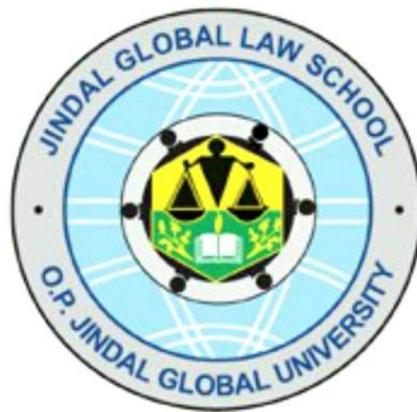


Sixteenth Annual Willem C. Vis East International
Commercial Arbitration Moot

JINDAL GLOBAL LAW SCHOOL



MEMORANDUM FOR RESPONDENT

On behalf of

Black Beauty Equestrian

2 Seabiscuit Drive

Oceanside

Equatoriana

Against

Phar Lap Allevamento

Rue Frankel 1

Capital City

Mediterraneo

PAVAN KALYAN • KARAN HIMATSINGKA • KARAN KUMAR
MADHUR ARORA • SUDARSHAN SRIKANTH • CHINAR GUPTA

SONIPAT • INDIA



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LIST OF ABBREVIATIONS

§/§§	paragraph/paragraphs
%	per cent
ANoA	RESPONDENT's Answer to Notice of Arbitration of 24 August 2018
a contrario	on the contrary
Art./Artt.	Article/Articles
cf.	confer (see)
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	exempli gratia (for example)
ed.	Edition
emph. add.	Emphasis added
Eng	English
et al.	et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
fn.	Footnote
FSSA	Frozen Semen Sales Agreement



i.e.	id est (th`at is)
IBA	International Bar Association
IBA Rules	The International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)
ibid.	ibidem (in the same place)
ICC Rules	Rules of Arbitration of the ICC (2012)
in arguendo	for the sake of argument
in casu	in the case at hand
infra	below
inter alia	among other things
Italian Code	Italian Civil Code (1942)
lex arbitri	law of the seat of arbitration
LP	Limited Partnership
Ltd	Limited company
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
mutatis mutandis	with the necessary changes having been made
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
No.	number/numbers



NoA	CLAIMANT's Notice of Arbitration
p./pp.	page/pages
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
USD	United States Dollars
v.	versus (against)



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STATEMENT OF FACTS

Phar Lap Allevamento (“CLAIMANT”) is a registered company operating Mediterraneo’s oldest and most renowned stud farm covering all areas of equestrian sport. In addition to providing stallions for breeding purposes, CLAIMANT also offers frozen semen of its champion stallions for artificial insemination. **Black Beauty Equestrian (“RESPONDENT”)** is a company located in Equatoriana, renowned for its champion show jumper and dressage horses and also has a nascent racehorse stable.

- 21 March 2017** RESPONDENT expressed its intention to purchase 100 doses of frozen horse semen from CLAIMANT.
- 24 March 2017** CLAIMANT submitted to RESPONDENT the price for each dose of semen (USD 99,500) and communicated certain pertinent conditions.
- 28 March 2017** RESPONDENT insisted on DDP Delivery, and demanded that the courts of Equatoriana have jurisdiction.
- 31 March 2017** CLAIMANT accepted delivery on the basis of a DDP, subject to an increase in the price per dose and the inclusion of a hardship clause. Further, CLAIMANT refused to cede jurisdiction to Courts in Equatoriana and suggested arbitration in Mediterraneo instead.
- 10 April 2017** RESPONDENT submitted a draft dispute resolution clause which provided for the seat of arbitration to be Equatoriana and the law governing the arbitration clause to be the law of Equatoriana.
- 11 April 2017** CLAIMANT retorted with a clause which placed the seat of arbitration in Danubia, subject to the law of Mediterraneo continuing to govern the Sales Agreement. This draft was silent on the law governing the arbitration agreement.
- 12 April 2017** CLAIMANT’s and RESPONDENT’s lead negotiators retired from negotiations due to a tragic car accident.
- 6 May 2017** The parties entered into the Frozen Semen Sales Agreement (‘the **FSSA**’).
- 15 November 2017** Mediterraneo imposed a tariff of 25% on all agricultural products.
- 19 December 2017** Equatoriana announced with a tariff of 30% on all agricultural products with effect from **15 January 2018**.



- 20 January 2018** CLAIMANT informed RESPONDENT of the applicability of the tariffs to frozen horse semen.
- 21 January 2018** RESPONDENT assured CLAIMANT of its willingness to increase the price per dose, *if so required by the contract*.
- 23 January 2018** CLAIMANT delivered the final shipment of 50 doses to RESPONDENT.
- 12 February 2018** Negotiations to adapt the price broke down.
- 29 June 2018** An arbitral tribunal in another proceeding involving RESPONDENT ruled in favour of regarding the adaptability of the contract.
- 31 July 2018** CLAIMANT submitted the Notice of Arbitration (**'NoA'**) to RESPONDENT and appointed **Ms. Wantha Davis** as its arbitrator.
- 24 August 2018** RESPONDENT filed its answer to the NoA (**'ANoA'**) and appointed **Dr. Francesca Dettorie** as its arbitrator.
- 2 October 2018** CLAIMANT requested the Tribunal to admit into evidence a **Partial Interim Award** from the other proceeding RESPONDENT was a part of.
- 3 October 2018** RESPONDENT urged the Tribunal to deem the Partial Interim Award as inadmissible in light of the cardinal principle of confidentiality.

INTRODUCTION

Good people get cheated, just as good horses get ridden. CLAIMANT's scheme to disavow the contract must be forbidden.

Transnational sales are susceptible to tremendous risks that can render the attainment of contractual goals impossible. However, the governing legal regime's parallel evolution abundantly equips involved parties to deal with such perils.

Claimant's attempted invocation of this Tribunal's non-existent jurisdiction to adapt the contract, which in itself is a legally untenable proposition, must be opposed. Claimant's endeavours to present unlawfully acquired evidence which is inherently confidential, and jeopardises the reputation of this Tribunal as well as a third party, must be prevented.

Vis-à-vis procedure, Danubian Law is applicable to the arbitration agreement, rendering the adaptation of the contract beyond this Tribunal's jurisdiction. Even if the Law of Mediterraneo is found to be applicable, the Tribunal remains precluded from adapting the contract (ISSUE 1).



Further, Claimant's efforts to propel the admission of protected information that it acquired illegally must be barred (ISSUE 2). Lastly, Claimant is not entitled to an adaptation to the tune of 1,250,000 USD in lieu of any hardship caused by the tariffs (ISSUE 3).



ARGUMENTS ADVANCED

ISSUE ONE: THE TRIBUNAL IS NOT EMPOWERED TO ADAPT THE CONTRACT.

1. The Tribunal is barred from adapting the contract as the arbitration agreement is governed by Danubian law **(A)**, that mandates an express authorization from the parties to enable the Tribunal to exercise such powers. **(B)** In a scenario where this Tribunal finds Mediterranean Law as the governing law for the arbitration agreement, RESPONDENT avers that the Tribunal still lacks the authority to adapt the contract. **(C)** Further, the Tribunal cannot adapt the contract under the HKIAC Rules. **(D)**

A. Danubian Law Is Applicable to The Arbitration Agreement.

2. In light of Danubia being the seat of arbitration, the Law of Danubia should govern the arbitration agreement. **(1)** Additionally, as per the test provided by *Sulamerica*, the application of Danubian Law to the arbitration agreement is evident. **(2)** Danubian Law is not disqualified as the choice of law in the absence of an express choice of law clause. **(3)**

1) The arbitration agreement should be governed by Danubian Law as Danubia is seat of the arbitration.

3. It is a well-established principle that the law of the seat is applicable to an arbitration agreement in the absence of a choice of law to govern the arbitration agreement [*Born, p. 1530-31; Redfern pp. 172-3; Compagnie Case; Shagang Case*].

4. In the case at hand, the seat is expressly chosen [*FSSA, p. 6, §15*]. The imposition of tariffs led to the CLAIMANT wishing for the contract to be adapted. This is highly unlikely as per the law of Danubia [*PO1, p. 52, II*]. CLAIMANT denies the application of Danubian Law solely because of the aforementioned reason. Stating Danubia as the seat of arbitration but positing the application of a distinct law contravenes internationally accepted practices [*Shagang Case*]. This at least “invites jurisdictional complications and issues” [*ibid.*]. Consequently, it cannot be held as a rational choice.

5. The seat of the arbitration is Danubia, and the one whose laws the CLAIMANT wishes to apply to the agreement is Mediterraneo. This may be theoretically possible, but practically would be quite inconvenient, and does not seem to be an acceptable proposition [*Peruvian Insurance Case*]. In the case at hand, Mediterranean Arbitration Law, which replicates the UNCITRAL Model Law, provides for majority of the Model Law to be inapplicable if the arbitration is not conducted within Mediterranean territory. [*UNCITRAL Article 1.2*]. If most of the country’s law is rendered



inapplicable, it will leave multiple voids. [*C v. D*]. CLAIMANT also recognizes the significance of the seat as it uses the law of Danubia to propose admissibility of evidence [*Cl. Memo, p. 15, §52*].

6. Further, the connection between the law of the arbitration agreement and the seat is also extremely strong, essential and the most convenient choice [*Enercon Case; Peruvian Insurance Case*]. Therefore, the absence of an express choice of law renders the presumption in favour of the law of the seat. CLAIMANT wrongly avers that the absence of an express choice of law clause for the arbitration agreement leads to the assumption that the law of the underlying contract would govern the arbitration agreement [*Cl. Memo, p. 4, §6*]. CLAIMANT neglects the significance of a “neutral” country being chosen as the seat. The seat does not denote just a physical venue [*Bharat Aluminum Case*]. It bears significantly upon either the governing law, or the courts that may exercise jurisdiction [*McDonnell Corp. Case*]. “Neutral” denotes the parties choosing a seat believing that the applicable law would not favour any one party unfairly. Even if it is interpreted to signify that the courts would be neutral, having a law different than the seat as well as the courts would be problematic as it will hamstring the courts by requiring them to interpret the law of a different country. [*Dubai Bank Case*]

7. In light of the above, it is clear that Danubian law applies to the arbitration agreement.

2) Upon application of the Sulamerica test, it is apparent that Danubian law is applicable.

8. The test laid down by Sulamérica lays down a three-step approach to ascertain the law governing arbitration agreements. The first approach looks at the law expressly chosen by the parties, if such is the case. If not available, the implied choice of law is applied to the arbitration agreement. In the absence of both, the law with the closest and realest connection is to be chosen [*Sulamérica Case*]. RESPONDENT shall demonstrate that there exists no express choice of law in the present case (a), the implied choice of law is Danubian law (b), and that Danubian law has the closest and realest connection to the arbitration agreement (c).

a. There exists no express choice of law in the present case.

9. CLAIMANT incorrectly avers the law governing the underlying contract is the “express choice of law” for the arbitration agreement [*Cl. Memo, p. 4, §6*]. A law chosen expressly to govern the underlying contract does not denote an express choice of law for the arbitration agreement [*XL Insurance Case; Lesotho Highlands Case*]. In the case at hand, there exists no express choice of law within the arbitration agreement.

10. Hence, the law of Mediterraneo is not the express choice of law governing the arbitration agreement.



b. Danubian law is the implied choice of law.

11. CLAIMANT posits that Mediterranean law is the implied choice of law [*Cl. Memo, p. 4, §6*]. On the contrary the parties elected to preclude the application Mediterranean law. **(i)** Further, it is apparent that Danubian law is the implied choice of law as Danubia is the seat. **(ii)** Finally, the drafting history of the arbitration agreement unquestionably clarifies that Danubian law is the implied choice of law. **(iii)**

i. The parties elected to preclude the application of Mediterranean law.

12. Though not relied on by this CLAIMANT, another might argue that the parties have intended to submit the entire agreement to the law of Mediterraneo by including a choice of law in Clause 14.

13. The use of the term “Sales Agreement” in Clause 14, and only “Agreement” in the other parts of the contract shows that parties intended for them to have different meanings [*FSSA, p.14*]. RESPONDENT in its email suggested that the law governing the Sales Agreement and arbitration agreement be different [*Exh. R1, p.32*]. The use of “Sales Agreement” excluded the arbitration clause and included only the first fourteen clauses (sales part of the contract) as the arbitration clause was to have a different law applicable to it.

14. CLAIMANT responded with a proposal to change parts of the arbitration clause but on the condition that the law applicable to the Sales Agreement “*remains the law of Mediterraneo*” [*Exh. R2, p.33*] signifying its assent to RESPONDENT’s proposal without any changes. The same term was included in Clause 14 of the FSSA indicating that the law of Mediterraneo was intended and agreed upon by the parties to only govern the first fourteen clauses.

15. Realizing this, CLAIMANT is now attempting to go back on its word by alleging that the term Sales Agreement was a reference to the Frozen Semen Sales Agreement [*PO2, p. 62, §50(c)*]. While interpreting statements made by a party, regard has to be had to the statements impact at the time when it was made and not to the meaning a party attaches to it after the dispute arises [*Farnsworth in Bianca/ Bonell, p. 98, §2.2*]. The Tribunal should bar CLAIMANT from doing so because CLAIMANT could not have been unaware that it led RESPONDENT to believe that Mediterranean law would only apply to the substantive contract.

16. CLAIMANT wished to have the law of Mediterraneo govern the entire contract and give its court’s jurisdiction over the matter [*Exh. C2, p.10*]. In the interest of a long-term relationship, RESPONDENT did not want the contract to unduly favor CLAIMANT. In furtherance of this, RESPONDENT sent a counter proposal granting jurisdiction to the courts in Equatoriana with the substantive law of the agreement remaining Mediterranean law [*Exh. C3, p.11*]. CLAIMANT could



not accept courts of Equatoria having jurisdiction and proposed to have arbitration in Mediterraneo [*Exh. C4, p.12*]. This would not balance the power in the contract as the dispute resolution mechanism would still be tilted in CLAIMANT's favor. RESPONDENT instead proposed to have the seat of the arbitration agreement in Equatoria and submit the arbitration agreement to the law of Equatoria while the law of Mediterraneo govern the Sales Agreement [*Exh. R1, p.33*]. CLAIMANT instead proposed the seat of arbitration agreement to be in Danubia [*Exh. R2, p.34*].

17. This counter proposal could only achieve RESPONDENT's explicit desire to have a power balance if the entire dispute resolution mechanism remained in a neutral country. Applying the law of Mediterraneo to the arbitration agreement would unduly favor CLAIMANT which was not acceptable to RESPONDENT and known by CLAIMANT.

18. Upon giving effect to this intention, it is clear that the law of Mediterraneo was excluded as the choice of law for the arbitration agreement.

ii. Danubian law is the implicit choice of law by virtue of Danubia being the seat.

19. General practice prescribes the seat of arbitration and the law applicable to the substantive contract to be specified, but not the law applicable to the arbitration agreement as there is a presumption in favour of the law of the seat to be the law of the arbitration agreement [*Redfern p. 161; Shagang Case*]. Danubia being appointed as the seat of the arbitration bears significance while ascertaining the law governing the arbitration agreement [*Supra §3*]. It is an accepted norm that in the absence of an express choice of law for the arbitration agreement, the law of the seat is a strong indicator to identify the law that the parties intended to govern the arbitration [*Enervon Case*]. Hence, appointing the seat of the arbitration practically denotes the same as choosing the law governing the arbitration agreement [*Shashoua Case*]. Further, the statement of Mr. Julian Krone [*Exh. R3, p.35*] makes it abundantly clear that RESPONDENT had always intended Danubian law to govern the arbitration agreement.

iii. The drafting history of the arbitration agreement points to Danubian law as the law governing the arbitration agreement.

20. RESPONDENT's initial draft had clauses which specified the seat and the law governing the arbitration agreement to be the same [*Exh. R1, p.32*]. It also stated that law governing the "Sales Agreement" is of Mediterraneo [*Exh. R1, p.32*]. CLAIMANT responded with its own amended draft which only had a clause specifying the seat and not the law governing the arbitration agreement. It also wished for the "Sales Agreement" to be governed by the law of Mediterraneo [*Exh. R2, p.34*]. CLAIMANT stated that this draft would "*read in its relevant part*" thus conveying the fact that



the second draft amends the first draft in respective positions but borrows from it the parts which have not been amended [*ibid.*]. An important aspect of the first draft suggested by RESPONDENT was that the seat and law governing the arbitration agreement were one and the same. Thus, the parties intended for the seat and the arbitration agreement to be the same as the first draft gave effect to this and the second draft did not refute this.

21. Accordingly, the Tribunal should find that the law of Danubia was the implied choice of law for the arbitration agreement.

c. Danubian Law possesses the closest and realst connection to the arbitration agreement

22. Here, an implied choice of proper law in favour of Danubia exists. This satisfies the second step of the test which disallows the application of the third step. Hence, the third step is inapplicable in this case [*Sulamerica Case*].

23. In the unlikely scenario, where this Tribunal wishes to apply the third test, the outcome would clearly signify that Danubian law has the realst and closest connection to the arbitration agreement. As per RESPONDENT, Danubia being chosen as the seat implies that the parties had intended to use the law of Danubia to govern the arbitration agreement as demonstrated by Mr. Julian Krone's statement [*Exh. R3, p.35*].

24. The closest connection is denoted by CLAIMANT's usage of the term "Neutral Venue" [*Exh. R2, p.34*]. CLAIMANT proposed Danubia considering it to be a "neutral venue". Hence, the application of Danubian Law to the arbitration agreement would not confer any biases as neither of them belong to Danubia.

25. If the term was to be interpreted to mean that the courts of Danubia have jurisdiction over the agreement, it would sufficiently establish a close relationship with Danubian Law. There was an agreement signifying RESPONDENT not to being subject to the courts of Mediterraneo, rendering Danubian courts as the only other possible alternative. Merely claiming Danubia to be a venue does not justify CLAIMANT's rationale behind choosing a "neutral" seat. The parties' decision to appoint a seat for the arbitration also generally implies that the courts of the same country also have exercise jurisdiction over the proceedings [*Shagang Case*]. In a scenario where such need arises, Danubian courts may interpret the arbitration agreement, powers of the tribunal and other relevant issues in accordance with Danubian standards. In the face of a challenge, merits may also be evaluated in accordance with Danubian standards and jurisprudential practices. This sufficiently establishes the requisite close connection between Danubian law and the agreement. Such a connection is absent between the agreement and the law of Mediterraneo.

26. Hence, in light of the above, Danubian Law possesses the realst and closest connection to the arbitration agreement.



3) Danubian Law is not disqualified in lieu of an express choice of law clause being absent.

27. CLAIMANT avers that the absence of an express choice of law clause signifies that the parties wished that the contract be governed by the law governing the FSSA [*Cl. Memo, p. 4, §6*]. Though not argued by this CLAIMANT, another might base this proposition upon the parties not submitting to the model clause suggested by HKIAC Rules [*HKLAC Rules, Suggested Clauses, pp. 2-3*]. The HKIAC Rules recommend having an express choice of law clause for the arbitration agreement if the parties do not wish the arbitration agreement to be governed by the law of the underlying contract. However, this is insufficient to preclude the application of Danubian law.

28. The burden is not to prove the application of Danubian law in the absence of an express choice of law clause. Conversely, the burden is to demonstrate the existence of “significant contrary indicia”. This would mean that parties must highlight clear indications that the law of the seat is disqualified from applying to the arbitration agreement. [*Shashoua Case*]. As is apparent, such clauses are optional [*HKLAC Rules, Suggested Clauses, pp. 2-3*]. The absence of the said clause was an oversight consequential to the tragic car accident which involved the original negotiators. RESPONDENT’s understanding during negotiations to have Danubia as the applicable law was clearly demonstrated in Mr. Krone’s statement [*Exh. R3, p.35*]. The clarifies why RESPONDENT did not include a separate choice of law clause, as Mr. Antley did in the initial draft [*Exh. R1, p.33*]. The presumption that the failure of the parties to include such provision demonstrates that they never did intend a separate law to govern the contract and the arbitration agreement, does not flow from the mere absence. Therefore, the absence of such a clause, is insufficient to serve as a “significant contrary indicia”.

29. Hence, the application of the law of Danubia is not *prima facie* precluded merely due to an explicit agreement on the law applicable to the arbitration agreement being absent.

B. The Tribunal Lacks Jurisdiction To Adapt The Contract Under Danubian Law.

30. The contract’s adaptation would violate the parol evidence rule, precluding the Tribunal from adaptation. (1) There is no express authorization for the Tribunal to act as *amiable compositeur*. (2) Additionally, adaptation is beyond the scope of the arbitration agreement. (3) Further, the CISG does not apply to the arbitration agreement (4)

1) Adaptation would violate the parol evidence rule, precluding the Tribunal from adaptation.

31. Danubian contract law replicates the UNDRONT Principles, barring a few notable exceptions [*PO2, p. 61, §45*]. Article 6.2.3(4)(b) of the Danubian Contract Law empowers the Tribunal with the power “to adapt the contract” only “if authorized” [*ibid.*]. This upholds the parol evidence as



per which the interpretation of the agreement is restricted to the “four corners” of the contract prohibiting any external evidence [*Article 2.1.17, UNIDROIT Principles*].

32. The replacement of Article 4.3 of the UNIDROIT Principles with the parol evidence rule in the Danubian law, replicates the effect of a Merger Clause under Article 2.1.17. The complete and final agreement of the parties is held in the words of the contract [*ibid.*]. Therefore, the Tribunal is barred from relying upon any prior communication or agreement between the parties to the contract [*Article 2.1.17, Comments*]. The FSSA does not mention adaptation. Consequently, both the parties agree to the unlikelihood of arbitration agreement being interpreted as authorizing the Tribunal to adapt the contract [*PO1, p. 52, II*].

33. Therefore, the Tribunal is barred from adapting the contract as per the law of Danubia.

2) The Tribunal cannot adapt the contract as an *amiable compositeur* without express conferral of powers.

34. Equity clauses under Danubian arbitration law give the tribunal the power to resolve a dispute upon the basis of what is fair and reasonable rather than on the basis of law, that is, they may allow arbitrators to ‘decide according to an equitable rather than a strictly legal interpretation’, or, more simply, that they shall decide as *amiable compositeurs* [*Redfern, p. 217*]. One of the two requisites for such an equity clause to take effect is the parties expressly agreeing to it. Article 35(2) of the DAL, states: “*The arbitration tribunal shall decide as amiable compositeur or ex aequo et bono only if expressly authorised ...*” [*Art. 35(2), UNCITRAL; Redfern, p. 218*].

35. The FSSA lacks such an express conferral of powers upon this Tribunal. While this CLAIMANT does not argue for the Tribunal to adapt the contract as an *amiable compositeur*, regardless, this Tribunal cannot exercise such powers.

3) Adaptation of the contract is beyond the scope of the arbitration agreement.

36. International arbitration agreements are to be construed in a conservative fashion [*ICC Case No. 7920; Shuffman case; Flood case*]. In case an award deals with an issue not talked about in the arbitration agreement, it may be set aside by a competent court [*Article 34(2)(iii), UNCITRAL*]. For a dispute to meet the test of arbitrability, parties must make claims by relying upon the existence of contractual obligations [*Kaverit Steel case*]. In this case, CLAIMANT is asking for additional remuneration and such a demand does not arise out of any contractual obligation as it is over and above the decided price under Clause 6 of the FSSA [*Cl. Memo, p. 26, §96*].

37. Therefore, it is evident that adaptation of the contract is beyond the mandate of this Tribunal.

4) The CISG does not apply to the arbitration agreement.



38. CLAIMANT incorrectly relies on CISG to interpret the arbitration agreement [*Cl. Memo*, p.5, §10]. RESPONDENT contends that the CISG does not apply to the arbitration agreement.

39. The scope of application of the CISG as per Articles 1-3 is restricted only to sales contracts and does not regulate procedural matters [*Kroll II*, p.45; *Cookie tins case*; *Building materials case*]. As arbitration agreements are separate agreements and are procedural in nature, the CISG cannot apply to them even if they are contained in the same contract [*Kroll II*; *Petit*]. Further, the arbitration agreement is governed by the law of Danubia [*Supra* §3] and there is consistent jurisprudence in Danubia that the CISG does not apply to arbitration agreements [*PO2*, p.60, §36].

40. As a result, CLAIMANT cannot rely on the CISG to interpret the arbitration agreement.

C. The Tribunal Is Precluded From Adapting The Contract Even If Mediterranean Law Governs The Arbitration Agreement.

41. If the Tribunal holds that the The United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to the Arbitration Agreement. However, it does not provide adaptation as a remedy for hardship under Clause 12 of the FSSA. Unqualified and unimpeachable intention by the parties is required to establish the acceptance to be bound by particular contractual terms [Butler/Mueller, p. 301]. During negotiations, Respondent stated that “it was probably the task of the arbitrator to adapt the contract” [Exh. C8, p. 17] which cannot be understood as unqualified acceptance as it avails Respondent the opportunity to later change his position. Additionally, Respondent had said it would get back with a proposal in this regard and listed it in its note under “issues for further negotiations” [Exh. R3, p.35].

42. The parties did not reach any final consensus. This clearly shows that Respondent never fully agreed to the Tribunal being allowed to adapt the contract. Hence, the statements of Respondent pertaining the issue of adaptation are inconsequential for the Tribunal. Hence, Claimant’s averment for adapting the contract in lieu of the intention of the parties is incorrect [*Cl. Memo*, p. 12, § 48].

D. The Tribunal can act as *amiable compositeur* only if the contract expressly empowers the Tribunal under the HKIAC Rules.

43. The Tribunal may act in the interest of justice without being restricted to any particular national law, or, as *amiable compositeur* if the parties expressly authorized the Tribunal to do so. [*HKIAC Commentary*, p. 261].

44. As stated in the preceding sections, the absence of the requisite express authorization bars the Tribunal from deciding the issue on the principle of fairness and binds it to the law. Hence, adaptation of the contract is beyond the scope of this Tribunal’s jurisdiction.



CONCLUSION ON ISSUE ONE

45. The law of Danubia governs the arbitration agreement. Consequently, the Tribunal lacks the power to adapt. In the event this Tribunal finds that the law of Mediterraneo applies, the Tribunal is still devoid of powers to adapt the contract.

ISSUE TWO : CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM A SEPARATE ARBITRATION PROCEEDING INVOLVING RESPONDENT DUE TO ITS INADMISSIBILITY.

46. The parties consented to conduct the arbitration as per the HKIAC Administered Arbitration Rules, and under the ambit of the Hong Kong International Arbitration Centre (HKIAC) [*FSSA*, p.14, §15]. CLAIMANT stated its intent of relying upon a Partial Interim Award rendered in a separate arbitration involving RESPONDENT. This arbitration too was conducted as per the HKIAC Rules. CLAIMANT seeks to admit impugned evidence to further its claim for price adaptation [*Langweiler's E-Mail*, p. 50]. RESPONDENT avers that CLAIMANT is not entitled to submit impugned evidence. The confidential nature of the Partial Interim Award renders it inadmissible under the HKIAC Rules (A) as well as the *lex arbitri* (B).

A. THE PARTIAL INTERIM AWARD IS INADMISSIBLE UNDER THE HKIAC RULES.

47. The Partial Interim Award rendered in the other arbitration proceedings, is inadmissible due to the statutorily codified duty of confidentiality within the HKIAC Rules (1), and the illegal manner of acquisition of impugned evidence (2). Impugned evidence lacks the requisite relevance and materiality. (3)

1) Impugned evidence is inadmissible due to the statutorily codified duty of confidentiality.

48. A key facet of international commercial arbitration is confidentiality. Hong Kong is among the few jurisdictions where the statute expressly codifies the duty of confidentiality. [*Moser*, p. 281].

49. The agreement to arbitrate as per the HKIAC Rules binds both parties by the express duty of confidentiality codified by Art. 45 [*Moser*, p. 282]. Publication, disclosure, or communication of any information that is related either to arbitration proceedings or arbitration awards, including but not limited to the existence of the arbitration proceedings, correspondence, written statements, evidence, awards, and orders is barred. Art. 45 further envisages the application of Art. 45 to the arbitration tribunals administered as per the Rules [*ibid.*].

50. Art. 45 enables the publication of awards in a redacted form, subject to the consent of the involved parties. The award shall not be published if any party objects to such publication [*Moser*,



p. 284]. The consent requisite as per the HKIAC Rules for waiver of confidentiality vis-à-vis the impugned Partial Interim Award is absent.

51. In addition to RESPONDENT, admission of the Partial Interim Award prejudices the interests of the other party involved in the other arbitration. Further, it will result in vilification of the integrity of this Tribunal, in addition to that of the Tribunal that rendered the impugned Partial Interim Award. This assertion is bolstered by the *Libananco case*, where the need to exclude all confidential and privileged communication was recognized. It was held that “*if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result*” [*Libananco Holdings case*].

52. CLAIMANT's propositions to overrule the statutorily codified confidentiality are erroneous. It mischaracterized the provisions of Art. 45(3)(i) [*Cl. Memo, p. 11, §35*]. On a textual interpretation of the provisions of Art. 45(3)(i), they can reasonably be inferred as being solely applicable to the parties to an arbitration proceeding, and not any other third party. Further, CLAIMANT mischaracterizes the authority, *Emmott v. Michael Wilson & Partners Ltd*, it cites in furtherance of such argument. In *Emmott*, the parties to both suits in question were the same. This is fundamentally distinct from the case at hand, as the arbitration where the impugned Partial Interim Award was rendered only involved RESPONDENT as a party and not the present CLAIMANT. Further, cited authority pertains to a case where an implied duty of confidentiality was contended, as opposed to a statutorily codified duty in the case at hand. Moreover, *Emmott* also necessitated either express, or implied consent for disclosure. This is absent in the dispute at hand. It also states that Courts do not have a general discretion to lift the obligation of confidentiality, which CLAIMANT neglected. [*Emmott, §107*].

53. CLAIMANT's averments with respect to the prevalent Principles of Transparency overriding the duty of confidentiality also hold no stead [*Cl. Memo, p.12, §39*]. The UNCITRAL Rules on Transparency relied upon by CLAIMANT [*Cl. Memo, p. 12, §41; Langweiler's E-Mail, p.50*] are inapplicable to the case at hand. The Transparency Rules are applicable only to investor-State arbitration with the consent of both parties and are expressly inapplicable to commercial arbitration [*UNCITRAL Transparency Rules FAQs*].

54. Therefore, in light of the aforementioned submissions, the duty of confidentiality bars CLAIMANT from admitting impugned evidence.

2) The illegal manner of acquisition renders impugned evidence inadmissible.

55. International tribunals must have a high threshold for sensitivity towards the unlawful procurement of evidence, no matter how conclusive such evidence may prove to be [*Reisman/Freedman, p. 738*]. Even though fairness factoring in the pursuit of truth signifies that



evidence will rarely be restrained, concerns pertaining to efficiency suggest the imposition of reasonable limits [*Waincymer*, p. 744].

56. The above stated leads to the invocation of the ‘fruit of the poisonous tree’ doctrine, which renders information acquired through illegal sources inadmissible by association [*Boykin/Havalic*, p. 35; *Reisman/Freedman*, p. 747; *Nardone v. US*]. If a Party fails to act in adherence to the good faith principle while procuring evidence, such evidence should be barred from admission.

57. Moreover, evidence acquired from unreliable sources may lack veracity, which may result in a shadow being cast over the Tribunal’s findings.

58. RESPONDENT submits that the impugned evidence is inadmissible due to the illegal manner in which it was acquired by CLAIMANT. The impugned evidence could have only been acquired either via a hack of RESPONDENT’s computer system, or a disclosure by former employees of RESPONDENT [*Fastrack’s E-Mail*, p.51]. Both these means are patently illegal in nature.

59. The verdict in the *Methanex* case substantiates this assertion. In this case, the Tribunal held the admission of unlawfully obtained evidence as wrongful [*Methanex case*]. Additionally, admission of unlawfully obtained evidence was also held to be an affront to basic principles of justice and fairness. The Tribunal further held that the parties owed each other and the Tribunal a general duty to conduct themselves in good faith, as well as respect the equality of arms between each other, the principles of equal treatment and procedural fairness imposed by the UNCITRAL Rules.

60. Moreover, *Methanex* demonstrates inadmissibility of the impugned evidence. The aforementioned, and CLAIMANT’s admission to acquiring the Partial Interim Award illegally [*Cl. Memo*, p. 17, §60], render impugned evidence inadmissible. This is due to the application of the principle of fruit of the poisonous tree. The Tribunal operating upon the assumption of impugned evidence being acquired illegally, further supports this assertion [*PO2*, p. 53, §III(1)(b)].

3) Impugned Evidence Lacks The Requisite Relevancy and Materiality

61. Art. 22 of the HKIAC Rules provide a framework for handling evidentiary issues. [*HKIAC Commentary*, p.190]. It enables the Tribunal to ascertain what evidence may or may not be produced in the proceedings, as well as admit or exclude any documents, exhibits or other evidence. [*HKIAC Commentary*, p.192]. If this Tribunal seeks to disregard the aforementioned objections and exercise its discretion as enabled by Art. 22.3 of the HKIAC Rules, RESPONDENT submits that the impugned evidence lacks the requisite relevancy (a) and materiality (b).

a. Impugned evidence is not relevant to the current arbitration proceedings

62. ‘Relevance’ as under Art. 22.3 denotes the usefulness of impugned evidence in order to establish the truth of a party’s factual allegations, upon which it bases its legal conclusions. [*Hilmar*



Raeschke-Kessler]. In the present scenario, CLAIMANT does not seek to establish any facts based on the Partial Interim Award which legally pertain to the dispute at hand.

63. The difference in factual circumstances between the other arbitration and the proceedings at hand fail to warrant the position as averred by CLAIMANT [*Cl. Memo, p. 15, §53*]. The other arbitration agreement includes an ICC Hardship Clause 2003, a choice of law clause in favour of Mediterranean law, as well as the Model HKIAC-Arbitration Clause with all additions. [*PO 2, p. 60, §39*]. As alleged by CLAIMANT, RESPONDENT had argued in the other arbitration for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles), refusing delivery of the mare. In the FSSA which is the inception of the dispute at hand, there exists no ICC Hardship Clause. Additionally, its choice of law clause favours Mediterranean law to govern the substantive agreement. It also maintains its silence on the choice of law governing the arbitration agreement. Further, CLAIMANT by its own admission, does not possess a copy of the award it seeks to present before the Tribunal [*PO2, pp. 60-61, §41*]. This signifies it is merely operating upon hearsay.

64. In light of the above, the Tribunal should find the CLAIMANT precluded from admitting the impugned evidence due to its lack of relevance.

b. Impugned evidence is not material to the current arbitration proceedings

65. ‘Materiality’ entails that the Tribunal must deem a document as a necessary element to facilitate complete consideration of the truth behind a factual allegation. [*Hilmar Raeschke-Kessler*]. As stated in the preceding section, the current dispute and the other arbitration arose from distinct factual scenarios. RESPONDENT was within its legal rights when it adopted its position vis-à-vis hardship and choice of law in the other dispute. Further, proposals pertaining to the consistency of arbitration awards are contentious in themselves, in light of the absence of a binding doctrine of precedent in arbitration. [*Waincymer, p. 203*].

66. Therefore, in lieu of the aforementioned, the Tribunal should bar the admission of the impugned evidence owing to it lacking the relevant materiality.

67. *In arguendo*, if this Tribunal wishes to go beyond the prescriptions of the HKIAC Rules and seek guidance from the IBA Rules on the making of evidence in international commercial arbitration, CLAIMANT shall still be barred from the admission of impugned evidence. First, it is submitted that IBA Rules are inapplicable, as they were not explicitly agreed upon by the parties [*IBA commentary, preamble 3*]. Further, The IBA Rules also embody the aforementioned principles of relevancy and materiality, which the impugned evidence fails to adhere to.



B. THE PARTIAL INTERIM AWARD IS INADMISSIBLE AS PER THE LEX ARBITRI.

68. CLAIMANT has made assertions in issue 1 which are incongruent with issue 2. For issue 1, CLAIMANT avers the law of Mediterraneo as the governing law, [*Cl. Memo, p.4, §5*], whereas in issue 2, it repeatedly refers to the law of Danubia to further multiple assertions [*Cl. Memo, pp.13-14, §§ 43-47; Cl. Memo, p.15, §§ 52-55*]. Considering this is an oversight on behalf of the CLAIMANT, it is submitted *in arguendo*, that even under Danubian Law, impugned evidence is inadmissible.

69. Danubian Law, which replicates Arbitration Rules of the United Nations Commission on International Trade Law, bestow upon the Tribunal broad powers pertaining to disclosure with respect to evidentiary concerns. Art. 19(2) empowers the Tribunal to “determine the admissibility, relevance, materiality, and weight of the evidence offered”.

70. As provided above, the impugned evidence fails to fulfil the requisite criteria of relevance and materiality, hence rendering it inadmissible.

71. Further, CLAIMANT mischaracterizes RESPONDENT's objection to the admissibility of the illegally obtained evidence in lieu of the four corners rule [*Cl. Memo, p.17, §§ 61-63*] This rule solely purports to disallow evidence pertaining to the interpretation of a contract, and not evidence in general [*Supra §31*]. Additionally, as the CISG does not apply to procedural matters, it cannot be employed as a backdoor to admit the illegal evidence [*Supra 39*].

72. Admissibility of illegal evidence has been dealt with in various cases before [*Methanex case, Libanancon case*]. The tests that have emerged to assess whether illegally obtained evidence should be admitted or not posits two questions to the Tribunal. First, Whether the evidence is obtained illegally by a party who seeks to benefit from it and second, whether admitting such evidence, result in miscarriage of justice [*Blair & Gojkovic, p. 25; Boyken and Havalic*].

73. The Partial Interim Award that the CLAIMANT seeks to introduce into evidence has been obtained through either a breach of confidentiality agreement or a hack of the RESPONDENT's computer system. While the CLAIMANT did not actively engage in the procurement of the evidence, but an agreement to obtain it through a payment of 1000 USD, reflects their bad faith. [*PO2, pp. 60-61, §41*] This would also be prejudicial towards the RESPONDENT and the other party in the other dispute. Moreover, it would negatively affect the repute and sanctity of the Tribunal and may encourage parties to obtain evidence through illegal means.

74. Therefore, the Tribunal should not admit the evidence obtained in breach of law.

CONCLUSION ON ISSUE TWO



75. By virtue of both parties consenting to conduct the arbitration as per the HKIAC Rules, impugned evidence is barred from admission. Even in a scenario wherein this Tribunal wishes to go beyond the ambit of the HKIAC Rules to ascertain the Partial Interim Award's admissibility, it is still barred from doing so as it fails to fulfil the requisites for the same.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT OF 1,250,000 USD THROUGH ADAPTATION OF THE CONTRACT

76. CLAIMANT states that it is entitled to an additional payment due to the hardship created by the tariffs [*Cl. Memo, p.19, §66*]. RESPONDENT will show that Clause 12 of the FSSA does not warrant an additional payment to CLAIMANT. **(A)** Further, the claim for increased payment is not maintainable under the CISG. **(B)**

A. Clause 12 of the FSSA does not warrant an additional payment to CLAIMANT.

77. CLAIMANT states that it is entitled to an additional payment of the stated amount under Clause 12 of the FSSA. However, the tariffs do not fall within Clause 12 **(1)**. The Parties intended for CLAIMANT to bear the risk of the tariffs **(2)**. In any case, contractual adaptation is not a remedy under Clause 12 of the FSSA **(3)**.

1) The tariffs do not fall within the ambit of Clause 12.

78. RESPONDENT contends that the tariffs do not constitute hardship **(a)**, they were not comparable **(b)** and they were foreseeable by a reasonable person in CLAIMANT's position **(c)**.

a. Tariffs do not constitute hardship.

79. The present tariffs are not "comparable" to health and safety requirements, as a narrow hardship clause was finally included. This limited the range of events covered. Instead of adopting CLAIMANT's initial suggestion of covering all custom regulations and import restrictions, the Clause only covers health and safety requirements and comparable events. Choosing health and safety requirements over custom regulations and import restrictions, shows an intent to restrict the range of State interventions, which when covered are strictly comparable to the former. Tariffs are solely comparable with health and safety requirements by virtue of being state interventions.

b. Tariffs are not comparable to the intended degree of hardship

80. CLAIMANT in the initial stages of negotiations expressed its desire to not be liable for health and safety requirements which increase cost of performance by 40%, consequently destroying the basis of the deal [*Exh. C4, p.12*]. This created an impression that CLAIMANT would be willing to bear increased costs if the commercial basis of the deal sustained and did not stand as destroyed [*ibid.*]. CLAIMANT wrongly avers that the present tariffs constitute hardship and rendering the



contract's performance so onerous to an extent that its commercial basis gets destroyed [*Cl. Memo, p.19, §69*]. CLAIMANT incorrectly relies solely upon the transactional value of the third shipment while calculating the hardship caused to it [*Cl. Memo, p.22, §80*]. While assessing the degree of hardship caused to a party, the entire contract is to be looked at, and not each of its instalments [*Florida Power and Light case; Brunner II, p.462; NoA, p.7, §18*]. In the present contract, CLAIMANT would have made a profit of 500,000 USD. The present tariff increases the costs by 1,500,000 USD, resulting in a total loss of 1,000,000 USD (1,500,000 - 500,000). This is merely 10% of the contract's entire value of 10,000,000 USD. This causes CLAIMANT a hardship of merely 10% of the transaction's entire value, and not 25% as alleged [*NoA, p.7, §18*]. A hardship of 10% fails to meet the threshold of 40% intended by the parties, as well as the generally accepted thresholds under hardship. [*Brunner I; Schwenger, p.717*] Further, in absolute value, CLAIMANT's present loss of USD 1,000,000 is less than the loss of USD 3,200,000 it incurred in 2014 and was used as the reason to include a hardship clause. [*PO2, p.58, §21*]

81. While all circumstances need to be examined to calculate the degree of hardship [*Brunner II, p.440*], undue advantage must not be given to any party by virtue of them lacking resources [*Brunner II, p.437*]. CLAIMANT cannot demand an added degree of hardship on the basis of their poor financial health [*Cl. Memo, p.22, §80*]. The deterioration of a party's financial situation, in principle, is that party's own predicament. Such party cannot shift the risk upon another party [*Roth, in Münchener Kommentar*]. Further, CLAIMANT's assertion that its dressage unit will have to be sold in order to extend their credit line, cannot be considered while assessing hardship. This is because their business must be viewed as a whole [*Brunner II, p. 438; PO2, p.59, §29*]. In any case, the continuance of their business is not at risk as only a part of it might have to be sold to endure the 10% loss caused by this transaction.

c. The Tariffs were foreseeable as per any reasonable person in CLAIMANT's position

82. Contrary to CLAIMANT's contention [*Cl. Memo, p. 20, §73*], an event is not unforeseeable merely by virtue of it being a State intervention [*Ramberg/Herre, p. 571; Semi-Automatic weapons case; Steet case*].

83. Although not argued by this CLAIMANT, another might argue that the tariffs levied by the Government of Equatoriana were unforeseeable as Equatoriana is a member state of the WTO and a supporter of the free trade system. However, in the past, Equatoriana has responded with retaliatory measures, hence setting a reliable precedent [*Exh. C6, p. 15*]. In the present scenario, it is highly unlikely that WTO's Reconciliatory Mechanism would have been employed, as the



President of Mediterraneo cited ‘national security’ as one of the main reasons for imposing such tariffs [*ibid*]. This results in the retaliatory measures being extremely ineffective and implausible.

84. In light of the above, trade frictions between Mediterraneo and Equatoriana were inevitable. Consequentially, the tariffs imposed by Government of Equatoriana were foreseeable by a reasonable person and they do not fall within the ambit of Clause 12 of the FSSA.

2) Parties intended for CLAIMANT to bear the risk of the tariffs.

85. If a party does not include a clause to protect itself from a foreseeable risk then it is said to have assumed that risk [*Tallon, p.580*]. Thus, by not adding a clause which protected claimant from the risk of tariffs, it is said to have assumed the risks of such tariffs. Irrespective of this, RESPONDENT will show that both parties mutually intended for the CLAIMANT to bear the risk of the tariffs. **(a)** In any case, a reasonable person would conclude that claimant assumed the risks of the tariffs. **(b)**

a. CLAIMANT could not have been unaware that it had to bear the risks of the tariffs

86. Article 8 of the CISG provides the method for interpreting the statement and conduct of parties to the contract [*AC-OP No. 13; Farnsworth, p. 94; Eörsi*]. Further, Art.8 has been deemed applicable in interpreting the contract itself [*Yarn case; Roofing material case; Computer hardware devices case; Crudex v. Landmark; Roland Schmidt v. Textil-Werke*]. Art. 8(1) serves as a tool to examine the ‘subjective’ intent of the parties which the other party “could not have been unaware of” [*Huber/Mills, p. 235; Fruit and vegetables case*].

87. The INCOTERMS 2010 are commercial terms which allocate risks and costs between parties [*Ramberg, p.65*]. RESPONDENT stated that it would prefer a delivery based on DDP according to the INCOTERMS 2010, given the “urgency of delivery and your much greater experience in the shipment” [*Exh. C3, p.11*]. This in no way meant that CLAIMANT would no longer have to bear the risks under a DDP delivery. RESPONDENT’s statement here does not amount to a derogation from the commercial definition of a DDP as they do not alter the existing distribution of obligations within the DDP framework but merely state the reason why they require a DDP to begin with.

88. CLAIMANT subsequently accepted this proposal and made it clear that it was “not willing to take any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulations”. It is important to note here that “further risks” indicates that CLAIMANT was not willing to take more risks than the ones it has taken upon itself while accepting a DDP incoterm over an EXW in its general conditions. While transitioning from an EXW to a DDP all the risks are transferred from the buyer to the seller and as tariffs already



fall within the risk allocated to a seller under DDP , they cannot be precluded by the use of the word “further”.

b. In any case, a reasonable person would conclude that CLAIMANT bore the risk of the tariffs.

89. Article 8(2) of the CISG provides for an objective test of what a reasonable person in the assessor’s situation would infer the intent to be [*Zuppi; Schlechtriem-II; Ferrari/Torsello, p. 132*]. Parties agreed upon a DDP delivery and included it in Clause 8 of the FSSA. demonstrates the intent of the parties having accepted a DDP delivery. Under a DDP delivery, the seller must pay any duties that arise during delivery of the consignment [*A6, Ramberg, pg.152; Gaston Schul BV v Staatssecretaris van Financiën*].

90. It is common practice for the party domiciled in the country receiving the delivery to arrange for import-export clearance and pay duties but by including a DDP term the parties usually intend for the party delivering to pay the duties [*Ramberg, p.61*]. However, if the parties truly wished for the buyer to pay the duties a DAP rule would have been used. The main difference between a DAP and DDP is that the buyer pays the tariffs under a DAP [*Ramberg, p.148*]. Thus, by virtue of parties having agreed upon a DDP instead of a DAP, they the parties intended for the CLAIMANT to pay the tariffs.

91. The presence of a “Delivery Terms” clause in the contract means that the parties intended to abide by the INCOTERMS [*Insurance case*]. Giving weight to these basic provisions of widely accepted commercial definitions is an intelligent approach to interpretation. [*Honnold I, Pg.116*] as by virtue of being prevalent in international Trade the parties as reasonable business entities should have known or ought to have known the intent they bring along.

3) In any case, contractual adaptation is not a remedy under clause 12 of the FSSA

92. The parties did not intend to provide the Tribunal with the power to adapt [*supra §41*]. Consequently, the remedy of adaptation is not available within Clause 12.

93. Although not contended by this CLAIMANT, it may be averred that a tacit acceptance of price adaptation is evidenced in Mr. Shoemaker’s statements [*Cl. Memo, p.21, §76; Exh. R4, p. 36*]. Such claim is reliant upon Art. 8(3), which provides for subsequent statements and conduct of parties to be considered while interpreting the contract [*CISG, Art. 8(3)*]. Conversely, Mr. Shoemaker made it categorically clear that he lacked the authority to make such a decision as he was not a lawyer [*Exh. R4, p. 36*]. Subsequently, he stated that Respondent shall abide only by the provisions of the contract, and nothing beyond them, in lieu of good faith and in the interest of a long-standing relationship with Claimant. [*ibid.*].



94. In absence of either an explicit, or tacit agreement on part of RESPONDENT empowering the Tribunal to adapt the contract, this Tribunal should find that Clause 12 does not posit adaptation as a remedy.

B. The claim for increased payment is not maintainable under the CISG.

95. In contradiction to CLAIMANT's assertion [*No.4, p. 8, §20*], the Tribunal should not rely on Art. 79 as the parties have chosen to derogate from Art. 79 by specially regulating situations of hardship. **(1)** CLAIMANT, in no event can rely on Art. 79 of the CISG as the drafters contemplated and conclusively rejected claims of hardship. **(2)** If this Tribunal were to find that situations of hardship are regulated by Art. 79, RESPONDENT shall prove that the present situation does not fulfil the conditions laid out in Art. 79. **(3)** In an event, the CISG does not provide for the claimed remedy of contractual adaptation. **(4)** Lastly, the tariffs do not fulfil the conditions under Art 6.2.2 of the UNIDROIT Principles. **(5)**

1) The parties have elected to derogate from Art. 79 of the CISG

96. CLAIMANT cannot rely on Art. 79 of the CISG because the parties have derogated from it in the sense of Art. 6 CISG. Parties may wish to not apply specific rules given in the CISG and can replace it with their own rules. Art. 6 confirms this aspect of party autonomy and allows for partial derogation either explicitly or implicitly [*Schlechtriem/ Schwenzler, §2,3, Bianca/ Bonell, p.51, §1.2*]. The parties, by including Clause 12 in the FSSA, have provided for special regulation of hardship and force majeure events and have explicitly derogated from Art. 79 **(a)**, and the parties implicitly derogated as they did not intend to be bound by Art. 79. **(b)**

a) The inclusion of Clause 12 provides for special regulation of situations of hardship and force majeure.

97. CLAIMANT's argument that the parties have not explicitly derogated by virtue of including Clause 14 in the FSSA is a straw man fallacy as RESPONDENT does not contend the applicability of the CISG in its entirety but only of Art. 79. [*Cl. Memo, p.26, § 108*] Art. 79 CISG only begins to function when the parties have failed to agree on a clause to govern their relationship [*Ishida, p.366*]. Inclusion of a clause which supplants or contradicts provisions of the CISG has been considered to be an explicit derogation from that specific provision. [*Gül, p.87*] In the present FSSA, the parties have agreed to include Clause 12 which contains contractual terms that supplant and are inconsistent with the requirements under Art. 79. Firstly, Art. 79 only conclusively exempts the seller from situations of force majeure while the parties have also exempted the seller from situations of hardship. [*see infra §100-101*] In the few cases where hardship has been recognized as an excuse under Art. 79, it has been restricted to those events which are excessively onerous, and the threshold has been upwards of 100%. [*Infra §106*] The parties here have derogated from these



standards and allowed for a threshold of “more onerous” which is restricted to events upwards of 40% as per CLAIMANT. [FSSA, p.14, Clause 15] Secondly, the parties have provided for a specific list of situations which restricts the range of events covered. . Art. 79 leaves the list wide by leaving it at “impediments”, but the parties have chosen to restrict this and absolve the seller only for a few specific situations failing which the seller will not be exempted. It has been held that where the contract contains a list of situations, then the parties will only be exempted when the event falls under the list and Art. 79 cannot be relied upon. [*automatic diffractometer case*] Thus, the use of these contractual terms which replace and are inconsistent with Art. 79 conclusively shows a partial derogation from the CISG.

b) The parties intended to derogate from Art. 79 CISG

98. The parties’ intent can be understood using Art. 8 CISG. The criteria to check whether parties have implicitly derogated from the CISG are to be found within the Convention to promote uniformity [Bonell in Bianca/Bonell, p.55 §2.3.1; Art. 7(1) CISG]. Article 8 CISG can be used as implied derogation involves interpreting statements and conducts of parties. [Bonell in Bianca/Bonell, p.56, §2.3.1] Statements made during negotiations, and post conclusion of the contract have to be interpreted. [Farnsworth in Bianca/Bonell, p.98, §2.1] During negotiations, CLAIMANT had a clear intent to include a hardship clause and have the parties’ relation be governed by it. [Exh. C 4, p.12] The discussions around whether to have a broad clause like the ICC Hardship clause, as suggested by CLAIMANT, or to have a narrow hardship clause, as suggested by RESPONDENT, show that when there would be a situation of hardship, the parties would be bound by the threshold and situations indicated in the hardship clause and not by those elucidated in Art. 79. [ANoA, p. 30, § 4] The emphasis on a broad or narrow clause shows that the parties knew that they are specially regulating their contract and are bound by the Clause they choose to include and not by Art. 79. Post realizing that the tariffs are applicable on the last shipment, CLAIMANT had insisted that they are not liable as per the contract. [Exh. C 8, p.18] Their dependence on only the contract and RESPONDENTS’ insistence to look at the contract only to test whether the CLAIMANT was exempted shows their understanding and intent to specially regulate these situations using the contract and not the CISG. [ibid]

2) Art. 79 does not provide for situations of hardship

99. CLAIMANT incorrectly relies on Art. 79 for its claim of economic hardship. The legislative history of Art. 79 shows that the drafters expressly rejected economic hardship. (a) RESPONDENT shall further prove that there is no gap concerning hardship in Art. 79 (b)

a. Art. 79’s legislative history clearly indicates an express rejection of economic hardship.



100. The drafters of the CISG wished to narrow the scope of events covered by Art. 79 and used ‘impediment instead of ‘circumstances’, employed by its predecessor Art. 74 of the ULIS [*Honnold I*, p. 537; *Rimke*, p. 222]. Employment of ‘impediment’ was specifically to narrow the scope of Art. 79 [*Stoll/Gruber*, p. 608, §16; *Honnold II*, p. 350; *Flambouras I*, p. 265]. During the drafting of Art. 79, amendments proposing the inclusion of hardship were promptly rejected [*Schwenzer*, p. 713; *Yearbook 1977, Vol. 8*, p. 57; *Nicholas*]. Hence, it can be inferred that hardship was intentionally excluded from the purview of Art. 79 [*Ramberg/Herre*, p. 568; *Garro*, p. 242; *Carlsen; Ferrochrome case*]. This establishes the rejection of the doctrine of changed circumstances and hardship by the CISG [*Audit*, p. 175; *Dalhuisen*]. Additionally, the provisions of Art. 79(1) closely resemble the conditions necessary for *force majeure* [*Tallon*, p. 574; *Lindstrom; Southerington*] which furthers the assertion that Art. 79 precludes cases of hardship or commercial impracticability [*Kessedjian*, pp. 416-418; *Zeller*, p. 158; *Flambouras II, Slater; Sunflower seeds case*].

101. In light of the above, the Tribunal should hold that Art. 79 excludes claims of hardship, hence preventing CLAIMANT FROM relying upon the same.

b. Art. 79 does not contain any gap regarding hardship.

102. CLAIMANT incorrectly contends that there exists a gap in Art. 79 regarding hardship and relies on Art. 7(2) CISG, commonly known as the ‘gap-filling provisions’, to fill the gap. [*Cl. Memo*, p. 25, para 93]. [*Schlechtriem/Schwenzer IV, Art. 7; Rosenberg, §5; Viscasillas, p. 15*].

103. A reliance on 7(2) is not possible as the legislative history detailed above demonstrates the non-existence of a gap concerning hardship in Art 79 [*Rimke*, p. 220, *Honnold II*, p.349-350]. A certain circumstance which is not contemplated by the drafters of the CISG, gives rise to a gap. [*Schlechtriem/Schwenzer IV, Art. 7, §7*]. As the drafters deliberated upon and rejected hardship, the position is well settled within CISG. CLAIMANT’s assertion that there exists a gap threatens the uniformity of the CISG [*Miettinen, p. 30*] and therefore, the Tribunal should find that there exists no gap regarding hardship in Art. 79.

3) The present claim does not fulfil the conditions of Art. 79.

104. If the Tribunal identifies hardship as within the scope of Art. 79, RESPONDENT shall exhibit that CLAIMANT is disentitled from relying upon Art. 79, as the tariffs fail to qualify as an impediment beyond CLAIMANT’s control **(a)** and were reasonably foreseeable. **(b)** Additionally, CLAIMANT’S position allowed it to both avoid, and overcome the tariffs. **(c)** Lastly, CLAIMANT failed to duly serve notice to RESPONDENT, and **(d)** hence, must not be granted relief under Art. 79.

a. The tariffs fail to qualify as an impediment beyond CLAIMANT’S control.



105. An obstacle to the contract qualifies as an impediment under Art. 79(1) only if it renders the performance of the contract *excessively onerous* [*Schwenzer*, p. 714; *Schlechtriem*, p. 101; *AC-OP No. 7; Maskow*, Art. 79, §6.3; *Perillo; Chinese goods case*]. To be an impediment, performance of such contract should cause suffering to the party beyond its ‘limit of sacrifice’ [*Schlechtriem/Schwenzer III*, Art. 79, §30; *Tomato case*]. The burden of proof is on CLAIMANT’s to show the existence of such an obstacle [*Lookofsky*, p. 102; *Vulcanized rubber case; Milling equipment case*]. RESPONDENT shall prove that the present situation does not meet the required threshold of impediment under Art. 79(1), **(i)** and that CLAIMANT is not on the brink of financial ruin. **(ii)**

i. The present situation does not meet the generally accepted threshold for impediment

106. CLAIMANT rightfully identifies that the question of whether a particular change of circumstance warrants exemption varies from one case to another [*Cl. Memo*, p. 19, §69]. Nevertheless, it is generally accepted that Art. 79 is extremely narrow [*Schlechtriem/Schwenzer IV*, Art. 79, §12; *AC-OP No. 7; Miettinen*, p. 7; *Arroyo*, p. 5]. Any imposition lesser than a 100% increase in performance costs does not qualify as an impediment [*Schwenzer*, p. 717; *Brunner I*, Art. 79, §26; *Jenkins; Steel ropes case; AC covers case; Tomato concentrate case*]. In the present case, CLAIMANT, at worst faces a mere 10% increase in cost of performance [*Supra* §80]. This amount of hardship is trivial when compared with other situations where claims for exemption have been conclusively rejected.

107. Further, the present case warrants an increase in the threshold for impediment. A speculative industry is one which entails acutely risky transactions, due to a heightened probability of fluctuations in price or other factors affecting the industry [*Biais/Rochet/Woolley; Economic Times*]. Speculative industries are characterized by the lack of reliable and verifiable information regarding their trajectory. This warrants a higher threshold for impediment [*Iron Molybdenum case*]. The horse semen industry in Equatoriana is at its fledgling stages. Hence, the absence of information pertaining to financial regulations and market fluctuations renders it uncertain and speculative. As a result, the Tribunal should take note of the heightened the threshold for impediment and disqualify a mere 10% increment in cost of performance from being classified as an impediment under Art. 79.

ii. CLAIMANT is not on the brink of financial ruin

108. Though, the financial status of the party claiming hardship is relevant. [*Brunner II*, p. 438]. CLAIMANT is incorrect in its submission that the threshold is the party suffering ‘financial instability’ [*Cl. Memo*, p. 22, §80]. Instead, the threshold maintained is higher and the test is whether the party is on the brink of financial ruin, threatening its very existence [*Brunner II*, p. 435]. The key distinction is that a party is expected to *accept losses* to perform which endanger its financial stability,



but not its existence [*Schlechtriem/Schwenzler IV, Art. 79 §15; Stoll/Gruber, p. 817; Brunner II, p. 322; Liu, §4.5; Heuzé, Note 471; Suez Canal case; Frozen Raspberries case*].

109. CLAIMANT clearly does not face impending financial ruin. CLAIMANT itself proposes that it may divest its dressage unit to its largest competitor to avail a new credit line and sustain its business [*PO2, p. 59, §29*]. CLAIMANT cannot rely on this to lower the threshold as while assessing the threshold, a party's entire business is evaluated and not just one part of it. [*Brunner II, p. 438*]. The dressage unit is but one unit of CLAIMANT's business which covers all areas of equestrian sport [*NoA, p. 4, §1*]. Hence, claimant can continue to operate its business even without its dressage unit.

110. Further, even though it is difficult for CLAIMANT to seek a new credit line from its existing bank [*PO2, p. 59, §29*], it can still seek funds from a new creditor. This is a viable alternative in light of the equestrian industry's financial stead [*NoA, p. 5, §4*]. Although both options run the risk of incurring losses, they avoid CLAIMANT going bankrupt.

111. Therefore, the Tribunal should hold that the tariffs do not qualify as an impediment under Art. 79(1).

b. The tariffs were reasonably foreseeable.

112. To avail an exemption, Art. 79 posits that the impediment be such that a reasonable person in CLAIMANT's position could not have been expected to foresee the hindrance at the time of conclusion of the contract [*Schlechtriem/Schwenzler IV, Art. 79, §14; Coke fuel case*]. An examination of foreseeability must consider historical factors [*Eisenberg, p. 245*], and factors existing at the time of contract conclusion [*Schlechtriem/Schwenzler III, Art. 79, §15*]. While examining the factors existing at the time of signing of the contract, the Tribunal should ascertain whether early signs of the impediment could be seen [*Flambouras I, p. 271*].

113. Considering the historical factors, the tariffs were foreseeable [*see supra §83*]. While examining the political conditions existing at the time the FSSA was concluded, the tariffs become reasonably foreseeable. State interventions, especially, are gaining foreseeability in the present world [*Flechtner/Lookofsky, p. 206*]. With protectionist trends rapidly spreading, modern commercial markets are becoming more susceptible to transnational trade wars than witnessed before [*Levin; Ben-Ami; Matsa*]. This trend is evident in the present scenario. The President of Mediterraneo had declared his preference for protectionist measures in his election campaign [*Exh. C6, p. 15*], almost five months before the FSSA was signed. This gave CLAIMANT ample time to account for trade frictions. Further, the appointment Ms. Cecil Frankel, a hard-core protectionist, as the super-minister for trade before the conclusion of the contract [*PO2, p. 58, §23*], signified the furtherance of said trend. claimant conspicuously ignored said indicators which clearly demonstrated the



possibility of trade frictions arising. It avers that it chose to do so in light of horse semen generally not being categorized as an agricultural good [*Cl. Memo*, pp. 30-31, §129]. *A contrario*, as per WTO Regulations, horse semen is commonly classified as an agricultural good [*see infra*].

114. In light of Claimant neglecting early signifiers of tariffs, this Tribunal should find that a reasonable person in CLAIMANT's position ought to have foreseen the tariffs.

c. CLAIMANT was in a position to both avoid and overcome the tariffs.

115. A party claiming hardship has the burden to take steps to avoid or overcome the impediment. [*Schlechtriem/Schwenzer III*, Art. 79, §14; *Ramberg/Herre*, p. 572; *Uribe*, p. 193; *Tarquinio*, p. 13; *Steel Plates case*; *Iron Molybdenum case*]. Although CLAIMANT accepts this condition, they do not show why they could not have overcome the tariffs. [*Cl. Memo*, p. 25, §90]. Therefore, the Tribunal should find that a reasonable person in CLAIMANT's situation could have avoided **(i)** or overcome **(ii)** the tariffs.

i. CLAIMANT could have avoided the tariffs by an early delivery.

116. Although not argued by this CLAIMANT, another might argue that it could not have avoided the tariffs due to their indiscriminate imposition [*Cl. Memo*, p. 31, §131]. The tariffs were made public on 19 Dec. 2017, and became applicable from 15 Jan. 2018 [*PO2*, p. 58, §25]. This interval availed CLAIMANT the time to simply prepone the delivery and avoid the tariffs altogether. If required, parties must deliver using an alternative method even if it increases costs [*Stoll/Gruber*, p. 817; *D'Arcy/Murray/Cleave*, p. 113; *Gomard/Rechnagel*, p. 223]. CLAIMANT was obliged to do so, even if it led to higher costs, as such expenses do not come within the purview of Art. 79 [*Schlechtriem*, p. 101; *Flehtner/Lookofsky*, p. 205]. Given that the tariffs came into force merely 8 days prior to the agreed delivery date and CLAIMANT had over 3 months to prepare for the final shipment of 50 doses, the Tribunal should find that, at the very least, CLAIMANT could have delivered most of the shipment before the tariffs came into force [*ibid*].

117. CLAIMANT incorrectly argues that it was impossible to deliver earlier as racehorse breeding is usually treated differently from pigs, sheep etc and not classified under 'agricultural goods' [*NoA*, p.11, §6]. However, frozen horse semen is classified under 'agricultural goods' as per the global standard for transnational trade, i.e., the WTO Regulations [*WTO Regulations*]. Further, it is a standard practice for parties in the trade of import and export of frozen horse semen to obtain permission from the relevant Ministries of Agriculture [*Australian Ministry*; *South African Ministry*; *US Ministry*]. CLAIMANT, by virtue of being a WTO member [*PO2*, p61, §47] as well as by its own admission of being amply well versed with the necessary import and export protocol, [*Exb. C8*, p. 18; *NoA*, p. 7, §18], could not have been unaware of the aforementioned.



118. Hence, the Tribunal should preclude CLAIMANT from relying upon Art. 79 as it failed to fulfill its obligation of exploring all possible ways to avoid tariffs.

ii. CLAIMANT should have overcome the obstacles posed by the tariffs.

119. The Tribunal should find CLAIMANT to be in a position to overcome the obstacles posed by the tariffs. CLAIMANT's submissions pertaining to the tariff's unavoidability solely expound upon the alleged unexpected nature of the tariffs [*Cl. Memo, p. 25, §90*]. CLAIMANT's averments only propound why the tariffs could not have been avoided, but do not denote whether they could have overcome it. The analysis of whether a party could overcome an impediment substantively entails the same examination as the 'limit of sacrifice' [*Schlechtriem/Schwenzer IV, Art. 79, § 15; Huber, Art. 79, § 9*]. CLAIMANT can afford to bear the tariffs while keeping its enterprise intact [*refer to § above*]. Therefore, the Tribunal should find CLAIMANT to be in a position to overcome the hardship caused by the tariffs.

d. CLAIMANT failed to notify RESPONDENT.

120. As per Art. 79(4), the party claiming hardship has a duty to notify the other party regarding its existence, cause and effect of an impediment as soon as got to know, or ought to have known [*Schlechtriem/Schwenzer III, Art. 79, §43; Magnus, p. 425*]. The term 'ought to have known' signifies that the claiming party bears the obligation to investigate the existence or impact of an impediment [*Honnold I, p. 229*].

121. A perfunctory inquiry by CLAIMANT would have shown that frozen horse semen fell within the scope of the present tariffs. Therefore, CLAIMANT is barred from arguing that the category of "agricultural goods" under which the horse semen came was misleading as it clearly is information that CLAIMANT ought to have known [*supra §113*]. CLAIMANT notified RESPONDENT of the existence of the tariffs on 20th Jan., which was merely two days before the date of dispatch of the final shipment [*Exh. C7, p. 16*]. CLAIMANT breached its obligation to serve due notice upon RESPONDENT as it ought to have known that frozen horse semen fell under the ambit of the tariffs much earlier, in light of their announcement being made more than a month prior to CLAIMANT first gaining cognizance of the tariffs' effects.

122. In lieu of this, the Tribunal should hold that CLAIMANT has breached its duty to serve due notice under Art. 79(4), and thus precluding its eligibility to claim relief.

4) The CISG does not recognize adaptation as a remedy for impediments to performance.

123. CLAIMANT reaches the conclusion that a gap exists in Art. 79 and uses Art. 7(2) to resort to Mediterranean contract law, which are effectively the UNIDROIT Principles. CLAIMANT neither demonstrates how there exists a gap nor explains why Mediterranean contract law must be resorted



to. Exemption is the sole redressal under Art. 79. Pursuantly, RESPONDENT will establish the absence of a gap in the CISG regarding adaptation. **(a)** In a scenario where the Tribunal finds such a gap to exist, RESPONDENT shall show that Mediterranean contract law cannot be relied upon, **(b)** the general principles of CISG do not include the remedy of adaptation **(c)** and the UNIDROIT Principles are inapplicable as the general principles of the CISG. **(d)**

a. There is no gap in the CISG regarding adaptation.

124. As per Art. 79(5) of the CISG, exemption is provided as a remedy if an impediment exists. Employing a literal interpretation, exemption will be inferred as the sole form of relief envisaged by Art. 79. Without citing any authority, CLAIMANT asserts the absence of adaptation as a demonstration of a gap within Art. 79 [*Cl. Memo, p. 25, §94*].

125. Conversely, there exists no gap regarding adaptation in Art. 79 and the CISG decisively deals with remedies for an impediment [*Schwenzer, p. 724; Lindstrom*]. Proposing the existence of such a gap in Art. 79 compromises and endangers the credibility of the CISG as a uniform body of rules at its very core [*Flechtner, pp. 8-9*]. It is beyond the mandate of the CISG to impose re-negotiation of a contract upon parties [*DiMatteo, p. 284; Kruger, p. 313, §93; Dauner-Lieb/Dotsch, p. 925*]. Therefore, no concrete proof exists to conclude that the non-existence of one form of remedy amounts to a gap [*Schwenzer, p. 722; Slater*].

126. The aforesaid submission pertaining to the existence of such gap would be tenable if the CISG did not provide for any remedies. However, in a scenario wherein a remedy is provided, it clearly takes precedence over other forms of relief. Art. 79(5) allows for exemption from damages as a remedy, denoting the rejection of other forms of relief. Therefore, it is established that adaptation is not an available remedy within Art. 79 of the CISG [*Schwenzer, p. 725; Tallon, p. 592; Rimke, p. 243*].

127. Therefore, the Tribunal should find that CLAIMANT cannot rely on Art.7(2)'s 'gap-filling' provision as Art. 79 is an exhaustive provision.

b. Mediterranean contract law cannot be employed to fill the gap within the CISG

128. CLAIMANT's relies on Mediterranean contract law to fill the gap in CISG [*Cl. Memo, p.25 §93*] in utter disregard to its international character and the need to promote autonomous interpretation.[*Bonell in Bianca/Bonell, p.74, §2.2.2*] Reliance on domestic laws jeopardizes the uniform interpretation of the Convention even if the domestic law is the one which would be relied on had the Convention not applied [*Ferrari, p.65; ibid.*] Art. 79 pre-empts the application of domestic law. [*Honnold I, p. 432; Rimke, p.219*] Therefore, the Tribunal must preclude CLAIMANT from relying on Mediterranean contract law.



c. The general principles of the CISG do not provide for adaptation as a relief under Art. 79.

129. In the unlikely event that this Tribunal finds a gap within Art. 79, the Tribunal must resort to the first alternative under Art. 7(2), which are the general principles of the CISG [CISG, Art. 7(2)]. The cardinal principle of *pacta sunt servanda* rejects contractual adaptation. **(i)** Further, the principle of good faith does not impose on parties a duty to renegotiate. **(ii)**

i. The principle of pacta sunt servanda rejects the remedy of adaptation.

130. A cardinal doctrine of contract law is the principle of *pacta sunt servanda*, or the sanctity of contracts. It is the edifice upon which all contracts are built. It also serves as is pivotal general principle of the CISG [UNCITRAL Digest 2008, §§21-22; Magnus II, 5(b)(2); Andersen, *fn.* 32; Meat case; Tombstones case].

131. Owing to their duty to preserve the sanctity of the contract, Tribunals are extremely restricted in altering contractual provisions [ICC Award No. 1512; ICC Award No. 2404; ICC Award No. 8486]. As of yet, merely positing that one of the parties are to bear the risks is not a tenable averment for a variation of the contract [Horn, p. 137].

132. Therefore, the principle of *pacta sunt servanda* serves as a valid basis to preclude adaptation from the mandate of the CISG.

ii. The duty to renegotiate cannot be found in the principle of good faith.

133. One of the essential postulates of the CISG is the principle of good faith [Schlechtriem, p. 38; Magnus II, 5(b)(3)]. CLAIMANT avers that such principle may be employed to adapt the contract, so that it pragmatically embodies the variance in status quo. [Cl. Memo, p.25, §92]

134. Contrarily, the principle of good faith is extremely vague, hence offering little to no guidance [Schlechtriem II, p. 290; Janssen/Kiene, p. 272; Zeller II, Ch. 4]. Further, the postulated observance of good faith is extendable solely to interpreting the CISG and is not enforceable as a duty upon individual contracting parties [Schwenzer/Atamer/Butler, p. 112; Bridge, §10.41]. Art. 7 (1) categorically states that the observance of good faith must be regarded “in the interpretation of this Convention”. It is silent with respect to the imposition of such duty directly upon the parties.

135. In an event where this Tribunal finds the principle of good faith necessary to ascertain adaptation, it still finds no place within the ambit of the CISG. While it is feasible to deduce duties such as the one to follow procedural rules from the principle of good faith [Honold I, p. 144; Machinery case], duty to renegotiate cannot be derived from the same [Schwenzer, pp. 722-723]. Rather, the principle of good faith serves to bolster the cardinal principle of *pacta sunt servanda* [Ferrari et al,



pp. 99-100] as it seeks to prevent parties from going back on their word [*Piltz*; *Porcelian tableware case*; *Metal sheets case*].

136. Therefore, the Tribunal should find that it is not possible to employ the principle of good faith to interpret adaptation as being with the scope of the CISG.

d. The UNIDROIT Principles cannot be employed as general principles of the CISG.

137. Although not argued by this CLAIMANT, another might argue that the UNIDROIT Principles can be used as the standard to fill legislative gaps in the CISG. The use of the UNIDROIT Principles as a gap-filling canon is contentious and has not been well accepted. [*Ferrari et al*, pp. 99-101; *Zeller*, p. 160]. The UNIDROIT Principles can only be resorted to fill gaps in the CISG when contracting parties explicitly agree to the same [*Bonell* p. 97]. This is in pursuance of party autonomy being an intrinsic and essential principle of the CISG [*UNCITRAL Digest*, p. 43; *Kessedjian*, p. 429].

138. CLAIMANT cites the erroneous holding of the *Scafom* case but does not rely on the UNIDROIT Principles to support its claim. [*Cl. Memo*, p.25 §92;]. Here, the Hof van Cassatie relied upon the UNIDROIT Principles to gap-fill the CISG [*Scafom case*]. However, the *Scafom* case is incongruent with the principles of autonomous interpretation [*DiMatteo*, p. 284]. The Court conflates the term ‘general principles upon which this convention is based’ found in Art. 7(1), with the ‘general principles of international trade’ [*Flechtner*, p. 10]. The two sets of principles are markedly distinct. The general principles of the CISG are ascertained from the text of the CISG. The general principles of international trade can be found outside the Convention and often contravene the general principles of the CISG [*Flechtner II*, pp. 170-174; *UNIDROIT Principles, Introduction*].

139. In lieu of the afore-stated, the Tribunal should find the UNIDROIT Principles to be inapplicable as a gap-filling provision for CISG.

5) The tariffs fail to meet the standard laid down by Art. 6.2.2 of the UNIDROIT Principles.

140. In a scenario where the Tribunal were to find the UNIDROIT Principles as applicable using the second alternative in Art. 7(2), i.e., the applicable private international law, CLAIMANT is still disentitled from contractual adaptation.

141. Although the UNIDROIT Principles offers contractual adaptation as a remedy for claims of hardship [*UNIDROIT Principles, Art. 6.2.3*], the case at hand does not fulfill the conditions laid out therein. The UNIDROIT Principles employ the standard of hardship so ‘excessively onerous’ that it fundamentally alters the equilibrium of the contract [*Atamer*, §78, *Yildirim*]. CLAIMANT’S loss of 10% does not meet the required threshold and is therefore ineligible to demand contractual



adaptation [*DiMatteo*, p. 271; *UNIDROIT Principles*, Art. 6.2.2, *Comments*]. The tariffs of 30% is not an obstacle contemplated by the UNIDROIT Principles [*supra* §§106,107].

142. Therefore, the Tribunal should find that the tariffs fail to meet the conditions laid down by the UNIDROIT Principles, hence dismissing CLAIMANT's plea for adaptation of the price.

CONCLUSION ON ISSUE 3

143. CLAIMANT is ineligible from demanding an additional payment of 1,250,000 USD, or any other amount, as the present tariffs imposed by the government of Equatoria do not meet the conditions laid out in Clause 12 of the FSSA. The tariffs were reasonably foreseeable. CLAIMANT had assumed the risk of such tariffs.

144. CLAIMANT cannot rely on Art. 79 CISG as the parties, by including Clause 12, have partially derogated from the CISG. Moreover, Art. 79 does not provide for claims of commercial hardship. Under no circumstances can the tariffs be construed as an impediment that lay beyond CLAIMANT's control. Regardless, the CISG does not allow for contractual adaptation as a relief, rendering the present claim futile.

PRAYER FOR RELIEF

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

- 1) Danubian law governs the Arbitration Agreement;
- 2) Regardless of the law applicable to the arbitration agreement, the Tribunal does not have the authority to adapt the contract;
- 3) The Partial Interim Award from the other proceeding is inadmissible;
- 4) CLAIMANT is not entitled to additional remuneration through an adaptation of the contract.

RESPONDENT reserves the right to amend its prayer for relief as may be required.

CERTIFICATE

signed _____, 24th January 2019

ATTORNEYS

/S/

(Sudarshan Srikanth)

/S/

(Madhur Arora)

/S/

(Chinar Gupta)

/S/

(Pavan Kalyan)

/S/

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