*; *Mitsubishi*; *Viscasillas*]. For instance, the domestic sales law of a State may only be correctly used for interpretation if the parties expressly choose to be governed by it in their choice-of-law clause [LOOKOFSKY I, *p.27*; *Ajax Tool Works*; *ICC Case No. 6653/1993*; *ICC Case No. 7565/1994*; *ICC Case No. 7660/1994*; *Guardian Insurance*; *Russian Federation*; *Travelers Property*].

59. In the present case, merely stating "*Law of Mediterraneo*" does not imply the application of the UNIDROIT Principles [*Ex. C5, p.14*]. CLAIMANT has applied the UNIDROIT Principles to construe intent of the PARTIES [*CLAIMANT,* ¶109]. On the contrary, Art. 8 CISG is an adequate and a popular mechanism to achieve the same purpose. In cases where the rules of the UNIDROIT Principles and the CISG are in conflict, then for a contract governed by the CISG, the rule of interpretation provided shall prevail [*Carlsen*]. Moreover, there is no relevant gap in Art. 8 CISG that would warrant the use of UNIDROIT Principles [*CISG, Art. 8*]. Accordingly, the reliance placed on UNIDROIT Principles by CLAIMANT is erroneous and flawed.

B. The PARTIES mutually agreed to a narrow hardship clause

60. CLAIMANT has argued for a wide interpretation of the hardship clause in light of the intent of the PARTIES to not include a narrow hardship clause [*CLAIMANT*, ¶¶100-101]. RESPONDENT will establish that such allegations are false through the Convention's subjective **(1)** and objective **(2)** tests of interpretation.

1. Subjective interpretation

61. Art. 8(1) of the Convention allows reliance on the subjective intention of the PARTIES for interpretation of the contract [*CISG, Art. 8(1)*; *LG Hamburg*; *LG Oldenberg*; *OGH*; *Roll of Rubber*; *Sunprojuice*]. It defines 'statement' to be any expression that the other party is aware of [KRÖLL/MISTELIS/VISCASSILAS, *p.146*; LOOKOFSKY II, *p.55*; SCHLECHTRIEM/SCHWENZER, *p.151*; *Eörsi*; *Graz*; *Lautenschlager*; *Zeller*; *Building Materials*; *Blumenegg*; *Circuit*; *Gantry*; *Helsinki*]. Further, actual intent is arrived at on the basis of the fact and evidence of the circumstances [KRÖLL/MISTELIS/VISCASSILAS, *p.143*; *BGer*; *MCC-Marble*; *Supermicro*; *Yugoslav*]. CLAIMANT has argued that the PARTIES had no intention to include a narrowly worded hardship clause into the

contract [*CLAIMANT,* ¶103]. Such a claim is untenable. During negotiations, CLAIMANT in its email dated 11th April 2017 suggested reliance on the ICC-Hardship clause [*Ex. R2, p.34*]. However, RESPONDENT clarified with CLAIMANT that reliance on such a broad clause was not acceptable for the purposes of the contract [*PO2,* ¶12]. This demonstrated their inclination towards a narrow clause. CLAIMANT cannot therefore claim to be unaware of the intention of RESPONDENT. Subsequently, RESPONDENT suggested the phrasing of the hardship clause in light of the risks mentioned by Ms. Napravnik [*Ex. R3, p.35*]. The PARTIES agreed to a narrowly phrased hardship clause because CLAIMANT insisted on RESPONDENT undertaking several delivery obligations such as insurance fees, tank rental and handling fees [*Ex. R3, p.35*; *Ex. C5, p.14*].

62. The non-inclusion of a broad hardship clause is evidence of the intention of RESPONDENT. It was common ground between the PARTIES that clause 12 of the contract should be interpreted more narrowly than the ICC-Hardship clause [*PO2,* ¶12]. This is evident from the comparison of both clauses. The latter clause allows for termination of contract in case renegotiation fails whereas the former clause does not provide such a remedy.

63. An interpretation of the hardship clause in light of its context would exclude import tariffs from its ambit. The words "*comparable unforeseen events*" in clause 12 can be understood with regards to CLAIMANT's intention. CLAIMANT had previously undergone hardship due to unforeseeable additional health and safety requirements [*Ex. C4, p.12*; *PO2,* ¶21]. It destroyed the commercial basis of the deal as the requisite tests increased costs by 40% and CLAIMANT was on the brink of insolvency [*Ex. C4, p.12*; *PO2,* ¶21]. It is in this context that RESPONDENT suggested the phrasing of the hardship clause that was ultimately agreed on and added to the contract by the PARTIES [*PO2,* ¶12]. Further, CLAIMANT contends that it could not have been aware of the intention of RESPONDENT to limit the phrase "comparable events" to health and safety requirements [*CLAIMANT,* ¶103]. Import tariffs do not fall within this category because *first*, it is not related to health and safety and *second*, the probability of government of Equatoriana retaliating with such a high tariff was very low [*Ex. C6, p.15*]. Furthermore, it would not make commercial sense for RESPONDENT to cover risks of tariffs within the hardship clause when the PARTIES have already undertaken equitable risk allocation under DDP delivery.

2. Objective Interpretation

64. CLAIMANT has also relied on the objective standard to demonstrate the intention of the PARTIES [*CLAIMANT,* ¶¶105-108]. Art. 8(2) CISG allows interpretation "*according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances*" [*CISG, Art. 8(2)*]. The intention of a party is gathered in accordance with what a reasonable person in the shoes

of the other party would construe it to be [*ATB, 1995*; *CLOUT Case No.* 106; *CLOUT Case No. 166*; *CLOUT Case No. 189*; *CLOUT Case No. 215*; *CLOUT Case No. 308*; *Cooling*; *Hamm*; *Köln*; *Machinery*]. Additionally, RESPONDENT will establish that even from the perspective of a reasonable person, it is clear that the narrowly worded hardship clause excludes import tariffs.

65. CLAIMANT relies on the 'inexperience' of Mr. Ferguson to argue that a reasonable person in his position would interpret the hardship clause to include tariffs [*CLAIMANT,* ¶107]. On the contrary, RESPONDENT asserts that Mr. Ferguson understood the implications of the hardship clause. Ms. Napravnik specified the scope of the hardship clause, as is evident from her email dated 31st March 2017 [*Ex. C4, p.12*]. Mr. Ferguson was aware of this [*PO2,* ¶5]. Moreover, having been involved in the drafting of clauses 6-15, he could not have been unaware of the risk allocation that influenced the phrasing of the hardship clause [*Ex. C8, p.17*]. He further agreed to its phrasing and also consented to adding it to the contract [*Ex. R3, p.35*]. Therefore, Mr. Ferguson was always aware of the scope of the hardship clause.

66. Additionally, CLAIMANT argues for the interpretation of the hardship clause on the basis of the *contra proferentem* rule [*CLAIMANT,* ¶111]. The application of such a rule is misguided and should not be given much weight in the present case. It must only be applied in rare situations involving ambiguous terms [KLINGLER ET AL., *pp.249-250*; *ATS Arbitral Award*; *Aramco Award*]. Further, the rule is only relevant when contractual terms are imposed in a manner that does not leave the other party an opportunity to review it [KLINGLER ET AL., *pp.249-250*].

67. In the present case, RESPONDENT has merely suggested the phrasing of the hardship clause to CLAIMANT [*PO2,* ¶12]. This was done on the basis of consultations with CLAIMANT. RESPONDENT also took into consideration the email correspondence between the PARTIES [*PO2,* ¶5; *PO2,* ¶12]. CLAIMANT had sufficient time to review and object to the proposed wording of the clause if it determined it to be ambiguous. Moreover, the PARTIES mutually agreed to the inclusion of a narrow hardship clause to the original *force majeure* clause [*Ex. R3, p.34*]. Furthermore, as established above the scope of the words "*comparable unforeseen events*" is narrow. Accordingly, there can be no application of the *contra proferentem* rule. Any reasonable person in the shoes of Mr. Ferguson would have understood the clause to be narrow, given the negotiations. Consequently, CLAIMANT's allegations of clause 12 being a broad clause and covering tariffs is completely fallacious.

68. Thus, it was the common intention of the PARTIES to have a narrow hardship clause and exclude the import tariffs from the scope of the clause.

C. DDP delivery entails that CLAIMANT is to bear the additional tariffs

69. The PARTIES agreed on DDP delivery as prescribed under the INCOTERMS [*PO2,* ¶10]. 'Delivered Duty Paid' specifies that the seller must bear all costs and risks involved in clearing the goods for import and export, other custom formalities and also pay the corresponding duty until the goods are delivered to the buyer [*ICC INCOTERMS RULES, 2010*]. CLAIMANT contends that under a CISG contract, the intention of the PARTIES *viz* the terms of DDP would prevail over the general obligation under the INCOTERMS [*CLAIMANT,* ¶114; COETZEE, *p.17*; SCHLECHTRIEM, *p.420*; SCHLECHTRIEM/SCHWENZER, *p.741*; *Bensafi/Mack/Nassef/Simonnet,* ¶3.1; *Fertilizer*].While RESPONDENT agrees with this settled principle, it asserts that CLAIMANT has erroneously concluded that it had no obligation to pay tariffs.

70. CLAIMANT has conveniently cherry-picked facts to argue that it is only responsible for transportation fees [*CLAIMANT,* ¶115]. Such a contention is baseless. In fact, RESPONDENT had very good reasons to suggest that CLAIMANT undertake a DDP obligation. *First*, RESPONDENT was aware of CLAIMANT's greater experience in shipping of frozen semen, which includes *inter alia* the "*necessary export and import documentation*" [*Ex. C3, p.11*]. *Second*, CLAIMANT is in a better position to ensure speedy delivery of the shipments [*Ex. C3, p.11*; *PO2,* ¶11]. *Third*, DDP delivery would be commercially reasonable for both PARTIES in the present case.

71. The thrust of CLAIMANT's argument revolves around the email dated 31st March 2017 from Ms. Napravnik [*CLAIMANT,* ¶116; *Ex. C4, p.12*]. The email clarified the position of *Phar Lap*. It specified that it was not willing to undertake any additional risks including customs regulations or import restrictions [*Ex. C4, p.12*]. This was not acceptable to RESPONDENT as it would have entailed bearing a much higher price in exchange for practically nothing [*Ans. NoA, p.30*]. Additionally, CLAIMANT emphasized that it would be willing to perform its DDP obligations if there is a hardship clause in the contract [*Ex. C4, p.12*]. In this regard, Ms. Napravnik, in her email states "*we are not willing to take over any further risks* […] *At minimum, a hardship clause should be included into the contract to address such subsequent changes*" [*emph. add*] [*Ex. C4, p.12*]. Accordingly, a narrow hardship clause was added as protection against additional health and safety requirements and events comparable to it. However, after all the risks that RESPONDENT has already undertaken in the contract, the risk of custom changes and import tariffs remain unaddressed [*Ex. C5, p.14*]. CLAIMANT should be responsible for these risks since it had assumed them when it agreed to the hardship clause. Further, CLAIMANT also agreed to receive increased revenue for its DDP obligations [*Ex. C4, p.12*; *PO2,* ¶8]. Since most obligations were performed by RESPONDENT, the risks that were not expressly addressed fell within CLAIMANT's domain.

72. CLAIMANT has argued that the interpretation of the contract as a whole implies that it never

intended to bear any risk including import tariffs [*CLAIMANT,* ¶110]. Contrary to CLAIMANT's allegations, RESPONDENT only undertook certain risks such as insurance, tank and rental fees [*Ex. C5, p.14*]. All the other risks were to be borne by CLAIMANT in accordance with its DDP obligations [*Ex. C5, p.14*].

73. Furthermore, if CLAIMANT's contention of a skewed risk allocation were to be believed, then RESPONDENT might as well have insisted on EXW delivery rather than suggest DDP delivery. It was because of commercial dynamics that RESPONDENT insisted on the latter and went out of its way to reach an agreement with CLAIMANT. In summary, risk allocation was undertaken in an equitable fashion and it was never the intention of RESPONDENT to have a one-sided and unfair risk allocation such that import tariffs are excluded from the broad DDP delivery definition in the INCOTERMS. Therefore, it is clear that the intention of the PARTIES read with the broad definition of DDP suggests that CLAIMANT had the obligation to pay the import tariffs.

D. The hardship clause does not provide for adaptation

74. CLAIMANT has argued that clause 12 of the contract provides for an adaptation mechanism [*CLAIMANT,* ¶119]. It has cited authorities to contend that the PARTIES need to commit to a renegotiation process and allow the Tribunal to adapt the contract rather than seek termination [*CLAIMANT,* ¶¶120-122]. Contrary to CLAIMANT's allegations, the PARTIES never intended to allow adaptation of price under clause 12 of the contract. Clause 12 was intended to be a hardship clause that determines the circumstances of hardship for the PARTIES [*Ex. C5, p.14*]. The Tribunal should give priority to the principle of party autonomy in order to find that the intention was not to have adaptation as a remedy under clause 12.

75. The PARTIES' intent can be gathered with the aid of Art. 8(1) CISG [*CISG, Art. 8(1)*; KRÖLL/MISTELIS/VISCASILLAS, *p.142*; STAUDINGER/MAGNUS, ¶7; SCHLECHTRIEM/SCHWENZER, *p.144*; *Secretariat Commentary*]. Although not raised by this CLAIMANT, a claimant may place reliance on the brief discussion between Ms. Napravnik and Mr. Antley on 12th April 2017 to construe the intention of the PARTIES [*Ex. C8, p.17*]. Mr. Antley, in response to the question on adaptation of contract, said that, "*it should probably be the task of the arbitrators to adapt* …" [*emph. add.*] which clearly indicates that he was unsure about the power to adapt the hardship clause [*Ex. C8, p.17*]. Ms. Napravnik "*suggested to clarify the issue and include an express reference* …" which signifies that both PARTIES were unsure about the Tribunal's power to adapt the contract. Thus, there was no common intention to allow adaptation under clause 12.

76. Further, CLAIMANT's contentions are baseless even from the objective standpoint under Art. 8(2) CISG [*CISG, Art. 8(2)*]. RESPONDENT asserts that a reasonable person would construe these

statements to imply that the PARTIES were unsure about the Tribunal's power to adapt through the hardship clause. Moreover, the hardship clause is in itself enough to identify the responsibilities of seller and buyer as the case may be. Accordingly, there was no need for an express or an implied reference to adaptation.

77. Furthermore, the subsequent conduct of PARTIES is a relevant source in discerning the intent of the PARTIES [*CISG, Art. 8(3)*; *CISG AC OP. 13*; STAUDINGER/MAGNUS, *p.152*; *American Mint*; *Céramique*; *Cour d'appel de Paris*; *Fondmetall*; *Moscow*; *Thompson*]. Although not raised by this CLAIMANT, a claimant might have argued that the phone call between Ms. Napravnik and Mr. Shoemaker signifies the intention of RESPONDENT to accept price adaptation of the contract. However, such an allegation is baseless in light of the facts and circumstances. Mr. Shoemaker categorically said, "*if the contract provides for an increased price* […] *we will find an agreement on the price*" [*emph. add.*] [*Ex. R4, p.36*]. A reasonable person in the shoes of CLAIMANT would not construe this statement to mean that clause 12 provides for price adaptation. The primary reason for Mr. Shoemaker to express this was to ensure that CLAIMANT complete the shipment on time [*Ex. R4, p.36*]. He never intended to make binding commitments and in fact tried to clarify the issue with the legal department, however no legal personnel were available [*PO2,* ¶34].

78. Finally, since the contract does not provide adaptation of contractual terms as a remedy under any of the clauses it is illogical of CLAIMANT to arrive at the impression that RESPONDENT agreed to a general need for price adaptation [*Ex. C8, p.17*; *NoA, p.6*]. Additionally, the new set of negotiators who finalized the contract, only had access to only the prior chain of emails and could not have been aware of the short conversation between Ms. Napravnik and Mr. Antley [*Ex. C8, p.17*; *PO2,* ¶5]. RESPONDENT asserts that though clause 12 does not have any reference to adaptation, this is not because the negotiators forgot about it or considered it to be unnecessary but because they deliberately avoided it [*Ex. C8, p.17*]. Accordingly, the PARTIES never intended for the remedy of adaptation under clause 12 of the contract.

Conclusion to Issue 3: In summary, the PARTIES always intended the scope of the hardship clause to be narrow. The words "comparable unforeseen events" has to be interpreted keeping in mind the context in which it was drafted. Such intent can be gathered with the aid of Art. 8 CISG to reasonably conclude that import tariffs lie outside the ambit of the hardship clause. Further, the DDP delivery obligations specific to the present case, connote that the risk of import tariffs is to be borne by CLAIMANT. Finally, the narrowly worded hardship clause does not envisage the remedy of adaptation of price as requested by CLAIMANT. Consequently, CLAIMANT is not entitled to US$ 1,250,000 through adaptation under clause 12 of the contract.

IV. ALTERNATIVELY, CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG

79. CLAIMANT seeks payment of US$ 1,250,000 under Art. 79 CISG. However, the PARTIES through the hardship clause have agreed to derogate from the applicability of Art. 79 **(A)**. Further, even if Art. 79 were applicable, it does not exempt non-performing parties from circumstances of hardship nor does it provision a remedy for adaptation **(B)**. Alternatively, if the Tribunal still believes there is a gap in Art. 79 it may resort to the mechanism of gap filling. CLAIMANT argues that the Tribunal must adapt the contract on the basis of the general principle of good faith [*CLAIMANT,* ¶137]. Contrary to CLAIMANT's allegations, RESPONDENT establishes that such an approach is implausible. Additionally, RESPONDENT will establish that the mechanism of gap filling may be performed with recourse to Danubian domestic law **(C)**. Additionally, CLAIMANT also contends that RESPONDENT breached the duty to renegotiate as well as enforce an agreement under the UNIDROIT Principles [*CLAIMANT,* ¶¶153-154]. However, RESPONDENT refutes these claims **(D)**. Finally, CLAIMANT asks for an additional amount of US$ 300,000 in damages [*CLAIMANT,* ¶166]. However, such a request lies outside the scope of the present dispute **(E)**.

A. The PARTIES have derogated from Art. 79

80. CLAIMANT argues that there is neither any implicit intent to derogate nor is there a contradiction between the contractual clause and Art. 79 [*CLAIMANT,* ¶130]. Both these contentions are completely unfounded. In order to determine derogation, both parties must have clear intent to do so [KRÖLL/MISTELIS/VISCASILLAS, *p.104*]. Intent may be gauged through the effect a contractual clause may have over the application of the CISG provisions. Intent may also be clear when there are contradictions between the contractual clause in question and the Convention's provision. Accordingly, both PARTIES very clearly intended to derogate from the provision of Art. 79 by way of drafting a clause that specially regulated the situation of changed circumstances **(1)**. Further, clause 12 is in contradiction of Art. 79 **(2)**.

81. CLAIMANT further indicates that an unequivocal statement is necessary to demonstrate derogation [*CLAIMANT,* ¶131]. It must be noted that in order to derogate from a particular provision, an explicit expression to derogate is not required, an implicit intention to derogate would suffice [BIANCA/BONELL, *p.55*; FLECHTNER, *p.77*; HONNOLD/FLECHTNER, *p.1081*; KRÖLL/MISTELIS/VISCASILLAS, *p.104*; *Alicante*; *Celle*; *Ceramique*; *Dresden*; *Flottweg*; *ICC Award No. 8453/1995*; *München*; *Popular*; *Vigevano*; *Weinfelden*].

1. There was a clear and implicit intention to derogate from Art. 79

82. One of the general principles on which the CISG is based on is that of party autonomy [HUBER/MULLIS, *p.34*; NEUMANN, *p.37*; STAUDINGER/MAGNUS, *p.112*; SCHLECHTRIEM/SCHWENZER I, *p.244*; *Felemegas*; *Ferrari II*]. Accordingly, contractual agreements must be privileged over CISG provisions that have default application [BÜCHLER/MÜLLER-CHEN, *p.1285*; MÜNCHKOMMHGB/BENICKE, *p.110*; SCHLECHTRIEM/SCHWENZER I, *p.105*; *Hof van Beroep*]. Art. 6 of the Convention allows party autonomy to operate in derogation of individual provisions in the CISG by way of modification, alteration or supplementation of their effect [BRIDGE, *p.17*; ENDERLEIN/MASKOV, *p.49*; FERRARI II, *p.119*; SCHLECHTRIEM/SCHWENZER I, *p.105*; *Hayward/Zeller/Anderson*; *Witz, p.111*].

83. *First*, CLAIMANT has argued that Art. 79 provides for the situation of hardship or change in circumstances [*CLAIMANT,* ¶139]. Accordingly, if this line of argument is valid, as CLAIMANT contends, then clause 12 acts as a special regulation for Art. 79. It clearly delineates the obligations and risks between the two PARTIES so much so that Art. 79 has been modified and augmented in order to better serve the PARTIES and their intent.

84. One of the criteria to claim an exemption under Art. 79 is the failure of an obligation on the part of the party claiming the exemption [*CISG, Art. 79(1)*; SCHLECHTRIEM/SCHWENZER I, *p.1131*]. Whereas, clause 12 states one of the criteria to avoid responsibility is an increased onerousness in performing the contract [*Ex. C5, p.14*]. Accordingly, the PARTIES have agreed on a contractual clause that qualifies or conditions one of the prerequisites of Art. 79. An alteration of prerequisites under Art. 79 would preclude its default application and constitute an implicit derogation [SCHLECHTRIEM/SCHWENZER I, *p.115*]. This modification thereby constitutes derogation under Art. 6.

85. *Second*, during negotiations, upon RESPONDENT's suggestion, CLAIMANT generally accepted a DDP delivery and originally did so for an increase of US$ 1000 per dose [*Ex. C4, p.12*]. The reference to incorporation of ICC INCOTERMS as regards delivery is indicative of the PARTIES' intention to customise rules for themselves [SCHLECHTRIEM/SCHWENZER II, *p.115*; SCHROETER/ANDERSON, *p.77*; *Coetzee*; *Farnsworth*]. At the same time, CLAIMANT initially refused to be burdened with any risks associated with changes in customs regulations or import restrictions [*Ex. C4, p.12*] but then opted to include a hardship clause instead [*PO2,* ¶8]. CLAIMANT decided, with consensus from RESPONDENT that it wanted to modify some of its obligations under DDP in order to include a narrowly worded hardship clause within the contract. In this way, it has negotiated its risks with RESPONDENT and has ultimately structured its priorities such that the intervention of Art. 79 would only serve to negate the PARTIES' intention and ultimately the

principle of party autonomy.

86. Moreover, the contract is based on a basic industry template from Mediterraneo [*PO2,* ¶3]. Originally, clause 12 of the contract only exempted the seller from responsibility when faced with specific circumstances or acts of God [*Ex. C5, p.14*; *PO2,* ¶3]. However, in the final version of the contract, the PARTIES included a hardship provision that read "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*emph. add.*] [*Ex. C5, p.14*]. Here, both PARTIES have agreed to specify that only in the event of additional health and safety requirements or an event that is comparable to it would fall under the purview of hardship [*Ex. R3, p.35*]. A specialised hardship clause that is in effect more specified in contrast to Art. 79 is reflective of the PARTIES' intention expressed in their email correspondence [*Ex. C5, p.12*] as well as their final price fixing [*PO2,* ¶8].

2. The provision of clause 12 is in contradiction with Art. 79

87. In order to exclude a particular provision, there must be clear intent to derogate [WINSHIP, *pp.35-36*; *Namur*; *CLOUT Case No. 229*; *CLOUT Case No. 433*]. An indication of clear intent could be when the PARTIES have agreed to a contractual clause that is inconsistent with individual provisions of the Convention [BIANCA/BONELL, *p.56*; *Ferrari I*; *CLOUT Case No. 237*; *ICC Arbitral Award 11333*].

88. CLAIMANT contends that in the present case, there exists no contradiction between clause 12 of the contract and Art. 79 CISG [*CLAIMANT,* ¶131]. CLAIMANT asserts that Ms. Napravnik's statement to "*include an express reference* [...] *not necessary*" was in relation to the ICC Hardship clause mentioned in the email dated 11th April 2017 [*CLAIMANT,* ¶134]. However, this is completely baseless. Ms. Napravnik's statement at the annual colt auction was regarding an adaptation mechanism. It had nothing to do with the ICC Hardship clause nor was the statement of any weight to the division of risk or the scope of hardship present under clause 12 [*Ex. C8, p.17*].

89. Hence, in the process of specialising a hardship clause in the contract, the PARTIES have derogated from Art. 79. Further, the resulting contradictions between the contractual clause and the provision of Art. 79 can only amount to derogation from Art. 79.

B. Art. 79 regulates neither hardship circumstances nor adaptation

90. CLAIMANT argues that Art. 79 is capable of regulating changed circumstances within the term 'impediment' [*CLAIMANT,* ¶139]. Further, although this CLAIMANT has not argued against the contention of Art. 79 being unable to regulate adaptation, a claimant might argue that the remedy of adaptation lies within Art. 79. RESPONDENT will establish that it is implausible for Art. 79 to

regulate either hardship **(1)** or adaptation **(2)**.

1. Art. 79 does not regulate circumstances of hardship

91. In accordance with the wording of Art. 79, neither the terms 'hardship' nor 'changed circumstances' make an appearance in the provision [*CISG, Art. 79*; KRÖLL/MISTELIS/VISCASSILAS, *p.1088*; *Rösler*]. The provision's prevailing interpretation has always placed a high threshold for exemption effectively burdening the obligor with the risk of changed circumstances [FERRARI, *pp.827-828*; *Winship*; *Colmar*; *Hamburg*; *Rechtbank*; *Tribunale Civile de Monza*]. Further, several scholars advocate the view that Art. 79 does not cover hardship [AUDIT, *p.174*; FELEMEGAS, *p.500*; HONNOLD, *pp.349-350*; VISCHER, *p.173*; ZELLER, *pp.164-165*; *Anderson/Kuster*; *Flambouras*; *Rimke*; *Rösler*]. In fact, reported cases demonstrate a restrictive interpretation of Art. 79 by excluding hardship from the Convention's purview [*Melis*; *Bulgaria*; *Fondmetall*; *Molybdenum*; *OLG Hamburg*; *Romay*; *UCC*; *Vital Berry*]. There has been a deliberate omission in addressing the circumstances of hardship in the CISG drafting history [HONNOLD/FLECHTNER, *pp.349-350*; *Rimke*]. In fact, the drafters flat out rejected proposals to exempt liability when a party is faced with hardship [HONNOLD, *p.602*; *Klepac*; *Schwenzer*]. In fact, no decision has ever provided exemption for a breach of contract on the basis of hardship [*CISG AC Op. 7*].

92. *First*, RESPONDENT's position is that allowing for such a reading of the provision creates a situation in which circumstances relating to hardship cannot be adequately resolved. If Art. 79 was to exhaustively provide for circumstances of hardship, its framework of remedies had to necessarily prevail over other systems of remedy [HONNOLD/FLECHTNER, *p.628*; *Rimke*]. In this way, Art. 79 is rendered insufficient. Apart from not providing for adaptation of the contract, it also does not address other remedies such as avoiding the contract or specific performance claims [KRÖLL/MISTELIS/VISCASILLAS, *p.1089*]. Therefore, the issues involved circumstances of hardship cannot be adequately resolved by Art. 79 [KRÖLL/MISTELIS/VISCASILLAS, *p.1089*].

93. *Second*, although this CLAIMANT has not raised such a contention, a claimant could argue that allowing changed circumstances to be governed by Art. 79 would be in line with the Convention's objective of uniform interpretation [BIANCA/BONELL, *p.592*; *Klepac*; *Rimke*]. While it may seem that a singular reasoning in interpretation could bring about uniformity, such a contention is completely baseless. It must be noted that the prevailing judicial opinion has traditionally interpreted Art. 79 as a *force majeure* provision [SCHLECHTRIEM/SCHWENZER, *p.1076*]. Hence, reading in hardship into Art. 79 is an approach that many courts would be reluctant to enforce. This is because of well-established judicial practice and a reading in hardship could result in non-

uniform application of the Convention [*Petsche*]. Additionally, the concept of hardship is fluctuating and is the subject of a multitude of interpretations that vary in fixing the trigger event of hardship as well as the legal consequences resulting from such a provision [RAMBERG/HERRE, *pp.565-566*; SILVERIA, *p.257*; *Liu*]. In fact, the Convention set aside the confusing notion of 'changed circumstances' and chose a unitary idea of exemption instead [BIANCA/BONELL, *p.594*].

94. Finally, a contextual reading of Art. 79 also indicates that an exemption for hardship is implausible. Art. 79, along with Art. 80, is drafted within Section IV of the Convention titled 'Exemptions'. It is clear from its wording that Section IV exhaustively covers all available exemptions under the CISG [*Lookofsky*]. The understanding that Arts. 79 and 80 are merely illustrative would be contradictory to the essential requisite of legal certainty. Its outcome would lead to ambiguity and undermine the Convention's objective of uniformity. Moreover, other topics under the Convention contain provisions that are indisputably exhaustive. If one were to argue that the clauses provided are not exhaustive, it would once again be at odds with the Convention's goal of uniform application.

95. In view of these problems and consequences, RESPONDENT urges the Tribunal to refrain from reading in hardship within the ambit of Art. 79 of the Convention.

2. Adaptation is not recognized by Art. 79(5)

96. Although this CLAIMANT has not raised the argument, a claimant could have argued that adaptation is a remedy provided under Art. 79. Adaptation of contracts is not expressly authorised by the CISG and is usually regarded as impossible as an action by the judge [BIANCA/BONELL, *p.592*]. In fact, the legal foundation for price adjustment is lacking under the CISG [KRÖLL/MISTELIS/VISCASILLAS, *p.1091*]. Moreover, reading in adaptation into Art. 79(5) would result in incoherence within the provision [*CISG, Art.79*]. The remedy for failure to perform is exemption [*CISG AC Op. 7*]. However, the interpretation in question would seek to place the remedy of exemption on equal terms with a remedy that generally supports continued performance (adaptation) without making clear when they are applicable. Remedies that facilitate further performance would be in contradiction with Art. 79(1). Hence, such an interpretation becomes implausible.

97. Further, Art. 79(5) specifies that the exemption provided under Art. 79(1) does not deprive either party from seeking other remedies under the Convention [*CISG, Art. 79(5)*]. Crucially, no provision in the Convention provides for the remedy of adaptation and hence the solution of adaptation cannot be conceived to lie within the purview of Art. 79(5) [*Petsche*]. While price reduction under Art. 50 may be a remedy under the Convention [*Secretariats Commentary*; BRUNNER,

p.366; HONNOLD/FLECHTNER, *p.637*; KRÖLL/MISTELIS/VISCASILLAS, *p.1070*; *Lindström*; *Rimke*], the CISG does not allow a solution that involves an increase in price.

C. Alternatively, the Tribunal may adopt a gap-filling mechanism

98. Alternatively, if this Tribunal believes there exists a gap in Art. 79 with respect to hardship, it may undertake a gap-filling mechanism. In this regard, the gap may be filled initially through reliance on general principles underlying the CISG **(1)** and subsequently with recourse to the applicable domestic law **(2)** [*CISG, Art. 7(2)*].

1. Gap-filling based on good faith undermines the objective of the Convention

99. CLAIMANT argues that the exemption of hardship under Art. 79 exist on the basis of the general principle of good faith that pervades the Convention [*CLAIMANT,* ¶137]. CLAIMANT's approach in this case is untenable. In order to substantiate its claim CLAIMANT has relied on the decision of *Scafom* [*CLAIMANT,* ¶138]. It is the sole decision that undertook the approach of reading in hardship into Art. 79 on the basis of good faith [*Scafom*]. However, *Scafom*'s approach of relying on general principles to achieve this once again undermines the Convention's goal of uniform application enshrined in Art. 7(2). Based on this approach, courts or tribunals may attempt to fill the CISG's gaps through varying reasonings including relying on the principle of *pacta sunt servanda* [*Maskow*] which would ultimately result in contradictory solutions [*Petsche*]. Thus, RESPONDENT urges the Tribunal to refrain from undertaking gap-filling based on principles that underlie the CISG.

2. The gap within the CISG can be filled through Danubian contract law

100. Although this CLAIMANT has not raised this contention, a claimant could argue that the gap within Art. 79 could be filled with recourse to Mediterranean domestic law. Art. 7(2) CISG specifies that in the absence of suitable general principles, an internal gap can be resolved by recourse to the applicable domestic law by virtue of private international law [*CISG, Art. 7(2)*]. Further, the applicable domestic law may be determined through the conflict of rules of the forum [LOOKOFSKY I, *p.9*; SCHLECHTRIEM/SCHWENZER, *p.132*; *Alstine*]. In the present case, the conflict of rules of the forum is the general conflict of rules of Danubia, a verbatim adoption of the Hague Principles [*PO2,* ¶45].

101. Art. 11(3) of the Hague Principles allow for the exclusion of the parties' chosen law if it is established that the enforcement of such chosen law is incompatible with a fundamental policy provision of the forum's state [*HCCH, p.77*; *Pertegás/Marshall*]. RESPONDENT will establish that: *First*, Art. 6.2.3 of Danubia's contract law, a verbatim adoption of the UNIDROIT Principles

[*PO1,* ¶4], is a fundamental policy of Danubia **(a)**. *Second*, the chosen law of Mediterraneo is incompatible with Danubian Law **(b)**

a) Art. 6.2.3(4)(b) constitutes fundamental policy of Danubia

102. Fundamental public policy of a State must be law that is rooted in well-established tradition [*Goodrich*; *Note*]. In this regard, the principle of party autonomy is a well-established universal legal principle in contract law [REDFERN ET AL, *p.315*; *Yntema*]. Art. 6.2.3(4)(b) is only a reflection of that principle. Further, the fact that Danubian contract law is a verbatim adoption excepting Art. 6.2.3(4)(b) is indicative of its significance to Danubian domestic law. Hence, Art. 6.2.3(4)(b) should constitute fundamental policy.

103. In any case, the scope of fundamental policy for exemption is uncertain due to varying approaches by Courts [*Sprague*]. Some judges have interpreted it so that statutes that are merely different from each other are enough to invoke a fundamental policy exemption [*Lathrop*; *Lotel*; *Sperry*; *Von Hamm*]. Thus, Art. 6.2.3(4)(b) should constitute fundamental policy of Danubia.

b) The PARTIES chosen law of Mediterraneo is incompatible with Danubian law

Art. 6.2.3 of Mediterranean contract law lays down adaptation as a remedy for circumstances in which a party is faced with hardship [*Art. 6.2.3, PICC*; *PO1,* ¶4]. Whereas Art. 6.2.3 of Danubian contract law, specifically states that adaptation may only be possible in light of authorisation [*PO2,* ¶45]. It is clear that there exists a conflict between the provisions to the extent that Danubian contract law requires authorisation while Mediterranean contract law doesn't. Hence, the chosen law of the PARTIES is in conflict with the law of the forum. Accordingly, the forum law will override the law chosen by the PARTIES to the extent of their incompatibility.

104. Due to the gap-filling mechanism that the Tribunal could undertake, it becomes imperative that the Hague Principles guide the Tribunal in deciding the suitable law for the exercise of filling the gaps within the CISG [*HCCH, p.42*]. Further, the incompatibility of the chosen law with the law of the forum will result in the law of the forum having an overriding effect on the chosen law till the extent of incompatibility [*HAGUE PRINCIPLES, Art. 11(3)*].

105. Danubian contract law, a verbatim adoption of the UNIDROIT Principles clearly states that the Tribunal may only adapt the terms of a contract if it is authorised to do so [*PO2,* ¶45]. As has already been established above, this Tribunal does not possess the power to adapt the contract [*Issue I(B)* ¶17; *Issue III(D)* ¶74] and hence no adaptation of the price would be plausible.

106. Hence, RESPONDENT urges this Tribunal to fill the gap within the CISG with the most suitable applicable domestic law *viz* Danubian domestic law.

D. RESPONDENT did not breach the duty to renegotiate nor did it fail to enforce the resulting agreement

107. CLAIMANT contends that RESPONDENT has breached both the duty to negotiate as well as failed to enforce the resulting agreement under the UNIDROIT Principles [*CLAIMANT,* ¶¶153-154]. However, these contentions are completely baseless. RESPONDENT complied with the duty to renegotiate **[1].** Further, RESPONDENT did not fail to enforce the agreement reached during renegotiations **[2]**.

1. RESPONDENT did not breach the duty to renegotiate under the UNIDROIT Principles

108. CLAIMANT argues that there exists a right to renegotiate under the UNIDROIT Principles [*CLAIMANT*, ¶155]. However, at the outset, it must be noted that the exercise of renegotiations has to be founded on mutual trust and willingness since that is the nature of such a task [*Schwenzer*]. A cooperative and productive renegotiation cannot be imposed upon parties through coercion [BRUNNER, *p.483*; *Schwenzer*].

109. CLAIMANT argues that the telephone call between Ms. Napravnik and Mr. Shoemaker was an instance of renegotiation and Mr. Shoemaker breached the duty of renegotiation [*CLAIMANT*, ¶¶156-157]. In fact, the telephone call between Mr. Shoemaker and Ms. Napravnik was in order for CLAIMANT to seek authorisation in sending out the final shipment [*Ex. C7, p.16*; *Ex. C8, p.18*].

110. Renegotiations must occur in a cooperative and constructive manner and PARTIES must refrain from flinging accusatory remarks based on feeble evidence [*PO2,* ¶20]. CLAIMANT contends that during the renegotiations that took place on 12th February 2018, RESPONDENT halted the discussions and thus breached the duty of renegotiation under the UNIDROIT Principles [*CLAIMANT,* ¶157]. However, CLAIMANT fails to mention that it was their party that accused RESPONDENT of breaching the contract when CLAIMANT had initiated the renegotiations in order to fix a price that was suitable to both PARTIES [*Ex. C8, p.18*]. The allegations of bad faith would hinder the amicable progression of the renegotiations. Hence, the termination of the meeting was merely a result of differing views between the PARTIES.

2. RESPONDENT did not breach the agreement reached during discussions

111. CLAIMANT contends that RESPONDENT failed to enforce the agreement reached during the telephone call on 21st January 2018. This is completely baseless. At the outset, it must be emphasised that there exists no duty to reach an agreement during renegotiations under the UNIDROIT Principles [*Zaccaria*; *ICC Arbitral Award 2478*]. The telephone call between Ms.

Napravnik and Mr. Shoemaker does not constitute renegotiations. In fact, it was a conversation merely to attain authorisation for the final shipment in light of the newly enforced tariffs [*Ex. C7, p.16*]. Moreover, CLAIMANT alleges that RESPONDENT has promised the adaptation of the contract [*CLAIMANT*, ¶¶162-163]. In fact, this is in contradiction with the statement by Mr. Shoemaker "*if the contract provides for an increased price in the case of such a high additionally tariff, we will certainly find an agreement on the price*" [*emph. add.*]. He does not promise either expressly or impliedly an adaptation of the price [*Ex. R4, p.36*]. It was meant to imply that a constructive solution would be reached based on what the contract, or more specifically, clause 12 has expressed [*Ex. R4, p.36*]. From RESPONDENT's perspective, clause 12 of the contract has always been narrow and does not cover unforeseen custom changes [*Issue III(B)* ¶17]. Hence, Mr. Shoemaker's statement in light of the contract can only insinuate that no adaptation can actually take place.

E. CLAIMANT is not entitled to an additional amount of US$ 300,000

112. CLAIMANT contends that RESPONDENT has breached the resale clause of the contract and is thus entitled to an additional US$ 300,000 resulting from that breach [*CLAIMANT,* ¶¶166-167]. This contention raised is untenable because the damages cannot result from the mechanism of adaptation.

113. The additional amount of US$ 300,000 cannot result from the adaptation of the contract. CLAIMANT may only ask for additional amounts that are a result of adaptation [*PO1,* ¶1]. CLAIMANT argues that damages should be provided under Art. 61(1) read with Art. 74 of the CISG [CLAIMANT, ¶167]. However, neither of these provisions provides the remedy of adaptation within their ambit [*CISG, Art. 61(1), Art. 74*]. Further, seeking damages for an alleged breach of the resale provision is entirely irrelevant to the present dispute given the orders of this Tribunal [*Ans. NoA, p.31*; *PO1,* ¶1]. Hence, CLAIMANT's request for damages resulting from an adaptation of the price of the contract lies outside the present dispute.

Conclusion to Issue 4: In summary, the PARTIES have agreed to derogate from the applicability of Art. 79 through the incorporation of a specialised hardship clause. Further, even if Art. 79 were applicable, it does not exempt non-performing parties from circumstances of hardship nor does it provision a remedy for adaptation. Alternatively, if the Tribunal still believes there is a gap in Art. 79 it may resort to the mechanism of gap filling by recourse to Danubian domestic law. Furthermore, RESPONDENT has not breached any duty to renegotiate or enforce an agreement. Finally, the request of an additional amount of US$ 300,000 in damages by CLAIMANT lies outside the scope of the present dispute. Accordingly, CLAIMANT is not entitled to US$ 1,250,000 through adaptation under the CISG.

REQUEST FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully request the Tribunal to find that:

I. The Tribunal does not have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract (**Issue 1**).

II. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings (**Issue 2**).

III. CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the Contract (**Issue 3**).

IV. Alternatively, CLAIMANT is not entitled to the payment under the CISG (**Issue 4**).

Respectfully signed and submitted by counsel on 24th January 2019

KAIRA PINHEIRO | SHREYAS SHRIDHAR | SAURAV RAJURKAR | VISHAKHA KADAM

Certificate and Choice of Forum

To be attached to each Memorandum

I SAURAV RAJURKAR, on behalf of the Team for (name of School) WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES

Name SAURAV RAJURKAR

Signature