SIXTEENTH ANNUAL WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONK KONG | 31ST MAR – 7TH APRIL, 2019

MEMORANDUM FOR RESPONDENT

NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

MADHYA PRADESH, INDIA

ON BEHALF OF	**AGAINST**
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
2 SEA BISCUIT DRIVE	RUE FRANKEL 1
OCEANSIDE	CAPITAL CITY
EQUATORIANA	MEDITERRANEO
RESPONDENT	**CLAIMANT**

COUNSEL

PRANJAL AGARWAL | ADITYA WADHWA

ANKIT GUPTA | NILAKSHI SRIVASTAVA | SHIULI MANDLOI

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	and (ampersand)
$	Dollar
%	Percentage
AC	Advisory Council
All ER	All England Reporter
Art.	Article
ASA	Swiss Arbitration Association or Association Suisse de l'Arbitrage
AUS	Australia
AUT	Austria
BEL	Belgium
CAM/CCBC	Centre for Arbitration and Mediation of the Chambers of Commerce Brazil-Canada
CAN	Canada
Cl. Ex.	Claimant's Exhibit
CLOUT	Case law on UNCITRAL text
Co.	Company
'DDP'	Delivery Duty Paid
ECJ	European Court of Justice
et al.	and others (*et alia*)
etc.	etcetera
EWHC	High Court of England and Wales
FRA	France

GBR	Great Britain
GER	Germany
GmbH	Limited Liability Co. in Germany (*Gesellschaft mit beschränkter Haftung*)
GRE	Greece
HK	Hong Kong
HKIAC	Hong Kong International Arbitration Centre
i.e.	That is
ICC	International Chambers of Commerce,
ICDR	International Centre for Dispute Resolution of the American Arbitration Association (New York, United States of America)
ICSID	The International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labour Organisation
Inc.	Incorporated
IND	India
Int'l	International
ITA	Italy
LCIA	London Centre of International Arbitration (London, United Kingdom)
Lloyd's Rep.	Lloyd's reporter (Law Report)
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration
NED	Netherlands

No.	Number
NY	New York
NYC	New York Convention
Op.	Opinion
Or(s).	Other(s)
p.	Page Number
para.	Paragraph Number
PCIJ	Permanent Court of International Justice
PICC	Principles of International Commercial Contract
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
QB	Queen's Bench
Re. Ex.	Respondent's Exhibit
SCC	Stockholm Chambers of Commerce
SG	Singapore
SGCA	Singapore Court of Apeeal
SGHC	Singapore High Court
SGHCR	Singapore High Court Registrar
SLR	Singapore Law Reports
SWE	Swedish Supreme Court
SWZ	Switzerland
U.S.	United States of America
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations

UN CISG	United Nations Commission on International Trade Law
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, 2010
USA	United States of America
USD	US Dollar (US$)
v	Versus
Vol.	Volume
UKR	Ukraine
W.D.P.A	Western District of Pennsylvania
WLR	Welsh Law Reporter

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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"; together "**the Parties**"). **CLAIMANT** is a Co. registered and located in Mediterraneo. It operates Mediterraneo's oldest stud farm, covering all areas of equestrian sport. **RESPONDENT** is a Co. registered and located in Equatoriana and is famous for its broodmare lines.

21 Mar '17	RESPONDENT approached CLAIMANT to enquire about the semen of Nijinsky III, CLAIMANT's stallion of world repute, for artificial insemination.	*Cl. Ex. 1, p. 9*
24 Mar '17	CLAIMANT offered 100 doses of Nijinsky III's frozen semen as per its standard terms.	*Cl. Ex, 2, p.10*
28 Mar '17	RESPONDENT accepted the terms but demanded for delivery *'DDP'*. Further, it proposed for the courts in Equatoriana to have jurisdiction.	*Cl. Ex. 3, p. 11*
31 Mar '17	CLAIMANT accepted the *'DDP'* delivery, but included a hardship clause in order to regulate the risks arising from the delivery. CLAIMANT further offered for arbitration in Mediterraneo.	*Cl. Ex. 4, p. 12*
10 – 11 Apr '17	RESPONDENT while agreeing to arbitration, proposed that arbitration agreement be governed by the law of the seat i.e., Equatoriana. CLAIMANT changed the seat to Danubia but did not object to the proposal regarding the governing law.	*Re. Ex. 1* & *2, p.33* & *34*
6 May '17	The Frozen Semen Sales Agreement (**"the Contract"**) was finalised and signed by the subsequent negotiators. A narrowly worded hardship clause was also included in the Contract.	*Cl. Ex. 5, p. 14*
19 Dec '17	Mediterraneo's newly elected President, Mr. Bouckaert imposed 25% import tariff on agricultural products from Equatoriana,	*Cl. Ex. 6, p. 15*

	which could have been anticipated from the announced preference for a more protectionist approach relating to agricultural products. Consequently, Equatoriana imposed a retaliatory tariff of 30% on all agricultural goods (including horse semen) imported from Mediterraneo.	
20 Jan '18	CLAIMANT informed RESPONDENT about the imposition of the tariff and resultantly put the final shipment on hold.	*Cl. Ex. 7, p.16*
Jan '18	After having a word with RESPONDENT's representative, CLAIMANT sanctioned the final shipment on payment of the third installment. The said representative had informed that he had no authority to consent to additional payments.	*Re. Ex. 4, p.36; Cl. Ex. 8, p. 18*
31 July '18	CLAIMANT filed the Notice of Arbitration for seeking further payments through adaptation of the Contract owing of change in circumstances.	*Notice of Arbitration, p. 4*
24 Aug '18	RESPONDENT submitted the Answer to the Notice of Arbitration.	*Answer to the Notice of Arbitration, p. 29*
2 Oct '18	CLAIMANT subsequently informed the Tribunal of another arbitration, wherein, RESPONDENT being negatively affected by the tariffs had claimed adaptation. CLAIMANT wishes to submit a copy of the Partial Interim Award ("**the Award**") rendered in that arbitration to prove RESPONDENT's alleged contradictory behaviour. It also requests the Tribunal to join the other party if need arises.	*Letter by Langweiler, p. 49*
3 Oct '18	RESPONDENT informed the Tribunal that such evidence should not be admitted as it could only have been obtained by means of an illegal hack or by breach of confidentiality.	*Letter by Fasttrack, p. 50*

SUMMARY OF ARGUMENTS

CLAIMANT showcased that it was eager to establish a long-term relationship with RESPONDENT based on cooperation and loyalty. However, in the very first transaction with RESPONDENT, CLAIMANT demands an additional payment owing to imposition of tariffs despite it being never agreed upon by the Parties. This shows that CLAIMANT, being an experienced player in the frozen semen industry, knows the *tricks of the trade* and uses them to unjustly enrich itself.

To prevent CLAIMANT from doing this, the Tribunal in this dispute should uphold the common will of the Parties evidenced from the Contract and find that the claim for adaptation of the Contract is unjustified.

In absence of an express choice of law governing the arbitration agreement, the Tribunal should apply the law of Danubia to the arbitration agreement. Thereby, the arbitration agreement should be interpreted narrowly to exclude the present dispute. Furthermore since, the Parties have not expressly or impliedly empowered the Tribunal to adapt the contract, the Tribunal should not adapt the Contract. **[I]**

Furthermore, the Tribunal should refuse the admission of the Award as it fails to prove the alleged contradictory behaviour of RESPONDENT, rendering the evidence irrelevant. Moreover, CLAIMANT has played a direct role in the illegal procurement of the Award in violation of general principles of good faith. The copy of the Award will also be rendered inadmissible under the IBA Rules owing to the legal impediment of confidentiality. Additionally, the inapplicability of the UNCITRAL Transparency Rules that CLAIMANT has relied upon, does not warrant breach of confidentiality. **[II]**

The imposition of tariffs by Equatoriana fails to qualify as a '*comparable unforeseen event*' that makes the Contract '*more onerous*' and thereby, does not constitute hardship under clause 12 of the Contract. Furthermore, a remedy of price adaptation should not be granted as the Parties neither intended for the same nor is it deemed to be an appropriate in the present situation. Alternatively, there exists no remedy for price adaptation under CISG therefore, it cannot be granted by placing reliance on UNIDROIT. **[III]**

ARGUMENTS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

1. The dispute arises upon CLAIMANT's request to adapt the Contract in light of foreseeable imposition of tariffs. This is because as per CLAIMANT, in absence of an express choice, the law governing the underlying the Contract extends to the arbitration agreement. Consequently, the arbitration agreement is to be interpreted broadly to include the present dispute, thereby allowing the Tribunal to adapt the Contract.

2. RESPONDENT rejects this assertion and respectfully requests the Tribunal to find that in absence of an express choice of law, **[I]** the law of the seat governs the arbitration agreement; **[II]** the present dispute is outside the jurisdiction of the arbitral tribunal; and **[III]** the Tribunal is not empowered to adapt the Contract.

I. THE LAW OF THE SEAT GOVERNS THE ARBITRATION AGREEMENT

3. In absence of an express choice of law governing the arbitration agreement [*Cl. Ex. 5, p. 14*], the law of the seat shall apply to it, since the **[A]** presumption is in favour of the law of the seat; and **[B]** law of the seat applies to the arbitration agreement as per the three-step test (per *Sulamérica).*

A. Presumption is in favour of law of the seat

4. Ordinarily, arbitration agreements have either no choice-of-law clause at all or the underlying contract includes a general choice-of-law clause [*Born, p. 460*]. In the latter case, it would be going too far to interpret such general choice-of-law clause as containing an express choice as to the law governing the arbitration agreement [*Fouchard, p. 222*]. Therefore, a general choice-of-law clause should not to be interpreted as applying to the parties' arbitration agreement [*Born, p. 460*].

5. Furthermore, the '*separability'* principle recognises the arbitration clause in an underlying contract as a separate contract, independent and distinct from the underlying contract [*Samuel, p. 10*]. Therefore, it postulates that the arbitration clause can readily be governed by a national law different from that of the parties' underlying contract, owing to differing nature of both the contrats [*Born, p. 354, 464; ICC Case No. 4131 of 1984*].

6. CLAIMANT submits that in absence of an indication thereto, there exists a strong presumption that the law of the substantive agreement is to be extended to the arbitration agreement [*Cl. Memo., para. 30*]. However, in international commercial arbitration, this strong presumption that existed previously in favour of the law of the underlying contract has now been shifted to a strong presumption in favour of the law of the seat [*Bernardini, p. 198; Berg, p.191, 201; Dallah Real Estate Case (GBR, 2010); ICC Case No. 9987 of 2010*].

7. Furthermore, the presumption in favour of the law of the seat is irresistible in such an absence of an explicit choice [*Balfour Betty Case (GBR, 2012)*] since it is consistent with Art. V(1)(a) of the NYC [*Husslein-Stich, p.86; Redfern/Hunter, para. 2.92*].

8. The NYC to which the Parties are contracting states [*Rule 20, Rules VEM16*], contemplates, that recognition may be denied to an award if the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Therefore, an award may be set aside if the arbitration agreement is invalid under the law of the seat [*Art. 34(2)(a)(i), NYC*].

9. In the present case, there is an absence of any indication of the law governing the arbitration agreement, therefore, at the enforcement stage, the validity of the arbitration agreement should be ascertained according to the law of the seat.

10. Thereby, parties to an arbitration being rational businessmen (putting aside the *ex-post facto* views of the losing party), generally ensure the validity of the arbitration agreement under the law of the seat as opposed to the law of the contract [*FirstLinks Case (SG, 2014)*].

11. Thus, it is reasonable to assume that in absence of an express choice, the law of the seat should be applied to the arbitration agreement in contrast to law of the underlying Contract. This will guarantee the validity of the arbitration agreement and reduce the probability of annulment of the award.

12. Furthermore, in countries that have adopted the Model Law, the law of the arbitration agreement is determined by the law of the seat of the arbitration [*Tweeddale, p. 217*]. This squarely applies to the present case, wherein Mediterraneo and Equatoriana have adopted the Model law, consequently, the law of the arbitration agreement shall be determined by the law of the seat of the arbitration [*PO2, p. 57, para. 14*].

13. To rebut RESPONDENT's claim, CLAIMANT takes recourse to the 'seat theory'. The said theory stipulates that the '*law governing the arbitration*' is governed by the law of the seat, which only determines the procedural matters and not the interpretation of the arbitration agreement [*Cl. Memo., para. 7*].

14. CLAIMANT has however, failed to appreciate the difference between the '*law governing the arbitration: the lex arbitri*' and the '*law governing the arbitration agreement*'. It is pertinent to note that the dispute is regarding determination of the latter and not the former. Therefore, the 'seat theory' cannot be used to determine the law governing the arbitration agreement.

15. Notwithstanding the aforesaid, CLAIMANT might have asserted that the law governing the arbitration agreement would only be applicable to the procedural matters, however, many jurisdictions apply this choice of law governing the arbitration agreement also to the interpretation of the international arbitration agreement [*Born, p. 635*].

B. Law of the seat applies to the arbitration agreement as per the three-step test (Sulamérica)

16. In *Sulamérica,* the English Court of Appeal formulated a three-step test to determine the law governing the arbitration agreement. The first step is inapplicable as in the present case, there is an absence of an express choice of law [*Cl. Ex. 5, p. 14, Clause 15*]. Therefore, by referring to the remaining two steps, CLAIMANT shall demonstrate that **[a]** the implied choice is in favour of the law of the seat; and **[b]** the law of the seat is the governing law as per the '*closest connection*' test (per *Sulamérica*).

a) The implied choice is in favour of the law of the seat

17. Implied choice can be ascertained from the pre-contractual negotiations as they are an excellent indicator of the real intention of the parties [*ICC Case No. 7920 of 1993*].

18. CLAIMANT portrays that RESPONDENT agreed to arbitrate solely because of its reluctance to Mediterraneo's court, not its law. For this, CLAIMANT relies on the email dated 31st March, 2017, wherein it proposed for arbitration seated in Mediterraneo. CLAIMANT may further submit that negotiations regarding dispute resolution between 28th March, 2017 and 11th April, 2017 were based on the assumption that the applicable law was that of Mediterraneo.

19. However, vide email dated 10th April, 2017, RESPONDENT categorically objected to the choice of law in favour of Mediterraneo by providing arbitration agreement to be governed by the same law as that of the seat i.e. Equatoriana [*Respondent Ex. 2, p. 34*].

20. Furthermore, as soon as the dispute resolution mechanism was changed to arbitration, RESPONDENT vide email dated 10th April, 2017 clarified its position that the law governing the arbitration agreement should be that of the seat i.e. Equatoriana. CLAIMANT reverted vide email dated 11th April, 2017, wherein it never objected to the arrangement that law governing the arbitration agreement will be that of seat. Therefore, law of Danubia should govern the arbitration agreement.

21. Additionally, CLAIMANT for the sake of argumentation, submits that RESPONDENT cannot insist on application of law of Danubia, as RESPONDENT never made an express mention of it [*Cl. Memo., para. 22*]. On the contrary, RESPONDENT agreed to the change in the seat and thereby can rely on its consequence with regard to the law governing the arbitration agreement.

22. Going by CLAIMANT's logic, an argument may be advanced that CLAIMANT cannot rely on the law of Mediterraneo as it never mentioned it to be the law governing the arbitration agreement.

23. Therefore, the arrangement as proposed by RESPONDENT with respect to seat and the governing law reflects the common intention of the parties, and hence, the implied choice is in favour of the law of the seat.

b) The law of the seat is the governing law as per the 'closest connection' test

24. Even if the Tribunal rejects the aforesaid submissions, the '*closest connection*' test also dictates that the law of Danubia will govern the arbitration agreement. The '*closest connection*' test stipulates that the disputed arbitration agreement should be governed by the legal system with which it has the closest connection [*Fouchard, p. 222; Born, p. 466*].

25. CLAIMANT contends that in international arbitration practice, the tendency is to disregard the choice of the seat of arbitration in determining the law governing the arbitration agreement [*Cl. Memo p. 20*]. However, RESPONDENT submits that the arbitral seat is the juridical centre of gravity which gives effect to an arbitration agreement. Without it, the agreement would not grow into a full-fledged arbitration resulting in an enforceable award [*FirstLinks Case (SG, 2014)*].

26. Therefore, the law of Danubia is closely connected to the law governing the arbitration agreement since **(i)** there is plurality of reasons behind selecting the law governing the arbitration clause and the underlying contract; and **(ii)** the choice of seat provides supervisory jurisdiction and ensures overall effectiveness of the overall arbitral process.

i. There is plurality of reasons behind selecting the law governing the arbitration clause and the underlying contract

27. The nature and purpose of arbitration clause and the underlying contract is very different from each other and therefore, there is no connection between the obligations under them [*Sulamérica (GBR, 2012)*]. Existence of such a disconnection means, that the reasons which led the parties to select a particular legal system for their underlying contract have no application to their arbitration agreement [*Born, p. 590*].

28. CLAIMANT submits that choice of seat in favour of Danubia is only because it is a neutral country for both the Parties [*Cl. Memo., para. 21*] and there exists no other connection. On the contrary, RESPONDENT submits that the choice of seat was for the purposes of the interpretation of the arbitration agreement as is evident from the arrangement proposed by RESPONDENT.

ii. The choice of seat provides supervisory jurisdiction necessary to ensure effectiveness of the overall arbitral process

29. In international commercial arbitration, an arbitration agreement has a '*closer and more real connection'* with the seat of arbitration rather than with the place of the law of the underlying contract [*C v D (GBR, 2007); Abuja v Meridien (GBR, 2012)*]. This is because the law of the seat will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective [*Sulamérica (GBR, 2012)*].

30. CLAIMANT may not submit that the arbitration clause has the closest connection with the law of Mediterraneo since it was the place of signing of the Contract. However, while determining the law most closely connected to the arbitration clause, priority must be given to connecting factors which apply specifically to that clause [*Born, p. 518*]. Therefore, for determining the law governing the arbitration agreement, the place of signing is an irrelevant factor.

31. Therefore, after analysing the aforesaid legal position and relevant factors, it can be concluded that the law of the seat is most closely connected to the arbitration agreement.

II. THE PRESENT DISPUTE IS OUTSIDE THE JURISDICTION OF THE TRIBUNAL

32. The dispute over the claim for an increased remuneration by adaptation does not fall within the scope of the arbitration agreement. Therefore, the Tribunal does not have the jurisdiction to entertain the said claim because **[A]** the scope of the arbitration agreement is restricted; and **[B]** the law of Danubia provides for narrow interpretation of the arbitration agreement.

A. <u>The scope of the arbitration agreement is restricted</u>

33. The scope of an arbitration clause is to be construed in accordance with the real and common intent of parties, based on the wording of that clause [*Born, p. 1321; ICC Case No. 7929 of 1995; Overseas Union Case (GBR, 1988)*].

34. In the present case, RESPONDENT proposed a narrowed and streamlined version the of the HKIAC Model clause [*Re. Ex. 1, p.33*] which was accepted by CLAIMANT. The modified

arbitration clause, therefore, reflects the true intention of the parties to interpret it differently than the model clause.

35. A comparative analysis between the HKIAC Model clause and the arbitration clause contained in the Contract is given in the table below:

MODIFICATION. NO.	HKIAC MODEL CLAUSE	ARBITRATION CLAUSE IN THE PRESENT ARBITRATION
One	Any dispute, controversy, difference or claim	controversy, difference or claim deleted.
Two	arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof	or relating to deleted.
Three	or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted."	or any dispute regarding non-contractual obligations arising out of or relating to it deleted.

36. Modification number one was made to narrow down the wide ambit of disagreements. Furthermore, modification number two is a clear indication of the Parties' intention to exclude disputes which are '*related to*' the Contract and only allow the Tribunal to have jurisdiction only over the disputes that *'arises out of"* it.

37. Unlike the phrase '*relating to*' which encompasses non-contractual as well as contractual claims [*Overseas Union Case (GBR, 1988); Born, p. 1349*], arbitration clauses containing the phrase '*arising out of the contract'* have been categorized as "narrow" and are restricted to only include disputes of contractual nature [*Schlosser, para. 421*]. Furthermore, even Modification number three excludes any dispute of non-contractual nature.

38. The aforesaid modifications reflect the true intention of the Parties to only subject to arbitration, the disputes of contractual nature. The burden of proof to establish that the

claim for increased remuneration is contractual, and thereby within the scope of the arbitration agreement falls on the Claimant. This burden lies on CLAIMANT [*HKIAC Rules 2018; Art. 22*] which it has failed to discharge.

39. As per the Contract, remuneration has been duly paid by RESPONDENT [*Cl. Ex. 8, p. 80*]. Therefore, in absence of any provision in the Contract for increased remuneration, such a claim is of a non-contractual nature and thereby excluded from the ambit of arbitration clause.

40. CLAIMANT may not rely on the '*pro-arbitration principle*' since such presumption cannot be used to rewrite the parties' agreement [*Born, p. 1344*]. Therefore, arbitration is for resolving *only* those disputes that the parties have agreed to submit to arbitration [*Czarina v Poe (USA, 2004); Walkinshaw v Diniz (GBR, 2000)*].

41. Therefore, the Tribunal should find that the scope of the arbitration agreement does not extend to a claim for an increased remuneration owing to hardship.

B. The law of Danubia provides for a narrow interpretation of the arbitration agreement

42. The interpretation of the arbitration agreement is governed by the law applicable to it [*Born p. 489; NTPC v Singer (IND, 1992)*], which in the present case is the law of Danubia [*Re. Memo., para. 3*].

43. The parole evidence rule under the Danubian law provides for narrow interpretation of the arbitration agreement, confined to its wordings [*Answer to the Notice of Arbitration, para. 16*]. Since CLAIMANT cannot assert to broadly interpret the narrowly worded clause, therefore the arbitration agreement should be interpreted narrowly to exclude the present dispute.

III. THE TRIBUNAL IS NOT EMPOWERED TO ADAPT THE CONTRACT

44. If the Tribunal is of the opinion that the dispute as to increased remuneration falls within the scope of the arbitration agreement, even then, RESPONDENT submits that the Tribunal in not empowered to grant the relief of adaptation because **[A]** the applicable laws do not empower the Tribunal to adapt; **[B]** the Tribunal cannot derive its power under the synchronised competence rule or the hardship clause; and **[C]** even under Mediterranean law, the Tribunal cannot adapt the Contract.

A. The applicable laws do not empower the Tribunal to adapt

45. Since the arbitration agreement does not provide the basic authority to adapt the contract, the law applicable to the arbitration determines if the arbitrators are procedurally authorized to decide on the contract adaptation [*Berger, p. 10*].

46. In absence of such authority, there is no enforceable award under the NYC since the question of determining the enforceability is ascertained not by the *lex fori* (law of forum) of the enforcement court but by the law applicable to the arbitral procedure [*Berg, p. 46*].

47. In the present case, the arbitration is governed by HKIAC Rules 2018 [*PO1, para. 2, p. 52*]. Under Art. 36.2 of said Rules, adaptation of the Contract is justified only if the Tribunal is granted *ex aequo et bono* powers by the Parties [*Intrafor Cofor v Gagnant* (FRA, 1985)].

48. However, the Parties have not granted the Tribunal such powers, therefore, the Tribunal in the present case, cannot adapt the Contract under the HKIAC Rules.

B. The Tribunal cannot derive the power even under the synchronsied competence rule or the hardship clause

49. In the event where the Tribunal cannot trace its power to adapt the Contract under the arbitration agreement and the HKIAC Rules, one has to refer to the competence of domestic courts in that particular jurisdiction for the same [*Berger, p. 10]*. This is the synchronized competence rule. As per the said rule, if the courts have the authority to adapt or supplement the contract, then the arbitral tribunal acting under the arbitration law of that jurisdiction enjoys the same competence [*Sanders, p. 70*; *Schmitthoff, p. 88*; *Peter, p. 257*; *Bernardini, p. 214*; *Berger*, *p. 10*; *Holtzmann/Neuhaus*, p. 1126, 1131].

50. Article 6.2.3 (4)(b) of the Danubian Contract Law grants the court, the power '*to adapt the contract'* only *'if authorized'*. This authorisation is qualified by Art. 28(3) of the Arbitration law of Danubia, which requires express conferral. Thereby, even on application of synchronized competence rule, the Tribunal cannot adapt the Contract unless expressly authorized by the Parties [*PO2, para. 36*].

51. Furthermore, even under the hardship clause, the Tribunal may not derive its power since a hardship clause, unlike a price review clause, is in itself insufficient to empower the arbitral tribunal or the courts to adapt the contract [*Ferrario, p. 83*].

C. Even under Mediterranean law, the Tribunal cannot adapt the Contract

52. Under the law of Mediterraneo, a *standard arbitration agreement* is considered to be sufficient to grant an arbitral tribunal to adapt the Contract [*PO2, para. 39*].

53. In the present case, the arbitration clause as agreed between the Parties is largely based on the model clause suggested by the HKIAC [*Re. Ex. 1, p. 33*]. However, it is pertinent to note that the Parties finally agreed on a *narrowed and streamlined version* of the broadly worded HKIAC Model clause, deleting any reference which could be interpreted as an empowerment for adaptation of the Contract [*Re. Ex. 1, p.33*].

54. Therefore, in an attempt to grant the Tribunal the power to adapt, CLAIMANT cannot turn a blind eye to the fact that this tailored arbitration clause cannot be considered as standard arbitration agreement. Hence, the Tribunal cannot be deemed to have the power to adapt sourced from the arbitration agreement.

55. As a means of last resort, CLAIMANT submits that the Parties empowered the arbitrators to adapt the Contract by relying upon the pre-contractual negotiations [*Cl. Memo., Para. 39*]. Reliance on such negotiations is permissible because in contracts governed by the law of Mediterraneo, CISG governs the interpretation of the Contract along with the arbitration agreement [*PO1, p. 53, para. 4*].

56. CLAIMANT basis the aforesaid conclusion relying on the agreement between the initial negotiators. The negotiators agreed that, in case of disagreement between the Parties, the arbitrators can adapt the Contract [*Cl. Ex. 8, p. 17*]. Additionally, the fact that Mr. Antley had promised to come up with the proposal to include an express reference either in the hardship clause or the arbitration clause further supports the said conclusion [*Cl. Ex. 8, p. 17*].

57. However, CLAIMANT ignored the fact the initial negotiators merely opined that "*it should probably* have been the task of the arbitrators to adapt in case the Parties would have disagreed" [*Cl. Ex. 8, p. 17*]. This statement can, at best, qualify as a *mere suggestion* and not an agreement since it was subject to the proposal that Mr. Antley was to bring the next day.

58. Since, the proposal was never formulated and discussed due to the accident of the initial negotiators, the mere suggestion of one of the initial negotiators cannot be regarded as an agreement between the Parties to impliedly empower the Tribunal to adapt the Contract. Even the final negotiators never considered empowering the Tribunal to adapt and therefore, the mere suggestion did not materialise as binding agreement between the Parties.

59. Therefore, in light of the negotiations, there exists no implied agreement between the Parties to empower the arbitrators to adapt the Contract.

CONCLUSION OF ISSUE 1

The Tribunal should find that in absence of an express choice, the law of the seat applies to the arbitration agreement. Furthermore, it should hold that the Tribunal lacks jurisdiction to adjudicate upon the present dispute. Since on application of the Danubian law, an express conferral of power to adapt is required, the Tribunal cannot adapt in absence of such express conferral. Even if the Mediterranean law were to apply to the arbitration agreement, there exists no implied conferral of powers to adapt. Therefore, the Tribunal cannot adapt the Contract.

ISSUE 2: EVIDENCE FROM THE OTHER ARBITRATION CANNOT BE SUBMITTED AS IT HAS BEEN ILLEGALY OBTAINED

60. CLAIMANT seeks to submit a copy of the Award rendered in the other arbitration in which RESPONDENT is a party. This is to allege contradictory behaviour exhibited by RESPONDENT. In the said arbitration, RESPONDENT demands adaptation [*PO2, p. 60, para. 39*], while on the other hand, it objects when demanded by CLAIMANT in the present case.

61. RESPONDENT submits that such allegation is not justified as the facts of both the arbitration are materially different [*Figure 1*]. Furthermore, RESPONDENT submits that this illegally obtained Award should not be admitted because **[I]** the Tribunal should not admit the Award because it is confidential; **[II]** illegally obtained evidence should not be admitted as a matter of arbitral practice; **[III]** the IBA Rules prohibit admission of the Award; **[IV]** the Award does not possess the requisite probative value; and **[V]** confidentiality cannot be breached under the Transparency Rules.

I. THE TRIBUNAL SHOULD NOT ADMIT THE AWARD BECAUSE IT IS CONFIDENTIAL

62. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts, do not disclose anything in the public domain [*Ali Shipping v Trogir (GBR, 1997)*]. Rather, they recognise confidentiality as one of the most prominent feature of international commercial arbitration [*Bernardo/Rodrigo, p.25, 26*].

63. Upholding this principle, the PCIJ in the *Danube Case* [*Advisory Opinion (PCIJ, 1927)*] declined the admission of the history of certain articles of the Versailles treaty, since those were *confidential* and had not been placed before the court by, or with the consent of, the competent authority. Likewise, in the *Chorzow Factory* case [*Germany v Poland (PCIJ, 1927)*], the court refused to consider declarations, admissions, or proposals made by the parties in the course of prior, abortive negotiations in order to preserve the *confidentiality* of earlier efforts at settlement.

64. Therefore, the Tribunal must uphold the principle of confidentiality of arbitration and refuse admission of the Award.

65. CLAIMANT, in the present case asserts that there exists no obligation of confidentiality in the other arbitration due to absence of an express agreement/acknowledgement to that effect [*Cl. Memo., para. 57*]. It relies on *Esso v Plowman* [*Cl. Memo., para. 46*] and *Biwater v Tanzania*

[*Cl. Memo., para. 56*] wherein it was held: "*disclosure regarding the proceeding can be claimed by a third party unless there is an express acknowledgment of the confidential obligation*".

66. However, this assertion is misleading as the aforesaid observation of the courts does not apply. This is because there exists an express agreement/acknowledgement of confidentiality between the parties as the other arbitration incorporates the HKIAC 2013 rules which mandates the proceedings to be confidential [*Art. 42, HKIAC 2013 Rules*].

67. CLAIMANT has further submitted that obligation of confidentiality under the HKIAC Rules 2013 is not binding unless there is a separate agreement regarding such confidentiality between the parties.

68. However, this is untenable because incorporation of institutional rules by the Parties *ipso facto* forms part of the arbitration agreement thus negating a need for a separate agreement [*Kinga, p. 117*].

69. Furthermore, the confidential nature of the other arbitration is evident as the witnesses (including former employees of RESPONDENT) were under a contractual obligation to maintain its confidential status [*PO2, p. 61, para. 41*].

70. Therefore, in light of such express agreement/acknowledgement of the confidentiality of the other arbitration, the Tribunal should not admit the Award into evidence.

71. CLAIMANT has also submitted that presumption of confidentiality is weak since the awards are subject to the jurisdiction of the court at enforcement stage, therefore, the Award will ultimately be in public domain [*Cl. Memo., para. 64*].

72. However, CLAIMANT, turns a blind eye to the fact that the Award is interim in nature and is not capable of enforcement. Therefore, the question of the Award being in public domain does not arise.

73. Additionally RESPONDENT submits that even if the Award is publicly available, a confidential information may not be admitted into evidence. This is on the premised on the decision of the SCA [*Wee Shuo Woon Case (SG, 2017)*] wherein, while rejecting admission of a confidential document uploaded onto Wikileaks, the court held:

"confidential character of the information in the emails had not been lost by its posting on WikiLeaks because to hold otherwise would be to sanction and to encourage unauthorized access and pilferage of confidential information"

74. Furthermore, contrary to CLAIMANT's submission, an illegally obtained evidence cannot be relied upon, notwithstanding the fact that the party introducing it has no role in its procurement [*Boykin/Havalic, p. 24, 25*]. Therefore, the Tribunal should hold the evidence to be inadmissible.

II. ILLEGALLY OBTAINED EVIDENCE SHOULD NOT BE ADMITTED AS A MATTER OF ARBITRAL PRACTICE

75. There are no fixed rules as to the admissibility of evidence in international commercial arbitration. It is generally left to the discretion of the arbitral tribunal [*Lew/Mistelis, p. 565*].

76. However, in order to ensure certainty, international commercial arbitration needs to accept the role and existence of arbitral precedents [*Mourre/Vagenheim, p. 75; Born, p. 3822*]. This means that if a series of arbitral awards are consistent on a specific legal question, then these decisions will have *'persuasive authority on arbitrators called upon to decide on the same issue'* [*Banifatemi/Gaillard, p. 33*]. Therefore, the Tribunal should exercise its discretion in adherence to the arbitral legal order.

77. Furthermore, discretion cannot be absolute [*Phoenix Action v Czech Republic*]. If the arbitral tribunal were to make decisions on evidential issues based on its own whims and without any rational basis, the parties may have legitimate grounds to feel aggrieved, and a possible recourse [*Ma/Brock, p. 15.084*].

78. It is generally accepted that arbitral tribunals favour exclusion of illegally obtained evidence. In *Methanex* [*Methanex v USA*], the tribunal decided that, since the document was procured unlawfully, it would be wrong to allow Methanex to introduce it into the proceeding. This is because it would violate *a general duty of good faith* imposed by the UNCITRAL Rules.

79. Similarly, in the case of *Libananco Holdings* [*Libananco Holdings Co.*], where Turkey intercepted 2,000 confidential emails through government surveillance, the tribunal weighed in favour of protecting the claimant's confidential information by excluding the evidence from the arbitration proceedings.

80. Therefore, in light of the aforesaid decisions, the Tribunal should not admit the Award.

III. THE IBA RULES PROHIBIT ADMISSION OF THE AWARD

81. The IBA Rules is a result of harmonization of the procedures commonly used in international arbitrations [*IBA Rules Commentary, p. 2*]. Parties may use them as guidelines [*IBA Rules Commentary, p. 3*] since the purpose of these rules is to supplement the institutional rules adopted in an arbitration [*Schwarz/Konrad, p. 415*]*; Segesser, p. 737*].

82. In the present arbitration, since HKIAC 2018 is silent on the admissibility of illegally obtained evidence, therefore, the IBA Rules should be used to determine the admissibility of the Award.

83. RESPONDENT will demonstrate that as per the IBA Rules, the Award should be deemed inadmissible as **[A]** admission of the Award will violate the principle of good faith; **[B]**

presence of legal impediment does not warrant admission of the Award; and **[C]** the Award should not be admitted on grounds of fairness and equality.

A. Admission of the Award will violate the principle of good faith

84. Art. 9.7 of the IBA Rules states that if a party has failed to conduct itself in good faith in the taking of evidence, the arbitral tribunal may impose sanctions or order exclusion of evidence [*Art. 9, IBA Rules*]. This good faith obligation implies the duty to employ fair behaviour, absent of any malice or intention to deceive [*Henriques, p. 523*].

85. CLAIMANT violates its duty of good faith by engaging a Co. providing intelligence on horseracing industry for the procurement of the Award against the payment of *US$ 1000* [*PO2, p. 60, para. 41*].

86. It is pertinent to note that the Award was not available because had it been so, CLAIMANT would have been in possession of the same [*PO2, p. 60, para. 41*]. This clearly indicates that it was only at the behest of CLAIMANT that the Co. proceeded to procure the Award.

87. By initiating the illegal procurement of the Award, CLAIMANT acted with malice and thus, violated its good faith obligations. Therefore, the Award should not be admitted.

B. Presence of legal impediment does not warrant admission of the Award

88. Art. 9(2)(b) of the IBA Rules provide that the arbitral tribunal may exclude the production of any evidence on the basis of existence of a *legal impediment or privilege* under the applicable legal rules [*Art. 9(2)(b) IBA Rules*].

89. In the present case, this legal impediment exists because the other arbitration is conducted under the HKIAC Rules 2013 [*Letter by Fasttrack, page 51*]. Art. 42 of the said rules grant confidential status to arbitration proceedings [*HKIAC Guide, p. 282*].

90. This confidential status of the Award acts as a legal impediment to its disclosure as admission of the Award into evidence will inevitably lead to the breach of its confidential status. Therefore, the Tribunal should not admit the Award.

C. The Award should not be admitted on grounds of fairness and equality

91. Art. 9(2)(g) of the IBA Rules allows an arbitral tribunal to exclude an evidence, if its admission results in unfairness or inequality between the parties.

92. In the present case, CLAIMANT engaged in an underhand transaction to procure the Award [*Re. Memo., p. 85*] and consequently gained access to confidential information. It now seeks to use this information to gain unfair advantage over RESPONDENT, which the Tribunal should not permit.

93. In light of the aforesaid rules, illegally obtained evidence should not be admitted. The result would be the same, even if a party comes into possession of information that was previously illegally obtained by a third party [*Confidentiality vs. Transparency*].

IV. THE AWARD DOES NOT POSSESS THE REQUISITE PROBATIVE VALUE

94. The Tribunal is empowered to determine the admissibility, relevance and materiality [*Art. 22.2, HKIAC Rules; Art. 19(2) Danubian Arbitration Law*] and may admit or exclude any evidence [*Art. 22.3, HKIAC Rules*]. For any evidence to be admissible, it must have certain probative value.

95. The probative value is determined by ascertaining the relevancy and materiality of the evidence sought to be admitted [*Pilkov, p. 154; Kubalczyk, p. 103; Art. 9(2)(a), IBA Rules*]. The RESPONDENT shall demonstrate that **[A]** the Award lacks relevancy; and **[B]** the Award is immaterial to the present matter.

A. The Award lacks relevancy

96. CLAIMANT wishes to convince the Tribunal that the Award is relevant since it shows that RESPONDENT has exhibited contradictory behaviour when compared to the other arbitration. The reason for such assertion is that if the Award is considered relevant then notwithstanding its confidentiality, it may be admitted into evidence [*Cl. Memo., para. 47*].

97. *Relevance*, under Art. 22 HKIAC Rules, means that the document must be useful in order to establish the truth of a factual allegation or of any *fact that is of consequence* [*Pilkov, p. 148; HKIAC Guide, p. 190,193; Raeschke-Kessler, p. 427*].

98. CLAIMANT submits that the *fact of consequence* is the contradictory behaviour exhibited by RESPONDENT. It alleges that RESPONDENT, in the other arbitration demanded adaptation owing to hardship [*PO2, p. 60, para. 39*]. Whereas, it denies such adaptation in the present arbitration. This assertion is misleading [*See Figure 1*].

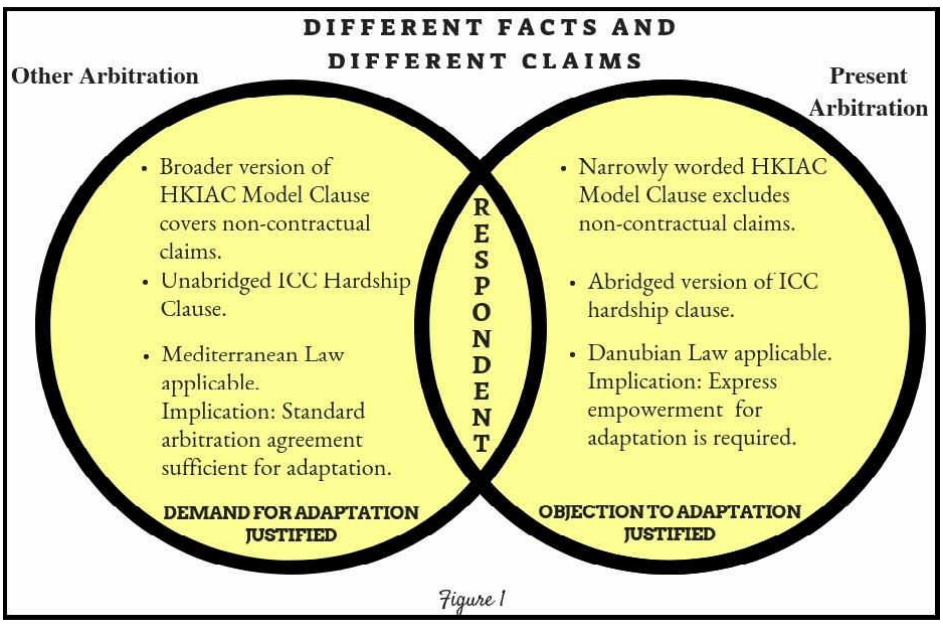

Figure 1

99. RESPONDENT submits that the facts of the other arbitration are fundamentally different from the present arbitration, allowing RESPONDENT to demand adaptation of the Contract. This is because **[a]** presence of a broader form of ICC hardship clause allows RESPONDENT to claim adaptation; **[b]** presence of a broader version of HKIAC Model clause allows adjudication of a non-contractual claim; and **[c]** Mediterraneo as the choice of law, allows for adaptation.

a) Presence of a broader form of ICC hardship clause allowing RESPONDENT to claim adaptation

100. The hardship clause in the present arbitration only convers *hardship arising out of additional health and safety requirements or comparable unforeseen events making the Contract more onerous".* The purpose of including this narrowly worded clause is only to transfer certain risks from Claimant. However, imposition of tariff by Equatoriana is not covered under the aforesaid arbitration clause as alleged by CLAIMANT [*Re. Memo., p. 144*]

101. In the other arbitration, ICC hardship clause 2003 was adopted inclusive of all its additions. The said clause makes a provision for hardship where the performance of a contract excessively *onerous due to an event beyond its reasonable control, which could neither have been expected before its occurrence, nor avoided after it.*

102. Therefore, it is clear that the hardship clause in the other arbitration has an extremely broad ambit and unlike the present case, allows RESPONDENT to demand adaptation.

b) Presence of a broader version of HKIAC Model clause allows adjudication of a non-contractual claim

103. The other arbitration adopts the unabridged HKIAC Model clause. Such a broad arbitration clause shows that it includes contractual as well as non-contractual claims. However, the arbitration clause in the present case has been extensively narrowed down to exclude non-contractual claims [*Re. Memo., para 34*].

104. Therefore, unlike the present case, RESPONDENT in the other arbitration could very well ask for adaptation.

c) Mediterraneo as the choice of law, allows for adaptation

105. The other arbitration is governed by the law of Mediterraneo. Under Art. 6.2.3 of the Mediterranean Law, a *standard arbitration agreement* is sufficient in itself to grant the tribunal, the powers to adapt [*PO2, p. 60, para. 39*]. Unlike the other arbitration, the present arbitration agreement does not have a standard arbitration agreement. Rather, it has been deliberately modified in the present arbitration.

106. Thereby, RESPONDENT was justified in seeking adaptation in the other arbitration.

B. The Award is immaterial to the present matter

107. Evidence is material when it is necessary or sufficient to allow complete consideration of a factual allegation [*Raeschke- Kessler, p. 427; Pilkov, p.149*]. It is pertinent to note that relevancy of an evidence is a pre-condition to its materiality [*Pilkov, p.149*]. As a logical corollary, if an evidence is irrelevant, it cannot be material [*Pilkov, p. 149*]. Since RESPONDENT has proven that the Award is irrelevant [*Re. Memo., para.* 91], it is therefore, futile to determine its materiality.

108. Even if the Award were to be considered relevant and material, it is however, not reliable. To determine reliability, the manner in which the evidence is introduced is to be assessed [*Pilkov, p.153*].

109. The Award in the present case was procured illegally by engaging an intelligence Co. [*PO2, p. 60, para. 41*]. This suggests that since the manner of procurement is illegal, therefore, the evidence is not reliable. In conclusion, the Tribunal should not admit the Award as it lacks probative value.

V. CONFIDENTIALITY CANNOT BE BREACHED UNDER THE TRANSPARENCY RULES

110. CLAIMANT wishes to rely upon the Transparency Rules [*Letter of Langweiler, p. 50*] in order to find a way around the inadmissibility of the Award due to its confidential nature.

111. Relying on the said Rules, CLAIMANT, however, misses the forest for the trees. It fails to realise that the scope of the Transparency Rules is restricted only to investor state arbitration [*Art. 1(1), Transparency Rules*].

112. However, the Transparency Rules may be applied to an international commercial arbitration, if the parties expressly incorporates them by way of an agreement [*Art. 2, Transparency Rules*]. Therefore, absence of any such agreement coupled with the limited scope of the said rules, renders the Transparency Rules to be inapplicable.

113. Furthermore, in international commercial arbitration, disclosure of confidential information can be permitted if public interest is involved [*Rusculla, p. 9*]. To establish this exception, CLAIMANT relies on two precedents [*Cl. Memo., para. 68, 69*].

114. RESPONDENT submits that these precedents are not applicable in the present case, since there public interest was involved because, in one of the cases, government authority was a party to the arbitration. In the other case, it was the Court that permitted disclosure since it was allowed under the domestic laws.

115. It is pertinent to note that the present dispute is of private nature and involves no such public interest. Therefore, transparency should not be preferred over confidentiality. On the

contrary, public interest will be served in holding the Award to be inadmissible since the contrary will lead to promotion of illegal activities such as hacking [*Reisman/Freedman, p. 752*].

116. Alternatively, CLAIMANT requests the Tribunal to join the other party to the other arbitration to prove contradictory behaviour of RESPONDENT. This claim for joinder is procedurally impermissible and insistence upon it will be akin to *flogging a dead horse*.

117. Joinder of an additional party is permissible only when the original parties to the arbitration have expressly consented to it in writing. [*HKIAC Guide, p. 210*]. Absent such consent in writing, the Tribunal has no power to order '*forced joinder*' of the other party to this arbitration [*PT v Astro (SG, 2013); Art. 27, HKIAC Rules*]. Therefore, CLAIMANT's request for joinder cannot be granted.

CONCLUSION OF ISSUE 2

The Tribunal in adherence to the arbitral legal order should find that the illegally obtained Award is inadmissible. Further, the IBA Rules demonstrate that the Award should be deemed as inadmissible on grounds of violation of principle of good faith, presence of a legal impediment and considerations of fairness and equality. Even if admission of illegally obtained evidence was permissible in commercial arbitrations, the said evidence is inadmissible because it is irrelevant, immaterial and lacks credibility. Therefore, in absence of an express agreement or any public interest, transparency cannot be given preference over confidentiality.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

118. During negotiations, RESPONDENT accepted CLAIMANT's request for transferring certain risks relating to delivery of goods and thereby, the Parties inserted a narrowly worded hardship clause into the Contract [*Cl. Ex. 5, p. 14*]. At the time of the delivery of the final installment, the government of Equatoriana imposed tariffs resulting in an increase in the cost which is required to be paid by CLAIMANT [*Cl. Ex. 8, p. 17*].

119. Since imposition of said tariffs was foreseeable, therefore, the risk associated with them was borne by CLAIMANT. Contrary to CLAIMANT's assertion, the price of goods as agreed between the Parties should not be adapted **[I]** under clause 12 of the Contract; or **[II]** under CISG.

I. THE PRICE OF GOODS AS AGREED BETWEEN THE PARTIES SHOULD NOT BE ADAPTED UNDER CLAUSE 12 OF THE CONTRACT

120. CLAIMANT changed the mode of delivery to *'DDP'* upon RESPONDENT's request. It is acknowledged that such a change was made in order to profit from CLAIMANT'S experience in the transportation of frozen semen [*Cl. Ex. 3, p. 11*].

121. For the purpose of allocating additional risk arising from such a change, clause 12 was inserted into the Contract. However, the tariffs imposed by Equatorianian government do not command a remedy of price adaptation under the said clause.

122. RESPONDENT shall demonstrate that **[A]** the import tariffs imposed by the government of Equatoriana do not constitute hardship under clause 12 of the Contract; and **[B]** price adaptation should not be granted as a remedy to resolve the situation of hardship.

A. The import tariffs imposed by the government of Equatoriana do not constitute hardship under clause 12 of the contract

123. The Parties agreed to the delivery being made via '*DDP'* [*Cl. Ex. 4, p. 12*] which requires that the seller has to bear all the costs and risks involved in bringing the goods to the named port including payment of any and all duties for import in the country of destination [*INCOTERM, p. 629*].

124. However, the Parties regulated some of the possible risks by agreeing upon a general definition of exempting impediments to ensure that only the events having the characteristics set forth in clause 12, will be considered to constitute hardship [*UNCITRAL legal guide, p. 251; Rimke, p. 219*]. Therefore, reliance must be placed on clause 12 of the Contract to determine the occurrence of hardship [*Schwenzer, p. 715*]. It states:

"Seller shall not be responsible […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the Contract more onerous."

125. It is submitted that the imposition of tariffs does not comply with the aforesaid characteristics under clause 12 because it fails to **[a]** constitute a '*comparable unforeseen*' event and **[b]** make the Contract '*more onerous*' for CLAIMANT.

a) The imposition of tariffs fails to qualify as a 'comparable unforeseen' event

126. CLAIMANT submits that the imposition of tariffs can be compared to additional health and safety requirements by relying on certain minor similarities between them [*Cl. Memo., para. 98*]. However, this is not the case since the additional requirements imposed by Danubia in 2014 are, in essence, different from the tariffs imposed by Equatoriana. +

127. The quantum of increase in cost of performance is different in both cases. In the case of the 2014 transaction, the total revenue to be earned from the sale was US$ 8,000,000 and increase in the cost amounted to 40% of the sale price i.e., US$ 3,200,000 [*PO2, p. 58, para. 21*]. However, the tariffs imposed by Equatoriana resulted in a mere increase of US$ 1,250,000 in the cost of performance.

128. The disparity in the quantum of increase in the cost leads to different implications as the financial burden on CLAIMANT in the present case is much lower than that in the transaction with the Danubian buyer. Therefore, the two events are not of a similar nature and cannot be compared with one another.

129. Furthermore, the imposition of additional requirements in 2014 was sudden and immediate due to discovery of a rare aggressive type of foot and mouth disease [*PO2, p. 58, para. 21*]. On the contrary, it is submitted that the imposition of import tariffs in the present case could have been anticipated and thus, does not qualify the '*unforeseen*' criteria under clause 12 of the Contract since **[i]** the tariffs imposed by Mediterraneo were foreseeable; **[ii]** the retaliatory measures taken by Equatoriana were not unforeseen; and **[iii]** listing of frozen semen under agricultural goods was foreseeable.

i. The tariffs imposed by Mediterraneo were foreseeable

130. The foreseeability of tariffs can be ascertained by analysing not just the event, but also the time of its occurrence [*Tallon, p. 581; Doudko, p. 496*]. The newly elected president of Mediterraneo, Mr. Bouckaert, had announced a preference for a more protectionist approach to international trade in his election program itself [*Cl. Ex. 6, p. 15*].

131. Shortly after his appointment, he appointed Ms. Cecil Frankel, an outspoken protectionist, as his super minister. She is known for supporting the practice of limiting the access of foreign agricultural products to the Mediterranean market [*PO2, p. 58, para. 23*].

ii. The retaliatory measures taken by Equatoriana were not unforeseen

132. CLAIMANT submitted that the tariffs imposed by Equatorianian government were unforeseeable [*Cl. Memo., para. 101*]. However, it is asserted that said tariffs could have been anticipated considering they were made in retaliation to the tariff imposed by Mediterraneo.

133. Such retaliatory measures are generally accepted as a foreseeable event [*Martin/Vergote, p. 67*]. This is further substantiated by the fact that in the past, Equatoriana has imposed retaliatory measures against another nation [*Cl. Ex. 6, p. 15*].

134. Furthermore, this practice is followed by various other countries that have also imposed tariffs of a comparable size [*PO 2, p. 58, para. 23*] thus, supporting the claim of foreseeability of imposition of tariffs.

iii. Listing of frozen semen under agricultural goods was foreseeable

135. Contrary to CLAIMANT's assertion of unforeseeability of frozen semen being listed as agricultural goods, it is submitted that agriculture, as a general trade term, includes animal husbandry and livestock [*ILO Report, p. 37*]. Therefore, it can safely be assumed that CLAIMANT should have had knowledge of frozen semen being categorized under agricultural goods.

136. Additionally, under the *'DDP'* INCOTERM, CLAIMANT had the responsibility of fulfilling all custom formalities [*INCOTERM, p. 629*]. Consequently, it had a duty to enquire about items covered under the newly imposed tariffs which it failed to perform.

137. In conclusion, the imposition of tariffs could have been anticipated and therefore, fail to meet the criteria under clause 12 of the Contract.

b) The imposition of tariffs fails to make the Contract more onerous for CLAIMANT

138. CLAIMANT asserts that since the tariffs could not have been assumed when signing the contract, they make the contract more onerous by placing reliance on Total S.A. v Argentine Republic [*Total v Argentina*]. However, this argument is not convincing.

139. The said case was decided by relying upon a stabilisation clause for fixing legal framework between the parties which is absent in the present case and therefore, it cannot be relied upon.

140. Furthermore, CLAIMANT may not submit that the 30% increase in the cost of performance would in itself result in onerousness. However, this argument is misguided as the Contract is said to be '*onerous*' only when its performance causes great difficulty [*Onerous, in Black's Law, p. 1122*]. A change that merely makes performance burdensome for one party does not entitle it to claim onerousness.

141. Therefore, the change in economic circumstances must be a substantial change [*Maskow, p. 662*] and must represent a significant portion of the Co.'s revenues [*ICC Case No. 2508 of 1976*]. In the present case, the revenue arising from the present transaction represents only a small portion of CLAIMANT's revenue. This is because the proceeds earned from the sale of frozen semen is over and above what CLAIMANT usually earns from transactions involving natural coverage [*Notice of Arbitration, p. 4, para. 2*].

142. Considering that the CLAIMANT had sold frozen semen for artificial insemination for the first time [*PO 2, p. 55, para. 4*], a reasonable assumption can therefore be drawn that the revenue earned from the present transaction do not represent a significant proportion of its revenue.

143. Even though the profit earned from the present transaction would have helped the CLAIMANT in improving its financial condition [*PO2, p. 59, para. 29*], the aforesaid surplus cannot be regarded as a *lion's share* in its revenue collection [*Cl. Ex. 3, p.11*]. Therefore, such a change in economic circumstances should not be considered in determining the onerousness of the Contract.

144. In conclusion, the present imposition of tariffs is a foreseeable event which fails to make the Contract more onerous. Therefore, the said imposition does not fall under clause 12 of the contract and the remedy of price adaptation should not be granted [*Maskow, p. 663*; *ICC Case No. 1990 of 1972*].

B. Price adaptation should not be granted as a remedy to resolve the situation of hardship

145. Even if the Tribunal is of the opinion that imposition of tariffs falls under clause 12 of the Contract, it is submitted that price adaptation should not be granted as a remedy because **[a]** the Parties never intended for price adaptation as a remedy for hardship; **[b]** price adaptation is not an appropriate remedy in the present case; and **[c]** adaptation of the price must not be made in favour of CLAIMANT.

a) The Parties never intended for price adaptation as a remedy for hardship

146. CLAIMANT submits that RESPONDENT should bear the burden of the import tariffs because it cannot know about RESPONDENT's internal condition regarding Mr. Shoemaker's authority [*Cl. Memo., para.112*]. However, RESPONDENT submits that CLAIMANT approached Mr. Shoemaker to enquire about the imposition of tariffs and their effects on the Contract. Mr. Shoemaker, who was only responsible for the racehorse breeding program [*PO2, p. 59, para. 32*], replied by stating that he was neither a lawyer nor had he taken part in negotiations of the Contract [*Re. Ex. 4, p. 36*].

147. As per his understanding, CLAIMANT was to bear all risks under *'DDP'* delivery and he merely stated that:

"If the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price."

148. He had expressly informed CLAIMANT that he was not authorized to commit to any adaptation of the Contract [*Cl. Ex. 8, p. 18*]. Therefore, CLAIMANT's assertion of absence of knowledge of RESPONDENT's internal conditions, does not arise.

149. Additionally, CLAIMANT has submitted that RESPONDENT accepted its demand for finding a solution by not objecting to their statement regarding delivery [*Cl. Memo., para. 113*]. However, this assertion is misguided as mere non-objection cannot be deemed as acceptance by RESPONDENT [*Filanto v Chilewich*]. This is further supported by the fact that

Mr. Shoemaker did not make any promise of finding a solution that could be deemed to have a binding effect on RESPONDENT.

150. Since CLAIMANT was in urgent need of financial resources to fulfil its goal of being profitable in 2018 [*PO2, p. 59, para. 29*], an inference can be drawn that the goods were timely delivered to ensure payment of proceeds from the third and last shipment. This was also necessary for CLAIMANT to ensure prolongation of its credit lines.

151. Therefore, CLAIMANT did not rely on Mr. Shoemaker's statement to deliver and neither did he promise that a solution would be found. He merely stated that the provisions of the Contract would be given effect.

152. Furthermore, it is generally accepted that a relief can only be granted when the intent of the parties has been clearly expressed for the same [*ICC Award No 1512 of 1971, Zaccarria, p. 137*]. However, the Parties have not expressed any intention of granting price adaptation as a remedy.

153. On the contrary, CLAIMANT, during negotiations, proposed to include the ICC hardship clause into the Contract [*Res. Ex. 2, p. 34*]. The said clause actually encourages the parties to either find a solution amongst them or terminate the contract, without the intervention of courts or arbitrators [*Zaccaria, p. 161; ICC Model Clause, p 16*]. Therefore, it expressly excludes the possibility of adaptation of price by a third party.

154. It is submitted that on application of Art. 8(3) CISG, such a proposal becomes relevant to determine the intention of CLAIMANT to not include price adaptation as a remedy for hardship [*Building material case, (SWZ, 2004)*].

155. In conclusion, since the Parties never intended to include price adaptation as a remedy for hardship and the imposition of tariffs does not fall under clause 12 of the Contract [*Re. Memo., Para. 144*], no remedy could be granted to CLAIMANT [*ICC Case No. 1512 of 1971*].

b) Price adaptation is not an appropriate remedy in the present case

156. CLAIMANT may submit that since the Parties were not able to reach upon an agreement on renegotiation of price, adaptation becomes an appropriate remedy [*Cl. Ex. 8, p.18*].

157. However, it is asserted that a duty to renegotiate a contract is a duty of reasonable efforts and not a duty to achieve a specific result. Therefore, the Parties were not expected to reach a definite result [*Doudko, p. 502*] Therefore, the agreement continues to stand in its original form [*Zaccarria, p. 154*].

158. Furthermore, for a remedy to be considered appropriate to accommodate any change in circumstances, there must be an express mention of the same in the contract between the Parties [*ICC Case No. 9029 of 1998*]. However, in the present case, the Parties have not

expressly provided for any effect of hardship in the Contract particularly, adaptation of the price [*Cl. Ex. 8, p. 17*].

159. Since the Tribunal has the power to only interpret contracts made by the Parties and not make any agreements for them [*Gilmore, p. 151.*], it is asserted that only two remedies are available.

160. CLAIMANT subscribes to this view that the Parties can only request either renegotiation or termination of the Contract [*Cl. Memo., para. 115*]. However, the CLAIMANT demands adaptation without any basis.

161. Claimant could have asked for adaptation had there been a clause in the Contract minutely detailing the circumstances that could justify a hardship situation and entails consequences [*ICC Case No. 8873 of 1997*]. Absent such a clause in the Contract, CLAIMANT cannot insist on adaptation.

162. In conclusion, the Parties never intended to provide price adaptation as a remedy for hardship coupled with the fact that no express clause for the same has been mentioned in the Contract, price adaptation should not be granted as a remedy in the present case.

c) Adaptation of the price must not be made in favour of CLAIMANT

163. The principle of '*Pacta Sunt Servanda'* is recognised as one of the fundamental rules of contract law which makes the contract binding and establishes the allocation of risk once and for all [*Horn, p. 54*] In the present case, the additional risks arising from the change in the mode of delivery to *'DDP'* were allocated amongst the Parties by specifying certain events for which CLAIMANT could not be made responsible.

164. The imposition of tariffs by Equatorianian government, though, does not fall under such specified events [*Re. Memo., para. 144*]. Therefore, even though CLAIMANT is in a financially weak position, it must perform its obligations which include payment of import tariffs. This is because such imposition is within what CLAIMANT was reasonably expected to perform under the Contract [*Silveira, p. 353; Aluminium v Essex Group, (USA, 1980)*].

165. Furthermore, CLAIMANT may assert that RESPONDENT should bear the burden of import tariff because of its breach of re-sale prohibition. However, this argument is misguided because the Contract does not contain any prohibition on resale of frozen semen purchased from the CLAIMANT. It merely contains a requirement to inform CLAIMANT of all the doses that may be sold to any third party.

166. Additionally, the assertion made by CLAIMANT is based on information received from another breeder from Equatoriana and hence, is *heresay* [*PO2, p. 57, para. 20*]. Thus, neither

the information is authentic nor does CLAIMANT have any evidence to prove that such a re-sale prohibition was breached.

167. Supposing RESPONDENT did re-sell a certain number of doses, CLAIMANT has made a wrongful assumption that all the 15 doses would have been sold at the same price, thereby, resulting in RESPONDENT earning unlawful profit.

168. Since CLAIMANT has not provided any proof regarding the existence of resale prohibition as well as profit, if any, earned by RESPONDENT, therefore, the CLAIMANT's allegations are not tenable.

169. Even if the Tribunal is of the opinion that RESPONDENT must bear the burden of import tariffs, there must be a *'fair distribution of the losses'* between the Parties [*Darankoum, p.421, 473*].

170. CLAIMANT's demand for adaptation in its favour cannot be granted as adjustment should not be designed to make CLAIMANT whole, but only what is strictly necessary to make the performance bearable [*Fucci, p.40*].

II. THE PRICE OF GOODS AS AGREED BETWEEN THE PARTIES SHOULD NOT BE ADAPTED UNDER CISG

171. Upon rejection of the request for price adaptation under clause 12 of the Contract, CLAIMANT may assert that the said remedy could be granted under CISG. However, this submission is misguided. The RESPONDENT shall demonstrate that **[A]** application of Art. 79 CISG has been excluded by the Parties; **[B]** price adaptation cannot be granted as a remedy by application of Art. 79 CISG; and **[C]** supposing a gap exists relating to the remedy for hardship, price adaptation should not be granted under Art. 7(2) CISG.

A. Application of Art. 79 CISG has been excluded by the Parties

172. CLAIMANT submission that loss incurred by it should be granted by applying Art. 79 CISG [*Cl. Memo., para. 118*]. However, this submission is misleading in light of application of Article 6 CISG. Art. 6 CISG embodies the principle of party autonomy [*Printing system and software case, (GER, 1996)*], which reserves the parties' option to set aside, totally or partially, the application of CISG.

173. In the present case, the Parties have impliedly derogated from Art. 79 CISG by including in the Contract itself that defines impediments, indicating the Parties desire for such derogation [*Rimke, p. 227, Hachem, p. 219*]. The Parties clear [*Auto case (AUT, 2007); Corn Case, (UKR, 2012)*] *and real* [*Building materials case, (SWZ, 2004)*] intention for said exclusion can also be determined by interpretation of their statements and other conduct [*Article 8 (3) CISG, Bianca/ Bonell, p. 56*].

174. During negotiations, CLAIMANT demanded for the inclusion of a hardship clause given their past experience with "*additional health and safety requirements*" [*Cl. Ex. 4, p. 12*]. RESPONDENT agreed to such a request and consequently specified certain events that may make the performance of the Contract more onerous.

175. Unlike CISG, clause 12 of the Contract enumerates the events which may qualify as hardship by setting the standard in terms of *additional health and safety requirements and any other events which are of a near identical nature.*

176. This hardship clause prescribes its own formula for event to qualify as hardship which is at variance with Art. 79 CISG. It is pertinent to note that the hardship clause contained in the Contract may even cover situations which would otherwise not be covered under Art. 79 CISG

177. Therefore, the aforesaid clause performs the same function as mentioned in CISG and simultaneous application of both CISG and clause 12, will lead to inconsistent results [*Hellner, p. 86; Honnold, p. 161*].

178. In conclusion, the said clause regulates the issue of hardship in contrast to provisions of CISG and reflects the clear intention of the Parties to exclude the application of Art. 79 CISG considering the incompatible nature of the clause [*Borisova, p. 3*].

B. Price adaptation cannot be granted as a remedy by application of Art. 79 CISG

179. It is asserted that two views exist regarding the inclusion of hardship within the CISG. One group of scholars are of the view that hardship is not governed by CISG at all. The other group is of the view that hardship, though covered under CISG, the remedy for the same is limited to provisions of Art. 79 CISG.

180. RESPONDENT shall demonstrate that **[a]** CISG does not govern the situation of hardship; and **[b]** Supposing CISG does govern the situation of hardship, there exists no gap in relation to its remedy.

a) CISG does not govern situation of hardship

181. The first view is supported by the finding that hardship as a concept has not found an expression in CISG, though attempts were made to introduce such a provision [*Maskow, p. 660*]. A reference should be made to the *'Travaux preparatoires'* of the CISG to understand the intentions of the drafter of CISG [*Zeller*].

182. The drafters of CISG intended not to introduce the theory of hardship (*theorie de l'imprevision*, the French equivalent), which is reflected from rejection of a Norwegian proposal to modify the wording of CISG Art. 79(3) [*Schlechtriem, p. 97, Nicholas, p. 5.03*].

183. Furthermore, the UNCITRAL Working Group which adopted the text of CISG, while evaluating the goal of Art. 79 CISG replaced the term *"circumstances"* with *"impediment"*. This change was made to define the requirements for the application of Art. 79 CISG more narrowly [*CISG-AC OP. NO. 7*] and implicitly exclude hardship from the scope of application of Art. 79 CISG [*Petsche, p. 150*].

184. The reason for such non-inclusion was to uphold the principle of party autonomy and remove any ambiguity that may arise from intervention of any third party. Therefore, contrary to assertions made by CLAIMANT [*Cl. Memo., para. 127*], the concept of hardship is not governed by CISG at all [*Gillies/Moens, p. 37*] and the remedy of price adaptation cannot be granted under it.

b) Supposing CISG does govern the situation of hardship, there exists no gap in relation to its remedy

185. Even if the Tribunal is of the opinion that the concept of hardship is governed by CISG, the only remedy is provided under Art. 79 i.e., exemption from payment of damages in case of non-performance of obligation(s).

186. RESPONDENT agrees with CLAIMANT [*Cl. Memo., para. 131*] that the imposition of tariffs meets the criteria of Art. 79 CISG except for foreseeability of the said tariffs [*Re. Memo., para 129*]. However, even if the criteria of Art. 79 is met *in toto*, it is asserted that the remedy for hardship can only be found in the said provision [*Nuova Fucinati v Fondmetall International (ITA, 1993), Société Romay AG v SARL Behr France, (FRA, 2001)*].

187. CLAIMANT submits that there exists a gap in relation to the remedy when a party facing an impediment performs its obligations by placing reliance on the fact that such a remedy is not mentioned in CISG [*Cl. Memo., para. 139*]. However, this argument is misguided.

188. The legislative history of Art. 79 rules out the assumption of the existence of such a gap. This is supported by dismissal of a proposal in the UNCITRAL's Sale Draft of 1977 which provided for changes that resulted in excessive difficulties. Additionally, the purpose of Art. 79 CISG of establishing definite limits as to a promisor's responsibility for breach of contract further rebuts the possibility of any unstated remedy [*Rimke, p. 219*].

189. It is widely accepted that the legal effect of post-contract developments that render a party's performance more difficult, including more expensive, is fully addressed in the exemption provisions of CISG [*Flechtner I, p. 34, Schlechtriem/ Schwenzer, p. 1134*]. The aim of limiting the remedy under hardship is to exclude the possibility of application of Art. 7(2) CISG. This is so because it would be a severe threat to the uniform nature of CISG, considering the different stands adopted by various nations in regard to hardship [*Carlsen*].

190. CISG is said to refer to a stricter standard than that of hardship [*Tallon, p. 592*] and therefore, it is impossible to request revision of the contract to adapt it to the changed circumstances [*Bonell II, p. 570*] in the present case. Therefore in light of the aforesaid submissions, the Tribunal should hold that there exist no gap in relation to price adaptation as a remedy.

C. Supposing a gap exists relating to the remedy of hardship, price adaptation should not be granted under Art. 7(2) CISG

191. Even if the Tribunal is of the opinion that the remedy of hardship is a matter governed but not settled under CISG, it is asserted that price adaptation should not be granted under UNIDROIT.

192. Any matter that is governed but not settled under CISG should be filled according to the prescriptions of Art. 7(2) CISG [*Silveira, p. 312; Garro*]. RESPONDENT by relying on said provision shall demonstrate that **[a]** UNIDROIT cannot be relied upon for filing the gap under Art. 7(2) CISG; and **[b]** imposition of tariffs does not qualify for claiming a remedy under UNIDROIT.

a) UNIDROIT cannot be relied upon for filing the gaps under Art. 7(2) CISG

193. Art. 7(2) CISG mandates that primarily reliance for gap-filling should be placed on general principles upon which CISG is based [*Kropholler, p. 292; Minibus case, (NED, 2009)*]. CLAIMANT submits that the general principles as incorporated under UNIDROIT are similar to the principles upon which CISG is based by placing reliance on the Scafom International BV case [*Cl. Memo., para. 142*].

194. However, the Belgian court in the aforesaid case unjustifiably turned to the "*general principles which govern the law of international trade*" instead of the "*general principles of CISG*" as required under Art. 7(2) CISG [*Scafom v Lorraine Tubes (BEL, 2009)*]. These two principles are founded on a different basis since the latter are derived from the text of CISG itself whereas the former could be found in many sources outside the Convention [*Flechtner II, p. 345, Tepeš, p. 688*] Therefore, the aforesaid case cannot be relied upon to grant a remedy under UNIDROIT.

195. Furthermore, Articles 6.2.2 and 6.2.3 of UNIDROIT are simply an expression of common practice in international trade and do not correspond to international practice [*ICC Case No. 8873 of 1997*]. Therefore, the abovementioned provisions cannot be legitimately used to supplement CISG [*Slater, p. 254*].

196. Contrary to CLAIMANT's assertions pertaining to general principles of CISG [*Cl. Memo., para. 114*], it is asserted that that the '*theory of changed circumstances'* i.e., hardship does not form part

of widely recognised and generally accepted legal principles that form the basis of general principles [*Bonell I, p. 231, ICC Case No. 8873 of 1997; Tepeš, p. 688*].

197. Therefore, general principles under hardship provisions of UNIDROIT are different and do not cover the general principles upon which CISG is based. Thus, UNIDROIT cannot be used to grant price adaptation as a remedy since it would jeopardize the harmonious nature and aim of CISG as stated in Art. 7(1) CISG [*Tallon, p. 594*].

b) Imposition of tariffs does not qualify for claiming a remedy under UNIDROIT

198. Contrary to CLAIMANT's assertions [*Cl. Memo., para. 141*], reliance cannot be placed directly on the domestic legislation applicable to the Contract i.e., the law of Mediterraneo (verbatim adoption of UNIDROIT) to fill any gaps in CISG. The same must be filled primarily by taking into account general principles of CISG [*Re. Memo., Para. 193*] which however, do not allow the remedy of price adaptation to be granted.

199. Even if the Tribunal is of the opinion that no such general principles exist, it is asserted that price adaptation cannot be granted as a remedy under UNIDROIT. It is acknowledged that UNIDROIT may be applicable by virtue of rules of private international law [*Article 7(2) CISG*] however, it is submitted that the imposition of tariffs do not qualify the criteria under Art. 6.2.2 UNIDROIT.

200. The aforesaid provision provides that hardship is said to occur only when an event "*fundamentally alters the equilibrium of the contract*". For all other cases, the terms of the contract must be respected even if a party experiences heavy losses instead of the expected profits or if the performance becomes meaningless for that party [*Art. 6.2.1, UNIDROIT, Doudko, p. 494*].

201. In the present case, the imposition of tariffs was foreseeable in nature and did not make the Contract onerous [*Re. Memo., para. 138*]. Therefore, the criterion of fundamental change, which sets a much higher threshold, is not met in the present case, therefore, no remedy under UNIDROIT should be granted. If the Tribunal chooses to hold otherwise, this will lead to a situation whereby, the result of normal economic risks will be shifted to the other party and in effect, will undermine the foundations of a market economy [*Maskow, p. 663*].

202. Furthermore, in the earlier comments on Art. 6.2.2, UNIDROIT provided that in order for a party to be entitled to any remedy under hardship, the minimum quantum of increase in the cost of performance must amount to more than 50%. Below such a level, no circumstances could command any remedy under UNIDROIT. [*Commentary, Art. 6.2.2, UNIDROIT*]

203. Even though this comment has been excluded in the present version of comments in the principles, however, the reason for its removal was to discourage inclusion of events which comprised of disruption in cost even as low as 50%. Thus, such a condition still applies [*Doudko, p. 495*]. In the present case, the resultant change in cost of performance amounts to 30% which does not qualify as a fundamental change as required under Art. 6.2.2 UNIDROIT.

204. Additionally, while providing a remedy under Art. 6.2.3 for adaptation, there exists a limit to the arbitrator's power of adaptation, whereby some clauses can be modified but not to the extent of rewriting the whole contract [*Lando/Beale, p. 326–327*].

205. In the present case, CLAIMANT's request for an amount of US$ 1,250,000 is not arising out the Contract since the Parties have not expressly provided for price adaptation to be granted as a remedy for hardship [*Cl. Ex. 8, p. 17*]. Rather, it is a claim which requires rewriting the entire Contract which will surely defeat what the Parties had originally agreed.

206. Therefore, the claim for such an adaptation of price is an imposition of a new contract rather than restoration of the original balance between the Parties. In conclusion, the remedy of price adaptation should not be granted [Zaccarria, p. 136] under CISG for the aforesaid reasons summarised in Figure 2.

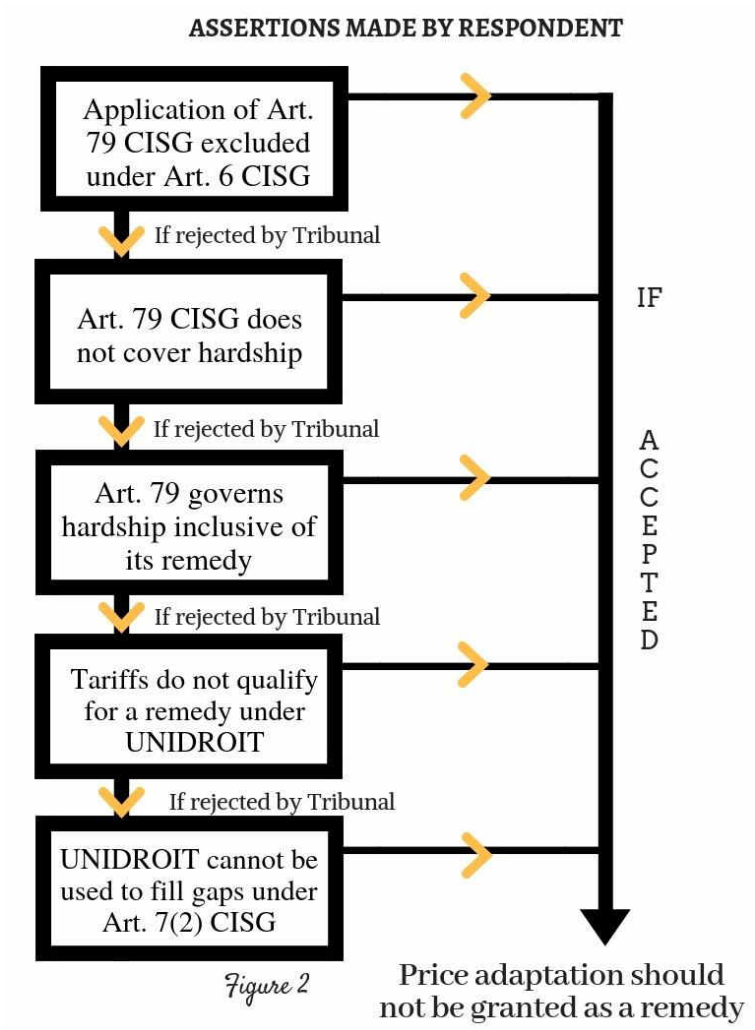

Figure 2

CONCLUSION OF ISSUE 3

The Tribunal should find that the tariffs imposed by the Equatoriana do not constitute hardship under clause 12 of the Contract. The adaptation of the Contract should not be granted as a remedy since it was neither intended by the Parties nor is it an appropriate remedy in the present condition. Alternatively, there exists no remedy for price adaptation under Art. 79 CISG. Furthermore, supposing a gap exists in relation to the said remedy, UNIDROIT Principles do not provide the remedy of price adaptation by filling the gaps under Art. 7(2) CISG.

PRAYER FOR RELIEF

Counsels for RESPONDENT respectfully request the Tribunal:

1. To find and hold that the Tribunal does not have the jurisdiction and power to adapt the contract under the arbitration agreement.
2. To find and hold that the Award from the other arbitral proceedings is inadmissible before the Tribunal and that CLAIMANT is not entitled to rely on the same.
3. To find and hold that CLAIMANT is not entitled to an increased remuneration resulting from adaptation of the price under clause 12 of the Contract or under CISG.

Based on these findings, RESPONDENT respectfully requests the Tribunal:

1. To dismiss the claim for additional remuneration in the amount of US$ 1,250,000 raised by the CLAIMANT.
2. To order the CLAIMANT to pay the costs incurred by the RESPONDENT in this arbitration.

Respectfully submitted,

Bhopal, 24th January 2019

Pranjal Agarwal

Aditya Wadhwa

Ankit Gupta

Nilakshi Srivastava

Shiuli Mandloi

CERTIFICATE

Certificate and Choice of Forum

To be attached to each Memorandum

I **PRANJAL AGARWAL**, on behalf of the Team for (name of School) **NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL, INDIA** hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name): NATIONAL LAW INSTITUTE UNIVERSITY, BHOPAL

Name: PRANJAL AGARWAL

Signature: _____