SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong, March 31st – April 7th, 2019

Memorandum for CLAIMANT

AMITY LAW SCHOOL, DELHI

(Affiliated to GGSIP UNIVERSITY)

On behalf of	**Against**
Phar Lap Allevamento	*Black Beauty Equestrian*
Rue Frankel 1	*2 Seabiscuit Drive*
Capital City	*Oceanside*
Mediterraneo	*Equatoriana*
(CLAIMANT)	(RESPONDENT)

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%	per cent
&	and
Art(s).	Article(s)
CAS	Court for Arbitration of Sport
CE	Claimant's Exhibit
Cf.	Confer
CIF	Cost, Instance and Freight
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
Corp	Corporation
Corp.	Corporation
DCFR	Draft Common Frame of Reference
DDP	Delivered Duty Paid
e.g.	example given (for instance)
ECHR	European Convention on Human Rights
En	English
Ex.	Exhibit
FAA	Federal Arbitration Act
FOB	Free on Board
FRA	France
GER	Germany
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ibid.	ibidem (the same)
ICAC	International Commercial Arbitration Court
ICAC	*Independent Commission Against Corruption*
ICC	International Chamber of Commerce and Industry
ICSID	International Centre for Settlement of Investment Disputes
Incoterms	International Commercial Terms
Int.	International

LCIA	London Court of International Arbitration
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985
Mr	Mister
Ms	Miss
MST	Mediterranean Standard Time
No.	Number
p.	page(s)
Para.	Paragraph(s)
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
PIA	Partial Interim Award
PICC	Principles of International Commercial Contracts
PO No	Procedural Order Number
RE	Respondent's Exhibit Number
Sec.	Section
Sin	Singapore
U.K	United Kingdom of Great Britan and Northern Islands
U.S.A.	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNECE	United Nations Economic Commission for Europe
UNIDROIT	Institut International Pour L' Unification du Droit Prive (French for: International Institute for the Unification of Private Law)
UPICC	The UNIDROIT Principles of International Commercial Contracts
USD	United States Dollar
v.	versus

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No. 07 Civ. 6706(RJS)

Available Online:
https://www.courtlistener.com/opinion/2247289/kowalewski-v-samandarov/
cited as: *Tadeusz Kowalewski v. Rudolf Samandarov*
in ¶ *37*

United States District Court, S.D. New York
Urban Box Office Network, Inc. v. Interfase Managers, L.P.
Jul. 26, 2006
2004 WL 2375819 (S.D.N.Y.)
Available online:
https://casetext.com/case/urban-box-office-network-inc-v-interfase-managers
cited as: *Urban Box Office Network v. Interfase Managers*
in ¶ *92*

United States District Court, E.D. Tennessee, N.D.
Tennessee Valley Autho*rity v. Exxon Nuclear Company, I*nc. And Exxon Corporation.
22 August 1983
Civ. No. 3-83-230
570 F. Supp. 462 (1983)
Available at:
https://law.justia.com/cases/federal/district-courts/FSupp/570/462/1432908/
cited as: *Tennessee Valley Auth. v. Exxon Nuclear Co.*
in ¶ *178*

United States District Court, W.D. Michigan, N.D.
The Cleveland-Cliffs Iron Company v. Chicago & North Western Transportation Company
5 March 1984
NO. M 81-68 CA2

581 F. Supp. 1144(1984)

Available at: https://law.justia.com/cases/federal/district-courts/FSupp/581/1144/1596085/

cited as: *Cleveland-Cliffs Iron Co. v. I.C.C*

in ¶ 178

LEGAL SOURCES AND OTHER MATERIALS

CISG	United Nations Convention on International Sale of Goods (Vienna 1980), as adopted on 11th April, 1980
DCFR	Draft Common Frame of Reference, 2008
HKIAC Rules	2018 HKIAC ADMINISTERED ARBITRATION RULES, 26 September 2018
IBA Rules	IBA Rules on the Taking of Evidence, London May 29, 2010
ICC Rules	Rules of Arbitration, ICC International Court of Arbitration, 1st January 1998
LCIA Rules	London Court of International Arbitration Rules, adopted 1 January 1998
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York June 10, 1958
PECL	Principles of European Contract Law, 2002
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna June 21, 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2010

STATEMENT OF FACTS

The PARTIES to this Arbitration are Phar Lap Allevamento (hereinafter, "CLAIMANT") and Black Beauty Equestrian (hereinafter, "RESPONDENT"; together the "PARTIES"). CLAIMANT operates Mediterraneo's oldest and most renowned stud farm, registered in Mediterraneo. RESPONDENT operates a race horse stable in Equatoriana and is famous for their broodmare lines.

21st March 2017	RESPONDENT sent CLAIMANT an invitation to offer for 100 doses of frozen semen from Nijinksky III.
24th March 2017	CLAIMANT submits its offer for the unusual demand of 100 doses stating its conditions and prohibitions.
28th March 2017	RESPONDENT expressed its intention for a long-term relationship and requested lowered costs and a DDP. The proposed law was that of Mediterraneo and jurisdiction of the courts of Equatoriana.
31st March 2017	CLAIMANT submitted the revised cost accounting for the DDP delivery and declared the intention to not take any further risks in delivery terms. CLAIMANT expressed an intention for arbitration in Mediterraneo if jurisdiction of the Mediterranian courts was unacceptable.
12th April 2017	Ms. Julie Napravnik and Mr. Chris Antley, the negotiators for the PARTIES met with a car accident.

6th May 2017	The PARTIES finalised and adopted the Frozen Semen Sales Agreement (hereinafter, "AGREEMENT") including the hardship clause and the law to be followed.
20th May 2017	First shipment of 25 doses was delivered as per schedule.
3rd October 2017	Second shipment of 25 doses was delivered as per schedule.
November 2017	CLAIMANT'S State imposes 25% tariffs on all agricultural products from RESPONDENT'S State.
December 2017	RESPONDENT'S State implements a 30% retaliatory tariff on selected goods from CLAIMANT'S State.
20th January 2018	CLAIMANT discovered that the new tariff is applicable on the frozen semen shipment increasing the cost for the last shipment and diligently reached out to RESPONDENT regarding the burden of the additional costs.
21st January 2018	RESPONDENT assured that a fair agreement will be reached and urged to send the shipment as planned in interest of future business.
12th February 2018	CLAIMANT confronted the RESPONDENT with regard to discovery of breach of resale prohibition and is met with aggression from the CEO who terminated the negotiation. From this point on, RESPONDENT has refused to make any further payments.

SUMMARY OF ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS THE JURSIDICTION AND POWER TO ADAPT THE CONTRACT.

CLAMANT basis its argument on the PARTIES intention which is evident from the pre-contractual negotiations, the HKIAC's guidelines and the principles of international commercial arbitration. The law of Mediterraneo governs the arbitration agreement. PARTIES never agreed that Danubian law shall govern the arbitration agreement. Furthermore, Danubia was to only act as a neutral venue and not as the juridical seat. However, even if the Danubian law is to apply, Tribunal is not barred from adapting the AGREEMENT. Also, the Rule of Parole Evidence and the Four Corners Rule are inapplicable.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING.

CLAIMANT is entitled to submit evidence from the other arbitration proceeding even if it is confidential or hacked. CLAIMANT is not bound by any confidentiality by virtue of the doctrine of privity. Furthermore, HKIAC empowers the parties to admit evidence to protect their rights. The Tribunal exercises discretion in deciding the admissibility and relevance of evidence and the same is within international practice. Moreover, the source of the evidence is immaterial and has no bearing to the present dispute. Furthermore, if need be, the Tribunal may join the two proceedings as both arbitrations are governed by the HKIAC Rules.

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD RESULTING FROM AN ADAPTATION OF PRICE

CLAIMANT is entitled to the additional amount of 1,250,000 USD after price adaptation to account for the additional tariffs imposed on the final shipment of 50 doses of the horse semen. The unexpected imposition of tariffs resulted in hardship which calls for an adaptation of price for the last shipment as per clause 12 of the AGREEMENT. Furthermore, CLAIMANT submits that Art. 79 CISG also provides for the adaptation of price. The same principle is embodied in the UNIDROIT Principles. Thus, the price of the shipment must be adapted to account for the 30% increased tariffs and the additional amount of 1,250,000 USD must be repaid to CLAIMANT.

ARGUMENTS ON PROCEDURE

I. THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND POWER TO ADAPT THE CONTRACT.

1. The Tribunal has the exclusive jurisdiction and the powers to adapt the contract. CLAIMANT submits that, *firstly*, the law of Mediterraneo governs the arbitration agreement as the pre-contractual negotiations must be read into the AGREEMENT **(A).** *Secondly*, even if Danubian Law is to apply, the Tribunal is not barred from an adaptation of the contract **(B).** *Thirdly*, the AGREEMENT and the post-contractual communication is immune to Danubian Law **(C)**.

A. THE PRECONTRACTUAL NEGOTIATIONS SHALL BE READ INTO THE AGREEMENT.

2. CLAIMANT submits that: *Firstly*, the pre-contractual negotiations held between the PARTIES indicate that the Law of Mediterraneo shall govern the Sales Agreement and the arbitration clause therein **(1)**. *Secondly*, the HKIAC affirms that in its model clause, in the absence of an express choice of the law of the arbitration, law governing the underlying contract shall apply **(2).** *Lastly*, the standard in international commercial arbitration is to apply the substantive law of the contract to the arbitration agreement where no express choice contrary to that effect is made **(3).**

1) <u>The pre-contractual negotiations show that the PARTIES agreed that the Law of Mediterraneo shall govern the contract and the arbitration clause therein.</u>

3. CLAIMANT and RESPONDENT in their communications had agreed that the Mediterranean law shall govern the arbitration agreement and its interpretation.
4. The PARTIES are bound by the writings, negotiations and all such agreements out of which the final contract arises [*Ferrario, p. 139-140*].
5. When the Arbitral Tribunal is not able to conclusively gather the intent of the parties, the practice is to read the pre-contractual negotiations with the contract to ascertain the real intent of the parties [*Stellard Pty Ltd v. North Queensland Fuel Pty Ltd; Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*].
6. One of the essential terms for CLAIMANT was that law of Mediterraneo applied to the AGREEMENT [*CE 5, para 4, p. 11*; *RE 2, para 4 p. 34*]. This was reduced into a stipulation in Clause 14 of the AGREEMENT [*CE 5, p. 14*].
7. The proposal of making the law of the place of arbitration to be the law governing the arbitration clause was never communicated to CLAIMANT expressly. Moreover, CLAIMANT envisioned the 'seat' only to be the venue for conducting the arbitration proceedings. This is evident from the fact that CLAIMANT'S creditors committee allows arbitration proceedings to be conducted only in a neutral country (herein 'Danubia') unless with prior approval [*PO 2, para 7, p. 56*; *RE 2, para 4,*

p. 34]. The same is confirmed further as RESPONDENT had agreed to the proposal of Ms. Napravnik suggesting that Danubia be a neutral venue in her e-mail of 11 April 2017 [*PO2, para. 14, p. 36*; *RE 2. para. 4, p. 35*].

8. Finally, RESPONDENT through the witness statement of Julian Krone affirms that Danubia was to act only as a neutral venue and not the juridical seat [*RE 3, para 3, p. 35*].
9. Hence, the law of Mediterraneo is the governing law of the arbitration agreement, and Danubian law cannot be used to interpret the arbitration agreement.

2) <u>The HKIAC affirms that in its model clause, in the absence of an express choice of the law of the arbitration, law governing the underlying contract shall apply.</u>

10. In the absence of an express choice of the law of the arbitration agreement, the law applicable to the underlying contract shall apply.
11. The HKIAC Model Clause indicates that the arbitration agreement shall be understood to be governed by the law governing the contract where there is no express mention of the law of the arbitration.
12. The law applicable to the arbitration agreement depends upon which institution's model clause and rules are adopted by the parties. In disputes regarding the law of the arbitration agreement, the arbitrators have interpreted the provisions of the contract in view of the recommended clauses and rules applicable therein to the arbitration to reach to a conclusion [*BCY v. BCZ*].
13. In recognition of the problem as to which law governs the arbitration agreement, HKIAC has added an option in its model clause with such wording which allows the parties to select the law governing the arbitration agreement expressly.
14. The provision reads, 'The Law of this Arbitration Clause shall be …'. HKIAC specifies that such provision mentioning the law which governs the arbitration agreement should be included particularly where the law of the substantive contract and the law of the seat are different.
15. In the present case, the PARTIES had adopted the verbatim language of the HKIAC Model Clause for the arbitration agreement. However, PARTIES failed to insert the sentence concerning the law applicable to the arbitration agreement for unknown reasons [*PO 2, para 5, p. 55*]. As a result, the AGREEMENT does not expressly mention the law governing the arbitration agreement [*CE 5, Clause 15, p. 14*]. In such a case, the HKIAC Model Clause indicates that the law governing the contract shall also be the law governing the arbitration.
16. In the absence of such an express provision, clearly pointing to the law of arbitration, the Danubian law cannot be taken as the law governing the arbitration agreement as the law elected for the underlying contract is the law of Mediterraneo.

17. Hence, the Mediterranean law, which is the governing law of the underlying contract will also be the law governing the arbitration agreement.

3) <u>The standard in international commercial arbitration is to apply the substantive law of the contract to the arbitration agreement where no express choice contrary to that effect is made.</u>

18. The threshold assessment to determine the governing law of an arbitration agreement is to be determined through the following test: Firstly, the parties' express choice. Secondly, the parties' implied choice at the time of contracting. Thirdly, the system of law with which the arbitration agreement has the closest and most real connection [*Sulamérica Cia Nacional de Seguros SA and Ors v. EnesaEngenharia SA and Ors*].
19. PARTIES had made no express provision regarding the law governing the arbitration agreement. CLAIMANT, following the standard set in *Sulamerica* case submits: PARTIES' implicit choice for the law of the arbitration agreement is the Mediterranean law **(a)** and the Mediterranean law has the most real and close connection to the arbitration agreement **(b)**.

a. PARTIES' implicit choice for the law of the arbitration agreement is Mediterranean law.

20. In the absence of an express choice, the implicit choice of law of arbitration agreement shall be the law governing the underlying contract.
21. The principle in international commercial arbitration is that where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will be governed by the body of law expressly chosen to govern the substantive contract [*Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd; Svenska Petroleum Exploration AB v. Lithuania*; *Peterson Farms Inc. v. C&M Farming Ltd*; *Tonicstar Ltd v. Am. Home Assur. Co.; Arsanovia Ltd v. Cruz City*; *Final Award in ICC Case No. 6752*].
22. The *Sulamerica* approach takes the law of the contract as its starting point, where the arbitration agreement forms a part of the contract. The parties in such cases are deemed to have intended the same law to govern both the arbitration agreement and the underlying contract unless an express choice for the law of the arbitration is made.
23. Furthermore, the seat of the arbitration was held to be "overwhelmingly significant" only in cases where no substantive law was chosen for the underlying contract.
24. The Singaporean jurisprudence has affirmed that the governing law of the contract is a reliable indicator of the governing law of the arbitration agreement. The choice of a different seat from that of the governing law is not, in itself, sufficient to displace this presumption. If the parties had

intended otherwise then, specific provision should have been made for a different law to apply [*BCY v. BCZ*].

25. The law governing the arbitration agreement can be different from that of the contract. It is equitable to deem that in the absence of an express choice to the contrary effect, the parties intention is that their relationship should be governed by the same system of law [*Sulamérica Cia Nacional de Seguros SA and Ors v. EnesaEngenharia SA and Ors; Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd*; *Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG*; *Sonatrach Petroleum Corporation v. Ferrell International Ltd*].
26. The proper law of the arbitration agreement would thus, typically be the same as the substantive law of the contract [*Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission*; *Leibinger v. Stryker Trauma; Dicey, Morris, and Collins*; *Mustill and Boyd*].
27. In the case at hand, during the negotiations on electing the applicable law and arbitral forum, RESPONDENT agreed that the Mediterranean Law would apply on the AGREEMENT while the dispute shall be resolved via arbitrations conducted by the HKIAC. Moreover, CLAIMANT only envisaged Danubia to be a neutral venue for the instant arbitral proceedings [*PO 2, para. 14 p. 56*].
28. Therefore, the law chosen by the parties to govern the contract is an implicit choice for the law governing the arbitration clause as the arbitration clause is only one of the many clauses in the contract.

b. In the alternative, applying the closest connection test, the law of Mediterraneo should apply to the arbitration agreement.

29. The Mediterranean law has the most real and close connection with the arbitration agreement.
30. When there is no express or implied choice of law, the arbitration agreement will be governed by the law with which the agreement has its closest and most real connection, that is, the Mediterranean law governing the contract since the arbitration agreement is considered to be the "part of the substance of the underlying contract" [*Mustill & Boyd*].
31. The English Commercial Courts have held that when referring to the third stage of the *Sulamérica* test, to find the law having most real and close connection to the parties and the contract, the terms of the arbitration agreement should be given the utmost importance.
32. Where the law of the arbitration was yet to be clarified, RESPONDENT cannot take the benefit of the doubt by referring to the provision mentioning that Danubia shall be the seat of the arbitration.
33. More so, it was abundantly clear to the PARTIES that Danubia was a neutral venue and AGREEMENT had nothing to do with the law of the place of arbitration [*RE 3, para. 3, p. 35*].

34. Therefore, applying the closest connection test to the circumstances in this case, in the absence of an express choice of the law governing the arbitration agreement, the AGREEMENT has the closest connection to the law of Mediterraneo.

B. EVEN IF THE DANUBIAN LAW IS TO APPLY, THE TRIBUNAL IS NOT BARRED FROM ADAPTING THE CONTRACT.

35. In the arguments that follow, CLAIMANT establishes that: *Firstly*, the arbitration clause is broadly worded and hence, must not be restrictively read **(1)**. *Secondly*, adaptation of the contract is the preferred recourse in international commercial arbitration **(2)**. *Thirdly*, the absence of an adaptation clause in the sales agreement shall not bar adaptation **(3)**. *Lastly*, the doctrine of separability does not apply to the present case.

1) The arbitration agreement must not be restrictively read.

36. This Tribunal can adapt the AGREEMENT as the arbitration clause is broad enough to encompass the issue of adaptation.

37. The fundamental principle in international commercial arbitration is that the phrase 'any dispute' extends to all disputes having any plausible factual or legal relation to the parties' agreement or dealings [*Brunner, p. 457*]. The word 'dispute(s)' in an arbitration agreement encompasses a broad jurisdiction [*Woolf v. Collis Removal Service*; *Bechtel Do Brasil Construcoes LTDA v. UEG Araucaria LTDA; Tadeusz Kowalewski v. Rudolf Samandarov; Energy Transp., Ltd v. MV San Sebastian*].

38. Further, the phrase "arising out of" is a linking word which is also crucial in any dispute as to the scope of an arbitration agreement. A broad meaning has been given to it, and this form of words will embrace all disputes capable of being submitted to arbitration [*Ethiopian Oilseeds Pulses Export Corp v. Rio Del Mar Foods*].

39. If it is established that an arbitration clause exists, there is no reason to interpret that clause restrictively and it must instead be deemed that the 'parties wish for an embracing jurisdiction of the arbitral tribunal, given that they have concluded an arbitration agreement' [*Sonatrach v. K.C.A. Drilling Ltd; T. Rüede & R. Hadenfeldt, Schweizerisches Schiedsgerichtsrecht*].

40. Moreover, even a narrow arbitration clause must be construed in light of the presumption in favour of arbitration and in case of doubt, an arbitration clause is not to be interpreted restrictively, but rather extensively [*Chevron U.S.A., Inc. v. Consolidated Edison Co.*].

41. The adaptation of the contract is an issue relating to the interpretation and the performance of the obligations outlined in the contract [*ICAC Case No. 252/2010*]. Such a dispute shall be deemed to be arbitrable, wherein the arbitral tribunal shall have the powers to resolve such dispute [*Mineral Park Land Company v. P.A. Howard*, *172 Cal 289 (1916), 293; Harry M. Flechtner*, *p. 4*].

42. In the present case, the arbitration clause contains phrases which have been held to be broad enough to encompass any issue. There is also no issue with regards to the validity of the agreement.
43. The allegation raised by RESPONDENT that "disputes arising out of this contract" is a narrowly worded term is contrary to the well-settled principles [*Notice of Arbitration, para. 16, 17, p. 32*].
44. Hence, PARTIES have given exceptional powers to this Tribunal to adapt by incorporating a broadly worded arbitration clause in AGREEMENT.

2) <u>Adaptation of the contract is the preferred remedy in international commercial arbitration.</u>

45. The international practice is to adapt the contract.
46. The adaptation of the contract price as against commercial hardship is a preferred recourse for burdened parties in international commercial arbitrations [*Wegfall der Geschäftsgrundlage*].
47. The German law allows a decision *ex aequo et bono* and gives the arbitrator the exclusive jurisdiction [*N. Horn, Aequitas in den Lehren des Baldus, para. 15.3*]. International conventions on arbitration provide for the possibility that arbitrators may decide *ex aequo et bono*, if the parties expressly so agree [*N. Horn, Aequitas in den Lehren des Baldus, para. 15.3*]. Such provisions are found in the European Convention of 1961 as well as in the arbitration rules of ICSID (1965), UN ECE (1966), ICC (1975) and UNCITRAL (1976) [*ECCA, Art. VII.2; ICC Arbitration Rules; UNCITRAL Arbitration Rules*].
48. The courts have preferred adaptation of the contract to alter the price when parties failed to renegotiate upon the occurrence of unforeseen events altering its balance [*Electricitè de France v. Shell France; Novacarb v. Socoma; A.H. Puelinckx*].
49. The principle of commercial impracticability has been recognised by courts [*Mineral Park Land v. P.A. Howard; Scafom International BV v. Lorraine Tubes*]. The arbitrators have the power to adapt the contract when it becomes unbalanced and adjust the price according to the severity of the hardship [*Cosarma v. Agip; OfficinaMeccanica di Crosta Mario v. Tintorie Milano di Cozzi & C; M Fontaine*, *'Les clauses de hardship (1976)*].
50. In the present case, adaptation is the most convenient mechanism to settle the dispute as CLAIMANT has already performed its contractual obligations relying upon RESPONDENT'S assurance to find a solution to the instant problem [*CE 8, para. 3, p. 18*].
51. The termination of the contract, being the other alternative, would be prejudicial to the interest of CLAIMANT for it paid the import duty in utmost good faith. Moreover, termination of contract is not possible considering the perishable nature of the frozen semen and the reports of RESPONDENT having begun the use of doses delivered to them [*PO 2, para. 20, p. 57*].

52. Hence, the preferred remedy in international commercial arbitration of adapting the contract should also be employed in the present case.

3) <u>The absence of an explicit adaptation clause does not bar adaptation.</u>

53. The existence of an adaptation clause is not a prerequisite for adaptation of the AGREEMENT.
54. The tribunal can adapt the contract even without an express mention of the adaptation clause [*Ferrario, p. 139*].
55. In international arbitration, irrespective of the non-existence of an adaptation clause, the arbitrators can choose to depart from the sanctity of contract doctrine when the occurrence of unforeseen events alters the contractual balance [*Ferrario, p. 140; Timegate Studios v. Gamecock Media Group*].
56. It is the case of CLAIMANT that the arbitration agreement is worded broadly enough to encompass the issue of adaptation in situations of commercial hardship. Hence, the non-existence of an explicit adaptation clause should not restrict the Tribunal to adapt the AGREEMENT.

4) <u>The doctrine of separability does not apply to the present case.</u>

57. Doctrine of separability is a presumption and the parties may negate the same with their intention [*Born p. 135*].
58. In international commercial trades, the separability presumption is derived from the expectations of reasonable commercial parties, whose intentions are often implied [*Mayer, p 359-360*].
59. The legislative provisions in many jurisdictions including Danubia and Mediterraneo, recognize, but do not dictate the separability presumption [*Art. II and V(1)(a) of the New York Convention, Art. 7 and 16 of the UNCITRAL Model Law and sections 2, 3 and 4 of the FAA*].
60. The doctrine of separability is invoked in cases where there is a question regarding the validity, non-existence, illegality, or termination of their underlying contract [*Symeonides, p. 472; Born, p. 398*].
61. In the case at hand, PARTIES never agreed to have a separate agreement regarding arbitration. The PARTIES always referred to AGREEMENT as containing the arbitration clause. It is evident from the fact that PARTIES during negotiations and also in the AGREEMENT, mentioned choice of law clause in the favour of law of Mediterraneo to govern the AGREEMENT [*CE 3, para. 3, p. 11; CE 5, para. 14, p. 14*].
62. The limited importance given to arbitration agreement signifies that the PARTIES did not believe in separating the arbitration clause from the main contract and treat it differently. If so desired, PARTIES would have added a separate clause mentioning the same.
63. Similarly, the PARTIES intended Danubia only to be the venue of arbitration and not the juridical seat [*PO 2, para. 7, p. 56, RE 2, para. 4, p. 34*]. Therefore, the question of the application of

Danubian law doesn't arise. Furthermore, RESPONDENT has raised no objection as to the validity of AGREEMENT.

64. Hence, in absence of alternatives thereto, the doctrine of separability is inapplicable as it is only a presumption and PARTIES did not intend to treat arbitration agreement separately from AGREEMENT.

C. THE AGREEMENT, INCLUDING THE POST CONTRACTUAL COMMUNCATION IS IMMUNE TO THE PRINCIPLES OF THE DANUBIAN LAW.

65. CLAIMANT shall establish that the presence of the Four Corners Rule and the Rule of Parole Evidence are the two differences between the Danubian contract law and the Mediterranean contract law as both the countries otherwise have adopted the UNIDROIT Principles. Further, CLAIMANT shall show that the case at hand is immune to the said rules.
66. The Four Corners Rule and the Rule of Parole Evidence are not applicable to the present case.
67. The Danubian contract law is a largely verbatim adoption of the UNIDROIT Principles (i.e., the Mediterranean contract law) on international commercial contracts with two exceptions. Firstly, Art. 2.1.17 which in substance envisages the Four Corners Rule through a merger clause replaces Art. 4.3. Secondly, Art. 6.2.3 (4)(b) in relation to the adaptation of the contract is worded as the court 'shall adapt the contract only if authorized to do so'.
68. As long as, Art. 2.1.17 of the Danubian contract law is concerned, it provides that 'a contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements can be used to interpret the writing'.
69. The effect of this provision is that where a merger clause is added to the contract, the court can only admit documents when used to interpret the intention drawn from the contract. However, the effect of such a clause is not to deprive prior statements or agreements of any relevance [*Official Commentary on UNIDROIT Principles, p. 64*].
70. A merger clause covers only prior statements or agreements between the parties and does not preclude subsequent informal agreements between them. This article, indirectly, confirms the principle set out in Art. 1.2 of the UNIDROIT Principles in the sense that, in the absence of a merger clause, extrinsic evidence supplementing or contradicting a written contract is admissible [*Official Commentary on UNIDROIT Principles, p. 64*].
71. The Four Corners Rule requires an express stipulation in the contract giving effect to the final embodiment of the rights and liabilities of the parties involved with no scope of change arising

out of any of the previous negotiations. E.g., a merger clause could be worded as – 'this contract contains the entire agreement between the parties'.

72. In the current case, AGREEMENT has no express stipulation as to the inclusion of a merger clause. There exists no such stipulation expressly finalizing the agreement between the parties and barring any evidence from the negotiations leading to the contract.
73. In absence of a merger clause in AGREEMENT, CLAIMANT is not barred from presenting all such documents and writings which were a part of the negotiations leading to the finalisation of AGREEMENT. Therefore, the Rule of Parole Evidence is not attracted to the present case.
74. Even if the Tribunal finds a merger clause in the given arrangement, the Four Corners Rule does not bar CLAIMANT from submitting the documents to gather the intention in AGREEMENT. AGREEMENT precisely points out in Clause 12 that the seller shall not be responsible for unforeseen circumstances causing the performance of the contract to be excessively burdensome [*CE 5, para. 12, p. 14*].
75. More so, an existence of a merger clause does not preclude agreements made after the signing of the contract. RESPONDENT, through Mr. Shoemaker had asserted to CLAIMANT that they were sure that a solution would be found for the commercial hardship caused by the imposition of the retaliatory customs tariffs. The intent of the PARTIES was to adapt the contract [*CE 8, para. 3, p. 18*].
76. Thus, CLAIMANT submits that the adaptation of AGREEMENT is protected irrespective of the Tribunal finding a merger clause or not. The law being adopted does not bar the Tribunal's power to adapt.

CONCLUSION TO ISSUE I.

The Tribunal has the exclusive jurisdiction and the powers to adapt the contract. The law of Mediterraneo governs the arbitration agreement as the pre-contractual negotiations must be read into the AGREEMENT. PARTIES never agreed, not even impliedly, to Danubian law to govern the arbitration agreement. However, even if the Danubian law is to apply, the Tribunal is not barred from adapting the contract. Lastly, AGREEMENT including the post contractual communication is immune to the principles of the Danubian law.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

77. RESPONDENT is a party to another arbitration, where it had asked for an adaptation of price due to an unanticipated change in circumstances, having a detrimental effect on it [*PO 1, p.49*]. CLAIMANT highlights the contradictory stand of RESPONDENT in justifying an adaptation on the basis of an additional tariff of 25% and in denying the adaptation of price in an even more unforeseeable increase of 30% when it negatively impacts RESPONDENT [*CE 6, p.15*].
78. CLAIMANT seeks to admit this information in the present arbitral proceedings. RESPONDENT claims that the information cannot be made admissible as it violates confidentiality [*PO 1, p. 51*].
79. CLAIMANT is entitled to submit evidence from the other arbitral proceedings as *firstly,* confidentiality is not applicable to CLAIMANT **(A)**. *Secondly*, HKIAC Rules empower CLAIMANT to submit evidence to protect its legal rights **(B)**. *Thirdly*, the source of the evidence is immaterial to its admittance **(C)** and *lastly* if the need be, the Tribunal can consolidate the two arbitrations **(D)**.

A. CONFIDENTIALITY IS NOT APPLICABLE IN THE PRESENT DISPUTE

80. CLAIMANT is not a party to the other arbitration and is not governed by the principle of confidentiality in the present case.
81. Confidentiality obligations are derived from the agreement of the parties to arbitrate [*Born II*].
82. CLAIMANT is a *third party* with respect to the other arbitration in which RESPONDENT is engaged. Any confidentiality agreement is only applicable to the parties in the other arbitration.
83. CLAIMANT is not bound by confidentiality as *first,* the doctrine of privity puts it outside the purview of confidentiality **(1)**. *Second*, the doctrine of confidentiality is not essential for admitting the evidence **(2)**.

1) <u>The doctrine of privity puts CLAIMANT outside the purview of confidentiality.</u>

84. CLAIMANT does not fall within the scope of confidentiality by virtue of it not being a party in the other arbitral proceedings.
85. CLAIMANT is not bound by the implied confidentiality as per Art. 45 of the HKIAC Rules.
86. The doctrine of privity provides that only a party to a contract can acquire rights or be subjected to liabilities under it with very limited exceptions [*Brekoulakis, Lew and Mistelis*].
87. The doctrine of privity of contract recognised in both civil and common law jurisdictions is applicable only to the parties to an agreement [*Dunlop v. Selfridge*]. Only a signatory to a contract is thus bound by express or implied confidentiality pertaining to the agreement.
88. The consensual nature of an agreement does not extend to parties foreign to a contract or to third parties [*Case No. A40-56769/07-23-401*]. Any confidentiality provisions in the parties' arbitration

agreement are binding only on the parties themselves, and not on third parties [*Esso Australia v. Plowman*].

89. In the present case, CLAIMANT is neither a party to the contract between RESPONDENT and the other party nor is it a part of the other arbitral proceedings. Any matter of confidentiality has no bearing on CLAIMANT's conduct. CLAIMANT being a foreign element with respect to the other arbitration, is outside the ambit of confidentiality of that arbitration.
90. Neither the terms of the arbitration agreement or national law nor the New York Convention extend the effects of a confidentiality provision to non-parties. Thus, making CLAIMANT fall beyond its purview.

2) <u>The doctrine of confidentiality is not essential for the admittance of the evidence.</u>

91. Confidentiality is used to refer to the parties' asserted obligations not to disclose information concerning the arbitration to third parties [*Born, p. 2782*].
92. Third parties are free to disclose materials from arbitral proceedings provided to them without separate confidentiality restrictions. Seeking compulsory disclosure of materials produced in or in connection with arbitral proceedings from the parties to those proceedings is also allowed without being restricted by confidentiality provisions [*Lawrence Pension Plan v. Household Int'l, Inc.; Urban Box Office Network v. Interfase Managers*]. Parties revealing their own case is also within the "spirit of confidentiality" [*Amco v. the Republic of Indonesia*].
93. Thus, the parties' agreement to treat an arbitration as confidential is not decisive with regard to the obligations of the parties to an arbitration agreement. The existence of a confidentiality agreement does not shield the arbitration from compelled disclosure to third parties.

B. THE HKIAC RULES EMPOWER THE PARTIES TO ADMIT EVIDENCE TO PROTECT THEIR RIGHTS.

94. PARTIES agreed that the Tribunal would conduct the proceedings in accordance with the HKIAC Rules [*CE 5, p. 14; PO 1, para. 2, p. 51*].
95. CLAIMANT can submit the evidence because: *Firstly*, the Tribunal is empowered to peruse evidence which the parties bring to protect their legal rights **(1)**. *Secondly,* the Tribunal should exercise its discretion in admitting the evidence **(2)**. *Lastly,* international practice supplements the Tribunal's authority to do the same **(3)**.

1) <u>AGREEMENT between the PARTIES empowers CLAIMANT to submit the disputed information.</u>

96. Art. 45.3 of the HKIAC Rules provides that disclosure of an award 'may be required to protect or pursue a legal right or interest' and to a professional or any other adviser of any of the parties, including any actual or potential witness or expert.

97. Pursuant to HKIAC Rules and Art. 19(2) UNCITRAL Model Law, Tribunal should conduct the arbitration proceedings in accordance with the parties' agreement. To the extent that the parties have not found an agreement, arbitral tribunal should conduct the proceedings in the manner it deems appropriate. Both, the HKIAC Rules and the UNCITRAL Model Law lack specific provisions regarding the admissal of evidence [*Broches, Art. 19, para. 15; Haugeneder/Netal II, para. 3 et seq.*].
98. Parties are persuaded to do everything to ensure a fair arbitration [*Art. 13.5, HKIAC Rules*]. It is the Tribunal's discretion to apply strict rules of evidence or any other rules to the admissibility, relevancy and weight of any material tendered by a party on any issue. It is at the behest of the esteemed Tribunal to decide on the matter of admissibility [*Art. 22.2, HKIAC Rules*].
99. Where a party is denied the opportunity to be heard in a meaningful manner the award rendered by the Tribunal becomes unenforceable [*Art. V (1)(b) NYC; Qingdao v. P and S; Iran Aircraft v. Avco*].
100. CLAIMANT is protected by the HKIAC rules to submit a copy of the PIA as this will ensure not only being heard in a meaningful manner but also would ensure a fair arbitration altogether.
101. Thus, the Tribunal exercises jurisdiction through the AGREEMENT of the PARTIES to arbitrate under the HKIAC Rules to allow submission of the contested evidence to ensure protection of legal rights.

2) <u>The Tribunal should exercise its discretion to admit the evidence.</u>

102. The Tribunal determines the admissibility, relevance, materiality and the weight of the evidence including whether to apply strict rules of evidence. Tribunal may at any time require or allow a party to produce documents that the Tribunal determines to be relevant to the case and material to its outcome [*Art 22, HKIAC Rules*].
103. Tribunals have broad authority with respect to evaluating evidence regarding disclosure or discovery of relevant materials [*Art. 19 (2), UNCITRAL Model Law,*]. Furthermore, tribunals are also empowered to seek judicial assistance in taking evidence [*Art. 27, UNCITRAL Model Law*].
104. The arbitrators have express authority to order either party or a third party to produce evidence in the arbitration proceedings [*Born, p. 2325*].
105. Even if the requested documents are essential to the interest of RESPONDENT and their confidentiality is paramount, Tribunal is still entitled to order the production of such documents accompanied by a protective order. Protective orders preserve confidential information from being disclosed by redacting parts of the text [*Born, p. 2388; Smeureanu, p. 171 et seq.; Zuberbühler/Hofmann/Oetiker/Rohner, Art. 9, para. 53*]. The explicit duty of confidentiality would oblige the party to keep the information secret and only use it during the present proceedings [*Lee, para. 172; cf. Redfern/Hunter, para. 2.161*].

106. In the dispute in hand, it is within the Tribunal's discretion to entertain and admit the evidence either wholly or if it so deems, with the issuance of a protective order, as the inclusion of the evidence will substantiate the CLAIMANT' s stance.

107. Admitting the evidence is at the sole discretion of the Tribunal where measures are in consonance with the international practice. [*Art. 9 (4), IBA Rules*]. Thus, the Tribunal must admit the contested evidence.

3) <u>International practice supplements the Tribunal's authority to admit evidence which the parties bring to protect their legal rights.</u>

108. The Tribunal derives additional power to admit evidence which the parties seek to protect their legal rights from; *Firstly* the IBA Rules of Evidence **(a)**, and *secondly* from other institutional rules and arbitrations in other jurisdictions **(b)**.

a. The IBA Rules supplement Tribunals discretionary power to admit evidence

109. The IBA Rules reflect international practice on the taking of evidence [*Kreindler, p. 157; Marghitola, p. 34; Redfern/Hunter, para. 6.95; Welser/De Berti, p. 80; cf. Born, p. 2347 et seq.; El-Ahdab/Bouchenaki, p. 98*] and are frequently used [*Born, p. 2348; Hill, p. 9; Marghitola, p. 33; Müller, p. 78; Veeder, p. 321*].

110. The IBA rules of evidence are designed to supplement the legal provisions and the institutional rules that apply to the conduct of arbitration, they fill in gaps intentionally left in the procedural framework rules with respect to taking of evidence [*IBA Commentary*].

111. A party who may be in possession of evidence from a third party outside the arbitration may use it [*Article 3 (2), IBA Rules*]. The party requesting to admit such confidential documents is to provide to the tribunal the reasons for which such documents are relevant to the case and are material to its outcome [*Art. 3.3, IBA rules*]. A party thus, may take any step which is necessary or appropriate to obtain documents from any person or organisation [*Art. 3.10, IBA Rules*].

112. The relevancy of the material that CLAIMANT wishes to submit to the Tribunal lies on the fact that RESPONDENT in that other arbitration is itself asking for an adaptation of the price, invoking an unforeseeable change of circumstances, whereas in the present proceeding it is denying any need to adapt.

113. Thus, the Tribunal must exercise its discretion in deciding on the admissibility of alleged confidential documents [*Art. 9(2) (e) IBA rules; Muller, p. 71; Perkins, p. 273*] with reference to the IBA rules on evidence, which supplement existing rules and laws and provides guidance where little or none exists [*Park, SDLR, p. 676; Armbrüster/Wächter, p. 216*].

b. Other institutional rules and other jurisdictions give power to Tribunal to admit evidence

114. If a party has a legitimate interest in obtaining information not intended for the public eye, the tribunal can nonetheless disclose the information to protect the legitimate interest [*Milsom & Standish v. Outen & Ablyazov; Myanma v. Win; Quinto/Singer, p. 205*].
115. Any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties [*Esso Australia v. Plowman*].
116. Arbitral Proceedings are not only discoverable but are also admissible. Thus, there should be no order to grant protection of such documents [*United States v. Panhandle Eastern Corp.*].
117. The LCIA Rules grant a number of additional powers to tribunals with respect to admitting documents and such materials which are deemed relevant, joining of parties as well as compliance. [*Art. 22.1, LCIA Rules*]. Tribunals are to establish facts of the case "by all appropriate means" [*Art. 20(1), ICC Rules*]. This includes the competence of the tribunal to order one party to introduce certain documents, including internal documents into the arbitral proceedings.
118. The opposing party in the other arbitration has information which CLAIMANT requests the Tribunal to admit. That party is a third party with respect to the present arbitral proceedings before the Tribunal. This warrants CLAIMANT to use evidence for its submission which is in possession of a third party outside arbitration. The admittance of the contested material in the on-going arbitration is within the power of the Tribunal.
119. CLAIMANT calls for the admittance of such information for the reason that RESPONDENT's motives and respect towards the arbitration proceedings are not in line with the principles of international trade.

C. THE SOURCE OF THE EVIDENCE HAS NO BEARING IN THE ARBITRAL PROCEEDING.

120. CLAIMANT is entitled to rely on the evidence irrespective of its source as the right to be heard is a fundamental principle which acts as a procedural safeguard for a fair proceeding [*Baldwin, p. 233; Schwarz/Konrad, para. 20-031*].
121. It extends the possibility for each party to present the facts or their views about the case [*Gbangbola v. Smith Sherriff; O'Malley, para. 9.115*]. Additionally, it provides the parties with a possibility to participate in obtaining evidence [*Duarib v. Jallais; Haugeneder/Netal II, para. 17*]. Information that is material to the case and its outcome can be sought by the Tribunal to adjudicate upon the dispute at hand and pass a just and equitable award.
122. CLAIMANT seeks the permission of the Tribunal to allow it to substantially fulfil its obligation of presenting to it, all relevant facts that will facilitate it to arrive at a conclusion that would prove to be fair and would be in the interest of justice. Depriving CLAIMANT of the opportunity to produce the information in dispute is a travesty of justice.

123. If the Tribunal were to deny the admission of evidence, CLAIMANT's right to fair treatment would be violated. CLAIMANT shall show this as, *first* admitting evidence which is confidential is within international practice **(1)**. *Second*, the tribunal can admit evidence, which may be hacked **(2)**.

1) <u>In any case admitting confidential material is within international practice.</u>

124. In private arbitration there exists no implied duty of confidentiality [*Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*]. While the privacy of a hearing should be respected, confidentiality of the same is not an essential attribute of private arbitration [*Esso Australia v. Plowman*].

125. It is the arbitral tribunal which decides which evidence is material and relevant to the case, which may or may not, depending upon the circumstances and the arbitrators include unlawfully obtained evidence [*Sicard-Mirabal and Derains, p. 208*].

126. Here, CLAIMANT's concerns are founded on the ground of contradictory stands taken by RESPONDENT, in both arbitrations.

127. Likewise, a requirement to conduct *in camera* proceedings does not translate into an obligation to a party not to disclose the documents and other information for the purpose of the arbitration [*Esso Australia v. Plowman*].

128. Assuming that the evidence in dispute is confidential it can be admitted within the norms of international practice as *first*, CLAIMANT has approached with clean hands **(a)**. *Second*, the information sought is of overriding interest **(b)**.

a. CLAIMANT has approached the Tribunal with clean hands.

129. The doctrine of clean hands provides that the party seeking to introduce unlawfully obtained evidence must not have played any part in procuring that evidence.

130. The party seeking to introduce the evidence must not participate in the unlawful activity that led to its disclosure, only then is the evidence inadmissible. Here, CLAIMANT is not profiting from its misconduct. Tribunals have also admitted evidence not-withstanding the method of obtaining the same even if it violates sovereignty [*15 XII 49*].

131. CLAIMANT has not taken part in any unlawful activity that led to the discovery of the evidence thus approaching the Tribunal with clean hands.

b. The information sought is of overriding interest.

132. Illegally obtained evidence can be considered in cases of overriding interest. The approach of 'end justifies the means' has been adopted by tribunals [*Alejandro Belmonte v. CONI*].

133. Wiretaps as evidence have also been admitted considering the overriding public interest for the purpose of arriving at a fair decision, by tribunals [*Sivasspor Kulubu v. UEFA*].

134. Arbitrators have wide discretion to decide how important the establishment of truth is in a particular case, especially when the stake is as high as 1,250,000 USD. CLAIMANT respects the time

of the Tribunal and wants it to allow the evidence to understand the true nature of RESPONDENT's intent and conduct towards the proceedings.

135. The material which CLAIMANT seeks to submit is highly relevant for the outcome of the arbitration.

2) <u>In any case evidence which may be hacked has no bearing on its admittance.</u>

136. Tribunals' discretionary power which flows through party autonomy goes on to include emails as well as documents illegally obtained and published on the internet [*Opic Karimum Corporation v. Venenzuela; Kilic v. Turkmenistan*].

137. Wikileaks can be relied on, which publishes hacked documents on its website rendering the same information into the public domain. Such confidential information which has been illegally obtained and published has been relied upon extensively by tribunals to award as much as 50 Billion Dollars in damages [*Yukos Award*].

138. The principle that an international arbitration tribunal can admit emails and documents if the documents were obtained by hacking a computer network has been established across national boundaries [*Caratube International Oil Company v. Kazakhstan*].

139. Assuming that the information in dispute was obtained from a hack of RESPONDENT's computer system, it is within the Tribunal's discretionary prowess to admit such information as is necessary to come to a conclusion. Ignoring glaring evidence and ignoring its existence and discarding its relevance is in itself a travesty to justice [*Dissenting opinion of Prof. Georges Abi- Saab; ConnocoPhillips v. Venezuela*]. Furthermore, inability of RESPONDENT to have an updated firewall [*PO 2, para. 42, p. 61*] for its security purposes should not have a bearing on a just outcome of the arbitration.

140. Thus, it is within the Tribunal's power to admit the evidence.

D. THE TRIBUNAL HAS THE POWER TO CONSOLIDATE ARBITRATIONS.

141. The Tribunal has the power to consolidate two or more arbitrations which are pending before it under the HKIAC rules, upon the request of parties [*Art 28.1, HKIAC*].

142. Before allowing a third party to make a submission, the Tribunal must take into consideration the extent to which the submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties [*Art. 4.3(b), UNCITRAL Rules of Transparency*].

143. Since there is a common question of law or fact in both arbitrations, which is a requisite for consolidation itself, the consolidation of the proceedings would thus result in time and cost effectiveness as well as would help prevent the risk of conflicting decisions.

144. The party in the other arbitration, if need be, may be joined to the proceedings [*Art. 4, UNCITRAL Rules of Transparency*]. The issue that would be determined by the Tribunal relates to

the position of RESPONDENT. If the Tribunal deems it necessary, it may join the other party to the present arbitration as both arbitrations are governed by the HKIAC rules.

CONCLUSION TO ISSUE II

Admitting the evidence is in line with international practice. The requested evidence is relevant for the outcome of these proceedings. Additionally, even if the the documents are confidential or hacked they are admissible as they substantiate the CLAIMANT'S stance. There is no breach of confidentiality by CLAIMANT as it is not bound by any agreement pertaining to the disputed evidence. Finally, if need be, the other party may be joined to the present arbitration proceedings as both are governed by the HKIAC rules.

ARGUMENTS ON MERITS

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD RESULTING FROM AN ADAPTATION OF THE PRICE

145. CLAIMANT is entitled to the additional amount of 1,250,000 USD after price adaptation to account for the additional tariffs imposed on the final shipment of 50 doses of the horse semen. CLAIMANT is exempt from bearing any additional costs under Clause 12 of the AGREEMENT **(A)**; CLAIMANT has the right to retrieve the additional costs under Art. 79 of the CISG **(B)**; and additionally, CLAIMANT is empowered by the UNIDROIT Principles of International Commercial Contracts to claim relief for hardship **(C)**.

A. CLAIMANT is exempt from any additional costs under Clause 12

146. The AGREEMENT was adopted by the PARTIES on 6th May 2017. The PARTIES provided for hardship under Clause 12 of the AGREEMENT. As per the above clause, CLAIMANT is exempt from any additional costs as: Clause 12 of AGREEMENT provides for adaptation of price in cases of hardship **(1)**; RESPONDENT had an explicit duty to act in good faith under Art. 7(1) of CISG **(2)**.

1) Clause 12 of the contract provides for adaptation of price in cases of hardship.

147. Clause 12 of the AGREEMENT relieves CLAIMANT from any additional costs or responsibility in cases of hardship where unforeseen events make the performance of the contract more onerous. [*CE 5, para. 12, p. 14*]

148. Hardship is defined as a fundamental alteration of the contractual equilibrium due to unpredictable changes in the circumstances, "where performance becomes exceptionally and unexpectedly burdensome for the obligor" [*Brunner, p 401; Cf ICC 1512, 1971*]. Hardship can only be found if the performance of the contract has become *excessively* onerous [*ICC Hardship Clause 2003, para. 2(a); Joseph Perillo*] or, in other words, if the equilibrium of the contract has been fundamentally altered [*PICC, Art. 6.2.2.*]. The concept of hardship relates to situations where after the conclusion of the contract the surrounding circumstances change dramatically so as to make performance of the contract appear overly burdensome for the debtor [*Ingeborg, para. 42, p. 82*].

149. Under Clause 12 of the AGREEMENT, seller is not responsible for an increased burden causing hardship due to change of circumstances making their obligation more onerous.

150. The imposition of tariffs increased the cost of shipment by 1,500,000 USD for CLAIMANT causing hardship. Clause 12 of the AGREEMENT was specifically included with an intent to account for such unprecedented changes. It clearly exempts CLAIMANT from any responsibility arising out of such a situation that makes the obligation more onerous and commercially impractical.

151. There is a clear exemption in the AGREEMENT specifically for CLAIMANT to not undertake any additional risks and burdens. The imposition of tariffs that increased the cost of the shipment by

30% is clearly beyond the responsibilities and obligations that CLAIMANT had undertaken at the time of conclusion of the contract. Thus, adaptation of price is implicit under Clause 12 as a recourse to account for the additional costs that resulted from the tariffs.

a. PARTIES had an intention to account for unforeseeable changes.

152. Art. 8(2) CISG clearly states that the intent of a party is to be interpreted through their statements and conduct, as a reasonable person would have understood in the relevant circumstances. Clause 3 of the above article further goes on to state that the term 'conduct' includes the conduct of the parties even after the conclusion of the contract.

153. Art. 8 CISG is concerned with the interpretation of statements and other conduct of parties [*ICC, Arbitral award no. 7331*]. It governs not only the interpretation of unilateral acts of each party but is also "equally applicable to the interpretation of 'the contract', when the document is embodied in a single document" [*United Nations Conference on CISG, Vienna, March-11 April 1980; ICC 1994 Arbitral award no. 7331; Roland Schmidt GmbH v. Textil-Werke Blumenegg AG*]. Parties cannot derogate from their obligations under the contract as *pacta sunt servanda* is a universally binding principle of international commercial law.

154. The insertion of the hardship clause in the AGREEMENT is an explicit indication and *prima facie* fact that the contracting PARTIES were willing to undertake revision of the AGREEMENT, if unpredicted circumstances make performance of the contract excessively onerous for either one of the PARTIES [*U Draetta; PJM Declercq; J Rimke*].

155. The PARTIES had an intention to account for the unforeseeable changes that may impact the costs of the shipments. Clause 12 was included with an aim to account for such changes making the obligations of each party clear. PARTIES had made their intention that CLAIMANT will not bear any additional costs explicit in the contract itself. RESPONDENT cannot deviate from its duty as the principle of *pacta sunt servanda* is applicable.

156. The conduct of RESPONDENT following the imposition of tariffs was such that any reasonable individual in CLAIMANT'S position would perceive an intention to adapt the price. Mr. Shoemaker assured that they will reach an agreement on price as the contract provides for it [*CE 8, para. 2, p. 18*].

157. Therefore, the PARTIES' intention to account for the unprecedented changes by adaptation of the price is unequivocally perceivable in RESPONDENT'S conduct and the same is an obligation under the AGREEMENT.

b. The PARTIES derogation from the ICC clause is reflective of the CLAIMANT'S intention to reduce obligations

158. CLAIMANT is entitled to renegotiations after an unprecedent circumstance renders the obligations of performance of the contract excessively burdensome as per the interpretation of Clause 12 with regard to ICC Hardship Clause 2003.

159. The Force Majeure Clause and the Hardship Clause of the ICC are distinct. When an unexpected, irrevocable instance beyond the control of the disadvantaged party makes performance of the agreement impossible it falls under the ambit of the Force Majeure Clause. In contrast, a situation of hardship arises when the sudden change of circumstances irreversibly alters the economic balance of the parties to the contract, thus making the performance by one of the parties excessively onerous or non-economically viable, even if it is still objectively possible [*U Draetta*].

160. The ICC Hardship Clause 2003 instills a duty on the parties to renegotiate the contractual terms in cases of hardship. As per provision 2 of the above mentioned clause, the disadvantaged party must invoke the clause at the earliest instance when the cause of hardship arises. If the hardship could not have been accounted for, the parties are required to renegotiate the contractual terms to allow for the new circumstances.

161. The Clause now provides one formulation with clear alternative consequences, negotiation or termination, the latter of which would in most cases provide an incentive towards the former. The Clause amalgamates elements of Art. 1467 of the Italian Civil Code and of Art. 6.2.2 of the UNIDROIT PICC [*Notes on ICC Hardship Clause 2003 ICC Force Majeure Clause 2003, para. b, p. 6*].

162. The purpose of the ICC Hardship Clause is to provide a higher level of flexibility and to balance the risk between the parties. The principle of Hardship is particularly influenced by the Common Law and the Equitable Rights of the Anglo-American legal system, to find a balance under the principle of equity and good faith [*Comparison of commonly used Hardship and Force Majeure Clauses May 2017, Newsletter No. 119 (EN)*].

163. As per the rule, CLAIMANT contacted RESPONDENT to renegotiate the terms to account for the additional tariffs [*CE 7, p 16*]. CLAIMANT was assured by RESPONDENT that an agreement on price would be reached and urged for the timely delivery of the last shipment [*RE 4, p 36*]. The ICC Hardship Clause 2003 requires the parties to renegotiate the contract in such cases, but RESPONDENT refused to negotiate after the delivery and acted with *mala fide* intention.

164. The PARTIES chose not to include the ICC Hardship Clause 2003 verbatim as RESPONDENT felt that its scope was too broad. However, the wording of Clause 12 is such that it derives the underlying principles of hardship from the ICC Hardship Clause. It exempts CLAIMANT from any liability arising out of hardship due to additional costs such as tariffs.

165. RESPONDENT clearly depicted a complete disregard to principles of international trade law when it broke off negotiations and refused to pay the additional amount it owed to CLAIMANT. Thus, CLAIMANT is entitled to the additional amount of 1,250,000 USD from RESPONDENT.

2) RESPONDENT had an explicit duty to act with good faith under CISG

166. RESPONDENT was under an obligation to act in good faith as *firstly* Art. 7(1) CISG imposes a duty to act in good faith **(a)** and s*econdly,* the duty to renegotiate in good faith was infracted by RESPONDENT **(b)**.

a. Art. 7(1) imposes a duty on parties to act in good faith

167. Art. 7(1) has a broad interpretation, especially in cases where an unpredictable change in circumstances alters the equilibrium of the parties to the contract. "Good faith is implicit in this doctrine as it requires parties to do not what has been exactly promised, but rather that which is fair and reasonable under the circumstances" [*Mazzcano, Nordic Journal of Commercial Law, Issue 2011 #2, p 3*]. This plays an integral role in determining a party's obligation where the set of the land has considerably changed since the time of the conclusion of the contract. It is against the principles of good faith and fair dealing that the increased tariffs be borne only by CLAIMANT.

168. Renegotiation of the contract is conceived as a way to preserve the *pacta sunt servanda* principle making the adaptation of the contract prevail over its termination [*Garro p.1188. 86 Slater, Florida Journal of International Law Vol.12, 1998-2000, pg.246; Cf. Stephen Kroll p 34*]. The Belgium court in Scafom Case [*Scafom International BV v. Lorraine Tubes S.A.S*] ordered an adaptation of the contract due to the change of circumstaces resulting in hardship. The recourse was the result of the application of the principle of good faith.

169. Renegotiation of the contract is the process by which the principles of *pacta sunt servanda* and good faith are balanced together. The court also stated that the seller's proposal to renegotiate was reasonable. That is why non-acceptance of a price adjustment, and the fact that the buyer was reluctant to negotiate contravened the principle of good faith.

170. RESPONDENT contravened the principles of good faith and fair dealing when it breached the resale prohibition and sold the horse semen to third-parties for greater profits. This conduct points towards the *mala fide* intentions of RESPONDENT [*PO 2, para. 20, p. 57*].

171. Moreover, RESPONDENT took a stand in the other arbitration in favour of price adaptation when the tariffs negatively impacted them. On the other hand, in this case, RESPONDENT is trying to evade its duty to adapt the price and taking a contrary stand [*PO 2, p. 50*].

172. Thus, the conduct of RESPONDENT points towards their repeated disregard for Art. 7(1) CISG and the principles of good faith and fair dealing that it embodies.

b. The duty to renegotiate in good faith was infracted by RESPONDENT.

173. The Tribunal has the discretion to award damages for the loss suffered through a party refusing to negotiate or breaking off negotiation contrary to good faith and fair dealing. Furthermore, the mitigation rule is well recognised in international arbitration practice [*Komarov 'Mitigation of Damages'*]. In cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered [*Brunner, 438-441*].

174. The Singapore Court of Appeal has ventured to articulate such a core conception:

> *"*We think that the concept of good faith is reducible to a core meaning … At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of observing accepted commercial standards of fair dealing in the performance of the identified obligations. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party.*"* [*HSBC Institutional Trust Services (Singapore) Ltd. v. Toshin Development Singapore Pte Ltd.*].

175. The principle of *pacta sunt servanda* cannot be disregarded merely by accepting the fact that the performance of the contract has become excessively burdensome for the disadvantaged party. In cases where there is a hardship, the contract must be adapted to account for the new circumstances to restore the equilibrium.

176. RESPONDENT broke off negotiations and acted contrary to fair and just dealing which is an accepted practice in international trade. RESPONDENT made false assurances regarding fair price to ensure that that they received the final shipment of 50 doses on the contractually obligated date. They urgently required the shipment to sell doses to third parties which was in breach of the Resale Prohibition [*PO 2, para. 33, p. 59*].

177. RESPONDENT had a duty to negotiate and reach an agreement to account for the additional tariffs imposed. It was contrary to the principle of good faith and commercial prudence to break off negotiations.

178. The last shipment becoming 30% more expensive than anticipated does not only destroy the CLAIMANT's profit margin of 5% but further results in financial and commercial hardship. The loss of 25% of the value of the frozen semen dispatched in the third instalment is clear indication of gross inequity and unfairness [*Tennessee Valley Auth. v. Exxon Nuclear Co.; Cleveland-Cliffs Iron Co. v. I.C.C.*].

179. CLAIMANT'S prolongation of credit line was contingent on them making a profit from this sale [*PO 2, para. 29, p.* 59]. However, RESPONDENT'S refusal to fulfil their obligations threatens the existence of CLAIMANT's business pushing them beyond their threshold of sacrifice.

180. This action of RESPONDENT created undue obligations and hardship on CLAIMANT. RESPONDENT had a duty to renegotiate the contract to make it commercially viable and just; the breaking of

negotiations was an unmerited act and they have a legal obligation to pay the additional amount to CLAIMANT.

B. CLAIMANT is entitled to the additional cost under Art. 79 CISG.

181. Art. 79 CISG is the Force Majeure Clause whose broad interpretation also covers situations of hardship. It calls for termination or adaptation of the contract to account for the unforeseen changes in the equilibrium of the contracting parties. CLAIMANT is entitled to price adaptation under Art. 79 as the imposition of the 30% tariffs was an unprecedented move causing unreasonable burden. CLAIMAINT in the following arguments will prove that: Art. 79 CISG is applicable **(1)**, and; CLAIMANT is entitled to price adaptation under Art. 79 CISG **(2)**.

1) Art. 79 CISG is applicable

182. CLAIMANT can invoke Art. 79 CISG as Clause 12 of AGREEMENT is not in derogation of it, rather is complimentary to Art. 79. Clause 12 incorporates the wide interpretation of Art. 79 and highlights the intent of CLAIMANT to apply the provisions of Art. 79 for seeking remedy in situations specified in Clause 12.

183. Pursuant to Art. 6 CISG, a party may derogate from or exclude the application of certain provisions of the convention [*Art. 6, CISG*]. For such an exclusion there has to be a clear and explicit intent to exclude [*CISG, AC Opinion No. 16*]. This intent to exclude should be inferred from:

i. express exclusion of the CISG;
ii. choice of the law of a Non-Contracting State (to the CISG);
iii. choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application [*CISG, AC Opinion No. 16*].

184. A real or a tangible intent rather than a hypothetical intent is required. This sets the threshold for intent to exclude at a higher level than is otherwise required for intent under the CISG [*U.G. Schroeter, The Global Challenge of International Sales Law (Cambridge University Press, 2014) 16*].

185. Here, by adding Clause 14 in the AGREEMENT [*CE 5, para. 14, p. 14*], CLAIMANT had a clear intention to be governed by the provisions of CISG including Art. 79. The inclusion of Force Majeure and Hardship Clause in the AGREEMENT does not exclude the application of 79; instead, it enables the broad interpretation and application of it. CLAIMANT intended to provide for the application of Art. 79 in situations of hardship as well as situations of Force Majeure. Both these provisions (*Art. 79 CISG; Clause 12, AGREEMENT*) are complementary to each other rather than exclusive.

186. Thus, RESPONDENT'S claim that Art. 79 CISG is not applicable is ill-founded and without merit. The fact that the contract is governed by CISG as *ex facie* stated in Clause 14 clearly implies that

the inclusion of Clause 12 does not exclude Art. 79 CISG but rather are complementary rules and must be read with each other.

2) CLAIMANT is entitled to price adaptation under Art. 79 CISG.

187. Art. 79 CISG allows CLAIMANT to demand adaptation of price due to hardship caused by the unprecedented tariffs. This hardship disrupts the equilibrium that existed between the PARTIES, making the contract no longer commercially prudent for CLAIMANT unless the price was adjusted to account for the new tariffs. Art. 79 CISG creates an obligation on RESPONDENT to reach an equitable price for the final shipment.

188. Art. 79 CISG is a Force Majeure Clause whose interpretation also includes hardship. This clause allows for the exemption of liability or adaptation of contract when unforeseen circumstances render the performance of the contract impossible or excessively onerous for one party.

189. The terms "hardship" or "change in circumstance" have not been used in the convention, however, the Scafom decision [*Scafom International BV v. Lorraine Tubes S.A.S.*] qualifies the problem of hardship as an issue governed by Art 79. A change of circumstance that could not reasonably be expected to have been taken into account, rendering performance excessively onerous, i.e. 'hardship' qualifies as an 'impediment' under Art. 79(1). The language of Art. 79 does not expressly equate the term 'impediment' with an event that makes the performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship under Art. 79 [*CISG-AC opinion No. 7, 2007, para. 3.1*].

190. The additional tariffs caused an undue burden on CLAIMANT which they bore on the promise of RESPONDENT to negotiate and reach a fair agreement as to the increased cost. CLAIMANT believed that RESPONDENT would adhere to the contract, international trade law and deal in good faith as they repeatedly expressed a desire to maintain a long-term relationship [*CE 2, para. 3, p. 10*].

191. These additional tariffs amounting to 1,500,000 USD are an excessively burdensome amount for CLAIMANT. It is unjust and commercially impracticable for CLAIMANT to bear such an amount. CLAIMANT agreed to a DDP delivery only on the ground that it had more experience to easily facilitate such a shipment. The contract explicitly excluded any additional liability that may arise in the course of the delivery. Clause 12 exempted CLAIMANT from any additional costs specifically in the nature of tariffs [*CE 5, para. 12, p. 14*].

192. CLAIMANT while agreeing to the DDP delivery laid down strict limitations as to its liability. In cases of hardship, CLAIMANT explicitly refused to undertake any addtionl costs arising in the course of events. In their experience, CLAIMANT had witneesed a 40% increased price in health and safety regulations and expressly denied to undertake the liability of costs arising out of impositions of similar nature as they destroy the commercial nature of the contract [*CE 4, para. 4, p. 12*].

193. RESPONDENT agreed to the same and hence, bears any and all additional costs that the tariffs caused on the last shipment.
194. Art. 79 CISG is a recourse for a party that bore an excessive amount causing an imbalance in the equilibrium between the parties. CLAIMANT was entitled to demand renegotiations on the increased costs that were incurred in order to complete the delivery of the shipment. RESPONDENT assured that there would be negotiations and urged CLAIMANT to send the final shipment.
195. CLAIMANT is entitled to the additional costs as it bore them on the word of RESPONDENT. RESPONDENT cannot derogate from its statement to come to a fair price. Art. 79 allows for this and thus, empowers CLAIMANT to retrieve 1,250,000 USD from RESPONDENT.

a. Hardship caused the obligation of CLAIMANT to go beyond limit of sacrifice

196. The additional cost is a financially crippling amount for CLAIMANT to bear as it has been suffering severe losses since 2014 [*PO2, para. 15, p. 57*]. CLAIMANT would not be able to survive the repercussions of non-payment of the amount that is due from RESPONDENT. The 30% tariffs are beyond the limit of sacrifice for CLAIMANT.
197. A party's hardship defence is accepted if the performance of the contract has become excessively onerous or beyond the "limit of sacrifice", which is why the promisor should not be any more expected to perform its obligation [*Schwenzer, p. 714*].
198. The relevant limit for hardship has to be analysed by estimating the risk between the parties, considering the particular circumstances of the case, and analysing whether impediment and its consequences can be overcome [*Ingeborg, p.715*].
199. In ICC Award No 2291 [*ICC Award No 2291 of 1975 Clunet 1976, 989; ICC Award No 1512 of 1971 Clunet, 1974,905*] taking into account the principles of the *lex mercatoria* that the reciprocal performances in an agreement are founded on the profit balance and that any change in this balance should lead to revision of the agreement. Thus, 'in most international contracts, the price is established on the basis of the circumstances existing when the agreement was reached and it will be revised according to the different events that occurred during the performance of the contract' [*ICC Award No 2291*].
200. Art. 79, interpreted in the light of the observance of good faith in international trade, cannot be read as imposing on the affected party, an obligation to take on extraordinary responsibilities in order to perform [*Lando, O, p. 299; Lindström, N., p.13*]. Therefore, the 'limit of sacrifice' is linked to the reasonability standard [*Schlechtriem, P. and Schwenzer, I., p. 1076*].
201. Art. 79 is a force majeure clause which allows for exemption from obligations in cases where an unprecedented act renders the contract impossible. However, the extensive application and purview of this article also allow for hardship as the principle of *pacta sunt servanda* is considered to

be the apex principle and the fountainhead of all international contracts. The imposition of the 30% tariffs was an unexpected measure, but it cannot be a ground to disparage from RESPONDENT's liability to pay the increased price as Clause 12 of the AGREEMENT specifically accounted for such a change shifting the liability on RESPONDENT.

202. It is a well-accepted principle in international trade that a party should not be obliged or expected to perform a contract beyond a "limit of sacrifice". In the present case, CLAIMANT should not be expected to bear the additional costs; such an amount is commercially inviable for CLAIMANT as it excceds its limit of sacrifice [*Peter Schlechtriem and Schwenzer, I., p. 824*].

203. There is "commercial impracticability" if a party's performance can only be rendered with extreme and unreasonable difficulty, expense, injury or loss as a result of unexpected supervening events, the non-occurrence of which was a basic assumption on which the contract was made. The financial condition of CLAIMANT render it impossible for it to bear the additional tariffs without suffering eminent financial ruin [*Azerdo Da Silveira (p 322, Part IV, Jan 2014*].

204. In a situation of hardship under Art. 79, the Tribunal should provide for the relief consistent with the CISG and the general principles on which it is based [*CISG, AC Opinion No. 7, p. 32*]. What the council meant by further 'relief' was 'relief specifically tailored for hardship' [*Lookoofsky, journal of law and commerce, vol. 29, p. 162*]. Therefore, an adaptation of the contract would fall within this category of remedies.

205. The implementation of the retaliatory tariffs increased the cost of shipment by 1,500,000 USD which was borne by CLAIMANT on the belief that RESPONDENT will bear the costs as stipulated in Clause 12 of the AGREEMENT and as was additionally assured by Mr. Shoemaker on 21st January [*CE 8, p. 18*]. RESPONDENT refusal to pay the additional costs would be a crippling blow to the company as it has been operating at a loss for years and would have generated a small profit through this contract since 2014 [*PO2, para. 15, p. 57*]. RESPONDENT, being aware of the dire financial situation of CLAIMANT used this to have the upper hand in the negotiation and lured CLAIMANT with a promise of a long-term relationship and future profits [*PO 2, para 22, p 58*].

206. The increase of 30% is a crippling amount for CLAIMANT, and it was borne on the belief that RESPONDENT would bear it as it repeatedly assured and was legally obligated to do so. Even so, CLAIMANT in good faith, recognising the burden of a sudden 30% increase, only demands a 25% remuneration foregoing its entire profit margin on the shipment. More so, when the prolongation of CLAIMANT'S credit line was contingent on it making a profit in the years of 2017 and 2018 [*PO 2, para. 29, p. 59*]. Whereas, the increased costs would not have any considerable impact on RESPONDENT.

C. Art. 7(2) CISG empowers CLAIMANT to resort to UNIDROIT PICC

207. UNIDROIT PICC also provides for remedy in cases of hardship. It is sought for when the CISG does not explicitly provide for an aspect of law. It further enables CLAIMANT to recover the additional costs it paid for RESPONDENT. Article 7(2) CISG acts as a gap filling provision **(1)** and UNIDROIT PICC is used to fill the gaps as they are universally accepted principles governing international trade **(2)**.

1) Art. 7(2) CISG is a gap filling provision

208. Art. 7(2) CISG permits CLAIMANT to look towards other international conventions and treaties of *lex mercatoria* to fill the gap that exists in the CISG. The absence of an exclusive hardship clause results in a void that can be filled by other principles of international trade law.
209. Art. 7(2) CISG states,

> *"questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

210. The intent behind the article was to use other internationally accepted laws and conventions to fill in the gaps where the CISG is silent. If a situation is considered to be governed under the scope of, however it is not expressly or entirely regulated by the CISG, the matter has to be resolved by referring to the general principles on which the CISG is based. Those general principles cannot only be deduced from the text of the CISG, but also from external principles which are considered to be general principles of international trade and commerce [*Lindström, N., p. 20*].
211. In the *Scafom* case, it was held that 7(2) CISG is a resort to the general principles "which govern the law of international trade" to fill the gap in CISG [*Scafom International BV v. Lorraine Tubes S.A.S.*].
212. Since the CISG does not explicitly provide for price adaptation due to hardship under its Force Majeure Clause, the Tribunal must consider other sources of international law to reach to a just award. Though hardship is included in Art. 79's broad interpretation, the absence of the term often leaves ambiguity where one can take recourse to other principles of international law.
213. The UNIDROIT Principles of International Commercial Contracts 2010 , Principles of European Contract Law 1999 and the Draft Common Frame of Reference 2008 all expressly provide for consequences and remedies in case of changed economic circumstances, including the duty to renegotiate the contract and ultimately the right of the parties to apply to the tribunal which has the power to either terminate it on a specified date or adapt it.

2) CLAIMANT is empowered to claim relief for hardship under UNIDROIT PICC.

214. UNIDROIT Principles provide for the general rules that govern international commercial contracts and are often used to supplement and the fill the gaps in CISG **(a)**, and CLAIMANT can plead relief for hardship under its Principles **(b)**.

a. UNIDROIT PICC is used as the gap filling provision

215. The preamble of the UNIDROIT PICC establishes that they "may be used to interpret or supplement international uniform law instrument." The CISG is the most successful and sought after instrument for international commercial law. Therefore, these principles can be used to complement its provisions and substantiate the same. The interpretation of CISG in light of UNIDROIT principles is the mechanism that allows the evolutions of contractual practice in *lex mercatoria* [*Flechtner, p. 13. 77*].

216. The goal of uniformity in the application of the CISG and the task of the courts will be facilitated with the use of the UNIDROIT PICC in the context of Art. 7.2 [*Bonell, M.J., p. 34-36*].

217. Moreover, reasons of fairness also support the application of the UNIDROIT since resorting to uniform law is better as it protects the interest of both parties rather than solving the dispute according to domestic jurisdiction which may benefit only one of them.

218. They are used as a means of interpretation and/or supplementing the applicable law and uniform law instruments and as a model law for the legislators when the parties agree to submit their relationship to *lex mercatoria* or general principles of international trade law.

219. PICC are considered to be the tool that is used to interpret CISG where there is lacuna or gap, [*Magnus 'General Principles of UN-Sales Law' [1997] International Trade and Business Law Annual 33, 33ff (Pace) p 173*]. Specifically when there is no collision or contradiction in underlying principles of CISG and PICC [*Michaels, Preamble, No 110*].

220. CISG allow resorting to *lex mercatoria* and the PICC[*CISG-AC Declaration No 1*] as a means of interpreting and supplementing the CISG based on the principle of uniformity [*Perales Viscasillas, p 286*].

221. The international commercial vocation of the PICC has been recognised by UNCITRAL, which has endorsed the PICC for the same, [*Report of the United Nations Commission on International Trade 2016*] therefore, enhancing its prestige and popularity worldwide [*Bonell,M.J in C Andersen and U. G Schroeter (eds),; Bonell, M.J, (2003) Uniform Law Review 472*].

222. The ambiguity in CISG as per the hardship clause must be filled by resorting to the UNIDROIT PICC. It is a well-established principle of international trade law that uniformity is preferred and hence the PICC is used as its provisions are not contradictory to the CISG. CLAIMANT is well within its rights in resorting to the provisions of UNIDROIT PICC to further substantiate their claim.

b. UNIDROIT PICC provides for relief in cases of hardship

223. CLAIMANT is entitled to retrieve the additional tariffs under Rules 6.2.2 and 6.2.3 of the UNIDROIT PICC which establish hardship, its effects and the remedy.

224. Art. 6.2.1. UNIDROIT Principles 2010 reflects the maxim of *pacta sunt servanda* and provides that "the party for which the performance of the contract has become more onerous is still bound to perform its contractual obligation."

225. Hardship is defined under Art. 6.2.2 of the UNIDROIT Principles and lays down the test of hardship on four grounds; (i) as an event which alters the equilibrium between the two parties due to increased performance cost or, (ii) depreciated value of subject goods making the performance excessively onerous for the disadvantaged party, (iii) the event must be unforeseen and (iv) could not have been accounted for at the time of the conclusion of the contract.

226. Art. 6.2.3 of the UNIDROIT lays down the effects of hardship on the parties and the remedies that can be claimed. Clause 1 of the said article entitles for renegotiation of the contract so as to reach a fair distribution of liabilities in light of the changed circumstances. Clause 4 of the same article empowers the court or tribunal to adapt the contract to restore the equilibrium between the parties.

227. In Court of Appeal of Paris in *Intrafor Cofor* case, the position taken, first, by arbitrators and then, by the Court of Appeal of Paris, in favour of the adaptation of contracts was mainly justified on the fact that the arbitration tribunal was granted *ex aequo et bono* powers that are recognised as allowing arbitrators to temper the effects of the contract in light of the particular facts of the case [*Intrafor Cofor v. Gagnant, Revue de l'Arbitrage, 299 (Court of Appeal of Paris 12 March 1985)*].

228. The UNIDROIT Principles follow the approach that if hardship is found to exist, the aggrieved party is entitled to demand renegotiations. Upon failure to reach an agreement, the consequence is the 'adaptation' of the contract. Such an 'adaptation' involves an adaptation or reformation of the contract (in the narrow sense), with the aim of restoring its equilibrium. The adaptation will not always depict the loss sustained by the disadvataged party due to the change in circumstances since the extent of risk that a party must bear has to be taken into account.

229. UNIDROIT Principles have a complimentary rule especially on the issue of hardship and have been so used in ICC award no. 7365 where the tribunal relied on Principle 6.2.3 since the parties had agreed to "complementary and supplementary action" of general principles of international trade law and usages despite it not being the governing law.

230. The additional costs of 1,500,000 USD increased the burden of performance on CLAIMANT. The DDP delivery was already one avenue where CLAIMANT had undertaken greater risk but the tariffs were exempted from their ambit as per the AGREEMENT between the PARTIES. The INCOTERM

Guidelines on DDP allow for it with certain exclusions from the obligations of the seller should it have been mentioned before. In the present case, Clause 12 of the AGREEMENT clearly stated that any additional cost would not be borne by the CLAIMANT and the same was also said in the preceding emails. As a show of good faith, the CLAIMANT still demands only 25% of the additional tariffs as opposed its right of the entirety of the amount [*CE 5, para. 12, p. 14*].

231. CLAIMANT agreed to the DDP delievery to facilitate the delivery purpose as it had greater knowledge and experience in exporting of equestrian products. It was not ready to bear any additional costs arising out the the delivery purpose and had made that intent clear by inculcating it in the AGREEMENT itself. If CLAIMANT had the knowledge of such high tariffs, it would not have agreed for DDP in the first place as it was already operating in loss.

232. The retaliatory tariffs were an unforeseen measure that were taken by RESPONDENT'S state which had a history of promoting free trade. The fact that horse semen was included in the list of goods was another unnerving shock to both the parties [*CE 7, p 16; R4, para 2, p 36*]. As stated in Art. 6.2.2 UNIDROIT PICC such an unforeseen event which could not have been accounted for at the time of the conclusion of the contract qualifies as hardship. It alters the equilibrium between the parties placing CLAIMANT at a distinct disadvantage to bear the additional tariffs. The events of this instance qualify as hardship as per the test as laid down in Rule 6.2.2 of the UNIDROIT PICC.

233. In a situation of hardship, Art. 6.2.3 UNIDROIT entitles the parties to renegotiate the terms of the contract to attain the stable equilibrium that was present before. CLAIMANT contacted RESPONDENT at the earliest possible stage after finding out that the tariffs would be applicable on to their last shipment. Moreover, CLAIMANT was assured that negotiations would be done to account for the additional costs. However, no solution was reached.

234. Art. 6.2.3 (4)(b) empowers the Tribunal to grant adaptation of price for an equitable distribution of burden to restore the equilibrium.

235. It was essential for CLAIMANT to earn a profit as its survival was dependent on earning a profit in the years of 2014-2018. Such a large shipment plays a pivotal role in determining the financial health of the company and the prolongation of its credit line which was contingent on its profits [*PO 2, para. 29, p. 59*].

236. CLAIMANT is entitled to additional costs that resulted from the imposition of tariffs. These tariffs increased the cost of the shipment by 1,500,000 USD causing an undue burden on CLAIMANT. The UNIDROIT PICC provides for a recourse in the nature of renegotiations, failure of which leads to adaptation of price by the tribunal to restore the equilibrium. CLAIMANT is due to retrieve the

entire amount, however, in good faith, CLAIMANT demands only 25% of the tariffs to be borne by RESPONDENT forgoing its entire profit margin of the last shipment.

CONCLUSION TO ISSUE III

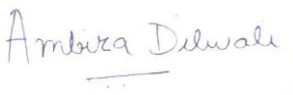
CLAIMANT is entitled to recover the additional costs it undertook to account for the tariffs as RESPONDENT assured about reaching an AGREEMENT on price pursuant to Clause 12 of the AGREEMENT. Despite CLAIMANT'S right of the entire 30%, CLAIMANT with good faith is only asking RESPONDENT to compensate 25% of the additional tariffs sacrificing its entire profit margin for the last shipment. Alternatively, CLAIMANT is also entitled to get compensation under Art. 79 CISG as the additional tariffs constituted hardship for CLAIMANT. Additionally, the claim still holds merit taking the UNDIROIT Principles into account. Thus, RESPONDENT is legally obliged to pay 1,250,000 USD to CLAIMANT.

REQUEST FOR RELIEF

In light of the submissions made above, CLAIMANT respectfully request the Tribunal to find that:

1. The Tribunal has the jurisdiction and the power to adapt the contract under Mediterranean Law;
2. CLAIMANT is entitled to submit evidence from other arbitration proceedings;
3. CLAIMANT is entitled to the payment of 1,250,000 USD from RESPONDENT resulting from an adaptation of the price, and;
4. RESPONDENT has to bear the costs of the arbitration.

Respectfully submitted,
New Delhi, India
December 6, 2018



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CERTIFICATE AND CHOICE OF FORUM

I GARV GUPTA, on behalf of the Team for AMITY LAW SCHOOL, DELHI (AFFILIATED TO GGSIP UNIVERSITY) hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for AMITY LAW SCHOOL, DELHI (AFFILIATED TO GGSIP UNIVERSITY)

Name GARV GUPTA

Signature