DIPLOMATIC ACADEMY OF VIETNAM

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
2 SEABISCUIT DRIVE OCEANSIDE EQUATORIANA	RUE FRANKEL 1 CAPTIAL CITY MEDITERRANEO

PHUONG ANH DO • DIEU LINH NGUYEN • HA VAN PHAM THI
ANH NGUYEN THI MINH • THUY DUONG VU

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¶/¶¶	para/paras
&	And
AAA	Amercian Arbitration Association
ANoA.	Respondent's Answer to Notice of Arbitration
Apr	April
Art./Arts.	Article/Articles
BTTP	Bulgarian Chamber of Commerce and Industry
Chapter	Chap.
CIETAC	China International Economic & Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
DDP	Deliver Duty Paid (Incoterm 2010)
Dec	December
DSU	Understanding on rules and procedures governing the settlement of disputes (Annex 2 of the WTO Agreement)
ed.	Edition
et al.	and others
et seq.	et sequentes (and that which follows)
Ex. C	Claimant's Exhibit
Ex.R	Respondent's Exhibit
Feb	February
fn.	Footnote
FSSA	Frozen Semen Sales Agreement
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts

HKIAC	Hong Kong International Aribtration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules 2018
I.	Issue
i.e.	id est
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Dispute
IUSCT	Iran-US Claims Tribunal
Jan	January
Jul	July
Let. Fast	Letter by Fasttrack
Let. Lang	Letter by Langweiler
Mar	March
Memorandum for Claimant	CL. Memo
No.	Number
NoA.	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Oct	October
p./pp.	page/pages
PECL	Principles of European Contract Law
PO.	Procedural Order
Representative	Rep.
TLDB Principles	Transnational Law Database Principles
ULIS	Convention relating to a Uniform Law on the International Sale of

	Goods
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts 2016
US$	United States Dollar
v.	Versus
V.	Volume
Vienna Convention	Vienna Convention on the Law of Treaties (1969)
WTO	World Trade Organization

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STATEMENT OF FACTS

1 This proceeding is between and Black Beauty Equestrian ("**Respondent**") and Phar Lap Allevamento Company ("**Claimant**") (collectively "**Parties**"). Respondent is an Equatoriana-based company famous for show jumper and international dressage broodmare lines. Respondent is also planning to become a leading breeder for racehorses. Claimant is a company registered in Mediterraneo, whose business operations include all areas of equestrian sport.

2 On **21 Mar 2017**, Respondent asked Claimant for an offer of 100 doses of semen from NIJINSKY III, one of Claimant's world class stallions. Claimant then made an offer on **24 Mar 2017.**

3 In response, on **28 Mar 2017,** Respondent expressed its favor for DDP delivery term and another choice in dispute resolution. On **31 Mar 2017** Claimant accepted the delivery term on a condition of a price increase. Claimant also suggested arbitration. Later, Respondent provided Claimant with a draft arbitration clause based on HKIAC Model Clause with shortened wording. Claimant then changed the arbitration seat to Danubia, but ignored the law applicable to the arbitration agreement on **11 Apr 2017**. It also suggested reliance on the ICC Hardship Clause.

4 On **12 Apr 2017**, Parties met to discuss Tribunal's power to adapt as well as the hardship clause. However, no agreement was reached due to an accident of the two main negotiators.

5 The FSSA is then signed on **6 May 2017** in Mediterraneo. Parties agreed to solely stipulate the seat of arbitration as well as forwent the specification of the law applicable to their arbitration clause (Clause 15) and the Tribunal's power to adapt the contract. The hardship clause (Clause 12) is also narrowed down.

6 On **20 Jan 2018,** Respondent was informed of Equatoranian's 30% tariff applied to the horse semen. Respondent urged a timely delivery and agreed to consider renegotiating the price later on as a gesture of good faith. Despite Respondent's clear emphasis on not making any commitment, Claimant chose to deliver the final shipment and pay for the tariff.

7 However, on **12 Feb 2018**, when Parties met to discuss the possibility of price adjustment, Claimant erroneously blamed Respondent for breaching the inexistent resale prohibition. Seeing no chance of a conclusive settlement, Respondent had to stop renegotiation and refuse to pay the tariff.

8 During the course of this proceeding, Claimant tried to make use of Respondent's position in another concurrent arbitration proceeding under HKIAC Rules. Although Respondent has immediately clarified that such information was leaked either through a breach of confidentiality

agreement or an illegal hack, Claimant still tried to obtain the Award from the other proceeding. They even went so far to get into contact with a company who is infamous for getting intelligence on the horseracing industry from questionable sources. They paid US$1000 for the evidence despite their constant claim of fragile financial situation.

SUMMARY OF ARGUMENTS

ISSUE 1

9 In the attempt to force the adaptation of the FSSA, Claimant argued that the law governing the arbitration agreement is Mediterranean law, and the Tribunal has the jurisdiction to adapt the contract. Respondent submits that the law applicable to the arbitration agreement is in fact Danubian law. As examined in accordance with this law, the Tribunal is not authorized to adapt the contract. Even if the law governing the arbitration agreement is Mediterranean law, the Tribunal still does not have the power to adapt the contract. Furthermore, the pro-arbitration presumption, though popular, is not binding upon Parties**.**

ISSUE 2

10 To support its request for price adaptation, Claimant wished to submit evidence regarding another arbitration involving Respondent under HKIAC Rules. In that arbitration, Respondent asked for price adjustment due to Mediterranean 25% tariff. Respondent objected to the submission of such evidence to current arbitration on the grounds that it was obtained illegally, either through a breach of confidentiality or through a computer hack. Contrary to Claimant's argument, the Award is inadmissible under the applicable laws. Furthermore, the admission of the Award would affect due process and proceeding efficiency. Lastly, the Award should not be admitted under the principle of good faith and the principle of transparency.

ISSUE 3

11 In an effort to force Respondent to pay for additional payment, Claimant inaccurately interpreted the FSSA and the CISG so as to entail the remedy of contract adaptation. It will be submitted that neither the relevant provisions Clause 12 FSSA or Art. 79 CISG can be invoked in the absence of a breach of the contract. In the alternatives, Equatoriana's 30% tariff cannot be established as hardship under both Clause 12 FSSA and Art.79 CISG. Additionally, there is no remedy of contract adaptation in accordance with both the FSSA and the CISG. In any event, the requested 25% price adjustment is unreasonable and should be dismissed.

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

12 Claimant argued that the law governing the arbitration agreement is the law of Mediterraneo. As a result, the Tribunal has the jurisdiction to adapt the contract because arbitral tribunals in Mediterraneo have the power to do so, and because the interpretation of Clause 15 confirms that the Tribunal has such power.

13 Respondent submits that the law governing the arbitration agreement is actually Danubian law, and under this law the Tribunal does not have the power to adapt the contract (***A***). Even if the law applicable to the arbitration agreement were Mediterranean law, the Tribunal still does not have the power to adapt (***B***). Finally, Respondent submits that the pro-arbitration presumption that Claimant relies upon, despite being a popular trend, is not binding on the Parties (***C***).

A. The tribunal does not have the jurisdiction to adapt under Danubian law

14 Respondent submits that Danibian law is the law governing the arbitration clause (***I***). Under Danubian law, the Tribunal does not have the power to adapt the contract (***II***).

I. Danubia law is the law governing the arbitration agreement

15 The law of an arbitration agreement is determined through three steps: an express choice, an implied choice of the parties or, in the absence thereof, by its closest and most real connection [*Sulamérica; BCY v BCZ; Glick/Venkatesan, p.133; Moses, p.65; Seyadi, p.35; Klara, p.75*]. Respondent thereby submits that Danubian law is the law governing the arbitration agreement since there was no express choice of the Parties **(1)**. At the same time, Parties impliedly chose Danubian law to govern Clause 15 FSSA **(2)**. Should the Tribunal decide that there is no implied choice of law, Danubian law also has the closest and most real connection to Clause 15 FSSA **(3)**.

1. There was no express choice of law in choosing the applicable law for the arbitration agreement of the Parties

16 According to Claimant's allegation, in Clause 14 FSSA, the Parties expressly elected the applicability of Mediterranean law for both the substance of the contract and the arbitration agreement. However, this assumption is wrongful as the Parties did not consent to any express choice for arbitration agreement (**a**) and the Separability doctrine should be respected, as a consequence Danubian law is applied to the arbitration agreement (**b**).

a. Parties did not agree on any express choice of law for the arbitration agreement

17 A choice of law of an arbitration agreement is express when it is specifically written down or is an oral statement to submit before the arbitrators [*Lew, ¶17.13; Wang/Briers*]. In *Vita Food Product Inc v. Unus Shipphing Co. Ltd*, an express choice is defined when the contract contains a provision to specify the law governing it.

18 In this case, there is no such provision. Even though Claimant argued that Clause 14 provides Mediterranean law as the governing law, it is only to govern the substance of the FSSA [*Ex.C5, p.14*]. According to professor Gary Born and many scholars, in the world the law governing the substance of a dispute is different from that applicable to the arbitration agreement [*Born, p.515; Neil, p.51-66; Karrer, ¶46; Lew; Berg, p.114; Berger I, p.301; Choi p.105*]. As a result, the law of Mediterraneo cannot be considered the express choice for the arbitration agreement.

b. The Separability doctrine should be respected, as a consequence Danubian law is applied to the arbitration agreement

19 Claimant argues that the separability doctrine is only applied to ensure the arbitration agreement remains intact when the underlying contract in deemed void, which is not related to the choice of law [*Cl.Memo, ¶12*]. However, Claimant's explanation is erroneous. Under this doctrine, the arbitration agreement is regarded as separate not only when the main contract is void or invalid, but also when determining the governing law of the arbitration agreement since they are distinct agreements [*Glick/Venkatesan, p.137*].

20 That doctrine provides that an international arbitration agreement is separable from the underlying instrument with which it is associated [*Born, p.360*]. One of the consequences of the separability presumption is that the arbitration agreement will be governed by a law different from the law governing the underlying contract in common practice [*Born, p.464*]. In the same field, Article II of the New York Convention referred that the arbitration agreement will be subject to a different legal regime other than the law of the underlying contract [*Born p.477-479*]. Consistent with the New York Convention provision, Art 16 of the UNCITRAL Model Law even expressly provides for the presumptive separability of international arbitration agreements - and implicitly recognises the possibility that a different national law will apply to the arbitration agreement than the underlying contract, which in fact is recognized by scholars and case law [*Samuel p.3*; *US Supreme Court decision in Mastrobuono; Preston v. Ferrer*, *Neil, p.51-66*].

2. The Parties impliedly chose Danubian law to govern the arbitration agreement

21 Implied choice will be found in words or acts which manifest the intention and expectation of the parties that a particular law governs their relations [*Lew/Mistelis/Kroll, ¶17.13*]. The implied choice for the law applicable to the arbitration agreement by the Parties is established through the wording of the FSSA (***a***). Any references to extrinsic evidence such as negotiation stage will be prohibited because of the four corners rule (***b***). Even if the four corners rule is not applicable, the drafting history refers to the application of the Danubian law for arbitration agreement(***c***)**.**The use of economic analysis is also not relevant (***d***).

a. The wording of the FSSA expressed the Parties' intention in applying Danubian law to the arbitration agreement

22 Respondent agrees with Claimant's allegations that the arbitration agreement forms part of the FSSA. However, the arbitration clause is to be treated differently from other clauses of the contract in general (***i***).In addition, the interpretation of Clause 15 also indicate the Parties' choice of Danubian law as the law governing the arbitration agreement (***ii***).

i. The arbitration agreement is not equally treated as other clauses of the FSSA

23 Although Clause 15 is a part of the FSSA [*Cl.Memo, ¶9*], Respondent submits that this clause is not equivalent to other clauses of the FSSA. An arbitration clause is not regarded in the same light as other contractual obligations [*Cohen/Dayton*] since it has more special effects than other clauses [*Mugabo vs. Saava; Daniel Delestre and Six Others v. Hits Telecom Ltd Miscellaneous*]. Thus, it is erroneous to conclude that the law applicable to the arbitration agreement and to the rest of the contract is the same.

24 Moreover, the choice-of-law clause in Clause 14 only applies for the "Sales" part of the FSSA. In this regard, contractual provisions should be interpreted in accordance with their natural and ordinary meaning, otherwise it would lead to absurdity or inconsistency with the rest of the contract [*Sinochem Oil Co. Ltd. v. Mobil Sales*]. The terms "This Agreement is made…" in the beginning of the contract [*Ex.C5, p.13*] is obviously different from the terms "This Sales Agreement shall be…" in Clause 14 of the FSSA [*Ex.C5, p.14*]. Indeed, the wording of the FSSA clearly distinguish between the arbitration agreement and the rest of the contract. As such, the Tribunal should find that both Parties have indicated their intention to exclude Mediterranean law to be applicable for the arbitration agreement.

25 On a side note, in order to support its argument, Claimant cited *Black Clawson International v. Papierwerke Waldhof-Aschaffenburg* to uphold for its argument [*Cl.Memo, ¶9*]. In this case, Mustill J held that the arbitration agreement's applicable law would be "likely to follow the law of the substantive contract". This is a misleading contention, as in the end, the Court concluded that *lex arbitri* shall govern the arbitration agreement, as the parties' intention was sufficiently indicated through the nominating of the seat of arbitration [*Black Clawson v. Papierwerke*].

ii. The interpretation of Clause 15 leads to the application of Danubian law for the arbitration agreement

26 The interpretation of Clause 15 favors the application of Danubian Law. Clause 15 FSSA is conveyed by the wording "out of the contract", which indicates a "narrow" arbitration agreement. This is in contrast to other wording, e.g. "in connection with the contract" which signals a "wide" arbitration clause [*Kinoshita & Co Ltd et al. v. American Oceanic; Mediterranean Enterprises Inc v. Ssangyong; Tracer Research v. National Environmental*]. Thus from the textual interpretation, it can be deduced that Parties favor the law that construes the arbitration agreement narrowly. Between Mediterranean law and Danubian law, it is Danubian law that interprets arbitration agreement narrower [*NoA, ¶16, p.7*; *PO1, p. 52*]. Thus, the narrow wording of Clause 15 implies Parties' intent for Danubian law as the law governing that Clause.

b. The drafting history should be disregarded because of the "four corners rule"

27 Claimant deduced that an implied choice is demonstrated from the circumstances surrounding the conclusion of the contract such as the drafting history [*Cl. Memo, ¶14*]. Yet, the Tribunal may draw indications of the four corners rule to limit the usage of the external evidences other than the FSSA [*ANoA, ¶17*]. The arbitration agreement should be treated as a separate contract for its interpretation under the four corners rules [*ANoA, ¶18*].

28 Four corners rule, which excludes extrinsic evidence, determines the interpretation from the words of the contract alone [*Posner*]. To define the Parties' intention, the Tribunal looked only at what the parties actually stated in the deed, not what they allegedly meant. [*Stewman Ranch, Inc. v. Double M. Ranch, Ltd.*]. It is unreasonable to attribute the third person's intention on the parties which was not actually their intention [*James Miller and Partners Ltd. v. Whitworth Stree Zsa Ltd.*]. The reason of this rule is to prevent judging panel from disregarding the actual, ascertainable meaning of a contract, as they might be inclined to do because they were sympathetic to one party of the dispute [*FDIC v. W.R.*

Grace & Co.]. Under four corners rule, only when the term is deemed ambiguous may evidence of prior negotiations be admitted for purposes of clarification [*Farnsworth p. 476; Eisenberg v. Redd*].

29 In this case, there is no such term considered vague or ambiguous in the contract. The term on the law governing arbitration agreement is absent due to the negligence of parties [*Ex.R3, p.35*]. Provisions not included in an agreement are not the equivalent of ambiguous terms [*TWA Resources v. Complete Production Services, Inc.; Evans v. Famous Music Corp.; Greenfield v. Philles Records*]. Therefore, the Tribunal should observe that silence on the law applicable to arbitration agreement does not mean that extrinsic evidence from prior negotiations can be used to interpret the arbitration agreement.

c. Even if four corners rule is not upheld in this case, the drafting history refers to the application of the Danubian law for arbitration agreement

30 Claimant argued that they opposed to the use of a foreign law unless there was an approval by board committee under company's internal policy [*Ex R2, p.34*]. Yet, this policy is unconnected to the following sentences "It would, however, agreed "on arbitration in the neutral country"" [ibid]. The word "arbitration" in this context should be interpreted to be both "seat of arbitration" and "arbitration agreement". In the case at hand, Danubia is a neutral country and has an irrelevant law system to both contracting parties. As such, the Tribunal should find that, Claimant has indicated their intention for Danubian law to be applicable arbitration agreement.

31 Moreover, Claimant's amendment for the arbitration clause in response to the Respondent's proposing email should be construed as Claimant intended for *lex arbitri* to be applicable to the arbitration agreement. It is evinced by the fact that Claimant expressly reelected the seat of arbitration to Danubia, and omitted the law governing the arbitration agreement comparing to the previous proposal by the Respondent [*Ex.R1, p. 33*]. In *PT Garuda,* ruled that "*by directly choosing the 'place of arbitration' the Parties would have also thereby decided on the law which is to govern the arbitration agreement.*" [*PT Garuda Indonesia v Birgen Air*]. The same principle was similarly expounded in *Dermajaya Properties*6 when it ruled "*if Singapore is the place of arbitration, the curial law of Singapore applies*." [*Dermajaya Properties v. Premium Properties*]. This modification shows Claimant's intention to choose *lex arbitri* for the law governing the arbitration agreement.

d. The economic issue is not related to the law governing the arbitration agreement

32 Respondent agrees with Claimant that the Parties tried their best to minimize their costs and operate their relationship as efficiently as possible [*Cl. Memo, ¶17*]. However, Respondent strongly opposes to

Claimant's contention that the economic interest will relate to the determination of the law governing arbitration agreement. Economic analysis has been largely avoided in applying to conflicts of laws and rules [*O'Hara/Ribstein*].

33 Moreover, Claimant asserted that choosing the Mediterranean law for arbitration clause assists the parties to act as economically as possible [*Cl. Memo, ¶18*]. This is an assumption without sufficient grounds. Normally, it is only through inadvertence that parties will have failed to negotiate a vital term of the contract, and in those cases the costs will be increased as arbitral tribunals have to fill the judicial gap [*Posner, p.1588*]. In this case, because of the negligence to insert the law of arbitration agreement, the cost for arbitrators to fill in the gap is now much more increased, thus, it shows that Parties did not take that problem seriously.

3. Danubian law has the closest and most real connection to the arbitration clause

34 Contrary to Claimant's allegation [*Cl. Memo, ¶¶20-23*], Respondent submits that *lex arbitri* has closest and most real connection to the arbitration clause under international practice **(a)** and *lex-loci-contractus* should not be applied **(b)**.

a. Danubian law has closest and most real connection under international practice

35 Under Article V(1) of New York Convention, if there is no express or implied choice of law, the arbitration agreement will be governed by "the law of the country where award is made" [*Born pp.478, 506, 507*].

36 Further, it is inaccurate to conclude that the law of the underlying contract will always prevail where the law of the seat and the underlying contract are different [*Sumitomo v. Oil & Natural Gas; Leibinger v. Stryker Trauma; Tweeddale/Tweeddale¶7.20; Thai-Lao Lignite Co Ltd &Anor v Government of the Lao People's Democratic Republic*]. In practice, *lex arbitri* is widely recognized to have closer connection with the arbitration agreement [*C v. D; Abuja International Hotels Ltd v. Meridien*]. In common law countries, if the express agreement is absent, there is a strong *prima facie* presumption that the parties intend the arbitration agreement's governing law to be the law of the seat of the arbitration [*Mustill/Boyd, p. 64*]. The majority of arbitral tribunals emphasized that the law of arbitration agreement typically follows the law of seat of arbitration and any exception to this general rule would only arise under few circumstances such as the absence of the seat of arbitration or having express implication of the governing law [*Born, p. 510; XL Insurance Ltd v. Owens Corning; Noble Assurance v Gerling Konzern General Insurance; C v. D; Black-Clawson v. Papierwerke; Sulamerica*]. In the case at hand, none of the exceptions

to the rule is present. Therefore, the law applicable to the arbitration agreement should automatically be the *lex arbitri* which is Danubian Law.

b. *Lex-loci-contractus* should not be applied in this case

37 Even though Claimant raises the link between the law of the place of contract's conclusion and the closest connection test [*Cl.Memo, ¶22*], *lex-loci-contractus* should not be applied to the arbitration agreement for undermining parties' choice of law autonomy, being inflexible and outdated.

38 Firstly, one court characterized the *lex-loci-contractus* doctrine as ignoring the party-autonomy basis [*Depau v. Humphreys; Saul v. His Creditors*]. In *VeljiBharmal v. SamjiPoonja,* the autonomy for choice of law is preferable rather than automatically applying the *lex-loci-contractus* [*VeljiBharmal v. SamjiPoonja*]. It has also seldom been applied to issue concerning law applicable to contract or arbitration agreement [*Little, p.213*].

39 Secondly, although once widely accepted in most jurisdictions, today *lex-loci-contractus* is outdated and considered the minority rule [*Lorenzen*]. The *lex-loci-contractus* doctrine has also been criticized as being too rigid, too difficult to apply, and not adequately recognizing the policy interests of the involved states [*Renella; Chartres v. Cairnes; Olivier v. Townes*].

40 In conclusion, the express choice of Mediterranean law for the FSSA does not apply to the arbitration clause. In any case, Parties intended Danubian law to govern the arbitration agreement through the wording of the FSSA and denied the application of Mediterranean law by restricting the use of previous negotiation and economic interest under four corners rule. Alternatively, Danubian Law is applicable to the arbitration as the law with the closest and most real connection. Consequently, Danubian law is the measure to determine that the Tribunal has the power and jurisdiction to adapt the contract.

II. Under Danubian law, the Tribunal has not been authorized to adapt the contract

41 Respondent submits that under Danubian law which is the law applicable to the arbitration agreement, the Tribunal has not been conferred the power to adapt the contract.

42 The scope of the Tribunal's jurisdiction, *in casu* the power to decide on a claim of increased remuneration, depends on the interpretation of the arbitration agreement [*Blackaby/Partasides, et.al, p. 92 ¶2.63; ICCA's Guide, p.56*]. The interpretation of an arbitration clause follows the rules of the law applicable to the clause itself [*Welser/Molitoris, p.18*]. Therefore, as Danubian law is the law applicable to the arbitration agreement, the jurisdiction of the Tribunal is subject to it as well.

43 Respondent does not contest that under Danubian law, arbitral tribunals may have the jurisdiction to adapt contracts in case of changed circumstances resulting in contractual equilibrium. It must be emphasized, however, that such jurisdiction may only be established once the parties "expressly authorized" them to do so. In this case, there is no such express authorization.

44 Respondent submits that under Danubian Arbitration Law the power to adapt the price is a special power (power to decide *ex aequo et bono* or as *amiable compositeur*) (**1**). Particularly, it is required that the Tribunal may only adapt contracts if it has been expressly authorized to do so by Parties. Such authorization, however, is absent in this case (**2**).

1. Contract adaptation is deciding *ex aequo et bono* or as *amiable compositeur*

45 Contract adaptation is an exercise of an exceptional power - power to decide *ex aequo et bono* or as *amiable compositeur* [*Horn, pp. 179-180; Fouchard/Gaillard/Goldman, No. 31; Berger II, p.2*].

46 When deciding *ex aequo et bono* or as *amiable compositeur*, arbitrators are not obliged to decide the dispute in accordance with a strict application of legal rules; but rather, are expected to decide in light of general notions of fairness, equity and justice [*Born, p. 2771; Yesodei Hatorah College Inc. v. Trustees of the Elwood Talmud Torah Congregation*].

47 Contract adaptation is not resolving disputes concerning pre-established rights and obligations of the Parties on the basis of the interpretation of the contract [*Brunner, p. 494; WG A/CN.91/263, p. 58, ¶15*]. Rather, it is a power that involves the evaluation of economic issues and the rewriting of the parties' contract, making them carry out new obligations that have not been previously mutually agreed upon [*Berger II, p. 2; Rubin/Nelson, pp. 29, 36*].

48 In this particular case, if the Tribunal was to adapt the contract, there would be an exercise of a power of arbitrating *ex aequo et bono* or as *amiable compositeur*. The Tribunal is being asked to change the price of US$10,000,000 as previously agreed upon by Parties [*Ex C8, p. 14, ¶6*] to US$11,250,000 '*or any other amount' (*emphasis added*)* [*PO1, p. 53, ¶III.1.c*].

49 Therefore, the determination the power to adapt must subject to the rules regulating the power to decide *ex aequo et bono* of Danubian law [*PO2, p. 60, ¶36*].

2. There was no express authorization in accordance with Danubian law

50 The examination of Danubian law shows that under both its arbitration law and contract law, arbitral tribunals only have the power to adapt a contract if expressly authorized by the Parties.

51 Under Art.28(3) Danubian Arbitration law, a tribunal may only decide *ex aequo et bono* if have been 'expressly authorized' by the Parties. Such express authorization may be jointly given by the Parties in the arbitration agreement, in a separate agreement, or orally before the arbitrators (at a pre-hearing conference or a hearing) [*Caron/Caplan, Chapter 3, on Art. 35(2); Lew/Mistelis/Kroll, p. 415, ¶17-13*].

52 Similarly, under Art.6.2.3(4)(b) Danubian Contract Law, the Tribunal may adapt the contract in case of hardship "if authorized" [*PO2, ¶45*]. There is no consistent jurisprudence on the meaning of this term [*PO2, ¶45*].

53 Danubia, while adopting UPICC as its contract law, has replaced Art.4.3 UPICC – the rule on the interpretation of contract – with the four corners rule. Under this rule, no statements or agreement made prior to the conclusion of the contract can be used to supplement or contradict the contract terms [*Art.2.1.17 UPICC*]. The determination of the authorization is, therefore, restricted within the contract. This line of reasoning is consistent with the presumption that there is always a link between the procedural and substantive law aspects of a state's national law [*Brunner, p. 494*].

54 In this case, there is no such express authorization in the FSSA. As Respondent maintains its objection to the jurisdiction of the Tribunal in this phase of proceeding, no oral agreement will be made either. Because of the four corners rule, the discussion between Mr. Antley and Mrs.Napravnik in the meeting of 12 April 2017 on empowering the Tribunal to adapt the contract [*Cl.Memo, ¶42*] is excluded.

B. Even if Mediterranean law is the law governing the arbitration agreement, the Tribunal does not have the jurisdiction to adapt

55 Even in the unlikely event that the law governing the arbitration agreement is Mediterranean law, the Tribunal still does not have the jurisdiction to adapt. Respondent submits that Parties did not have any common intention to authorize the Tribunal with such power (**I**). Furthermore, the Tribunal does not have the power similar to Mediterranean national courts to adapt the contract (**II**).

I. Parties did not intend to confer upon the Tribunal the power to adapt

56 If the law governing the arbitration agreement is Mediterranean law, the CISG which governs the FSSA [*Ex C5, p. 14, ¶14*] shall be applied to interpret the arbitration clause [*PO1, p. 53, ¶4*]. In interpreting the arbitration agreement, like with other contract clauses, consideration must be given to the common intention of the Parties in accordance with Art.8 CISG [*Lew/Mistelis/Kroll, p. 150, ¶7-60; Born, p. 1326; Mitsubishi Motors Corp v. Soler Chrysler-Plymouth; Amco Asia Corporation v Republic of*

Indonesia]. As this is the Parties' first transaction, there existed no practice between the Parties at the time the FSSA was concluded or other relevant circumstances that could aid the interpretation under Art. 8(1) [*UNCITRAL Digest, Art.8, p. 56;Fabrics case*]. Clause 15 shall be interpreted according to the reasonable person standard under Art. 8(2) CISG.

57 According to Art. 8(3) CISG, in interpreting the agreement of the Parties with the objective reasonable person standard, relevant circumstances, in particular the negotiation process, should be taken into consideration. From neither evidence in the negotiation process (***1***) nor during the conclusion of the contract (***2***) could a reasonable person have understood that the Tribunal have been authorized to adapt the contract.

1. Clause 15 FSSA was drafted in a way to reduce the jurisdiction of the Tribunal

58 A reasonable person must have understood the Parties' intent to exclude jurisdiction to adapt of the Tribunal due to the reduced wording of Clause 15.

59 The Parties drafted Clause 15 based on the model clause of the HKIAC, providing for the power of the Tribunal to decide on

> "[a]ny dispute arising out of this contract , including the existence, validity, interpretation, performance, breach or termination" (*emphasis added*) [*Ex.C5, p.14, ¶15*].

60 Clause 15 is shortened compared to the HKIAC Model Clause which provides arbitration for

> "[a]ny dispute, *controversy, difference or claim* arising out of *or relating to* this contract, including the existence, validity, interpretation, performance, breach or termination thereof or *any dispute regarding non-contractual obligations arising out of or relating to it*" (*emphasis added*) [*Model HKIAC-Arbitration Clause*].

61 The terms "controversy, differences or claims" is traditionally viewed as wider than "dispute", and the terms "related to" is wider than "arising out of" [*Lew/Mistelis/Kroll, p. 169, ¶8-14; Born, p. 1353;Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*,*Kinoshita & Co Ltd et al. v. American Oceanic*]. Claimant's argument that the word "*including*" also encompasses contract adaptation [*Cl.Memo, ¶38*] is not sufficiently established, as contract adaptation is a special power [Supra. ¶¶*45-49*], unlike the deciding of the "existence, validity, interpretation, performance, breach or termination" of the contract which are commonplace in arbitration.

62 As both Parties had agreed on sufficiently reducing the wording of the Model HKIAC-Arbitration Clause in a way that leaves behind only the most restrictively worded formulae, this indicates an

intent to restrict the jurisdiction of the Tribunal. Had they intended for the scope of jurisdiction to stay as broad as possible, they would not have reduced the clause.

63 Claimant may contend that as businessmen, Parties could not have paid attention to the differences in the formulae of the wording of the arbitration clause [*Fiona Trust v. Privalov*]. However, Respondent submits that Parties indeed intended to shorten the arbitration clause. In fact, in the email of 10 April 2017, Respondent's Rep. Mr. Antley proposed the clause with a view to "*narrow down and streamline a little the* ***fairly broad wording*** *of the clause*" [*Ex R1, p. 33*] and in the responding email on 11 April 2017, Mrs. Napravnik accepted the proposal with no an amendment but to the seat of arbitration [*Ex R2, p. 34*]. This indicates Claimant's consent to Respondent position. It is clear that Parties intended to narrow down the broad wording of the arbitration clause so as to restrict is scope of jurisdiction.

2. The circumstances during the conclusion of the contract demonstrate that Parties did not intend to authorize the Tribunal to adapt the contract

64 Claimant argued that Parties intended to empower the Tribunal to adapt the contract because Mr.Antley and Mr. Napravnik agreed to empower the tribunal to adapt the contract [*Cl.Memo, ¶44*]. Respondent submits that this is not sufficient to establish common intention. Mr. Antley's mere suggestion "it should *probably* be the task of the arbitrators to adapt the contract if the Parties could not agree" (*emphasis added*) [*CL. Memo, ¶102-103; Ex.C8, p.17*] and his need for further negotiation on the matter [*Ex.R3, p.35*] show that the alleged "agreement" was in fact just an in conclusive position.

65 Furthermore, when concluding the FSSA on 6 May 2017, despite having access to the email chain [*PO2, ¶5*], both Parties neither negotiated on nor included an empowerment for contract adaptation by the Tribunal into the FSSA [*PO2, ¶¶6, 7*]. The determinative time to find out Parties' intent is at the conclusion of the contract [*Huber/Mullis, p.14; Fruit and vegetables case; Building materials case*]. According to Claimant's Rep. Mrs. Napravnik, the final negotiators could have decided not to include the empowerment to adapt because the agreement was 'too tentative' [*Ex C8, p. 17*]. In fact, had he known about it, Respondent's Rep. Mr. Krone would have objected to price adjustment by the Tribunal [*Ex.R3, p.35*]. It should be concluded that Parties deliberately excluded this power of the Tribunal.

II. Tribunal does not have the power similar to Mediterranean national courts to adapt

66 Claimant alleged that in effect of the principle of synchronized power or Art. 1(11) UPICC, the Tribunal shall have the same power to adapt the contract as the Mediterranean national courts [*Cl.Memo,¶26*]. Respondent submits that this is not the case.

67 According to Mediterraneo's jurisprudence, as long as there is hardship, a *standard* arbitration clause will be sufficient to empower the Tribunal to adapt the price in accordance with Art.6.2.3.4b Mediterranean Contract Law [*PO2, p. 60, ¶39*].

68 The standard arbitration clause, in this relevant case, shall be the Model HKIAC-Arbitration Clause. In this proceeding, however, after the reduction made by the Parties [*Ex R1, p. 33*], Clause 15 is no longer a standard clause. This is different from the other arbitration between Respondent and the buyer in Mediterraneo, where its Tribunal had the power to adapt based on this provision because their arbitration clause was Model HKIAC-Arbitration Clause with all additions [*PO2, p. 60, ¶39*].

69 Therefore, Tribunal no longer has the power similar to Mediterranean national court to adapt the contract.

C. The pro-arbitration presumption is not relevant for the determination of jurisdiction

70 Claimant contended that since the pro-arbitration approach, as articulated in Art. II New York Convention, promotes the wide recognition of arbitration agreements and awards, the Tribunal should have the power to adapt [*Cl.Memo, ¶40*]. Respondent submits that Claimant has taken a mistaken approach to determine an arbitral tribunal's jurisdiction to adapt. Interpretation of the arbitration clause under relevant arbitration law, rather than Pro arbitration presumption, must be respected in determining the Tribunal's jurisdiction.

71 Respondent submits that Claimant has misunderstood the rationale behind Art.II(3) New York Convention. Art.II(3) prescribes that the court of a Contracting State shall refer the parties of an action to arbitration if there is a valid arbitration agreement between the parties. This provision's purpose is to maintain the effectiveness of arbitration against the likelihood of respondents' efforts to avoid or delay the arbitral proceedings through bringing the matter before national courts [*Ipek, p.683; Graves, p.9, 2.3*]. This, however, is different from the pro-arbitration presumption, which assumes that arbitral tribunals should be granted the widest scope of jurisdiction possible. Art.II(3) seeks to protect the parties' right to arbitration as long as the arbitration agreement is valid,

regardless of its (restrictive or not) nature. Therefore, Claimant's argument raising the New York Convention is not relevant.

72 Furthermore, the pro-arbitration presumption that Claimant relied on, even if is a prevailing trend in the world, is not a binding and relevant approach to determine the jurisdiction of the arbitral tribunal under dispute. Instead, the interpretation of the Arbitration Clause are the relevant indicators of jurisdiction to adapt [*ICCA Guide, p. 57; Welser/Molitoris, p.18*].

73 In this case, the law governing the arbitration agreement is Danubian law. This law states that for an arbitral tribunal to adapt contract, the parties to the contract must have empowered it to do so [*Art.28(3) Danubian Arbitration Law*]. On this account, determination on the Tribunal's jurisdiction to adapt must be made in accordance with Danubian law. The pro-arbitration presumption, however popular it is, is not binding upon the Parties.

74 Even if the substantive applicable law (*in casu* Mediterranean law including CISG [*Ex C5, p. 14, ¶14*]) allows contract adaptation as a remedy for changed circumstances, but the *lex arbitri* does not allow such power, this power becomes moot [*Brunner, p. 493*]. Respondent has demonstrated that under the *lex arbitri* (which is Danubian law), the Tribunal has not been empowered to adapt the contract [*Supra.* ¶¶*50-54*].

CONCLUSION OF ISSUE 1

Respondent respectfully submits that the law governing the arbitration agreement is Danubian law, as it is the implied choice of law of the Parties or failing that, has the closest and most real connection to the arbitration agreement. Applying the rules of Danubian law in interpreting Clause 15, it is proven that the Tribunal has not been authorized to adapt the contract. Even in the unfortunate event that the law governing Clause 15 is Mediterranean law, the Tribunal still does not have the jurisdiction to adapt as the Parties had no intention to empower it to do so. Furthermore, Tribunal does not have the same power as national courts to adapt because it does not satisfy the standard arbitration clause requirement. Finally, the pro-arbitration presumption that Claimant relied on is not relevant to determine jurisdiction.

ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION, WHICH HAD BEEN OBTAINED ILLEGALLY

75 Claimant requested to submit the Partial Interim Award from another arbitration to which Respondent is a party ("**the Award**") to support its claim for price adaptation and its unfounded statement that there are inconsistencies in Respondent's attitude towards price adaptation [*Let. Lang, p.50; Cl.Memo, ¶46*]. However, this Award had been obtained illegally either through a violation of confidentiality obligation of Respondent's former employees, or through a hack of Respondent's computer system [*Let. Fast, p.51; PO2, p.61, ¶41*].

76 Claimant stated that Respondent bears the burden to prove that the Award was obtained illegally [*Cl.Memo, ¶51*]. However, such burden of proof is not necessary at this stage of the proceeding. The issue is discussed based on "the assumption that the evidence had been obtained illegally" [*PO1, p.53*]. The illegal manner of obtaining the Award makes this issue debatable. If there is no such assumption, this would defeat the whole purpose of Claimant's submission.

77 According to Clause 15 FSSA, Parties agreed to choose HKIAC Rules as the applicable procedural rules [*Ex. C5, p.14*]. Also, since Danubia, the seat of arbitration, has adopted UNCITRAL Model Law [*PO1, p.53, ¶4*], this law governs the proceeding. The issue of whether Claimant is entitled to submit the Award includes not only the *prima facie* question of Claimant's right to submit evidence, but it also involves the admissibility of evidence as the Tribunal has ordered [*PO1, p.52, ¶II, point 6*].

78 It is uncontested that Claimant has the right to submit the Award. Art.16(3) HKIAC Rules and Art.23(1) UNCITRAL Model Law allow a party to submit documents that they deem relevant to support its claim. The question of evidence's admissibility is concerned because the Tribunal is required to determine the admissibility of "*any* evidence" put forward by parties [*Art.19(2) UNCITRAL Model Law*].

79 Regarding admissibility, Claimant made two main arguments in its submission. First, the IBA Rules on the Taking of Evidence ("**IBA Rules**") should be applied [*Cl.Memo, ¶49*]. Second, the evidence is admissible when using the HKIAC Rules and IBA Rules since Claimant respected the doctrine of good faith in taking evidence and the Award itself is not privileged.

80 Contrary to Claimant's submissions, Respondent submits that the Award is not admissible under the applicable laws (**A**) and under the principle of good faith (**B**). Besides, Claimant cannot rely on the principle of transparency to support evidence's admissibility as this principle does not bind the Parties (**C**).

A. The Award is not admissible under the applicable laws

81 Art.22(2) HKIAC Rules stipulates that "[t]he arbitral tribunal shall determine the *admissibility*, relevance, materiality and weight of the evidence". However, since Art.22 does not further clarify the standards or requirements regarding admissibility, Respondent agrees with Claimant that the IBA Rules can be used to supplement HKIAC Rules concerning admissibility [*IBA Rules, Preamble, p.4; Born, p.2212; Railroad Development case, ¶15*].

82 With the application of the IBA Rules, the Tribunal is provided with more guidance to determine the Award's admissibility. Indeed, the Award is not admissible under the HKIAC Rules and the IBA Rules (**I**) and the admission of the Award would render the proceeding inefficient and affect due process (**II**).

I. The Award should be excluded under the HKIAC Rules and the IBA Rules

83 In addition to the requirements of relevance and materiality of evidence under Art. 22 HKIAC Rules, Art. 9(2) of the IBA Rules lists out the situations in which an evidence is excluded. The Award should be found inadmissible under Art.22 HKIAC Rules and Art.9(2)(a) IBA Rules because it is irrelevant to the case and immaterial to its outcome (**1**). It should also be excluded under Art.9(2)(e) IBA Rules since it may contain commercial or technical confidentiality (**2**).

1. The Award should be excluded under Art.22 HKIAC Rules and Art.9(2)(a) IBA Rules because it is irrelevant to the case and immaterial to its outcome

84 Claimant did confirm and emphasize the importance of relevance and materiality of an evidence to a case [*Cl.Memo, ¶50*]. However, it did not prove how the Award is relevant to the current proceeding and material to its outcome. Despite Claimant's absence of explanation, Respondent submits that this matter needs to be addressed. The Award taken from the other arbitration is irrelevant and immaterial to the current case and hence, should be excluded from evidence.

85 "Relevance" refers to the logical connection between the evidence and the claim it is proving [*Pilkov, p.148*]. Claimant requested to submit the Award to support its claim for price adaptation, which involves the interpretation of Clause 12 FSSA. According to Art.8 CISG, the interpretation of the contract must be made according to intent of the party, and relevant circumstances including any *subsequent practices* of the Parties (*emphasis added*) [*CISG, Art.8; Secretariat Commentary Art.8, ¶2*].

86 However, it is erroneous to apply the Award from the other arbitration to interpret the hardship clause of the current case since the two cases are completely different and independent. First, the contextual circumstances, including the parties, the goods purchased and the applicable law between

two cases are different. Second, Respondent's attitude towards price adaptation in the Award is not final, it is subject to change. Last and most importantly, the Award is irrelevant because the "subsequent practice" used to interpret *one* contract must be related to *that* contract only [*Secretariat Commentary Art.8,* ¶*2*]. Thus, it is impossible to use Respondent's intention and subsequent practice in one case to interpret its intent in the other case and vice versa.

87 "Materiality" is connected with the sufficiency of evidence. Once the tribunal is provided with sufficient evidence, any other relevant evidence of the same fact is no more material to the outcome of the case [*Ashford, p. 71; Pilkov, p. 149*]. In the case *Methanex*, the Tribunal disregarded the significance of documents obtained illegally as evidence, not because of the manner in which they were obtained, but because "there was other direct oral and documentary evidence" relating to the claim they are pursuing [*Methanex, Part II, Chapter I, p. 26,* ¶*54*].

88 Similarly, in this case, Claimant can use other evidence directly related to the current arbitration, including all exchanges between Parties after the date of the contract, to address Respondent's subsequent practice. Those directly related evidence are sufficient and relevant for the Tribunal to render their decision.

89 In addition, the Award is not sufficient to demonstrate a fixed opinion of Respondent toward price adaptation, nor does it show Respondent's subsequent practice relating to the FSSA. As a result, the Award does not represent Respondent's intent to support the adaptation of the FSSA. Hence, this piece of evidence does not add any material meaning to the current proceeding. The use of the Award, demonstrating Respondent acts towards a *third* party, is irrelevant and unnecessary.

90 In short, since the Award is irrelevant to the case and immaterial to its outcome, it should be excluded from evidence under Art.22 HKIAC Rules and Art.9(2)(a) IBA Rules.

2. The Award should be excluded under Art.9(2)(e) since it may contain commercial or technical confidentiality

91 Claimant argued that the Award is not privileged because there is no general duty of confidentiality in arbitration, and hence it should be admitted [*Cl.Memo,* ¶*60*]. Claimant agrees that there is no absolute confidentiality in arbitration [*Born, p.2789*]. However, Art.22 HKIAC Rules shows the importance of confidentiality in proceedings under HKIAC Rules, as it lists out who can have access to an award, and states that an award can only be published if both parties agree. Indeed, confidentiality is one of the hallmarks of arbitration and one of arbitration's most prominent features

[*Poorooye/Feehily, p. 277, fn1,2*], and this inherent character of arbitration makes it attractive to disputants [*Blackaby/Partasides/et al., p.30*].

92 Furthermore, Parties can have legitimate expectation of how their technically-privileged documents are protected from evidence production [*Ashford, p.160*]. Art.9(2)(e) IBA Rules allows for the exclusion of evidence on the grounds that such evidence may contain commercial or technical confidentiality. A commercial or technical confidentiality, aiming to protect sensitive business or technical information, includes financial history, tax records, know-how, or trade secrets [*O'Malley, p.301*]. The Award in the current case should be excluded because to support its claim, not only Respondent but also the other party may reveal some of its sensitive business information, and the admission of the Award risks disclosing those information.

II. The admission of the Award would render the proceeding inefficient and affect due process

93 The principle of efficiency in arbitration is laid down in Art.13(5) HKIAC Rules, as well as in the Preamble and Art.9(2)(g) IBA Rules. The admission of the Award would make the arbitration inefficient in terms of cost and time. Despite the Award's irrelevance and immateriality as proven above in paragraphs 85-89, if the Award were admitted, the Tribunal would have to waste time carrying more procedural steps to consider it.

94 Efficiency is not only associated with cost and time, but it must also come with due process, that is parties' being treated equally and having opportunities to present their case [*Art.13 HKIAC Rules; Waincymer, p.16*]. Equality between the parties does not mean that the parties need to be treated identically, but that both parties be treated in a way that does not disadvantage them in the circumstances [*Martin, p.7; Waincymer, pp.16,17,19*]. The admission of the Award would affect due process since equality between the Parties is not maintained. The Award risks giving away Respondent's sensitive business information, despite its irrelevant quality to the case.

95 On the other hand, if the Award is not admitted, this does not affect due process. Claimant still has the opportunity to present its case. Opportunity to present one's case lies in the assurance that parties be kept informed at every stage of the proceedings and be given an opportunity to refute any evidence that is raised in the process [*Martin, p. 6*].

96 If the Award is not admitted, this does not mean that the Tribunal sets a disadvantage towards Claimant, nor will it affect Claimant's opportunity to present its case. It is still kept fully informed of

the proceeding, and is given the chance to use other evidence to support its claim or rebut Respondent's arguments. Claimant can use exchanges between the Parties after the date of the conclusion of the FSSA to support its argument of price adaptation. In fact, beside all the documents, correspondents and conversations between two Parties, in their submission, Claimant used many other case laws and doctrines to prove the case.

B. The admission of the Award violates the principle of good faith

97 Claimant argued that they maintained the principle of good faith in the taking of evidence since they did not directly take part in the hack and they were not bound by confidentiality agreement in the other arbitration [*Cl.Memo, ¶52 et seqq.*]. Nevertheless, its act of obtaining evidence from a questionable source contradicts the principle it is purporting (**I**), and Claimant used irrelevant cases to justify the use of the Award (**II**).

I. Claimant tried to obtain the Award knowing the questionable manner through which the evidence has been obtained

98 Respondent agrees with Claimant on the principle of good faith required from parties in arbitration proceedings [*Cl.Memo, ¶52*] and its presentation in the IBA Rules [*IBA Rules, Preamble ¶3, Art.9(7)*]. The principle of good faith is recognized in international law and in many domestic legal systems, which requires parties "to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage" [*D'Amato; Phoenix Action, ¶107*]. This principle is also confirmed in many Decisions [*Methanex, Part II, Chapter I, p. 26, ¶54; Libananco v. Turkey, ¶78*].

99 A violation of good faith can be demonstrated by the use of illegally obtained evidence [*Cremades, p. 787*]. Although Claimant has many times emphasized the importance of the principle of good faith, it bought the Award from the company which provides intelligence in the horse industry, knowing the questionable manner through which the Award has been obtained [*PO2, p. 61, ¶41*].

100 Claimant stated that it maintained its good faith since it did not directly take the Award, and there is no *fruits of the poisonous tree* in arbitration [*Cl.Memo, ¶54*]. This doctrine is a US evidentiary doctrine used in criminal proceeding, which does not allow the introduction of evidence obtained illegally [*Boykin/ Havalic, fn.1*].

101 Respondent submits that since the arbitrators are not bound by any strict evidentiary rules [*Art. 22(2) HKIAC Rules*], they can refer to any rules or that they deem appropriate [*Born, p. 2310*]. Respondent

suggests that the Tribunal take into consideration this doctrine to exclude the Award from evidence, especially when Claimant tries to use it knowing the questionable manner through which it has been taken.

II. Claimant's supporting cases are irrelevant and taken out of context

102 Claimant used five cases to support their claim that if a party possesses an illegally obtained evidence but does not directly carry out the act, that evidence is admissible [*Cl.Memo, ¶¶53,54*]. Nevertheless, the case law analysis given by Claimant is incomplete.

103 In the first three cases, namely *Yukos v. Russia*, *Hulley v. Russia* and *Veteran Petroleum v. Russia*, the Tribunals used evidence that had been made public on the WikiLeaks website without discussing the admissibility of documents. Since there is no reasoning in those three cases as to why illegally obtained evidence should be admitted, Claimant cannot apply those decisions in an automatic manner to justify its actions.

104 Claimant also cited the case *Caratube v. Kazakhstan*, in which the Tribunal accepted hacked documents and highlighted their need to access information that "is *in the public domain, accessible to all*" (*emphasis added*). The evidence in the case at hand, however, is completely different in nature. The Award from the other arbitration to which Respondent is a party is not "in the public domain" and "accessible to all".

105 In fact, the Award is only in the possession of the parties and those directly involved in the other arbitration, protected by the confidentiality agreement. And due to the private nature of arbitration, the Award is likely to remain confidential. Indeed, the Award had been obtained illegally either through a violation of confidentiality obligation of Respondent's former employees, or through a hack of Respondent's computer system [*Let. Fast, p.51; PO2, p.61, ¶41*].

106 Last, Claimant based on the *Dissenting Opinion of Georges Abi-Saab in ConocoPhillips v. Venezuela*, which stated that tribunals must not ignore the existence and relevance of leaked documents as evidence due to their "high degree of credibility" [*Dissenting Opinion of Georges Abi-Saab, ¶64*].

107 It must be emphasized that there exists a big difference with regards to degree of public access between the two cases. In *ConocoPhillips v. Venezuela*, Respondent tried to use documents taken from Wikileaks, a public source, but in the current case, the Award has not been public yet for that only a very limited number of people possess and have access to it.

C. The principle of transparency does not bind the Parties and cannot be used to support evidence's admissibility

108 In its email presenting its wish to submit the Award, one of Claimant's arguments was that the production of the Award would "be in line with the prevailing principles of transparency as now evidenced in the Transparency Rules of UNCITRAL" [*Let. Lang, p. 50*].

109 First, Claimant is mistaken when attempting to apply the Transparency Rules of UNCITRAL as it is not applicable to commercial arbitration [*UNCITRAL Transparency Rules FAQ*].

110 Second, the principle of transparency should not be applied either as it concerns investor-state arbitrations. Unlike commercial arbitrations, investor-state arbitrations concern key public policy issues such as environment and the expenditure of public funds, which calls for the consideration of the public interest involved in such arbitrations [*Malintoppi/ Limbasan, pp. 31,32; Hay, p.212; G.A. Res. 69/116*].

111 The case at hand is a commercial proceeding and does not regard any public interest that drives greater transparency as in investment arbitration. Both parties are private entities, the contract between them is a commercial contract concerning the purchase of horse semen, and the merit of the case is about the adaptation of the price. Hence, the case does not possess any details that could affect public interest which requires the application of the principle of transparency.

112 In short, neither UNCITRAL Transparency Rules nor the general principle of transparency can be applied to justify evidence admissibility.

CONCLUSION OF ISSUE 2

Even though Claimant has the right to submit the Award, the Tribunal should exclude it based on the HKIAC Rules and the IBA Rules. The admission of the Award would render the proceeding inefficient and would affect due process. Also, the Award should not be admitted under the principle of good faith and the general principle of transparency.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO PAYMENT OF US$ 1.250.000 RESULTING FROM AN ADAPTATION OF THE PRICE

113 Concerning the merit, Claimant made a two-prong argument based on the FSSA and Art. 79 CISG regarding its right to receive the payment of US$ 1.250.000 resulting from an adaptation of the price [*Cl.Memo, ¶67-167*]. However, Claimant erroneously interpreted the FSSA. It also misled the Tribunal

in understanding the CISG and Mediterranean law, which is a verbatim adoption of the UPICC (collectively "**the applicable law**").

114 It will be submitted that none of the exemption provisions Claimant relied on under the FSSA and the applicable law can be invoked in this case (**A**). Alternatively, Claimant is not entitled to the remedy of contract adaptation (**B**) and in any cases, the price should not be adjusted to 25% (**C**).

A. None of the exemption provisions Claimant relied on is inapplicable in this case

115 Claimant relied on Clause 12 FSSA, Art.79 CISG and Chap.6 UPICC [*Cl.Memo, ¶67-167*]. However, it ignored the fact that such provisions actually do not apply in cases where performance of the contractual obligation has already been carried out. As Claimant already delivered the third shipment pursuant to Clause 8 FSSA, Respondent contends that both Clause 12 FSSA and exemptions provision of the applicable law are inherently inapplicable (**I**) or in the alternative, Claimant already waived its right to rely on them (**II**).

I. Clause 12 FSSA, Art. 79 CISG or Chap. 6 UPICC is inherently inapplicable

116 The Tribunal is respectfully requested to hold that Clause 12 is of no relevance as it is a liability exemption clause only in case of lost shipment and delays in delivery (**1**).Likewise, exemption provisions under the applicable lawArt.79 CISG (**2**) and Chap. 6 UPICC (**3**) are inapplicable.

1. Clause 12 FSSA only applies to case of lost shipment and delays in delivery

117 In its submission, Claimant deliberately misread Clause 12 of the FSSA [*Cl.Memo, ¶69*]. Under Art.8 CISG, due consideration is given to, *inter alia*, the wording, the context and the purpose of the contract as well as the negotiations [*Art. 8 CISG, Schlechtriem/Schwenzer, p. 120, ¶20; Fruit and vegetables case; Building materials case*]. Herein, based on the overall texts of Clause 12, the purpose of the FSSA which ensures that Respondent receive the horse semen on time and Parties' intent to draft a liability exemption clause of limited scope [*Ex.R3, p. 35; PO.2, p.56, ¶12*], Clause 12 should be read:

> "Seller shall not be responsible **for lost semen shipments or delays in delivery** not within the control of the Seller such as … hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." (*emphasis added*)"

118 Accordingly, Clause 12 can only be invoked on conditions that there is lost shipment or late delivery. In other word, "hardship, caused by additional health and safety requirements or comparable unforeseen events" is among the illustrative causes for lost shipment or late delivery. However, no lost or delays exist in this case. It is undisputed that Claimant delivered all three instalments timely

and correctly in quantity as stipulated under the FSSA [*Ex.C5, pp. 13-14; NoA., p. 6, ¶9, 13*]. Thus, there is no grounds to invoke Clause 12.

2. Art. 79 CISG is inapplicable

119 Respondent pleads that Art. 79 CISG is inapplicable to this dispute because by Clause 12 FSSA, Parties already derogated from this Art. (**1**). Alternatively, Art.79 only pertains to impossibility, not hardship (**2**) and addresses cases of non-performance (**3**).

a. By incorporating Clause 12, Parties already derogated from Art. 79

120 Under Art. 6 CISG, the mere presence of a *force majeure* clause constitutes a derogation from Art. 79, let alone a specified exemption clause like Clause 12 [*DiMatteo, pp. 295 – 296; Saidov, pp.55 - 56*]. *A fortiori*, CISG provision is excluded if it is incompatible with Parties' agreed term [*UNCITRAL Digest, Art.6, p.34, ¶15*]. While Art. 79 CISG provides exemption for all non-performances by both seller and buyer [*Mazzacano, p.51; CISG-AC Opinion No.7*], Clause 12 FSSA is of a narrower scope. Clause 12 only stipulated exemption only for Claimant (seller) in some limited circumstances concerning its delivering obligation [*Ex.C5, pp. 13-14; Ex.R3, p. 35; PO2, p.56, ¶12*].

121 Thus, contrary to Claimant's wrong assertion [*CL. Memo, ¶123 – 125*], by virtue of Clause 12 FSSA, Parties had in fact derogated from Art. 79 and accordingly cannot invoke this Art.

b. Even if the Tribunal find that Parties did not derogated from Art. 79 CISG, this Art. does not apply to hardship

122 Art. 79 CISG is in its nature a *force majeure* clause [*UNCITRAL Digest, p.373, ¶1*]. This understanding is in line with the treaty interpretation rules under the Vienna Convention. Under Art. 32 Vienna Convention, resort must be made to the preparatory work. Compared to its predecessor Art. 74 ULIS which provides excuse easily when performance become more difficult, Art. 79 CISG is a stricter version. Particularly, the wording "circumstances" of Art. 74 ULIS was replaced by "impediment". The travaux préparatoires of Art. 79 also indicates an exclusion of hardship since the drafters dismissed a proposal concerning hardship [*Flambouras I; Flambouras II p.265; Spivack, pp.771 – 773; Rimke, p.222-223; Miettinen, p.31*]. That Art. 79 only deals with impossibility, not hardship, is also supported by scholars and case law [*Nicholas; Jenkins, p.2025; Zeller, p.160; Sunflower seed case, Canned oranges case; Steel ropes case*]. Therefore, hardship is not within the governing scope of Art. 79, unlike Claimant's contention [*Cl.Memo, ¶128 – 130*].

123 Claimant raised an argument that even in case hardship is not governed under Art. 79, based on their intent, Parties agreed that the increased tariff would constitute an "impediment" [*Cl.Memo, ¶138 - 140*]. However, this groundless argument should be dismissed. Not once during the negotiations or later during the execution of the FSSA did Parties mention Art. 79 CISG or its wording "impediment". As such, there is no evidence whatsoever that Parties broadened Art. 79. The fact Parties intended to and excluded risks from "unforeseeable additional health and safety requirements" actually confirmed their derogation from Art. 79 [*Supra, ¶¶120-121*].

124 Thus, tariff as an economic hardship is under all circumstances not governed by Art. 79 CISG.

c. In addition, Art. 79 is only applicable to case of non-performance or breach of contract

125 According to Art. 79 CISG, exemption must arise from a "failure to perform". Thus this Art. is restricted to situations in which performance under the contract is prevented by an impediment, in other words, situation of non-performance or breach of contract [*Honnold; Zeller, p.153; Mahasneh, p.76-77*]. In fact, Courts and Tribunals have consistently dismissed claim of exemption of one party in the absence of its breach of contract or non-performance [*Romay v. Behr France; Case No. 26/00*].

126 In this case, as submitted in paragraph 118 above, Claimant already complied with all its obligations. Hence, there is no "failure to perform" of Claimant for it to be exempted.

3. Chap. 6 UPICC is also inapplicable as it only applies to performance not yet rendered

127 Although not raised in its Memorandum, Claimant may also invoke the application of hardship under Mediterranean law. However, Chap. 6 UPICC can only be invoked in case performance under the contract has not been rendered [*UPICC, Art. 6.2.2 Comment, p.221*]. Therefore, in a manner similar to Clause 12 and Art. 79, as Claimant already performed its contractual obligation to deliver the third shipment timely, it is no longer able to invoke Chap. 6 UPICC.

II. Otherwise, Claimant waived its right to rely on such provisions

128 Party can waive its right under the principle of party autonomy in Art.6 CISG [*Butler, p.26, ¶8.06[b]*]. As there is no specific mention of waiver of exemption, thus by virtue of Art.7 (2) CISG, analogy [*Felemegas, pp.26-27*] should be made to waiver in other provisions, e.g. Art.40, Art.44 CISG [*Huber/Mullis, pp.167 – 168*]. Party can impliedly waive its right by conduct [*Surface protective film case; Tiller case*].

129 In this case, Claimant proceeded to deliver the third shipment despite the knowledge that the FSSA does not contain provision on increased price and Mr. Shoemaker is in no position to authorize price

adjustment [*Ex.C5, pp. 13-14; Ex.C8, p.18; Ex. R4, p.36*]. Hence, by its conduct, Claimant impliedly waived its right to rely on Clause 12 and other relevant provisions of the applicable law.

B. Alternatively, Claimant is not entitled to payment resulting from contract adaptation

130 Claimant tried to establish Equatoriana's 30% tariff increase as hardship and its entitlement to additional payment pursuant to Clause 12, then repeated that effort on the basis of Art. 79 CISG [*Cl.Memo, ¶67-167*]. For the purpose of consistency, from here onward, the term "hardship" is employed interchangeably of "impediment" as in Art. 79 CISG. Respondent pleads that in all situations, Equatoriana's new tariff is not hardship (**I**) and there is no remedy of contract adaptation (**II**). In addition, Respondent's positions in the other proceeding is irrelevant (**III**).

I. Tariff increase does not constitute "hardship" under Clause 12 and the applicable law

131 Clause 12 FSSA provides for exemption in case "not within the control of the Seller", "unforeseen" and "making the contract more onerous" [*Ex.C5, p.14*]. Moreover, it was drafted based on ICC Hardship Clause [*Ex.R2, p. 34; PO2, p. 56, ¶12*], which follows pattern similar to Art. 79 CISG [*Arroyo, p. 43*]. At the same time, a claim of hardship under Article 79 CISG necessarily arises from an "impediment" which are beyond control, reasonably unforeseeable and unavoidable [*Schwenzer, pp.713–714;* Nagy, *p.21*]. The level of risk assumption must also been taken into account [*Azeredo da Silveira, p.223*]. Art. 6.2.2 UPICC, which applies to event "fundamentally alters the equilibrium of the contract", also sets the similar criteria. Therefore, the common requirements for the existence of hardship under either Clause 12 FSSA or the applicable law are threshold, causation, externality of control, unforeseeenability and unavoidability of the event as well as parties' risk assumption.

1. Equatoriana's tariff does not meet the threshold of hardship under Clause 12 FSSA and the applicable law

132 Clause 12 stipulates exemption only for events that makes the FSSA more onerous. The drafting history of the FSSA suggests that a supervening event make the contract more onerous if it "destroy the commercial basis of the deal" by increasing the cost by 40% [*Ex.C4, p.12*]. Similarly, Article 79 sets the threshold of an extreme difficulty bordering impossibility [*Honnold*]. Scholars' writings and case law involving Art. 79 CISG and Chap. 6 UPICC also favor an interpretation of hardship being equivalent to more than 50% cost increase [*Maskow, p.662; Brunner, pp.427-428; Girsberger/Zapolskis, pp.125–126; Schwenzer, pp.715-717; Scafom v. Lorraine; Iron molybdenum case*].

133 Accordingly, it can be deduced from the FSSA and the applicable law that the threshold of hardship must be at minimum a 40% cost increase. Since the new tariff only increases the cost of third shipment by 30% [*Ex.C7, p. 16*], it fails to satisfy the threshold of hardship.

2. The tariff increase is neither beyond control of Claimant nor the only cause for its claim of hardship

134 While tariff increase is undisputedly an act of Equatoriana's government, such fact by itself does not constitute an impediment beyond control of a party. An event *prima facie* beyond control is deemed to be within a party's control if that party could have taken measures to avoid it [*Flambouras II, p. 267*]. Claimant could have avoided the increase tariff completely if it delivered before such tariff took effect [*infra ¶143*]. The increased tariff is therefore not an impediment beyond control.

135 Furthermore, an exclusive causal link is required between the intervening event and a claim of hardship [*Tallon, p.582, ¶2.6.6*]. In this case, the actual reason for Claimant's unwillingness to pay the increased tariff is its own financial capacity. Such matter is within Claimant's sphere of control [*Schlechtriem/Schwenzer, Art.79, p.815, ¶¶15-17; Flambouras II, pp. 267 – 268*]. Thus, there is no exclusive causal link between the increased tariff and Claimant's assertion.

3. Tariff increase could have been reasonably taken into account and was actually foreseen

136 Among other criteria of Art.79 CISG, exemption is only granted if party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract". The ICC hardship Clause on which Parties originally referred to also set the similar requirement [*ICC Hardship Clause; Ex.R2, p.34*]. Thus, the relevant test of whether tariff increase was "reasonably foreseeable" must be applied according to Parties' intent and the applicable law. Even assuming that the "foreseen" test as alleged by Claimant is correct [*Cl.Memo, ¶92–97,143*], whether tariff increase is foreseeable must still be proven before deciding whether that it was foreseen [*US Lamb, p.28, ¶7.22*].

137 Regarding the foreseeability of the increase tariff, expertise and prior experience of the party claiming hardship as well as early signs of the impediment obvious at the conclusion of the contract are relevant [*Lee, pp.297-298; Azeredo da Silveira, pp.224-226; Steel bars case; Macromex v. Globex; Shirt case*]. Furthermore, an increase in the seller's cost of performance is particularly foreseeable if it happened before and is below the maximum historically-based increase [*Eisenberg, p.245; Ishida, p.374-378,381; Sunflower seed case*].

138 Herein, Claimant could have reasonably expected an increase tariff. As an experienced deliverer, Claimant has once suffered from a 40% increased cost [*PO2, p.58, ¶21; PO2, p.56, ¶9*]. Moreover, considering the obvious protectionist attitudes of Mediterranean authority even before the conclusion of the FSSA as well as the tariff regime of other countries [*Ex. C6, p.15; PO2, p.58, ¶23*], a new Mediterranean tariff regime is certainly expected. As a consequence, a comparable retaliatory act from Equatoriana can be reasonably foreseen. Claimant argued otherwise based on Equatoriana's position "as one of the biggest supporter of the existing system of free trade" [*Cl.Memo, ¶97; Ex. C6, p.15*]. However, Equatoriana has used direct retaliatory measures before [*Ex. C6, p. 15*]. In other cases where Equatoriana invoked WTO dispute mechanisms [*Ex.C6, p.15; PO2, p. 61, ¶47*], pursuant to Article 22 DSU, retaliation measures are also possible [*Read*]. Cumulatively, Equatoriana's retaliatory tariff of 30% is reasonably foreseeable.

139 In fact, Claimant knew that its delivery might entail "risks associated with changes in customs regulations", citing the example of additional health and safety requirements [*Ex.C4, p.12*]. Parties eventually insert the term "comparable unforeseen events" into Clause 12 to address such risks [*Ex. C5, p.14; PO2, p. 56, ¶12*]. As tariff is inherently a custom regulation and have comparable effects as health and safety requirements [*Bossche, p.376; Cl.Memo, ¶83–86*], it can be deduced that even under the "foreseen" test, Parties foresaw the risk of the cost up to at least 40%, let alone 30%.

4. Claimant assumed the risk of tariff increase both expressly and impliedly

140 Unlike Claimant's contention [*Cl.Memo, ¶¶116-118*], Clause 12 FSSA does not provide for Respondent's automatic financial obligation in case of hardship. Clause 12 only exempts Claimant in case of "lost semen shipments and delays in delivery" [*Ex. C5, p.14, supra ¶117*]. In any case, a cost increase of 30% caused by Equatoriana's tariffs has been assumed by Claimant.

141 Under DDP delivery terms, the burden of paying tariff is on the seller [*Ramberg, p.149*]. By agreeing to such delivery terms as stipulated in Clause 8 FSSA, Claimant in fact expressly agreed to bear all risks concerning tariff. Furthermore, if the change of circumstances was reasonably foreseeable and the debtor did not take any measures to protect himself, he is considered to have impliedly assumed the risk of such change [*Schlechtriem/Schwenzer Art.8, p.128, ¶39; Uribe, p.253*]. From the negotiation over the semen price, it can be deduced that Claimant only charged additional US$300 per dose as compensation for unexpected change of circumstance [*PO2, p. 56, ¶12*]. Claimant settled for such additional payment and an exemption clause which only governs lost shipment and late delivery,

despite the fact that at least 40% cost increase is reasonably foreseeable [*supra. ¶¶136-139*]. Therefore, Claimant has also impliedly assumed the risk of the tariff.

5. Equatoriana's tariff could have been reasonably avoided

142 The final element is satisfied when one party could not reasonably avoid or overcome occurrence of the impediment or its consequences. That party, however, has to take every step to provide a commercially reasonable substitute [*Secretariat commentary Art.65, ¶7; Hilaturas v. Iraq*]. Limited financial ability is generally considered to be surmountable [*Schlechtriem/Butler, p.202, ¶289a*].

143 In its submission, Claimant was confused between the availability of a substitute performance and access to dispute settlement forum [*Cl.Memo, ¶144–146*]. While it is true that Claimant cannot challenge Equatoriana's tariff before the WTO, it could have delivered the third shipment at the original cost. As Equatoriana's new tariff took effect from 15 Jan 2018 and Claimant knew such information [*PO2, p.58, ¶25,26*], had Claimant delivered the third shipment at least 6 days sooner, it would not have to suffer 30% tariff. Furthermore, Equatoriana's new tariff is indeed avoidable as Claimant had already paid for it [*Ex.C8, p.18*]. To summarize, Equatoriana's tariff could have been reasonably avoided but Claimant failed to avoid it.

II. Additionally, contract adaptation is unavailable under the FSSA and the applicable law

144 Beside the fact that Equatoriana's tariff cannot be established as hardship, according to both the FSSA and the applicable law, the remedy of contract adaptation is not available. Respondent pleads that under the FSSA, Parties have never agreed on the remedy of contract adaptation (**1**). Such remedy does not exist under the CISG (**2**) or else, cannot be deduce from the CISG gap-filling mechanism Art.7.2 (**3**). Last, adaptation is not binding usage on Parties (**4**)

1. Parties did not agree on contract adaptation as a consequence to a finding of hardship

145 Claimant argued that Parties agreed on contract adaptation based on statement of Respondent's Rep. Mr. Antley on 12 April 2017, stating "it should **probably** be the task of the arbitrators to adapt the contract if the Parties could not agree" (*emphasis added*) [*CL. Memo, ¶102-103; Ex.C8, p.17*]. However, that statement is a mere speculation during negotiation process. Since Mr. Antley intended to make a proposal the next morning but he was not able to do so [*Ex.C8, p.17*], his statement is actually not the conclusive position of Respondent on contract adaptation. In his note, Mr. Antley even aimed for further negotiation on that matter [*Ex.R3, p.35*]. Mr. Antley and Mrs. Napravnik indeed did not agree on contract adaptation despite their cognizance of it as a remedy for hardship [*Ex.C8, p.17*].

146 More importantly, the determinative time to find out Parties' intent is at the conclusion of the contract [*Huber/Mullis, p.14; Fruit and vegetables case; Building materials case*]. When the FSSA was finalized on 6 May 2017, neither of the two substitute negotiators Mr. Ferguson and Mr. Krone was aware of contract adaption as a remedial consequence. Contract adaptation by the Tribunal was not mentioned in any of the previous emails [*PO2, p.55, ¶5*].Moreover, Parties' main source of reference, the ICC Hardship Clause does not provide for such remedy. Instead, it only stipulates the duty to renegotiate and right to termination. In fact, Respondent's Rep. Mr. Krone would have objected to price adjustment by the Tribunal had he known about such remedy [*Ex.R3, p.35*]. Cumulatively, therefore, Parties could not have agreed on contract adaptation at the conclusion of the FSSA.

147 Parties even deemed the above-mentioned possible effects of hardship to be of limited importance and removed them from Clause 12 FSSA [*Ex.R3, p.35;PO2, p.55, ¶7, p.56, ¶12*]. This omission hence should be interpreted as their intent to solely exempt for Claimant in case of "lost semen shipments or delays in delivery" [*Ex.C5, p.14*]. In other words, the only remedy Parties agreed on is liability exemption in some limited circumstances, not including this case [*supra. ¶117*]. Pursuant to Art.8(3) CISG, Claimant's subsequent conduct endorsed this interpretation. Against her original wish for a clear provision on contract adaptation and the absence of such provision in the FSSA, Claimant's Rep. Mrs. Napravnik had never attempted to clarify to Respondent that contract adaptation may be a remedial consequence before the occurrence of Equatoriana's tariff [*Ex.C8, p.17*].

148 Claimant also put forward an argument that pursuant to general principles of law evidenced by UPICC, PECL and TLDB Principles, contract revision is a natural remedy failing the Parties' renegotiation [*Cl.Memo, ¶104–106*]. However, the mentioned documents are actually non-binding soft law and cannot represent any general principle of law [*Meyer; Kessedjian, pp.430-431*]. Thus, Tribunal is not bound to adapt the contract as a consequence of Parties' failure to renegotiate.

2. Remedial consequence of a finding of hardship is deliberately excluded from CISG

149 Claimant contended that remedial consequence of hardship is a governed-but-not-settled matter, or in other word, an internal gap under the CISG [*Cl.Memo, ¶149–155*]. However, the mere fact that the CISG does not authorize contract adaptation does not mean it contains a gap. In contrast, contract adaptation was deliberately excluded from the CISG [*Rimke, pp.219-226; Flambouras II, pp.279-280; Kofod;Flechtner II*]. This is evident by the legislative history of CISG during which a proposal for "equitable revision of the contract" was rejected [*Slatter, pp.259 -260; Flechtner I, pp. 8 – 9*].Art. 79(5)

CISG already provides for the sole remedial consequence of hardship, if existed, which is exemption from damages [*Secretariat Commentary Art.65, ¶¶1,8*].

3. Even if Tribunal finds consequence of hardship is an internal gap of the CISG, there is no remedy of contract adaptation pursuant to Article 7.2

150 Even assuming remedial consequence of hardship is an internal gap of the CISG as argued by Claimant, this gap will be dealt with by the CISG gap-filling mechanism Art..7.2. Under Art. 7.2, resort will be made to first, the general principles underlying the CISG and failing that, the applicable domestic law. It will be submitted that the Tribunal cannot adapt the FSSA under this mechanism.

a. No general principle of contract adaptation exists under the CISG

151 Contract adaptation is by *per se* not a general principle of CISG [*Garro, ¶15; Flambouras II, pp.288–289; Tallon, p.592, ¶3.1*]. Contrarily, other general principles of CISG, e.g. *pacta sunt servanda* and favoring contract [*Magnus*], oppose to such remedy [*Slatter, p.261;van Houtte,Hans, pp.107-109; Kessedjian, p.426*].

152 Claimant reasoned based on Professor Schlechtriem's suggestion of a general principle of contract adaptation in analogy to Art. 50 CISG on price reduction [*Cl.Memo, ¶157-159*]. However, that suggestion is only a liberal speculation [*Uribe, fn.52*]. It was based on the Professor's understanding as a German lawyer that Art. 50 is a form of adaptation. Schlechtriem himself admitted Art. 50 can be seen as a set off by common law lawyer [*Schlechtriem's suggestion*]. Thus, an interpretation that a general principle of contract adaptation can be derived from Art. 50 would contravene Art. 7 (1) CISG on uniform interpretation [*Lindström*].

153 Though not raised in its Memorandum, Claimant cannot invoke contract adaptation pursuant to Art. 6.2.3(4) UPICC on account of UPICC as a whole being general principles the CISG. Since the UPICC was adopted later than the CISG, it cannot represent principles underlying the CISG [*Huber/Mullis, pp. 35–36*].

b. Furthermore, contract adaptation cannot be derived from principle of good faith

154 Claimant reasoned that the FSSA must be adapted pursuant to two manifestations of principle of good faith, namely the duty to cooperate and doctrine *venire contra factum proprium* [*Cl.Memo, ¶¶108–114*]. While Respondent does not challenge good faith itself as a general principle of the CISG, it pleads that the principle of good faith cannot generate the remedy of contract adaptation. Good faith cannot to prevail over sole exemption from damage under Art. 79 [*Tallon, p.594, ¶3.1.2*]. Furthermore, interpretation based on good faith so as to create the not-globally-recognized remedy

of contract adaptation would go against the aim of CISG to promote uniformity [*Flambouras II, p.280; Miettinen, p.31*]. In any event, the two manifestations as submitted by Claimant do not oblige the Tribunal to adapt the FSSA.

i. Respondent is not bound under the duty to cooperate to adapt the contract

155 As contended by Claimant, duty to cooperate requires Parties to "seek, and **if possible**, try to find a solution" (*emphasis added*) [*Cl.Memo, ¶110*]. Such duty clearly does not guarantee contract adaptation as Parties are only obliged to try. Indeed, renegotiation is a process of willingness and trust that does not necessarily result in agreement [*Arroyo, pp.35–36*]. The essence of duty to cooperate only prohibits one party from hindering other party's performance [*Felemegas, pp.47–48*].

156 Herein, under the FSSA, Respondent did not impede any performance of Claimant. Instead, Respondent acted in good faith and considered Claimant's request for price adjustment by attending the meeting initiated by Claimant [*PO2, p.60, ¶35*]. Hence, Respondent already complied with its duty to cooperate. The failure to renegotiate is actually due to Claimant wrongfully accusing Respondent of breaching the FSSA despite an obvious lack of resale prohibition [*Ex.C8, p.18*].

ii. Respondent did not promise adaptation and thus cannot be bound under the doctrine *venire contra factum proprium*

157 Although Claimant used the doctrine of *venire contra factum proprium*, it fails to clarify its actual content. This doctrine prohibits a party to act inconsistently with an understanding other party reasonably relied on [*Magnus*]. However, Respondent did not act inconsistently in this case.

158 Claimant argued that it was given an impression of adaptation, presumably based on the dialogue between Claimant's Rep. Ms. Napravnik and Respondent's Rep. Mr. Shoemaker [*Cl.Memo, ¶113-114; Ex.C8, p.18*]. Yet, during that dialogue, Mr. Shoemaker took caution not to create any concessions. He repeatedly emphasized that he did not have power to authorize additional payment and that party may adjust the price only if the contract provides for such mechanism [*Ex.R4, p.36; Ex.C8, p.18*]. Hence, it is unreasonable for Claimant to rely on Mr. Shoemaker's statement when it was aware of the absence of provision on price adjustment under the FSSA and Mr. Shoemaker's lack of authority.

c. Also, the FSSA cannot be adapted through resort to Mediterranean law

159 Mediterranean law is the final resort either pursuant to Art. 7.2 CISG in the event Tribunal finds no general principles. However, contrary to Claimant's reasoning [*Cl.Memo, ¶160-161*], Art. 6.2.3(4) UPICC does not allow contract adaptation automatically. Instead, the contract can only be adapted

"if reasonable" [*Art. 6.2.3(4) UPICC*]. Tribunal always have the choice of confirming the original contract provisions [*UPICC, Art. 6.2.3, Comment 7, p.226*] and should not adapt a contract if it creates a completely new contract or different obligation [*Uribe, p.262*].

160 In this case, it is more reasonable to maintain the original price in the FSSA. The essence of FSSA based on the competitive price and delivery term as discussed between Parties from the very beginning [*Ex.C1, p.9; Ex.C2, p.10; Ex.C3, p.11*]. By adjusting the price and requiring Respondent to pay for Equatoriana's tariff, the Tribunal will actually impose on Respondent an additional obligation which did not exist before according to the DDP delivery terms as well as rearrange the whole risk distribution between Parties [*Supra. ¶¶140-141*]. Therefore, Respondent respectfully requests the Tribunal not to adapt the price under the FSSA as such adaptation will create a new contract

4. Contract adaptation under the UPICC is not trade usage binding on Parties

161 Article 9(2) CISG on binding trade usage requires elements such as "widely known" and "regularly observed" in international trade [*UNCITRAL Digest, Art.9, p.64,* ¶11]. Although being appreciated by scholars, as a whole, UPICC has not met the abovementioned requirements yet. The drafter of the UPICC itself admitted that UPICC is "still not yet generally adopted" [*UPICC, Introduction to the 1994 Edition, pp. xxviii-xxx*] and aimed to become "better known and more widely used" [*UPICC, Introduction to the 2016 Edition, pp.vii-viii*]. In other words, UPICC in its entirety is not trade usage [*Bridge, pp.6–7; Gotanda, pp.23- 24*]. Hence, Article 6.2.3(4) UPICC cannot reflect binding international trade usage solely by its mere inclusion in UPICC as argued by Claimant [*Cl.Memo, ¶162-164*].

162 Furthermore, though it prevails over conflicting CISG provisions, trade usage does not overrule the contract between Parties [*Bell, p. 7*]. Therefore, contract adaptation as trade usage, if existed, cannot deny the absence of such remedy in the FSSA [*Ex.C5, pp.13-14*].

163 Accordingly, Tribunal should dismissed Claimant's contention that the contract can be adapted pursuant to Art. 6.2.3 (4) UPICC on account of Art. 9(2) CISG [*Cl.Memo, ¶¶162–164*].

III. Irrelevance of other proceeding

164 Claimant tried to make use of Respondent's position from another proceeding as evidence of subsequent conducts to support its interpretation of the FSSA [*Cl.Memo, ¶¶75–80*]. However, Tribunal should deny such misuse. Art. 8 CISG indeed accept parties' subsequent conducts to aid the interpretation of the contract. Nevertheless, reference under Art. 8(3) CISG is to the "subsequent conduct of **the parties**"(*emphasis added*). This reference aims to confirm Parties' intention at the

conclusion of the contract [*Huber; UNCITRAL Digest, Art. 8, p.57, ¶27; Schlechtriem/Butler, p.57, ¶57*]. Thus, subsequent conducts of one party must be vis-à-vis another.

165 In this light, the position of Respondent in another proceeding against a third party is of no relevance to the interpretation of the FSSA as the Parties in the other proceeding are not the same parties to the FSSA. More importantly, the two proceedings are fundamentally different on the fact. Whereas the other proceeding involves standard Model HKIAC and ICC Hardship Clauses, this proceeding between Claimant and Respondent concerns modified Clauses [*PO2, p.60, ¶39; Ex.C5, p.14*]. Such differences justify Respondent's different positions in two proceeding.

166 Not to mention, an arbitral award has absolutely no binding effect on a different proceeding [*HKIAC Rules, Art.35.2; Blackaby/Partasides, et.al, p. 563, ¶¶9.182-9.184*]. In addition, the Award about to be submitted by Claimant is a decision on jurisdiction [*Let. Lang, p.50; PO2, p.60, ¶¶39, 41*]. Therefore, not only does it has no binding effect on this Tribunal, it also of no guiding significance on the merit of this case.

C. Even if Claimant is entitled to adaptation, the price should not be adjusted to 25%

167 Even assuming that Claimant is entitled to the remedy of contract adaptation, Claimant's request for 25% price adjustment would go against the purpose of contract adaptation as clarified under Art. 6.2.3 (4) UPICC – adaptation "with a view to restoring its equilibrium". In other words, the primary reference for adaptation is the original risk distribution under the contract[*Maskow, p.663; Bund, pp. 389-391; UPICC, Art. 6.2.3 Comment, p.226*]. In this case, Respondent respectfully requests the Tribunal to mirror the FSSA as closely as possible in determining the degree of price adjustment. According to Clause 8 and Clause 10 FSSA concerning risk in delivery, Claimant is the superior risk bearer [*Ex.C5, pp.13-14*]. Thus, the Tribunal should dismiss Claimant's request and award the majority of Equatorian's increased tariff to Claimant.

168 Additionally, adaptation as remedy aims to maintain the parties' purpose while distribute losses fairly and mitigate the excessive onerousness of performance [*UPICC, Art. 6.2.3 Comment, p.226; Uribe, p.262;Hillman, pp.20–22*]. Alternatively speaking, as the negatively affected party, Claimant must bear the increased cost, saving for the excessively onerous part. If the Tribunal adjust the price of the third shipment to 25%, Claimant is actually not affected by the tariff while Respondent lost US$25.000 per dose (US$1.250.000 in total).

169 Finally, it is noteworthy that as the party invoking hardship, Claimant should have given a "detailed justification of the impact" of Equatoriana's tariff on it [*Brunner, p.441; Fucci, II.C*]. However, Claimant does not furnish any other specific grounds advocating for 25% price adjustment other than its belief that it acted in good faith by sacrificing its 5% profit margin [*Cl.Memo, ¶¶119, 166 - 167*]. At hand, Claimant vaguely argued in favor of the 25% price adjustment by invoking its "fragile" financial conditions [*PO2, p.59, ¶¶21, 29; Cl.Memo, ¶¶119,136,166*]. Nevertheless, financial ruin caused by lack of management skills is not a criterion to be considered in calculating the degree of price adjustment [*Brunner, p.436; Girsberger/Zapolskis, pp.131 -132*]. If Claimant is financially endangered by not receiving the 25% tariffs, it is attributable to Claimant's sphere of control. The Tribunal hence should not grant Claimant the requested US$1.250.000 merely on the ground that it may become insolvent.

CONCLUSION OF ISSUE 3

Respondent respectfully requests the Tribunal to dismiss Claimant's contentions on the merit on the grounds that neither Clause 12 FSSA nor Art. 79 CISG, as provisions applies only in case of non-performance, is inapplicable. At the same time, Equatoriana's 30% tariff does not meet the requirements of hardship and contract adaptation is not a remedy under the FSSA as well as the CISG. In any cases, the price should not be adjusted to 25% as such degree would contradict the purpose of contract adaptation.

PRAYER FOR RELIEF

In light of the above submissions, Respondent respectfully requests the Tribunal to find that:

- The Tribunal does not jurisdiction to adapt the FSSA under the arbitration clause **(Issue 1)**
- Claimant is not entitled to submit evidence obtained either through a breach of confidentiality agreement or through an illegal computer hack **(Issue 2)**
- Respondent does not have responsibility to pay the amount of US$ 1.250.000 resulting from an adaptation of the price both under the FSSA and CISG **(Issue 3)**

Hanoi, 23 January 2019

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose signatures below.

We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

PHUONG ANH DO

DIEU LINH NGUYEN

HA VAN PHAM THI

ANH NGUYEN THI MINH

THUY DUONG VU