SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

UNIVERSITAS SEBELAS MARET

SURAKARTA, INDONESIA

Memorandum for Respondent

CLAIMANT	RESPONDENT
Phar Lap Allevamento Rue Frankel 1 Capital City Mediterraneo	Black Beauty Equestrian 2 Seabiscuit Drive Oceanside Equatoriana

Dini Kartika Salsabila • Gian William Sumule • Jesslyn Antonia Mirabel • Latasya Puan Nagari • Muhammad Irsyad Marwandy • Nadine Rayna Salsabila • Purkon Abdul Latip

TABLE OF CONTENT

TABLE OF ABBREVIATIONS

e.g.	Exempli Gratia
Co.	Company
Cir.	Circa
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Ex.	Claimants Exhibit
Cl. Mem.	Claimant Memoranda
DDP	Delivered Duty Paid
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
PO[...]	Procedural Order No [...]
Resp. Ex.	Respondents Exhibit
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principle	UNIDROIT Principles of International Commercial Contracts of 2004
US$	United States Dollar
v.	Versus

INDEX OF AUTHORITIES

TABLE OF PRIMARY AUTHORITIES

UNCITRAL Model Law on International Commercial Arbitration with Amendements	United Nations Commision on International Trade Law 7 July 2006 Cited as UNCITRAL Model Law
Swedish Arbitration Act	Swedish Arbitrators Act 1999 Cited As Swedish Arbitrators Act

TABLE OF JOURNALS, BOOKS, ARTICLES

Bergami 2016	Roberto Bergami, " International Delivery Risks: The Case of Delivered Duty Paid in Australia" (2016), *Acta Universitatis Bohemiae Meridionalis, Vol 19, No.1*	Para. 87
Besson	*Comparative Law of International Arbitration, Sweet & Maxwell, London 2007 para* 17	Para13
Brandon Nagy	Brandon Nagy, *Unreliable Excuse : How do Difering Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?. New York International Law Review*, , Vol. 26, No. 2 published by the New York State Bar Association Summer 2013	Para. 87, 149
Carolina Arroyo	Carolina Arroyo, *Change of Circumtances under the CISG*, Bucerius Law School. 2012	Para. 142
Christer Soderlund	Christer Soderlund, "Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings", Journal of International Arbitration 22(4): 301–322, 2005. © 2005 Kluwer Law International. Printed in The Netherland	Para.45
CISG Case Digest	2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods - Digest of Article 79 case law. Available at https://www.cisg.law.pace.edu/cisg/text/digest-2012-79.html	Para. 140, 154
CISG AC OPINION	CISG AC Opinion No 7 *Exemption of Liability for Damages Und er Article 79 of the CJSG* (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Opinion 3.1 [CISG AC Opinion No 7]; Schwenzer in Schlechtriem and Schwenzer (eds), above n 18, Articlc 79 para 4; Niklas Lindström "Cbangcd Circumstances and Hardship in the International Sale of Goods" (2006) (Issue 1) Nordic Journal of Corrunercial Law 23-24;	Para.35

	Brunner, above n 19,218; Schlechtriem, above n 20, para291.	
Claire A. Hill	Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI. KENT L. REV. 29, 53 (2001)	Para. 99
Daniel Girsberger and Paulius Zapolskis	Daniel Girsberger and Paulius Zapolskis, *Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption* JURISPRUNDECIJA/JURISPRUDENCE 2012, 19(1), P.121-141. ISSN 2029-2058	Para. 106, 117,
David Kuster and Camilla Baasch Andersen	David Kuster and Camilla Baasch Andersen, *Hardly room for Hardshiip – A Functional Review OF Article 79 of the CISG.* Journal of Law & Commerce Vol. 35, No. 1 (2016)	Para. 139
Dr.Pair	Dr. Pair, "Efficiency at all cost – arbitration and consolidation?" (2014)	Para. 54,58
Fontaine	M Fontaine, 'Les clauses de hardship', (1976) Dir Prat Comm Int 257	Para.
Fouchard	*Fouchard, Gaillard, Goldman on International Commercial Arbitration* *Boston: Kluwer Law International, 1999*	Para.21.24
Frederick R. Fucci	Frederick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts. Practical Considerations in International Infrastructure Investment and Finance.* American Bar Association Section of International Law Spring Meeting (April 2006) Available at https://www.cisg.law.pace.edu/cisg/biblio/fucci.html#6	Para. 130, 131, 132

Gaz de Bordeaux analyse (Théorie de l'imprévision)	30 mars 1916 - *Compagnie générale d'éclairage de Bordeaux, Théorie de l'imprévision,* Analyse. Le Conseil d'État et La Juridiction Adminitrative. Conseil d'État statuant au contentieux No. 59928 publié au recuile Lebon.	Para. 128
Henderson	*Security for Costs in Arbitration in Singapore, in: 7(1) Asian International Arbitration Journal* (2011), pp. 54-75	Para.15
Henry Deeb Gabriel	Henry Deeb Gabriel, *The Buyer's Performance Under The Cisg: Articles 53-60 Trends In The Decisions*	Para. 163
IBA Guidelines	International Bar Association Guidelines for Drafting International Arbitration Clauses IBA Guidelines	Para.
Ibrahim Amir	League of Nations. (1928). *Protocol on arbitration clauses, Geneva, September 24, 1923: Edition containing all signatures affixed to the Protocol and ratifications relating thereto deposited with the Secretariat until January 31st, 1928*. Geneva: League of Nations Ibrahim Amir, Summary of Young-OGEMID Symposium No. 6: "Double Trouble: Parallel Proceedings in International Arbitration (9-18 October 2017)	Para. 57
*ICC Force Majeure-Hardship Clause 200*3	*ICC Force Majeure-Hardship Clause 200*3. ICC Publication No. 650 (February 2003)	Para. 80
Ingeborg Schwenzer	Ingeborg Schwenzer, *Force Majeure And Hardship In International Sales Contracts,* VUWLawRw 39; 39(4) Victoria University of Wellington Law Review 709 (2008)	Para. 112, 140, 144, 146
Ingeborg Schwenzer & members	Ingeborg Schwenzer, Chair with his member, *Limitation and Exclusion Clauses in CISG Contracts.* CISG Advisory Council* Opinion No. 17. NJCL 2017/2	Para. 152, 155

Jerry Salcido	*Jerry Salcido* *The four Corner rule for contract dispute, December 3 2013, salcido law firm*	Para.32
J. Fawcett, J Harris & M. Bridge	J. Fawcett, J Harris & M. Bridge, *International Sale of Goods in the Conflict of Law*	Para. 133
J. Honnold,	J. Honnold,*Uniform Law for International Sales under the 1980 United Nations Convention* (3d ed. 1999)	Para. 135
Jean Braucher	Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 723-24 (1990)	Para.
Jenni Miettinen	Jenni Miettinen, *Interpreting Cisg Article 79 (1): Economic Impediment And The Reasonability Requirement,* (2015)	Para. 151
John F. Coyle and W. M. C. Wiedemaier	John F. Coyle and W. Mark. C. Wiedemaier, *Interpreting Contracts Without Context.* 24 of March (2017)	Para. 100
John Y. Gotanda	*John Y. Gotanda, Using the Unidroit Pronciple to Fill Gaps in the CISG. Villanova University Charles Widger School of Law.* (2007) Available at : http://digitalcommons.law.villanova.edu/wps/art88	Para. 133, 134. 135, 136
Joseph Lookovsky	Joseph Lookovsky, *Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's 'Competing Approaches to Force Majeure and Hardship*. Int'l Rev L & Econ (2005) 25	Para.146

Larry A. DiMatteo	Larry A. DiMatteo, *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines,* Vol. XXVII::1 Pace Int'l L. Rev. 258 (2015) Available at: http://digitalcommons.pace.edu/pilr/vol27/iss1/5	Para. 82, 84, 88, 114, 140, 144
Lawrence M. Solan	Lawrence. M. Solan, *Contract as Agreement,* 83 NOTRE DAME L. REV. 353, 368 (2007)	Para.100
Luke Nottage	Luke Nottage, *Changing Contract Lense : Unexpected Suprevening Events in English, New Zeland, US, Japanese and International Sales Law and Practice,* 14 IND. J.GLOBAL LEGL STUD. 385, 406 (2007)	Para.123
McKendrick	E. McKencdrick, *Comment to Performance : Art. 6.2.1 – 6.2.3 – Hardship,* in COMMENTARY ON THE UNIDROIT PRINCIPLE OF INTERNATIONAL COMMERCIAL CONTRACT (PICC), 711, 717 (2009)	Para. 123
Nana Adjoa Hackman	Nana Adjoa Hackman, "The Problem of Arbitration and Multi-Party/Multi-Contract Disputes : Is Court-Ordered Consolidation an Adequate Process?"	Para. 60, 61
Nathan M., Francesca G-C	Nathan M. Crystal and Francesca Giannoni-Crystal "*Contract Enforceability During Economic Crisis: Legal Principles and Drafting Solutions*," Global Jurist: Vol. 10: Iss. 3 (Advances), Article 3. (2010) Available at: http://www.bepress.com/gj/vol10/iss3/art3	Para. 81, 109, 110, 112, 116, 118
Ole Lando	Ole Lando, *The CISG and the UNDIROIT Principles in a*	Para. 102

	Global Commercial Code. MELANGES OFFERTS A MARCEL FONTAINE, 451, 465 (2003)	
Datu Prof. Sundra Rajoo	Datu Prof. Sundra Rajoo, *Practice, Procedure and Arbitration* (2011)	Para. 119
R.A Momberg Uribe	R.A. Momberg Uribe, *The effect of a change of circumstances on the binding force of contracts. Comparative Perspective.* (2011)	Para. 127, 161, 162
Redfern/Hunter	*Redfern & Hunter on International Arbitration 6th Edition, Oxford University Press, Oxford 2015*	Para 8.24
Renatha Tarquinio	Renatha Tarquinio, *The Hardship Gap in the Contract of International Sales of Goods.* UC Davis, University of Califronia School of Law. (2015)	Para. 166, 167
Schmitthoff	*Defective Arbitration Clauses* 1975 JBL 9 Author: Schmitthoff Clive	Para.22
S.Jarvin and Y.Derains	*Objections to Jurisdiction in the Leading Arbitrators Guide to International Arbitration : Juris Publishing New York 2004*	Para 20
S. I. Strong	S. I. Strong, Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?, 31 Vand. J. Transnat'l L. 915 (1998)	Para. 65, 66
Sarah Howard Jenkins	Sarah Howard Jenkins, *Exemption for Non Performance: UCC, CISG, UNIDROIT PRINCIPLES—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2027 (1998)	Para. 125
Ugo Draetta	Ugo Draetta, *Hardship and Force Majeure Clauses in International Contracts*, 3-4 INT'L BUS. L.J. 347, 349	Para. 127

(2002)

TABLE OF CASES

Coal Case	Bulgarian Chamber of Commerce and Industry, Bulgaria. Case No. 56/1995 of 24 April 1996 (*Ukraine v. Bulgaria*) Available at http://cisgw3.law.pace.edu/cases/960424bu.html	Para. 76.109
Delta Comercializadora de Energia Ltda. v. AES Infoenergy Ltda	Câmara FGV de Conciliação e Arbitragem, São Paulo, Brazil. Case No. 1/2008 of 09 February 2009 (*Delta Comercializadora de Energia Ltda. v. AES Infoenergy Ltda*) Available at http://www.unilex.info/case.cfm?id=1530	Para. 109
DST v.Rakoil case	Deutsche Schachtbau und Tiefbohrgesellschaft mbH (DST) and others v. R'as Al Khaimah Oil Company (Rakoil) and others, 14 Y.B. Com. Arb. 111 (1989)	Para. 46
Emmott v Michael Wilson & Partners	Emmott v Michael Wilson & Partners [2008] EWCA Civ 184	Para. 68
French v. USA	ICC International Court of Arbitration (Arbitral Award), Case No. 9994 of December 2001. (Licensing Agreement between *French and USA Compnies)* Available at http://www.unilex.info/case.cfm?id=1062	Para. 121, 123
Gosset v. Carapelli (France)	*Société Gosset v. Société Carapelli Cour d'Appel de Paris, [Appellate Court], 1re Chambre suppl. (Nov. 26, 1981)*	Para.21
Harbour Assurance Co. v. Kansa General (UK)	*Harbour Assurance Co. v. Kansa General, 1 Lloyds Rep 81, (1992)*	Para 21

Iron molybdenum case (Germany)	Court of Appeal Hamburg, Germany Case No. 1U167/95 of 28 February 1997	Para. 145
Karl Wendt Farm Equipment Co. v. International Harvester Co. (USA)	United State Court of Appeals for the Sixth Circuit (*Karl Wendt Farm Equipment Co. v. International Harvester Co.*)	Para. 116, 117
Krauss v. Utah State Dept. of Transp., 852 P.2d 1014	Krauss v Utah State Dept. Of Transp.852 p.2d 1014 , Court of Appeals of Utah	Para 32
Langham-Hill Petroleum Inc v. Southern Fuels Company (USA)	United States Court of Appeals, Fourth Circuit (*Langham-Hill Petroleum Inc v. Southern Fuels Company*), 813 F.2d 1327, 7 Fed.R.Serv.3d 321, Nos. 86-1596(L), 86-1632, (1987)	Para. 166
Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV (Netherlands)	District Court 's-Hertogenbosch, Netherlands. Case No. 9981/HAZA 95-2299 of 2 October 1998 (*Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV*)	Para. 36
Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc.	ICC International Court of Arbitration, Paris (Arbitral Award), Case No. 7365/FMS of 05 May 1997. (*Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc.*) Available at http://www.unilex.info/case.cfm?id=653	Para. 123

Nuova Fucinati S.p.A. v. Fondmetall International A.B. Case	Tribunal [Distric Court] Civil, Monza, Italy Case No. R.G. 4267/88 of 14 January 1993 (*Nuova Fucinati v. Fondmetall International*), Translation Available at http://cisgw3.law.pace.edu/cases/930114i3.html	Para. 112, 146, 148
Prima Paint Corporation v.Flood & Conklin Manufacturing Co. (USA)	Prima Paint Corporation v. Flood & Conklin Manufacturing Co., 388 U.S. 395, [Supreme Court], (1967)	Para.21
PT Garuda Indonesia v.. Birgen	PT Garuda Indonesia v. Birgen Air [2002] SGCA 12 Court of Appeal Civil No of 2001	Para 17
Sojuznefteexport v. Joc Oil (Russia)	Sojuznefteexport v. Joc Oil Limited, Award in case no. 109/2980 (1984)	Para.21.24
Scafom Case (Belgium)	Court of Cassation [Supreme Court] Belgium, Case No. C.07.0289.N of 19 June 2009 (*Scafom International BV v. Scafom Tubes S.A.S.*) Available at http://cisgw3.law.pace.edu/cases/090619b1.html	Para. 143, 147
Steel Bars Case	ICC Arbitration Case No. 6281 of 26 August 1989 Available at http://cisgw3.law.pace.edu/cases/896281i1.html	Para. 146
Wood v Capita Insurance Service Ltd. (UK)	The Supreme Court, United Kingdom. Case No. UKSC 25 of 29 March 2017 (*Wood v Capita Insurance Service Ltd.*)	Para. 95, 98, 101

STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**").
2. CLAIMANT is a most renown and oldest stud farm company which is a high-quality company that produces superior stallions and is undoubtedly superior in Capital City, Mediteraneo.
3. RESPONDENT is a breeding company which is famous for its broodmare lines in Oceanside, Equtoriana.
4. Both CLAIMANT and RESPONDENT ("**The PARTIES**") are companies that had been in coorperated since 2017 for sales of frozen semen. They began their cooperation because Black Beauty was interested in Nijinsky III frozen semen due to Equatoriana situation of the ban on artificial insemination for racehorses that had been temporarily lifted.

28 March 2017 RESPONDENT objected to the forum selection clause and asked for delivery DDP **[*Cl. Ex. C3*].**

31 March 2017 CLAIMANT accepted DDP delivery in principle but asked to hardship clause. RESPONDENT considered hardship clause to be too broad **[*Cl. Ex. C4*].**

10 April 2017 RESPONDENT contacted CLAIMANT. In Mr. Antley's latest draft, RESPONDENT wished for arbitration agreement which was governed by law of place arbitration not law of the contract **[*Resp. Ex. R1*].**

11 April 2017 CLAIMANT replied RESPONDENT. CLAIMANT had changed the suggested place of arbitration but not objected about RESPONDENT's wish in the email 10 April 2017. And made the place of arbitration shall be held on Danubia (neutral country). And law of sales agreement governed by Mediteraneo **[*Resp. Ex. R2*].**

12 April 2017 Car accident's which experienced by the negotiators made the team was no longer available and replaced by Mr. Krone who found Mr.Antley's note and did not fully understand his reference of choice of law and hardship clause **[*Resp. Ex. R3*].**

21 January 2018 Mr.Shoemaker called Ms.Napravnik to discuss about the issue and want to ensure the 50 doses shipment that needed urgently **[*Resp. Ex. R4*].**

22 August 2018 The witness statement of Greg Shoemaker explained shortly that he said he was not involved in the negotiation of the contract and he had no authority to consent to additional payments outside the contract **[*Resp. Ex. R4*].**

23 August 2018 Mr. Julian Krone's witness statement talked about place of arbitration, applicable law, and hardship clause. The place of arbitration is in Danubia, applicable law governed by Danubia law and clause of hardship reference into force majeure clause **[*Resp. Ex R.3*].**

SUMMARY OF ARGUMENTS

ISSUE 1

This Arbitral Tribunal lacks jurisdiction over the present case under the Arbitration Agreement to adapt the contract, including the question of which law governs the arbitration agreement and its interpretation. It should be acknowledged in the first place that RESPONDENT never show its consent regarding the law of Arbitration Agreement will be governed by the law of contract, as CLAIMANT claimed. Here, RESPONDENT submit that Danubian Law should be applied since it has been chosen by the PARTIES as the seat of Arbitration which consequently its law will govern the Arbitration Agreement as Lex Arbitri under UNCITRAL Model Law

Furthermore, Danubian Arbitration Law recognize the Doctrine of Separability where CLAIMANT should consider. The Arbitration Agreement shall be treated as separate contract for its interpretation under the four corners rules since contains no choice of law wording.

In conclusion, this Tribunal does not have any power under the Arbitration Agreement to adapt the Contract

ISSUE 2

The partial interim award is not admissible to be evidence, since it is not final yet and has its own confidentiality. Then, the former arbitral proceeding of RESPONDENT cannot become parallel arbitral proceeding to the present case although it has the identical case because there is a confidentiality that is illegally taken by CLAIMANT either by itself or the other party. Hence, TRIBUNAL's authority to take and review the evidence should concerns about this matter. CLAIMANT cannot say that CLAIMANT's interest outweighs RESPONDENT's secrecy to set aside how precious the confidentiality in the arbitration moreover the former arbitration has not final yet. Therefore, RESPONDENT requests the TRIBUNAL to investigate how did CLAIMANT obtain the evidence.

RESPONDENT's inconsistency is reasonable to maintain its legal right, RESPONDENT has its own consideration to adapt the contract like the former arbitration. RESPONDENT's inconsistency might not effect the arbitral award to be inconsistent in the arbitration since there is no binding legal precedent for arbitrator to do so. Therefore, in this arbitration RESPONDENT does not agree to do consolidation or joinder, because it concerns about the efficiency, the confidentiality of the former arbitration, and also the

contractual construct that did not say any provision to do joinder if there might be any dispute.

ISSUE 3

Increasing remuneration is baseless due to CLAIMANT his self lack of predictability since the Government has the newest President. Therefore, Under The UNIDROIT Principle and Art. 79 CISG, the retaliatory imposing by RESPONDENT still unrecognized as hardship due to it not included to hardship either force majeure because consideration with its derogation from Art. 79 CISG and exactly such case only assumed as the normal economy risks that always rised.

Moreover, It goes too far to apply the UNIDROIT Principles as the primary source of authority for filling a gap in the CISG because the Principles are not merely a restatement of general principles of international contract law. Renegotiation is applicable by both Parties, meanwhile here, If the renegotiation is base on Good faith, however CLAIMANT should initiatively to request the renegotiation, especially his claimed his self as disadvantage party. CLAIMANT cannot be assumed the refuses the negotiation is contract breaching due to it did not constituted in the contract. Hence, this Tribunal should terminate that CLAIMANT is not entitled for the Payment US$ 1.250.000 to RESPONDENT.

ARGUMENTS

I. THE TRIBUNAL LACKS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, INCLUDING THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

A. THE ARBITRAL TRIBUNAL LACKS JURISDICTION OVER THE PRESENT CASE; THERE WAS NO ANY CONSENT FROM RESPONDENT REGARDING THE LAW OF ARBITRATION AGREEMENT WILL BE GOVERNED BY THE LAW OF CONTRACT

1. Jurisdicition has a distinct meanings that one of meanings is the most legal authority on the arbitral tribunal in the chosen territority.[*Oxford Dictionaries;E. Alcaraz, B. Hughes*]. Here RESPONDENT will show that this arbitral tribunal lacks jurisdiction over the present case.
2. The first issue of the present case is regarding whether this Arbitral Tribunal have the jurisdiction under the Arbitration Agreement to adapt the "Contract" [*Frozen Semen Sales Agreement; Cl. Ex. C5*]. CLAIMANT should ask and obtain RESPONDENT's acceptance to have the Arbitration Agreement governed by the law of the contract in the first place. In other words, since there was no any consent regarding this matter from RESPONDENT, this Arbitral Tribunal lacks jurisdiction over the present case.
3. RESPONDENT submit that this Arbitral Tribunal is lacks of jurisdiction to decide the present case where CLAIMANT argued that the Arbitration Agreement and its interpretation is governed by the law of Mediterraneo brought by CLAIMANT in its Notice of Arbitration [*Records p.6* ; *Cl. Memo p.4*]. RESPONDENT has never agreed related this matter, particularly there was no any consent from RESPONDENT.
4. Consent is considered the cornerstone in arbitration, not only in national arbitration but also in international arbitration since its Consensual. This consensual matter has been recognized undoubtedly by International Commercial Arbitration with its New York Convention on Recognition and Enforcement of Arbitral Awards [*New York Convention*]. In such commercial arbitration mutual consent to arbitration has to be reached with regard to the essential elements, for instance the agreement between the Parties that any dispute between them will be resolved by arbitration.

5. The consensual nature of arbitration is one of the fundamental elements of its classical characterization. As CLAIMANT correctly provide that the PARTIES has agreed to refer any dispute arisen between them to submit to the Hong Kong International Arbitration Centre [*HKIAC*], but it should be emphasized that RESPONDENT never agreed to have the arbitration agreement governed by the Law of The Contract. [*Cl. Ex C3 ; Resp. Ex. R2 and R3*]
6. In the present case, as provided that in the first place, which correctly provided by CLAIMANT that RESPONDENT had in its email of 28 March 2017 [*Cl. Ex. C3*]objected to the forum selection clause and asked for delivery DDP. However, related to the arbitration clause, RESPONDENT already made a clear proposal for an arbitration agreement which was governed by the law of the place of arbitration, not by the law of the contract [*Resp. Ex. R1*]
7. In fact, CLAIMANT had not objected to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement [*Resp. Ex. R2*]
8. RESPONDENT show consent to arbitrate as good faith by also drafting the arbitration clause in the Contract [*Resp. Ex. R1 ; American Design Associates v. Donald Install Associates*], but not regarding the matter of Law of Mediterraneo will applies to govern the arbitration agreement. Consent by RESPONDENT as the PARTIES itself is the foundation of this Arbitral Tribunal [*Redfern/Hunter*]
9. In conformity with the present case, unfortunately, prior negotiators between the PARTIES had an car accident while to negotiating the main contract [*Cl. Ex. C8*]. In the end,the successors who finalizing the contract and not expressed the law of arbitration in the contract [*Cl. Ex. C5 p.15*]. Further, from the relevant email when the negotiators discuss the contract, the PARTIES have been agreed if the seat of arbitration in Danubia [*Ibid*].
10. In fact,the negotiators had not discuss about *lex arbitri* until the contract reach agreement.the arbitration has a lack of jurisdiction and between the Parties not reach an agreement in *lex arbitri* [*Records page 7 para 15*].
11. To provide this Tribunal more fact, will be in the following about RESPONDENT has sent email to CLAIMANT per 10 April 2017, stated as follow :

"Applicable Law and Dispute Resolution : Given the desirability of a long-term relationship for the mutual benefit of both PARTIES we consider it not appropriate that your law (Law of Mediterraneo) applies and your courts have jurisdiction. We could accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction" (Cl. Ex. C3)

This shows that RESPONDENT objected with the choice of law to Dispute resolution mechanism. Conclusively, since there was no any consent from RESPONDENT to have the Arbitration Agreement governed by the law of contract, this Arbitral Tribunal lacks jurisdiction to hear the present case.

B. DANUBIA IS THE SEAT OF ARBITRATION CHOSEN BY THE PARTIES; DANUBIA IS THE PLACE OF ARBITRATION THEREFORE DANUBIAN LAW SHOULD GOVERN THE ARBITRATION AGREEMENT AS *LEX ARBITRI* UNDER UNCITRAL MODEL LAW

12. It is confirmed that PARTIES has agreed to have the Arbitration Seat will be conducted in Vindobona, Danubia in order to resolve any dispute arisen regarding the contract [*Cl. Ex. C5*]. RESPONDENT submit that Danubian law governs interpretation of the Arbitration Agreement [*PO 1. p.31 para 12*]
13. This Arbitral Tribunal also has authority to rule with its jurisdiction, including finding that there is no jurisdiction applies. In addition, it should be recognized that arbitration itself is governed by the law where the seat of that arbitration is conducted [*Besson para 112*], therefore Danubian Arbitration Law shall be applied.[*Cl. Ex. C5 ; Resp. Ex. R2*]
14. *Lex Arbitri* itself has defined as the primary and ground framework for arbitration, which translates from Latin as the Law of the Arbitration whereas focuses on internal matters of this arbitral tribunal procedure.
15. Pursuant to Article 2 of The Geneva Protocol on Arbitration Clause 1923 [*Geneva Protocol*]has emphasized an early international aspect that the law applicable to the arbitration should be that of the Arbitral Seat where the arbitration is conducted [*Henderson*]:

"*The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place"*

16. This matter also has reflected in the UNCITRAL Model Law on International Commercial Arbitration 1985 [*Model Law*] that most of its provisions will apply '*only if the place of arbitration is in the territory of this state*' [*Art 1(2) UNCITRAL Model Law*]. The standar approach of the Model Law is recognize that law applicable to *Lex Arbitri* will be the law of the place where that arbitration conducted
17. Furthermore, the selection of a particular place (seat) of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework, with such derogation or variation as may be permitted [*PT Garuda Indonesia V. Birgen Air ; Henderson*]
18. For provide this Tribunal an example regarding this matter, it would be where Singapore is chosen as the seat of arbitration, it would be follow by that the Singapore Arbitration Act [*AA*] or International Arbitration Act [*IAA*] will apply to that arbitration tribunal [*Ibid*]

"*If Singapore is the place of arbitration, the curial law of Singapore applies, I would add that the curial law, or the lex arbitri as its sometimes called, is not necessarily restricted to a set of procedural rules governing the conduct of the Arbitration [Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd] by choosing the place of arbitration the parties would have also thereby decided on the law which is to govern the arbitration proceedings [PT Garuda Indonesia v. Birgen Air]*

19. Whereas CLAIMANT has stated correctly regarding evidence that PARTIES has agreed Danubia is the seat of Arbitration [*Cl. Memo. p.6 para 12*] , hence it makes its arbitration will governs this Arbitration [Art. V(I)(a),(d),(e) of NYC ; Redfern/Hunter, p.179 ; *CL.Ex.5, p. 15]*. It also has provided that Danubia itself has adopted the UNCITRAL Model Law with the 2006 Amendments [*PO1 p. 52 para 4*], subsequently makes it applicable to the arbitration [*Art. 2 of NYC*].

20. Furthermore, *law of lex loci arbitri* is the closest connection jurisdiction with international arbitration jurisdiction. Similar approach in The award of Intenational Arbitral Tribunal published so far prefence for the conflict rules of law according to which contract is governed by the law of the country which has the closest connection to arbitral tribunal [*S.Jarvin and Y.Derains p.170-171*].For instance, European Convention on Contractrual Obligation [*Rome Convention*] in the event of a failure by the Parties to make an express choice of law,*'The contract shall be governed by the law of the country with which it is most closely connected*."[*Art.4(1) Rome Convention*]. Similar with the present case, law of Danubia as law of *lex loci arbitri* should be applied.

C. THE DOCTRINE OF SEPARABILITY IS ACKNOWLEDGED BY DANUBIAN ARBITRATION LAW

21. As also has been recognized by International Arbitration established in international level, International Commercial Arbitration also know and recognize the existence of Doctrine of Separability, which has been known as one of doctrine in international arbitration. [*Fouchard ; Varady/Barcelor at 141*]. This doctrine also has been implemented in several cases regarding transaction of goods whereas give the Arbitral Tribunal authority to evaluate of such an arbitration clause from its main Contract [*Harbour Assurance Co v. Kansa General (1992) (UK); Prima Paint Corporation v. Flood (1967) (USA)]* Related to the present case, pursuant to Art. 16 of the of the Danubian Arbitration law as well as the identically worded Art. 16 of The Mediterranean Arbitration law which both explicitly acknowledge the Doctrine of Separability [*Sojuznefteexport v. Joc Oil (1984) (Russia); Gosset v. Carapelli (1981) (Fr.) ; Records p.31 para 14*]
22. Generally, for the effect of this doctrine in Arbitral Tribunal provides the Tribunal to apply a substantive law to the arbitration agreement different from that of the main contract [*Schmitthoff*]. RESPONDENT argues that the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e the "Sales" part of it [*Cl.Ex.5 ; Records page 31 para 14*]

23. Whereas Danubia is the seat of Arbitration [*Cl. Ex. C3 ; Reps. Ex. R2 and R3*] ,Danubian Arbitration Law, as the law of the place of arbitration, has expressly adopted the doctrine of separability in Art. 16(1). For the purpose of determining the existence or validity of an arbitration agreement, Art. 16(1) provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" [*CLOUT Case*]
24. For these reasons, RESPONDENT submits that Danubian Arbitration applies in the present case since it governs the substantive law of the arbitration agreement in accordance with the doctrine of separability, since the Tribunal itself may apply the law of the place of arbitration (Danubia) to govern the validity of the arbitration [*Redfern/Hunter at 77*]. Therefore, the substantive law itself governing the main contract [*Fouchard at 212; Born at 68; Sojuznefteexport v Joc Oil (1984) (Russia)*]
25. CLAIMANT claims pursuant case *BCY v. BCZ* that the arbitral tribunal decide problem solve of conflict of law by choose the subtantive law as *lex arbitri*.[*Cl. Memo. para.12*]As demonstrated above,that case contrary with Procedural danubian law because danubia arbitration rules adopt principles of separability. Thus,arbitration clauses separated with Sales Agreement clauses[*PO 2 para.36, Art. 16(1) Model Law, Art.7.7 De Hauge Conference.*].

i. IBA Guidelines support the place of arbitration as *Lex Arbitri*

26. International Bar Association "IBA" Guidelines for Drafting International Arbitration Clauses , which has been adopted by a Resolution of the IBA Council 7 October 2010 International Bar Association are designed to help achieve effective arbitration clauses which unambiguously embody the parties' wishes [*IBA Guidelines*]
27. Pursuant to its Guideline 8: *The parties should ordinarily specify the rules of law governing the contract and any subsequent disputes* , under para 21, 42-44:

> *Para 42 :*
>
> In international transactions, it is important for the parties to select in their contract the rules of law that govern the contract and any subsequent disputes (the 'substantive law').

Para 43 :

The choice of substantive law should be set forth in a clause separate from the arbitration clause or should be addressed together with arbitration in a clause which makes clear that the clause serves a dual purpose, eg, captioning the clause 'Governing Law and Arbitration [or Dispute Resolution].' This is so because issues can arise under the substantive law during the performance of the contract independent of any arbitral dispute.

Para 44 :

By choosing the substantive law, the parties do not choose the procedural or arbitration law. Such law, absent a contrary agreement, is ordinarily that of the place of arbitration (see paragraph 21 above). Although the parties can agree otherwise, it is rarely advisable to do so.

Para 21 :

The place of arbitration is the juridical home of the arbitration. Close attention must be paid to the legal regime of the chosen place of arbitration because this choice has important legal consequences under most national arbitration legislations as well as under some arbitration rules. While the place of arbitration does not determine the law governing the contract and the merits (see paragraphs 42-46 below), it does determine the law (arbitration law or *lex arbitri*) that governs certain procedural aspects of the arbitration, eg, the powers of arbitrators and the judicial oversight of the arbitral process. Moreover, the courts at the place of arbitration can be called upon to provide assistance (eg, by appointing or replacing arbitrators, by ordering provisional and conservatory measures, or by assisting with the taking of evidence), and may also interfere with the conduct of the arbitration (eg, by ordering a stay of the arbitral proceedings). Further, these courts have jurisdiction to hear challenges against the award at the end of the arbitration; awards set aside at the place of arbitration may not be enforceable elsewhere. Even if the award is not set aside, the place of arbitration may affect the enforceability of the award under applicable international treaties.

28. The PARTIES already agreed regarding the Arbitration agreement, where particularly stated that the Arbitration will be held in Danubia, which this consequently leads to the matter that Arbitration Agreement itself is governed by Danubian Arbitration Law [*Records para 14 p.31 ; Cl. Ex. C5 ; Resp. Ex. R2*]

ii. The Arbitration Agreement Shall Be Treated As Separate Contract For Its Interpretation Under The Four Corners Rules Since Contains No Choice Of Law Wording

29. RESPONDENT here will shows that under the Four Corners Rule, the Arbitration Agreement in contract shall be treated as separate contract for its interpretation, since no choice of law wording.
30. Danubian law adheres for the interpretation of contracts including Arbitration Agreements to the "four corners rule", that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [*Records p.32 para 16*]
31. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with the 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 Art. 2.1.17 UNIDROIT Principles of International Commercial Contracts. Second, Art. 6.2.3 (4)(b) is worded differently granting the power"to adapt the contract" to the court only "if authorized [*PO 2 p.65 para 45*].
32. Case related to four corner rule can be found in *Krauss v. Utah State Dept. of Transp., 852 P.2d 1014 (Utah App. 1993)* . This doctrine states that a court will not look outside of the four corners of the contract document itself to determine what the parties' duties are under the contract [*Jerry Salcido*]. It explained that Courts first "*look to the four corners of the agreement to determine the intentions of the parties*." Court will deviate from the four corners of the document only if the contractual language is found to be ambiguous. The Krauss court explained as follows:

    "*Language is ambiguous if the words used to express the intent of the parties are insufficient so that the contract may be understood to reach two or more plausible meanings.* [*Ibid*]
33. Therefore, since Danubian law also recognize this doctrine [*Records p.32 para 16*], hence the interpretation of the arbitration agreement stated in the Contract [*Cl. Ex. C5*] is limited.

D. ARBITRAL TRIBUNAL DOES NOT HAVE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

34. This Arbitral Tribunal does not have any power to adapt the contract under the Arbitration Agreement [*Cl. Ex. C5*]. Only several National Arbitration laws provide provisions regarding matter whether arbitrator have the authority to adapt such a contracts [*Dutch Arbitrators Act 1986 ; Swedish Arbitration Act 1999 ; Bulgarian Law on International Commercial Arbitration 1993*]. Furthermore, CLAIMANT implicitly request this Arbitral Tribunal to adapt the contract regarding the hardship between PARTIES [*Records p.8 para 20*]
35. If one recognizes hardship as an impediment under Art. 79 of CISG, it is questionable whether an adaptation of the contract is possible [*CISG AC Opinion No 7],* furthermore it can hardly be conceived that there is a gap in the CISG that can be filled by giving the court or tribunal the power to adapt the contract to the changed circumstance [*Ibid*].
36. In addition, for example, Art. 1467 of the *Italian Codice Civile* as well as the ICC Hardship Clause 2003 take a different stand: the party invoking hardship is entitled to an avoidance of the contract; an adaptation of the contract is not contemplated.
37. In conclusion, RESPONDENT submit that this Tribunal do not have any power to adapt the present Contract under the arbitration agreement, since CLAIMANT is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT [*Records p.31 para 12*]

CONCLUSION OF ISSUE 1

38. For the above reason, CLAIMANT submits that this Arbitral Tribunal lacks jurisdiction to decide the case. CLAIMANT itself is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT. Further, there was no any consent from RESPONDENT to agree that law of Mediterraneo will govern the Arbitration Agreement. In contrast, law of seat the Arbitration, which is Danubia, should be applied. Conclusively, this Arbitral Tribunal does not have any power to adapt the contract.

II. CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

39. The Partial Interim Award can not be an evidence **(A)** even though tribunal has authority to determine the evidence, the partial interim award is not admissible **(i)**, hence the former arbitral proceeding cannot become the parallel arbitral proceeding **(ii)**, moreover, CLAIMANT had breached the confidentiality **(iii)**. On the other hand, RESPONDENT's inconsistency is reasonable in the two of arbitration **(B)** because RESPONDENT has its legal rights **(i)**, here, CLAIMANT is also being inconsistent **(ii)**. Consolidation or joinder has many disadvantages **(C)**, since consolidation is not efficient and might also breach the confidentiality in the end **(i)**, furthermore RESPONDENT is the one who has two arbitration, consolidation or joinder cannot happen without its consent **(ii)**, also, joinder can breach the contractual construct **(iii)**. Hence RESPONDENT requests an investigation to the CLAIMANT **(D).**

A. THE PARTIAL INTERIM AWARD IS NOT ADMISSIBLE TO BE EVIDENCE

i. Although TRIBUNAL has authority to take and review evidence, the partial interim award has its confidentiality and has not final yet

40. TRIBUNAL has authority to determine whether evidence admissible or not pursuant to Art. 9.1 IBA Rules Taking of Evidence, but in addition to that authority TRIBUNAL should considering the confidentiality of the documents, which means in this case, TRIBUNAL has to think about confidentiality of RESPONDENT's partial interim award from the former arbtitral proceeding [*IBA Rules, Art.9.1*].
41. Since TRIBUNAL's decisions does not create a binding legal precedent, thus arbitration proceedings are private and confidential, the parties are generally prohibited from disclosing the outcome of an arbitration, except in limited circumstances. As a result, arbitration may not be ideal where a party hopes to set a precedent in one case that it can use against other parties in future.
42. CLAIMANT could not submit the evidence that they got from the other party who had met them in the annual breeder conference especially that party had not been

involved in the arbitration [*PO 2, para. 40, p.60*], hence he could not disclose the award if the parties objected to be published the award. In accordance to Art. 42.5 point (a) and (b). An award may be published in some conditions such as following : (a) a request for publication is addressed to HKIAC;(b) all references to the parties' names are deleted. Since in the point (c) of Art. 42.5 said that an award cannot be published if there is a party that objects to such publication [*HKIAC 2013 Art. 42.5*] . Therefore, CLAIMANT has no right to submit the evidence from the other arbitration proceedings in case RESPONDENT has objected to publish an award.

43. As explained in the PO 2 para. 40, CLAIMANT got the information about partial interim award from the other party that had not been involved in the arbitration. Hence TRIBUNAL should consider CLAIMANT's possession to the partial interim award by getting it illegally without RESPONDENT's consent which makes requesting to produce the document is not admissible subject to Art. 3.3.b. [*Art.3.3.b IBA Rules Taking of Evidence*].

ii. The former arbitral proceeding cannot become the parallel arbitral proceeding

44. If CLAIMANT requests to involve the parallel arbitral procedings to the ongoing process, there will be several unavoidable consequences for parties, including RESPONDENT.
45. The arbitral proceedings and the court action proceeded side by side and delivered contradictory results, the arbitral award coming later in time. As for the court decision, the arbitrators merely noted in passing that the court decision would not prevent the "arbitration tribunal to proceed with the arbitration and to award on the merits of the case" [*Christer Soderlund*].
46. Thus, what the tribunal stated—and rightly so—was that the arbitral tribunal was under no duty to defer to any court of law outside of Switzerland as long as it had assumed jurisdiction over the dispute. [*DST v. Rakoil case*].
47. Hence the consequence of this dichotomy which is so unavoidable is when the decisions of the facts from both proceedings turn out

iii. Claimant breached the confidentiality of Respondent's former arbitral proceeding either by itself or the other party

48. CLAIMANT heard about RESPONDENT's arbitral proceeding from the unreliable third party who has name Mr.Velazquez, since he has not been involved in the arbitration, so he does not know the overall arbitral proceeding. And he could not give the copy of partial interim award to the CLAIMANT because he was not in arbitration then he could not be the third party to the present case since he has not acknowledge absolutely the overall arbitral proceeding. [*PO 2, para. 40, p.60*].
49. Even though it was not CLAIMANT wrongdoing, it turned out that CLAIMANT get the former arbitral proceeding by Mr. Velazquez who could not organize from his former employer a copy of the Partial Interim Award or Respondent's submission in the case. He had, however, given CLAIMANT the address of the company which had promised to sell CLAIMANT a copy of the award. The company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand. Thus, it is not clear whether the person who had provided the award to the company was the hacker [*PO 2, para. 41, p.60*].
50. Essentially, an arbitration award refers to an obligation of not disclosing any informations about the arbitration proceedings and the awards to any third parties. Born goes on to say that the duty of confidentiality extends not only in prohibiting third parties from attending the arbitration hearings, but also prohibiting them from disclosure of hearing transcripts, written pleadings and submissions in the arbitration, evidence adduced in the arbitration, materials produced during disclosure and as well as the arbitral awards. There is a duty of confidentiality not to disclose the evidence, Award or Reasons to a third party stranger, although it reserves the right to argue before the court [*Ali Shipping Case,p.5*].
51. If it were not for CLAIMANT's allegations regarding the resale of doses of the semen, RESPONDENT would not be raising this challenge concerning CLAIMANT's breach of confidentiality. Thus, no reasonable party could argue that RESPONDENT's counter-claim on damages arising out of the breach of confidentiality should be dealt with separately, it is intrinsically linked to the main

dispute. CLAIMANT still owes RESPONDENT a duty to maintain confidentiality in the scenario [*Cl. Memo. p.13, para.2*].

52. Any document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration [*Art. 3.12, IBA Rules*]. On the first place each parties have agreed regarding the confidential agreement about the arbitration award. On the other hand, we also agree to keep pursuing legal standing or legal rights of a party. Nevertheless, protecting a legal right of a party does not mean it is allowed to violate the confidential provisions which has been agreed only on behalf of protecting legal rights of the parties. Therefore, RESPONDENT requests the TRIBUNAL to find that CLAIMANT breach its duty of confidentiality by disclosing other arbitration award.

B. RESPONDENT'S INCONSISTENCY IS REASONABLE

i. RESPONDENT has right to object the adaptation of contract based on its legal right consideration

53. RESPONDENT's inconsistency is reasonable for some consideration especially for its legal pursue. Even from the former arbitral proceedings RESPONDENT agreed to adapt the contract then in this current proceedings they disagreed to do so, it is still RESPONDENT's right. Furthermore RESPONDENT's inconsistency might not effect the arbitral award, there is no reason of binding legal precedent that leads the former arbitral award influencing the present arbitration.
54. As a consequence, inconsistent or contradictory awards that produce by TRIBUNAL may not be reconciled or set aside by annulment committees or judicial authorities. Conflicting or contradictory awards may be said to be inherent in the arbitral process and thus an acceptable risk. After all, the parties choose to leave the all inclusive jurisdiction of litigation and enter into a dispute resolution process outside of binding precedent. Furthermore, having obtained a decision in one forum could cause the parties to comply with this decision and its consequences, and not commence, or participate in, other proceedings that contradict the arbitral award. Many awards are

adhered to without further litigation or disputes on the basis of the agreement to arbitrate [*Dr.Pair, para 14*]

ii. Here, the one who is being inconsistent is not only RESPONDENT but also CLAIMANT

55. CLAIMANT requested to do parallel proceeding for efficiency. While the parallel proceeding combines two arbitration of RESPONDENT's for the same case –adapting the contract – here, it seems the parallel proceeding more efficient but it turns out that this way is completely more complex than to do two arbitration separately. Parallel proceeding makes the time of arbitration longer and also more expensive at costs. From this argument, we can conclude that CLAIMANT is also inconsistent about efficiency.
56. Parallel proceedings will lead to unnecessary duplication of time and cost when CLAIMANT also suggests to make the dispute more efficient. It shows that the suggestions and requests from CLAIMANT about parallel arbitral proceedings are inversely and inconsistent on behalf of the purpose to make the dispute more efficient and economical.
57. Therefore, parallel proceedings are often said to complicate and slow down the settlement of disputes, consuming scarce resources, such as time and money. Also, parallel proceedings in the worst case could result in the issuance of conflicting judgments or awards and hence run the risk of rendering time-consuming and costly proceedings meaningless as a whole [*Ibrahim Amir, para 4*].

C. EVEN IF CONSOLIDATION OR JOINDER CAN BE THE ALTERNATIVE FOR CLAIMANT's INTEREST AND RESPONDENT's SECRECY, THERE WILL BE MANY DISADVANTAGE CAUSED OF IT

i. Consolidation might prevent the inconsistent awards but it is not efficient and might breach the confidentiality

58. Until very recently, the great majority of case law did not support consolidation, absent specific contractual authorization (e.g. Connecticut General Life Ins. Co. v. Unicover Managers, Inc., 210 F.3d 771 at 773 [7th Cir. 2000]). This trend now seems to have been broken, with a number of arbitration rules enlarging consolidation rules (such as the Swiss Rules and the ICC Rules) and arbitral decisions . Arguments against consolidation made by objecting parties and some commentators focus on: (i) lack of the parties' consent; (ii) non-participation in the appointment of the arbitral tribunal; (iii) potential infringements of a party's substantive rights; (iv) allocation of arbitral fees and other costs; and (v) general lack of efficiency [*Dr.Pair,para 4,6*].
59. Consolidation can have several advantages, like prevention of inconsistent awards, procedural efficiency as well as saving of time and money, but it also presents disadvantages, such as the constitution of the arbitral tribunal, the distribution of costs and issues of confidentiality. However, probably the strongest criticism is that compelling consolidation without the consent of the parties involved directly undermines the freedom of contract that forms the basis of an arbitration agreement. This aspect is, along with confidentiality, the main reason most countries have not adopted provisions on the consolidation of related arbitral proceedings. In fact, it is believed that this constitutes an infringement of the rights of the parties to have their disputes settled in private according to their will. For the same reason, arbitration institutions are rather reluctant to consolidate proceedings [*Andrea Marco Steingruber*].
60. Once a consolidation is ordered, there could be complications in deciding the number of arbitrators to be used and the method to be adopted in the appointment process [*Nana Adjoa Hackman, p.12, para. 3*].
61. Another problem would be how to ensure confidentiality during the course of the consolidated arbitration proceedings. In a commercial dispute, it is likely that some confidential information in the nature of trade secrets, data, and all of informations related would be disclosed. Not all parties would be comfortable having parties not privy to certain sensitive information in the same arbitral proceeding [*Nana Adjoa Hackman*].
62. Above all, many strong arguments made in favour if a consolidation would save time and cost, but let us bear in mind that there is also some possibilites of disadvantages

which may be true. The complexities that would come with having two or more parties in the same arbitration, spescifically by parallel proceedings, and trying to ensure equal treatment, satisfactions to all the parties involved. Furthermore, it will be more complicated if some parties may not coorporate to the process.

ii. Consolidation or joinder must depend on consent of the parties

63. Consolidation had been ruled in Art. 28 HKIAC 2018 so does joinder in Art. 27. It is written in both of the articles that "..all parties, including the additional party, expressly agree". These articles concern about all parties agreement and also some provisions. Since it provides the consent expressly, if RESPONDENT do not agree to consolidate or add joinder. These ways cannot be chosen as the alternative [*HKIAC Rules 2018 Art.27,28*].
64. As an important point to do consolidation or joinder is the consent from all of the parties, since it has said in the ICC Rules "...one of provisions to do consolidation is the agreement of each parties" [*ICC Rules Art.10*].

iii. Joinder in arbitration is rarely used because it can breach the contractual construct

65. Relying on an interpretation of arbitration as a contractual construct, if the parties to the arbitration do not agree to joinder or intervention, neither the courts nor the arbitral tribunal can order such measures. As the argument goes, to allow joinder or interest in would be taking to rewriting the contract and upsetting the dispute resolution mechanism bargained for by the parties. In addition, strict contractualists argue that because arbitral authority is limited to the terms of the contract, an arbitrator would have no power to hear the joined dispute unless the party to be joined either expressly or impliedly agreed to arbitrate [*S.I.Strong, para 8*].
66. Arbitrators who are faced with a request for a third party to join or intervene in an arbitration will therefore look first to the arbitration agreement to see what, if anything, the contracting parties contemplated with respect to third parties. Three possibilities exist: (1) a contract that expressly allows for joinder or intervention of third parties; (2) a contract that expressly prohibits joinder or intervention of third

parties; and (3) a contract that is silent or vague regarding joinder or intervention of third parties. The first situation, although incredibly rare, is obviously the most simple to resolve: if the parties have agreed to permit strangers to the contract to intervene in certain or all cases, then the courts and arbitral tribunals should give effect to that language. It is the second and third situations that cause the most problems [*S.I.Strong, para 10,11*].

67. Hence, in this arbitration, there will not be joinder since it is not written in the contract and also there is no RESPONDENT's consent to do so.

D. RESPONDENT REQUESTS THE TRIBUNAL TO INVESTIGATE A CRIMINAL OFFENCE DONE BY THE CLAIMANT TO OBTAIN AN EVIDENCE

68. An implied obligation (arising out of the nature of the arbitration itself) on both parties not to disclose or use for any documents prepared for and used in the arbitration, or disclosed or produced in the course of arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose any other way what evidence has ben given by any witness in the arbitration, save with the consent of the party, or pursuant to an order or leave of the court [*Emmott v Michael Wilson & Partners [2008] EWCA Civ 184,Para. 81*]
69. It is important for the TRIBUNAL to exercise caution whenever a party is considering obtaining information secretly, or even illegally, because no matter how important and crucial the information which the party obtains that can be an evidence to the case. The information might be has an evidentiary value but it might not be admissible before the Court if it is obtained ilegally. At the extreme, various forms of illegal evidence-gathering can constitute a criminal offence, punishable by imprisonment.
70. The Tribunal suspects if there is an illegal hacking done by the CLAIMANT on RESPONDENT's computer systems. Criminal offences where an information is surreptitiously downloaded from a computer is included to an unauthorized access with intent to commit or facilitate commission of further offences is punishable [*Section 2, Computer Misuse Act 1990*]. Therefore, any informations which CLAIMANT obtained from the computer system of RESPONDENT is obtained surreptitiously and possibly leads to a criminal offence.

CONCLUSION OF ISSUE 2

71. RESPONDENT requests to do criminal investigation to the CLAIMANT due to the information obtained to be the evidence since the partial interim award has not final yet and has its own confidentiality that breached illegally by CLAIMANT either by itself or the other party. Hence, the former arbitration cannot be associated as parallel proceeding to the present arbitration. Other than that, RESPONDENT's inconsistency might not effect the arbitral award to be inconsistent, therefore there is no need consolidation or joinder since it is not agreed by RESPONDENT to do so

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1.250.000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT AND CISG

72. Contrary to CLAIMANT's submission, This Tribunal has the authority to unrecognize CLAIMANT's entitlement to the payment of US$ 1.250.000, due to RESPONDENT assert that Payment of US$ 1.250.000 or any other amount resulting from an adaption of the price under the clause 12 of the contract cannot be bear by RESPONDENT.
73. In circumtances, the contract did not contain rule about the remuneration additional cost and buyer's responsibility about the change of the tariff, Hence RESPONDENT has no responsibility under clause 12 in the Contract due to these circumstances excluded from Hardship either Force Majeure **(A)**, Moreover, Under CISG and UNIDROIT Principle it did not contain any rules which has mean that RESPONDENT has responsibility to bear that cost **(B),** Moreover, The UNIDROIT Principles Art. 6.2.2 does not serve as a gap-filler for Art 79 CISG, hence CLAIMANT is not entitled to price adaptation under UNIDROIT Principles **(C),** Therfore, The Price concern due to Increasing remuneration which is completely baseless, thus CLAIMANT has no right to ask for the Payment under the force majeur or hardship nor under Art. 79 CISG **(D)**. Thus, The Tribunal should determine the conformity of goods pursuant to Art. 79 of CISG.

A. RESPONDENT HAS NO RESPONSIBILITY UNDER CLAUSE 12 IN THE CONTRACT DUE TO THESE INCREASING REMUNERATION EXCLUDED FROM HARDSHIP EITHER FORCE MAJEURE

74. This issue can be assumed that RESPONDENT should not bear the Payment to CLAIMANT US$ 1.250.000 due to these circumstances cannot be categorized as Hardsip either Force Majeure which mean that CLAIMANT cannot be exempted. Under the originally agreed, RESPONDENT still has no responsibility to the risk that CLAIMANT claimed as his rights to ask for the Payment of US$ 1.250.000. Increasing remuneration which imposed by Equtoriana is caused by Mediterraneo Government with newly elected President imposed the agricultural product included frozen semen, due to its circumstances, CLAIMANT is lack of predictability for the situation of his country and government **(i)**; Therfore, CLAIMANT cannot be blame to RESPONDENT however, it is out of control and increasing remuneration cannot be assumed as hardship which narrowly worded in the contract with Force Majure clause **(ii)**.

i. CLAIMANT lacks of predictability

75. Firstly, CLAIMANT is not entitled to an increase of the purchase price of at least twenty-five per cent due to higher cost following the imposistion of the new tariffs by the newest Presdient [*Record p.* 7]. Because, CLAIMANT is lack of predictability to take a concern with the tariff. CLAIMANT should already knew that in that time will held the election for the new President, and has prospect that CLAIMANT's country will have the new President when the agreement is going to conclude. CLAIMANT should has prediction when it comes has new Presient, his country has prospect to change or produce new rules either. Moreover, CLAIMANT knew that twenty-five per cent tariff had either been part of any strategy papers released earlier by the new President nor of the election manifesto [*Record p. 6*].
76. Several decisions have denied an exemption when the impediment was in existence and should have been known to the party at the time the contract was concluded. For example, where a seller claimed an exemption because it was unable to procure milk powder that complied with import regulations of the buyer's state, the court held that the seller was aware of such regulations when it entered into the contract and thus took the risk of locating suitable goods [*Malaysia Dairy Industries Pte. Ltd. v. Dairex*

Holland BV]. Similarly, a seller's claim of exemption based on regulations prohibiting the export of coal [*Coal Case*] and a buyer's claim of exemption based on regulations suspending payment of foreign debts [*Austria v. Bulgaria*] were both denied because, in each case, the regulations were in existence (and thus should have been taken into account) at the time of the conclusion of the contract.

77. Hence, suggesting that the CLAIMANT did not qualify for exemption under either Art. 79(1) or 79(2). An arbitral tribunal has suggested that Art. 79(2) applies when the seller claims exemption because of a default by a "sub-contractor" or the seller's "own staff", but not when the third party is a "manufacturer or sub-supplier" [*Alejandro*].
78. This Tribunal should have consideration within CLAIMANT's imposing the increasing tariff due to the impositon by the new President it cannot be accepted as its increasing to request the additional cost. If the Tribunal find that RESPONDENT have no expected the possibility that the cost of the goods would change, it would be accompanied with the consideration that CLAIMANT should be aware of it too, because it has impact to the tariff. CLAIMANT did not do so, hence CLAIMANT is lack of predictability for CLAIMANT's self-interest. Therefore, CLAIMANT has no right to ask for RESPONDENT to bear a bulk the risks.

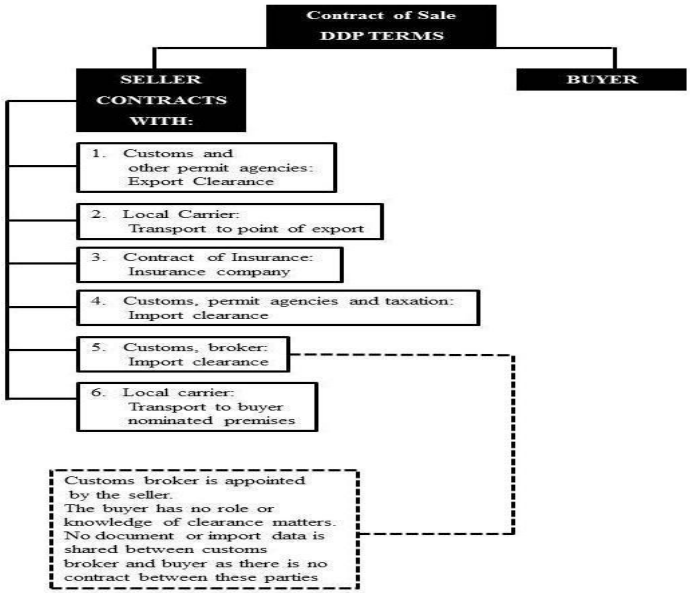
ii. Increasing remuneration is not included to hardship or force majeure clause in the contract

79. Based on the contract, Even CLAIMANT shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flight, weather delays, failure of third party service, or act of God *neither for hardship, caused by additional health and sfety requirements, or comparable unforeseen events making the contract more onerous* [*Cl. Ex. C5*] as stated on the contract. Clause 12 did not stated that increasing on remuneration is included the additional health and safety requirements, or comparable unforeseen events making the contract more onerous. This is not something that can be included in the force majeure or hardship clause and can be used as the responsibility of the RESPONDENT.

80. However, this Tribunal should considered which circumstances which included to the Hardship either Force Majeur. Force Majeure literally means "greater force" [*ICC Force Majeure-Hardship Clause 200*3 *p.3*]. Force majeure clauses only excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract [*Ibid*]. Meanwhile, CLAIMANT still be able to performing its obligation under the contract.
81. Moreover, interpreting the Force Majeure clause stated that the parties would be temporarily relieved of their obligations under the contract "in cases of *force majeure* or chance events affecting the facilities used for the performance of this Contract, such as in particular *(listing of typical force majeure events*)." This Tribunal should found that the clause did not cover adverse market or economic conditions. However, even when the *force majeure* clause is quite broad, tribunal are unlikely to construe the clause to cover market changes *[Nathan M., Francesca G-C. p. 2*].
82. PICC Art. 6:111 ("Change of Circumstances") accepts the more modern liberalization of excuse by recognizing hardship as a ground to request an exemption or modification. It first notes that the purpose of the provision is not to re-allocate the risk expressed or implied in the contract by stating that a "party is bound to fulfill its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished." However, when a change of circumstances results in the "performance of the contract becoming excessively onerous, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it." [*Larry A. DiMatteo p.273*]
83. According to CLAIMANT's lack of predictability, the circumstances could be reasonably have overcome the effect of it, which it is contrary to CLAIMANT's claimed that the tariff included to the force majeure Clause either Hardship due to beyond its control.
84. However, with the involvement of force majeure and hardship on the contract, it is not valid for the increase in remuneration to be borne by the RESPONDENT. The difficulty is not special which is a combination with force majeure. The word "impediment" was substituted for the word "circumstances" in order to disallow the granting of an exemption "merely because performance became more difficult or

unprofitable." [*Larry A. DiMatteo p.279*]. Though the circumstances permitting exemption cannot generally be equated simply with strict notion of force majeure", efforts were made to define them narrowly. [*Larry A. DiMatteo p.279*]

85. Although RESPONDENT considerated with ICC-hardship to be too broad by CLAIMANT [*Resp. Ex R3*]. Hardship clause originally cannot to be interpreted as covering also the presented case as Force Majeure. But, concequently Hardship narrowly reference into the force majeure clause and regulate some other risks direclty in the contract which have agreed by both Parties [*Resp. Ex. R3*]. This clause has means that all circumstances which reffering to its statement in the clause are include to hardship or force majeur. But, circumstances was occured in this case cannot be assumed as hardship or even force majeure.
86. Therefore an adaption of the contract, neither under force majeure or hardship, CLAIMANT's cannot defeneded to ask RESPONDENT for bearing disadvantages impact from CLAIMANT. Therefore, clause 12 not provide for any adaption by the Arbitral Tribunal. Hence, it cannot relied by CLAIMANT to order the Payment.
87. In the context of DDP, based on the information in Table and the explanation above, it is clear the party having the primary responsibility for border control activities is the seller or in this case is CLAIMANT. The contracts a seller needs to execute to complete the supply function to the buyer under DDP [*Bergami 2016*]. Seller's sphere of risk does not extend to situations where the seller cannot control the choice of supplier or its performance [*Brandon Nagy p.28*]



88. However, The first order rule for any court or tribunals to enforce a commercial contract as written. It is not the courts role to evaluate the relative values, benefits, and costs being exchanged between the parties to the contract or as changed by subsequent events. Hence, the fact that a party will suffer heavy losses or lose all benefit from the contract is not a reason to relieve that party of its contractual obligations. [*Larry A. DiMatteo p.271*] This Tribunal could denied CLAIMANT in order RESPONDENT to Pay the loss.

B. UNDER CISG AND UNIDROIT PRINCIPLE RESPONDENT HAS NO RESPONSIBLE FOR THE PAYMENT US$ 1.250.000 TO CLAIMANT

89. Furthermore, CLAIMANT cannot avoid his obligation related to the risks. Because under Art. 8 CISG, even outside of the agreed upon DDP terms, CLAIMANT is not entitled for the Payment **(i)**; Moreover, CLAIMANT cannot assumed that economic risks as a hardship, because, however Under the UNIDROIT Principles, RESPONDENT should not to bear a bulk the Payment rised due to the thridty percent imposed by Equatoriana not made a hardship **(ii)**; Therefore, if this circumstances made CLAIMANT become suffer due to losses, Renegotiation under 6.2.3 the UNDIROIT Principle is applicable by both parties, Thus CLAIMANT should offer the renegotiate within his Good Faith **(iii)** which meant without relying to RESPONDENT promise after the third shipment within consideration of his good faith; Hence, Accordingly, CLAIMANT is not entitled for adaptation for tariff under Art. 6.2.3 The UNIDROIT Principles and hardship clause **(iv)**.

i. Under Art. 8 CISG, even outside of the agreed upon DDP terms, CLAIMANT is not entitled for the Payment

90. A contract shall first be interpreted according to the parties subjective intent where the other party could not have ben unaware of what this intent was [*Art. 8(1) CISG*]. Due regard must be given not only to the text of the contract but also to surrounding circumstances [*Art.8(3) CISG; Cl. Memo. para. 65. p. 20*]. Both Articles should be provable that RESPONDENT's intent agreed with the statement that RESPONDENT

should take on the hardship associated with trade and potential tariffs. Therefore, CLAIMANT cannot avoid of his obligation under Art. 8 CISG.

91. Even if CLAIMANT assumed that DPP was incomplet due to Ms. Napravnik email on 31 March 2017 which states CLAIMANT's unwillingness to bear all the risks [*Cl. Memo. para. 67 p. 20*], it was still have to discussed by the Parties in a personal meeting or over the phone [*Cl. Ex. C4*]. Therefore, that statement has not been approved by the Parties, hence CLAIMANT cannot rely on that email which stated by Mr. Napravnik to avoid his obligation to bear the risks under DDP terms.
92. First, During the negotiation, Mr. Greg Shoemaker to his understanding DDP meant that all risks had to be borne by CLAIMANT even he would try to clarify the legal situation with his legal departement or the drafters of the Sales Agreement [*Resp. Ex. R4*]. Moreover, Mr. Greg Shoemaker had no authority to made decision about the tariff. Therefore, this Tribunal should consider with his authority could not be used to make a change.
93. If this Tribunal find that Mr. Greg Shoemaker has authority to make a change, and conclusively that both Mr. Greg Shoemaker and Ms. Napravnik reach the deal. The negotiation still approve that Mr. Greg Shoemaker never committed to the adaptation on the price which means never agreed that RESPONDENT would pay such Payment [*Resp. Ex. R4*].
94. Second, in DDP terms, a seller bears the risk that its supplier will deliver non-conforming goods, unless the parties have allocated such risk to another party. Under Mr. Greg Shoemaker understanding about DDP, there is no confirmed that RESPONDENT willing to bear a bulk the risks, and he never never committed to the price and would also not have the required authority to do so [*Resp. Ex. R4*]. Hence, this Tribunal should consider with the terms that the Parties followed either under the Contract was stated.
95. Regarding, If CLAIMANT request this Tribunal to interpret the terms and expression in light of the contract [*Cl. Memo. para. 69 p. 21*] under Art. 4 UNIDROIT, it has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause [*Wood v Capita Insurance Service Ltd.*].
96. Even, Art. 4.6 UNIDROIT decides that when a contract terms supplied by one party is unclear, the interpretation against that party is preferred. However, the contract terms

supplied by both Parties. RESPONDENT considered the originally suggested ICC-hardship clause to be too broad [*Record para. 4 p. 30*]. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause [*Ibid*].

97. If this Tribunal find the language of the clause ambiguous, under the narrowly worded on force majeure and hardship clause, CLAIMANT cannot stated that ambiguity should be read against RESPONDENT only. This Tribunal should consider that the parties concentrated in their following discussion on the inclusion of a hardship clause [*Ibid*]. Conclusively, it has mean that the Parties have an intent to the clause.

98. This Tribunal must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning [*Wood v Capita Insurance Service Ltd*].

99. Moreover, the Tribunal should consider that a contract is an attempt to translate the ideas underlying a bargain into words. Much can get lost in this act of translation, for ideas are more complex and nuanced than the words available to represent them. [*Claire A. Hill*].

100. In many cases, however, it will be difficult or impossible to uncover the parties' subjective intentions *[John F. Coyle and W. M. C. Wiedemaier p. 3*]. Effectively, even if this tribunal should ostensibly concerned with subjective intent, but it still tend to favor evidentiary proxies that are "objective" in nature [*John F. Coyle and W. M. C. Wiedemaier; Jean Braucher; Lawrence M. Solan*]. Due to the courts assign to each party's behavior the meaning reasonably understood by its counter-party [*Jean Braucher*].

101. Similarly, the Tribunal should not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms [*Wood v Capita Insurance Service Ltd.*], which both Parties did so already. However, the clause of the contract was negotiated by both Parties and was concluded with both intents. Hence, CLAIMANT cannot avoiding his obligation within the contract either that this Tribunal will find that the inttent and language was clear, RESPONDENT have no responsibility to bear a bulk the risk which was raised.

ii. Under the UNIDROIT Principles, RESPONDENT should not to bear a bulk the Payment rised due to the thridty percent imposed by Equatoriana not made a hardship

102. The section on hardship starts off, in Art. 6.2.1, by stressing that *pacta sunt servanda* is an underlying principle of the UNIDROIT Principles. Even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected [*Art. 6.2.1 UNIDROIT*]. This entails that performance must be rendered even though a change in the market has caused the contract to become more burdensome for one party, or even it becomes unprofitable for CLAIMANT [*Ibid; Ole Lando*].
103. Art. 6.2.1 UNIDROIT Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship. Alleging a substantial increase in the price or remuneration in the aftermath of recent new President, the CLAIMANT's request increasing remuneration twenty percent of the tariffs and should be bear by RESPONDENT is unrecognized [*UNIDROIT Art.6.2.1 illustration*]. CLAIMANT is not entitled to such an increase because CLAIMANT bears the risk of its performance becoming more onerous.
104. Accordingly, Under the UNIDROIT Principles, CLAIMANT is not entitled for the Payment. Moreover, the illustration in the Art. 6.2.1 stated that the Party is not entitled to such increase due to substantial increas in the price aftermath of a political crisis in the region, because the Party bears the risk of its performance becoming more onerous. [*Illustration of Art. 6.2.1 UNIDROIT*]. Related to that case, increasing remuneration have to be bears by CLAIMANT even if the contract became more onerous for CLAIMANT.
105. Moreover, due to CLAIMANT has fulfilled its duties when it delivered the final shipment of semen doses to RESPONDENT on 23 January 2018 [*Cl. Memo. para. 73 p. 22*], it is CLAIMANT's obligation under the contract also under the UNIDROIT Principle Art. 6.2.1, comment 1, which stated performance must be rendered "as long as it is possible and regardless of the burden it may impose" on the performing party [*Art. 6.2.1 UNIDROIT comment. 1*].

106. Since the general principle is that a change in circumstances does not affect the obligation to perform (see Art. 6.2.1), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental [*Daniel Girsberger and Paulius Zapolskis p. 126*]. Hence, due to its performance, RESPONDENT has no obligation beyond the contractual duties either under the UNIDROIT Principles.
107. Bounded to perform its obligation is not only for the shipment, but the duties related to its performance. Here, CLAIMANT has duties to bear its substantial increase, however, due to it is included to CLAIMANT's duties and responsibility.
108. However, Art. 6.2.1 recognizes that in exceptional cases relief may be granted under the principle of hardship, when supervening circumstances lead to a fundamental change in the equilibrium of the contract [*Art. 6.2.1 UNIDROIT comment. 2*]. The comments note that many countries recognize the concept of hardship as a basis for granting relief from the obligations of a contract [*Ibid*].
109. This tribunal have to order CLAIMANT the claim based on the termination of a contract for unforeseen circumstances (hardship) should be allowed "only in truly exceptional circumstances" [*Nathan M., Francesca G-C. p. 12*] The tribunal noted that Art. 6.2.1 of the UNIDROIT Principles expressly provides that the fact that performance of the contract becomes more onerous for one of the parties is not sufficient to establish "hardship." [*Delta Comercializadora de Energia Ltda. v. AES Infoenergy Ltda; CAM*]
110. Art. 6.2.2 of the UNIDROIT Principles defines what is to be understood as hardship more precisely [*Anja Carlsen; Nathan M., Francesca G-C. p. 9*]. It reads: "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of performance a party receives has diminished . . . ". According to this provision, a change in the market after the conclusion of the contract only amounts to hardship if the equilibrium of the contract has been *fundamentally* altered [*Anja Carlsen*]. The requirement of a fundamental alteration of the contract entails that normal economic risks is not to be regarded as hardship but only developments in the market that lie far beyond the normal economic development [*Ibid; Nathan M., Francesca G-C. p. 10*].

111. According to the Art 6.2.2 UNIDROIT Pinciples, the events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract. Regarding to the Clause that CLAIMANT is not disadvantaged party because, First, the additional remunertion is caused by his own State's policy which has no right to ask for an adaption of the contract. Hence, CLAIMANT's claim for an increased remuneration is completely baseless.
112. The Comments on the UNIDROIT Principles state, as a guideline in cases of price increases or decreases, that an alteration of 50% or more is likely to be regarded as a fundamental alteration of the equilibrium of the contract [*Nathan M., Francesca G-C. p. 11*]. At the present time, there is no case law establishing hardship on the basis of the UNIDROIT Principles [*Nuova Fucinati S.p.A. v. Fondmetall International A.B. Case*]. Therefore, it can only be assumed that the hardship provisions will be applied in accordance with the Comments on the UNIDROIT Principles. Consequently, hardship is likely to require a price increase of 50% or more.
113. In this case, CLAIMANT is not entitled for the Payment due to the price increase is less than 50% that is not included as a hardship based on the previosly case, and CLAIMANT still has no right to ask for the Payment to RESPONDENT. Hence, RESPONDENT still have no obligation to bear a bulk the risks that CLAIMANT requested to this Tribubnal.
114. The words foreseen, foreseeable or foreseeability are not found in Art 79 CISG. Instead, Art 79 CISG stated that the party claiming an impediment could not have been expected to have "taken . . . [the impediment] into account at the time of the conclusion of the contract." [*Larry A. DiMatteo p.298*]
115. Impediment is an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness [*Chinese Goods Case*]. Third-party suppliers, however, are not considered "impediments" that would warrant an exception under Art. 79 [*CISG Case Digest p.14*]. Moreover, either under UNIDROIT Principles CLAIMANT cannot rely on it due to it unused for gap-filler the CISG.
116. In particular, this Tribunal held that to invoke impracticability CLAIMANT have to show a failure of a basic assumption on which the contract was based [*Karl Wendt Farm Equipment Co. v. International Harvester Co. Case*]. However, stability of the

market is not a valid assumption because markets are subject to dramatic changes [*Nathan M., Francesca G-C. p. 2*]. Hence, the change of economics circumstances is not able to include to the impediment.

117. The Tribunal should consider with denying that mutual profitability could be viewed as the primary purpose of the contract and as a way to rescind or void the contract due to frustration of purpose [*Karl Wendt Farm Equipment Co. v. International Harvester Co. Case*]. CLAIMANT is also not entitled to use the hardship exemption only because the contract turned out to be less profitable than expected at the time of conclusion of the contract [*Daniel Girsberger and Paulius Zapolskis p. 123*]. Frustration is an equitable doctrine designed to fairly apportion unforeseen risks. In that case, The court recognized that CLAIMANT might have valid economic reasons for going out of the farm equipment business, but fairness did not require allocation of this risk to the RESPONDENT [*Karl Wendt Farm Equipment Co. v. International Harvester Co. Case; Nathan M., Francesca G-C. p. 2*].

iii. Renegotiation under 6.2.3 the UNDIROIT Principle is applicable by both parties, Thus CLAIMANT should offer the renegotiate within his Good Faith

118. Art. 6.2.3 deals with the remedy for hardship. In a situation of hardship, Art. 6.2.3 of the UNIDROIT Principles mandate renegotiation between the parties to adapt the contract to the new circumstances. [*Amin Dawwas p.13*]. However, The existence of hardship does not give rise to a right to avoid the contract, but it does give the disadvantaged party a right to request that the parties renegotiate the contract [*Nathan M., Francesca G-C. p.11*].
119. Some authors, however, advocate the idea that under the CISG as well there is a duty to renegotiate based upon Art. 7(1) of the CISG, according to which the Convention has to be interpreted with regard to the observance of good faith in international trade be interpreted with regard to the observance of good faith in international trade *[Datu Prof. Sundra Rajoo*]. In the first place, renegotiation – as negotiation – has to be based on willingness and trust. Constructive and cooperative renegotiation cannot be forced upon the parties by coercion *[Ibid*].

120. For these reasons, the Council opines that the *Nightmare* situation *deserves* a legal response under the Convention that would pre-empt the application of domestic rules on hardship. And to tackle that challenge—to "ascertain the contours of the remedial guidelines that may be followed to grant the most appropriate [hardship] remedy"—the Council *infers*, from the obligation to interpret the Convention in good faith under Art. 7(1), a *duty* imposed upon the parties to *renegotiate* the terms of the contract with a view to restore a balance of the performances.
121. In 2001, the ICC International Court of Arbitration decided that when, after a certain period of time, the CLAIMANT considerably increased the price of the raw material due to the more stringent conditions imposed upon the claimant by a governmental agency , the good faith principle (*also prevailing in international commercial law, e.g. the UNIDROIT Principles Art.s 6.2.2 and 6.2.3*) imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution in order to ensure that its performance does not cause the ruin of one of the parties [*French v. USA*].
122. This duty to renegotiate is seen to be based on a general duty to act in good faith which is common to many civil law system [*Ingeborg Schwenzer p. 721*]. CLAIMANT is should conduct their right for renegotiate after the conclusion of the Contract, upon failure to reach an agreement. Hence, if CLAIMANT has sense to be disadvantaged party, he can request this Tribunal to either terminate or revise ("adapt") the contract, upon failure to reach an agreement [*Art. 6.2.3 UNIDROIT Principle*]. But CLAIMANT's request cannot rely on RESPONDENT promise after the third shipment within consideration of his good faith.
123. Moreover this Tribunal should consider with CLAIMANT's relying on RESPONDENT promise to renegotiate that if CLAIMANT did so, However, Art. 6.2.3 itself does not oblige the creditor to participate in the renegotiations [*McKendrick*]. Yet, such a duty results from two other principles set forth in the UNIDROIT Principles: [*Ibid*] good faith, Art. 1.7 [*Luke Nottage*], which is indeed the underlying legal basis of the hardship exemption,[*Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc.; France v.USA*]; , and cooperation, Art. 5.1.3 of The UNIDROIT Principles. If the

CLAIMANT agrees to renegotiate, then he must negotiate in good faith; furthermore, he may not break off negotiations in bad faith [*Amin Dawwas p.15*].

124. However, In addition, the hardship event does not automatically result in an exemption from non-performance [*Amin Dawwas p.16*]. Indeed, the second paragraph of Art. 6.2.3 of the UNIDROIT Principles explicitly states that the request for renegotiation does not, in itself, entitle the debtor to withhold performance. This is also supported by case law; an Arbitral Tribunal rejected a defendant's argument that his liability for non-performance was excluded on the ground of hardship, stating that even if the events were to be considered a case of hardship, the effect would not be the exclusion of the defendant's liability for its non-performance, but only the right to ask for renegotiation of the distributorship agreement with a view to adapting it to the changed circumstances [*CAM*]. This Tribunal should suspend the proceedings for a reasonable period of time to enable the parties to renegotiate.
125. According to Art. 6.2.3 and the Official Comment thereon, the court,- if it finds a hardship situation, is authorized to grant four possible options of relief: terminate the contract at a specified date and on terms to be fixed; adapt the contract with a view to restoring its equilibrium; direct the parties to resume negotiations to reach an agreement adapting the contract; or confirm the terms of the contract as originally agreed [*Sarah Howard Jenkis*].
126. All options stand on equal footing, there is no preference for any particular option [*Amin Dawwas p.19*]. Thus, the decision to adapt the contract may be more easily determined by an arbitral tribunal than by a state court [*Amin Dawwas p.20*].
127. As for reason the last option of relief, it would be obviously lead to a situation in which the debtor has to continue to carry burden of hardship, which seems to be contrary to the rationale of hardship under the UNIDROIT Principles [*Ugo Draetta*]. Notably, the most current case law available, shows that tribunals do not refuse to revise the contract by a declaration that the contract be performed as originally agreed [*Ibid*]. In the same way, the only reported arbitral decision in Chile referring to the subject expressly rejects the existence of such a duty in the absence of an express contractual provision [*R.A Momberg Uribe p.219*]. Therefore, This Tribunal should consider the contract with easier way to adapt for both Parties.

iv. However, CLAIMANT is not entitled for adaptation for tariff under Art. 6.2.3 The UNIDROIT Principles and hardship clause

128. Additionally, CLAIMANT stated that is still entitled for the Payment in case with *Gaz de Bordeaux* is similar [*Cl. Memo. p.28 para.94; 96*]. Even though, The Conseil d'État decided that the company was still obliged to provide the service but that it had the right to be compensated for the pecuniary consequences of the force majeure situation which exceeded the normal economic hazard [*Gaz de Bordeaux analyse (Théorie de l'imprévision)*]. As a result of the First World War, the price of coal used by *Gaz de Bordeaux* more than tripled, which itself exceeded the price established for its revenues under the concession contract and be the special conditions that do not allow the contract to operate normally [*Ibid*].
129. This Tribunal should consider with the circumstances which would be equted or similared to this case. However, war is condition which inluded to the force majeure and it is different with hardship, even if in the Contract was narrowly wordedd to the force majeure clause. Hence, however, CLAIMANT is not entitled for the Payment under hardship clause either has no relation with *Gaz de Bordeaux.*
130. The Commentary to Art. 6.2.3 of the UNIDROIT Principles states that during the renegotiation process, both parties are subject to the general principle of good faith and the duty of cooperation. Thus, the "disadvantaged party must honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical maneuver." [*Frederick R. Fucci*].
131. Thus, If this Tribnal did not find any tariff which would be adapted, accordingly, in practice what the Tribunal did is the logic of the fair distribution of losses stated in the UNIDROIT Principles [*Ibid*]. Even though, in the contract did not stated that the risks must be share by the Parties. Thus, to restore its equilibrium, RESPONDENT offer the reasonable and fair solution with his good faith.
132. However, CLAIMANT cannot be blame to the economic concequences even if he assumed that this circumstances is under hardship clause, the fact is that the CLAIMANT cannot ask to be entirely beyond the reach of the abnormal conditions prompted by the crisis, as this would be unrealistic [*Ibid*]. Therefore, this Tribunal

should terminate that RESPONDENT should not bear a bulk the risks that CLAIMANT's requested.

C. THE UNIDROIT PRINCIPLES ART. 6.2.2 DOES NOT SERVE AS A GAP-FILLER FOR ART 79 CISG, HENCE CLAIMANT IS NOT ENTITLED TO PRICE ADAPTATION UNDER UNIDROIT PRINCIPLES

133. It goes too far to apply the UNIDROIT Principles as the primary source of authority for filling a gap in the CISG [*John Y. Gotanda p.16*]. Moreover, UNIDROIT Principles are not the work of UNCITRAL but rather the work of the International Institute for the Unification of Private Law, a quite separate body and not a United Nations agency and, in consequence, CLAIMANT cannot rely on it due to they cannot represent a formal source of law for the purpose of supplementing the Vienna Convention [*J. Fawcett, J Harris & M. Bridge p. 933*].
134. While articles in the UNIDROIT Principles often correspond to provisions of the CISG, the Principles are not merely a restatement of general principles of international contract law [*UNIDROIT Principles pmbl; John Y. Gotanda p. 16*]. As the Governing Council of UNIDROIT explained in the Introduction, the Principles not only "reflect concepts found in many ... legal systems, ... they also embody what are perceived to be best solutions, even if not yet generally adopted" [*Ibid*]. Thus, it cannot be said that the Principles as a whole reflect general principles on which the Convention is based [*John Y. Gotanda p.17*].
135. Accordingly, CLAIMANT could not rely on Art. 7(2) to justify using the UNIDROIT Principles to fill gaps in the CISG. The article clearly states that "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." [*Art. 7(2) CISG*]. The text of CISG Art. 7(2) requires that a "particular general principle must be moored to premises that underlie specific provisions of the Convention" [*J. Honnold p. 667-91*]. It seems inappropriate to reach that result through a strained reading of Art. 7(2) CISG [*John Y. Gotanda p.17*].
136. Therefore, Gaps in the CISG are to be resolved first according to the literal text or the plain and natural reading of the applicable article [*Ibid p. 19*]. Then, If not, according to CISG Art. 7(2), this Tribunal must attempt to resolve the issue "in conformity with

the general principles on which [the Convention] is based" [*John Y. Gotanda p.17; J. Gotanda*]. In this situation, this Tribunal should try to resolve the unsettled question by liberally applying specific provisions of the CISG by analogy. Hence, This Tribunal should consider within the Gap filling CISG under UNIDROIT that CLAIMANT requested cannot be realized in this Tribunal.

D. CLAIMANT HAS NO RIGHT TO ASK FOR THE PAYMENT TO RESPONDENT UNDER ART. 79 CISG

137. Clause 12 provides that the: "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Cl. Ex. C5*]. Under Clause 12, CLAIMANT is not responsible for any circumtances which stated in the clause. Increasing remuneration not included to its clause due to its event cannot be assumed as hardship or force majeure either. Therefore, CLAIMANT's reliance to the hardship is impossible due to it is not included to the exemption and does not provide for the request remedy under Art. 79(1) **(i);** Moreover, Including the Force Majeure and Hardship to the Contract is constitutes a derogation in the sense of Art. 6 CISG **(ii);** Additionally, however, RESPONDENT did not breach the contract due to increasing remineration excluded to the harship, hence Art. 74 CISG could not be applied due to these circumstances that the Parties face is different **(iii);** And thus, If the Tribunal find the circumtances exempted under Art. 79(1) and Art. 74, increasing remuneration is not liable rely under Art. 79(2) CISG, hence CLAIMANT is not entitled for the Payment US$ 1.250.000 **(iv).**

i. CLAIMANT's reliance to the hardship is impossible due to it is not included to the exemption and does not provide for the request remedy under Art. 79 (1)

138. CLAIMANT's reliance on the hardship clause is not possible renegotiate. The narrowly worded clause is not applicable to the present impediment. Unless, If

RESPONDENT had known of those events when entering into the contract, it would have been able to take them into account at that time.

139. Moreover, CLAIMANT claime that he is to be exempted under Art. 79 CISG due to he faced a hardship situation which caused by thirdty percent retaliatory which imposed by RESPONDENT [*Cl. Ex. C8 p.17*]. Therefore, CLAIMANT stated that the term "hardship" under The UNIDROIT Principles fills in for "impediment" [*Cl. Memo. p.26 para.87*], eventhough, under Art. 79 itself, there is no mention of the term "hardship" within Art. 79(1), and the linguistic problem of categorizing hardship as an "impediment" rather than a "difficulty" has fueled the debate [*David Kuster nd Camilla Baasch Andersen*].
140. To be exempted under Art. 79, a party's failure to perform be due to an impediment beyond that Parties's control [*CISG Case Digest p.10*]. Art. 79 CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control [*Ingeborg Schwenzer p.712*]. Due to CLAIMANT's circumatnces which his claimed as an hardship, cannot be exempted under 79(1) caused it can be catogirized as impediment. It interpreted the wording of Art. 79(1) CISG in a broad manner and argued that hardship was not implicitly excluded from its scope [*Larry A. DiMatteo*]. Hence, CLAIMANT cannot rely on this provision to invoke the Payment that should be bear by RESPONDENT.
141. Therefore, further arrangements related to hardship should be predictable. Dependence on Art. 79 is not possible to be used to prosecute the RESPONDENT for the increase in remuneration and must pay it. RESPONDENTs cannot be blamed by the application of Art. 79 CISG.
142. The CISG does not contain a provision that establishes which situations could trigger exemption for change of circumstances and if so, what is the threshold for the exemption of liability for a party in breach. In practice, how the "change of circumstances" doctrine is regulated will depend heavily on the interpretation that local courts or arbitration tribunals will give to Art. 79(1) and this doctrine [*Carolina Arroyo, 2012. Para 2*]. In fact, The CISG, however, does not contain a special provision dealing with questions of hardship. It does not mention either force majeure or hardship.

143. Moreover, That changes of circumstances that could have not reasonably been foreseen at the time of the conclusion of the contract and that aggravate performance, in certain cases may constitute an impediment beyond the promisor's control in light of Art. 79(1) CISG, and exempt them from liability to pay damages [*Scafom Case*].
144. Thus, it is quite understandable that during the first years after the coming into force of the CISG some scholars argued that there was no room to consider hardship under Art. 79 [*Ingeborg Schwenzer, p.713*]. Moreover, the Art. 79 states that the exemption only protects the claiming party from liability for damages. [*Larry A. DiMatteo p.272*]. However, increased procurement and production costs do not constitute exempting impediments [*Ibid p.280*].
145. In Germany, the court of did not exempt a seller from liability under Art. 79 of the CISG although the market price for the contract item, iron molybdenum from China, had risen by three hundred per cent [*Iron molybdenum case*]. The court reasoned that in a trade sectoer with highly speculative traits the threshold for allowing hardship should be raised. As such, typical fluctuations of price in the commodity trade generally will not give rise to an acknowledgement of hardship [*Benjamin Leisinge p.119*].
146. However, courts interpreting Art. 79(1) CISG have been very reluctant to allow hardship in case of fluctuations of prices. [*Steel Bar Case; Nuova Fucinati S.p.A. v. Fondmetall International A.B. Case Tribunale; Joseph Lookovsky p. 434, 438*]. Up to now, there is no single reported court or arbitral decision exempting a party – either a seller or a buyer – from liability under a CISG sales contract due to hardship. All decisions dealing with hardship under Art. 79 concluded that even a price increase or decrease of more than a hundred per cent would not suffice. [*Ingeborg Schwenzer p.716*]
147. It argued the fact the CISG does not contain clear provisions to exempt liability due to force majeure, did not imply that the possibility to revise the price due to unexpected modifications in the market was exclude [*Scafom Case*].
148. However, the international market price "rose remarkably and unforeseeably to the point that it upset the balance between the corresponding performances, The court reasoned that that the seller could not rely on hardship as a ground for avoidance,

since Art. 79 did not contemplate such a ground for an exemption. [*Nuova Fucinati S.p.A. v. Fondmetall International A.B.*]

149. Therefore, Economic fluctuations cannot be an "impediment" to the extent that they reflect the risk inherent in international trade. Indeed, according to the decisions addressing hardship under Art. 79 prior to the Steel Tubes Case, a price increase or decrease of more than 100% does not suffice. [*Brandon Nagy p.28-29*]
150. The first requirement for an exemption under CISG Art. 79 (1) is that the failure is due to an impediment, in other words an overwhelming difficulty. For a party to be exempted the impediment must be the sole reason for the failure to perform.
151. This Tribunal should consider, If the exempting impediment consists of several events, all of the events must fulfill all of the requirements for an exempting impediment [*Jenni Miettinen p.19*]. Hence, however, CLAIMANT cannot rely on Art. 79 CISG to avoid his obligation under the Contract. Therefore, RESPONDENT should not bear the Payment which CLAIMANT requested to this Tribunal.

ii. Including the Force Majeure and Hardship to the Contract and applying Art. 79 CISG is constitutes a derogation in the sense of Art. 6 CISG

152. Under the contract that has been concluded by both Parties, it is not contain any mean with REPONDENT's responsobility for the economics change in the Contract. However, Under Art. 8 CISG that party are to be interpreted according to his intent where the other party knew or could not have been unware what that intent was [*Ingeborg Schwenzer & members p. 236*].
153. CLAIMANT cannot rely on Art. 79 CISG because by including the force majeure and hardship clause into the Contract, the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art. 79 CISG. It constitutes a derogation in the sense of Art. 6 CISG
154. Moreover, Art. 79 is not excepted from the rule in Art. 6 empowering the parties to "derogate from or vary the effect of" provisions of the Convention. Decisions have construed Art. 79 in tandem with force majeure clauses in the parties' contract. One decision found that a seller was not exempt under either Art. 79 or under a contractual

force majeure clause, thus suggesting that the parties had not pre-empted Art. 79 by agreeing to the contractual provision [*CISG Case Digest*].

155. According to the principle of freedom of contract laid down in Art. 6 CISG the parties may derogate from the provisions of the Convention by including limitation and exclusion clauses [*Ingeborg Schwenzer & members p. 236*]. Therefore, under Art. 6 the Parties has a freedom to made a contract.

156. The Parties have Provided for a special regulation of the problem of change circumstances excluding an application of Art. 79 of CISG through the inclusion of a narrowly worded a hardship reference into the force majeure clause and regulated some other risks directly in the contract [*Resp. Ex. R3*]. In this case, both Parties has get into the understanding and aware of the clause.

157. In spite of the limitations imposed by the CISG on the contractual liability of the parties, namely the foreseeability rule (Art. 74), the duty to mitigate (Art. 77) and the *exemptions due to an impediment (Art. 79)* or to other circumstances (Art. 80) there is no provision in the Convention specifically addressing the parties'agreement on the limitation or exclusion of liability for failure to perform the contract, in whole or in part [*Ibid p. 238*].

158. Moreover, Art. 79 CISG did not govern a hardship which CLAIMANT cannot rely on its Art. to invoke the exemption as a basis to ask for RESPONDENT responsibility to bear all the risks that CLAIMANT request. Hence, This Tribunal should consider with its derogation from Art. 79 CISG due to it is not govern hardship and both Partie's awareness of intent at the formation of the Contract was existed.

iii. However, RESPONDENT did not breach the contract due the refuses of negotiation is beyond the contract, hence Art. 74 CISG could not be applied

159. Art. 74 CISG states that "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract." [*Art. 74 CISG*]. However, RESPONDENT did not breach of the Contract,

because Clause 12 of the Contract did not include the increasing remuneration as hardship under The UNIDROIT Principles.

160. RESPONDENT's refuses cannot be categorized as contract breaching. However, what the CLAIMANT's stated that RESPONDENT breached the contract for price adaptation when RESPONDENT'S CEO acted hostile towards CLAIMANT and refused to negotiate the price [*Cl. Ex. C8 para.10, p. 18; Cl. Memo. para. 100 p.29*], it did not constituted in the contract.
161. Moreover, it does not constitute a breach of contract because 'an obligation to renegotiate is not an obligation to agree' and that 'it is clear that such a duty (to renegotiate) does not include an obligation…to reach agreement…(and the party is not) legally required to enter into such an agreement, however reasonable it may be [*R.A Momberg Uribe p.228*].
162. The only obligation for the parties is to effectively enter into negotiations and to conduct those negotiations in good faith; but the modification of the contract is not an obligation but merely a possibility and there is no liability if a refusal by the advantaged party is not due to his abusive conduct or bad faith, even though the proposed adaptation of the contract to the new circumstances is reasonable and adequate for both parties' interests [*Ibid*].
163. CLAIMANT cannot be assumed the refuses the negotiaton is contract breaching, and CLAIMANT can rely under Art. 74 CISG outright. This Tribunal should consider with the things that should be assumed as the contract breaching. Therefore, Subject to the seller being responsible for any additional costs, and presumably limited to the rare circumstances where the assignment of the right of payment created an undue burden on the buyer [*Henry Deeb Gabriel*].
164. However, The Tribunal should not order RESPONDET to pay CLAIMANT US$ 1.250.000, which is twenty-five percent of the price of the third shipment, due to CLAIMANT has no fulfill the requirement of Art. 74 CISG itself, which can be interpreted that RESPONDENT's refuses for negotiaton to price adaptation as contract breaching.

iv. If the Tribunal find these circumtances exempted under Art. 79(1) and Art. 74, this Tribunal should consider with impediment and Risk taken

requirements for both Parties that CLAIMANT still not entitled for the Payment

165. This Tribunal should consider with the standar and indication of what CLAIMANT's request. If the Tribunal find that CLAIMANT was exempted under the hardship due to its impediment, based on The Secretariat Commentary indicates that the condition are strict [*The Secretariat Commentary, the Official Records, p.55 para.5*] but it does not indicate how strict or how big the change in the market has to be before a party can be excused on the basis of Art. 79 of CISG. Moreover, the ruling does not reflect what is to be understood as an impediment. To date, there is no judicial guideline as to what is to be understood as an "impediment" [*Anja Carlsen*].
166. However, CLAIMANT is not entitled for the Payment, and RESPONDENT has no obligation to bear all the risks that CLAIMANT's requested. Hence, this Tribunal should aware with the The normal risk of a fixed-price contract is that the market price will change [*Langham-Hill Petroleum Inc v. Southern Fuels Company*] either a significant drops in price are not unreasonable expected [*Renatha Tarquinio p.24*].
167. However, given reflect the idea that decision-rulers should apply Art. 79 of the CISG only in cases of impossibility [*Ibid p.25*]. Moreover, Changes of market prices of goods most of the times have not been accepted as a possibility of an impediment within Art. 79 (1) [*Ibid p.26*]. In most cases market fluctuations are not to be considered an "impediment" under CISG Art. 79, because such fluctuations are a normal risk of commercial transactions in general [*Alejandro*].
168. Moreover, Art. 79(5) of the CISG, as has already been pointed out, expressly relieves the affected party from damages only. Here, both Parties cannot to be assumed as damages, due to there is no circumstances which could be categorized as damages. Even, as was pointed out by RESPONDENT that even CLAIAMANT stated that awarded for damages for CLAIAMNT due to RESPONDENT breach the contract which caused by the negotiation was refused, however, it cannot be include as contract breaching. Hence, CLAIMANT is not entitled for the Payment with claim that RESPONDENT obligated for its Payment.

CONCLUSION OF ISSUE 3

169. Here, CLAIMANT is not entitled for the Payment, However, awarding CLAIMANT for damages is baseless due to RESPONDENT had not breach the contract, and this Tribunal should terminate that RESPONDENT cannot be ordered to Pay US$ 1.250.000 to CLAIMANT as restoring the equilibrium of the contract due to increasing imunertion or the retaliatory imposed by RESPONDENT was not impediment caused hardship either force majeure. Moreover, Art. 79 CISG did not govern relted to the hardship which caused CLAIMANT can be exempted and has right to ask for the Payment that should be bear by RESPONDENT. Hence, This Tribunal should adjust the contract price of the good with the base requirement if impediment related to the hardship either force majeure, also as CLAIMANT's obligation.

PRAYER OF RELIEF

In response to Arbitral Tribunal's Procedural Orders.Counsel makes the above submissions on behalf of RESPONDENT.For the reason stated in this Memorandum,Counsel respectfully requests the Arbitral Tribunal that:

1. This arbitral tribunal has no jurisdiction and/or powers under the arbitration agreement to adapt the contract and Law of Mediterraneo should not govern the arbitration agreement and its interpretation.
2. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings.
3. CLAIMANT is not entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price;

In light of the above RESPONDENT requets the Arbitral Tribunal for the following orders:

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

15th January 2019

Counsel for RESPONDENT.

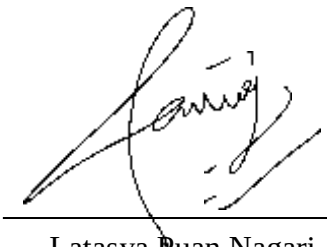
CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Dini Kartika Salsabila

Gian William Sumule

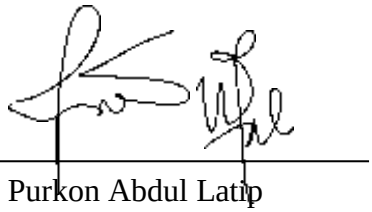
Jesslyn Antonia Mirabel



Latasya Puan Nagari

Muhammad Irsyad Marwandy

Nadine Rayna Salsabila



Purkon Abdul Latip