26th Annual Willem C. Vis

International Commercial Arbitration Moot

2018 – 2019

Memorandum for Respondent

— PHAR LAP ALLEVAMENTO —

Against

— BLACK BEAUTY EQUESTRIAN —

MONASH UNIVERSITY

Melbourne • Australia

Harrison Frith • Ariella Gordon • Cameron Inglis

Sarala Baskaran • Lachlan Cameron • Genevieve Trinh

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INDEX OF ABBREVIATIONS

%	per cent
Answer	Answer to the Notice of Arbitration
Arbitration Agreement	Clause 15 FSSA
Art.	Article
Arts.	Articles
c.f.	*contra* (against)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Cl. Ex.	CLAIMANT'S Exhibit
Cl. Memo.	CLAIMANT'S Memorandum of Argument
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ed.	Edition
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Ltd.	Limited
Mediterranean Buyer	The party to the Other Arbitration against RESPONDENT
No.	Number
Notice	Notice of Arbitration
NYC	New York Convention 1959
Other Arbitration	Ongoing arbitration proceedings between RESPONDENT and the Mediterranean Buyer
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
P.O.	Procedural Order
Resp. Ex.	RESPONDENT'S Exhibit

ML ICA	UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments adopted in 2006
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, Rome, 2016
US$	US-Dollar
v.	*versus* (against)

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Rules and Laws

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.
Hague Principles	Principles on Choice of Law in International Commercial Contracts 2015.
HKIAC Rules 2013	Hong Kong International Arbitration Centre Administered Arbitration Rules 2013.
HKIAC Rules 2018	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018.
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010.
ICC Hardship Clause	ICC Hardship Clause 2003.
NYC	New York Convention 1959.
Transparency Rules	UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration, New York, 2014.
ML ICA	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 21 June 1985.
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, Rome, 2016.

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Sulamerica	*Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA Civ 638 20 March 2012.	P. 4, 7.
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STATEMENT OF FACTS

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

21 March 2017	CLAIMANT and RESPONDENT (**'Parties'**) enter discussions concerning the purchase of Nijinsky III's frozen semen.
24 March 2017	CLAIMANT offers RESPONDENT 100 doses of frozen semen.
28 March 2017	RESPONDENT accepts the law of Mediterraneo if the courts of Equatoriana have jurisdiction.
31 March 2017	CLAIMANT rejects that Equatorianian courts can have jurisdiction and suggests the Parties opt for arbitration in Mediterraneo.
10 April 2017	RESPONDENT made clear that the law of the seat of arbitration should govern the arbitration agreement, namely Equatoriana.
11 April 2017	CLAIMANT proposes shifting the seat of arbitration to Danubia.
12 April 2017	The lawyers for the Parties are severely injured in an accident.
6 May 2017	The Parties conclude the contract (**'FSSA'**) providing for the purchase of 100 doses of frozen semen for US$ 10 million in three instalments.
20 May 2017	The first shipment of 25 doses is complete.
3 October 2017	The second shipment of 25 doses is complete.
23 November 2017	The Mediterranean government imposes a 25% tariff.
19 December 2017	The Equatorianian government imposes a 30% tariff.
20 January 2018	Ms Napravnik (CLAIMANT) alerts Mr Shoemaker (RESPONDENT) to the effect of the tariff.
21 January 2018	Mr Shoemaker emphasised he lacked authority to commit to an adaptation of the contract price, and clarified his understanding that all risks would be borne by CLAIMANT under DDP terms.
23 January 2018	The third and final shipment of 50 doses is complete.
31 July 2018	CLAIMANT initiates proceedings and submits Notice of Arbitration.
24 August 2018	RESPONDENT submits Answer to the Notice of Arbitration.
3 October 2018	Ms Fasttrack objects to the admission of CLAIMANT'S evidence from the Other Arbitration to the Tribunal.

INTRODUCTION

1 Whilst CLAIMANT has alleged RESPONDENT is responsible for the cost of the tariff, CLAIMANT has not based their submissions upon a sound legal position. The decision by the Equatorianian government to impose a 30% tariff directly affected the cost of exporting the frozen semen to RESPONDENT. As the scope of the FSSA does not capture this event, RESPONDENT should not bear the increased exportation cost. In any event, the FSSA does not allow for an adaptation of the contract price (**'Adaptation Price'**) by the Tribunal.

2 RESPONDENT engaged CLAIMANT because of their reputation as a commercially experienced party. Hence, if CLAIMANT intended to allow for price adaptation in the event of hardship, CLAIMANT should have taken further steps to clarify the terms of the contract during negotiations. In response to CLAIMANT'S Notice of Arbitration, three key issues arise.

3 *Firstly*, the Tribunal does not have jurisdiction or power to adapt the contract price under Clause 15 (**'Arbitration Agreement'**). RESPONDENT submits that the law of Danubia governs the Arbitration Agreement. This means the Arbitration Agreement should be read narrowly, such that adaptation falls outside the scope of the Tribunal's jurisdiction. Alternatively, if Mediterranean law applies, RESPONDENT submits that extrinsic evidence demonstrates that the Parties intended the scope of the Arbitration Agreement to be narrow, meaning the Tribunal does not have jurisdiction to adapt the contract price.

4 *Secondly*, the Tribunal should not accept CLAIMANT'S evidence from the prior arbitral proceeding, including a copy of the Partial Interim Award and relevant submissions (**'Evidence'**). This was obtained through either a breach of confidentiality or an illegal hack of RESPONDENT'S computer system. Given confidentiality is a pillar of the arbitral process, and the Evidence is not sufficiently similar to be relevant, there are sufficient policy justifications for why the Tribunal should not admit the evidence (**Issue 2**).

5 *Thirdly*, the Tribunal should find that CLAIMANT is not entitled to the payment of US$ 1,250,000 as a consequence of a price adaptation. On a proper construction of the FSSA, the tariff event does not fall within the scope of Clause 12. Additionally, RESPONDENT made clear that no adaptation of the contract price was agreed upon. CLAIMANT is also not entitled to the Adaptation Price under the CISG or the hardship provisions of the UNIDROIT Principles (**Issue 3**).

6 RESPONDENT respectfully requests the Tribunal to find that CLAIMANT should bear the increased cost imposed by the tariff event as per the DDP terms.

ARGUMENT

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION OR POWER TO ADAPT THE CONTRACT PRICE

7 RESPONDENT respectfully submits that the Tribunal does not have jurisdiction to adapt the contract [*c.f. Cl. Memo., paras. 16–23*]. The FSSA does not expressly provide for which law shall govern the Arbitration Agreement, but states that the seat of arbitration shall be Danubia. Therefore, whether the Tribunal has jurisdiction to adapt the contract price requires first, a choice of law analysis, the outcome of which will determine whether the Tribunal's jurisdiction extends to adaptation. The Parties have further agreed that the arbitration shall be administered by the HKIAC Rules 2018 [*P.O. No. 1, para. II*].

8 The Arbitration Agreement is governed by Danubian law as this was impliedly chosen by the Parties. In the event that there was no implied choice, then Danubian law should still govern the Arbitration Agreement as it has the closest and most real connection to the dispute [*Sulamerica, para. 25*]. The narrow scope of the Arbitration Agreement, which under Danubian law is governed by the 'four corners rule', dictates that it is highly likely the Tribunal does not have jurisdiction to adapt the contract price [*P.O. No. 1, para. II*].

9 In the event that the law of Mediterraneo governs the Arbitration Agreement, the Tribunal still lacks jurisdiction to adapt the contract price as the wording of the contract and surrounding circumstances evince an intention by the negotiators for a narrow Arbitration Agreement [*Resp. Ex. R1; Resp. Ex. R3; P.O. No. 2, para. 12*].

I. <u>The Legal Framework for International Commercial Arbitration is not in Dispute.</u>

10 RESPONDENT agrees with CLAIMANT'S assertion that the principle of separability applies [*Article 19.2 HKIAC Rules 2018; Cl. Memo., para. 1*]. Therefore, the fact that the Parties have expressly chosen Mediterranean law to govern the FSSA [*Clause 14 FSSA*] does not preclude Danubian law applying to the Arbitration Agreement [*Born 2014, p. 819; ICC Case No. 1507, p. 216; Sulamerica, para. 11; Lew 1999, p. 117*]. It is also not in dispute that different laws may govern the FSSA and the legally distinct Arbitration Agreement [*Cl. Memo., para. 3*].

11 The Hague Principles are the most suitable conflict of law rules for the Tribunal to apply. This is because the general conflict of law rules for all relevant countries, Danubia, Mediterraneo and Equatoriana, are a verbatim adoption of the Hague Principles [*P.O. No.*

2, para. 43]. The Hague Principles state that 'a choice of law ... must be made expressly or appear clearly from the provisions of the contract or the circumstances' [*Art. 4 Hague Principles*], meaning a choice of law may be express or implied [*Comment 4.2 Hague Principles*].

12 The three-step test outlined in *Sulamerica* is the appropriate test to apply as it coincides with the approach taken by the Hague Principles. First, whether the parties have expressly chosen the applicable law. Second, whether the parties have impliedly chosen the applicable law. The third step provides further guidance than the Hague Principles if parties have not expressly or impliedly chosen the law that governs the arbitration agreement [*Comment 4.17 Hague Principles*], identifying 'the system of law with which the contract has the closest and most real connection' [*Born, 2014, p. 574; Sulamerica, para. 9*]. There is no dispute that the three-step test in *Sulamerica* applies [*Cl. Memo., para. 4*].

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

13 RESPONDENT agrees with CLAIMANT that there is no express choice-of-law provision in the Arbitration Agreement under the FSSA [*Cl. Memo., para. 7*].

A. The Parties impliedly selected Danubian law as the law governing the Arbitration Agreement.

14 RESPONDENT denies that *Sulamerica* stands for the proposition that there is a presumption that the substantive law of the contract also governs the Arbitration Agreement by implied choice of law [*Cl. Memo., para 5*]. Rather, the court took a more nuanced approach in which they accounted for both the law of the seat and the law of the substantive contract. Ultimately, the Court found that the law of the seat was the law that governed the arbitration agreement [*Pearson 2013, p. 121; Sulamerica, p. 32*].

(1) The language of the FSSA indicates a tacit choice that the law of Danubia was intended to govern the Arbitration Agreement.

15 RESPONDENT denies that Mediterranean law was the implied choice-of-law governing the Arbitration Agreement, as a result of being chosen as the law governing the substantive contract [*Cl. Memo., para. 8*]. CLAIMANT'S exclusive focus on the underlying contract is not a satisfactory approach [*Born 2014, p. 517*]. This is because it disregards the doctrine of separability, and fails to give proper consideration to the importance that the law of the seat might have in any given instance [*Born 2014, p. 517*].

16 RESPONDENT submits that Danubian law was the implied choice-of-law governing the Arbitration Agreement. Danubia was expressly chosen by the parties as the seat of arbitration [*Clause 15 FSSA*]. The English Court of Appeal underscored that 'it would be rare for the law of the [separable] arbitration agreement to be different from the law of the seat of the arbitration' [*C v. D, para. 26; Born 2014, p. 829; Blessing 1999, p. 174*]. For example, a Swiss Court found that 'in the absence of a choice-of-law provision, the validity of the arbitral clause must be decided according to the law of the seat of the arbitral tribunal' [*Born 2014, pp. 501–2*]. The fact that the Parties' chose the seat of arbitration 'cannot be overestimated' [*Born, 2014, p. 2052*]. The seat is not the geographical location of the hearing, but rather, the *legal* home of the arbitration [*Born 2014, p. 2052*]. In fact, the geographical location of hearings or meetings do not have to be at the location of the seat [*Born 2014, p. 2052*]. Rather, the seat has legal consequences in this instance, as it is the law that governs the Arbitration Agreement [*Born 2014, p. 2053*].

17 Parties to a contract often do not agree to a choice-of-law clause. Born has described it as 'very unusual' for the law of the arbitration agreement to be expressly specified in the contract [*Born 2014, p. 491*]. RESPONDENT recognises that focusing on the seat alone is not a complete answer to the question of which law applies to the Arbitration Agreement [*Born 2014, p. 517; Born, Arb. Agreements 2014, p. 828*], and the underlying contract should also be considered. However here, there is nothing integral linking the Arbitration Agreement to the FSSA [*Born, Arb. Agreements 2014, p. 832*]. The FSSA is a reasonably simple sales contract for goods, which can be distinguished from contracts where the arbitration agreement is integrally linked to the substantive agreement, such as corporate articles of association or joint venture agreements [*Born 2014, p. 832*]. Thus, there is no reason why the law of the underlying contract should prevail over the law of the seat.

(2) The Parties' choice of Danubian Law can be implied from the circumstances.

18 First, the Parties expressly agreed during negotiations that Mediterranean law would not govern the Arbitration Agreement. A tribunal's 'paramount' task is to uncover the parties' true intention [*Choi 2015, p. 107*], by asking 'what category of disputes or claims have the parties *agreed* to submit to arbitration?' [*Born 2015, p. 517; Berger 2007, p. 301*].

19 This express agreement is found in the Parties' email correspondence. Ms Napravnik, on behalf of CLAIMANT, sent an email response to RESPONDENT agreeing that it would 'accommodate [RESPONDENT'S] wish not to be submitted to the jurisdiction of the courts in Mediterraneo' [*Resp. Ex. R2*]. After this statement, Ms Napravnik suggested an

arbitration clause that set Danubia as the seat of arbitration [*Resp. Ex. R2*]. This strongly implies that, because Mediterranean law does not apply to the Arbitration Agreement, Danubian law applies by virtue of being chosen as the seat. Further, the offer was followed by 'the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo', which strongly indicates the Parties' mutual understanding for the Arbitration Agreement and the FSSA to be governed by two different laws [*Resp. Ex. R2*].

20 The final negotiators of the contract had access to the email chains, and significantly for these purposes, the emails referred to in the immediately preceding paragraph [*P.O. No. 2, para. 5*]. Therefore, this shows there was a *mutual* understanding that RESPONDENT would not be submitted to the jurisdiction of the courts in Mediterraneo in relation to the Arbitration Agreement.

21 Second, in an email dated 10 April 2017, RESPONDENT underscored its wish for an arbitration agreement that was governed by the law of the seat, and not by the law of the underlying contract [*Resp. Ex. R1; Answer, para. 5*]. In their reply dated 11 April 2017, CLAIMANT changed the place of arbitration but did not object to the proposal that the law of the seat should govern the Arbitration Agreement [*Resp. Ex. R2; Answer, para. 6*]. RESPONDENT understood this as an acceptance that the law of the seat, Danubian law, would govern the Arbitration Agreement.

22 The absence of an express provision in the FSSA stating that Danubian law governs the Arbitration Agreement was, therefore, an oversight caused by the rapid transition from the initial negotiators to Mr Krone and Mr Ferguson, who concluded the contract [*Resp. Ex. R3; Answer, para. 8*]. Mr Krone understood that Danubian law governed the Arbitration Agreement [*Resp. Ex. R3*], with no evidence from Mr Ferguson showing a contrary intention. Further, Ms Napravnik's intention [*Cl. Ex. C8*] is not relevant to the final negotiations, because the intentions of the final negotiations should be taken as the Parties' true intentions [*Art. 8(3) CISG*].

(3) Conclusion of Argument A.

23 Danubian law was the implied choice-of-law governing the Arbitration Agreement, due to the circumstances surrounding the parties' choice of Danubia as the seat of arbitration.

B. Even if there is no implied choice of law, Danubian law should still apply.

24 In the situation that there is no express or implied choice of law, there is no choice of law agreement between the Parties [*Comment 4.17 Hague Principles*]. The Tribunal must look

outside the Hague Principles to determine which law should govern the Arbitration Agreement.

25 RESPONDENT agrees that the Tribunal may look to the approach in the English decision of *Sulamerica*, to find that the law with the 'closest and most real connection' to the Arbitration Agreement should apply [*Cl. Memo., para. 4; Born 2014, pp. 517, 574*].

(1) Danubian law is the law with the closest and most real connection to this matter, and therefore should be applied.

26 In the absence of an express or implied choice of law, the English Court found that the last step was identifying 'the system of law with which the contract has the closest and most real connection' [*Born 2014, p. 574; Sulamerica, para. 9*]. It has been found that the seat of arbitration 'will normally have a closer and more real connection with the place where the parties have chosen to arbitrate' because it is implicit that the law of that place will govern the arbitration agreement as a result of being located in that chosen place [*C v. D, para. 26; Abuja, para. 20–24; Born 2014, p. 829; Pearson 2013, p. 120*].

27 In this instance, Danubia is the place of arbitration. The Court in *Sulamerica* underscored the weight that must be given to the seat of arbitration, as the seat determines 'the procedural law and the supervising jurisdiction of the courts of the country where the seat is located' [*Pearson 2013, p. 120*]. The Court in *Sulamerica* ultimately held that the law of the seat (London) was the law that governed the arbitration agreement, despite Brazilian law being closely connected to the contract in the following ways: Brazilian law was the express choice of law of the contract, there existed an exclusive jurisdiction clause favouring Brazil, there was a close commercial connection between Brazil and the policy (similar to the subject matter of insurance, the currency and the language) and the mediation clause was governed by the law of Brazil [*Sulamerica, paras. 3, 10*].

28 A further reason why the seat should be preferred is that the tribunal should follow the approach from the NYC. Under the NYC, an arbitration agreement may not be recognised if it 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made' (i.e. the law of the seat) [*Art. V(1)(a) NYC; Pearson 2013, p. 121; Born 2014, pp. 478, 501–2*]. In other words, if the parties have not expressly or impliedly selected a law to govern the arbitration agreement, then the arbitration agreement is governed by the law of the seat, in order to be valid [*Art. V(1)(a) NYC*].

29 RESPONDENT acknowledges that the issue does not concern an issue of validity. Rather, the issue concerns the scope of the arbitration agreement. However, Art. V(1)(a) underscores that the NYC favours the seat.

(2) The validation principle does not apply.

30 Despite not being raised by CLAIMANT, the validation principle, which dictates that the law that upholds the validity of an arbitration agreement should govern the arbitration agreement [*Pearson 2013, p. 125*], does not apply. This is because the Arbitration Agreement will not be invalidated under either Danubian or Mediterranean law. Rather, Danubian law merely narrows the scope of the Tribunal's jurisdiction.

(3) Conclusion of Argument B.

31 Danubian law has the most 'close and most real connection' to the Arbitration Agreement, and therefore applies even if the Tribunal finds that the Parties did not expressly or impliedly choose any law to govern the Arbitration Agreement.

III. The Scope of the Arbitration Agreement does not Permit Adaptation of the Contract Price by the Tribunal.

32 Assuming the Arbitration Agreement is governed by the law of Danubia, then the 'four corners rule' applies. As a consequence, all extraneous evidence for the interpretation of contracts is excluded, which dictates that arbitration agreements are interpreted narrowly. Therefore, it is highly likely that the Arbitration Agreement does not enable price adaptation by the Tribunal [*P.O. No. 1, para. II*]. In the event that Mediterranean law governs the Arbitration Agreement, extrinsic evidence read together with the terms of the contract evidences that the Parties did not intend to grant the Tribunal jurisdiction to adapt the contract price. Thus, contrary to CLAIMANT'S submission, it is irrelevant that a tribunal may generally adapt a contract [*Cl. Memo., para. 17*]. It is also irrelevant that in the Other Arbitration, RESPONDENT argued it was within the jurisdiction of the tribunal to adapt the contract price [*c.f. Cl. Memo., para*. 22]. Whether it is within the jurisdiction of the Tribunal to do so depends on the scope of the Arbitration Agreement and not the law governing the Arbitration Agreement [*c.f. Cl. Memo., para. 16*].

A. Irrespective of which law applies, the language of the Arbitration Agreement does not authorise the Tribunal to adapt the contract price.

33 Contrary to CLAIMANT'S assertions, Clause 15 narrows the scope of the Tribunal's jurisdiction to 'any dispute arising out of this contract, including … [its] interpretation'

[*Clause 15 FSSA*] such that it should be read restrictively. This is because the Arbitration Agreement was explicitly narrowed from the broad wording of the HKIAC Model Arbitration Clause, which empowers the Tribunal to adapt the contract price [*Answer, para. 13*]. This argument is underscored by the absence in Clause 15 of any reference to 'non-contractual obligations' and disputes 'relating to' the contract contained within the HKIAC Model Clause. This argument is further advanced because CLAIMANT is not seeking the originally agreed contractual remuneration, which has been paid, but is instead seeking remuneration that goes beyond the amount, for which the arbitrators would have to adapt the contract [*Answer, para. 12*]. Consequently, CLAIMANT is also incorrect in submitting that RESPONDENT acknowledges that governance of an Arbitration Agreement by Mediterranean law alone, suffices to grant the Tribunal jurisdiction to adapt the contract [*Cl. Memo., para. 22*]. Whether the Tribunal has jurisdiction to adapt depends on the scope of the Arbitration Agreement and not the law that governs it [*c.f. Cl. Memo., para. 22*].

34 Although RESPONDENT agrees with CLAIMANT'S position that the Arbitration Agreement must be construed in light of the contract in which it appears [*Cl. Memo., para. 18; Ferrario 2017, p. 146*], such an analysis results in a restrictive interpretation of Clause 15. Hence, although Born has argued there now exists a general pro-arbitration presumption in favour of encompassing all disputes through arbitration [*Born 2014, p. 1344*], the current dispute falls outside this general presumption due to this narrowed scope. This is particularly true in the instant circumstances, which involves a challenge to the scope of the Arbitration Agreement rather than a challenge to the agreement itself. The latter is presumed to serve as the effective dispute resolution mechanism intended to govern Clause 15 [*ICC Case No. 2321; ICC Case No. 7920*]. Therefore, whilst CLAIMANT is correct in arguing that Clause 12 of the contract functions to allow the Parties to adapt the contract in circumstances of hardship [*Cl. Memo., paras 59–61*], it does not grant the Tribunal jurisdiction to step in when the Parties fail to agree [*c.f. Fiona Trust, para. 7*].

(1) Conclusion of Argument A.

35 The terms of the contract, when read narrowly under Danubian law or with the aid of extrinsic materials under Mediterranean law, do not grant the Tribunal jurisdiction to adapt the contract price.

B. Even if Mediterranean law applies, the scope of the Arbitration Agreement still does not grant the Tribunal power to adapt the contract price.

36 RESPONDENT agrees with CLAIMANT'S submission that there is consistent jurisprudence in Mediterraneo that the CISG applies to interpretation of arbitration agreements in sales contracts governed by the CISG [*Cl. Memo., para. 19; P.O. No. 1, para. 4*]. This means that statements and other conduct of the negotiators are to be interpreted according to their intent, where the other negotiator knew or could not have been unaware what that intent was [*Art. 8(1) CISG*]. Alternatively, where their intent is not obvious to the other negotiator, the intent of a party is to be assessed according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Art. 8(2) CISG*]. In determining a party's intent, all relevant circumstances should be considered [*Art. 8(3) CISG*].

(1) Extrinsic evidence shows the Parties did not intend for the Tribunal to have jurisdiction to adapt the contract price in the event of a dispute.

37 The law of Mediterraneo permits consideration of extrinsic evidence to determine the scope of the Tribunal's powers beyond the four corners of the agreement [*Notice, para. 15–6*]. The Tribunal may therefore look to extrinsic evidence to determine the Parties' intention.

38 CLAIMANT relies heavily on the intention of the Parties evinced through the common understanding of the initial negotiators, Ms Napravnik and Mr Antley, on 12 April 2017, that it would be 'the task of the arbitrators to adapt the contract if the Parties could not agree' on an amendment in the event of hardship [*Cl. Ex. C8; Cl. Memo., para. 20*]. However, a new common intention was formed between the Parties, after Ms Napravnik and Mr Antley were severely injured in a car crash later in the day of 12 April 2017 and replaced by Mr Krone and Mr Ferguson [*Notice, para. 8*]. Moreover, CLAIMANT is incorrect in its assertion that the intention of Mr Krone and Mr Ferguson should not be relied on because they 'did not understand … the adaptation of the contract deeply at the time' [*Cl. Memo., para. 21*]. Mr Krone was the head of the legal department of RESPONDENT at the time that Mr Antley was engaged in negotiations with Ms Napravnik, and discussed the main strategy, including the need for DDP terms and non-acceptability of the courts of Mediterraneo with Mr Antley [*Resp. Ex. R3*]. This provided Mr Krone a foundational understanding of the disputes in question, which he clarified in the subsequent weeks prior to the contract being finalised on 6 May 2017 through access to email correspondence between Ms Napravnik and Mr Antley [*P.O. No. 2, para. 5*].

Accordingly, the Tribunal should find that the Parties did not intend to grant the Tribunal jurisdiction to increase the price upon its discretion [*Resp. Ex. R3*].

39 Left to interpret the negotiations of Ms Napravnik and Mr Antley through their prior email chain [*P.O. No. 2, para. 5*], Mr Krone and Mr Ferguson agreed to a narrow Arbitration Agreement and a narrow hardship clause, which was included in the existing force majeure clause and did not provide for adaptation by the Tribunal [*Resp. Ex. R3; Answer, para. 9*]. RESPONDENT demonstrated its intention for a narrowed and streamlined hardship clause in its email to CLAIMANT on 10 April 2010 [*Resp. Ex. R1*]. In this email, RESPONDENT narrowed the scope of the HKIAC Model Arbitration Clause which granted the Tribunal jurisdiction to hear 'any dispute, controversy, difference or claim arising out of or relating to [a] contract', merely to 'any dispute arising out of this contract' [*Clause 15 FSSA*]. This was accepted by CLAIMANT in its reply on 11 April 2017, in which it did not challenge the narrow scope of the Arbitration Agreement, but merely changed the law of the seat and law governing the Arbitration Agreement from Equatoriana to Danubia [*Resp. Ex. R2*]. This understanding is underscored in the witness statement of Mr Krone [*Resp. Ex. R3*], in which he states that had he known there was ambiguity regarding the scope of the Arbitration Agreement, he would have objected to the transfer of powers to the Tribunal to increase the price upon its discretion. In the absence of any evidence to the contrary presented by Mr Ferguson, Mr Krone's witness testimony [*Resp. Ex. R3*], should be treated as the most accurate representation of the Parties' intention at the time the FSSA was signed on 6 May 2017. Accordingly, the tentative agreement as to a choice of law between Ms Napravnik and Mr Antley provides insufficient guidance as to the Parties' intentions upon signing the FSSA [*c.f. Cl. Ex. C8; c.f. Cl. Memo., para. 21*].

(2) Conclusion of Argument B.

40 When read together, the language of the Arbitration Agreement and extrinsic factors demonstrate that the intention of the initial negotiators was superseded by that of the final negotiators. The effect of this is that the Parties did not intend to grant the Tribunal jurisdiction to adapt the contract under Mediterranean law.

C. If Danubian law applies, the scope of the Arbitration Agreement does not grant the Tribunal jurisdiction to adapt the contract price.

41 CLAIMANT has not argued whether Clause 15 grants the Tribunal jurisdiction to adapt the contract price under Danubian law. However, this analysis remains at the discretion of the Tribunal upon determining which law governs the Arbitration Agreement.

42 If Danubian law governs Clause 15, then the CISG plays no role in the interpretation of the Arbitration Agreement. This is because there is consistent jurisprudence in Danubia that arbitration agreements are considered to be separable procedural contracts, rather than sales agreements to which the CISG would apply [*P.O. No. 2, para. 36*]. Instead, the interpretation of arbitration agreements under Danubian law is governed by a largely verbatim adoption of the UNIDROIT Principles, with two relevant exceptions. The first is that of the 'four corners rule', which excludes any extrinsic evidence from being used to interpret the arbitration agreement. The second is a modification of Art. 6.2.3(4)(b) UNIDROIT Principles, which enables a tribunal to adapt a contract 'only if authorised' [*P.O. No. 2, para. 45*]. Furthermore, the conferral of exceptional powers to arbitral tribunals, such as the power to adapt the contract price, must be expressly conferred under Danubian law [*P.O. No. 2, para. 36*].

43 Accordingly, the Arbitration Agreement does not provide the Tribunal jurisdiction to adapt the contract price in the absence of an express conferral of power within the contract. At most, Clause 12 grants the Parties an implied right to adapt in circumstances of hardship, which falls below the express requirement required by the adapted Art. 6.2.3(4)(b) UNIDROIT Principles. Indeed, it was agreed by the Parties that if Danubian law applies, 'there is a high likelihood that the Arbitration Agreement would not be interpreted as authorising a contract adaptation by the Arbitral Tribunal' [*P.O. No. 1, para. II*].

(1) Conclusion of Argument C.

44 In the absence of an express conferral of power to adapt the contract, Danubia's strict interpretative principles dictate that the Tribunal does not have jurisdiction to do so.

CONCLUSION OF ISSUE 1

45 The Tribunal is requested to find that the law of Danubia governs the Arbitration Agreement. Consequently, Clause 15 does not grant the Tribunal jurisdiction to adapt the contract price. If the Tribunal denies its jurisdiction, RESPONDENT will withdraw its objection provided costs incurred for the jurisdiction phase are borne by CLAIMANT [*P.O. No. 1, para. II*].

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM OTHER PROCEEDINGS TO THE TRIBUNAL

46 CLAIMANT is due to obtain evidence from the Other Arbitration, comprising copies of both a Partial Interim Award and relevant submissions from that proceeding (**'Evidence'**), upon payment of US$ 1,000 to a company which provides intelligence on the horseracing industry (**'Intelligence Company'**) [*Letter by Langweiler, 2 October 2018; P.O. No. 2, para. 41*]. The Partial Interim Award allegedly confirms the tribunal in that matter had power to adapt the contract in the event of hardship [*P.O. No. 2, para. 39*]. The submissions also allegedly show RESPONDENT argued an unforeseen tariff of 25% was sufficient to constitute hardship [*Letter by Langweiler, 2 October 2018*]. However, due to significant differences between the circumstances in each arbitration, RESPONDENT submits that the Evidence is not relevant.

47 In any event, CLAIMANT could only have obtained the Evidence through either a breach of confidentiality by one of RESPONDENT'S former employees, or an illegal hack of RESPONDENT'S computer system [*Letter by Fasttrack, 3 October 2018; P.O. No. 1, para. III 1(b); P.O. No. 2, para. 41*]. As such, RESPONDENT respectfully requests the Tribunal to find that the Evidence should not be admissible in the current proceedings.

I. Notwithstanding the Tribunal's Discretion to Admit Evidence, Numerous Factors Weigh Against Admitting the Evidence in These Proceedings.

48 Both Art. 19(2) ML ICA and Art. 22.2 HKIAC Rules 2018 grant the Tribunal power to determine the admissibility, relevance, materiality and weight of any evidence. On the facts, there are no specific rules governing how tribunals should deal with evidence obtained in breach of contractual obligations or by illicit means under the laws of Danubia, Mediterraneo or Equatoriana [*P.O. No. 2, para. 46*]. However, as CLAIMANT correctly submits [*Cl. Memo., paras. 26–8*], the Tribunal can take guidance from the IBA Rules, which have become generally accepted standards for best practice on evidence-taking in international arbitration [*Born 2014, pp. 2212, 2349*].

49 Arbitral tribunals are often pragmatic when resolving issues of admissibility [*Redfern 2015, p. 377*] by accounting for important considerations including efficiency, fairness and equality [*Art. 9.2(e) IBA Rules; Born 2014, p. 1022; Redfern 2015, p. 353*]. Hence, whilst strict rules of evidence may not typically be observed in arbitration [*Moser 2017, para. 9.153; Redfern 2015, p. 377*], the Tribunal can nonetheless justify the exclusion of the Evidence for numerous reasons, including the interests of justice, fairness and efficiency.

50 Ultimately, regardless of whether the Evidence was obtained in breach of confidentiality or through illegal means, RESPONDENT contends the Tribunal should exclude it on the basis that **(II)** it lacks sufficient relevance to be admissible, and because (**III**) admitting the evidence undermines the arbitral process. Moreover, (**IV**) a multitude of policy factors weigh against the Tribunal admitting the Evidence.

II. The Evidence Lacks Sufficient Relevance to be Admissible.

51 For evidence to be admissible in arbitral proceedings, it must be sufficiently relevant and material to the resolution of the issues in dispute [*Art. 9.2(a) IBA Rules; Waincymer 2012, p. 789; Methanex, para. 54; Century Indemnity, paras. 115–6, 120–1; Decision on WikiLeaks, para. 21*]. Whilst CLAIMANT argues the Evidence is admissible because it is relevant to the present case [*Cl. Memo., para. 30*]. RESPONDENT submits the Evidence is not relevant because the alleged circumstances of the Other Arbitration differ to these proceedings in several important ways.

52 Under the contract that was the subject of the Other Arbitration (**'Other Contract'**), arbitration was purportedly governed by the HKIAC Rules 2013, Mediterranean law expressly governed the parties' arbitration agreement, and the parties opted for a HKIAC Model Arbitration Clause and an ICC Hardship Clause [*P.O. No. 2, para. 39*]. By contrast, these proceedings between the Parties are governed by the HKIAC Rules 2018, Danubian law arguably governs the Parties' Arbitration Agreement (see *supra* Issue 1 sub. II), and the Parties have opted for a more narrowly worded Arbitration Agreement [*Answer, para. 13; Clause 15 FSSA*] and hardship clause [*P.O. No. 2, para. 12; Clause 12 FSSA*]. The two pertinent differences are the language of the respective **(A)** arbitration agreements and **(B)** the hardship clauses.

A. The language of each arbitration agreement is different.

53 Given the Arbitration Agreement was drafted more broadly and was governed by a different law under the Other Contract, it was more likely the tribunal in that instance would find it was empowered to adapt the contract price as compared to Clause 15 FSSA (see *supra* Issue 1 sub. III). In light of these differences, the purported decision in the Other Arbitration was decided on a different set of facts before the tribunal. Therefore, the Partial Interim Award has no material relevance or precedential value because it ruled on a matter of jurisdiction in fundamentally different circumstances.

B. The language of each hardship clause is different.

54 The difference in the respective hardship clauses goes to the question of whether RESPONDENT has acted inconsistently in this arbitration, as alleged by CLAIMANT. Under the Other Contract, it is more likely that a tariff event falls within the scope of the ICC Hardship Clause, which is broader than Clause 12 FSSA (see *infra* para. 108). This means RESPONDENT has better prospects of proving that hardship occurred in the Other Arbitration. Therefore, RESPONDENT'S submissions in the Other Arbitration were appropriately informed by their more favourable legal position in those circumstances, and are not comparable to CLAIMANT'S position in these proceedings.

55 As such, the submissions from the Other Arbitration do not show that RESPONDENT has behaved inconsistently [*Waincymer 2012, p. 789*]. Inconsistent behaviour would only arise if the terms of the Other Contract have the same legal effect as those of the FSSA, and RESPONDENT should not be prejudiced for adopting any particular legal standpoint based on varying circumstances in each case (see *infra* Issue 2 sub. IV-C).

C. Conclusion of Submission II.

56 On the basis of the aforementioned factual differences, the Evidence from the Other Arbitration should not be admitted because they are not relevant, and in any case hold no significant probative value.

III. Admitting the Evidence Undermines the Integrity of the Arbitral Process.

57 For arbitration to be valued as a fair and efficient method for settling disputes [*Preamble ML ICA*], it is fundamental that the institutional integrity of the arbitral process is maintained so that commercial parties continue to use arbitration to resolve disputes [*Poorooye 2017, p. 300; Born 2014, p. 2780*]. Admission of the Evidence in this case would undermine important principles of the arbitral process, namely in relation to **(A)** the burden of proof, **(B)** good faith, **(C)** the preservation of confidentiality, and **(D)** the applicability of transparency principles. RESPONDENT contends that admitting the Evidence in light of these factors would undermine the integrity of arbitration.

A. CLAIMANT has not met its burden of proof and RESPONDENT should not be required to prove CLAIMANT'S case for them.

58 Under Art. 22.1 HKIAC Rules 2018, each party shall have the burden of proving the facts relied on to support its claim or defence. CLAIMANT submits that RESPONDENT has not met its burden of proof in establishing the Evidence was obtained from one of

RESPONDENT'S former employees or an illegal hack [*Cl. Memo., paras. 40–1*]. RESPONDENT provides two submissions in response.

(1) RESPONDENT does not need to prove precisely which wrongful act occurred.

59 The Tribunal's terms of reference provide that the question of admissibility of the Evidence proceeds 'on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT'S computer system' [*P.O. No. 1, para. III 1(b)*]. The Tribunal's determination can be made without knowing which of the two wrongful acts actually occurred.

(2) CLAIMANT has not satisfied its own burden of proof.

60 It is not RESPONDENT, but rather CLAIMANT, who has not met its burden of proof under Art. 22.1 HKIAC Rules 2018. Even if the Evidence is deemed to be relevant and material, it should not be admitted by the Tribunal without being sufficiently reliable, authentic and accurate [*Blair 2018, p. 243; Decision on WikiLeaks, paras. 30, 35*]. CLAIMANT'S inability to establish the authenticity of the Evidence means it has not satisfied its burden of proving the facts alleged in the Other Arbitration. Nor is it incumbent upon RESPONDENT to breach its duty of confidentiality imposed under the Other Arbitration in order to defend itself against CLAIMANT'S allegations.

61 In light of the Intelligence Company's doubtful reputation and its refusal to disclose their sources [*P.O. No. 2, para. 41*], it is possible the Evidence was manipulated. Thus, its admission may lead to the Tribunal being misinformed about the true circumstances of the Other Arbitration. The only means by which the Tribunal can verify the authenticity of the Evidence is if either RESPONDENT or the HKIAC produce copies of the Partial Interim Award and relevant submissions in their possession, so that the Tribunal can corroborate them. However, both RESPONDENT and the HKIAC are bound by duties of confidentiality to the Mediterranean Buyer from the Other Arbitration [*Arts. 42.1, 42.2 HKIAC Rules 2013*].

62 Even though RESPONDENT wishes to protect its legal interests in these proceedings, RESPONDENT cannot disclose the Evidence to the Tribunal, given the Tribunal is not a 'judicial authority' [*Art 42.3(a) HKIAC Rules 2013*]. Thus, RESPONDENT is unable to produce the Evidence to refute CLAIMANT'S allegations. The only way for CLAIMANT to satisfy its burden of proof is to compel RESPONDENT to breach its duty of confidentiality to the Other Arbitration. However this would undermine the purpose of the HKIAC Rules 2013, and be tantamount to having RESPONDENT prove the facts upon

which CLAIMANT'S case relies, contrary to CLAIMANT'S burden of proof [*Art. 22.1 HKIAC Rules 2018*]. Doing so would further contravene standards of procedural fairness and equal treatment required by both Art. 18 ML ICA and Art. 13.1 HKIAC Rules 2018 [*Born 2014, p. 2173*]. For these reasons, and the fact the Evidence is neither relevant nor material to this arbitration (see *supra* Issue 2 sub. II), the Tribunal should not require RESPONDENT to produce the Evidence [*Art. 22.3 HKIAC Rules 2018*].

(1) Conclusion of Argument A.

63 As CLAIMANT is not able to establish the authenticity of the Evidence, CLAIMANT has not discharged its burden of proving the facts relied upon to support its case pursuant to Art. 22.1 HKIAC Rules 2018. Further, compelling RESPONDENT or the HKIAC to breach their respective duties of confidentiality under Arts. 42.1, 42.2 HKIAC Rules 2013 contravenes procedural fairness and equal treatment with respect to RESPONDENT.

B. CLAIMANT obtained the Evidence in bad faith.

64 There is widespread international support for the principle that parties should conduct themselves in good faith in the taking of evidence [*Art. 9.7 IBA Rules; Waincymer 2012, p. 797; Ahongalu, para. 73*; *Methanex, p. 13*]. Thus, if the Tribunal finds CLAIMANT has acted inconsistently with good faith, it should consider this a compelling ground to exclude the Evidence to preserve fairness and equality in these proceedings [*Art. 9.2(g) IBA Rules*].

65 CLAIMANT submits it did not conduct itself in bad faith in the taking of evidence given it did not directly perpetrate the hacking or leaking, and thus has not contravened Art. 9.7 IBA Rules [*Cl. Memo., paras. 34–7*]. However, RESPONDENT submits that despite the fact CLAIMANT did not encourage or facilitate the initial wrongful act, CLAIMANT is not seeking to rely on the Evidence with clean hands [*Persia International Bank, para. 95; Blair 2018, p. 244*]. By arranging to exchange US$ 1,000 for the Evidence possessed by the Intelligence Company, CLAIMANT has taken positive steps to acquire information obtained through wrongful conduct [*P.O. No. 2, para. 41*]. This constitutes a breach of good faith [*Art. 9.7 IBA Rules*] that justifies a finding by the Tribunal that the Evidence is not admissible [*Art. 9.1 IBA Rules*].

66 Given CLAIMANT knew the Intelligence Company has a doubtful reputation and does not disclose its sources [*P.O. No. 2, para. 41*], CLAIMANT had at least constructive knowledge that the Evidence was obtained without permission, and therefore obtained through improper means. Despite this knowledge, CLAIMANT still proceeded to seek out the Evidence and take positive steps to purchase it. Therefore, CLAIMANT'S conduct

constitutes a breach of good faith [*Art. 9.7 IBA Rules*]. CLAIMANT'S conscious intention to benefit from a third party's wrongdoing shows that CLAIMANT is not wholly removed from the wrongful conduct and does not have clean hands [*Blair 2018, p. 256*]. Consequently, it would be inappropriate for the Tribunal to admit the Evidence.

(1) Conclusion of Argument B.

67 By taking positive steps to seek out the Evidence with the knowledge that it was acquired through wrongful conduct, CLAIMANT has acted in bad faith.

C. The Tribunal should preserve the confidentiality of the Evidence.

68 RESPONDENT acknowledges CLAIMANT is not a party to the Other Arbitration, and that only RESPONDENT owes a duty of confidentiality to the Mediterranean Buyer [*Cl. Memo., para. 33*]. However, RESPONDENT submits that the Tribunal should nonetheless prioritise preserving the confidentiality of the Other Arbitration, given that the Evidence is not yet in the public domain.

69 RESPONDENT submits that the circumstances in the present case are distinguishable from relevant cases involving 'Wikileaks Cables' such as *Caratube*, upon which CLAIMANT is seeking to rely [*Cl. Memo., para 38*], in which tribunals found illegally obtained evidence to be admissible. In forming their decision to admit such evidence in *Caratube* and other Wikileaks cases, tribunals placed significant weight on the fact that the evidence was already available in the public domain due to publication on the World Wide Web. By contrast, the Evidence remains confidential and has not been published. In this regard, the circumstances in this case differ fundamentally. Thus, RESPONDENT requests the Tribunal to distinguish those cases from the present facts, and exclude the Evidence.

(1) Conclusion of Argument C.

70 Given that the information is not yet in the public domain and remains confidential, the Tribunal should preserve the confidentiality of the Evidence.

D. The Tribunal should not use prevailing principles of transparency to circumvent confidentiality in these proceedings.

71 Contrary to CLAIMANT'S submissions [*Letter by Langweiler, 2 October 2018*], RESPONDENT argues that principles of transparency should not apply in these proceedings. The UNCITRAL Transparency Rules referred to by CLAIMANT cannot overrule the confidentiality that binds both these proceedings and the Other Arbitration, by virtue of the HKIAC Rules being adopted in both arbitrations [*Art. 45.1 HKIAC Rules*

2018; Art. 42.1 HKIAC Rules 2013]. Although Art. 3 Transparency Rules encourages tribunals to publish documents to the public, the Transparency Rules are not relevant because they only apply to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules [*Art. 1.1 Transparency Rules*].

72 Additionally, any broader principles of transparency that underlie the Transparency Rules **('Prevailing Principles')** should not be applied to guide these proceedings. RESPONDENT submits that the Prevailing Principles directly conflict with confidentiality provisions of the HKIAC Rules, which cannot be derogated from on the basis of transparency [*Art. 1.8 Transparency Rules; Art. 45.3 HKIAC Rules 2018*]. As such, the Prevailing Principles are inapplicable, and cannot be stretched to circumvent confidentiality and justify admitting the Evidence in these proceedings.

73 In arbitrations involving state or government bodies, transparency is justified to promote accountability and good governance [*Preamble Transparency Rules*]. Yet the same rationale does not apply here in the context of international commercial arbitration where there is no equivalent public interest in the outcome of disputes between private parties (see *infra* Issue 2 sub. IV-B). As no public authorities are involved in this arbitration, these proceedings can be distinguished from cases such as *Esso*, in which the 'public's legitimate interest in obtaining information about the affairs of public authorities' prevailed over confidentiality [*Esso, p. 249*]. Therefore, the Prevailing Principles should remain confined to investor-state arbitrations.

74 Confidentiality is widely considered to be an inherent part of arbitration, and one of the most important advantages of international arbitration as a mode of dispute resolution [*Born 2014, pp. 2815–6; Waincymer 2012, p. 798*]. This is a significant reason why courts in many jurisdictions have justified imposing implied duties of confidentiality upon arbitral proceedings [*Hassneh, p. 247; Myanma, para. 17; Aita, p. 583; Eastern Saga, p. 379*]. As a result, private parties are attracted to arbitration precisely because the arbitral system upholds confidentiality [*Poorooye 2017, p. 277–8; Redfern 2015, para. 1.105; Dolling-Baker, p. 1213*]. Thus, as the Prevailing Principles directly contradict confidentiality, application here undermines this important feature of arbitration, and risks deterring future parties from adopting arbitration as a means of settling disputes [*Poorooye 2017, p. 317*].

75 Keeping the Evidence confidential will not stifle the broader development of jurisprudence [*c.f. Poorooye 2017, p. 313*]. The HKIAC Rules 2013 would allow the Partial Interim Award to be published so that it could contribute to jurisprudence on international arbitration. However, by requiring the consent of both parties to publish information, the

confidentiality of proceedings is prioritised [*Art. 42.5(b) HKIAC Rules 2013*]. Therefore, for the Partial Interim Award to be disclosed in these proceedings, the consent of both the RESPONDENT and the Mediterranean Buyer is required. Given no such consent has been given by either party, it is inappropriate to disclose the Evidence and destroy the confidentiality of the Other Arbitration.

76 On balance, the factors in favour of transparency do not outweigh the need to uphold confidentiality in this arbitration. As confidentiality is an integral part of the arbitral process, and one of the most significant reasons why arbitration is valued by commercial parties [*Neill 1996, p. 315–6; Redfern 2015, para. 1.105*], it should not be so readily displaced by other policy considerations. Ultimately, there are no compelling reasons for why the Prevailing Principles should extend to international commercial arbitration. Thus, transparency principles should not be applied as a basis for overruling confidentiality in these proceedings.

(1) Conclusion of Argument D.

77 The Tribunal should find that the Prevailing Principles do not apply to CLAIMANT'S Evidence.

IV. Policy Factors Justify the Exclusion of Wrongfully Obtained Evidence.

78 Given that the Tribunal has discretion to decide on admissibility, public policy factors should guide the Tribunal to find the Evidence should not be admitted in light of it being obtained through either a breach of confidentiality or illegal conduct. In this case, the relevant policy justifications are that admitting the evidence **(A)** encourages wrongful conduct; **(B)** does not enhance predictability or efficiency of the arbitral process; and **(C)** is not in the interests of justice.

A. Admitting the Evidence encourages and incentivises wrongful conduct.

79 Whether or not the Evidence was obtained through a breach of confidentiality or through an illegal hack, CLAIMANT'S promise to purchase the Evidence from the Intelligence Company [*P.O. No. 2, para. 41*] indirectly increases demand for wrongfully obtained evidence. If the Tribunal then decides to admit the Evidence, it would in turn encourage such wrongful behaviour.

80 Admitting tainted evidence contributes to the perception that tribunals are more willing to accept such evidence. Such a perception incentivises parties in future arbitrations to seek out improperly obtained evidence, exacerbating the black market for this sort of

information. This black market, which is notably the source of CLAIMANT'S Evidence, subsequently encourages third parties to engage in wrongful conduct. With particular respect to illegally obtained evidence, this incentivises criminal behaviour.

81 As a result, admission of the Evidence in these circumstances risks tarnishing the reputation of international commercial arbitration itself. Any loss of public trust and confidence in the system of arbitration may cause commercial parties to turn away from choosing arbitration as a means of dispute resolution [*Poorooye 2017, p. 317; Neill 1996, p. 315–6*]. Therefore, the Tribunal should ultimately make a principled decision not to admit the Evidence in order to discourage wrongful behaviour rather than endorsing it indirectly.

(1) Conclusion of Argument A.

82 Admission of evidence that is inherently tainted by criminality or wrongful conduct contributes to a market for such information, thus incentivising improper conduct and tarnishing the reputation of the institution of international arbitration.

B. Admitting the Evidence will not enhance the efficiency or predictability of the arbitral process.

83 CLAIMANT may argue that if the Evidence is relevant, admitting it will assist the Tribunal to provide an efficient and predictable outcome for the Parties, which is in the public interest. However, it is not essential for the Tribunal to have every piece of evidence available before it in order to produce consistent and fair results. This is premised on the fact that Tribunals are not bound to follow prior arbitral awards [*Waincymer 2012, p. 798; Redfern 2015, para. 1.116*].

84 Admission of the Evidence may not necessarily lead to improved predictability given all decisions made by tribunals turn on the unique circumstances of each case [*Waincymer 2012, p. 789*]. In the context of international arbitration, where the majority of awards are bound by confidentiality (see *supra* Issue 2, sub. IV), tribunals typically do not have access to awards from prior proceedings to inform their decision-making. Even when prior awards are available, they are merely persuasive. Thus as independent expert bodies, tribunals are capable of making principled and well-reasoned decisions even in the absence of evidence from other arbitrations [*Redfern 2015, para. 1.116*]. As such, the Tribunal is not disadvantaged here by non-admission of the Evidence. In any event, even if the Evidence had some probative value, its disclosure should be balanced against the Parties' expectations of confidentiality, given there is public interest that parties have autonomy to resolve disputes as they wish [*City of Moscow, p. 2894*].

85 Moreover, admission of the Evidence will not enhance the efficiency of these proceedings. Given the Evidence lacks probative value (see *supra* Issue 2 sub. II), the degree to which it can assist the Tribunal to come to a reasoned conclusion is doubtful. The Evidence is not an essential source of information in light of the fact that other sources of jurisprudence are available for CLAIMANT to use in building its case. Namely, 'jurisprudence of the courts in Mediterraneo' in relation to a tribunal's power to adapt contracts under Mediterranean law exists and is readily accessible [*P.O. No. 2, para. 39*]. Therefore, CLAIMANT'S ability to present its case and receive a fair trial is not encumbered by the absence of the Evidence.

86 In any event, the right to a full opportunity to present a case and to adversarial proceedings does not presumptively override a tribunal's power to determine admissibility or weight of evidence [*Waincymer 2012, p. 791*]. Therefore, admission of the Evidence is unlikely to enhance the efficiency of these proceedings.

(1) Conclusion of Argument B.

87 The Evidence should not be admitted because doing so would not improve the efficiency or predictability of these proceedings.

C. It is not in the interests of justice to admit the Evidence.

88 In conducting this arbitration, the Tribunal is bound to adopt procedures that ensure the Parties are afforded procedural fairness and equal treatment [*Art. 18 ML ICA; Art. 13.1 HKIAC Rules 2018*]. RESPONDENT submits that these principles will be upheld if the Evidence is excluded in these proceedings.

89 *Firstly*, parties should be able to make commercial decisions that are in their best interests, including the ability to adopt a particular standpoint in legal proceedings. Subsequently, it would not be fair if RESPONDENT were to be precluded from defending its legal stance in these proceedings, particularly in light of the differing circumstances in each arbitration (see *supra* Issue 2 sub. II). It would be unjust to draw adverse inferences against RESPONDENT on the basis of adopting a commercially favourable legal position in the Other Arbitration. Doing so would also have broader ramifications, by discouraging commercial parties from protecting their legal interests for fear of limiting future recourse in arbitration. As such, the prejudicial effect of admitting the Evidence outweighs its probative value [*Waincymer 2012, p. 793*].

90 *Secondly*, RESPONDENT would be deprived of equal treatment if CLAIMANT is able to admit the Evidence. If CLAIMANT is able to rely on evidence that was wrongfully obtained, it would provide them with an unfair advantage in these proceedings, given

RESPONDENT is not able to benefit from submitting confidential information in the same way as CLAIMANT. Admission of the Evidence would therefore give preferential treatment to CLAIMANT and create an unbalanced playing field between the Parties, contrary to the interests of justice [*Born 2014, p. 2174*]. Additionally, CLAIMANT is not precluded from receiving equal treatment because it can nevertheless build its case upon other existing jurisprudence in the absence of the Evidence (see *supra* para. 85), which in any event, is not critical as it lacks probative value (see *supra* Issue 2 sub. II).

91 *Thirdly*, the expectation that confidentiality will be upheld is a key reason why parties are attracted to arbitration [*Redfern 2015, paras. 1.105, 2.161; Poorooye 2017, p. 300*]. Indeed, of all the institutional arbitration rules in existence, the HKIAC Rules are renowned for having some of the most stringent confidentiality provisions [*Moser 2017, p. 275*]. As such, consistency of the arbitral process is upheld where parties can enter into arbitration with the knowledge that their proceedings will remain confidential. Therefore, disregarding the confidentiality of the Other Arbitration by admitting the Evidence would undermine Parties' expectations in these circumstances. The Tribunal should uphold fairness and justice by not abandoning confidentiality in the absence of overwhelming considerations to the contrary.

(1) Conclusion of Argument C.

92 To prejudice RESPONDENT based on its legal position in the Other Arbitration would be unjust.

CONCLUSION OF ISSUE 2

93 The Tribunal is respectfully requested to find that the Evidence is not admissible in this arbitration, given it was obtained illegally or through breach of confidentiality. The Evidence is not sufficiently relevant to be admissible. While the Tribunal may have broad discretion to admit the Evidence, doing so in the circumstances would ultimately damage the integrity of the arbitral process, and undermine the interests of fairness and justice.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO PAYMENT FROM RESPONDENT FROM AN ADAPTATION OF THE CONTRACT PRICE

94 CLAIMANT is not entitled to an adaptation of the contract price under Clause 12 or the CISG, and as such RESPONDENT is not liable to pay US$ 1,250,000 to CLAIMANT.

I. CLAIMANT is Not Entitled to US$ 1,250,000 Under Clause 12.

A. A Proper Interpretation of Clause 12 does not entitle CLAIMANT to the Adaptation Price.

(2) The FSSA allocates risk for the tariff event to CLAIMANT.

95 The Parties expressly agreed upon DDP (Delivery Duty Paid) terms as per Clause 8 of the FSSA. RESPONDENT agrees with CLAIMANT that under DDP terms, CLAIMANT is prima facie allocated risk for all charges payable upon exportation of goods. Therefore, if Clause 12 is not enlivened, CLAIMANT must remain responsible for bearing the cost of the increased tariff as per the DDP terms. This argument is supported by the principle of sanctity of contracts (*pacta sunt servanda*), which holds that parties should remain bound to their obligations provided that performance is possible [*Brunner 2008, p. 391–2*].

(3) The tariff event falls outside the scope of the hardship reference in Clause 12.

96 Clause 12 provides that the 'seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous' [*Clause 12 FSSA*]. CLAIMANT is the seller in these circumstances.

97 As Clause 14 provides that the FSSA is governed by Mediterranean law, including the CISG, the interpretative rules of the CISG apply. Thus, where relevant, the Tribunal should consider the Parties' negotiations in determining contractual intent to ultimately ascertain whether Clause 12 is enlivened in the circumstances.

(a) The tariff event was not unforeseeable in the circumstances.

98 CLAIMANT argues the Equatorianian tariff was a comparable unforeseen event making the contract more onerous, on the basis that 'the Government of Equatoriana has promoted free trade for years' [*Cl. Memo., para. 46*]. RESPONDENT acknowledges there was a degree of surprise in the Equatorianian government imposing a tariff. However, this alone does not render the tariff event unforeseeable. Schwenzer described the test for foreseeability with respect to hardship as 'whether a reasonable person in the shoes of the

promisor, under the actual circumstances at the time of conclusion of the contract and taking into account trade practices, ought to have foreseen' the event [*Schwenzer 2016, p. 1134–5*]. Equatoriana had retaliated once before by imposing an exportation tariff [*Cl. Ex. C6*]. Therefore, Equatoriana were not strangers to this behaviour.

99 Notably, a new president had taken control of Mediterraneo before the contract was completed and announced a 'more protectionist approach to international trade' [*Cl. Ex. C6; P.O. No. 2, para. 23*]. This policy shift altered the political and economic landscape in which the Parties were operating. The ministers appointed by the new president were outspoken with respect to protecting Mediterranean farmers by limiting foreign products flowing into the Mediterranean market. Thus, it was foreseeable the new Mediterranean president would impose strict economic measures. Hence, it became less unforeseeable that RESPONDENT would retaliate in such novel and unprecedented circumstances.

100 Further, the examples provided in Clause 12 can be distinguished to a tariff event on the basis of their foreseeability. Missed flights, weather delays, failure of a third-party service, acts of God and additional health and safety requirements are more unforeseeable than an exportation tariff. RESPONDENT submits that tariffs are a far more common business risk when transacting internationally, and as such, the tariff event is not unforeseeable.

101 CLAIMANT also argued it was beyond the expectations of the Parties that a tariff would be imposed due to the ambiguity of the term 'agricultural good' [*Resp. Ex. R4*]. However, the foreseeability of the event must be analysed at the time of the conclusion of the contract, which renders this argument irrelevant. For the reasons stated above, at the time the contract was concluded, the tariff event was not beyond expectation for the Parties.

(b) <u>The tariff event is distinguishable from an additional health and safety requirement.</u>

102 The tariff event does not amount to an unforeseen event comparable to 'hardship caused by additional health and safety requirements'. RESPONDENT argues the tariff event is not analogous to a health and safety requirement on the basis that the origin of the risk is distinguishable. A tariff event is an economic risk, which in these circumstances, has arisen from retaliatory trade behaviour. Whereas, a health and safety requirement is a regulation seeking to protect the welfare of an industry, and would likely arise in the event of a disease requiring quarantining of goods. The differing origin and purpose for these two events illustrates the absence of a sufficient connection to justify the tariff event as 'comparable'.

103 In addition, the 30% tariff imposed by the Equatorianian government falls short of the 40% increase in cost stated by CLAIMANT when detailing the additional health and safety

requirement [*Cl. Ex. C4*]. Therefore, the tariff event falls below the minimum threshold stated by CLAIMANT and is not captured under Clause 12.

(4) The Parties' negotiations show the tariff event falls outside the scope of Clause 12.

104 CLAIMANT correctly submits that Art. 8 CISG permits the Tribunal to analyse the Parties' common intention [*Art. 8(1) CISG*] and the understanding of a reasonable person [*Art. 8(2) CISG*] to assist in the interpretation of contracts governed by the CISG. Where no common intention exists between the Parties, the Tribunal can apply the reasonable person test [*Kröll 2011, p. 143*]. Further, RESPONDENT acknowledges all relevant circumstances can be considered to determine the Parties' intention [*Art. 8(3) CISG*]. However, contrary to CLAIMANT'S assertion [*Cl. Memo., para. 50–7*], the Parties' statements made in negotiations do not justify an adaptation of the contract price.

105 RESPONDENT submits there was no common intention between the Parties that the tariff event was captured within Clause 12. The fact the hardship reference in Clause 12 is in italics merely demonstrates the Parties wrote that phrase themselves, and does not evidence a common intention for the clause to cover a tariff event [*c.f. Cl. Memo., para. 51*].

106 Moreover, the reference to 'customs regulation or import restrictions' [*Cl. Ex. C4; Cl. Memo., para. 52*] should not guide the interpretation and application of Clause 12. RESPONDENT'S failure to reply to CLAIMANT'S email on 31 March 2017 does not evidence an agreement that Clause 12 would cover such broad categories of events. Importantly, the terms 'customs regulation or import restrictions' were not included in the final drafting of Clause 12. If CLAIMANT wished for Clause 12 to capture such broad categories as hardship events, these ought to have formed part of the final draft of the FSSA.

107 By extension, the Parties have expressed an intention for the hardship reference in Clause 12 to be narrowly interpreted. During negotiations, CLAIMANT suggested the ICC Hardship Clause be incorporated into the contract [*Resp. Ex. R2*]. However, RESPONDENT explicitly rejected this proposal, arguing that the ICC Hardship Clause was 'too broad for the purposes of this contract and the objectives pursued' [*P.O. No. 2, para. 12; Answer, para. 4; Resp. Ex. R3*]. It was then agreed between the Parties that in lieu of a broad ICC Hardship Clause, a 'narrow hardship reference' would be included into the force majeure clause [*Resp. Ex. R3; Answer, para. 4; P.O. No. 2, para. 12*].

108 As presently constructed, Clause 12 reflects a narrower hardship provision than the ICC Hardship Clause. The ICC Hardship Clause captures any event 'which could not reasonably have been expected to have [been] taken into account at the time of the conclusion of the

contract' [*ICC Hardship Clause 2003, para. 2*]. Whereas, the hardship clause in the FSSA is limited to unforeseen events 'comparable' to 'health and safety requirements'. Therefore, the drafting history of Clause 12 indicates the Parties' intention that not *all* unforeseen events are captured. As a consequence, a reasonable party in the position of CLAIMANT would have understood Clause 12 should be interpreted narrowly.

109 CLAIMANT submits the hardship clause was suggested on the basis CLAIMANT was suffering financially from risks in the trade market [*Cl. Memo., para. 55*]. CLAIMANT'S reference to paragraph 21 of Procedural Order No. 2 must be read alongside paragraph 22. It is stated that RESPONDENT was only 'aware of unspecific rumours in the market that CLAIMANT was still in financial difficulties and had been losing money over the last years' [*P.O. No. 2, para. 22*]. Therefore, at the time Clause 12 was formulated, RESPONDENT was not sufficiently aware, and no reasonable party in the position of RESPONDENT would have been sufficiently aware, that CLAIMANT was in financial strife. As a consequence, CLAIMANT'S intention regarding the inclusion of the hardship reference in Clause 12 is not relevant by application of Art. 8 CISG.

(5) In any case, the drafting of Clause 12 demonstrates that the tariff event falls outside the scope of Clause 12.

110 Clause 12 has been drafted such that there are two distinct circumstances that must arise for CLAIMANT to be exempt from liability under their DDP obligations. One circumstance as lost semen shipments, and the other as delays in delivery caused by events beyond CLAIMANT'S control. RESPONDENT submits that the events that follow after the terms 'such as', including the reference to hardship, are provided as examples of types of delays and circumstances in which the semen shipments may be lost.

111 It necessarily follows that the imposition of a tariff falls outside the scope of Clause 12 because it did not delay CLAIMANT'S performance in delivering the goods or result in a lost semen shipment. This can be distinguished to a health and safety requirement, which may compel CLAIMANT to adopt active steps to export the goods. Thus, if the Tribunal adopts this interpretation, the tariff event should not fall within the scope of Clause 12.

(6) Conclusion of Argument A.

112 On the premise that the Tribunal does not accept RESPONDENT'S arguments under Issue 1 and it is found the Tribunal has the power to adapt the contract price, RESPONDENT submits that Clause 12 is not enlivened. This is justified on the basis that the tariff event is not unforeseeable, not comparable to an additional health and safety requirement, and the

Parties' negotiations do not evidence an intention for Clause 12 to have a broad application. Therefore, CLAIMANT should bear the cost of the tariff event as per the DDP terms.

II. Additionally, CLAIMANT is not Entitled to be paid the Adaptation Price Under the CISG.

A. CLAIMANT is not entitled to the Adaptation Price under Art. 79 CISG as the Parties have impliedly disposed of the CISG under Art. 6.

113 Under Art. 6 CISG, parties may derogate from or exclude its application. This is a consequence of party autonomy and freedom of contract, which are essential features of the CISG [*Kroll 2011, p. 99, para. 1; Honnold 2009, p. 614; CISG Op. No. 16*]. This is possible even when the CISG is included in a contract [*Kroll 2011, p. 101, para. 8*].

114 In this case, the drafting of the FSSA contains sufficient detail to render the CISG obsolete as it covers the hardship and delivery risks of the Parties entirely [*Kröll 2011, p. 103, para. 13*]. Following negotiations, the Parties agreed to DDP terms and accounted for exceptions under Clause 12 [*Cl. Ex. C4*]. Due to the Clause 12 carve-out, applying the CISG would be contrary to the Parties' agreement [*Kröll 2011, pp. 1093–4*].

(1) Conclusion of Argument A.

115 CLAIMANT should be precluded from recourse under Art. 79 CISG as the Parties have allocated risk under the FSSA.

B. In the event the CISG applies, CLAIMANT is not entitled to the Adaptation Price under Art. 79.

116 CLAIMANT correctly submits Art. 79(1) is not enlivened as there has been no failure to perform [*Cl. Memo., para. 63; Kröll 2011, p. 1057, para. 8*]. Art. 79 CISG only governs impossibility of performance and the majority of academic opinion supports that a disturbance which does not fully exclude performance, but renders it considerably more onerous cannot be considered as an impediment [*Flambouras 2002*, *para. 7*]. Here, CLAIMANT maintained performance by delivering the third shipment by its due date, 23 January 2018. Therefore, the circumstances fall outside of the scope of hardship under Art. 79 of the CISG. Further, Art. 79 CISG is inapplicable for the following three reasons.

(1) CLAIMANT'S hardship does not amount to an 'impediment' under Art. 79 CISG.

117 Impediments have been described as 'physical or legal impossibility' [*Garro 2005, part. IV, para. 1*]. The CISG does not allow performance to be excused on the basis of mere

economic impossibility. Therefore, the tariff event is insufficient to constitute an 'impediment' under Art. 79 [*Flambouras, p. 278; Schwenzer 2016, p. 1142, para. 31*].

118 The drafting history illustrates the Tribunal's need for caution when applying Art. 79. Firstly, Art. 79 evolved to avoid promisors being easily excused for non-performance [*Rimke 1999–2000, p. 211*]. Secondly, the Vienna Conference rejected the proposal to excuse a promisor if the circumstances had radically changed to the extent that it would be unreasonable to continue to hold the promisor to the obligation [*Rimke 1999–2000, p. 212*].

119 The starting point of assessing the relevant threshold for hardship is the contract itself and the parties' definition of the spheres of risk [*Schwenzer 2008, p. 715*]. RESPONDENT submits that the risk was allocated in the DDP terms.

120 In order for CLAIMANT to seek relief, the price fluctuation caused by the tariff event must be 'severe' or 'extreme', involving a substantial degree of cost discrepancy [*Publicker Industries; Vital Berry Marketing; Zeller 2011, p. 117; Honnold 2009, p. 629*]. As a rule, price fluctuations amounting to over 100% do not yet constitute a ground for exemption [*Schwenzer 2016, p. 1143, para. 31*]. Despite that a specific threshold has not yet been determined by case law, margins as high as 150–200% have been advised in international markets [*Schwenzer 2008, p. 717*]. In this case, the tariff event falls short of such thresholds.

121 CLAIMANT submitted that the case of *Scafom* demonstrated a broader definition of 'impediment', however this case has been considered 'controversial' and a 'departure from insistent attitudes of *pacta sunt servanda*' [*Cl. Memo., para. 63; Dai 2016, p. 131, 137*].

122 Furthermore, the history of Art. 79 substantiates a high threshold as there are 'not many real cases dealing with genuine situations of hardship in which courts have found it fair to provide relief' [*Garro 2005, part. IV, para. 4*]. Firstly, German courts failed to exempt liability under Art. 79 despite a market increase of 300% [*Iron Molybdenum*]. Secondly, in the highly analogous case of *Nuova*, attempted avoidance of the contract based on excessive onerousness due to a delivery price increase of 30% failed to constitute 'impossibility' of performance and release of liability was denied.

(2) The tariff event could have 'reasonably been expected'.

123 Governments changing policies is a regular occurrence. Hence this was a standard case of international market fluctuation which is part of the CLAIMANT's 'commercial risk' when transacting in general [*BCCI Award No. 11/1996; Garro 2005, part. IV para. 14; CISG Op. No. 7, para. 39*]. Mediterraneo's adoption of protectionist policies could have reasonably been expected due to the election propaganda that was public knowledge prior

to the conclusion of the contract [*Cl. Ex. C6*]. 'Foreseeability is a part of risk allocation in the contract … [and] anything which falls within the ordinary range of commercial probability is also foreseeable' [*Kröll 2011, p. 1075*]. As the imposition of the tariff was commercially foreseeable, it could have 'reasonably expected' by the parties, excluding CLAIMANT's exemption under Art. 79 (see *supra* para. 98–101).

(3) The Tribunal does not have power to adapt the contract price under Art. 79 CISG.

124 CLAIMANT correctly submits that there is no express provision in the CISG that considers the possibility of judicial adaptation of the contract [*Cl. Memo., para. 64; Schwenzer 2008, p. 724; CISG Op. No. 7, para. 40*].

(4) Conclusion of Argument B.

125 Art. 79 CISG is not satisfied in the circumstances to justify a price adaptation.

C. Additionally, CLAIMANT is not entitled to the Adaptation Price under Art. 79 CISG read with the UNIDROIT Principles.

(1) The Tribunal should find that the UNIDROIT Principles do not apply to supplement the interpretation of CISG.

(a) The UNIDROIT Principles on hardship cannot be considered under Art. 7(1) CISG.

126 CLAIMANT submits the Tribunal should apply hardship under the UNIDROIT Principles, having regard to the general principles outlined in Art. 7(1) CISG [*Cl. Memo., para. 63*]. Although there is a growing tendency to utilise uniform projects such as the UNIDROIT Principles when interpreting the CISG, 'having regard to its international character', the Tribunal cannot ignore that such principles were drafted by institutions with different political backgrounds. Consequently, the use of such principles fundamentally conflicts with the mandate established by Art. 7(1) to interpret the CISG autonomously [*Schwenzer 2016, p. 131–2*].

(b) The UNIDROIT Principles on hardship cannot be considered under Art. 7(2) CISG.

127 Although CLAIMANT is correct that the Tribunal may settle questions about the CISG which are not expressly settled within it under Art. 7(2), in this case there are three reasons why there is no gap under Art. 79 [*Cl. Memo., para. 66; Rimke 1999–2000, p. 218*].

128 *Firstly*, commentators prefer to deal with hardship (if at all) within the 'four corners' of the CISG, and if not, by then settling that matter on the basis of CISG general principles, including those which might be said to lie 'between the lines' of Art. 79 [*Lookofsky 2005–6, p. 100; Zeller 2005*]. The hardship provision under the UNIDROIT Principles is not

consistent with the skeleton of the CISG. Therefore, it cannot be imported into the CISG via the general principles [*Zeller 2005, p. 170*].

129 *Secondly*, since hardship was contemplated during the drafting of Art. 79, and deliberately omitted from the CISG, there can be no assumption of a gap. If the Tribunal were to gap-fill using the UNIDROIT Principles, it would be in danger of creating inconsistencies as domestic legal systems differ greatly [*Rimke 1999–2000, p. 219; CISG Op. No. 7, para. 35*]. Further, there was an intention to narrow the scope of the exemption, in the replacement of 'circumstances' with 'impediments' [*Rimke 1999–2000, p. 221*].

130 *Thirdly*, in order for a gap to exist, a deficiency must be in existence. It can be argued that a hardship clause does not contain a deficiency as the CISG can adequately resolve a breach of contract, and the history of the CISG excludes this approach [*Zeller 2005, p. 171*].

(c) The UNIDROIT Principles on hardship cannot be considered by direct application of domestic law.

131 A verbatim adoption of the UNIDROIT Principles is the domestic contract law of Mediterraneo. Yet, the Principles will only bind parties to the extent that they do not contradict the CISG [*Rimke 1999–2000, p. 234*]. Moreover, the UNIDROIT Principles 'cannot be considered to be worldwide trade customs or usage let alone trade customs … generally practiced by … business people' [*ICC Award No. 12446*]. Referencing domestic laws in interpreting Art. 79 jeopardises the fulfilment of the mandate under Art. 7(1) to interpret the CISG with regard to its 'international character and the need to promote uniformity' [*Rimke 1999–2000, p. 218; Zeller 2011, p. 118; Honnold 2009, pp. 615, 623*].

(d) The remedies under the UNIDROIT Principles cannot supplement the CISG.

132 The UNIDROIT Principles cannot supplement the CISG. Renegotiation of the price under Art. 6.2.3 is not a remedy falling within the four corners of the CISG, as there is no gap in the provision of remedies found in Articles 46 to 52 [*Zeller 2011, p. 126–7*]. As Garro confirmed, there is no 'general principle underlying the Convention from which to extract the obligation of the parties to renegotiate the terms of the contract' [*Zeller 2011, p. 127*].

(1) Conclusion of Argument C.

133 The UNIDROIT Principles cannot be applied in the present circumstances to supplement the interpretation of the FSSA under the CISG.

D. Even if the Tribunal applies UNIDROIT Principles, CLAIMANT is not entitled to the Adaptation Price.

134 Hardship is defined under Art. 6.2.2 UNIDROIT Principles as an event that fundamentally alters the equilibrium of the contract either by increasing the cost of a party's performance, or because the value of the performance has diminished. It is undisputed the tariff event that increased the cost of CLAIMANT'S performance occurred 'after the conclusion of the contract' and was 'beyond the control' of CLAIMANT [*Art. 6.2.2(a), (c) UNIDROIT*].

135 As a starting point, civil law jurisdictions apply the change of circumstances concept in a highly restricted way and common law jurisdictions are reluctant to permit parties to escape a 'bad bargain' unless the changed circumstances amount to impossibility [*Brunner 2008, pp. 402, 408*]. Further, arbitral case law demonstrates the concept of changed circumstances has rarely been met, even for long-term, non-speculative contracts [*Brunner 2008, pp. 417–20*]. Thus, the doctrine should be stringently, narrowly and cautiously applied.

(1) The Tariff has not fundamentally altered the equilibrium of the contract.

136 In this case, the additional expense of the tariff is known and can be calculated in precise monetary terms. Officially and reasonably, an alteration amounting to '50%' or more of the cost of the performance constitutes a 'fundamental' alteration [*Art. 6.2.2 UNIDROIT, Comment 2; Bonell 2002, p. 247; Duodko 2000, p. 496; Vogenauer 2009, p. 719*]. As the tariff amounted to an alteration of only 30%, the change of circumstances is not considered 'truly dramatic' [*Duodko 2000, p. 494*]. RESPONDENT acknowledges that thresholds are not conclusive, however can serve as a useful yardstick and practical tool [*Brunner 2008, p. 426*]. Nevertheless, case law across differing jurisdictions and scholarly opinion demonstrates that 30% falls far below the well-accepted range to substantiate an alteration of the contract equilibrium [*Brunner 2008, pp. 427–31; Iowa Electric Power; Nuova; Publicker*]. Notably, no published arbitral award has granted relief solely on the grounds of an alteration of 50% [*Brunner 2008, pp. 427–8*].

137 If the Tribunal looks to CLAIMANT'S ability to pay the tariff, it should be noted that commercial impracticability is focussed on 'the reasonableness of the expenditure at issue, not upon the ability of CLAIMANT to pay the commercially unreasonable expense' [*Alimenta, p. 653*]. CLAIMANT cannot escape liability merely because it is burdensome. It is insufficient the increased costs merely deprives CLAIMANT of an expected profit [*Brunner 2008, pp. 391–2, 407, 434, 441*]. The fact CLAIMANT'S financial situation may deteriorate in assuming risk for the tariff event is 'that party's own problem and

[CLAIMANT] cannot shift that risk to [RESPONDENT]' [*Brunner 2008, p. 436*]. Only in extreme circumstances can an alleviation of the 100% thumbnail rule be justified [*Brunner 2008, p. 436*]. Here, CLAIMANT would arguably face financial instability by assuming any risk beyond their 5% profit margin. It would be unreasonable for the Tribunal to limit CLAIMANT'S DDP risk based on a narrow profit margin and unduly favour a party without resources. Therefore, this doctrine is unjustified [*Perillo 1997, p. 126*].

(2) The tariff event could have reasonably been taken into account by CLAIMANT at the time of the conclusion of the contract (Art. 6.2.2(b)).

138 Under Art. 6.2.2(b) of the UNIDROIT Principles, foreseeability is a central concern in hardship cases [*Perillo 1997, p. 127*]. The 30% tariff event is not comparable to the official illustrations of unforeseeable circumstances such as 'the eruption of war' or the economic aftermath of a serious 'political crisis' [*Art. 6.2.2 UNIDROIT, illus. 2–3, Perillo 1997, p. 128*]. Moreover, the protectionist agenda of the Mediterraneo government, particularly focussed on the international trade of agricultural products, was included in their election program that was announced prior to the conclusion of the FSSA [*Cl. Ex. C6*]. Therefore, the change in policy could have reasonably been taken into account by CLAIMANT at the time of the conclusion of the contract [*Dawwas 2010, p. 10*].

(3) CLAIMANT assumed the risk of the tariff event (Art. 6.2.2(d)).

139 CLAIMANT cannot claim hardship if CLAIMANT has assumed the risk of the change in circumstances [*Art. 6.2.2(d) UNIDROIT; Bonell 2002, p. 249; Vogenauer 2009, p. 721*]. In accepting DDP terms, CLAIMANT assumed the risk of the tariff event, and the carve-out in Clause 12 represents the express allocation of risk under the FSSA by the Parties. Here, the contract itself supersedes the rules of hardship in the UNIDROIT Principles [*Perillo 1997, p. 128*]. CLAIMANT therefore has no right to rely on the UNIDROIT Principles for redress in arguing the tariff event far exceeded what was foreseen, particularly if they relate to monetary obligations alone [*Perillo 1997, pp. 128–9; Dawwas 2010, p. 12*].

(4) Hardship is normally relevant to long-term contracts and only relevant to performance not yet rendered.

140 It is undisputed that hardship is normally relevant to long-term contracts, however the contract at hand was not itself long-term. The parties were only intending to create a long-term relationship following the execution of this contract [*Cl. Memo., para. 89; Bonell 2002, p. 250*]. Additionally, by its very nature, hardship is only relevant with respect to

performance yet to be rendered [*Bonell 2002, p. 250; Dawwas 2010, p. 12*]. As CLAIMANT finalised the third shipment, they are no longer entitled to invoke an increase in the costs of its performance due to a change in circumstances [*Bonell 2002, p. 250*].

(5) Conclusion of Argument D.

141 Art. 6.2.2 UNIDROIT Principles is not satisfied to justify an adaptation of the price.

E. In the alternative, the Tribunal should not adapt the contract price by virtue of Art. 1.8 UNIDROIT Principles.

142 It may be of concern to the Tribunal whether Art. 1.8 UNIDROIT Principles justifies an adaptation of the contract price. However, recourse to the UNIDROIT Principles requires Art. 7(2) CISG being satisfied. Given the CISG does not expressly address inconsistent behaviour, the Tribunal may find Art.1.8 UNIDROIT Principles can be applied.

143 Art. 1.8 UNIDROIT Principles states a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party has reasonably acted in reliance to its detriment. Therefore, RESPONDENT arguably has an obligation not to contradict a representation on which CLAIMANT relied. This provision is built upon good faith under Art. 1.7 UNIDROIT Principles [*Kröll 2011, p. 120–4*].

144 It has been alleged by CLAIMANT that Mr Shoemaker's representations created an understanding that the contract price would be adapted in light of the tariff event. RESPONDENT submits that Mr Shoemaker's representations in the Parties' negotiations do not evidence a commitment to adaptation. The words 'find a solution' or 'find an agreement' only demonstrate that re-negotiation was possible between the Parties and not that the contract would be adapted such that RESPONDENT would bear the cost [*Cl. Ex. C7, C8; Resp. Ex. R4*].

145 Further, Mr Shoemaker qualified his comments by stating that a solution could be found 'if the contract provides for an increased price in the case of such a high additional tariff' [*Resp. Ex. R4*]. This conditional language demonstrates that it was not reasonable for CLAIMANT to form an understanding that the contract price would be adapted.

146 CLAIMANT'S reliance on their understanding that the contract price would be adapted was unreasonable given Mr Shoemaker lacked authority to commit to an adaptation. Mr Shoemaker informed Ms Napravnik 'several times that [he] was not a lawyer and had not been involved in the negotiations of the contract' [*Resp. Ex. R4*]. Despite that Mr Shoemaker was the person responsible for answering questions about the FSSA [*P.O. No. 2, para. 32*], he could not be reasonably relied upon as the person for making decisions for

RESPONDENT'S legal liability. A commercially experienced party, such as CLAIMANT, should not have reasonably relied upon the statements of a veterinarian, and ought to have clarified with RESPONDENT'S legal department or the drafters of the FSSA. Consequently, RESPONDENT has not breached Art. 1.8 UNIDROIT Principles.

(1) Conclusion of Argument E.

147 The Tribunal should not adapt the contract price based on Art. 1.8 UNIDROIT Principles.

F. The Tribunal should not adapt the contract price under Art. 6.2.3(4) UNIDROIT Principles because it is unreasonable.

148 CLAIMANT correctly submits that the Tribunal can adapt the contract under Art. 6.2.3(4) with a view to restoring its equilibrium [*Cl. Memo., para. 103*]. The parties involved are experienced commercial parties, who acted reasonably during the negotiations concerning the delivery terms. CLAIMANT accepted additional risks in accepting the DDP terms under the FSSA, and consequently must bear the cost of the tariff. To impose the entire cost of the tariff on RESPONDENT would be contrary to the parties' autonomous agreement to allocate risk under the contract [*Brunner 2008, p. 489–9*]. Regarding the financial situation of CLAIMANT, this is in principle, CLAIMANT'S 'own problem' and CLAIMANT cannot shift that risk to the other parties [*Brunner 2008, p. 436*].

(1) Conclusion of Argument F.

149 It would be unreasonable for the Tribunal to order RESPONDENT to pay US$ 1,250,000.

CONCLUSION OF ISSUE 3

150 RESPONDENT respectfully requests the Tribunal does not adapt the contract price based on Clause 12 of the FSSA, the CISG or the UNIDROIT Principles, in isolation or together.

REQUEST FOR RELIEF

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

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

(2) evidence from the Other Arbitration is not admissible in this arbitration;

(3) the Tribunal should not adapt the contract price based on the tariff event; and

(4) that CLAIMANT is obliged to pay RESPONDENT'S legal costs in this proceeding.

CERTIFICATE

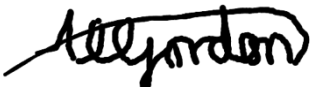
Melbourne, 24 January 2019

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

(Harrison Frith)

(Genevieve Trinh)

(Lachlan Cameron)



(Ariella Gordon)

(Sarala Baskaran)

(Cameron Inglis)