SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 07 APRIL 2019

MEMORANDUM FOR RESPONDENT

॥ न्यायस्तत्र प्रमाणं स्यात् ॥

NLU DELHI

NATIONAL LAW UNIVERSITY, DELHI

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

COUNSELS *for* RESPONDENT:

- ISHA GOEL
- ATHARVA KOTWAL
- AMAN GUPTA

New Delhi • India

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&	And
¶	Paragraph
%	Percentage
Art.	Article
CE	CLAIMANT's Exhibit
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for International Sale of Goods, 1980
CLAIMANT	Phar Lap Allevamento (Mediterraneo)
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
e.g.	Exampli Gratia; for example
ed./eds.	Editor/ Editors
edn.	Edition
etc.	Et Cetera, "and so on"
FCA	Federal Court of Australia
fn.	Footnote
HKIAC	Hong Kong International Arbitral Centre
i.e.	That is
IBA Rules	International Bar Association Rules on the Taking of Evidence

Ibid.	Ibidem (In the same place)
ICC	International Chamber of Commerce
ICC Rules	International Chamber of Commerce Rules of Arbitration
ICDR	International Centre for Dispute Resolution.
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Incoterms	International Commercial terms
LCIA	London Court of International Arbitration
Lex Arbitri	Procedural Law of the Seat i.e. the place where the arbitration will take place
Ltd.	Limited
Ms.	Miss
Mr.	Mister
No./Nos.	Number/ Numbers
OUP	Oxford University Press
p./pp.	Page/ Pages
Para.	Paragraph
Parties	Phar Lap Allevamento (Mediterraneo), Black Beauty Equestrian (Equatoriana)
PO1	Procedural Order 1
PO2	Procedural Order 2

RE	RESPONDENT's Exhibit
RESPONDENT	Black Beauty Equestrian
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
Swiss Rules	Swiss Chambers Arbitration Institution Rules
ULIS	Uniform Law for the International Sale of goods
UK	United Kingdom
UN	United Nations
UNCTAD	The United Nations Conference on Trade and Development
UNICTRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for Unification of Private Law
UNIDROIT PICC	UNIDROIT Principles of International Contracts
USD	United States Dollar
v.	Versus
Vol.	Volume
WTO	World Trade Organization

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STATEMENT OF FACTS

PHAR LAP ALLEVAMENTO ("**CLAIMANT**") is a company registered in Mediterraneo. CLAIMANT operates Mediterraneo's oldest stud-farm covering all areas of equestrian sport.

BLACK BEAUTY EQUESTRIAN ("**RESPONDENT**") is a company registered in Equatoriana. It recently started a new racehorse breeding programme for which it required Nijinsky III's semen from CLAIMANT.

January 2017	President Boukcaert of Mediterraneo announced a preference for a protectionist approach to international trade, in particular in relation to agricultural products in his election program.
21 March 2017	RESPONDENT contacted CLAIMANT, inquiring about the availability of the frozen semen of Nijinsky III for its newly started breeding programme.
24 March 2017	CLAIMANT offered 100 doses of Ninjinsky's semen. RESPONDENT accepted the applicability of the general terms and conditions of CLAIMANT'S offer, but requested for a change in the choice of law clause, the forum selection clause and insisted on a DDP-delivery ("Delivered Duty Paid").
31 March 2017	CLAIMANT accepted DDP-delivery but requested on an increase in price by USD 1,000 to take into account the additional costs associated with DDP-delivery. It also asked to be relived of further risks associated with such a delivery or at minimum, a hardship clause should be included in the contract.
10 April 2017	RESPONDENT proposed a dispute resolution clause after reducing the broad wording of HKIAC Model Clause ("Hong Kong International Arbitration Centre"). CLAIMANT only objected to the suggested place of arbitration.
6 May 2017	CLAIMANT and RESPONDENT ("Parties") concluded the FSSA ("Frozen Semen Sales Agreement") in Mediterraneo. It stipulated that the seat of the arbitration shall be Vindobona, Danubia. The sales agreement was governed by the law of Mediterraneo including the CISG ("United Nations Convention on Contracts for the International Sale of Goods").

	As per the Agreement, CLAIMANT delivered the first shipment of 25 doses on **20 May 2017** and the second shipment on **3 October 2017.**
19 December 2017	In retaliation to 25% tariffs imposed by Mediterraneo on agricultural products, Equatoriana announced 30% tariffs.
20 January 2018	CLAIMANT comes to know about the tariff applicable to the frozen horse semen. CLAIMANT informed RESPONDENT by mail on the same day. RESPONDENT, stressed on the urgent need for timely delivery and stated that increase in price shall be allowed if the contract provides for an increased price in case of import tariffs. On **23 January 2018,** CLAIMANT delivered the final shipment of 50 doses.
12 February 2018	In the meeting organized by CLAIMANT. RESPONDENT stopped the negotiations due to CLAIMANT'S persistent request to pay the amount of tariff which had no basis in the contract
29 June 2018	Partial Interim Award ("Award") of the Second Arbitration, concerning the sale of a mare by RESPONDENT to a buyer in Mediterraneo under the HKIAC Rules, was rendered. In the other arbitration, the contract included the Model HKIAC Clause, ICC Hardship Clause and its arbitration agreement was governed by the law of Mediterraneo.
31 July 2018	CLAIMANT submitted its Notice of Arbitration and designated Ms. Wantha Davis as the arbitrator.
24 August 2018	RESPONDENT filed its Response to the Notice of Arbitration, and appointed Dr. Francesca Dettorie as the arbitrator.
2 October 2018	CLAIMANT informed the Tribunal about the Partial Interim Award. In this regard, RESPONDENT informed the Tribunal that the Award could have been only obtained by a hack of RESPONDENT'S computer system or by two former employees of RESPONDENT who were witnesses in the other arbitration.
4 October 2018	Case Management Conference was held.

INTRODUCTION

1. RESPONDENT had entered into a contract with CLAIMANT hoping for a stable relationship, however in return was saddled with unfounded claim of the adaptation of contract. In the wake of tariffs, CLAIMANT has failed to appreciate the express stipulations of the FSSA when it insists on adaptation of the contract. International commercial arbitrations transpire on trust and commitment. However, RESPONDENT was devastated when CLAIMANT raised its unjustifiable demand of admitting evidence from the other arbitration. Thus, CLAIMANT draws completely wrong legal conclusions from the facts presented.
2. CLAIMANT paints an inaccurate picture of the arbitration agreement and its interpretation. The law of Danubia governing the arbitration agreement and its interpretation provides for the parol evidence rule whereby the interpretation of the arbitration agreement is limited to its wording and no external evidence can be relied upon. The Danubian law prohibits the Tribunal to adapt the contract in the absence of an express empowerment to that effect. Furthermore, the Tribunal lacks the jurisdiction and the power to adapt the contract even under the law of Mediterraneo. (**ISSUE I**)
3. The Tribunal should reject CLAIMANT'S request to admit the evidence from the other arbitration. The evidence could have only been obtained through a breach of confidentiality of the Partial Interim Award or through the illegal hack of RESPONDENT's computer system. In both cases, the evidence is improperly obtained and thus, inadmissible. Further, the Tribunal can reject the admission of the evidence as neither is it relevant or material to the present arbitration proceedings nor is its non-admission violative of the procedural fairness. (**ISSUE II**)
4. The Tribunal should not entitle CLAIMANT to the payment of USD 1,250,000 as the tariffs imposed by Equatoriana are covered in the risks assumed by CLAIMANT under the DDP-delivery. Clause 12 of the FSSA is a *force majeure* clause with only a hardship reference which neither applies to the tariffs imposed by the Equatorian Government nor provides for the remedy of adaptation of the contract. Additionally, CLAIMANT can also not rely on Article 79 CISG as its application is precluded by Clause 12 of the FSSA. Further, Article 79 CISG does not regulate hardship and does not provide for the remedy of adaptation. (**ISSUE III**)

ISSUE 1: THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

5. CLAIMANT asserts that the law governing the arbitration agreement is the law of Mediterraneo and consequently, the Tribunal has the jurisdiction and the power to adapt the contract [*MoC ¶1*]. To the contrary, RESPONDENT submits that the arbitration agreement is governed by the law of Danubia which provides for a narrow interpretation of the arbitration agreement and prohibits the Tribunal from adapting the contract in the absence of an express empowerment in the arbitration agreement.
6. The law of Danubia governs the arbitration agreement, including questions of its interpretation (**A**), and within this legal framework, the Tribunal lacks the jurisdiction and the power to adapt the contract (**B**). Even if, the law of Mediterraneo governs the arbitration agreement, the Tribunal lacks the jurisdiction and the power to adapt the contract (**C**).

A. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

7. Clause 15 of the FSSA, contains an arbitration agreement providing for arbitration under the HKIAC Rules with Vindobona, Danubia as the seat of the arbitration [*CE5 ¶15*]. The Parties have submitted the sales agreement to be governed by the law of Mediterraneo including the CISG [*ibid. ¶14*]. The Parties usually do not expressly agree upon the law governing the arbitration agreement [*Tweeddale & Tweeddale 217; Lew 241*]. It often falls upon the arbitral tribunal to determine the law governing the arbitration agreement [*Lew/Mistelis/Kröll 114*]. CLAIMANT correctly states that the law governing the arbitration agreement has not been expressly chosen in the arbitration agreement [*MoC ¶9*]. Therefore, the Tribunal must decide on the law governing the arbitration agreement.
8. The seat of the arbitration provides the conflict of law rules on the basis of which the arbitral tribunal decides the law governing the arbitration agreement [*Dicey/Morris/Collins ¶30.020; Shipping Corp v. Kuwait Insurance*]. In the present case, the seat of the arbitration, Danubia is a common law country [*PO2 ¶44*]. For determining the law governing any contract, the prevalent common law rules require the arbitral tribunal to recognise and give effect to the parties' choice of proper law express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection [*Dicey/Morris/Collins ¶16.001*]. These common law rules are also applicable for determining the law governing the arbitration agreement [*FirstLink Case; Sulamérica v. Enesa; BCY v. BCZ; Klockner Pentaplast Case*].

9. Contrary to CLAIMANT'S assertion that the law of Mediterraneo governs the arbitration agreement [*MoC ¶11*], RESPONDENT submits that the law of Danubia is the implied choice of law for governing the arbitration agreement (**I**). Alternatively, as per the closest connection test, the law applicable to the arbitration agreement is the law of Danubia (**II**).

I. The law of Danubia is the implied choice of law for governing the arbitration agreement

10. In the absence of an express choice of law, CLAIMANT has directly relied on the closest connection test for determining the law governing the arbitration agreement [*MoC ¶10*]. This is an erroneous understanding of the test to determine the law governing the arbitration agreement as the test requires the arbitral tribunal to first determine whether the parties have made an express or implied choice of law and then if not, with which system of law the contract has its closest connection [*Klockner Pentaplast Case; Sulamérica v. Enesa*].
11. RESPONDENT submits that the Parties have impliedly chosen the law of Danubia to be the law for governing the arbitration agreement as the law of the seat is the law governing the arbitration agreement (**i**). Also, the law applicable to the substantive contract is not the implied choice of law for governing the arbitration agreement (**ii**).

i. Law of the seat is the law governing the arbitration agreement

12. It is argued that law of the seat is the implied choice for the law governing the arbitration agreement as the Parties wanted to arbitrate in a neutral seat. The parties' selection of the neutral seat would invariably come with an implicit acceptance of the *lex arbitri* of that chosen seat to govern the arbitration agreement [*FirstLink Case; Miles/Goh 390; Glick/Venkatesan 135*].
13. In deciding the law governing the arbitration agreement, the parties' desire for neutrality comes to the fore [*FirstLink Case; Bulbank Case; Matermaco v. PPM*] and primacy is accorded to the neutral law selected by the parties to govern the proceedings of dispute resolution [*ibid.*]. The very choice of a neutral arbitral seat presupposes the parties' intention to have the seat govern the arbitration agreement [*Arzandeh/Hill 437*; *XL Insurance Ltd v. Owens; Bernardini 870*].
14. In the present case, CLAIMANT itself emphasised on the need of a neutral seat for arbitration as it did not want to subject the arbitration agreement to the law of Equatoriana [*RE2 34*]. CLAIMANT'S creditors committee had also stated that the place of arbitration should be in a neutral country with the functioning judicial system [*PO2 ¶14*]. Even, RESPONDENT was keen on conducting the arbitration in a neutral seat [*RE3 35*]. As the Parties' desired to arbitrate in a neutral seat, the Tribunal should give primacy to the law of the seat as the implied choice for the law governing the arbitration agreement.

15. Further, the Parties' acceptance to Law of Danubia governing the arbitration agreement is evidenced by the negotiations and the drafting history of the arbitration agreement. The first draft of the arbitration agreement contained an express choice of law provision in favour of the law of the seat (i.e. Equatoriana) [*RE1 33*]. CLAIMANT'S only objection to this draft was regarding the seat of arbitration [*RE2 34*]. However, there was no objection to RESPONDENT'S proposal that law of the seat of arbitration should govern the arbitration agreement [*ibid.*]. Moreover, the note left by Mr. Antley establishes a clear connection between the law applicable to the arbitration agreement and the neutral venue [*RE3 35*]. The eventual absence of a choice of law clause in the final draft was due to an oversight on part of the new negotiators of the Parties. Thus, even the drafting history of the arbitration agreement clearly indicates an implied choice of Parties in favour of law of the seat (i.e. Danubia) to govern the arbitration agreement.
16. Additionally, CLAIMANT asserts that law of the seat should govern the arbitration agreement, only in the absence of an express choice of law for governing the arbitration agreement and the substantive contract [*MoC ¶17*]. Contrary to CLAIMANT'S assertion, RESPONDENT submits that law of the seat has been held to be the law governing the arbitration agreement even in the presence of an express choice of law for the substantive contract [*Sulamérica v. Enesa; FirstLink Case; Klockner Pentaplast Case*] thereby making CLAIMANT'S argument untenable.

ii. Law applicable to the substantive contract is not the implied choice of law for governing the arbitration agreement.

17. CLAIMANT could have argued that the express choice of law applicable to the substantive contract, that is, the law of Mediterraneo is the choice of law for governing the arbitration agreement. However, the law applicable to the arbitration agreement is autonomous corollary to the doctrine of separability [*Fouchard/Gaillard/Goldman 450; National Corp v. Westinghouse*].
18. The doctrine of separability holds that the arbitration agreement and the main contract are two separate agreements [*Born 2014 352; ICC Case No. 8938*]. The consequence of the separability doctrine is that the differing national laws apply to the main contract and the arbitration agreement [*ICC Case 1995; Nussbaum 610*]. The essential point is that as the arbitration clause is a separate agreement, a separate conflict of law analysis is performed with regard to that separate agreement [*Born 2015 178; Landolt 512*].
19. In the present case, the seat of the arbitration (i.e. Danubia) has consistent jurisprudence that due to the doctrine of separability, the CISG does not apply to the arbitration agreement, as the latter is considered only a procedural contract and not a sales agreement [*PO2 ¶36*]. Thus, when the Parties designated Danubia as the seat, it was implied that such strong conception of the

separation between the arbitration agreement and the main contract will also apply to the Parties' contractual regime.

20. In the FSSA, the choice of law clause states that, "This ***Sales Agreement*** *is governed by the law of Mediterraneo"* [*CE5 ¶15*]. In comparison, the choice of law clause in contracts, often stipulates that "***the agreement*** *is to be governed by (…)*" whereby the Parties' intention can be inferred to be referring to all the clauses in the contract [*BCY v. BCZ; Bulbank Case*]. However, in the present case, the reference to the choice of law clause directly preceding the arbitration agreement is merely determining the law applicable to the main contract, that is, the "Sales" part of the contract. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement. Also, during the negotiations between the Parties, there was no deliberate choice in favour of law of Mediterraneo as the law governing the arbitration agreement. Hence, no implicit choice of law for the arbitration agreement can be made through the choice of law for the sales agreement.

II. Alternatively, as per the closest connection test, the law applicable to the arbitration agreement is the law of Danubia

21. In the absence of an express or implied choice by the parties, the arbitral tribunal is required to identify the system of law with which the arbitration agreement has the closest connection [*Sulamérica v. Enesa*]. CLAIMANT asserts that the law of Mediterraneo has the closest connection with the arbitration agreement [*MoC ¶13*]. To the contrary, RESPONDENT submits that law of Danubia has the closest and most real connection with the arbitration agreement.

22. According to the closest connection test, to determine the law governing the arbitration agreement, the principal factor to be taken into account is the law of the seat of arbitration [*Sulamérica v. Enesa; Hamlyn Case; Habas Sinai Case*]. Further, other factors like the place of performance, the place of contracting, the places of residence or business of the parties respectively and the nature of the subject matter of the contract are also considered in the absence of sufficient factors having a closer and more real connection with the arbitration agreement. [*Fouchard/Gaillard/Goldman ¶¶425-426; Born ¶457; Re United Railways Case*].

23. Where the parties have not reached an agreement regarding the law governing the arbitration agreement, the arbitration agreement has been held to be governed by the law of the country in which the arbitration proceedings take place [*XL Insurance Ltd v. Owens; FirstLink Case*]. It is rare for the law of the arbitration agreement to be different from the law of the seat [*C v. D*]. The law of the seat has the closest connection to the arbitration agreement because seat is the place of performance of the arbitration agreement [*Sulamérica v. Enesa; Hamlyn Case; Habas Sinai Case*]. The seat country has its supervisory power over the procedural aspects of the arbitration proceedings

[*Choi 109*]. The law of the seat and the arbitration agreement interact to determine the scope of an arbitral tribunal's mandate and jurisdiction [*Mayer 286*]. Moreover, the arbitration agreement has to comply with the mandatory laws of the seat of the arbitration [*Waincymer 1031; Redfern/Hunter 268*]. An arbitral award is annulled or set aside based on the validity of arbitration agreement under the law of the seat [*Greenawalt 103; Art. 34 Model Law*]. Thus, the law of the seat and not law of the contract has a closer and more real connection with the arbitration agreement.

24. In the present case, not only is Danubia the seat of arbitration [*CE5 ¶15*], but it is also the only place where physical negotiations occurred between the Parties. The negotiations between Ms. Julie Napravnik, representative of CLAIMANT and Mr. Chris Antley, representative of RESPONDENT took place at an annual colt auction in Danubia [*NoA ¶8*]. As compared, the sole connection of arbitration agreement with Mediterraneo is that the sales agreement is governed by the law of Mediterraneo [*CE5 ¶15*].

25. The law for substantive contract is of no consequence to the arbitration agreement because that law is presumed to only govern the substantive subject matters [*Choi 110; Kröll 141*]. Accordingly, this alone is insufficient to conclude that the arbitration agreement has its closest and most real connection to Mediterraneo. The "closest and the most real" connection has to be understood as the most significant procedural connection to the case and not the substantive connection. Therefore, RESPONDENT submits that the arbitration agreement has its closest and most real connection to Danubia and is thereby governed by the law of Danubia.

B. THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT

26. CLAIMANT asserts that the Tribunal has the jurisdiction and the power to decide on the adaptation of the contract [*MoC ¶26*]. It erroneously relies on the law of Mediterraneo including CISG to argue that interpreting the arbitration agreement under this law extends the jurisdiction and the power of Tribunal to adapt the contract [*NoA ¶¶15-16*]. To the contrary, RESPONDENT shall demonstrate that the Tribunal lacks the jurisdiction to adapt the contract (**I**) as well as the power to adapt the contract (**II**) under the law of Danubia which governs the arbitration agreement.

I. The Tribunal lacks the jurisdiction to adapt the contract

27. The arbitral tribunal must resolve disputes within its mandate bestowed by the parties under the arbitration agreement [*Redfern/Hunter 335*]. An award rendered exceeding the mandate or jurisdiction is null and void [*ibid. 342*]. CLAIMANT could have argued that the arbitration agreement provides for Tribunal's jurisdiction, extending to the claim for adaptation. However, RESPONDENT submits that the interpretation of arbitration agreement excludes adaptation from

the Tribunal's jurisdiction (**i**). Further, the Tribunal lacks the jurisdiction to adapt the contract under the law of Danubia pursuant to the parol evidence rule (**ii**).

i. The interpretation of the arbitration agreement excludes adaptation from the Tribunal's jurisdiction

28. The jurisdiction of the Tribunal depends on the scope of the arbitration agreement, particularly on the language of the parties' agreement and whether it extends to a non-contractual claim of adaptation of the contract [*Born 1318; Nejapa Power v. CEL*].

29. In the present case, the arbitration agreement states that "*Any dispute arising out of this contract*" [*CE5 ¶15*]. The term "disputes" is interpreted narrowly and is restricted to the referral of issues of non-performance of the contract to the arbitration [*Berger 1373; Al Faruque 153-154*]. The arbitral tribunal is authorised to determine the rights and obligations of the parties [*Berger 1374; Delaume 117*]. However, the issue of adaptation of contract in the present case is only a difference of opinion between the parties and cannot be regarded as "disputes" [*ICSID Doc. SIDILC/SR/4; Berger* 1374]. As the arbitration agreement refers only to term "dispute" and not to the terms "controversy, difference or claim" in comparison to the HKIAC Model Arbitration Clause [*CE5 ¶15; Moser/Bao 326*], the Tribunal lacks the jurisdiction to adapt the contract.

30. Also, the phrase "arising out of" is interpreted narrowly and is not said to extend to non-contractual claims [*Lebanon v. United Farmers; Tracer v. NES; Castlemil v Care*]. Further, the Parties in the arbitration agreement have removed the phrases "*in relation to*" or "*in connection with*" from the HKIAC Model Clause, thereby restricting the scope of arbitration agreement to only the disputes related to interpretation of the contract and matters of performance [*Figli v Fisheries*].

31. CLAIMANT could have argued for an expansive interpretation of the arbitration agreement so as to safeguard the commercial purpose of the agreement and thereby provide the Tribunal the jurisdiction to decide on all disputes. However, it is argued that to safeguard the commercial purpose of arbitration, the agreement should not be constructed in a way that leads tribunal to "rewriting the agreement" [*Sebastian Holdings Case*].

32. Further, an expansive interpretation of the arbitration agreement is not applied if the language of the arbitration agreement clearly indicates the Parties' intended to exclude the tribunal's jurisdiction to adapt the contract [*Fiona Trust Case*]. In the present case, the phrase "*disputes regarding non-contractual obligations*" provided in the HKIAC Model Arbitration Clause has been expressly deleted from the arbitration agreement [*CE5 ¶15; Moser/Bao 326*]. Therefore, deletion of any such reference that provides the Tribunal the jurisdiction to decide on "non-contractual claims" like adaptation of contract counters this argument. Also, the phrase "arising out of" cannot be liberally interpreted to include "non-contractual claims" in case, the parties, at the time of conclusion of

the contract, did not consider the possible claim [*Dreymoore v Eurochem*]. In the present case, the two final negotiators of the contract did not consider the claim of adaptation of the contract at the time of the conclusion of the contract [*RE3 35*]. Thus, the interpretation of the arbitration agreement excludes adaptation from the Tribunal's jurisdiction.

ii. The Tribunal lacks the jurisdiction to adapt the contract under the law of Danubia pursuant to the parol evidence rule

33. The circumstances in which an arbitral tribunal is allowed to admit evidence in interpreting the contract is determined by the substantive law of the seat [*Rosengren 7*; *Dicey/Morris/Collins 193*]. It is the duty of the tribunal to apply the substantive law of the seat to determine the circumstances in which extrinsic evidence can be admitted for contractual interpretation [*Azpetrol Oil Case*]. In the present case, Art. 4.3 of the Danubian Contract Law provides for the parol evidence rule and excludes the admissibility of all extrinsic evidence for the interpretation of contracts [*PO2 ¶45*].
34. The parol evidence rule is the exclusionary rule which restricts the pre-contractual negotiations and subsequent conduct of the parties from being considered while interpreting the contract [*Chartbrook v Persimmon; Peel 211*; *Jacobs*/Masters/*Stanley 38*]. Further, under the parol evidence rule, the oral evidence is not admissible to contradict the express terms of the contemporaneous written contract between the parties [*Nanayang v. Wan Shan; Man Sun v. Wong Kwan*].
35. CLAIMANT argues that the parol evidence rule should be rejected as the Parties' did not complete the contract as per the intention of the original drafters [*MoC ¶24*]. However, this assertion of CLAIMANT is untenable. **First**, the absence of a merger clause which declares the contract to be complete and final, does not *per se* allow the arbitral tribunal to admit extraneous evidence [*Milton v Bankers*]. **Second**, the parol evidence rule strictly applied in Danubia, has been given the same effect as a merger clause under Art. 2.1.17 UNIDROIT PICC [*PO2 ¶45*].
36. In the present case, CLAIMANT has relied on the negotiations between Ms. Napravnik and Mr. Antley to argue that the Tribunal has the jurisdiction to adapt the contract [*MoC ¶37*]. However, the law of Danubia provides for parol evidence rule which excludes all pre-contractual negotiations including any oral-communication between the Parties.

II. The Tribunal lacks the power to adapt the contract

37. The parties to the contract empower the arbitral tribunal to decide a dispute within the limits of the applicable law [*Redfern/Hunter 306*]. Thus, it is upon the parties to empower the arbitral tribunal to adapt the contract. CLAIMANT argues that the Parties have granted consent under the arbitration agreement to adapt the contract [*MoC ¶27*]. To the contrary, RESPONDENT submits

that the Parties have not authorised the Tribunal to adapt the contract (**i**). Consequently, if the Tribunal adapts the contract, the Award would be unenforceable (**ii**).

i. The Parties have not authorised the Tribunal to adapt the contract

38. The arbitrator's power to adapt the contract is determined in accordance with the arbitration agreement and the law governing the arbitration agreement [*Berger 5*]. The arbitration agreement is the primary source of arbitrator's power as it signifies the will of the parties [*Ferrario 42*]. The tribunal does not have the power to modify a contract and substitute itself for the parties, unless an express consent is obtained from the parties [*Aminoil Award; Berger 8*].

39. Art. 28(3) DAL enables the arbitral tribunal to decide *ex aequo et bono* or as amicable compositeur "*if the parties have expressly authorised*" the tribunal [*Art. 28(3) Model Law*]. This Article empowers the arbitral tribunal to decide the dispute on the lines of equity, fairness or justice [*Binder 340*]. While the Parties may authorise the arbitral tribunal to adapt the contract, an express conferral of power is required [*PO2 ¶36*]. Thus, in the absence of an express authorisation as provided in the law governing arbitration agreement, the Tribunal does not have the power to decide as amicable compositeur. Also, the Art. 6.2.3(4)(b) of the Danubian Contract Law grants the arbitral tribunal the power to adapt the contract only "if authorized" by the parties [*PO2 ¶45*].

40. In the present case, the Parties have not only adopted a narrowly worded arbitration clause [*see ¶¶29-30*] but have also not made any reference under the arbitration agreement or under the substantive contract empowering the Tribunal to adapt the contract [*CE5 14; CE8 17*]. Thus, the Tribunal does not have the power to adapt the contract under the arbitration agreement.

ii. If the Tribunal adapts the contract, the award would be unenforceable.

41. The arbitral tribunal has an integral duty to render an enforceable award [*Horvath 136-137*]. The ultimate goal of the arbitral process is to render an award enforceable under law [*Derains/Schwartz 353*; *Lew 537*]. The parties' agreement to arbitrate for resolution of disputes, implies that the parties' intended to have an award which is enforceable [*Lew 538*].

42. RESPONDENT submits that if the Tribunal adapts the contract then the award may be annulled pursuant to Art. 34(2)(a)(iii) DAL as it would be in contravention of the Parties' agreement and outside the scope of arbitration [*China Holdings Ltd v. Grand Pac*]. The phrase "arising out of" is narrowly interpreted and does not extend to adaptation of the contract [*see ¶30*]. Further, the Parties have removed any reference to the Tribunal's power to decide on "non-contractual claims" from the arbitration agreement [*see ¶32*] thereby signifying their intention to not authorise the Tribunal to adapt the contract. Thus, if the Tribunal was to adapt the contract it would contravene the Parties' agreement and would render the award unenforceable.

C. EVEN IF, THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT, THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT

43. RESPONDENT submits that even if, the law of Mediterraneo, specifically the CISG governs the arbitration agreement, the Tribunal is not empowered to adapt the contract. Art. 8 CISG provides a mechanism for the interpretation of all contractual terms including the arbitration agreement [*CISG-AC Opinion 3; Redfern/Hunter* ¶*3.12*]. To that effect, the Parties did not intend to empower the Tribunal to adapt the contract pursuant to an interpretation of the arbitration agreement under Art. 8(1) CISG (**I**). Also, an interpretation under Art. 8(2) CISG indicates that the Parties did not intend to empower the Tribunal to adapt the contract (**II**).

I. The Parties did not intend to empower the Tribunal to adapt the contract pursuant to an interpretation under Art. 8(1) CISG

44. A contract shall be interpreted according to a party's actual intention if the other party knew or could not have been unaware of such intention at the time of conclusion of the contract [*Art. 8(1) CISG*]. CLAIMANT asserts that it was the clear intention of both the Parties to confer power on the Tribunal to adapt the contract based on the negotiations between Ms Napravnik, and Mr. Antley, the initial negotiators of CLAIMANT and RESPONDENT respectively [*MoC* ¶*37*]. To the contrary, RESPONDENT shall demonstrate that the Parties did not intend to empower the Tribunal to adapt the contract pursuant to an interpretation under Art. 8(1) CISG.

45. During the negotiations, Ms. Napravnik had suggested to include in contract a mechanism to ensure adaptation of the contract, to which Mr. Antley had replied that "***in his view*** *that it should* ***probably*** *be the task of arbitrator to adapt the contract*" [*CE8 17*]. This statement of Mr. Antley cannot be interpreted as his intention to authorise the Tribunal to adapt the contract as his statement was merely an expression "of his view" and not an expression of his intent. Further, the note left Mr. Antley for future negotiations indicates that he did not intend to empower the Tribunal to adapt the contract as there was no mention of adaptation in the note [*RE3 3*5]. Thus, there was no common understanding between the Parties to empower the Tribunal to adapt the contract.

II. An interpretation under Art. 8(2) CISG indicates that the Parties did not intend to empower the Tribunal to adapt the contract

46. If the subjective interpretation is not discernible, the arbitral tribunal should resort to objective interpretation under Art. 8(2) CISG [*ICC 8324/1995; MCC Marble Case*]. Under this Article, statements and other conduct are to be interpreted according to the understanding of a reasonable third person of the same kind and in the same circumstances as the other party [*Farnsworth Art. 8*

¶*2.4*]. As a general rule, special weight is attached to the language employed in the arbitration agreement [*Schwenzer/Hachem/Kee* ¶*26.16*].

47. RESPONDENT submits that taking into account the wording of the arbitration agreement, a reasonable third person would interpret the arbitration agreement as excluding the arbitrator's power to adapt the contract. It is widely accepted that the phrase "arising out of" is interpreted narrowly and does not extend to non-contractual claims [*see* ¶*30,32*]. Further, the wilful exclusion of the phrase "non-contractual obligation" from the HKIAC Model Clause by the Parties indicates that a reasonable third person in the position of the Parties would interpret the arbitration agreement as excluding the power of the Tribunal to decide on non-contractual claims like adaptation of the contract. Thus, even if, the law of Mediterraneo governs the arbitration agreement, the Tribunal is not empowered to adapt the contract.

ISSUE 2: THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS SHOULD NOT BE ADMITTED

48. CLAIMANT, in an effort to support its claim for the remedy of adaptation, has urged the Tribunal to admit evidence from the other arbitration between RESPONDENT and a buyer in Mediterraneo [*MoC* ¶*44*]. It asserts that the evidence is admissible on the misguided application of the evidentiary standards [*ibid.* ¶*45*]. Moreover, it attempts to admit the evidence which is protected by confidentiality and is not available in public domain. Contrary to this submission, RESPONDENT requests the Tribunal to deny CLAIMANT'S request which is based on unfounded assertions. RESPONDENT submits that the Tribunal should not allow any evidence from the other arbitration proceedings (**A**). The evidence does not confirm to the evidentiary standards (**B**). Finally, the exclusion of evidence does not violate procedural fairness (**C**).

A. THE TRIBUNAL SHOULD NOT ALLOW ANY EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

49. CLAIMANT correctly states that the Tribunal's power to decide on the admissibility of evidence is subject to its discretionary rights [*MoC* ¶*50*]. It is for the arbitrators to decide on the admissibility, relevance, materiality and weight of any evidence [*Redfern/Hunter 420; Arb. App. No 3/2011*]. This power of the arbitral tribunal to decide on the admissibility of evidence is derived from the designated institutional rules and the *lex arbitri* [*Bockstiegel 2; Marghitola 20*]. In the present case, the Parties have agreed that the proceedings shall be in accordance with the HKIAC Rules 2018 and the *lex arbitri* is the law of Danubia [*CE* ¶*15*]. The HKIAC Rules prescribe that while deciding on the admissibility and weight of evidence, the arbitral tribunal may apply the strict rules of evidence

[*Moser/Bao ¶9.150; Art. 22 HKIAC Rules*]. The arbitral tribunal exercises its discretion to apply the strict rules of evidence depending upon the nature of the evidence, the manner of obtaining the evidence and the credibility of the evidence [*Sicard-Mirbal/Derains 195; ICC Case No. 7626*].

50. CLAIMANT requests the Tribunal to admit the Award from the other arbitration as evidence [*MoC ¶44*]. This evidence could have been obtained either through the two former employees of RESPONDENT or through the illegal hack of RESPONDENT'S computer system. In both cases, the evidence would have been obtained by improper means. RESPONDENT shall demonstrate that this evidence should not be admitted as the evidence obtained through a breach of confidentiality is inadmissible (**I**). Alternatively, the evidence obtained through an illegal hack is also inadmissible (**II**). Further, CLAIMANT has not acted in good faith while obtaining the evidence (**III**).

I. The evidence obtained through a breach of confidentiality is inadmissible

51. CLAIMANT argues that the evidence should be admitted notwithstanding that it has been obtained through a breach of confidentiality [*MoC ¶57*]. However, RESPONDENT shall demonstrate that the breach of confidentiality makes the Award inadmissible.

52. Confidentiality in an arbitration proceeding depends on the applicable laws as well as parties' agreement including the chosen institutional rules [*Born 2781; Redfern/Hunter 390; Fouchard/Gaillard/Goldman 188*]. In an arbitration, confidentiality is perceived as an implied as well as an express obligation [*Dolling Baker v. Merit; Eastern Saga Case; Aita v. Ojjeh*].

53. In the present case, the Parties have agreed to conduct the proceedings in accordance with the HKIAC Rules 2018 [*CE5 ¶15*]. Similarly, in the other arbitration also the contract provided for arbitration under the HKIAC Rules 2013 [*PO2 ¶39*]. Under Art. 45 HKIAC Rules 2018, any information that is related either to arbitration proceedings or arbitral awards including but not limited to the existence of the arbitral proceedings, correspondence, witness statements, evidence, awards and orders are protected by confidentiality [*Moser/Bao ¶12.30; Smeureanu 133*]. Further, the IBA Rules relied upon by CLAIMANT [*MOC ¶48*] also provide for excluding evidence on the basis of commercial or technical confidentiality [*Art. 9(2)(e) IBA Rules; Ashford 141*].

54. The evidence if obtained through the two former employees of RESPONDENT who were also the witnesses in the other arbitration would be through the breach of their contractual obligation that required them to keep all information about the other arbitral proceedings confidential [*PO2 ¶4; Letter by Fasttrack 51*]. Also, witnesses are bound by a general duty to maintain confidentiality of arbitration proceedings including the arbitral award [*Smeureanu 151; Enron Creditors Recovery Case*]. Thus, any information regarding the arbitration proceedings obtained through these two employees would be improperly obtained and inadmissible.

55. Although CLAIMANT as a third party to the other arbitration is not bound by an express duty of confidentiality, the Award that it seeks to admit as evidence is protected by confidentiality as any arbitral award unless otherwise agreed by the arbitrating parties remains confidential [*Esso Plowman Case; Dolling Baker v. Merit; Emmott v. Michael Wilson*]. It suffices that the evidence sought to be introduced is protected by confidentiality, and it is not material whether such breach of confidentiality took place at the hands of the party presenting the evidence [*Ali Shipping Case*]. Thus, the Award obtained through the breach of confidentiality is inadmissible as it is protected by confidentiality.

56. Additionally, CLAIMANT could have argued that the Award is not protected by confidentiality as it falls under the established exceptions to the duty of confidentiality- the establishment of a legal right vis-à-vis a third party, interests of justice and public interest [*Hassneh Insurance Case; Ali Shipping Case*]. However, these exceptions are not applicable to the present case. **Firstly**, only a party to the arbitration can use its prior arbitral award in subsequent proceedings to establish its legal right against a third party [*ibid.*]. **Secondly**, the Award does not support the claims and has been taken out of context by CLAIMANT as the other arbitration had a different contractual set-up [*PO2 ¶39*]. **Thirdly**, the Award is purely commercial in nature, involving no public interest as an exception to confidentiality.

57. CLAIMANT has asserted that the testimony of Mr. Velazquez, CEO of one of CLAIMANT'S regular customer, should be admitted as he is not bound by the confidentiality agreement [*MoC ¶57*]. However, RESPONDENT submits that this is an erroneous observation as the testimony of Mr. Velazquez is not in question. Even if, the Tribunal were to consider the testimony of Mr. Velazquez, it would be of no relevance as he was not involved in the other arbitration and had only provided CLAIMANT the information regarding the existence of the other arbitration [*PO2 ¶40*].

58. Further, CLAIMANT has argued that RESPONDENT from the other arbitration can join the dispute via joinder of the proceedings [*MoC ¶49*]. CLAIMANT places its reliance on the Art. 28.1 HKIAC Rules to consolidate the two arbitration proceedings [*ibid.*]. However, to do so if the claims are made under different arbitration agreements, a common question of law or fact should arise in the arbitrations [*Moser/Bao ¶10.18*]. In the present case, the parties of the other arbitration have not consented to consolidation of the proceedings. Also, the consolidation requirements have not been met as different systems of law as well as different factual situations are present in the two arbitration proceedings. Additionally, CLAIMANT has relied on Art. 4(1) UNCITRAL Transparency Rules to support its proposition for consolidation [*MoC ¶49; Letter by Langweiler 50*].

However, these rules are neither applicable to the two arbitrations nor to international commercial arbitration disputes in general [*Gehring/Euler/Scherer 9*].

59. In conclusion, the evidence is inadmissible as it is protected by the confidentiality and has been obtained through a breach of confidentiality agreement.

II. Alternatively, the evidence obtained through an illegal hack is inadmissible

60. CLAIMANT seeks to admit the evidence even if it has been obtained through an illegal hack of RESPONDENT'S computer system [*MoC ¶61*]. Contrary to this, RESPONDENT shall establish that the evidence obtained through an illegal hack is inadmissible in the present case.

61. While deciding the admissibility of evidence obtained through an illegal hack, the arbitral tribunal determines whether such information was available in public domain [*Valcke 2018*]. In cases, where the parties have sought to admit the evidence obtained through illegal hacks, evidence has always been available in public domain and was common knowledge [*Yukos Case 2014; Caratube v. Kazakhstan; Libananco v. Turkey*]. This is based on the premise that an information available in public domain loses its private and confidential nature [*ibid.*]. The arbitral tribunals have refused to admit the evidence obtained through an illegal hack when the evidence was not publically available and the party seeking to admit the evidence, improperly obtained it [*Libananco v. Turkey; EDF v. Romania; Methanex v. USA; Ireton 237*].

62. Information is said to be in public domain or a public information when it is freely available for everyone to see or know about and is common knowledge [*James 512; CED "Public Domain"*]. The fact that confidential information has been accessed by a limited segment of the public does not necessarily mean that the information has entered into public domain and thus, lost its quality of confidentiality [*Wee Shu Woon v. HT S.R.L*]. In the *City of Moscow Case*, the English courts held the judgment to be not in public domain despite it having reached 15,473 people via newsletter uploaded on a website [*City of Moscow v. Bankers Trust*]. Thus, an information which is not freely available and not common knowledge, is said to be not available in public domain despite it having reached a segment of public.

63. CLAIMANT has argued that the Award is in public domain as it is available with the intelligence company [*MoC ¶63*]. However, the mere availability of the Award with the company does not qualify it as being in public domain. **Firstly**, the Award was not a common knowledge as CLAIMANT came to know about the Award only from Mr. Velazquez who is a former employee of RESPONDENT of the other arbitration [*PO2 ¶40*]. **Secondly**, the Award is not freely available as CLAIMANT has arranged to acquire a copy of the Award against the payment of USD 1,000 from the intelligence company [*ibid. ¶41*]. Accordingly, CLAIMANT'S argument that the Award obtained

through an illegal hack of RESPONDENT'S computer system should be admitted as it is in public domain is untenable.

III. CLAIMANT has not acted in good faith while obtaining the evidence

64. CLAIMANT seeks to admit the Award that it is to obtain from the intelligence company on the payment of USD 1000 [*PO2 ¶41*]. RESPONDENT shall demonstrate that this Award should not be admitted as CLAIMANT has not acted in good faith and the evidence has been improperly obtained.

65. The arbitral tribunal while deciding the admissibility of evidence should look into whether the party seeking to admit the evidence has acted in good faith [*Waincymer ¶10.16; Glencore Finance Case v Bolivia; Ahongalu v FIFA*]. The preliminary consideration before the arbitral tribunal while deciding the admissibility of evidence based on the duty of good faith is whether the party seeking to rely on the evidence was involved in improperly obtaining it any manner [*Yukos case 2014; Caratube v. Kazakhstan; Ahongalu v FIFA; Amos Adamu v. FIFA*]. Evidence which is obtained through wrongful acts of a party is generally held to be inadmissible on the basis of the principle of *ex turpi causa non oritur actio* which states that "*a right cannot stem from a wrong*" [*Blair/Gojkovic 256*]. The arbitral tribunals have refused to introduce evidence when the party seeking to admit the evidence was involved in wrongful acts thereby violating its general duty to act in good faith while obtaining the evidence [*Methanex v. USA; EDF v. Romania*].

66. In the present case, CLAIMANT has arranged for the Award from the intelligence company which provides intelligence on the horseracing industry and has a doubtful reputation as to where it gets its information from [*PO2 ¶41*]. This company has promised to sell a copy of the Award to CLAIMANT on the payment of USD 1,000 [*ibid.*]. CLAIMANT not only arranged the Award from the intelligence company but also asked for it in symposiums especially from people who should have preserved the confidentiality of the Award but did not [*Letter by Fasttrack 50; PO2 ¶41*]. Thus, CLAIMANT improperly obtained the evidence and thereby violated its duty to act in good faith.

B. THE EVIDENCE DOES NOT CONFIRM TO THE EVIDENTIARY STANDARDS

67. CLAIMANT argues that the evidence is admissible considering its relevance to the proceedings and materiality to the outcome of the arbitral proceedings [*MoC ¶45*]. To the contrary, RESPONDENT submits that the evidence fails to meet these evidentiary standards. Art. 22.2 HKIAC Rules provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence including whether to apply strict rules of evidence. This Article is in line with Art. 19(2) DAL which is the *lex arbitri* [*Art. 19(2) Model Law*].

68. The standard of relevant to the case requires measuring the probative value of certain evidence as it relates to a party's burden of proof [*O'Malley ¶9.09; BNP Paribas Case*]. The commentary on the HKIAC Rules considers a document relevant if it is "*useful for the line of evidence by requesting party in order to establish the truth of its factual allegations on which its legal conclusions are based*" [*Moser/Bao ¶9.161*]. Further, the materiality standard implies that the requested evidence be necessary for the "*considerations of the factual issues from which legal conclusions are drawn*" [*Waincymer 858; Marghitola 53*]. An evidence is considered material if "*the arbitral tribunal deems it necessary as an element to allow complete consideration as to whether a factual allegation is true or not*" [*Moser/Bao ¶9.161*].

69. In the other arbitration proceeding governed by 2013 edition of HKIAC Rules, RESPONDENT had asked for adaptation of the contract when faced with hardship caused by the imposition of tariffs [*PO2 ¶39*]. Through the evidence, CLAIMANT intends to show RESPONDENT'S contradictory behaviour in the two arbitration proceedings [*MoC ¶45*]. However, RESPONDENT shall demonstrate that neither does the other arbitration proceeding indicate any contradictory behaviour of RESPONDENT nor is the evidence relevant and material to the present case.

70. **Firstly**, the arbitration agreement in the other arbitration contained an HKIAC Arbitration Clause [*PO2 ¶39*] as compared to the present arbitration clause which has been explicitly reduced [*CE5 ¶15*]. Thus, any reference which could have been interpreted as an express empowerment for contract adaptation is absent in the present case [*see ¶¶28-32*]. **Secondly**, the other arbitration had an explicit choice of law clause in favour of law of Mediterraneo which provides for adaptation without an express authorisation [*PO2 ¶39*]. However, the law of Danubia which governs the present arbitration agreement [*see ¶¶7-25*] requires an express conferral of power to the arbitral tribunal to adapt the contract [*ibid. ¶36*] and that is absent in the present case. **Thirdly**, the contract in the other arbitration contained an ICC Hardship Clause 2003 [*ibid. ¶39*] unlike the present contract, which contains only a *force majeure* clause with a hardship reference [*CE5 ¶12*]. This clause lacks any express reference to the remedy of adaptation as compared to the broadly worded ICC Hardship Clause.

71. Thus, CLAIMANT'S assertions indicate an erroneous understanding of the different contractual framework of the two arbitration proceedings. Hence, the evidence should not be admitted as it lacks relevance and materiality to the present arbitration proceedings.

C. THE EXCLUSION OF THE EVIDENCE DOES NOT VIOLATE PROCEDURAL FAIRNESS

72. CLAIMANT states that the right to equal treatment is a founding principle of arbitral proceedings [*MoC ¶55*] and alleges that the exclusion of the evidence would violate its right to be heard and the right to present its case [*MoC ¶¶54-56*]. RESPONDENT agrees that the mandatory requirements of procedural fairness necessitate party equality [*Holtzmann/Neuhaus 564; Binder ¶5.005*]. However,

RESPONDENT shall demonstrate that the exclusion of evidence would not infringe CLAIMANT'S due process rights.

73. Art. 18 DAL is a fundamental tenet of due process providing parties' a "*full opportunity to present its case*" [*Art.18 Model Law*]. However, this has been interpreted as a reasonable opportunity to present its case [*Amasya Enterprises v. Asta Developments; Reed 365; Bamforth/Madiment 488*]. The reasonable opportunity to present the case, affords the Tribunal the discretion to exclude evidence which lacks probative value [*Redfren/Hunter 440*]. It is universally accepted that an arbitral tribunal is not bound to admit all the evidence adduced by the parties so as to comply with their right to be heard [*Kaufmann-Kohler/Rigozzi 281; Karaha Bodas Co. Case; Football Players Case; Nickel Products Case*]. Any refusal by the arbitral tribunal to address evidence does not violate the parties' procedural rights [*Karaha Bodas Co. Case*]. Therefore, a party's right to be heard is not violated by the arbitral tribunal's refusal to admit evidence. In conclusion, the dismissal of the evidence will by no means undermine CLAIMANT'S right to be heard and the right to present its case.

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

74. According to the FSSA, CLAIMANT was required to sell 100 doses of frozen semen in three instalments under DDP-delivery [*CE5 13-14*]. Clause 12 of the FSSA states that the "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*ibid. ¶12*].

75. Before the last shipment, the Government of Equatoriana imposed a 30% tariff on agricultural products, which included racehorse semen, as a direct retaliation to the tariffs imposed by the Government of Mediterraneo [*CE6 15*]. CLAIMANT asserts that this imposition of 30% tariff amounts to hardship under Clause 12 of the FSSA, and thus, it is entitled to the payment of USD 1,250,000 resulting from an adaptation of the price under the Clause [*MoC ¶65*]. Alternatively, it argues that if Clause 12 is not applicable to the present issue, Art. 79 CISG provides for the remedy of adaptation [*MoC ¶92*]. Contrary to CLAIMANT'S position, RESPONDENT shall demonstrate that CLAIMANT is neither entitled to the remedy of adaptation under Clause 12 of the FSSA (**A**) nor under Art. 79 CISG (**B**).

A. CLAIMANT IS NOT ENTITLED TO THE REMEDY OF ADAPTATION UNDER CLAUSE 12 OF THE FSSA

76. CLAIMANT, in an effort to seek payment of USD 1,250,000 has urged the Tribunal to adapt the price under Clause 12 of the FSSA [*MoC ¶65*]. It erroneously asserts that the tariffs are not covered in the costs associated with DDP-delivery [*MoC ¶69*]. Moreover, it argues that the tariffs meet the requirements of hardship under Clause 12 [*MoC ¶81*] and that the agreement between the Parties allows for price adaptation [*MoC ¶86*]. To the contrary, RESPONDENT shall establish that the import tariffs are covered in the risks associated with DDP-delivery in the FSSA (**I**). The tariffs imposed by Equatoriana are not covered under Clause 12 (**II**). In any event, CLAIMANT is not entitled to the adaptation of price under Clause 12 of the FSSA (**III**).

I. The import tariffs are covered in the risks associated with DDP-delivery in the FSSA

77. Clause 8 of the FSSA explicitly provides for DDP-delivery [*CE5 ¶8*]. CLAIMANT asserts that the modifications made to the general meaning of DDP-delivery by the Parties include the preclusion of tariffs from the costs associated with DDP-delivery [*MoC ¶68*]. Though, RESPONDENT agrees that certain costs associated with such a delivery were modified, it shall demonstrate that the cost of custom formalities was not excluded by the Parties.

78. The INCOTERM DDP requires the seller to bear all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods for export as well as for import, to pay any duty for both export and import and to carry out all customs formalities [*Petersen 2017; Coetzee 2016; Ramberg 172; Wezel 9*]. DDP is the only INCOTERM wherein the seller and not the buyer is required to clear the goods for import and pay any duty related to the same [*ibid.*].

79. In the present case, the FSSA provides that RESPONDENT is responsible for tank rental and handling fees associated with the delivery as well as for the insurance fees [*CE5 ¶10,13*] which are traditionally borne by the seller under DDP-delivery [*Ramberg 173; Erauw 205*]. These are the only modifications made to the general meaning of DDP-delivery under the FSSA and no other modification has been made so as to make an exception for custom formalities.

80. CLAIMANT argues that it is not burdened with the risk of tariffs arising from DDP-delivery as during the negotiations, it had stated that it did not want to be burdened with risks "*associated with changes in customs regulations or import restrictions*" arising under DDP-delivery [*MoC ¶69*]. However, RESPONDENT submits that the negotiations leading to the inclusion of DDP-delivery in the FSSA imply that the import tariffs are to be borne by CLAIMANT only.

81. When RESPONDENT asked for DDP-delivery [*CE3 11*], CLAIMANT in its email accepted DDP delivery against an increased price of USD 1000 per dose [*CE4 12*]. Moreover, it asked to be relieved from the risk of "*custom regulations or import restrictions*" associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship

clause [*ibid.*]. RESPONDENT did not forthwith accept all of CLAIMANT'S requests and negotiated on some increase in price against DDP-delivery [*PO2* ¶*8*]. With regard to the regulation of risks, the first option was not acceptable to RESPONDENT and the Parties negotiated only on the second option of including a clause which deals with certain unforeseeable change of circumstances [*PO2* ¶*8; CE8 17; RE2 33, RE4 35*]. Thus, there was no common understanding between the Parties on the exclusion of risks related to custom formalities as alleged by CLAIMANT [*MoC* ¶*73*].

82. Additionally, CLAIMANT could have argued that DDP-delivery was chosen to benefit from CLAIMANT'S expertise in the transportation of frozen semen and not to burden it with all risks under DDP-delivery [*NoA* ¶*18*]. RESPONDENT agrees that the primary reason to include DDP-delivery in the FSSA was the urgency of the delivery and to benefit from CLAIMANT'S expertise in the shipment of frozen semen including the necessary export and import documentation [*CE3 11*]. However, this reason in itself does not lead to the conclusion that the risk of import tariffs associated with DDP-delivery in general was excluded.

83. Thus, the import tariffs are covered in the risks associated with DDP-delivery under the FSSA.

II. The tariffs imposed by Equatoriana are not covered under Clause 12 of the FSSA

84. CLAIMANT argues that Clause 12 of the FSSA is a hardship clause [*NoA* ¶*7*] and that the tariffs imposed by Equatoriana meet the requirements of hardship under Clause 12 [*MoC* ¶*81*]. To the contrary, RESPONDENT submits that Clause 12 is a *force majeure* clause with only a hardship reference (**i**). In any event, the tariffs imposed by Equatoriana do not meet the requirements of hardship under Clause 12 (**ii**).

i. Clause 12 is a *force majeure* clause with only a hardship reference

85. CLAIMANT argues that the Parties intended to and included a hardship clause under the FSSA [*NoA* ¶*7*]. Contrary to this, RESPONDENT submits that Clause 12 is a *force majeure* clause with only a hardship reference and is not in the nature of a general hardship clause.

86. While interpreting contractual stipulations, special weight is attached to the language employed in the contract [*Schwenzer/Hachem/Kee* ¶*26.16*]. A hardship clause refers to a clause dealing with change in economic circumstances and their effect on the agreement [*Junge 213; Bruner 201*]. These clauses refer to unforeseen events that fundamentally alter the economic equilibrium underlying a contract, making it excessively onerous for a party to perform its obligations and prescribe explicitly the remedy of renegotiation of the contract [*ibid.*]. Such an understanding does not align with the language of Clause 12 of the FSSA which provides a list of specific events of exemption from liability.

87. While accepting DDP-delivery under the FSSA, CLAIMANT asked for the insertion of a hardship clause in the contract [*CE4 12*]. The initially suggested ICC Hardship Clause was rejected by RESPONDENT as being too broad for the purposes of the FSSA and the objectives pursued [*PO2 ¶12*]. The standard terms and conditions of CLAIMANT already provided for a *force majeure* clause which stated that the "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God"* [*PO2 ¶3; CE5 ¶12*]. The final negotiators of the Agreement concentrated on including a hardship reference and regulating a few risks directly in this clause [*RE3 35*]. They only added the words "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* to the already existing *force majeure* clause [*PO2 ¶3; CE5 ¶12; RE3 35*]. The objective pursued for regulating the risks was only related to the health and safety requirements, which was added in the *force majeure* clause itself, without making any other changes to the clause [*PO2 ¶12*]. Thus, the Parties in the initial negotiations and the subsequently executed FSSA included only a hardship reference.

ii. In any event, the tariffs imposed by Equatoriana do not meet the requirements of hardship under Clause 12 of the FSSA

88. CLAIMANT argues that the tariffs imposed by Equatoriana satisfy the requirements of hardship under Clause 12 of the FSSA [*MoC ¶81*]. The burden of satisfying all the requirements of Clause 12 is placed on CLAIMANT as the party seeking to claim an exemption is required to meet all the conditions of exemption [*Silveira 199; Powdered Milk Case*]. RESPONDENT submits that the requirements of Clause 12 are not met as the imposition of tariffs is not an unforeseen event (**a**) and is even otherwise not envisaged under Clause 12 (**b**). Moreover, the imposition of tariffs has not made the contract more onerous (**c**).

a. <u>The imposition of tariffs is not an unforeseen event.</u>

89. CLAIMANT asserts that the tariffs imposed by Equatoriana are an unforeseeable event as they were introduced after the conclusion of the contract between the Parties [*MoC ¶83*]. However, RESPONDENT shall demonstrate that the tariffs were in the contemplation of the Parties and were thus, not unforeseeable.

90. The unforeseeability requirement of hardship implies that the aggrieved party could not reasonably be expected to have taken the change in circumstance into account at the time of the conclusion of the contract, and has thereby not assumed its risk [*Brunner 156; Stoll/Gruber Art. 79 ¶22; ICC Case No. 7197/1992*]. However, if at the time of conclusion of the contract, a party could not have been unaware of the economic conditions in a certain region, it must bear the consequences,

should the crisis materialize and then cannot claim exemption from liability on the basis of unforeseeability [*ICC Award No. 8486;* Rodner *687; Berger 520*]. Thus, under the foreseeability test, it is not the specific event that needs to be foreseen in great detail, but a change in circumstance of such a nature [*ibid.*].

91. The present 30% tariffs on agricultural products including racehorse semen were imposed by Equatoriana in retaliation to the 25% tariffs on agricultural products imposed by Mediterraneo in November, 2017 [*PO2 ¶23; CE6 15*]. This retaliatory act of Equatoriana was not unprecedented as it has in the past also taken direct retaliatory measures to the trade restrictions [*CE6 15*]. The President of Mediterraneo had in his election campaign, in January 2017, itself announced a more protectionist approach to international trade, in particular in relation to agricultural products [*CE6 15*]. Moreover, after coming to power in April 2017, on 5 May 2017 he had appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his "superminister" for agriculture, trade and economics [*PO2 ¶23*]. She had been an outspoken protectionist for years and had advocated limiting the access of foreign agricultural products to the Mediterranean market [*ibid.*]. Thus, the Mediterranean import tariffs were in consideration at the time of the conclusion of the FSSA in May 2017, and CLAIMANT has not discharged its burden of proving that the Equatorian retaliation could not have been foreseen by it. Further, CLAIMANT'S awareness of these economic developments in the region is mirrored by its request of regulating the risks related to "*custom regulations or import restrictions*" during the negotiation of the contract [*CE4 ¶12*]. Thus, the import tariffs were in the contemplation of the Parties at the time of conclusion of the contract.

92. Additionally, CLAIMANT could have argued that the size of the tariffs and the breadth of the goods covered was completely unforeseeable. However, as reported by WTO and UNCTAD, the average global tariffs on agricultural products are around 62%. [*Gibson/Wainio/Whitley/Bohman 4; World Tariff Profiles 2017*]. Further, live animal products are covered under the ordinary meaning of agricultural products in international trade [*WTO-LT/UR/A-1/A/2*]. Thus, the tariffs imposed by Equatoriana are not an unforeseeable event.

b. <u>The imposition of tariffs is not an event envisaged under Clause 12.</u>

93. The import tariffs are not covered in the list of specific events mentioned under Clause 12 of the FSSA [*CE5 ¶12*]. CLAIMANT relies on the residual clause "*additional health and safety requirements or comparable unforeseen events*" to argue that the tariffs imposed by Equatoriana are envisaged under Clause 12 [*MoC ¶82*]. It asserts that the tariffs are a "comparable unforeseen event" within the meaning of Clause 12 [*ibid.*]. To the contrary, RESPONDENT submits that the tariffs are not a circumstance envisaged under Clause 12.

94. The term "comparable unforeseen events" should be interpreted in a manner consistent with the understanding between the parties [*Art. 8(1) CISG; Schwenzer 145*]. In order to assess such understanding, the negotiations between the parties should be taken into account [*Art. 8(3) CISG; Fashion Products Case; Fruit & Vegetables Case*], especially the preceding correspondence between them [*Packaging Machines Case*]. In the initial negotiations, CLAIMANT had informed RESPONDENT [*CE4 12*] about its past experience with unforeseen additional health and safety requirements that made highly expensive tests necessary, thereby destroying the commercial basis of the contract [*PO2 ¶21*] and insisted on an inclusion of a hardship clause. RESPONDENT understood these to be the only objectives being pursued by CLAIMANT when it suggested a hardship reference to be included. With reference to this risk mentioned by CLAIMANT, the Parties added the wording, "*additional health and safety requirements or comparable unforeseen events*" into the existing *force majeure* clause [*PO2 ¶12*]. Import tariffs are an economic measure of the government related to custom regulation that lead to a direct increase in sales price [*Mankiw 671*]. In comparison, health and safety requirements depend on domestic conditions and involve certification and testing, which may lead to an incidental increase in sales price [*PO2 ¶21*]. Thus, even though the Clause expands to other comparable unforeseen events, it only covers government acts leading to an incidental price rise and not any or all government acts.

95. CLAIMANT asserts that applying the principle of *ejusdem generis*, tariffs and additional health and safety requirements are in the same genus of events [*MoC ¶76*]. However, this is an erroneous application of the principle. The *ejusdem generis* rule of construction provides that the general words are to be given the same meaning as those specifically mentioned in the clause [*BLD "Ejusdem Generis"*] to ensure that the contract is internally consistent [*Kirkham 30; Bund 23*]. Using this rule of construction, courts have refused to excuse performance for events that are dissimilar to events specifically listed in the clause [*Squillante/Congalton 80; Bund 25; Langham-Hill Petroleum Inc. v. Southern Fuels*]. If a clause includes a list of events, such a list is usually meant to be exhaustive and is given limited meaning [*Mandel 48; Kirkham 32*]. Thus, the term "comparable unforeseen event" should be interpreted to only include similar government acts leading to an incidental price rise using the *ejusdem generis* principle. Hence, the imposition of tariffs is not an event envisaged under Clause 12 of the FSSA.

96. Additionally, CLAIMANT has asserted that the Clause should be interpreted against RESPONDENT using the *contra proferentem* rule to interpret the contract [*MoC ¶80*]. *Contra proferentem* is founded on the basic principle that the party which has drafted the term must bear the risk of its possible ambiguity [*Schlechtriem/Schwenzer Art.8 ¶49; Honnold/Flechtner 107*]. However, if the other party had a chance to scrutinise the provision and subsequently accepted it, the principle of *contra proferentem*

cannot be relied upon [*Sykes 68; Haraszti 191*]. In the present case, even though RESPONDENT suggested the wording [*PO2 ¶12*] the Parties deliberated on the final clause together [*PO2 ¶12; CE8 17; RE3 35*]. Thus, the principle of *contra proferentem* does not apply in favour of CLAIMANT. In conclusion, the imposition of tariffs is not a circumstance envisaged under the Clause 12.

c. The imposition of tariffs has not made the contract more onerous.

97. CLAIMANT asserts that the tariffs imposed by Equatoriana have made the contract more onerous thereby meeting the requirement of Clause 12 [*MoC ¶85*]. Moreover, it argues that the term "more onerous" should be distinguished from the standard hardship clauses which require an "excessively onerous" burden [*ibid.*]. However, what is of fundamental importance is whether the imposition of tariffs made the contract onerous [*Brunner 424*]. RESPONDENT submits that the tariffs imposed by Equatoriana have not even made the contract onerous.

98. When determining whether the contract has become onerous, the arbitral tribunal first looks at the risks assumed by the parties in their contract, and then proceeds to ascertain as to whether there is a fundamental alteration in the equilibrium of the contract [*Silveira 323; Brunner 425*]. There is no hardship if the obligor has assumed the risk of the change in circumstances [*ICC Case No. 8486; Brunner 427*].

99. In the present case, Clause 8 of the FSSA provides for a DDP-delivery [*CE5 ¶8*]. Under the INCOTERM DDP, the seller has an obligation to pay any duty for both export and import and to carry out all customs formalities [*Ramberg 172; Erauw 205*]. The inclusion of DDP-delivery in the FSSA establishes that the tariffs are covered in the sphere of risk assumed by CLAIMANT. Further, the price in the FSSA was increased by USD 200 per dose due to the additional costs associated with DDP-delivery [*PO2 ¶8*] as requested by CLAIMANT [*CE4 12*]. Thus, the risks of import tariffs associated with DDP-delivery and the increase in contractual price due to DDP-delivery imply that CLAIMANT was already put in a position to account for any change in circumstance that would increase performance price. Hence, the contract has not become onerous.

100. Even if the Tribunal were to find that the import tariffs are not covered in the risks associated with DDP-delivery in the present case, the 30% import tariffs have not made the contract excessively onerous. CLAIMANT distinguishes between the terms "more onerous" and "excessively onerous" to argue that a less stringent test should be applied under Clause 12 [*MoC ¶85*]. However, the distinction between the terms "more onerous" and "excessively onerous" is limited to semantic artificiality and in contractual drafting these two terms are often used interchangeably in a hardship clause [*Brunner 424; Publicker Industries v. Union Carbide Corp.*]. Moreover, the distinction between these two terms cannot be applied to the present case as Clause 12 of the FSSA was finalised by the two negotiators of the Parties who had previously not been involved in

the negotiations and the drafting of the contract [*RE3 35*]. Hence, it is of no bearing that the contract uses the term "more onerous" instead of the standard hardship burden of "excessively onerous".

101. A contract is said to have become excessively onerous when the aggrieved party cannot be reasonably expected to effect performance in accordance with the terms of the contract [*Brunner 422; Berger 542; Girsberger/Zapolskis 134*]. An increase in cost of performance of about 100-125% is generally accepted as making the contract excessively onerous for the hardship test [*Brunner 431; CISG-AC Opinion No. 7*]. CLAIMANT alleges that the tariffs imposed by Equatoriana have increased its cost of performance by 30% [*MoC ¶89*]. However, RESPONDENT shall demonstrate that the increase in CLAIMANT'S cost of performance of the contract is not 30% but rather only 15.78%.

VARIANTS	**THIRD INSTALMENT OF 50 DOSES**	**TOTAL SHIPMENT OF 100 DOSES**
CONTRACT PRICE (PRICE/DOSE=100,000)	50*100,000=5,000,000	100*100,000=10,000,000
EXPECTED COST OF PERFORMANCE (COST/DOSE=95,000)	50*95,000=4,750,000	100*95,000-9,500,000
TARIFFS (30%)	30% of (50*100,000)=1,500,000	
INCREASE IN COST OF PERFORMANCE (IN %)	(1,500,000/4,750,000)*100 31.57%	(1,500,000/9,500,000)*100 15.78%

102. Clause 12 of the FSSA provides remedy for events "*making* ***the contract*** *more onerous*" [*CE5 ¶12*]. For hardship test, determination of any economic change requires consideration of the parties' actually expected costs [*Brunner 433*]. In the present case, CLAIMANT has erroneously calculated the 30% increase in cost of performance only with respect to the third shipment and not with respect to the cost of the overall contract as required under Clause 12 which has increased by 15.78%. In any event, the 15.78% increase in overall cost of performance of the contract or the alleged 30% increase in cost of performance is significantly lower than the generally accepted threshold for hardship.

103. Additionally, CLAIMANT could have argued that as it is suffering from economic losses, a 30% alteration in the cost of performance is sufficient to constitute a fundamental alteration in the equilibrium of the contract. However, the threshold for allowing hardship is lowered only in extreme situations when the lasting financial ruin of the party is impending [*Brunner 440*] and there is no possibility of absorbing the losses [*Girsberger/Zapolskis 131*]. Moreover, the decisive element

is not the financial ruin but the fundamental alteration of the equilibrium of the contract [*Brunner 437; Dawwas 25*]. In the present case, even though the 5% profit margin and the subsequent financial plan of CLAIMANT are affected by the imposition of tariffs [*PO2 ¶29, ¶31*], there is a possibility of new loans from its creditors [*ibid.*]. Also, RESPONDENT was made aware of CLAIMANT'S financial condition only after the imposition of the tariffs [*PO2 ¶22*]. Thus, its financial ruin is not imminent so as to lower the stringent threshold of hardship.

104. In conclusion, the imposition of the tariffs has not made the contract more onerous and this requirement of Clause 12 is not satisfied.

III. In any event, CLAIMANT is not entitled to adaptation of price under Clause 12 of the FSSA

105. CLAIMANT asserts that it is entitled to the adaptation of price by relying on Clause 12 [*MoC ¶86*]. It erroneously argues that the failure to provide the remedy of adaptation under Clause 12 does not preclude the adaptation of the contract [*ibid. ¶87*] and that the subsequent conduct of the Parties evidences agreement on the adaptation of price [*ibid. ¶91*]. Contrary to its submission, RESPONDENT shall demonstrate that an interpretation under Art. 8(1) CISG indicates that the Parties did not intend for adaptation of price as a remedy under Clause 12 (**i**). This is also evidenced pursuant to an interpretation under Art. 8(2) CISG (**ii**).

i. An interpretation under Art. 8(1) CISG indicates that the Parties did not intend for adaptation of price as a remedy under Clause 12

106. As aforementioned, Art. 8(1) CISG gives priority to the subjective intent of the party where the other party knew or could not have been unaware of the party's intention. [*Honnold 116*]. CLAIMANT argues that its intent vis-à-vis adaptation was made clear in the course of the Parties' negotiations initiated between Ms. Napravnik and Mr. Antley, who were the initial negotiators of CLAIMANT and RESPONDENT respectively [*MoC ¶89*]. RESPONDENT agrees that Ms. Napravnik had mentioned the need for adaptation if the Parties could not agree on an amendment in case of hardship [*CE8 17*]. However, Mr. Antley had only replied that "***in his view*** *it shall* ***probably*** *be the task of the arbitrators to adapt if the parties could not agree*" [*ibid.*]. This indicates that the statement was made only in his view and was not an expression of his intent regarding the remedy of adaptation. Further, the note left by Mr. Antley, which included the issues to be negotiated in the next round, makes it sufficiently clear that he did not agree to price adaptation as there was no reference to the remedy of adaptation, in that note [*RE3 35*].

107. Moreover, the new final negotiators of the Parties, who deliberated in detail on Clause 12 of the FSSA, neither negotiated on the remedy of adaptation under Clause 12 nor did they include any

reference to adaptation in the Clause [*RE3 35; CE8 12; CE5 12*]. In this regard, Art. 8(1) CISG denies effect to purely subjective and un-communicated party intent [*Schlechtriem 40*]. Thus, it cannot be said that the Parties intended for adaptation as a remedy under Clause 12.

108. Additionally, CLAIMANT asserts that pursuant to Art. 8(3) CISG, the subsequent conduct of the Parties' evidences agreement on adaptation of price [*MoC ¶¶89-91*]. It argues that the statement made by Mr. Shoemaker, who was in-charge of RESPONDENT's racehorse breeding program, and RESPONDENT'S subsequent conduct of accepting delivery indicates acceptance to the price adaptation [*ibid. ¶91*]. To the contrary, RESPONDENT submits that the subsequent conduct of the Parties' does not indicate agreement on price adaptation.

109. In the present case, when CLAIMANT informed Mr. Shoemaker about the tariffs and asked for an increased price, he only stated that "*if the contract provides for an increased price in the case of such tariffs we will certainly find an agreement on the price"* as he could not reject CLAIMANT'S request outright [*CE8 36*]. He also informed CLAIMANT that he was not involved in the negotiations of the agreement and would clarify the legal situation with the drafters of the FSSA [*ibid.*]. Thus, he did not agree to price adaptation nor had the authority to do so. Further, RESPONDENT'S acceptance of delivery does not indicate agreement on price adaptation. At the most, it can be said to indicate its acceptance to continuation of agreement. Also, the meeting between the Parties was related only to the issue of adaptation [*PO2 ¶35*] and does not indicate that in case the negotiations between the Parties are not successful, an arbitral tribunal will be entitled to rewrite the contract or determine the revised price. Hence, the subsequent conduct of RESPONDENT does not indicate an agreement on the remedy of adaptation.

ii. Clause 12 of the FSSA indicates that the Parties did not agree on the remedy of adaptation of the price pursuant to an interpretation under Art. 8(2) CISG

110. In the event that the common subjective intention of the parties is not discernible, a contract should be construed in accordance with the understanding of a reasonable person [*Art. 8(2) CISG; Schmidt-Kessel in Schlechtriem/Schwenzer 147*]. CLAIMANT asserts that failure to provide a remedy in Clause 12 does not preclude the remedy of adaptation of price [*MoC ¶87*]. To the contrary, RESPONDENT submits that a reasonable understanding of Clause 12 precludes the remedy of adaptation of price.

111. Adaptation of contract involving alteration of the terms of the contract applies only to exceptional circumstances when the parties have included a hardship clause in the contract, which specifically details the circumstances that could justify a hardship situation and the entailing consequences [*ICC Award No. 8873; Zaccaria 160; Aminoil Award*]. It is a reasonable understanding that if the parties have not included a hardship clause in the contract or if included is too limited to be able

to deal with the consequences of a particular event, the remedy of adaptation of the contract is not provided [*ICC Award No. 5953; Berger 7; Ferrario 77*] as introducing any consequence other than that envisaged in the contract *per se,* will leave the text of the contractual provision redundant [*ibid.*].

112. In the present case, Clause 12 of the FSSA is not in the nature of a general hardship clause but only provides a list of specific events of exemption from liability [*see* ¶¶*85-87*]. In this regard, a reasonable person in the position of the Parties would have understood that Clause 12 does not provide for the remedy of adaptation as the Clause only provides for exemption of liability in case of certain events and does not entail any other consequence.

113. In conclusion should the Tribunal find that the Parties' intention under Art. 8(1) CISG is not discernible, an objective interpretation of the Clause under Art. 8(2) CISG yields the same result that adaptation of the price is not provided under Clause 12 of the FSSA.

B. ADDITIONALLY, CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 RESULTING FROM ADAPTATION OF THE PRICE UNDER THE CISG

114. CLAIMANT asserts that in the event, it is not entitled to the payment resulting from adaptation of the price under Clause 12 of the FSSA, recourse must be made to the applicable substantive law [*MoC* ¶*94*]. Clause 14 of the FSSA provides for the Law of Mediterraneo including the CISG to be applicable to the sales agreement [*CE5* ¶*14*]. CLAIMANT argues that the tariffs imposed by Equatoriana constitute hardship under Art. 79 CISG and that it is entitled to adaptation under the law [*MoC* ¶¶*100-122*]. Moreover, it erroneously relies on UNIDROIT PICC to claim adaptation of the price [*MoC* ¶*125*].

115. Contrary to this submission, RESPONDENT shall demonstrate that Clause 12 of the FSSA precludes the application of Art. 79 CISG (**I**). Alternatively, the import tariffs do not entitle CLAIMANT to invoke hardship under Art. 79 CISG (**II**). In any event, Art. 79 CISG does not provide for the remedy of adaptation of price (**III**). Additionally, CLAIMANT cannot claim adaptation under UNIDROIT PICC (**IV**).

I. Clause 12 of the FSSA precludes the application of Art. 79 CISG

116. CLAIMANT asserts that Clause 12 of the FSSA does not exclude the application of Art. 79 CISG [*MoC* ¶¶*94-105*]. To the contrary, RESPONDENT shall demonstrate that Clause 12 of the FSSA precludes the application of Art. 79 CISG in accordance with Art. 6 CISG.

117. Art. 6 CISG grants parties the freedom to "*derogate from or vary the effect of any of its provision*" or even to exclude the application of the CISG altogether by means of contractual agreement [*Schwenzer/Hachem 102*]. The CISG does not explicitly state how contracting parties may derogate

from its provisions [*Art. 6 CISG*]. However, it is generally accepted that the contractual terms agreed to by parties in a sales agreement will be given precedence over the provisions of the CISG, in the event that there is a discrepancy between the clauses of the agreement and the provisions of the CISG [*Winship 525-554*].

118. Art. 79 CISG is not exempted from the principle in Art. 6 CISG [*UNCITRAL Case Digest 2012 ¶112*]. The parties may agree expressly or impliedly to derogate from Art. 79 and may themselves regulate in whole or in part the requirements for and the consequence of such exemption [*Schwenzer 1152*]. Contractual provisions containing a clause which provides a specific list of exempting circumstances supersede Art.79 CISG [*RF CCI 1995; Miettinen 38*].

119. CLAIMANT argues that Clause 12 of the FSSA does not present a discrepancy with Art. 79 CISG so as to constitute a departure from it [*MoC ¶97*]. However, Clause 12 provides a specific list of exempting circumstances [*see ¶¶ 85-87*] which supersedes the application of Art.79 CISG. Also, the remedy under Art.79 is exactly same as the remedy provided in Clause 12 of the FSSA (i.e. exemption of liability). Thus, the scope overlaps not only in substance but also in remedy. Hence, by including the *force majeure* clause with a hardship wording, the Parties have provided for a special regulation of the problem of changed circumstances thereby excluding the application of Art. 79 CISG.

II. Alternatively, the import tariffs do not entitle CLAIMANT to invoke hardship under Art. 79 CISG

120. CLAIMANT submits that Art. 79 CISG should be interpreted to include hardship [*MoC ¶¶106-110*] and that the tariffs imposed by Equatoriana meet the requirements of impediment under Art. 79 CISG [*MoC ¶¶111-118*]. However, RESPONDENT shall demonstrate that hardship is not within the scope of Art. 79 CISG (**i**) and in any event, the tariffs do not meet the requirements of Art. 79 CISG (**ii**).

i. Hardship is not within the scope of Art. 79 CISG

121. CLAIMANT argues that the term "impediment" under Art. 79 CISG should be interpreted to include hardship. However, RESPONDENT submits that hardship is not subsumed under Art. 79 CISG which follows from the object and purpose of Art. 79 CISG and its drafting history.

122. **Firstly**, in light of the meaning, object and purpose of the CISG, hardship is not covered under Art. 79 CISG pursuant to the principles of treaty interpretation provided in Art. 31 VCLT [*Art. 31 VCLT*]. The term "impediment", which has not been defined by the CISG, relates only to the situation of making performance of the contract impossible, and not merely difficult or excessively onerous for the disadvantaged party [*Petsche 157; Klepac 18*]. Further, it is argued that the wording

of Art. 79 CISG which provides that "*the disadvantaged party must not have been reasonably expected to avoid or overcome its consequence*" is not appropriate for the situation of hardship [*Petsche 158*] as Art. 79 CISG only regulates the question of releasing parties from obligations that have become physically impossible due to an unforeseen change in circumstance [*Nuova Fucinati v Fondmetall International; Iron Molybdenum Case*]. This argument is also supported by the wording of other uniform law instruments which do not use this language of Art. 79 in their hardship provisions [*Art. 6.2.2 UNIDROIT PICC; Art. 6.111 PECL*]. Thus, the meaning, object and purpose of the Convention indicates that hardship is not subsumed under Art. 79 CISG.

123. **Secondly**, in line with Art. 32 VCLT, it is argued that the drafting history of the CISG, in particular the rejection of the Norwegian proposal to include a hardship provision in the text of CISG indicates that Art. 79 CISG cannot be interpreted as including hardship [*Zaccaria 162; Petsche 165*]. A careful analysis of the negotiations that culminated in Art. 79 CISG indicates that the participants followed a rigorous selection method and excluded any reference of hardship [*Gillies/Moens 37; Tallon 592*].

124. During the drafting of Art. 79 CISG, the use of the term "impediment" instead of the generic term "circumstances" as used in Art. 74 ULIS was to specifically exclude any connection to changed circumstances and hardship [*Stoll/Gruber in Schlechtriem/Schwenzer 603*]. Further, the Norwegian proposal which was to take into account the radically changed circumstances as an excuse for non-performance was rejected [*Schlechtriem 603; Bonell 561; Honnold 602*]. This demonstrates that the ultimate intention of the drafters of the CISG was to regulate the question of the causes of exemption in a very precise fashion, deliberately restricting the scope and application of Art. 79 CISG as far as possible [*Zaccaria 165*].

125. Additionally, CLAIMANT could have argued that the principles of good faith and reasonableness should be used to interpret Art. 79 CISG, so as to include an economic change in circumstances. However, these principles cannot be used to interpret an express and intentional decision of the drafters of the Convention to exclude hardship [*Tallon 594; Zaccaria 167*].

126. In conclusion, the object and purpose of Art. 79 CISG and its drafting history indicate that hardship is not covered under Art. 79 CISG.

ii. In any event, the tariffs do not meet the requirements of Art. 79 CISG

127. CLAIMANT argues that the tariffs imposed by Equatoriana meet all the requirements of Art. 79 CISG [*MoC ¶111*]. The party invoking Art. 79 CISG has the burden to satisfy all the requirements mentioned [*Schwenzer 1130; Art. 79 CISG*]. However, RESPONDENT shall demonstrate that CLAIMANT has not discharged its burden under Art. 79 CISG as it can be reasonably expected to

have taken the impediment into account at the time of conclusion of the FSSA (**a**) Also, CLAIMANT can reasonably be expected to have overcome the impediment or its consequences (**b**).

a. CLAIMANT can be reasonably expected to have taken the impediment into account at the time of conclusion of the FSSA

128. Art. 79 CISG requires an objective assessment of what may be expected from a party entering into the contract, considering the circumstances surrounding the conclusion of the contract [*Lookofsky 139; Scafom International Case*]. The test for evaluation is whether a person, active in the same field and placed in the same circumstance, would have taken the impediment into account at the time of conclusion of the contract [*Brunner 160; Tallon 581*].

129. In the present case, a 30% tariff was imposed by Equatoriana in retaliation [*CE6 15; PO2 ¶23*] to the 25% tariff imposed by Mediterraneo [*PO2 ¶23*]. At the time of the conclusion of the FSSA, Mediterraneo had announced a clear preference for a protectionist regime and CLAIMANT itself had contemplated risks associated with "*import restrictions or custom regulations*" during the negotiations of the contract [*see ¶¶91-92*]. Thus, RESPONDENT submits that the tariffs were contemplated by CLAIMANT and hence, it can be reasonably expected to have taken the impediment into account at the time of conclusion of the contract.

b. CLAIMANT can be reasonably expected to have overcome the impediment or its consequences

130. The condition that the impediment must be unavoidable under Art. 79 CISG requires that the impediment is beyond the defaulting party's sphere of risks [*Liu 395; Tallon 581*]. A party is expected to do all that may reasonably be expected from it to ensure due performance, even if avoiding or overcoming an impediment entails greater effort and costs than anticipated at the time of the conclusion of the contract [*Brunner 322; Schwenzer 567*]. Thus, an impediment or its consequences are considered to be unavoidable only where the ultimate limit of sacrifice has been exceeded [*Schwenzer 1069*].

131. CLAIMANT argues that it could not reasonably be expected to have avoided or overcome the consequences of the tariffs imposed by Equatoriana [*MoC ¶116*]. To the contrary, RESPONDENT submits that the tariffs were in the sphere of risk of CLAIMANT under DDP-delivery [*see ¶99*] and thus, it is reasonably expected to have avoided or overcome the tariffs or its consequences.

132. Even if the Tribunal were to find that the import tariffs are not covered in the risks associated with DDP-delivery under the FSSA, it is argued that CLAIMANT has reasonably overcome the tariffs or its consequences within the meaning of Art. 79 CISG as the ultimate limit of sacrifice has not been exceeded. In the present case, the tariffs imposed by Equatoriana neither meet the

generally accepted threshold to invoke Art. 79 CISG nor is CLAIMANT facing imminent financial ruin to lower the threshold [*see* ¶¶*100-104*]. Thus, CLAIMANT has reasonably overcome the tariffs and its consequences.

III. In any event, Art. 79 CISG does not provide for the remedy of adaptation of price

133. CLAIMANT argues that it is entitled to an increase in price under Art. 79 CISG [*MoC* ¶¶*119-123*]. However, RESPONDENT shall demonstrate that adaptation of price, which involves alteration of the terms of the contract is not provided as a remedy under Art. 79 CISG.

134. CLAIMANT correctly states that Art. 79 CISG does not specifically provide any consequence or remedy if an impediment has occurred [*MoC* ¶*119*]. Art. 79(5) CISG allows either party to adopt any remedy apart from the payment of damages [*Honnold 1989* ¶*435.5; Silveira 212*]. Under this Article, the generally accepted remedies are the right of avoidance and the right to specific performance [*Bianca/Bonell* ¶*2.10; Hilaturas Miel v. Iraq; Electronic Hearing Aid Case*]. However, adaptation as a remedy is not envisaged under this Article [*Flechtner 97*].

135. In view of the *travaux préparatoires*, the CISG has opted for a unitary concept of exemption under Art. 79 CISG and does not entitle a party to alter the terms of the contract by seeking adaptation in situations of hardship [*Tallon 594; Silveira 332*]. This is evidenced by the drafters' rejection of proposals regarding relief to be granted when performance has become excessively burdensome as a result of changed circumstances [*Carlsen 4; Fletchener 93*]. This argument is also affirmed by the absence of any provision under the CISG which corresponds to the wording of other uniform legal instruments that entitle parties to seek adaptation of contract in situations of hardship [*Art. 6.2.3 UNIDROIT PICC; Art. 6.111(3) PECL*]. The CISG was intended to apply to cross-border transactions by achieving a balance between civil and common law traditions [*Komarov 78; Flechtner 97*]. Thus, non-acceptance of remedy of adaptation under the CISG can also be attributed to the fact that the remedy of altering the terms of the contract is mostly a civil law remedy and is rejected in common law traditions [*Clive 710; Klepac 38; Brunner 491*].

136. Additionally, CLAIMANT has argued that it is entitled to the remedy of adaptation of price under Art. 79 CISG based on the principle of *rebuc sic stantibus* [*MoC* ¶*121*]. However, it is argued that the principle of *pacta sunt servanda* providing for sanctity of contract is an overriding principle of the CISG [*Rimke 197*]. This principle provides that the parties remain bound to the terms of their agreement as long as performance of their respective obligations is still (physically) possible [*Jones/Schlechtriem 216; Brunner 392*].

137. The principle of *pacta sunt servanda* may be subject to certain limitations like the principle of *rebus sic stantibus* which allow for an adjustment in the terms of the contract [*Silveira 334*]. However, this

exception is subject to strict and narrow interpretation and is limited to cases where compelling reasons justify it [*ICC Award 1512; ICC Award 6281; Silveira 336*], having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved and the circumstances of the case [*Jones/Schlechtriem 216; Brunner 391*]. In the present case, this exception to the underlying principle of *pact sunt servanda* should not be applied as there is an alleged increase of only 30% in the cost of performance due to the imposition of tariffs and the FSSA provided for DDP-delivery. Also, when a remedy is specifically excluded from the CISG, as evidenced from the *travaux preparatoires*, it cannot be introduced through the principles like *rebus sic stantibus* [*Zaccaria 167; Carlsen 35*].

138. In conclusion, neither adaptation of price is envisaged as a remedy under Art. 79 CISG nor is CLAIMANT entitled to adaptation of price under the principle of rebus *sic stantibus.*

IV. Additionally, CLAIMANT cannot claim the remedy of adaptation under UNIDROIT PICC

139. CLAIMANT has erroneously relied on UNIDROIT PICC to claim the remedy of adaptation of price [*MoC ¶¶124-125*]. To the contrary, RESPONDENT shall demonstrate that CLAIMANT cannot rely on UNIDROIT PICC for the remedy of adaptation (**i**). Alternatively, the requirements of hardship under UNIDROT PICC are not met (**ii**).

i. CLAIMANT cannot rely on UNIDROIT PICC for the remedy of adaptation

140. CLAIMANT has argued that in the absence of an explicit wording in Art. 79(5) CISG, UNIDROIT PICC may be used as a gap-filler to provide the remedy of adaptation of price [*MoC ¶¶124-125*]. However, it is argued that UNIDROIT PICC as a soft-law instrument, should not be used to fill the gap [*Klepac 40*]. Art. 7(2) CISG expressly requires the arbitral tribunal to fill the gaps in the CISG by resorting to the general principles on which the CISG is based and not the general principles of international trade or commercial law [*Schwenzer 139*]. The scope of application of the CISG and the UNIDROIT PICC is significantly different [*Gotanda 3; Schwenzer 157*]. While CISG has a much narrower scope exclusively dealing with the international sale of goods, UNIDROIT PICC has a wider scope and covers the general principles of international trade and commercial law [*Flechtner 2*]. Thus, UNIDROIT PICC cannot be relied upon as a gap-filler. Also, when the remedy of adaptation is expressly excluded from the CISG [*see ¶¶133-138*], it cannot be introduced through the UNIDROIT PICC [*Keplac 47; Carlsen 35*].

141. Additionally, CLAIMANT could have relied on the law of Mediterraneo, which is UNIDROIT PICC, as the law applicable to sales agreement to claim the remedy of adaptation. However, where the parties have agreed upon a clause regulating change of circumstances that specifies both, the

hypothesis upon which it is activated, and the effects thereof, the provisions of applicable law dealing with the same stand precluded [*UNCITRAL Case Digest 2012 ¶23; Rimke, 240; Art. 1.5 UNIDROIT PICC*]. Thus, Clause 12 of the FSSA, which is sufficient in regulating change in circumstances, as it envisages the specific events of hardship as well as their consequences (i.e. exemption of liability), pre-empts the hardship and adaptation provisions of UNIDROIT PICC.

ii. Alternatively, the requirements of hardship under UNIDROT PICC are not met

142. Art. 6.2.3 UNIDROIT PICC entitles the "disadvantaged party" as provided in Art. 6.2.2 UNIDROIT PICC to claim adaptation of the contract [*Vogenauer 287; Perillo 130*]. Under Art. 6.2.2 UNDIROT PICC, hardship is said to occur when the occurrence of an event fundamentally alters the equilibrium of the contract [*Art. 6.2.2 UNIDROIT PICC; Vogenauer 275*]. This event should have occurred after the conclusion of the contract; the disadvantaged party could not have reasonably taken the event into account at the time of the conclusion of the contract; the event should be beyond the control of disadvantaged party and the risk of such event should not have been assumed by the disadvantaged party [*ibid.*].

143. In the present case, the tariffs imposed by Equatoriana have not fundamentally altered the equilibrium of the contract [*see* ¶¶*100-104*] and the risk of tariffs is assumed by CLAIMANT under the DDP-delivery [*see* ¶*99*]. Further, CLAIMANT could have reasonably taken the tariffs into account at the time of the conclusion of the contract [*see* ¶¶*128-129*]. Thus, RESPONDENT submits that the requirements of hardship under Art. 6.2.2 UNIDROIT PICC are not met and consequently, CLAIMANT cannot claim adaptation under UNIDROIT PICC.

REQUEST FOR RELIEF

In light of the foregoing, counsels for RESPONDENT respectfully request the Tribunal to:

1. Dismiss the claim for lack of jurisdiction and power to adapt the contract;
2. Find that the Partial Interim Award is inadmissible;
3. Reject the claim for additional payment of USD 1,250,000 resulting from an adaptation of the price.

Black Beauty Equestrian, Equatoriana: 24 January 2019

ISHA GOEL ATHARVA KOTWAL AMAN GUPTA