SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

SRI LANKA LAW COLLEGE

COLOMBO, SRI LANKA

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

DAMITHU SURASENA | RAJINDA KANDEGEDARA

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STATEMENT OF FACTS

- The CLAIMANT (Phar Lap Allevamento) is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and renowned stud farm, covering all areas of the equestrian sport.

- The RESPONDENT (Black Beauty Equestrian) in Oceanside, Equatoriana, is famous for its broodmare lines. Three years ago, Black Beauty decided to establish a racehorse stable.

- RESPONDENT approached CLAIMANT to purchase 100 doses of frozen semen of CLAIMANT's renowned stallion Nijinsky III, taking advantage of the status quo as the ban against artificial insemination was lifted in Equatoriana.

- Although CLAIMANT was surprised at the nature of the order, CLAIMANT agreed to provide the frozen semen to RESPONDENT on condition that the frozen semen sold to the RESPONDENT cannot be resold by the RESPONDENT unless permission from the CLAIMANT is obtained.

- RESPONDENT insisted that the contract is to follow a delivery DDP. Furthermore, RESPONDENT did not accept the contract to be subjected to the law and courts of Mediterraneo. However, RESPONDENT mentioned that RESPONDENT could accept the law of Mediterraneo if courts of Equatoriana had jurisdiction to hear the disputes.

- CLAIMANT accepted the delivery obligation of DDP. However, CLAIMANT requested that the price be increased by 1000 USD per dose. Furthermore, CLAIMANT informed

RESPONDENT that no more risks associated with the changed delivery terms will be borne by the CLAIMANT.

- CLAIMANT informed RESPONDENT about the need for a Hardship clause to be included in the contract. CLAIMANT while stating that the jurisdiction of courts of Equatoriana was unacceptable, expressed willingness to agree on arbitration in Mediterraneo.

- RESPONDENT agreed that the contract would be governed by the law of Mediterraneo. RESPONDENT proposed a draft Dispute Resolution Clause which provided that Equatoriana be the seat of the arbitration and Equatorian law govern the arbitration agreement.

- CLAIMANT informed RESPONDENT that according to CLAIMANT's internal policy, the Creditor's Committee's approval is mandatory if the contract is to be submitted to a foreign law or provides for dispute resolution in the country of counterparty. However, CLAIMANT agreed to arbitration in a neutral country.

- CLAIMANT mentioned that Danubia as the place of arbitration would be acceptable on the condition that the contract would be governed by the law of Mediterraneo. CLAIMANT further proposed to include ICC Hardship clause in the contract.

- Both CLAIMANT's and also RESPONDENT's negotiators who were carrying out the negotiations for the respective parties, were involved in a severe car accident and were hospitalized. Therefore the contract was finalized by other substitute representatives who were not familiar with the status quo of the negotiations done by their predecessors.

ISSUE 1 – DOES THE TRIBUNAL HAVE THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, WHICH INCLUDES IN PARTICULAR THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION;

1. The Arbitral Tribunal lacks jurisdiction and/or powers under the Arbitration Agreement to decide the case. As per the claim raised by the Claimant the Arbitral Tribunal requires to adapt the contract. Rather than a mere interpretation of the contract enabling the Arbitral Tribunal to order a payment to the Claimant, the Arbitral Tribunal would have to adapt the contract due to the fact that the claim raised by the Claimant amounts to a remuneration which goes beyond the originally agreed contractual remuneration. It has been undisputed by both parties to the fact that the originally agreed remuneration has been paid by the Respondent without lapse.

2. On 31st July 2018, Claimant had initiated an arbitral proceeding under HKIAC Rules which were agreed to by the parties during negotiations and has been included in the Arbitration Agreement ***[Claimant's Exhibit C5, Clause 15]***. In Respondents' position, the Arbitral Tribunal does not have the power to adapt the contract since, **A.** The governing law to the Arbitration Clause is not the law of Mediterraneo; **B.** The Tribunal does not have the power to adapt the contract in accordance with the law of Mediterraneo since it does not govern the Arbitration Clause; **C.** The Arbitral Tribunal does not have the power to adapt the contract in accordance with the law of Danubia.

A. THE GOVERNING LAW TO THE ARBITRATION CLAUSE IS NOT THE LAW OF MEDITERRANEO.

3. The primary issue at hand of the Arbitral Tribunal is to decide whether on their power to adapt the contract, which would be solely based on the law that governs the Arbitration Clause of the Sales Agreement ***[Claimants' Exhibit, C5, Clause 15]***. Contrary to the legal

standing of the Claimant, the law of Mediterraneo does not govern the Arbitration Clause of the Sales Agreement on the legal grounds of, **(I)** Parties have not agreed on the law governing the arbitration agreement; **(II)** Separability doctrine should be considered in determining the governing law of the Arbitration Agreement; **(III)** The closest connection relationship principle would not apply to the arbitration agreement.

(I) Parties have not agreed on the law governing the arbitration agreement.

4. The parties had not agreed on a specific law to govern the Arbitration Clause throughout the negotiation period. Nor the Claimant or the Respondent wanted to submit the arbitral proceedings to the law of the counterparties' country ***[Claimants' Exhibit, C3 / Claimants' Exhibit, C4 / Respondents' Exhibit, R1 / Respondents' Exhibit, R2]***.

5. The negotiations had taken up a considerable time due to the dispute which was not settled between the parties with regard to the law governing the Arbitration Clause. Further, negotiations could not be concluded properly due to the fact the main negotiators for the 2 parties had met with an accident which resulted in different negotiators having to conclude the agreement without having full knowledge of the negotiations carried out between the 2 main negotiators who were injured due to the accident ***[Respondents' Exhibit R3, Para 2]***.

6. The Sales Agreement does not include a clause with regard to the law governing the Arbitration Clause ***[Claimants' Exhibit, C5, Clause 15]***. In the absence of a law governing the Arbitration Clause the Arbitral Tribunal should look at the intentions of the parties and the prior negotiations of the parties to determine the law governing the Arbitration Clause. In this case, the Respondent would like to bring to this Tribunals notice that no law has been agreed on to govern the Arbitration Clause and therefore the following should be used to determine the law governing the Arbitration Clause; **a.** No express choice of law has been established in present case; **b.** Implied choice of law established in present case would be the law of the seat of arbitration.

a. No express choice of law has been established in present case.

7. Both parties had agreed to refer and resolve any dispute arising out of the contract to and under the HKIAC Rules of Arbitration ***[Claimants' Exhibit, C5, Clause 15]***.

8. Under the HKIAC Rules parties are provided the opportunity to agree upon a separate law to govern the Arbitration Clause ***["The law of this Arbitration Clause shall be ….. (Hong Kong Law), Model Clauses – HKIAC]***. Even though this was brought to the notice of the Claimant by the Respondent during negotiations ***[Respondents' Exhibit, R1]*** it was not mentioned by an oversight in the Sales Agreement signed ***[Claimants' Exhibit, C5]***.

9. Since there is no express clause regarding the law governing the Arbitration Clause mentioned in the contract, the Tribunal should consider if there is any indication of an implied choice of law to govern the Arbitration Clause.

b. Implied choice of law established in present case would be the law of the seat of arbitration.

10. The implied choice on law would be determined considering the true intentions of the parties on choosing a law to govern the Arbitration Clause, but have not been mentioned expressly in the contract. In this case at hand it is evident that the Respondents' implied choice of law to govern the Arbitration Clause is not the law of Mediterraneo to which the Claimant had not expressly disputed allowing the Respondent to rely on the assumption of the law governing the Arbitration Clause to be the law of the seat of Arbitration ***[Respondents' Exhibit, R1, Para 1 / Respondents' Exhibit, R2]***.

11. The implied choice on the law to govern the Arbitration Clause could be determined on, **i.** CISG and the law of Mediterraneo would only govern the Sales Contract and not the Arbitration Agreement; **ii.** Respondent has conveyed its intention on the law governing the

arbitration agreement to the Claimant; **iii.** The law of the seat of arbitration would be the implied choice of law.

i. CISG and the law of Mediterraneo would only govern the Sales Contract and not the Arbitration Agreement.

12. "Analysis of the choice of the law governing an international arbitration agreement begins with the separability presumption. As discussed above, an international arbitration agreement is presumptively separable from the underlying contract with which it is associated. As a consequence, it is theoretically possible (and common in practice) for the parties' arbitration agreement to be governed by a different law than the one governing their underlying contract" ***[International Commercial Arbitration (Second Edition), Gary Born, Chapter 4.01, Para 02]***.

13. In light of the present case, the law of Mediterraneo and CISG which governs the contract would not govern the Arbitration Clause due to the simple reason of the Separability Doctrine. The Arbitration clause would be regarded as a separate agreement or contract independent of the main contract. This has been even recognized in Mediterranean Arbitration Law under Article 16 ***[Ans. For NOA, Clause 14]***. Therefore, even if the agreement is governed by the law of Mediterraneo it would be considered as a separate agreement independent of the main contract.

14. Therefore, the law of Mediterraneo and the CISG would only govern the main contract ***[Claimants' Exhibit, C5, Clause 14]*** and would not influence on the Arbitration Clause. The Arbitration Clause would be governed by the implied choice of law of the parties which can be determined by considering the true intentions of the parties.

ii. Respondent has conveyed its intention on the law governing the arbitration agreement to be the law of the seat of arbitration to the Claimant.

15. The Respondent has expressly and impliedly stated at different times its desire not to subject itself to the jurisdiction of Mediterraneo. During the preliminary negotiations itself the Respondent has shown its dislike to subject itself to the jurisdiction of the law of Mediterraneo. "… we consider it not appropriate that your law applies and your courts have jurisdiction" ***[Claimants' Exhibit, C3, Last Para]***.

16. During final negotiations on the seat of arbitration and the law governing the Arbitration Clause, the Respondent has impliedly stated its desire for the Arbitration Clause not to be governed by the law of Mediterraneo. "… first draft for the dispute resolution clause which we would consider appropriate in light of the fact that the Sales Agreement is governed by the law of Mediterraneo" ***[Respondents' Exhibit, R1, 1st Para]***. This shows that the Respondent did not want the Arbitration Clause to be governed by the law of Mediterraneo.

17. "The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana" ***[Respondents' Exhibit, R1, Draft Dispute Resolution Clause]***. This shows that the Respondent impliedly stated the desire for the Arbitration Clause to be governed by the law of the seat of arbitration.

18. The Claimant has not totally disagreed on the Respondents' position on the law governing the Arbitration Clause. The Claimant has requested to subject the Arbitration Clause to the jurisdiction of a neutral country due to the reason that the Claimants' company has an internal policy of not subjecting itself to the jurisdiction of the counterparty of the contract. "… providing for dispute resolution in the country of the counterparty requires special approval…. It would, however, be possible to agree on arbitration in a neutral country" ***[Respondents' Exhibit, R2, 1st Para]***.

19. This has made the Respondent rely on the fact that the Claimant has not totally disagreed on the dispute resolution clause and only has requested for a change of venue to a neutral country, namely Danubia. This has made the Respondent assume that the law governing the Arbitration Clause to be the law of Danubia. Therefore, the Respondent had not objected even though the Claimant had sent a draft without the clause on governing law, since the Respondent had been under the assumption the law of the seat of arbitration would govern the Arbitration Clause ***[Respondents' Exhibit, R2, Draft Dispute Resolution Clause]***.

iii. The law of the seat of arbitration would be the implied choice of law.

20. Since no express choice of law has been provided and agreed by the parties to govern the Arbitration Clause, the Arbitration Clause would be governed by an implied choice of law intended by the parties. The Claimant has not expressly or impliedly made evident of any law to govern the Arbitration Clause. The Respondent has made clear the law governing the Arbitration Clause should be the law of the seat of arbitration ***[Memorandum for Respondent, Above Para 17]***.

21. Many judicial decisions have been given accepting the fact that the law of the seat of arbitration should govern the Arbitration Clause in instances where there is no express choice of law to govern the Arbitration Clause.

22. In the *Final Award in ICC Case No. 6162*, the tribunal applied Swiss law, as the law of the arbitral seat, to the parties' arbitration agreement; in doing so, it refused to apply the substantive law selected by the parties' choice-of-law clause to govern their underlying contract, which would have invalidated the arbitration clause ***[*Final Award in ICC Case No. 6162*, XVII Y.B. Comm. Arb. 153, 160-62 (1992)]***.

23. Particularly in more recent decades, a number of jurisdictions, both common and civil law, have applied the substantive law of the arbitral seat to the validity of international arbitration agreements (again, absent agreement by the parties on the law applicable to the arbitration agreement) ***[International Commercial Arbitration (Second Edition), Gary Born, Chapter 4.04, Page 509]***.

24. "If the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply" ***[Judgment of 30 May 1994, XX Y.B. Comm. Arb. 745, 747 (Tokyo Koto Saibansho) (1995) (emphasis added)]***.

(II) Separability doctrine should be considered in determining the governing law of the Arbitration Agreement.

25. The separability doctrine should be considered in determining the law governing the Arbitration Clause since both the Danubian Arbitration Law and Mediterranean Arbitration Law recognizes the doctrine under Article 16 respectively ***[Ans. To NOA, Clause 14]***.

26. Since the Arbitration Agreement is considered to be an independent agreement from the underlying contract, the express law of the underlying contract cannot be chosen as an implied law to govern the Arbitration Agreement. The express law governing the underlying contract would only govern the contract without the Arbitration Agreement.

27. "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement" ***[Justice Burton, NIOC v Crescent Petroleum]***.

(III) The closest connection relationship principle would not apply to the arbitration agreement.

28. The closest connection principle would not apply to the Arbitration Agreement on the basis that an implied choice of law governing the Arbitration Clause is available. The law of the seat of arbitration is the implied choice of law. Therefore, the law of Danubia would be governing the Arbitration Clause.

29. The closest connection principle would have applied if no express or implied choice of law was available to govern the Arbitration Agreement. Further the use of the principle of closest connection has been much debated about.

30. Despite their adoption in leading jurisdictions, and some arbitral awards, the closest connection/most significant relationship tests for international arbitration agreements have also proven unsatisfying, much like their various predecessors. In practice, courts and tribunals have encountered substantial difficulties determining what connecting factors are decisive in selecting the law governing an arbitration agreement ***[International Commercial Arbitration (Second Edition), Gary Born, Page 521]***.

B. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT IN ACCORDANCE WITH THE LAW OF MEDITERRANEO SINCE IT DOES NOT GOVERN THE ARBITRATION CLAUSE.

31. The law governing the Arbitration Clause would not be the law of Mediterraneo and CISG since it was not expressly or impliedly agreed upon. The mere fact that the underlying contract is governed by the law of Mediterraneo would not result in applying to the Arbitration Clause due to the separability doctrine which accepts the Arbitration Agreement to be a separate and independent agreement from the underlying contract.

32. Without the law of Mediterraneo governing the Arbitration Clause, the Tribunal would not have the power to adapt the contract to accommodate the claim of the Claimant. The claim which is a remuneration above the agreed price would specifically require the Tribunal to adapt the contract to honour the claim. The power of the Tribunal for adaptation of the contract would be determined on, **A.** Law of Danubia would be the law governing the Arbitration Agreement.

(I) Law of Danubia would be the law governing the Arbitration Agreement.

33. As the law of the seat of arbitration would be the choice of law to govern the Arbitration Agreement, the law of Danubia would govern the Arbitration Agreement. This is in light that no express choice of law had been agreed by the parties and the implied choice of law was the law of the seat of arbitration ***[Memorandum for Respondent, Above Para 20]***.

C. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT IN ACCORDANCE WITH LAW OF DANUBIA.

34. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with two relevant exceptions. First, the interpretation rule in Art. 4.3 is replaced for written contracts by the four corners rule. In substance the four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles of International Commercial Contracts. Second, Article 6.2.3 (4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized" ***[Para 45, PO 2, Page 61]***.

35. A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing ***[Article 2.1.17, UNIDROIT Principles]***.

36. Since the four corners rule has replaced the Article 4.3 of UNIDROIT Principles (Relevant Circumstances) all extraneous evidence would be excluded in interpreting the Arbitration Agreement. Therefore, a narrow interpretation would only be allowed in determining the law governing the Arbitration Agreement.

37. If the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium ***[Article 6.2.3 (4) (b), UNIDROT Principles]***. Has been worded differently including the words "if authorized" ***[Para 45, PO2, Page 61]***.

38. Therefore, unless the Tribunal has been granted power expressly under the Arbitration Agreement it would not have the power to adapt the contract. This is due to the reason that the Danubian Contract Law consists of the Four Corner Rule which allows only for a narrow interpretation excluding all extraneous evidence ***[Point 2 of Clause II, PO 1, Page 52]***.

39. Since the words "if authorized" has not been expressly included in the Arbitration Agreement the Arbitral Tribunal would not have the power or jurisdiction to adapt the contract.

D. CONCLUSION.

40. The law governing the Arbitration Agreement would not be the law of Mediterraneo due to the following reasons;

    a. There is no express choice of law agreed on by the parties in the Arbitration Agreement.

b. The implied choice of law would not be the law of Mediterraneo since, firstly the CISG and the law of Mediterraneo would only govern the underlying contract and not the Arbitration Agreement, secondly since the Respondent has clearly stated their intention not be subjected to the law of Mediterraneo and lastly the law of the seat of Arbitration should be the implied choice of law.

41. The separability doctrine should be considered when considering the law governing the Arbitration Clause. Since the doctrine should be applied in the present case, the Arbitration Clause would be considered to be a separate and independent contract of the underlying contract.

42. The closest connection relationship principle would not apply in this case at hand since it would apply only if there is no express or implied choice of law to govern the Arbitration Clause. Since the law of the seat of arbitration is the implied choice in this case the said principle would not apply.

43. Since the law of Mediterraneo would not govern the Arbitration Clause it does not provide the power or jurisdiction to the Tribunal to adapt the contract. If by any chance the Tribunal would have the jurisdiction or power to adapt the Arbitration Clause it would be under the law of Danubia as the law of the seat of Arbitration.

44. The Tribunal would not have power to adapt the contract under the law of Danubia since it only provides for a narrow interpretation of Arbitration Clauses. The law of Danubia requires the Tribunal to be vested with powers expressly to enable it to adapt contracts. Since there is no express wording in the Arbitration Clause empowering them to adapt the contract the Arbitral Tribunal would not have the power nor the jurisdiction to adapt the contract.

ISSUE 02: THE CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

45. CLAIMANT has sought to rely on facts from another arbitration the RESPONDENT is a party to ***[Rec. 50]***. This other arbitration too follows the HKIAC rules ***[PO2 Q39]***. The fact that this information is from another arbitration itself points that it must not be allowed as it could only come to the hands of the CLAIMANT either through a breach of confidentiality **A.** or through an illegal hack of the RESPONDENT's systems **B.** and in any case it is not relevant nor admissible **C.**

A. CLAIMANT CANNOT SUBMIT EVIDENCE SINCE IT WAS DISCOVERED THROUGH A BREACH OF CONFIDENTIALITY.

46. The information from the other arbitration ***[Rec. 50]*** must not be admitted because it would be a breach of confidentiality and will be against the HKIAC Rules **(I)**, it does not fall under any exceptions under which confidentiality obligations could be dispensable **(II)**, non-violation of duties is not an exception to dispense with confidentiality **(III)**.

(I) The information from the other arbitration must not be allowed as per the HKIAC Rules.

47. CLAIMANT cannot submit the evidence as it will go against the confidentiality agreements the RESPONDENT and the other party agreed on. The other arbitration too is being conducted under the HKIAC rules ***[PO2 Q39]***. According to the rules, unless the parties have agreed otherwise, no party may publish, disclose or communicate any information to the arbitration ***[Art. 45.1 HKIAC]***. If CLAIMANT submits such evidence, it would be a breach of confidentiality as per the HKIAC Rules under which the other arbitration too functions. Therefore, CLAIMANT must not be allowed to submit such evidence.

(II) Such evidence must not be allowed as it is introduced on a basis that is outside the scope of exceptions to dispensing with confidentiality.

48. The Tribunal must not admit this evidence as it does not fall under the exceptions laid out by HKIAC Rules to dispense with confidentiality obligations ***[Art. 45.3(a)-(e)]***. This information is not in pursuit of a legal right ***[Art. 45.3(a)]*** or interest since the RESPONDENT is not under a legal obligation to follow a precedent set by the way business is handled by RESPONDENT. The CLAIMANT has no legal obligation to disclose it ***[Art. 45.3(b)]***, therefore CLAIMANT cannot on its own disclose such information and it must not be admitted as it will constitute a breach of confidentiality.

(III) Non-violation of duties is not an exception to dispense with confidentiality obligations.

49. CLAIMANT claims that the submitting of information from the other arbitration, will not violate any contractual or statutory duties by any bound party ***[CL Memo pg 18-20]***. However, the CLAIMANT could only obtain such information in a way that a party would have to breach its confidentiality obligations since the parties have agreed on confidentiality in the other arbitration by agreeing to the use of HKIAC Rules through ***[PO2 Q39]*** which Article 45 provides for such confidentiality obligations ***[Art. 45.3(a)-(e)]***. Therefore, such obligations could only be dispensed with if it is with the scope of the above exceptions. Merely because it does not violate any contractual or statutory duties, a party cannot disregard its confidentiality obligations and make such disclosures. Therefore, the above evidence must not be allowed.

B. CLAIMANT CANNOT SUBMIT SUCH EVIDENCE SINCE IT WAS DISCOVERED THROUGH AN ILLEGAL HACK.

50. The information CLAIMANT seeks to submit ***[Rec. 50]***, must have been through an illegal hack of the RESPODENT's systems. Such evidence must not be admitted since it will open floodgates for unnecessary breaches **(I)** and such information has not been obtained by good faith **(II)**.

(I) Submitting evidence obtained through an illegal hack will open floodgates for unnecessary breaches.

51. CLAIMANT seeks to submit evidence that may have been obtained through an illegal hack of the RESPONDENT's systems ***[Rec. 50]***. Such evidence must not be admitted by the Tribunal because it is an essential feature in arbitration to protect confidentiality and privacy of parties and their dispute ***[Born, pg 29]***. Through actions such as these, it will give way to open floodgates for unnecessary breaches by way of hacking. Consequently, the use of a mechanism such as arbitration would prove to be counter-productive since national courts have stringent regulations on hacking and would not admit such evidence and will prevent such ways of discovery, parties may opt for litigation and move away from arbitration. Therefore, evidence obtained through illegal hacking must not be admitted by the Tribunal.

(II) CLAIMANT has not fulfilled its obligation of acting in good faith.

52. Parties have agreed on the application of CISG to the dispute ***[Clause 14, SA]***. Therefore CLAIMANT understands of its duty to act in good faith ***[Art. 7 CISG]***. Illegally hacking RESPONDET's systems is acting in contravention of good faith and admitting tainted evidence as such would undermine the integrity of international trade and would set a bad precedent. Therefore, such tainted evidence must not be admitted by the Tribunal.

C. CLAIMANT CANNOT SUBMIT SUCH EVIDENCE SINCE IT IS NOT ADMISSIBLE.

53. RESPONDENT's rights will be violated if CLAIMANT is allowed to submit evidence that was either obtained through a breach of confidentiality or an illegal hack. In any case this evidence is not admissible under the agreed HKIAC Rules **(I)** and also because it is not relevant **(II)**.

(I) Evidence sought to be submitted by CLAIMANT is not admissible under HKIAC Rules.

54. CLAIMANT seeks to submit information as evidence which were obtained either through a breach of confidentiality or an illegal hack ***[Rec. 50]***. Such evidence cannot be admitted as it is against the HKIAC Rules on which the other arbitration was based ***[PO2 Q39]***. Unless otherwise agreed by the parties, no party may disclose or communicate any information relating to the arbitration ***[Art. 45.1 HKIAC]***. The ground on which CLAIMANT purports to submit this evidence does not fall under any exceptions ***[Art. 45.3(a)-(e)]*** where confidentiality obligations could be disregarded. Therefore, such evidence cannot be admitted as per the HKIAC Rules.

(II) Evidence purported to be submitted is not relevant.

55. CLAIMANT seeks to equate the current case with the facts of the other arbitration ***[Rec. 50]***. However, in the contract involved in the other arbitration, parties had made a clear agreement on the law applicable to the arbitration agreement ***[PO2 Q39]***. However, in this case the applicable law to the arbitration agreement is being debated. Therefore these two cases cannot be equated to affect adversely the RESPONDET's bearing on the current case by bringing up different stances taken in the different situations by the RESPONDENT. Therefore the Tribunal must use its power ***[Art. 22.2 HKIAC]*** to reject such evidence on ground of irrelevance since RESPONDENT has no legal obligation to stick to a precedent set by itself in the way it handles business in different situations.

ISSUE 03: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE.

56. CLAIMANT seeks for an adaptation of the price under a "hardship" ground under Clause 12 of the contract ***[NoA, para 19]*** or the CISG ***[NoA, para 20]***. However, this is baseless as CLAIMANT is not entitled to such a payment under Clause 12 of the contract **A.** nor under the CISG **B**.

A. CLAIMANT IS NOT ENTITLED TO THE ABOVE PAYMENT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT.

57. CLAIMANT is not entitled to the additional payment under Clause 12 of the contract since the parties agreed to use a narrow hardship clause to regulate risks directly ***[RE R3]*** and this clause does not include the imposition of tariffs ***[Clause 12, SA]***. In any case it is widely held that increased cost alone does not constitute an impracticability of the transaction ***[W.R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983)]***. CLAIMANT assumed these risks when it agreed on the DDP Incoterms ***[Clause 8, SA]*** for which RESPONDENT paid an increased price ***[CE C4]***. Therefore CLAIMANT is not entitled to an adaptation of the price under Clause 12 of the contract since it assumed these risks and in any case the imposition of tariffs do not fall under the agreed "narrow" hardship clause.

B. CLAIMANT IS NOT ENTITLED TO THE ABOVE PAYMENT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG.

58. CLAIMANT is not entitled to a price adaptation under CISG since an "impediment" would come into existence only if such party has not assumed that risk **(I)** and in this case the CLAIMANT has assumed this risk **(II)**.

(I) An "impediment" would come into existence only if such party has not assumed that risk.

59. CLAIMANT seeks for a price adaptation under the CISG ***[NoA, para 20]*** i.e. under Article 79 of the CISG. However, CLAIMANT cannot proceed for an adaptation under the CISG since the "impediment" first needs to be qualified by a party not having assumed that particular risk ***[Transatlantic Financing Corp. v United States, 363 F.2d 312, 315 (D.C. Cir. 1966]***. Therefore, CLAIMANT can seek for such an adaptation only if the party claiming it have not assumed that risk.

(II) CLAIMANT assumed that risk.

60. CLAIMANT can seek an adaptation under the CISG only if the party has not assumed that particular risk which gave rise to the circumstances which require an adaptation ***[Transatlantic Financing Corp. v United States, 363 F.2d 312, 315 (D.C. Cir. 1966]***. In this case, the CLAIMANT has assumed this risk when it agreed on the DDP Incoterms ***[Clause 8, SA]***. Therefore, the "impediment" element does not qualify to be that of a situation which would enable the CLAIMANT to successfully invoke the CISG for an adaptation of the price.

PRAYER FOR RELIEF

For the foregoing arguments, RESPONDENT respectfully submits to the Tribunal, while dismissing all contrary requests and submissions by the CLAIMANT,

TO DECLARE THAT:

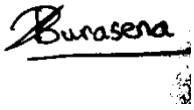
1. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
2. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT.

TO ORDER THE CLAIMANT TO:

1. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

CERTIFICATION

We, hereby certify that this memorandum was prepared by the members of the team, and that no person other than a team member has participated in the writing of this Memorandum.



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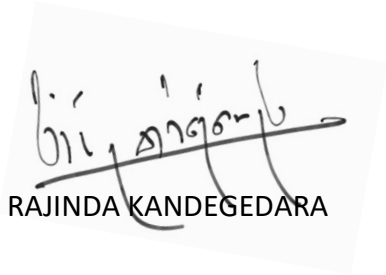

RAJINDA KANDEGEDARA