SIXTEENTH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, 31ST MARCH – 07TH APRIL 2019

MEMORANDUM FOR RESPONDENT

ROYAL INSTITUTE OF COLOMBO
SRI LANKA

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

CHIRASTHI	**HARISH**	**IRANTHI**	**MINUL**
SENEVIRATNE	BALAKRISHNAN	WALGAMA	MUHANDIRAMGE

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ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
§	Section
AA	Arbitration Agreement
Apr	April
Art. /Arts.	Article/Articles
C.	Comment
CE	CLAIMANT's Exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods (2010)
Cl./Cls.	Clause/Clauses
DDP	Delivery Duty Paid
Feb	February
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules
i.e.	Id est (that is)

IBA Rules	International Bar Association Rules on The Taking of Evidence in International Arbitration
Jan	January
Jul	July
Jun	July
Mar	March
MFC	Memorandum for CLAIMANT
No.	Number
NOA	Notice of Arbitration
NY Conv.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
pg.	Page
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Q	Question
RE	RESPONDENT's Exhibit

Rec.	Record
RNOA	Response to the Notice of Arbitration
Sales Agreement	Frozen Semen Sales Agreement
Sep	September
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT	UNIDROIT Principles of International Commercial Contracts (2016)
WTO	World Trade Organization

AUTHORITIES

LEGAL TEXTS AND JOURNAL ARTICLES

Berger	Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion (2006) Klaus Peter **Berger** Cited in ¶¶3, 28, 31, 37, 137
Berger II	Power of Arbitrators to Fill and Revise Contracts to Make Sense (01 March 2001) Klaus Peter **Berger** Cited in ¶37
Berger III	Evidentiary Principles under the Revised IBA Rules on the Taking of Evidence in International Arbitration (2010) Klaus Peter **Berger** Cited in ¶15
Blavi	A Case in Favor of Publicly Available Awards in International Commercial Arbitration: Transparency versus Confidentiality International Business Law Journal (2016) Francisco **Blavi** Cited in ¶74
Brower/Sharpe	Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law The Leading Arbitrators' Guide to International Arbitration Charles N. **Brower,** Jeremy K. **Sharpe** Cited in ¶67

Carlsen	Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law? Anja **Carlsen** Cited in ¶137
CISG-AC ON 3	CISG - Advisory Council Opinion No. 3 (23 October 2004) Cited in ¶40
CISG-AC ON 7	CISG - Advisory Council Opinion No. 7 (12 October 2007) Cited in ¶122
Delebecque	Hardship Clauses and Exemption Clauses in Charter Parties Philippe **Delebecque** Cited in ¶106
Derains	Chronique des Sentences Arbitrales (Clunet 1975) Yves **Derain** Cited in ¶19
Draft Final Report	Commission on Health Care Dispute Resolution, Draft Final Report (27 July 1998) 598 PLI/Lit 551 (Westlaw) American Arbitration Association, American Bar Association, American Medical Association Cited in ¶60
Enderlein/Maskow	International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods (1992) Fritz **Enderlein**, Dietrich **Maskow** Cited in ¶137

Fucci	Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Practical Considerations in International Infrastructure Investment and Finance: (2006) Frederick R. **Fucci** Cited in ¶¶132, 138, 142, 143, 144
Gibbes/Frick/Ibarra	Trade Wars: Do the Steel and Aluminium Tariffs Create a Force Majeure to Excuse Contract Performance Under North Carolina or South Carolina Law? International Business Blog (6 April 2018) L. Elizabeth **Gibbes**, Eric **Frick**, Hector **Ibarra** Cited in ¶91
Girsberger/Zapolskis	Fundamental Alteration of The Contractual Equilibrium Under Hardship Exemption (2012) Daniel **Girsberger**, Paulius **Zapolskis** Cited in ¶¶127, 128, 139, 140
ICC Hardship Clause	ICC Force Majeure Clause 2003, ICC Hardship Clause 2003 International Chamber of Commerce Cited in ¶¶82, 104
ILA Report	International Law Association Washington Conference, International Commercial Arbitration Report for the Biennial Conference (April 2014) Committee Members for The International Law Association Washington Conference Cited in ¶¶46, 48, 49

Kaufmann-Kohler/Bärtsch	Discovery in International Arbitration: How Much is Too Much? SchiedsVZ: Zeitschrift für Schiedsverfahren, German Arbitration Journal, vol. 1, pg. 13-2 (2004) Gabrielle **Kaufmann-Kohler**, Philippe **Bärtsch** Cited in ¶56
Kokorin/van der Weide	Force Majeure and Unforeseen Change of Circumstances: The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches) (2015) Ilya **Kokorin**, Jeroen **van der Weide** Cited in ¶82
Maskow	Hardship and Force Majeure, The American Journal of Comparative Law, Volume 40, Issue 3 Dietrich **Maskow** Cited in ¶¶95, 123
Mosk/Ginsburg	Evidentiary Privileges in International Arbitration (Coase-Sandor Institute for Law & Economics Working Paper No. 656) (2013) Richard M. **Mosk**, Tom **Ginsburg** Cited in ¶65
Perillo	Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts Tulane Journal of International and Comparative (1997) Joseph M. **Perillo** Cited in ¶40

Pilkov	Evidence in International Arbitration: Criteria for Admission and Evaluation Konstantin **Pilkov** Cited in ¶¶53, 65
Ramberg	ICC Guide to Incoterms 2010: Understanding Practical Use (2011) Jan **Ramberg** Cited in ¶97
Ross	Tribunals Rules on Admissibility of Hacked Kazakh Emails Global Arbitration Review (22 September 2015) Alison **Ross** Cited in ¶77
Schwenzer	Force Majeure and Hardship in International Sales Contracts (2008) Ingeborg **Schwenzer** Cited in ¶¶81, 97, 137
Sindler/Wüstemann	'Privilege Across Borders in Arbitration: Multi-jurisdictional Nightmare or a Storm in a Teacup?' ASA Bulletin 23, No. 4 (2005) Michelle **Sindler**, Tina **Wüstemann** Cited in ¶15
Smeureanu	Confidentiality in International Commercial Arbitration (Jan 2011) Ileana **Smeureanu** Cited in ¶60
Third Secretariat Note	Third Secretariat Note, A/CN.9/WG.II/WP.41 (1983) UNCITRAL Working Group Cited in ¶45

Travaux préparatoires	UNIDROIT International Institute for the Unification of Private Law Working Group for the Preparation of Principles of International Commercial Contracts. 1998 Working Group Report Cited in ¶137
Ullman	Enforcement of Hardship Clauses in the French and American Legal System, 19 Cal. W. Int'l L.J.81 (1988) Harold **Ullman** Cited in ¶82
van den Berg	Yearbook Commercial Arbitration, vol XXXIII (2008) Albert Jan **van den Berg** Cited in ¶10
van Houtte	Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration (1993) Hans **van Houtte** Cited in ¶44
von Mehren/Salomon	'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide': Journal of International Arbitration 20, No. 3 (2003) George M. **von Mehren**, Claudia T. **Salomon** Cited in ¶71

Ziegel	Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (1981) Jacob S. **Ziegel** Cited in ¶148

BOOKS

Black's Law Dictionary	Black's Law Dictionary (Eleventh Edition) Cited in ¶36
Born	International Commercial Arbitration (Second Edition) (2017) Gary **Born** Cited in ¶¶1, 7, 9, 12, 19, 24, 50, 60
Born II	International Commercial Arbitration in the United States: Commentary and Materials (1994) Gary **Born** Cited in ¶8
Brunner	Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration (2008) Christoph **Brunner** Cited in ¶¶116, 129, 137
Da Silveira	Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation (2014) Azerdo **Da Silveira** Cited in ¶115

DDP Incoterms	International Chamber of Commerce, ICC Rules for the Use of Domestic and International Trade Terms (2010) Cited in ¶¶79, 96, 98, 102, 146
Dicey/Morris/Collins	Dicey, Morris & Collins on the Conflict of Laws (Fifteenth Edition) (2012) A.V. **Dicey**, J.H.C. **Morris**, Lord **Collins** of Mapesbury Cited in ¶¶6, 7, 13
Di Matteo	Contractual Excuse Under the CISG: Impediment, Hardship and the Excuse Doctrines Pace International Law Review (2015) Larry A. **Di Matteo** Cited in ¶91
Flambouras	The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis (2001) Dionysios P. **Flambouras** Cited in ¶125
Fontaine	Les Clauses de Hardship - Aménagement Conventionnel de l'Imprévision dans les Contrats à Long Terme (1976) Marcel **Fontaine** Cited in ¶33

Fouchard/Gaillard/ Goldman	Fouchard Gaillard Goldman on International Commercial Arbitration (Edited by Emmanuel Gaillard and John Savage) (1999) Philippe **Fouchard,** Emmanuel **Gaillard,** Berthold **Goldman** Cited in ¶¶13, 33
Hachem	Fixed Sums in CISG Contracts (2009) Pascal **Hachem** Cited in ¶115
Jarvis/Derains	Collection of ICC Arbitral Awards 1974 - 1985 (1990) Sigvard **Jarvis**, Yves **Derains** Cited in ¶19
Lew/Mistelis/Kröll	Comparative International Commercial Arbitration (2003) Julian D. M. **Lew**, Loukas A. **Mistelis**, Stefan Michael **Kröll** Cited in ¶69
McKendrick	Commentary on the UNIDROIT Principles of International Commercial Contracts; S. Vogenauer, J. Kleinheisterkamp Section 2: Hardship, Articles 6.2.1.- 6.2.3 (2010) Ewan **McKendrick** Cited in ¶137
Moser/Bao	A guide to the HKIAC Arbitration Rules Oxford University Press (2017) Michael J. **Moser**, Chiann **Bao** Cited in ¶¶57, 64

Moses	Defining Issues in International Arbitration: Celebrating 100 Years Chartered Institute Arbitrators (2016) Margaret L. **Moses** Cited in ¶¶48, 49, 50
Petit/Edge	The Governing Law of the Arbitration Agreement Q&A International Arbitration Report (Issue 2) (2014) Sherina **Petit**, Marion **Edge** Cited in ¶22
Redfern/Hunter	Redfern and Hunter on International Arbitration (Sixth Edition) (2015) Alan **Redfern**, Martin **Hunter**, Nigel Blackaby, Constantine Partasides QC Cited in ¶¶9, 22, 27
Schlechtriem/Schwenzer	Commentary on the UN Convention on the International Sale of Goods (2 English edition, Oxford University Press, Oxford, (2005) Peter **Schlechtriem**, Ingeborg **Schwenzer** Cited in ¶91
Schwenzer/Hachem/Kee	Global Sales and Contract Law Ingeborg **Schwenzer**, Pascal **Hachem**, Christopher **Kee** (2012) Cited in ¶¶81, 83, 95
Waincymer	Procedure and Evidence in International Arbitration (2012) Jeffrey **Waincymer** Cited in ¶71

Zaccaria	The Effects of Changed Circumstances in International Commercial Trade. International Trade & Business Law Review (2005) E. C. **Zaccaria** Cited in ¶129

RULES AND GUIDELINES

CISG	United Nations Convention on Contracts for the International Sale of Goods (2010) Cited in ¶¶40, 42, 43, 49, 50, 78, 99, 110, 111, 112, 113, 114, 115, 116, 118, 120, 121, 122, 126, 127, 130, 137, 147, 150
CISG DIGEST	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition) Cited in ¶¶42
Hague Principles	Hague Principles in Choice of Law in International Commercial Contracts (2015) Cited in ¶5, 6, 7
HKIAC Rules	2018 HKIAC Administered Arbitration Rules Cited in ¶¶7, 34, 41, 48, 54, 64, 68, 74
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010) Cited in ¶¶52, 64, 65
Model Law	UNCITRAL Model Law on International Commercial Arbitration (2006) Cited in ¶¶11, 45
NY Conv.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Cited in ¶38

UNIDROIT/UNIDROIT Principles Commentary	UNIDROIT Principles of International Commercial Contracts (2016) Cited in ¶¶40, 42, 43, 44, 49, 50, 110, 111, 130, 131, 133, 134, 135, 136, 137, 142, 147, 150

ONLINE RESOURCES

Amole/Colston	Fruit from a Poisoned Tree: Unlawfully Obtained Evidence (2017) Anupreet **Amole,** Jane **Colston** Cited in ¶73
Brauer	Health and Safety Regulations: Protectionism in Disguise? (30 November 2016) Andres Rodriguez **Brauer** Cited in ¶85
Burnson	Yahoo's Massive Data Breach Draws Negligence Suits by Users (23 September 2016) Robert **Burnson** Cited in ¶76
Cieply/Barnes	Sony Hacking Fallout Includes Unraveling of Relationships in Hollywood (18 Decemeber 2014) Michael **Cieply**, Brooks **Barnes** Cited in ¶76
Coetzee	Incoterms as a Form of Standardisation in International Sales Law: An Analysis of the Interplay Between Mercantile Custom and Substantive Sales Law with Specific Reference to the Passing of Risk (2010) Juana **Coetzee** Cited in ¶146

Cook/Elliott/McKinley	Who Will Pay the Tariffs? (03 May 2018) Susanne **Cook**, Larry **Elliott**, Christina Manfredi **McKinley** Cited in ¶91
Raymond	U.S. Accuses Chinese Citizens of Hacking Law Firms (28 December 2016) Nate **Raymond** Cited in ¶76
Understanding the WTO	Understanding the WTO: The Agreements Cited in ¶¶85, 91
WTO	WTO Legal Texts World Trade Organization website Cited in ¶¶85, 91

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AUSTRIA

Himpurna v. Negara	Himpurna California Energy Ltd. (Bermuda) v. PT (Persero) Perusahaan Listruik Negara (Indonesia) (4 May 1999) Cited in ¶¶89, 138

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Vital Berry v. Dira-Frost	Vital Berry v. Dira-Frost Rechtbank van Koophandel Hasselt (District Court) 1849/94, 4205/94 (2 May 1995) Cited in ¶¶119, 123

FRANCE

Gaz de Bordeaux Case	Gaz de Bordeaux Case The Council of State DP 1916 3.25 (30 March 1916) Cited in ¶89
Société Romay AG v. SARL	Société Romay AG v. SARL Behr France Court of Appeal of Colmar 1 A 199800359 (12 June 2001) Cited in ¶124

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OLG München - 34 Sch 10/05	OLG München 34 Sch 10/05 (04 July 2016) Cited in ¶38

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Klöckner v. Advance Technology	Klöckner Pentaplast Gmbh & Co. Kg v. Advance Technology (H.K.) Co. Ltd. High Court (14 July 2011) Cited in ¶16

SINGAPORE

FirstLink v. GT Payment	FirstLink Investments Corp Ltd v. GT Payment Pte Ltd. and others Singapore High Court SGHCR 12 (19 June 2014) Cited in ¶10

UNITED KINGDOM

A v. Secretary of State for the Home Dept.	A and Others v. Secretary of State for the Home Department (No.2) House of Lords [2005] UKHL 71 (08 December 2005) Cited in ¶59
Channel Tunnel v. Balfour Beatty	Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. and Others House of Lords [1993] 1 All ER 664 (1993) Cited in ¶21
Dalmia v. NB of Pakistan	Dalmia Dairy Industries Ltd. v. National Bank of Pakistan Court of Appeal (1978) Cited in ¶3
Deutsche Schachtbau v. Shell Intl.	Deutsche Schachtbau- und Tiefbohrgesellschaft mbH and Others v. Shell International Petroleum Company Limited House of Lords (1988) Cited in ¶3

Emirates Agency v. Fomento	Emirates Trading Agency LLC v. Sociedade de Fomento Industrial Private Ltd. England and Wales Commercial High Court (20 May 2015) Cited in ¶56
Habas Sinai v. VSC Steel	Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd High Court (2013) Cited in ¶12
Hamlyn v. Talisker	Hamlyn & Co. v. Talisker Distillery House of Lords UKHL 642 (1894) Cited in ¶22
Hassneh v. Mew	Hassneh Insurance Co. of Israel and others v. Mew High Court of England and Wales Lloyd's Rep 243 (22 December 1992) Cited in ¶61
High Trees Case	Central London Property Trust v. High Trees House Ltd. Court of Appeal KB 130 (18 July 1946) Cited in ¶107
Imerman v. Tchenguiz	Imerman v. Tchenguiz Court of Appeal (12 May 2010) Cited in ¶73

ITC v. Video Exchange	ITC Films Distributors Limited v. Video Exchange Limited Chancery Division [1982] 1 Ch 431 (12 October 1981) Cited in ¶75
May and Butcher v. R	May and Butcher v. R House of Lords 2 KB 17 (1929) Cited in ¶37
Three Rivers v. The Bank of England	Three Rivers District Council and Others v. Governor and Company of the Bank of England House of Lords (11 November 2004) Cited in ¶66
Tunisienne v. D'Armement	Compagnie Tunisienne de Navigation SA v. Compagnie D'Armement Maritime SA House of Lords (1970) Cited in ¶14
Sulamérica v. Enesa	Sulamérica CIA Nacional De Seguros S.A. and others v. Enesa Engenharia S.A. and others Court of Appeal (Civil Division) Case No: A3/2012/0249 (16 May 2012) Cited in ¶7
XL Insurance v. Owens	XL Insurance Ltd v. Owens Corning Queen's Bench Division (Commercial Court) 2 Lloyd's Rep 500 (28 July 1989) Cited in ¶9

UNITED STATES OF AMERICA

Mastrobuono v. Shearson

Mastrobuono v. Shearson Lehman Hutton, Inc.
U.S. Supreme Court
514 U.S. 52
(1995)
Cited in ¶28

Preston v. Ferrer

Preston v. Ferrer
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552 U.S. 34
(2008)
Cited in ¶8

ARBITRATION AWARDS

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Iron Molybdenum Case

Iron Molybdenum Case
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Nuova Fucinati v. Fondmetall Intl.

Nuova Fucinati S.p.A. v. Fondmetall International A.B.
(CLOUT Case No. 54)
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CLOUT 102	CLOUT Case No. 102 6281/1989 (26 August 1989) Cited in ¶¶119, 142
Kuwait v. AMINOIL	The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL) 21 ILM 976 (24 March 1982) Cited in ¶35

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ICC No. 221	ICC Award No. 221 (1992) Cited in ¶87
ICC No. 1507	ICC Award No. 1507 (1977) Cited in ¶19
ICC No. 2216	ICC Award No. 2216 (1975) Cited in ¶143
ICC No. 2291	ICC Award No. 2291 (1976) Cited in ¶87
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ICC No. 4367	ICC Interim Award No. 4367 (1984) Cited in ¶13

ICC No. 5314	ICC Award No. 5314 (1988) Cited in ¶15
ICC No. 8486	ICC Award No. 8486 (1999) Cited in ¶144

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Caratube v. Kazakhastan	Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan ICSID Case No. ARB 13/13 Cited in ¶77
CMS v. Argentina	CMS Gas Transmission Company v. Argentina (2005) Cited in ¶89
ConocoPhillips v. Venezuela	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela ICSID Case No. ARB/07/30 (24 April 2018) Cited in ¶73
Ioannis and Ron v. Georgia	Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia ICSID Case Nos. ARB/05/18 and ARB/07/15 (03 March 2010) Cited in ¶71

Kiliç v. Turkmenistan	Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan ICSID Case No. ARB/10/1 (20 May 2013) Cited in ¶¶53, 73
Libananco v. Turkey	Libananco Holdings Co. Limited v. Republic of Turkey ICSID Case No. ARB/06/8 (22 May 2013) Cited in ¶¶50, 73
Methanex v. USA	Methanex Corporation v. USA ICSID Case No. ARB/08/12 (09 August 2005) Cited in ¶¶73, 74
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Phoenix v. Czech Republic	Phoenix Action, Ltd. v. The Czech Republic ICSID Case No. ARB/06/5 (15 April 2009) Cited in ¶50
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STATEMENT OF FACTS

CLAIMANT: Phar Lap Allevamento, referred to hereinafter as "CLAIMANT", is a renowned stud farm in Mediterraneo, offering frozen semen of its champion stallions for artificial insemination.

RESPONDENT: Black Beauty Equestrian, referred to hereinafter as "RESPONDENT", is an equestrian facility in Equatoriana, famous for its broodmare lines producing world champions.

21 MAR 2017	RESPONDENT contacted CLAIMANT, inquiring of the availability of Nijinsky III, one of the most sought-after stallions, for its breeding programme.
24 MAR 2017	CLAIMANT agreed to sell 100 doses of semen of Nijinsky III, as requested by RESPONDENT, and provided RESPONDENT with its basic conditions of sale.
28 MAR 2017	RESPONDENT suggested for the courts of Equatoriana to have jurisdiction if the law of Mediterraneo were to govern the contract. It also insisted on delivery as per the DDP Incoterms.
31 MAR 2017	CLAIMANT agreed to the DDP Incoterms in return for a price increase, and requested for the inclusion of a hardship clause.
1O APR 2017	RESPONDENT requested the interpretation of the AA to be subject to the *lex arbitri*.
11 APR 2017	CLAIMANT changed the seat of arbitration from Equatoriana to Danubia, but did not object to the application of the *lex arbitri*.
NOV 2017	RESPONDENT's state, Equatoriana, imposed 30% retaliatory tariffs on agricultural products, including frozen horse semen, from Mediterraneo.
20 JAN 2018	CLAIMANT informed RESPONDENT that the final shipment might be withheld until the parties agreed on a price adjustment due to the increase in the cost of shipping that had arisen due to the tariffs imposed.
23 JAN 2018	The final shipment was sent out by the CLAIMANT, upon RESPODENT's agreement to increase the price, *if* only the contract allowed for it.
02 OCT 2018	CLAIMANT informed the Tribunal of receiving information regarding RESPONDENT's involvement in a separate arbitration, which it wishes to submit.

SUMMARY OF ARGUMENTS

ISSUE 01: The Tribunal is Not Empowered to Adapt the Contract

According to the choice of law analysis, the presumption of separability, and the validation principle, the law governing the AA is the *lex arbitri* i.e. the law of Danubia. In turn, the law of Danubia does not grant the Tribunal the power to adapt the Contract. Alternatively, if it is the law of Mediterraneo that is applicable, the Tribunal still does not have such a power. Additionally, the Tribunal lacks discretionary or inherent powers to adapt the Contract.

ISSUE 02: The Claimant is Not Entitled to Rely on the Partial Interim Award Involving the Respondent from the Other Proceedings

The CLAIMANT should not be entitled to submit the evidence from the other arbitration, as such evidence is neither relevant nor material to the case at hand. The evidence is therefore inadmissible due to its irrelevance and immateriality, as the CLAIMANT has failed to substantiate such a position. However, even if the evidence is deemed relevant and material, it is still inadmissible due to the evidence being tainted, as it has been obtained either through a breach of confidentiality by two former employees of the RESPONDENT or an illegal hack of the RESPONDENT's computer system. The CLAIMANT is therefore not entitled to rely on the PIA as it is in violation of the procedural fairness of the arbitration.

ISSUE 03: The Claimant is Not Entitled to Any Payment Resulting from an Adaptation of Price

The CLAIMANT is not entitled to the payment of any amount resulting from the adaptation of price, as the CLAIMANT has not suffered a hardship. This is so as the imposition of tariffs does not fall within the ambit of Cl. 12 of the Sales Agreement the tariffs do not amount to a hardship, are not an additional health and safety requirement; nor are they unforeseeable, and have not made the performance of the Contract more onerous. Further, the CLAIMANT has assumed the risks under the DDP Incoterms and cannot therefore entitle the CLAIMANT to a price adaptation under Cl. 12. Additionally, the CLAIMANT is not entitled to any payment resulting from an adaptation of the price as both CISG and UNIDROIT do not allow the CLAIMANT to do so.

ARGUMENTS

ISSUE 01: THE TRIBUNAL IS NOT EMPOWERED TO ADAPT THE CONTRACT

1. The RESPONDENT asserts that the Tribunal does not possess the power to adapt the price. The CLAIMANT has misconceived the question of jurisdiction in the case at hand and argues as to the Tribunal's competence-competence **[MFC, ¶4]**. A tribunal's competence-competence is its jurisdiction to decide upon its own jurisdiction **[Born, pg. 1047]**; however, the RESPONDENT in the concurrent case does not challenge the Tribunal's competence-competence but rather, challenges its jurisdiction to adapt a contract **[PO2, Q48]**.
2. Therefore, while the Tribunal has the competence to decide upon their competence as the CLAIMANT argues **[MFC, ¶4]**, it does not possess the competence to adapt the Contract as: **(A)** the AA is governed by the law of Danubia; and, **(B)** pursuant to the law of Danubia, the AA must be interpreted narrowly, and therefore the Contract cannot be adapted by the Tribunal; further, **(C)** even if the law of Mediterraneo governs the AA, the Tribunal cannot adapt the Contract; and **(D)** it does not possess the inherent and discretionary powers to do so.

A. The Law of Danubia governs the Arbitration Agreement

3. Whether a tribunal can adapt a contract is a question as to the jurisdiction of the tribunal, and in order to ascertain such jurisdiction or power, the tribunal must first ascertain the law governing the AA **[*Dalmia v. NB of Pakistan*; *Deutsche Schachtbau v. Shell Intl.*]**. The AA, in its combined effect with the law governing the AA, conveys the necessary authority to the tribunal as to its powers **[Berger, pg. 10]**, including that of adaptation.
4. Contrary to the CLAIMANT's assertion, the AA is governed by the *lex arbitri* i.e. the law of Danubia **[CE 5, Cl. 15]**. This is the only conclusion the Tribunal can derive, irrespective of the approach taken in ascertaining the law. This is supported by: **(I)** the choice of law analysis; **(II)** the presumption of separability; and, **(III)** the validation principle of arbitration. The combined weight of all such approaches to the question of law governing the AA results in the law of Danubia governing the AA.

I. The Law of Danubia governs the Arbitration Agreement as per the choice of law analysis

5. Contrary to the CLAIMANT's contention **[MFC, ¶10]**, the Hague Principles primarily govern the approach in ascertaining the law governing the AA **[PO2, Q43]**. The CLAIMANT's position on the Hague Principles' inapplicability based on **Art. 1(3)(b)** is faulty, as the commentary to it

provides that such an exception is only applicable regarding the *material validity* of AAs i.e. in the event the AA is fraudulent, contains a mistake, or is a misrepresentation **[Hague Principles Commentary, ¶1.26]**. In the present case, however, there is no issue pertaining to the validity of the AA; hence, the Hague Principles must apply.

6. **Art. 4** of the Hague Principles provides that in ascertaining the law governing an AA, the tribunal must firstly establish any express choice of law by the parties, and if void, an implied (tacit) choice of the parties. If both such intentions cannot be clearly discerned, the law which has the closest and most real connection to the AA must govern it **[Dicey/Morris/Collins, ¶16-016]**.

7. Further, the CLAIMANT fails to substantiate its position as to the applicability of the choice law analysis as per the spirit of the HKIAC Rules **[MFC, ¶8]**, as all nations involved in the proceedings follow the Hague Principles for a choice of law analysis **[PO2, Q43]**. In practice, all tribunals and courts will primarily apply the conflict of laws rules of the arbitral seat or the forum in ascertaining the law applicable to an international AA **[Born, pg. 561]**. Hence, the CLAIMANT's approach to the choice of law analysis is incorrect and the three-stage choice of law analysis established in common law nations **[*Sulamérica v. Enesa*; PO2, Q44]** and the Hague Principles **[Art. 4]** must be applied in ascertaining the applicable law of the AA. That is as per: **(a)** the express choice of law; or, **(b)** the implied choice of the Parties; finally, in the absence of such a choice, **(c)** the law with the closest and the most real connection to the AA **[Dicey/Morris/Collins, ¶16-016; *Sulamérica v. Enesa*]**.

a. The Parties have not expressly declared a law to govern the AA

8. The Parties have not expressly declared either law to govern the AA. The CLAIMANT's submission that the AA is governed by the law of Mediterraneo as it is included in the Sales Agreement **[MFC, ¶¶13, 14]** is a faulty assertion as AAs are not *bound* to be governed by the law of the main contract **[*Preston v. Ferrer*; Born II, pg. 214-215]**. There is also a high likelihood of its governance by the *lex arbitri*. Hence, the implied choice of the Parties must be ascertained.

b. The implied choice of the Parties requires AA to be governed by the law of Danubia

9. Unless the AA is drafted as a separate contractual instrument, the parties do not make a direct choice of the laws applicable to the AA **[Born, pg. 491]**. Here, the Parties have only decided upon the seat of the arbitration and thereby the *lex arbitri*. By choosing the arbitral seat as Danubia, the Parties have impliedly agreed to the choice of law of the AA to be the law of Danubia. The Latin maxim *qui indicem forum elegit jus* provides that 'a choice of forum is a choice of law'. This is the basis for applying the seat's substantive law to govern the AA, and evidences an implicit choice of the

law **[Redfern/Hunter, pg. 220]**. This was also confirmed in ***XL Insurance v. Owens***, where the court held that a clause providing for arbitration in London constituted an implied choice of English law to govern the validity of the AA.

10. In ***FirstLink v. GT Payment***, the High Court of Singapore held that despite the existence of a choice of law clause within the parties' contract, there exists a strong implied notion that the law of the arbitral seat may govern the AA. The court held, "…this court takes the view that it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract […] the latter relationship often only comes into play when the former relationship has already broken down irretrievably. There can therefore be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships. The natural inference would instead be to the contrary". It further held that, "when commercial relationships break down and descend into the realm of dispute resolution, its desire for neutrality comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment, and primacy is accorded to the neutral law selected by parties". This concept is reiterated by scholars **[van den Berg, pg. 552–4]**, in the present case, the neutral applicable is the law of Danubia.

11. The RESPONDENT conveyed its implied intention for the *lex arbitri*, which is a neutral law to both Parties, to govern the AA, to the CLAIMANT throughout the negotiation process, which the CLAIMANT itself agreed to. The CLAIMANT, when refusing to subject the AA to Equatorianian law and have the place of arbitration as Equatoriana, stated immediately that it would be possible to agree on arbitration in a "*neutral country*", Danubia **[RE 1, ¶2, emphasis added]**. Considering that previous draft of the AA subjected the AA to the *lex arbitri*, it is implied that by changing the seat of arbitration, the CLAIMANT also impliedly changed the law governing the AA along with the seat. The CLAIMANT never made an objection to the notion of the *lex arbitri* governing the AA, only that it wanted a neutral nation, which Danubia is. Furthermore, Ms. Napravnik was well aware throughout that the arbitration law of Danubia was a largely verbatim adoption of the UNCITRAL Model Law, much like the arbitration law of Mediterraneo **[PO2, Q14]** and hence could not have realistically objected to its applicability. However, now that the primary dispute of adaptation has arisen, and requires the ascertainment of the law governing the AA, the CLAIMANT attempts to change its position for its advantage, by relying on the penultimate statement of the letter of 11 April 2017 **[MFC, ¶18]**.

12. The CLAIMANT's argumentation that the law of Mediterraneo has been impliedly agreed on by the Parties to govern the AA is lax **[MFC, ¶18-21]**. It rests on the position that as the AA is part

of the Sales Agreement, which is governed by the law of Mediterraneo, and that this was reiterated to the RESPONDENT by the CLAIMANT **[RE 2, ¶3]** after which the RESPONDENT made no objection. However, this is an incorrect assertion. Due to the principle of separability, an AA is not conclusively governed by the law of underlying contract **[Born, pg. 475]**. Hence, the fact that the Parties have not chosen, either expressly or impliedly, for Mediterranean law to govern the AA must mean that Danubian law, as the *lex arbitri*, must be the next most likely choice of law **[*Habas Sinai v. VSC Steel*]**.

c. The closest and most real connection test deems the law of Danubia to be applicable to the AA

13. In the event the Tribunal deems that the Parties have neither expressly nor impliedly agreed upon a law to govern the AA, as per the common law rules of ascertaining applicable laws, the Tribunal must decide on the law which has the closest and most real connection to the AA **[Dicey/Morris/Collins, ¶16R-001; *ICC No. 4367*]**. In doing so, factors specific to the AA must be taken into account **[Fouchard/Gaillard/Goldman, ¶428]**.

14. Many commentators point to a range of potentially relevant factors in considering the law which has the most close and real connection to the AA. This includes the forum state, which is in this case Danubia **[CE 5, Cl. 15]**. In ***Tunisienne v. D'Armement***, the court held that, "the fact that, [the parties] have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be *most familiar*" **[emphasis added]**.

15. Moreover, the place any document in issue was drafted, the place where the information was provided or the state where the communication occurred could also be considered as having a close and real connection to the AA **[Sindler/Wüstemann, pg. 619; Berger III, pg. 173; *ICC No. 5314*]**. The CLAIMANT's Ms. Napravnik and the RESPONDENT's Mr. Antley discussed a significant part of the Parties' Contract at the annual Danubian colt auction on 12 April 2017, hence this too points to the fact that the state of Danubia plays a significant and close role to the AA.

16. In ***Klöckner v. Advance Technology***, the country of the presiding arbitrator was considered a factor, which established the relationship between an AA and its governing law. In the present case, the presiding arbitrator, Prof. Calvin de Souza, is from Danubia **[Rec. pg. 41]**; hence, this too contributes to the connections that Danubia has to the dispute at hand. Furthermore, two of the three mares of the RESPONDENT to be inseminated were also registered in Danubia; hence, part

of the subject matter of the Contract is related to Danubia, which goes beyond it merely being the seat of arbitration.

17. All such factors, when analysed collectively along with the CLAIMANT's requirement that the law governing the AA be of a neutral nature **[RE 2, ¶1]**, point to the conclusion that the AA is closer and more connected to the *lex arbitri* than the law of Mediterraneo.

II. The Law of Danubia governs the AA in line with the presumption of separability

18. The CLAIMANT's argument that the lack of express conferral of the law governing the AA results in it being governed by the law of Mediterraneo **[MFC, ¶14]**, would fail because of the presumption of separability.

19. The presumption of separability provides that an international AA is "presumptively separable from the underlying contract with which it is associated", and one of the most direct consequences of the presumption is the possibility that the parties' AA may be governed by a different law than the one governing the underlying contract **[Born, pg. 475]**. It has been observed that "an arbitration clause in an international contract *may perfectly well* be governed by a law different, despite there being a choice of law provision that applies to the underlying contract" **[*ICC No. 1507*; Jarvis/Derains, pg. 216, emphasis added]**. Hence, the CLAIMANT cannot conclusively claim that the law of must govern the AA pursuant to the lack of express conferral.

20. The New York Convention, to which all three nations involved in the dispute are party to, states in **Art. V(1)(a)** that parties may select a particular law to govern only their arbitration agreement and establishes a specialised choice of law rule providing that, where the parties have not explicitly or implicitly selected a law to govern their arbitration clause, that provision will be governed by "the law of the country where the award was made".

21. A leading English decision explains this principle as follows: "it is by now firmly established that more than one national system of law may bear upon an international arbitration…There is the proper law which regulates the substantive rights and duties of the parties…Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration." **[*Channel Tunnel v. Balfour Beatty*]**.

22. In ***Hamlyn v. Talisker***, it was held that the arbitration clause could be governed by a different law to the main contract, typically the law of the place of arbitration, as the AA is "independent and distinct" from the main contract **[Redfern/Hunter, pg. 102]**. If there is no express choice of law, then the law of the seat of arbitration will apply to the AA **[Petit/Edge, pg. 17]**.

23. CLAIMANT's submission that the notion of a separate law applying to the AA is only a possibility and not a conclusive decision **[MFC, ¶17]**. The CLAIMANT does not further its position as there is no conclusive decision that the law of the underlying Contract *must be applicable*. However, the RESPONDENT's position as to the applicability of the *lex arbitri* to the AA is further supported by all other forms of choice of law analysis, which leads to the conclusion that it is the *lex arbitri* that must govern the AA.

III. Danubian law must govern the AA based on the validation principle

24. The CLAIMANT's argument that, as per the validation principle, the law of Mediterraneo must be applicable is not only a misunderstanding of the principle itself but also a faulty application of the law. The validation principles give effect to the parties' genuine commercial intentions in entering into arbitration and establishes a pro-arbitration enforcement regime that overcomes the complexities and uncertainties of traditional choice-of-law analysis **[Born, pg. 542]**.
25. Although, the CLAIMANT contends that the Parties' purpose and expectation in entering into arbitration, to obtain an *efficient resolution* to their dispute **[MFC, ¶24]**, it would be undermined if the law of Danubia is not decided upon. As per the validation principle, the Parties' intention in entering into arbitration was to resolve their disputes. However, the notion of adapting a contract is not synonymous with that of arbitration. The Tribunal's jurisdiction to decide upon the dispute or arbitrate is not challenged by the RESPONDENT, but rather only its power to adapt the Contract **[PO2, Q48]**. Hence, contrary to the CLAIMANT's contention, an efficient resolution *can* be obtained in that the Tribunal could also decide that it cannot adapt the Contract.
26. Furthermore, it is not "unreasonable" to assume that the Parties have concluded an AA that does not resolve their dispute **[MFC, ¶24]**; however, the RESPONDENT's contention is that it is not "unreasonable" to assume that the Parties have concluded an AA which does not allow for adaptation. Ms. Napravnik's statement that adaptation must be included in either the hardship clause or the AA **[CE 8, ¶4]** (which was not carried out), in itself, is evidence that the AA is not linked to adaptation. Nor is there an adaptation clause to be found within the hardship clause. Moreover, the intention of the Parties to submit their disputes to arbitration is not in issue in the given case as the RESPONDENT only contests the Tribunal's jurisdiction to *adapt the Contract*, not its jurisdiction to *hear the case*. Hence, the validity of the AA is not affected **[PO2 Q48]**.
27. If the CLAIMANT's extension of the validation principle were to hold true, there would be no case in which tribunals would decide that they do not possess jurisdiction to hear the case. However, such jurisdictional challenges are upheld by tribunals frequently. If the validation principle were to extend, as the CLAIMANT suggests, then, applying such a principle, a tribunal

must always hold that it possesses the jurisdiction to hear the case. Such an approach would defeat the notion of party autonomy, which is considered the foundation of arbitration **[Redfern/Hunter, pg. 355]**. Tribunals cannot claim to possess power that has not been granted by the parties, as such an act would be in contradiction with the validation principle itself, which bases its emphasis on the "true intentions of the parties" **[Redfern/Hunter, pg. 355]**.

28. The CLAIMANT's position that the applicability of the validation principles extends to the scope of the AA is questionable, as it does not substantiate its contentions **[MFC, ¶25]**. The case of ***Mastrobuono v. Shearson***, which CLAIMANT relies on, can be distinguished from the case at hand, as deciding to grant a different form of damages cannot be compared to the adaption of a contract. Adaptation can primarily only be carried out by parties, and if an arbitral tribunal were to carry out such adaptation, it must be authorised by the parties within the AA or the law governing the dispute **[Berger, pg. 10]**. However, in the case at hand, the Parties have narrowed down the AA **[RE 1, ¶1]**, as well the hardship clause **[PO2, Q12]**, which specifically does not contain a clause concerning adaption. Hence, the Tribunal cannot arbitrarily decide to extend its powers.

29. The CLAIMANT further argues that the Tribunal must decide upon the law of Mediterraneo due to its "favourable attitude towards arbitration"; however, a favourable attitude towards arbitration is not synonymous with one towards adaptation. The law of Danubia too allows for adaptation in the event there is express authorisation granted by the parties to the tribunal **[RNOA, ¶13]**. Hence, the law of Danubia too shows a "favourable attitude" towards both adaptation and arbitration.

30. Hence, the Tribunal must decide that it is the law of Danubia that governs the AA as per, collectively, the choice of law analysis, the notion of separability, and the validation principle.

B. The Tribunal cannot adapt the Contract as per the applicable law

31. In ascertaining the powers of a tribunal to adapt a contract, whilst the law provides procedural authorisation, an AA provides the basic authority as per party autonomy. It is the AA, in its combined effect with the law which governs it, that conveys the necessary authority to the tribunal **[Berger, pg. 10]**.

32. Contrary to the CLAIMANT's contention **[MFC, ¶41]**, the Tribunal does not have the power to adapt the Contract under the Danubian law. The law of Danubia only allows for adaptation in the event the parties expressly authorise tribunals to do so **[RNOA, ¶13; PO2, Q36]**. Such an express conferral of powers is, however, nonexistent within the Parties' Sales Agreement.

33. Pursuant to **Art. 28(3)** of Danubian Arbitration Law, the Tribunal does not have unlimited powers such as that of adaptation, without an express empowerment by the Parties **[PO2, Q36]**. Gap-filling and contract adaptation are non-arbitrable, unless the tribunal is authorised by the parties to

act as *amiable compositeur* **[Fouchard/Gaillard/Goldman]**. Therefore, unless empowered by the parties themselves to adapt the contract, the arbitrators' amendment of any contract provision would fall outside the boundaries of an arbitrator's duties **[Fontaine, ¶79]**.

34. In formulating the HKIAC model clause, the RESPONDENT made it clear to the CLAIMANT that the AA had been narrowed down **[RE 1, ¶1]** with no other intention other than to remove any reference which could grant the Tribunal any extraordinary powers.

35. In ***Kuwait v. AMINOIL***, the court held that there can be no doubt that "a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – *unless* that right is conferred upon it by law or by the parties **[emphasis added]**. In the present case, there is no such express conferral of powers to the Tribunal to adapt the Contract, when interpreted as per the law of Danubia.

36. Contrary to the CLAIMANT's contention, the discussion between the CLAIMANT's Ms. Napravnik and the RESPONDENT's Mr. Antley cannot be taken into account as binding express authorisation by the Parties **[MFC, ¶32]**. The Black's Law Dictionary defines the phrase 'express authority' as "authority given…by explicit agreement, either orally or in writing" **[Black's Law Dictionary]**. However pursuant to the 'four corners rule' established in Danubian law, the interpretation of an AA must be limited to its wording *only* **[PO2, Q45; RNOA, ¶16]**. Hence, such authorisation, even if express, cannot be considered binding.

37. Even if the four corners rule did not bar the statements from being taken into account, such pre-contractual negotiations which did not manifest in the Parties' Sales Agreement cannot be considered as binding. In ***May and Butcher v. R***, such oral agreements were held to be too indefinite to fashion a legal remedy based on the parties' intent. Where the parties specifically and clearly confer the power to fill the gaps, these problems can be avoided **[Berger II, pg. 4]**. Therefore, as no express empowerment was conferred upon the Tribunal in the AA, subsequent to the alleged 'agreement' by Mr. Antley **[NOA, ¶16]**, it only amounts to an agreement to negotiate and will therefore not empower the Tribunal.

38. It was held in the case of ***OLG München – 34 Sch 10/05*** that if an arbitral tribunal makes a decision which requires parties' authorisation but without explicit authorisation, on the grounds of equity instead of making a legal decision, this justifies a procedural error justifying the annulment of the arbitral award as per **Art. V(1)(d)** NY Conv. Hence, due to the lack of any express authorization by the Parties, the Tribunal cannot adapt the Contract, as to do so would be a violation of party autonomy.

C. Even if the law of Mediterraneo applies the Tribunal cannot adapt the Contract

39. Even if the law of Mediterraneo applies to the AA, the Tribunal cannot adapt the Contract, since the Parties never intended for the Tribunal to have the power to adapt the Contract.

40. The contract law of Mediterraneo is a verbatim adoption of UNIDROIT **[PO1, Q4]**; further, there is consistent jurisprudence in Mediterraneo that the CISG can be used to interpret the AA of a sales contract governed by the CISG **[PO1, Q4]**. As the Sales Agreement is governed by the law of Mediterraneo **[CE 5, Cl.14]**, both UNIDROIT and CISG can be used to interpret the AA and the intention of the Parties surrounding the formation of their agreement. As per **Art. 4.2** UNIDROIT, which is identical to **Art. 8(1)** and **Art. 8(2)** CISG, the primary standard is the subjective intention of the party whose statement or conduct is in issue, provided, however, that the other party knows or should know of that intent; where that standard fails, it is the standard of a reasonable person in the same circumstances of the other party **[Perillo, ¶d]**. Both UNIDROIT and CISG provide that prior statements and agreements may be used to interpret a writing **[CISG-AC ON 3, C. 3.1]**. Therefore, pre-contractual negotiations between the Parties can be taken into consideration.

41. The RESPONDENT, on 10 April 2017, suggested a narrowed down version of the HKIAC model clause **[RE 1, ¶1]**. The model clause provides: "any dispute, *controversy, difference or claim* arising out of *or relating to* this contract…" **[emphasis added]**, wherein the suggested clause merely provides for "any dispute arising out of this Contract" **[RE 1, ¶2]**. The terms "*controversy, difference or claim*" and "*or relating to*" **[emphasis added]** have been removed from the model clause for the purposes of narrowing down the AA. This was made clear to the CLAIMANT on the same letter, as it was stated that the "fairly broad wording" of the suggested clause had been "*narrowed down* and streamlined" **[RE 1, ¶1, emphasis added]**.

42. The CLAIMANT unsuccessfully bases its argument on the usage of the word "disputes", and attempts to confer a broad meaning to that word; it further refuses to acknowledge the removal of the terms "controversy, difference or claim" **[MFC, ¶36]**. This approach, however, completely disregards the reason for the narrowing-down of the wording of the model clause. Taking a subjective perspective, it is evident that the reason why the model clause was so altered was because the RESPONDENT intended to narrow down the scope of the AA **[Art. 4.2.1 UNIDROIT; Art. 8(1) CISG]**. Further, as the intention was communicated **[RE 1, ¶1]**, the CLAIMANT knew and could not have been unaware of the intention to narrow down the scope of the AA in a way so that it only covers "disputes". Moreover, in its letter dated 11 April 2017, the CLAIMANT stated, "we would largely accept your proposal", and merely suggested a change to the place of arbitration **[RE 2, ¶2]**; of note is that the CLAIMANT had no issue with the narrowed-down version of the

model clause, and accepted the reasons for such narrowing-down. Hence, in spite of the CLAIMANT's argument **[MFC, ¶34]**, the subjective intent of the Parties **[CISG Digest, Art. 8 ¶¶8, 23]** was to agree on a narrowly worded AA.

43. Further, the RESPONDENT disputes the CLAIMANT's contention that the discussion between Ms. Napravnik and Mr. Antley led to an agreement between the Parties to grant the Tribunal the power to adapt the Contract **[MFC, ¶32]**. Taking an objective perspective, it is evident that no such '*agreement'* was made between the Parties **[Art. 4.2.2 UNIDROIT; Art. 8(2) CISG]**. Ms. Napravnik, in her witness statement, states that Mr. Antley only said that the Tribunal should "*probably*" adapt the Contract if the Parties could not agree **[CE 8, ¶4, emphasis added]**. Nevertheless, neither the hardship clause nor the AA provide for adaptation i.e. no 'agreement' was made between the Parties – it was the initial stage, which is evinced by Mr. Antley having agreed to present a proposal the next morning **[CE 8, ¶4]**. Therefore, taking an objective perspective under UNIDROIT and the CISG **[Art. 4.2.2 UNIDROIT; Art. 8(2) CISG]**, the Parties did not intend to grant the Tribunal the power to adapt the Contract, as they never reached a conclusion on the issue and no evidence of such granting of power is found in the agreement signed by the Parties.

44. The CLAIMANT argues that **Art. 6.2.3(4)** UNIDROIT allows for adaptation because, as per Mediterranean law, arbitral tribunals are considered to have the same power as a court **[MFC, ¶38; PO2, Q39]**. However, UNIDROIT states that courts can adapt the contract under **Art. 6.2.3**, but only where there is a 'hardship' **[van Houtte, pg. 194]**; in other words, certain conditions must initially be fulfilled. The wording of **Art. 6.2.3(4)** reads, "*if the court finds hardship*, it may, *if reasonable*… adapt the contract with a view to restoring its equilibrium" **[emphasis added]**. Therefore, if the party claiming hardship has not proved that the alleged circumstances have a caused hardship, the Tribunal cannot adapt the contract pursuant to **Art. 6.2.3**. Furthermore, it is not reasonable for the Tribunal to adapt the Contract since the Parties did not intend to grant the Tribunal the power to do so **[supra, ¶33]**. Therefore, since the increase in tariffs is *not a hardship* on the CLAIMANT, and it is *not reasonable* for the Tribunal to go against the Parties' intention, **Art. 6.2.3** cannot be applied to give the Tribunal the power to so adapt the Contract.

45. The RESPONDENT disputes the CLAIMANT's argument that the broad interpretation provided by the Arbitration Law of Mediterraneo i.e. UNCITRAL Model Law, allows the Tribunal to adapt the contract **[NOA, ¶16]** – the CLAIMANT fails to substantiate what falls within the scope of 'broad interpretation'. The Arbitration Law of Mediterraneo, the UNCITRAL Model Law, does not address the issue of contract adaptation by a tribunal. Even in the event it does, the mandate to adapt or supplement the contract should be expressly conferred upon the tribunal in line with

party autonomy **[Third Secretariat Note, ¶8]**. Therefore, since the AA does not expressly confer such a power to the Tribunal, even a broad interpretation of the Mediterranean arbitration law does not allow the Tribunal to adapt the contract.

D. The Tribunal does not have discretionary nor inherent powers to adapt the Contract

46. In addition to the Tribunal not having the power to adapt the contract under Danubian and Mediterranean law, it also does not have the discretionary nor the inherent powers to adapt the Contract. The CLAIMANT wrongfully addresses the issue of discretionary powers of the Tribunal to adapt the Contract as a means to apply Mediterranean law **[MFC, ¶¶22-27]**. The inherent or implied powers that a tribunal may exercise, however, will depend upon the distinct configuration of direction and autonomy produced by the parties' choices **[ILA Report, pg. 6]** i.e. discretionary power is granted to the tribunal *through the law that the parties have agreed upon*. Therefore, the CLAIMANT's approach is faulty.

47. The Iran-U.S. Claims tribunal has defined the inherent powers of tribunals as "those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature" **[*Iran-US Claims Tribunal - B61*]**. The case of ***Rompetrol v. Romania*** held that, absent express provisions, the only justification for the tribunal to award itself such a power would be for an *overriding* and *undeniable* need to safeguard the essential integrity of the entire arbitral process. A control of that kind would fall to be exercised *rarely*, and only in *compelling circumstances* **[*Rompetrol v. Romania*, emphasis added]**. Therefore, for the CLAIMANT to rely on any inherent powers of the Tribunal to adapt the contract, it must prove that there is an overriding and undeniable need to safeguard the integrity of the arbitration process, but it has failed to do so.

48. Further, if the tribunal were to decide overriding party autonomy, it would lead to the apprehension of potential bias on the part of the tribunal, leading to a possible advantage to one litigating party **[*Rompetrol v. Romania*]**. A tribunal must not cross the line that circumscribes its powers; otherwise, it risks being challenged for bias or for acting beyond the scope of the AA **[Moses, pg. 210; ILA Report, pg. 6]**. If such a risk did genuinely exist, it might provide grounds for a challenge to the composition of the tribunal pursuant to **Art. 11** of the HKIAC Rules. Therefore, the CLAIMANT cannot argue that it being denied a price adaptation results in an overriding need to safeguard the integrity of the arbitration process because of its alleged unjust nature. The CLAIMANT being denied a price adaptation is not unjust, as the Parties never agreed for a price adaptation and since there is no proof of hardship on the CLAIMANT **[infra, ¶93]**. Therefore, the Tribunal does not have the inherent power to adapt the Contract.

49. Both rules governing the AA i.e. Danubian law, and the substantive law of the dispute i.e. UNIDROIT and the CISG, must be considered to determine the implied power the Tribunal may have **[Moses, pg. 211; ILA Report, pg. 7, 15]**. None provide for an inherent power to adapt contracts.

50. In fact, the inherent power that the Tribunal does have is to uphold good faith in arbitral proceedings **[Moses, pg. 213; Born, pg. 1253; *Libananco v. Turkey*]**. Such power to act in good faith, in this case, is granted through UNIDROIT and the CISG **[Art. 1.7 UNIDROIT; Art. 7 CISG]**. In ***Phoenix v. Czech Republic***, the tribunal referred to the principle of good faith in the making of a claim. The tribunal referred to Phoenix's "initiation and pursuit of this arbitration" as "an abuse of the system of international ICSID investment arbitration". The tribunal found the claimant's "creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled", as an abuse of rights. Adapting the Contract, which the Sales Agreement does not allow for, would be a violation of the good faith between the Parties as it would override party autonomy, and result in an abuse of rights.

CONCLUSION FOR ISSUE 01

The Tribunal cannot adapt the contract, as the law of Danubia, which governs the AA requires express authorisation, which is absent in the parties' contract. Furthermore, even if the law of Mediterraneo where to govern the AA, the Tribunal cannot adapt the contract as, the AA nonetheless does not allow for such powers. The Tribunal further lacks the inherent and discretionary powers to adapt the contract.

ISSUE 02: THE CLAIMANT IS NOT ENTITLED TO RELY ON THE PARTIAL INTERIM AWARD INVOLVING THE RESPONDENT FROM THE OTHER PROCEEDINGS

51. The CLAIMANT cannot rely on the PIA from the other arbitral proceeding as: **(A)** the evidence is neither relevant nor material to the arbitration at hand and is therefore inadmissible; **(B)** even if the evidence is to be considered as relevant and material, it is nonetheless inadmissible as it was obtained either through a breach of confidentiality or an illegal hack.

A. The evidence is inadmissible as it is neither relevant nor material

52. The CLAIMANT's argument that the Tribunal is bestowed with broad discretion in deciding on matters of relevance and materiality of potential evidence **[MFC, ¶46]** and the applicability of the IBA Rules **[MFC, ¶47]** are correct. However, contrary to its contention **[MFC, ¶¶63, 64]**, the

evidence from the other arbitral proceedings is: **(I)** irrelevant; and, **(II)** it is immaterial to the case at hand; **(III)** as a result, the PIA must be deemed inadmissible.

I. The Partial Interim Award is not relevant

53. Contrary to the CLAIMANT's position **[MFC, ¶63]**, the PIA is *not* relevant to the case at hand. Relevance of evidence in international arbitration is deemed as having a logical connection with what the evidence purports to prove in a case **[Pilkov, pg. 148]**. In ***Opic Karimum v. Venezuela*** and ***Kiliç v. Turkmenistan***, the tribunals did not discuss the admissibility of documents obtained through WikiLeaks cables as evidence because the tribunals held that the documents were not relevant. Therefore, where the evidence obtained from the other arbitration is not relevant, it would be inadmissible.

54. The CLAIMANT focuses on the purported similarity within the facts of the two proceedings in question, but fails to attach any importance to the fact that it is merely a "Partial Interim Award", with the final decision on merits yet to be rendered in August 2019 **[PO2, Q39]**. As such, this is only a temporary decision by that tribunal, asserting its *power to decide* on the case – this is not a conclusive decision that adaptation *is* necessary or that the contract *will* be adapted; the tribunal provisionally asserted its authority to adapt the contract "*should the tariff result in hardship*" **[PO2, Q39]**. Further, *this* AA is not governed by the law of Mediterraneo, but rather by the law of Danubia **[supra, ¶32]**; also, here, it is not a complete HKIAC model clause **[PO2, Q39]**, but has been narrowed down, and therefore express authorisation is required for the Tribunal to adapt **[RNOA, ¶13; PO2, Q36]**.

55. Hence, the PIA, contrary to the CLAIMANT's view **[MFC, ¶62]**, is not relevant in establishing the facts or in influencing the substance or conduct of this case as it is merely provisional relief, based on an AA which is not synonymous with the one at hand, and is not binding.

II. The Partial Interim Award is not material

56. Materiality of evidence is based on whether the evidence in question is needed, in order to allow the tribunal complete consideration of the legal issues presented to it **[Kaufmann-Kohler/Bärtsch, pg. 18]**. Regarding materiality, the PIA will not contribute to the outcome of the case **[MFC, ¶64]**, as the two criteria that CLAIMANT is relying on, to establish materiality, i.e. the foreseeability of the tariffs and onerousness of the performance of the party, have *not* been established in the other proceedings. Only an interim relief regarding the power of the tribunal has been granted, and there is no guarantee that the other tribunal will find that there *was* indeed any

hardship. Furthermore, as an interim award can be challenged **[*Emirates Agency v. Fomento*]**, the evidence in inconclusive and hence unreliable.

III. The Partial Interim Award is inadmissible

57. The CLAIMANT has failed to substantiate its argument that evidence from the other arbitration is relevant or material to the present arbitration. Therefore, due to the irrelevance and immateriality of the evidence, it is inadmissible **[Moser/Bao, ¶9.162]**.

B. Even if the evidence is relevant and material it is inadmissible

58. The RESPONDENT's investigation on the matter has disclosed that the CLAIMANT could have only sourced the evidence through: **(I)** a breach of confidentiality by two former employees of the RESPONDENT; or, **(II)** an illegal hack of the RESPONDENT's computer system **[Rec. pg. 50, ¶3]**.

59. Lord Hoffmann, in ***A v. Secretary of State for the Home Dept.*** stated that, "the courts will not shut their eyes to the way the accused was brought before the court or the [way in which] evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonor the administration of justice, if the proceedings were to be entertained or the evidence admitted". As arbitration is an extension of the judicial process, that places higher significance on confidentiality and procedural fairness, the admission of the evidence would compromise the integrity of the present arbitration.

I. The evidence is inadmissible as it has been obtained through a breach of confidentiality

60. Contrary to the CLAIMANT's contention **[MFC, ¶51]**, the PIA from the other arbitral proceedings is confidential in nature and cannot be admitted as evidence in the current proceedings. The CLAIMANT argues that as the PIA concerns a contract that it is not privy to, its confidentiality requirements do not bind the CLAIMANT. However, a fundamental characteristic of arbitration is that of confidentiality, which is otherwise lost in litigation **[Born, pg. 2780]**. Therefore, the notion of confidentiality is implied in arbitral proceedings **[Smeureanu, pg. 31]**. Arbitrators should carefully consider claims on privilege and violations of confidentiality when admitting evidence **[Draft Final Report, pg. 51]**.

61. In ***Hassneh v. Mew***, *which involved a third party seeking to admit the award*, the court held that because the arbitral proceedings, including the hearings, were *a private matter* between the parties and the

arbitral tribunal from which third parties are generally excluded, neither party was entitled to publish the details of the case.

62. In making a distinction, Coleman J started from the assumption that it was implicit in the AA that hearings were to take place in private, a fact that, in effect, meant that no one other than the parties had access the documents created and used in the course of the hearings. As such, any disclosure of the documents presented in the oral proceedings to any third party "would almost be equivalent to opening the door to the hearing room of the arbitration to that third party". Similarly, the award, being so closely related to the hearing, must be within the obligation of confidentiality.

63. Further, because awards reflect "an identification of parties' respective rights and obligations," and were "potentially public document[s] for the purposes of supervision by the courts or enforcement," awards were expected to be used in the "ordinary course of commerce and in the ordinary application of English arbitration law." Coleman J accepted that, in essence, documents created in arbitration were confidential, yet in light of these two features, awards could be legitimately disclosed under specific circumstances. However, in the case at hand, the award is *not* of public domain; the CLAIMANT can only obtain the award through an intelligence company by making a payment **[PO2, Q41]**. As this does not fall within the ambit of what is considered "publicly" available, and as it was not made legitimately available, the PIA must not be admitted in the current proceedings.

64. The IBA Rules on evidence generally supplement the HKIAC Rules on admissibility of evidence **[Moser/Bao, ¶9.155]**. The CLAIMANT, pursuant to **Art. 9(2)(e)** IBA Rules, argues that the PIA of the other proceeding can only be set aside by the Tribunal based on commercial confidentiality if it determines the evidence to be so compelling, and conveniently trivialises the award as an 'ordinary exchange' that could not be determined compelling **[MFC, ¶52]**.

65. The Tribunal should consider the PIA as sufficiently compelling to be excluded, as it is privileged information pursuant to **Art. 9(2)(b)** IBA Rules. Evidence can only be withheld from admittance when such evidence is protected by privilege and/or is in contravention with public policy **[Pilkov, pg. 150]**. 'Privilege' is a right to withhold certain documentary or testimonial evidence from a legal proceeding; it is a legally recognised right, and includes the right to prevent another from disclosing such information **[Mosk/Ginsburg, pg. 345]**. In the current case, the PIA that CLAIMANT wishes to submit is information that falls within attorney-client privilege as well as trade secrets privilege or business secrets privilege, as content settlement negotiations and discussions with an attorney are considered as such **[Mosk/Ginsburg, pg. 345]**.

66. The House of Lords, in ***Three Rivers v. The Bank of England***, considered attorney-client privilege to be legal advice and communications, which are sought from a lawyer in his professional

capacity, and communications relating to that purpose, made in confidence by the client. The evidence that the CLAIMANT wishes to submit to the Tribunal, although *prima facie* is the award, it would also consist of all information communicated, between the parties, the counsels with their respective client, and the counsels themselves. This information is to be kept confidential as it one of the fundamental purposes for which parties submit their disputes to arbitration. Hence, allowing such information to be submitted as evidence would be a violation of one of the reasons for parties to submit their dispute arbitration, violating party autonomy.

67. In addition, it would be wrong as a matter of principle for an arbitral tribunal to disregard privilege rules and allow privileged documents to be submitted. Courts likely are more inclined to set aside awards where arbitrators have refused to recognise and protect privileges than they are in circumstances where arbitrators have excluded evidence on the basis of privilege **[Brower/Sharpe, pg. 307, 331]**.

68. The Tribunal must further consider that it too would be complicit in a breach of confidentiality if the award were to be submitted. **Art. 45(2)** HKIAC Rules 2018 as well as **Art. 42(2)** HKIAC Rules 2013 require confidentiality obligations to be upheld by members of the tribunal. Particularly, as the PIA was also subjected to **Art. 45** HKIAC Rules **[PO2, Q39]** as the arbitration itself was governed by the HKIAC Rules, to admit evidence which violates the Rules that the Tribunal is intended to be governed by would not only the harm the integrity of the Arbitration process, but the integrity HKIAC Rules itself.

69. Grounds for exclusion of evidence, irrespective of relevance, include unreliability and public policy considerations (e.g. privileged material). Inadmissible evidence cannot be received by the court whatever its relevance, value or weight. Therefore, even if the evidence is relevant, which it is not, the PIA should not be admitted as evidence by the Tribunal. **[Lew/Mistelis/Kröll, pg. 562]**

II. The evidence is inadmissible as it has been obtained through an illegal hack

70. Contrary to the CLAIMANT's contention **[MFC, ¶¶63, 64]**, the evidence from the other arbitral proceedings is inadmissible due to its nature and as to how it was obtained: **(a)** The PIA has been obtained illegally; and **(b)** such illegally obtained evidence is inadmissible.

a. The evidence has been obtained illegally

71. The burden of proof, as stated by the CLAIMANT, is on a 'preponderance of probability' **[MFC, ¶56]**. In ***Ioannis and Ron v. Georgia***, the tribunal held that "the principle articulated by the vast majority of arbitral tribunals, in respect of the burden of proof in international arbitration proceedings, applies in these concurrent proceedings and does not impose on the parties any burden of proof beyond a balance of probabilities". Therefore, the RESPONDENT has only to

prove what amounts to being unlawful on a 'more likely than not' standard **[Waincymer, pg. 766]**. Even in a civil legal system, the standard is the inner conviction of the adjudicator, which is of a lower burden **[von Mehren/Saloman, pg. 291]**.

72. The company that has agree to sell the PIA to the CLAIMANT has not obtained it with the consent of either party involved in the arbitration **[Rec. pg. 50, ¶3]**, and refuses to disclose its sources **[PO2, Q41]**. The RESPONDENT's computer system was hacked in September of 2018, and the hackers managed to retrieve a considerable amount of data **[Rec. pg. 50, ¶3]**; even though the date that the company obtained the PIA is not known, the CLAIMANT received information of the company's possession of the evidence subsequent to the hack **[PO2, Q41]**. It is therefore 'more likely than not' that the information was obtained illegally. Further, the CLAIMANT, being aware of such information and of the company's "*doubtful reputation*" in obtaining its information, still intends to acquire the PIA for the price of 1000 USD **[PO2, Q41, emphasis added]**. Hence, the CLAIMANT should therefore not be allowed to adduce such evidence obtained from the other arbitral proceedings.

b. The evidence is therefore inadmissible

73. As it was obtained through an illegal hack of the RESPONDENT's computer system **[Rec. pg. 50, ¶3]**, it is, essentially, "fruit from a poisoned tree" **[Amole/Colston, ¶1]** – law does not condone unlawful activities as illegal hacking, and there is a long-standing aversion to unlawful self-help **[*Imerman v. Tchenguiz*]**. Obtaining evidence through illegal means contradicts the requirement of good faith, as was said in many of the cases the CLAIMANT submits to strengthen its position **[*ConocoPhillips v. Venezuela*; *Kiliç v. Turkmenistan*]**. It would be wrong to produce evidence obtained unlawfully **[*Methanex v. USA*]**, especially in the event such information has been ordered to be excluded from arbitration proceedings due to valid confidentiality reasons **[*Libananco v. Turkey*]**.

74. In ***Methanex v. USA***, the tribunal stated that the documents found in internal trashcans and dumpsters were obtained unlawfully and it would be wrong for Methanex to introduce it as evidential material, as it was obtained *unlawfully*. The tribunal further held that the parties owed each other and the tribunal a general duty to conduct themselves in *good faith* and to respect the equality of arms between them, based on the principles of equal treatment and procedural fairness imposed by the UNCITRAL Rules – it held that Methanex had violated this standard and had offended basic principles of justice and fairness. Confidentiality exists to ensure fairness and integrity in the arbitral process **[Blavi, pg. 87]**. As the HKIAC Rules impose the same procedural fairness as the UNICTRAL Rules and provide for equal procedural fairness, it would be a violation

of this procedural fairness to admit evidence that has been obtained illegally **[Art. 13.5 HKIAC; Art. 13.9 HKIAC]**.

75. In ***ITC v. Video Exchange***, the judge excluded such evidence, concluding that the interests of the proper administration of justice required him to do so, as the danger to the court system if one party was able to take possession of documents belonging to the other side within the precincts of the court, would outweigh the potential injustice to the parties in any particular case. In the present case, an illegal hack of the computer system **[supra, ¶72]** results in the CLAIMANT unlawfully obtaining the PIA. Admitting such evidence would therefore outweigh the injustice to the Parties. Further, in admitting evidence obtained by a company with a "doubtful reputation" **[PO2, Q41]**, the Tribunal would be encouraging further illegal actions by such companies.

76. The disclosure of information may violate laws or contractual commitments in business-to-business or customer agreements, causing economic harm to individuals or businesses **[Cieply/Barnes, ¶4]**, triggering negligence claims **[Burnson, ¶1]**, and affecting the integrity of public securities markets **[Raymond, ¶¶1, 2]**. These are all considerations that a party acting in good faith would take into account; the CLAIMANT, however, has shown complete disregard to these.

77. Such admission of illegally obtained evidence would also raise issues on grounds of public policy. Due process, which is a fundamental requirement of arbitration, would also be affected if unauthorised access of sensitive data is allowed **[Ross, ¶4; *Caratube v. Kazakhstan*]**.

CONCLUSION FOR ISSUE 02

The PIA from the other arbitral proceeding involving the RESPONDENT is not admissible, as it has been obtained either through a breach of confidentiality and/or illegal means.

ISSUE 03: THE CLAIMANT IS NOT ENTITLED TO ANY PAYMENT RESULTING FROM AN ADAPTATION OF PRICE

78. The Contract must not be adapted, resulting in the payment of any amount as: **(A)** the CLAIMANT is not entitled to an adaptation under Cl. 12 of the Sales Agreement; and, secondly, **(B**) the Contract cannot be adapted based on an interpretation the CISG.

A. The CLAIMANT is not entitled for a price adaptation under Clause 12 of the Sales Agreement

79. The CLAIMANT is not entitled to an adaptation of the price and the payment of any resulting amount thereof because: **(I)** the 30% increase in tariffs does not amount to a hardship under Cl.

12 of the Sales Agreement; **(II)** the CLAIMANT has assumed the risks under the DDP Incoterms; and, **(III)** the Tribunal therefore does not possess the authority to adapt the contract; alternatively, **(IV)** the CLAIMANT cannot plead promissory estoppel.

I. The imposition of tariffs is not a hardship under Clause 12 of the Sales Agreement

80. The 30% increase in the tariffs that have been imposed on Equatoriana does not amount to a hardship under Cl. 12 of the Sales Agreement as: **(a)** such an imposition does not cause a hardship on the CLAIMANT; and, **(b)** it does not fall within the ambit of Cl. 12 of the Sales Agreement.

a. Tariffs are not considered a hardship

81. Contrary to the CLAIMANT's contention, the 30% increase in tariffs does not cause a hardship on the CLAIMANT. When parties enter into contracts that are to be executed almost immediately, they are, to a very large extent, masters of their own destiny, being the ones who can control whether the contract is actually performed **[Schwenzer/Hachem/Kee, ¶45.77]**. Therefore, following the principle of *pacta sunt servanda*, what the Parties agreed would amount to hardship is what should be considered as hardship **[Schwenzer, pg. 719]**.

82. A hardship clause is a clause by which the parties will be able to request a rearrangement of the contract that binds them, if an intervening change in the initial basis on which they obligated themselves, modifies the equilibrium of the contract to the point that one of the parties sustains a hardship **[Ullman, pg. 82]**. Apart from the fundamental character of change, in order to rely on hardship, the party will have to prove that the change of circumstances was insurmountable, unforeseeable and external to the parties. These turn out to be a high threshold to pass **[Kokorin/van der Weide, pg. 56]**. In the present instance, the Parties agreed to a high standard for hardship by agreeing on a narrowly worded hardship clause – the CLAIMANT initially suggested the ICC Hardship Clause to be included **[RE 2, ¶4]**; however, the RESPONDENT did not agree to this, as it was "too broad" **[RE 3, ¶2]**. Subsequently, a narrow hardship reference was added to the force majeure clause **[RE 3, ¶4]**. As such, the Parties have set a high standard to be met to claim hardship, which the 30% increase in tariffs does not satisfy.

83. In an international market, one may expect the potentially aggrieved party to insist on incorporating terms for a possible adjustment in the contract, where the changed circumstances have met the required high margin, which is advised to be 150-200% **[Schwenzer/Hachem/Kee, ¶45.106]**. Even a 50% change in price does not amount to a claim of hardship **[infra, ¶129]**. In the present instance, however, the increase in price of the tariffs was only by 30% **[CE 7, ¶1]**. Therefore, it has not resulted in a hardship on the CLAIMANT. The CLAIMANT is therefore not entitled to

any price adaptation as the high standard set by Cl. 12 have not been met, for the CLAIMANT to establish hardship.

b. Tariffs do not fall within the ambit of Clause 12

84. In addition to the fact that 30% increase in tariffs does not satisfy the high standard of hardship, it further does not fall within the narrowed down hardship clause of the Sales Agreement i.e. Cl. 12. The CLAIMANT unsuccessfully attempts to bring hardship within the scope of the circumstances mentioned in Cl. 12 of the Sales Agreement: "hardship, caused by *additional health and safety requirements or comparable unforeseen events*" **[CE 5, Cl. 12, emphasis added]**. The RESPONDENT disputes the CLAIMANT's contention on the grounds that: **(i)** the tariffs imposed are not additional health and safety requirements; **(ii)** the tariffs imposed by Equatoriana are foreseeable; and, **(iii)** the imposition of such tariffs has not made the Contract more onerous.

i. Tariffs imposed are not additional health and safety requirements

85. CLAIMANT attempts to assimilate the imposition of tariffs with "additional health and safety requirements" **[MFC, ¶73]**, but neither in nature nor effect are health and safety requirements the same as tariffs; further, they do not fall within the ambit of "comparable unforeseen events". In fact, the WTO, of which the nations of both Parties are members of **[PO2, Q47]**, has specifically categorised 'safety and health requirements' as '*non-tariff* barriers' **[Brauer; Understanding the WTO]**. Therefore, the term "comparable" should be understood to only mean other 'non-tariff barriers'. The 40% increase in cost that the CLAIMANT suffered in the past which were imposed by the Danubian government were not tariff barriers; they were highly expensive tests that fell within the definition of health and safety requirements **[CE 4, ¶4]**, which is not the case in the present instance.

86. Further, the Equatorianian tariffs were imposed in retaliation to the tariffs imposed by the newly elected President of Mediterraneo **[CE 6, ¶2]**. They were not for the purpose of ensuring health and safety; therefore, they cannot fall within the ambit of health and safety requirements.

87. Case law has consistently held that hardship clauses should be interpreted strictly: a clause mentioning specific changes must be interpreted as meaning that no other changes should be taken into account **[*ICC No. 221*; *ICC No. 2291*]**. Therefore, the CLAIMANT can only invoke the hardship clause to adapt the price under the instances that have been mentioned in Cl. 12 i.e. "*health and safety requirements*" and "*comparable unforeseen events*" – other non-tariff barriers. In ***ICC No. 2478***, the hardship clause on currency exchange rates did not allow price increases when the commodity price, rather than the exchange rates, increased. As such, adaptation should *only* be done by the

Tribunal on the matters explicitly mentioned by Cl. 12 of the Sales Agreement i.e. "health and safety requirements" and "comparable unforeseen events".

88. Based on this, the hardship clause of the Parties, which only refers to *non-tariff* barriers such as health and safety requirements, should be interpreted narrowly, in line with the intention of the Parties to exclude all other hardships **[RE 3, ¶3]**; it should not be used as an excuse clause.

ii. Tariffs imposed were foreseeable

89. French Conseil d'État, in the landmark case ***Gaz de Bordeaux*** held that to establish hardship in it had to be unforeseeable and external to the parties, exceed all reasonable expectations, however, in the present case this standard of exceeding all expectations have not been met. Furthermore, tribunals in general, has held a high standard for what constitutes to hardship **[*CMS v. Argentina*; *Himpurna v. Negara*]**.

90. Cl. 12 of the Sales Agreement requires the event giving rise to hardship to be unforeseeable **[CE 5, Cl. 12]**. The 30% increase in tariffs were in fact foreseeable and therefore does not give rise to hardship. In ***Paris Maritime Award No. 1172***, it was held that an extensive increase of owner expenses cannot be considered as a hardship situation because they were predictable at the time of entering into the contract.

91. The WTO aims to, as a principle, have its trading system predictable; with stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition **[Understanding the WTO]**. Most U.S. courts view the imposition of tariffs as a foreseeable risk of entering into a contract **[Cook/Elliott/McKinley, ¶5]**. It is generally held that import tariffs are foreseeable due to the increase in competition and protectionism measures in international trade **[Gibbes/Frick/Ibarra, ¶11; Di Matteo, pg. 30; Schlechtriem/Schwenzer, Art. 79]**. Tariffs in general are therefore predictable (i.e. foreseeable) when parties enter into international commercial contracts. In fact, there are a few countries which have tried to protect their farmers by tariffs on foreign agricultural products of a comparable size **[PO2, Q23]**. Therefore, the CLAIMANT's contention **[MFC, ¶¶74-78]** that the tariffs imposed were unforeseeable is invalid.

92. The newly elected President of Mediterraneo, Mr. Bouckaert himself and his 'superminister' for agriculture, Ms. Frankel, have been outspoken protectionists, advocating for limiting the access of foreign agricultural products in the Mediterranean market before the Parties finalised the Contract **[PO2, Q23]**. Therefore, the tariffs were foreseeable at the time the Parties entered into the Contract.

iii. Tariffs imposed have not made the Contract more onerous

93. The CLAIMANT bases its standard for hardship on the consequences of the health and safety requirements imposed by Danubia, and the CLAIMANT's past experience with it **[MFC, ¶79]**. The imposition of tariffs in the present case is not due to additional health and safety requirements **[supra, ¶85]**. Also, under Cl. 12, the pre-condition set for circumstances to be "onerous" is that hardship was caused by health and safety requirements or comparable unforeseen events **[CE 5, Cl. 12]**.

94. The fact that the CLAIMANT did not take appropriate measures before entering into the Contract, knowing its financial situation **[PO2, Q29]**, does not place the burden on the RESPONDENT to pay them an additional amount deviating from the price, the Parties initially agreed to. The financial situation of the CLAIMANT was not caused by the imposition of the 30% increase in price **[PO2, Q29]**, and does not fall within the criteria for the contractual performance being "onerous".

95. Further, the economic situation of the disadvantaged party is not the only consideration which must be addressed – the relative 'onerousness' of the obligation should be measured against the counter-obligation **[Schwenzer/Hachem/Kee, pg. 670]**. The CLAIMANT cannot, therefore, meet the criteria for 'onerousness' relying only on its financial difficulty, which, in itself, does not meet the criteria, as the there are many counter-obligations such as the fact that CLAIMANT has assumed the risks **[Maskow, pg. 662]** and the fact that the circumstances were foreseeable.

II. The CLAIMANT has assumed the risks under the DDP Incoterms

96. The RESPONDENT disputes the CLAIMANT's contention that the Parties have modified the DDP Incoterms for the purpose of risk allocation, excluding the CLAIMANT of its responsibility for the imposition of tariffs **[MFC, ¶70]**. DDP, in itself, places the maximum obligation on the seller i.e. the CLAIMANT **[DDP Incoterms, pg. 69]**. The Parties, having subjected the Sales Agreement to DDP Incoterms through the Cl. 8 – "DDP, Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery" **[CE 5, Cl. 8]**, according to which the risk of the tariffs are solely placed on the CLAIMANT. as stated by the CLAIMANT **[MFC, ¶70]**, do have the discretion to deviate from the DDP Incoterms. However, in this instance, they have done so in a very limited manner, and those modifications do not result in the CLAIMANT being freed from responsibility for the imposition of tariffs.

97. If the parties wish to modify obligations on the seller, they should make clear exactly what these imply **[Ramberg, pg. 41, 42; Schwenzer, pg. 719]**. If, for instance, the parties merely add the word "loaded" in a clause, it is reasonable to assume that the seller is obliged to load the goods on the buyer's collecting vehicle **[Ramberg, pg. 41, 42]**. Similarly, if the CLAIMANT had intended

for a DDP with modified obligations to apply, these must have been explicitly and unambiguously stated in a manner that is not open to various interpretations.

98. The Parties have agreed to place the burden of risk for certain instances on the RESPONDENT under Cl. 9 and Cl. 10; none of these, however, cover the imposition of tariffs **[CE 5, Cl. 9,10]**. Cl. 12 does not provide for a case of import tariffs **[supra, ¶85]**. The CLAIMANT attempts to interpret this in a sweeping manner, including tariffs into those circumstances considered by the Parties **[MFC, ¶70]**. Contrary to the CLAIMANT's contention, no such interpretation is provided by Cl. 12. It only provides for cases of hardship caused by "health and safety requirement'" and "comparable unforeseen events" **[CE 5, Cl. 12]**, and does not cover Equatorianian tariffs. The seller must, at its own risk, carry out all customs formalities necessary for the importation of goods **[DDP Incoterms, pg. 70]**; since no derogation from this was made, the risk of the tariffs continues to fall on the CLAIMANT.

99. The Contract itself and the pre-contractual negotiations evince the Parties' intention to place the maximum obligation on the CLAIMANT under DDP. Taking a subjective point of view **[Art. 8(1) CISG]**, during the negotiation stage, the RESPONDENT explicitly stated that it requested DDP delivery *because of* the CLAIMANT's "greater experience in the shipment of frozen semen" **[CE 3, ¶4]**. This makes it evident that the purpose for the RESPONDENT's request for DDP delivery, in the first place, was that the CLAIMANT would take over risks associated with the shipment of frozen semen, which the CLAIMANT is now refusing to do. Taking an objective perspective **[Art. 8(2), 8(3) CISG]**, the CLAIMANT, which agreed to be bound by DDP, further suggested a price increase of USD 1000 per dose **[CE 4, ¶3]**. With the price increase, the RESPONDENT did not agree to relieve the CLAIMANT of its risks associated with customs regulations or import restrictions, as the CLAIMANT had suggested **[CE 4, ¶4]**. Therefore, Parties agreed to allocate the burden of certain risks to the RESPONDENT from the Contract itself **[CE 5, Cls. 9, 10, 11, 13]** and no other derogations were made other than the ones expressly stated in the contract;

100. Further, the CLAIMANT was familiar with the risks of DDP through the past experience it had in the sale of the three mares to Danubia **[PO2, Q21]**. It should therefore have clearly modified the DDP term in the Contract if that was its intention. However, not having included any modification to the DDP term to exclude its liability for import tariffs, the CLAIMANT cannot now attempt to modify the risks allocated through DDP.

101. Further, the CLAIMANT, in its letter dated 31 March 2017, stated that "*at minimum*, a hardship clause should be included into the Contract to address *such* subsequent changes" **[CE 4, ¶4, emphasis added]**. As a hardship clause *was* included in the end, and it did precisely reflect "such" changes – it mentioned "additional health and safety requirements" **[CE 5, Cl. 12]** – the minimum

was done, and the RESPONDENT cannot now be expected to have done anything more i.e. this is proof that relief from *all* DDP responsibilities was never contemplated by the Parties.

102. Hence, as per the nature of DDP Incoterms, *all other risks* i.e. those that the CLAIMANT did not expressly state it was not willing to bear responsibility for, including tariffs, must be borne by the CLAIMANT.

III. The Tribunal cannot adapt the price

103. Contrary to the CLAIMANT's contention **[MFC, ¶¶82-85]**, the Parties have *not* agreed, either during negotiations or in the Contract itself, that the Tribunal should be granted the power to adapt the Contract.

104. Firstly, as correctly stated by CLAIMANT **[MFC, ¶84]**, the ICC Hardship Clause that the Parties considered, does *not* contain an explicit reference to adaptation as a remedy under hardship. Narrowing-down **[PO2, Q12]** something that does not provide for adaptation by the Tribunal in the first place would not result in the Tribunal obtaining the authority to adapt. What the ICC Hardship Clause provides is for parties to "*negotiate* alternative contractual terms" **[ICC Hardship Clause]** – this does not give the Tribunal the power to adapt the price in any way. Even if it did, the Parties narrowed down the ICC Hardship Clause in both the scope of hardship and its remedies **[MFC, ¶84]**, by omitting such wording. Therefore, an inference of the Tribunal being capable of adapting the price cannot be drawn from the wording of the clause.

105. The CLAIMANT attempts to combine the AA and Cl. 12 to provide for adaptation **[MFC, ¶83]**. However, the AA does not provide for the Tribunal's power to adapt the Contract **[supra, ¶34]**, and does not, in any way, relate to an adaptation of price in the event of hardship. Therefore, the CLAIMANT does not have any ground on which to prove that the Parties intended the tribunal to adapt the price.

106. If parties cannot reach an agreement and if the hardship clause does not grant the arbitrators any ability to adjust their contract, the existing contract is always binding and continues to function based on the law of the parties **[Delebecque, ¶15]**. Therefore, the Tribunal has no basis from which it could assert the authority to adapt the Contract.

IV. Alternatively the CLAIMANT cannot plead promissory estoppel

107. Although not raised, the CLAIMANT could not have argued that the Tribunal must estop the RESPONDENT from denying the CLAIMANT's right to adaptation based on the RESPONDENT's 'promise' of adaptation in shipping the final 50 doses. There are elements to the defense of promissory estoppel that must be established by one that pleads the defense: the

existence of a promise, reliance upon the promise, and equitability laced with the promise **[*High Trees Case*]**. However, in the case at hand, there is no promise that has been made by the RESPONDENT for the CLAIMANT to rely on estoppel.

108. During the telephone conversation on 21 January 2018, Mr. Shoemaker communicated to the CLAIMANT that he had not been involved in the negotiations nor the Sales Agreement, and therefore could *not* authorise any additional payment **[CE 8, ¶7]**. What Mr. Shoemaker stated was that a solution would be found **[CE 8, ¶7]**, and he made no promise or indication that this solution would be an adaptation of the price. Hence, this does not amount to a 'promise'. He only stated that "*if the contract provides* for an increased price", **[RE 4, ¶4, emphasis added]**, they can agree on a price adaptation. Here, the Contract provides for no such purported remedy; therefore, the CLAIMANT cannot rely on what is merely a provisional statement made by Mr. Shoemaker.
109. The CLAIMANT itself states that it only delivered the 50 doses as it was of the *impression* that the RESPONDENT had agreed to the adaptation **[CE 8, ¶8, emphasis added]**. Such an impression is unrelated to the RESPONDENT, and is nothing but a perception on the part of the CLAIMANT; it does not reflect a promise made by the RESPONDENT to adapt the price.

B. The CISG does not allow the CLAIMANT a price adaptation based on hardship

110. The RESPONDENT asserts that the CLAIMANT cannot adapt the price through either: **(I)** an interpretation of the CISG doctrine of hardship; or, through **(II)** the UNIDROIT Principles.

I. The CLAIMANT cannot rely on the CISG for price adaptation

111. The CLAIMANT's contradictory and inconsistent positions between its NOA and written submission reflects the uncertainty and lack of merit within its claim. It argues for price adaptation pursuant to the CISG within the NOA **[NOA, ¶20]**, but later, however negates this position and relies only on the UNIDROIT provisions to substantiate their claim **[MFC, ¶92]**, which too is initially negated, for the adaptation of the price. This lack of a singular established position as to the dispute and how the claim for adaptation is substantiated under the CISG reflects that the CLAIMANT is aware of the lack of merit of its case.
112. Although the CLAIMANT concedes that the CISG cannot be relied upon for price adaptation, had the CLAIMANT relied on the CISG, **Art. 79** would be the only provision it could rely upon to request a price adaptation pursuant to the Convention. However, in the case at hand, this too would not result in an adaptation of the Contract.
113. Even if the CLAIMANT had relied upon **Art. 79** CISG, adaptation would nonetheless be impossible as: **(a) Art. 79** is not applicable to the Contract nor the dispute at hand; **(b) Art. 79**

does not set out the standard for hardship; and, as **(c)** tariffs do not amount to a hardship under the CISG.

a. Article 79 CISG is not applicable to the case at hand

114. Cl. 12 of the Parties' Sales Agreement consists of a force majeure and hardship clause that covers the exemption of a party from performing its contractual duties in the event of hardship or any other unforeseeable impediment. The intention of including such a provision within the Sales Agreement was in order to set the standard which would govern such change of circumstance or impediment, thereby derogating from the applicability of **Art. 79** CISG.

115. **Art. 6** CISG provides for parties to derogate from provisions contractually, provided the agreement is valid under the applicable law **[Hachem, pg. 219]**. **Art. 79** would only be triggered in the instance where the contractual agreement of the parties is invalid and could not govern such circumstances **[Da Silveira, pg. 253]**. Cl. 12 is a valid clause within the Sales Agreement, one which has been agreed to by both Parties; hence, the Parties' agreement must prevail over the terms of the Convention **[Da Silveira, pg. 254]**.

116. **Art. 79** of CISG states, "A party is not liable for a *failure to perform* any of his obligations if he proves that the failure was due to an impediment beyond his control…" **[emphasis added]**, thereby specifying the circumstances in which a party is exempted for failing to perform its obligations. A fundamental requirement for this exemption to apply is that the impediment is so powerful that it incapacitates the party from performing the contract. The exemption of liability will only be possible if there is a causal link between the impediment beyond control and the non-performance of any of the contractual obligations **[Brunner, pg. 59]**.

117. In the case at hand, as the CLAIMANT rightfully points out **[MFC, ¶¶98, 99]**, despite the tariffs imposed on frozen horse semen by Equatoriana, and the possible 'hardship' it may have caused the CLAIMANT, it has nonetheless performed the Contract by delivering the final shipment of horse semen on 23 January 2018 **[NOA, ¶13]**. Hence, even if the CLAIMANT relied on this provision, it would have been futile as the fundamental requirement for the provision to be applicable i.e. non-performance is not in existence.

b. Article 79 CISG does not set out the standard for hardship

118. Even if **Art. 79** CISG was applicable to the dispute at hand, the price of the frozen semen should not be adapted, as it does not set out the standard for hardship. **Art. 79** sets out the standard for an exemption in the event of an unforeseeable impediment such as force majeure – unenforceability and unavoidability of the event.

119. In cases involving changed economic circumstances, arguments posed by sellers, that an increase in the cost of performing the contract amounted to an impediment, have been rejected. These arguments have not been successful, and several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract **[*CLOUT No. 102*; *CLOUT No. 277*]**. A court held that such price fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities" **[*Vital Berry v. Dira-Frost*]**. Courts have even denied a seller an exemption after the market price for the goods tripled, commenting that "it was incumbent upon the seller to bear the risk of increasing market prices **[*Iron Molybdenum Case*]**.
120. Furthermore, a court held that **Art. 79** does not provide for an exemption for hardship, and thus, under CISG, a seller could not have claimed exemption from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded **[*Nuova Fucinati v. Fondmetall Intl.*]**.
121. The CLAIMANT, as a prudent business entity, must foresee such changes in world economy; hence, the tariffs cannot be categorised as impediments pursuant to **Art. 79** CISG and therefore, the 30% tariffs cannot be considered unforeseeable
122. The CLAIMANT may attempt to rely upon the **CISG-AC ON 7**, which holds that a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under **Art. 79**, but that only "…a change of circumstances that *could not reasonably be expected to have been taken into account*, rendering *performance excessively onerous* ('hardship'), may qualify as an impediment" under **Art. 79(1) [emphasis added]**. However, in this instance, the imposition of tariffs was foreseeable and did not make the contract more onerous.
123. A Belgian Court, in a case that involved frozen raspberries, ruled that price fluctuations and other factors that affect the financial status of the contract are foreseeable and are part of the normal risk assumed by parties, which the parties could not control **[*Vital Berry v. Dira-Frost*; Maskow, pg. 662]**.
124. Furthermore, the Court of Appeals of Colmar established that in long term contracts, the decrease of 50% in the price of a component good was a foreseeable risk: "experience shows that over a period of eight years, price fluctuations, even sudden and significant, are not exceptional and, *a fortiori*, are not unforeseeable…when becoming involved in such a long and restrictive supply agreement…an experienced professional acting in the international market, should have arrange[d] either guarantees of performance of the contractual obligations entered into…or means of revision of these obligations. Otherwise, it should bear the risk of non-performance" **[*Société Romay AG v. SARL*]**. In the case at hand, the CLAIMANT, in addition to foreseeing the tariffs as a prudent

business entity, could have also foreseen the Equatorianian tariffs as they were imposed in retaliation to those imposed by the CLAIMANT's own government.

125. Moreover, the assessment of this factor should consider other circumstances, "such as the duration of the contract (the longer the duration, the less likely the contracting parties will be able to foresee possible impediments), the fact that the price of the goods sold tend to fluctuate in the international market, or the fact that early signs of the impediment were already obvious at the time of the conclusion of the contract" **[Flambouras, pg. 271]**. In the instant case, all events have occurred within a year, and therefore, it is not a well-established business relationship for the CLAIMANT to contend that the circumstances were unforeseeable. Further, the tariffs were retaliatory and therefore the CLAIMANT cannot contend that they were unforeseeable from an early stage of the Contract. Therefore, the CLAIMANT can be expected to take the change in circumstances into account.

126. Moreover, the performance of the Contract by the CLAIMANT was not *excessively* onerous; had it been excessive, that would completely have barred the CLAIMANT from delivering the goods but it is not the case in this instance.

c. Equatorianian tariffs do not amount to a hardship

127. Alternatively, even if the doctrine of hardship could be considered as an impediment as per **Art. 79** CISG, the CLAIMANT cannot be granted a price adaptation, as the 30% Equatorianian tariffs do not amount to a hardship. The very essence of the hardship exemption suggests that hardship may arise due to certain events in the course of the performance of contract which cause disequilibrium between the parties. This disequilibrium may have two different effects: an increase of costs of performance, or a diminution of the value of the performance **[Girsberger/Zapolskis, pg. 122]**.

128. A disadvantaged party which wishes to use the hardship exemption must provide relevant evidence to demonstrate how certain changed circumstances would influence the party's ability to perform the specific contract; also, it is not entitled to use the hardship exemption merely because the contract turned out to be less profitable than expected at the time of its conclusion **[Girsberger/ Zapolskis; pg. 123]**.

129. In international commercial arbitration cases, a cost increase by 13%, 30%, 44% or 25-50% was considered *insufficient* to qualify as hardship **[Brunner, pg. 427]**. Arbitrators do not grant relief merely because the costs of performance have increased by 50% or less compared to what had been agreed to in the contract **[Zaccaria, pg. 169]**. Hence, the CLAIMANT cannot contend that a tariff of 30% amounts to a hardship that leads to an adaptation of the price.

II. The UNIDROIT Principles do not allow for price adaptation

130. **Arts. 6.2.2** and **6.2.3** UNIDROIT provide for the definition of the doctrine of hardship as well as remedies to parties in the event hardship is established. **Art. 6.2.2** defines hardship as where the occurrence of events fundamentally alters the equilibrium of the contract, and provides further criteria to be satisfied in order to establish hardship. The CLAIMANT's argument that the price of frozen semen can be adapted as per the UNIDROIT Principles by way of **Art. 7(2)** CISG **[MFC, ¶108]** is futile as: **(a)** the UNIDROIT provisions on hardship are not relevant to the current dispute; and **(b)** even if they were relevant, the price cannot be adapted.

a. The CLAIMANT cannot rely on the UNIDROIT Principles for Hardship

131. A fundamental element of a party relying on **Art. 6.2.2** to plead hardship is that the occurrence of the event, which fundamentally altered the equilibrium of the contract, be so onerous that it prevented the party from performing its contractual obligations **[UNIDROIT Principles Commentary]**.

132. The alteration in the equilibrium of the contract cannot mitigate already performed obligations. The doctrine of hardship is such that it is futuristic and not retrospective; thus, it can only operate on an *unperformed* future obligation, which, unbeknownst to the parties, has had its cost of performance excessively increased, or value exceedingly diminished **[Fucci, pg. 2, emphasis added]**.

133. The drafters of the UNIDROIT Principles themselves state this within the commentary that hardship is only relevant to performance that is yet to be rendered and that "once a party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance" **[UNIDROIT Principles: Commentary, pg. 221, ¶4]**.

134. However, in the case at hand, the CLAIMANT has performed its obligations of delivering the final 50 doses of frozen semen on 23 January 2018, and thereby barred itself from relying on the UNIDROIT Principles for adaptation. Hence, the CLAIMANT cannot rely on the UNIDROIT Principles for adaptation of the price, which the CLAIMANT itself concedes to **[MFC, ¶109-111]**, albeit for incorrect considerations.

b. Price adaption will not be allowed even if the UNIDROIT Principles were applicable

135. Alternatively, even if the UNIDROIT Principles are applicable to the dispute at hand, the price of the frozen semen cannot be adapted as: **(i)** the tariffs have not fundamentally altered the

equilibrium of the Contract; **(ii)** the tariffs could have been foreseen by the CLAIMANT; **(iii)** the CLAIMANT has assumed the risk involved with performing the Contract; and, **(iv)** the CLAIMANT has not mitigated its losses. Therefore, hardship cannot be established as per the UNIDROIT Principles.

i. The equilibrium of the Contract was not fundamentally altered

136. In order for the CLAIMANT to establish hardship pursuant to the UNIDROIT Principles, the event, in this instance the imposition of 30% tariffs, must have fundamentally altered the equilibrium of the Contract **[Art. 6.2.2 UNIDROIT]**. In the present case, the CLAIMANT fails to substantiate its claim as to how the imposition of 30% tariffs has fundamentally changed the equilibrium of the Contract.

137. To *fundamentally* alter equilibrium of a contract, there must be a *substantial* increase in the cost for one party of performing its obligation **[UNIDROIT Principles Commentary, pg. 219, emphasis added]**. In international commercial arbitration cases, a cost increase by 13%, 30%, 44% or 25-50% is considered insufficient to qualify as hardship **[Brunner, pg. 427]**; this was also reflected in the commentary of the UNIDROIT Principles that it is most likely that a cost/value alteration of less than 50% will not be considered 'fundamental' **[McKendrick, pg. 719; UNIDROIT Principles Commentary, pg. 147, Carlsen, ¶III]**. In fact, it was mentioned in the *travaux préparatoires* that this threshold was criticised in legal literature as "*too low and in any event rather arbitrary*" **[emphasis added]**; hence, the standard for a fundamental alteration of a contract has to be a higher standard than 50% **[Travaux préparatoires, pg. 15]**. The threshold for hardship based on general contract principles is considered as a price increase of about 80-100% **[Brunner, pg. 432; Enderlein/Maskow, Art. 79 CISG ¶6.3; Schwenzer, pg. 716; Berger ¶24-66]**. Therefore, a price increase of 30% cannot be considered as an increase that fundamentally alters the equilibrium of the contract.

138. In the case of ***Himpurna v. Negara***, even the contraction of the Indonesian economy by approximately 15%, the loss of 5 million jobs and an 80% loss of the value of the rupiah and an inflation rate exceeding 75% were held to be insufficiently extreme to qualify as hardship. Commentators share this view **[Fucci, pg. 13, 18]**.

139. The CLAIMANT wrongly submits that the Tribunal must lower the threshold of 'fundamental alternation' due to the financial ruin of the CLAIMANT **[MFC, ¶116]**. It provides no legal basis as to why such a reduction must be made by the Tribunal, except that for the CLAIMANT's financial despair, which does not legally garner such an alternation. According to the general rule, the deterioration of a party's financial capacity falls within the sphere of control of that party and thus does not authorise it to invoke the hardship exemption **[Girsberger/ Zapolskis pg. 131]**.

140. Only in exceptional cases, especially when the debtor is a small company and loses a major part of its income due to changed circumstances, a more flexible approach towards alteration threshold may be justified **[Girsberger/Zapolskis, pg. 131]**. However, the CLAIMANT is not a small company and was in a financially challenged status even before the tariffs were imposed – the tariffs themselves did not make a significant contribution to that status. This request of the CLAIMANT for the Tribunal to lower the threshold of 'fundamental alteration' further reflects that the CLAIMANT itself is aware that no such fundamental alteration has been made by the tariffs to the Contract, and that the claim it makes is meritless.

141. Furthermore, the total loss suffered by the CLAIMANT from the entire contract is 10% as the CLAIMANT enjoyed the full profit from the sale of the initial 50 doses. Considering that the Contract was for the sale of the 100 doses of horse semen, even if the price increase is 30% for the final 50 doses, the actual loss suffered by the CLAIMANT is 10% of the contract amount.

First 50 doses	Second 50 doses	Loss = Total Cost – Amount paid by the RESPONDENT – Total Profit
50 x 100,000 = 5 mil (revenue)	50 x 100,000 = 5mil (revenue)	(5mil + 1.5 mil + 5 mil) – 10 mil – 500,000 = 1 mil
5,000 x 50 = 250,000 (profit)	5 mil x 30% = 1.5 mil (tariff)	Loss = 1 mil → As a percentage of the transaction amount excluding the tariff = 10%

ii. Tariffs could have been foreseen

142. The CLAIMANT argues that a reasonable person could not have foreseen the sudden imposition of tariffs and, hence, pursuant to **Art. 6.2.2** UNIDROIT, they amount to a hardship **[MFC, ¶118]**. However, the 30% tariffs cannot be classified as unforeseeable as parties involved in international commerce are deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract. **[*CLOUT No. 102*; *Iron Molybdenum Case*]**. Dramatic changes in market or production prices are circumstances considered foreseeable especially to business entities who engage in international trade **[Fucci, pg. 13]**, such as the CLAIMANT **[PO2, Q21]**.

143. In ***ICC No. 2216***, a Norwegian company failed to perform a petroleum purchase agreement because the price of petroleum had gone down by more than 50% between the time of contract and scheduled delivery (this is hardship in the alternative sense where the value of the performance a party receives has diminished, thereby causing hardship). The tribunal did not permit an adjustment in the contract price based on a hardship argument, as it did not constitute a "bouleversement" of economic circumstances, but a simple fluctuation in market prices. In a commentary to this case by Yves Derains, then Secretary General of the ICC Court of Arbitration,

it was pointed out that to accept this type of fluctuation as a ground for hardship "would put in danger the security of transactions" **[Fucci, pg. 13]**. As recognising a 30% tariff as hardship would endanger in the security of transactions, it cannot be considered unforeseeable.

144. A similar position was taken by the tribunal in ***ICC No. 8486***, where the arbitrators considered that these elements of market fluctuations were not unforeseeable and that the risk of the evolution of the market in Turkey had to be borne by the buyer. In fact, it accepted that economic difficulties encountered by a country or one of its enterprises were foreseeable **[Fucci, pg. 14]**, as all business entities, especially ones in international trade, are expected to act prudently. In the same manner, the imposition of retaliatory tariffs could have been foreseen as Mediterraneo was retaliating to the tariffs imposed by Equatorianian government; even though it is a rare occurrence for Mediterraneo to retaliate, trade wars between countries are a common occurrence, and hence, it is a normal risk associated with international commercial transactions – thereby, it is foreseeable.

145. Hence, contrary to the CLAIMANT's contentions, both the size of the tariff, and the fact that the tariffs were imposed on horse semen, can be considered reasonably foreseeable.

iii. The CLAIMANT has assumed the risk involved

146. Although the CLAIMANT rightfully argues that Cl. 12 holds the modified DDP standards applicable to the Contract, it incorrectly implies that this derogation from the standard DDP clause amounts to a discharge of the CLAIMANT's liability for the risk of tariffs **[MFC, ¶120]** as there was no modification done regarding the risks associated with 'duty payments'. In fact, the general norm is such that if the DDP Incoterms are modified for the buyer to bear responsibility of the 'duty' payments, then the contract will include terms such as 'duty unpaid' **[Coetzee, pg. 191]**. Further, there was no other indication that the RESPONDENT should be responsible for any other such duty related restrictions other than '*health and safety requirements*'.

147. Therefore, the tariffs do not amount to a hardship as the equilibrium of the Contract is not fundamentally altered. Hence, the CLAIMANT is not entitled to a price adaptation pursuant to either the CISG or UNIDROIT.

iv. The CLAIMANT has not mitigated its losses

148. The impediment must be not only beyond the control of the non-performing party; "he must also be able to show that he could not reasonably have taken the impediment into account, avoided it, or overcome it or its consequences" **[Ziegel, ¶5]**. However, the CLAIMANT has failed to take steps to overcome the impediment or to avoid the consequences.

149. The CLAIMANT, as a prudent business party, when Mr. Shoemaker informed it that he had no authority to give a definite answer on the ability to adapt the Contract **[RE 4, ¶4]**, should have

made arrangements to contact an individual with authority i.e. the RESPONDENT's lawyer or the CEO. Furthermore, the management of the CLAIMANT's financial stability is a responsibility that the CLAIMANT has to bear, and the CLAIMANT has failed do so. The CLAIMANT now attempts to place the burden of its financial ruin on the RESPONDENT.

150. Therefore, the CLAIMANT has failed to act prudently and mitigate its losses, as required by **Art. 7.4.8** UNIDROIT and **Art. 77** CISG.

CONCLUSION FOR ISSUE 03

The CLAIMANT has not faced hardship due to the imposition of Equatorianian tariffs, and is therefore not entitled to the payment of any amount under Cl. 12 of the Contract and the applicable laws of the Contract: the CISG and UNIDROIT.

PRAYER FOR RELIEF

In response to the Tribunal's Procedural Orders, and the CLAIMANT's written submissions, Counsel for RESPONDENT makes the above submissions on behalf of the RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Tribunal:

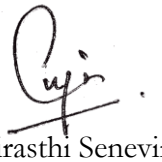
1. To dismiss the claim as inadmissible for a lack of jurisdiction and powers.
2. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by the CLAIMANT.
3. To order the CLAIMANT to pay the costs incurred in this arbitration to the RESPONDENT.

CERTIFICATION

24.01.2019.

Colombo, Sri Lanka.

We hereby confirm that this memorandum was written by the undersigned.



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