

**THE SIXTEENTH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION
MOOT
HONG KONG - APRIL 2019**

PHAR LAP ALLEVAMENTO, *CLAIMANT*
V.
BLACK BEAUTY EQUESTRIAN, *RESPONDENT*

MEMORANDUM FOR RESPONDENT



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Table of Contents

INDEX OF AUTHORITIES	i
INDEX OF CASES AND AWARDS	xi
TABLE OF ABBREVIATIONS	xvii
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENTS	3
ARGUMENTS	4
I. The Law of Danubia Governs the Arbitration Agreement	4
A. The Arbitration Agreement is Independent from the Sales Agreement and May be Governed by a Different Law	4
B. The Parties Consciously did not Decide on an Express or Implied Choice of Law for the Arbitration Agreement	5
C. The Arbitration Agreement is Governed by the Law of Danubia	6
1. There is no basis in urging the Tribunal to prefer or object to one law over the other.....	6
2. Applying the “Closest and Most Real Connection” test, the law of Danubia, being the law of the seat, governs the arbitration agreement.....	7
3. The law of Mediterraneo cannot govern the arbitration agreement.....	8
II. Under the Law of Danubia, the Tribunal Does Not Have the Power to Adapt the Sales Agreement	8
A. The Interpretative Obligations under Mediterranean Law and the CISG to the Arbitration Agreement are Irrelevant to the Tribunal’s Power to Adapt	8
B. The Arbitration Agreement Cannot be Interpreted in Favour of Conferring Power to the Tribunal to Adapt the Sales Agreement	9
1. CLAIMANT'S request for an increase in remuneration does not fall within the scope of disputes “arising out of this contract”	9
2. The Parties’ alleged intention in relation to the adaptation of contract cannot be used to supplement the clear wording of the arbitration agreement.....	10
3. The alleged intentions of the Parties in relation to the adaptation of the Sales Agreement is not sufficiently clear.....	11
III. CLAIMANT is Not Entitled to Submit Evidence From Unrelated Arbitration Proceedings	11
A. The Tribunal Should Use Their Broad Discretion to Exclude the Evidence Based on International Best Practices	12
1. The evidence should be excluded under Article 9(2)(g) of the IBA Rules of Evidence.....	12

i.	The Tribunal's duty is to ensure the reasonably efficient and proper conduct of the case.....	13
ii.	Opportunity to present evidence should not deprive an adverse party the right to response.....	13
2.	The evidence should be excluded under Article 9(2)(e) of the IBA Rules of Evidence.....	15
i.	The general standard of confidentiality cannot be breached by admitting this evidence.....	15
ii.	Admitting the evidence would be facilitating unlawful procurement of evidence.....	16
iii.	The authenticity of the evidence is questionable.....	17
B.	CLAIMANT Has a Full Opportunity To Present Their Case Without Admission of this Evidence.....	18
1.	The evidence is not relevant to the present arbitration.....	18
2.	The evidence is not material to the outcome.....	19
C.	The Award Rendered in This Arbitration Will be Enforceable.....	20
D.	The PIA is Not Sufficiently Significant to Justify the Breach of Confidentiality.....	21
1.	The Tribunal's duty is to the Parties to the arbitration only.....	22
2.	CLAIMANT currently does not have the PIA in their possession and is therefore unaware of its contents.....	23
IV.	CLAIMANT is not Entitled to Claim for an Increased Remuneration Under Clause 12 of the Sales Agreement or Under Art. 79 of the CISG.....	23
A.	The Tariff Imposed by the Government of Equatoriana Does not Amount to Hardship Falling Within the Narrow Ambit of Clause 12 of the Sales Agreement.....	24
1.	The imposition of the tariffs is unconnected to health and safety requirements nor is it a comparable unforeseen event which are not governed by Clause 12 of the Sales Agreement.....	25
2.	CLAIMANT'S offer of delivery DDP at a lower price during negotiations did not contain any requirement for RESPONDENT to indemnify all delivery risks.....	26
B.	Even if the Government of Equatoriana's Imposition of Tariff Falls Within the Ambit of Clause 12 of the Sales Agreement, it does not Constitute Hardship.....	28
C.	The Inclusion of Clause 12 of the Sales Agreement Constitutes a Derogation of Art. 79 in the Sense of Art. 6 of the CISG.....	29
D.	Art. 79 of the CISG Does Not Expressly Regulate Hardship Situations, nor Does it Provide for the Remedy of Increased Remuneration.....	30
1.	Art. 79 of the CISG does not regulate hardship situations.....	30

2. Art. 79 of the CISG does not provide for the remedy of increased remuneration of contract.....	32
E. The Tribunal Should Not Allow for a Price Adaptation Under the Sales Agreement.....	33
1. Mr. Shoemaker’s statement could not be construed as an affirmative agreement to renegotiate the Sales Agreement Statement.....	33
2. RESPONDENT had not acted in bad faith.....	34
REQUEST FOR RELIEFS.....	35



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[p. 3]



TABLE OF ABBREVIATIONS

&	And
Art.	Article
Cir.	Circuit
CISG	The United Nations on Contracts for the International Sale of Goods of 11 April 1980
CISG-AC	United Nations on Contracts for the International Sale of Goods - Advisory Council
Cl. Br.	CLAIMANT'S Brief
Cl. Ex.	CLAIMANT'S Exhibit
Co.	Company
Ed.	Edition
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules 2018
IBA	International Bar Association
IBA Rules of Evidence	International Bar Association Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICC Hardship Clause	International Chamber of Commerce Hardship Clause 2003
i.e.	id est [that is]
Id.	Idem
No.	Number
NoA	Notice of Arbitration
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959
PIA	Partial Interim Award
p./pp.	Page/pages



¶ / ¶ ¶	Paragraph/paragraphs
PO. 1	Procedural Order No. 1
PO. 2	Procedural Order No. 2
Res. Ex.	RESPONDENT'S Exhibit
U.K.	United Kingdom
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 2010
U.S.A.	United States of America
USD	United States Dollars
v	Versus
Vol.	Volume



STATEMENT OF FACTS

CLAIMANT, Phar Lap Allevamento (“**Phar Lap**”), is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo’s oldest and most renowned stud farm, encompassing all areas of the equestrian sport [*NoA*, p. 4, ¶ 1]. RESPONDENT, Black Beauty Equestrian (“**Black Beauty**”), is a company in Equatoriana that is renowned for their success in the equine realm, particularly being known for their broodmare lines [*NoA*, p. 5, ¶ 4].

In 2017, Equatoriana temporarily lifted their ban on artificial insemination for race horses [*Cl. Ex. C1*, p. 9]. RESPONDENT then saw an opportunity to collaborate with CLAIMANT and develop what RESPONDENT expected to be a fruitful long-term relationship. An agreement for the sale of horse semen (“**Sales Agreement**”) was entered into between CLAIMANT and RESPONDENT (“**the Parties**”) on 6 May 2017.

Prior to the conclusion of the Sales Agreement, both Parties agreed on its proper law and the law of the seat, but left the governing law of the arbitration agreement undecided. Both Parties also agreed on a narrowly worded hardship clause which was incorporated into the Sales Agreement to regulate health and safety regulations and comparable unforeseen events.

CLAIMANT was performing the final delivery when the Government of Equatoriana retaliated in the form of a 30% tariff on agricultural goods, inclusive of horse semen, from Mediterraneo. CLAIMANT then requested from RESPONDENT an increased remuneration on the grounds that their contractual obligations had become more onerous. Although the Parties had discussed the possibility for renegotiations through an unauthorised representative of RESPONDENT, and ultimately did not arrive at a consensus on a revised price, CLAIMANT still proceeded to perform the final delivery.



TIMELINE

- 21 March 2017** RESPONDENT contacted CLAIMANT to inquire on the availability of Nijinsky III, one of Phar Lap's most successful racehorses, for their new breeding programme [NoA, p. 5, ¶¶ 4-5].
- 24 March 2017** CLAIMANT offered to supply RESPONDENT with 100 doses of Nijinsky III's frozen semen, with reservations that were noted in the communications between the Parties [Cl. Ex. C2, p. 10].
- 28 March - 12 April 2017** The Parties negotiated and agreed upon Delivery Duty Paid (DDP) delivery, price, and the relevant systems of law governing the Sales Agreement [Cl. Ex. C4, p. 12, ¶ 3 ; Res. Ex. R2, p. 34, ¶¶ 3-4] .
- 6 May 2016** The Sales Agreement was signed [Cl. Ex. C5, pp. 13-14].
- 19 December 2017** The Government of Equatoria counter-imposed a 30% tariff on all agricultural goods from Mediterraneo as a retaliation to the 25% tariff previously imposed by the Government of Mediterraneo.
- 20 January 2018** CLAIMANT contacted RESPONDENT seeking a solution while withholding the shipment [CL. Ex. C7, p. 16].
- 21 January 2018** RESPONDENT reverted to CLAIMANT expressing their desire to have the semen shipped. CLAIMANT performed the delivery although consensus on a revised price had not been reached between the Parties.
- 31 July 2018** CLAIMANT submitted the dispute to the Hong Kong International Arbitration Centre ("HKIAC") in a NoA to request outstanding contractual payments through the mechanism of price adaptation [NoA, p. 4].



SUMMARY OF ARGUMENTS

The arbitration agreement is independent from the Sales Agreement and may be governed by a different law **[I(A)]**. Despite the parties not having consciously decided on an implied or express choice of law to govern the arbitration agreement **[I(B)]**, the arbitration agreement is governed by the law of Danubia **[I(C)]**. Therefore, the Tribunal lacks the power to adapt the Sales Agreement as the Tribunal has not been expressly empowered to do so. The interpretative obligations under Mediterranean law and the CISG to the arbitration agreement are irrelevant **[II(A)]**. Furthermore, the arbitration agreement cannot be interpreted to confer upon the Tribunal power to adapt the Sales Agreement **[II(B)]**.

CLAIMANT is not entitled to submit evidence from RESPONDENT'S previous arbitral proceeding based on applicable circumstances of exclusion under the IBA Rules of Evidence **[III(A)]**. The evidence is also not relevant or material to the current dispute, as outlined in the IBA Rules of Evidence **[III(B)]**. Furthermore, failure to admit the evidence will not affect the enforceability as proper arbitral procedure would still be complied with **[III(C)]**. In any event, the PIA would not be sufficient to justify the CLAIMANT'S breach of confidentiality **[III(D)]**.

CLAIMANT is also not entitled to claim for an increased remuneration neither under Clause 12 of the Sales Agreement nor Art. 79 of the CISG. The tariff in dispute does not amount to a hardship falling within the narrow ambit of Clause 12 of the Sales Agreement **[IV(A)]**, as it was not caused by health and safety requirements nor was it a comparable unforeseen event. Should the Tribunal consider that it does, the tariff does not constitute a hardship as it did not fundamentally alter the equilibrium of the Sales Agreement **[IV(B)]**. RESPONDENT submits that inclusion of the hardship clause derogates Art. 79 of the CISG pursuant to Art. 6 of the CISG **[IV(C)]**. In the event that the Tribunal does not consider it a derogation, Art. 79 of the CISG does not regulate hardship situations, and furthermore does not provide for the remedy of increased remuneration **[IV(D)]**. Taken collectively, the Tribunal should not allow for a price adaptation of the Sales Agreement as RESPONDENT had not acted in bad faith **[IV(E)]**.



ARGUMENTS

I. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT

1. RESPONDENT submits that it is the law of Danubia that governs the arbitration agreement. CLAIMANT argues that the doctrine of separability does not mandate that the choice of law must be different from that of the underlying contract [*Cl. Br. p. 6, ¶ 8*]. CLAIMANT also argues that the Tribunal may apply choice of law rules to determine the governing law of the arbitration agreement [*Id.*].

2. RESPONDENT accepts CLAIMANT'S position insofar as the general principle of the doctrine of separability is concerned [*Id.*]. RESPONDENT also concurs with CLAIMANT regarding the Tribunal's discretion in the application of different choice of law rules in determining the governing law of the arbitration agreement. However, RESPONDENT submits that the arbitration agreement, which is independent from the Sales Agreement, may be governed by a different law [A]. Further, the Parties did not consciously decide on an express or implied choice of law to govern the arbitration agreement [B]. Therefore, by applying the applicable choice of law rules, the law of Danubia is the law that governs the arbitration agreement [C].

A. The Arbitration Agreement is Independent from the Sales Agreement and May be Governed by a Different Law

3. Contrary to CLAIMANT'S allegations, RESPONDENT had never taken the position that the doctrine of separability mandates that the governing law of the arbitration agreement must be different from that of the Sales Agreement [*Cl. Br. pp. 5-6, ¶¶ 7-8*]. The doctrine of separability, as RESPONDENT argued in their *Answer to the Notice of Arbitration*, meant, first and foremost, that the specific choice of law clause which precedes the arbitration agreement only concerns the law applicable to the main contract. Secondly, given the doctrine of separability, it cannot therefore be automatically interpreted as the Parties' choice of law for the arbitration agreement, whether it be as an express or implied choice [*ANoA, p. 31, ¶ 14*].

4. As CLAIMANT themselves have acknowledged, the Parties may select a choice of law to govern the arbitration agreement by virtue of the doctrine of separability [*Cl. Br. p. 6, ¶ 8*]. It may thus be governed by a different law from that which governs the main agreement [*Born (2008), p. 473; Sutton, Gill, & Gearing, p. 90; Jones, p. 912; Lew, Mistelis, & Kröll, p. 107*]. Consequently, the acceptance



of an arbitration agreement contained in a contract does not automatically call for the law of the contract to govern the arbitration agreement [*Habas Sinai/VSC Steel*, p. 22]. The Parties, in their negotiations, recognised that a specific law was to be chosen to govern the arbitration agreement, but did not ultimately agree on a choice of law, leaving the choice to be made in accordance with the general choice of law rules [*Res. Ex. R2*, p. 34; *Cl. Ex. C5*, p. 13].

5. CLAIMANT also refers to the presumption laid down in *Sulamérica* as the basis of finding favour in the law of Mediterraneo, being the law of the contract [*Cl. Br. p. 6*, ¶ 9]. RESPONDENT submits it is impractical to rely on this starting presumption alone to disregard the application of the seat law to the arbitration agreement. To assume that an arbitration agreement is governed by the same law that governs the substantive issue in the contract is not a safe presumption, as it is premised on the notion that the parties do not usually decide on an express choice of law to govern their arbitration agreement [*Blackaby, Partasides, Redfern & Hunter*, p. 158; *Sulamérica/Enesa*, pp. 7-8]. This should no longer reflect the commercial realities in today's arbitration landscape. Parties to an arbitration are advised to, and often execute a separate choice of law clause for the arbitration agreement to be stipulated in the final agreement [*Blackaby, Partasides, Redfern & Hunter*, p. 158].

B. The Parties Consciously did not Decide on an Express or Implied Choice of Law for the Arbitration Agreement

6. Most model clauses found from leading arbitral institutions, such as the HKIAC Model Clause, do contain an explicit reference to the law governing the arbitration agreement. The Parties in the present dispute had proposed and discussed the specific law governing the arbitration agreement multiple times [*Res. Ex. R1*, p. 33, ¶ 2; *Res. Ex. R2*, p. 34, ¶ 4]. Thus the Parties did not intend for the law governing the Sales Agreement to govern the arbitration agreement by default as there were specific discussions and concerns as to the applicable law. It does not follow that the Parties should be *assumed* to have intended the law governing the Sales Agreement to also govern the arbitration agreement [*Glick & Venkatesan*, pp. 144-145; *Collins, Dicey, Humphrey, & Morris*, p. 717].

7. Therefore, the first step that must be taken in order to ascertain the governing law is to regard the arbitration agreement as being legally and juridically independent from the main agreement [*Born (2008)*, p. 475]; an arbitration agreement is distinct from the main contract that contains it [*Collins, Dicey, Humphrey, & Morris*, p. 716; *Lew, Mistelis, & Kröll*, pp. 102-103; *Fiona*



Trust/Privalov, p. 4]. Second, it is important to recognise that the Parties consciously did not expressly or impliedly choose a law to govern the arbitration agreement by their acceptance of the Sales Agreement, as rightly pointed out by CLAIMANT [*Cl. Br. p. 6, ¶ 10*]. Consequently, there can be no presumed intent whether expressly or impliedly in favour of the law of contract. The choice of law must therefore be determined independently [*C/D, p. 4; Collins, Dicey, Humphrey, & Morris, p. 717*].

C. The Arbitration Agreement is Governed by the Law of Danubia

8. RESPONDENT corroborates CLAIMANT'S argument insofar as the possible application of different choice of law rules and the interplay between the law of contract and law of the seat are concerned [*Cl. Br. p. 6, ¶ 10; Russell, p. 91*]. Nonetheless, RESPONDENT submits that contrary to CLAIMANT'S arguments, there is no basis in urging the Tribunal to prefer or object to one law over the other [*Cl. Br. p. 7, ¶¶ 11-15*] (1). Further, RESPONDENT also submits that by applying the “closest and most real connection” test, it is the law of Danubia, being the law of the seat, that governs the arbitration agreement (2). In any event, RESPONDENT submits that the law of Mediterraneo cannot govern the arbitration agreement (3).

1. There is No Basis in Urging the Tribunal to Prefer or Object to One Law Over the Other

9. CLAIMANT relies on *Sonatrach* as the basis of applying the law of contract to the arbitration agreement and erroneously asserts that such an application is “a default rule” [*Cl. Br. p. 7, ¶ 11*]. As confirmed by the U.K. Court of Appeal in the latter case of *Sulamérica*, this proposition of arbitration agreements being governed by the law of contract is merely a starting assumption. A deeper analysis of *Sonatrach* itself reveals the judge’s inclination towards the “closest and most real connection” test that would see its approval in later cases, including *Sulamérica* [*Sonatrach/Furrell, p. 5*].

10. CLAIMANT asserts that by extending the choice of law of the Sales Agreement to the arbitration clause itself, the Tribunal would be recognising the law to which the Parties have already consented thereby giving effect to party autonomy [*Cl. Br. p. 7, ¶ 13*]. According to CLAIMANT, the fact that the law of Mediterraneo had been chosen as the proper law of the main agreement following discussion by the Parties necessitates that the Parties also intended for it be applicable to the arbitration agreement [*Cl. Br. p. 7, ¶ 15*].



11. CLAIMANT conveniently disregards the fact that the Parties had also chosen the law of Danubia as the law of the seat [*Res. Ex. R2, p. 34, ¶ 4*]. The Parties had never consented to the law of Mediterraneo to govern the arbitration agreement [*Res. Ex. R1, p. 33, ¶ 2*], neither was it contained in the arbitration agreement [*Id.*]. The law of Mediterraneo was only intended to be applicable to be the sales part of the Sales Agreement as CLAIMANT themselves suggested [*Cl. Ex. C2, p. 10, ¶ 5*]. CLAIMANT'S argument has failed to sufficiently explain the bearing that the Parties' choice of Mediterranean law has on the governing law of the arbitration agreement.

2. Applying the “Closest and Most Real Connection” Test, the Law of Danubia, being the Law of the Seat, Governs the Arbitration Agreement

12. CLAIMANT relies on *Sulamérica* to lay down the presumption that applies the law of the underlying contract to the arbitration agreement, barring any contrary intentions [*Cl. Br. p. 6, ¶ 9*]. This contention, while correct, cloaks a very important consideration that CLAIMANT has omitted from their analysis. Pursuant to *Sulamérica*, the governing law of the arbitration agreement is determined according to the the law that has the closest and most real connection with it, in the absence of an express or implied choice of the Parties [*Sulamérica/Enesa, pp. 11-12; Habas Sinai/VSC Steel, p. 19; BCY/BCZ, p. 15*]. By applying the “closest and most real connection” test, it is the law of Danubia, being the law of the seat, that governs the arbitration agreement [*C/D, p. 6; Sulamérica/Enesa, p. 15; Collins, Dicey, Humphrey, & Morris, p. 718; Mustill & Boyd, p. 63*].

13. First, the law of the seat is most closely connected to the characteristic performance of the arbitration agreement which is an obligation to arbitrate disputes [*Greenberg, Kee, & Weeramantry, pp. 160-161*]. The place of performance of this obligation, therefore, is most closely connected to the legal place of the arbitration, that is, the place where the arbitral procedure will happen [*Id.*] The present arbitration is seated in Vindobona, Danubia [*PO.1, p. 53, ¶ IV*]. RESPONDENT submits therefore that the arbitration agreement is most closely connected to Danubia and the law of Danubia which ultimately governs it as opposed to the law of Mediterraneo.

14. Secondly, the law of Danubia, being the law of the seat, governs many aspects of this arbitration [*Glick & Venkatesan, p. 142*]. It has the closest and most real connection to the arbitration agreement in that it exercises the supporting and supervisory jurisdiction necessary to ensure the effectiveness of the arbitral procedure [*Sulamérica, p. 15*]. For instance, the law of Danubia aids



arbitral proceedings by regulating its procedural aspects in conjunction with the HKIAC Rules [*Blackaby, Partasides, Redfern & Hunter, pp. 168-170*]. It also provides the courts the power to entertain a challenge to the arbitration or to remit the matter to the arbitrators during the proceedings [*Briggs, p. 496*]. The effective conduct of an international arbitration is therefore dependent upon the law of the place of arbitration [*Redfern & Hunter, p. 168*].

3. The Law of Mediterraneo Cannot Govern the Arbitration Agreement

15. In the event that the substantive relationship between the parties breaks down, the parties' desire for neutrality comes to the fore and the procedural law of the arbitration takes precedence over the substantive law [*FirstLink/GT Payment, p. 8*]. There cannot be any inference that the parties would envisage their rights and obligations under the arbitration agreement be governed by the same law that applies to the substance of the dispute [*Id.*]. As per CLAIMANT'S request, Equatoriana was eliminated as the seat of arbitration in favour of Danubia for the sake of neutrality [*Id.; Res. Ex. R1, p. 33, ¶ 2*]. Therefore, the law of Mediterraneo cannot govern the arbitration agreement for want of neutrality which could prejudice RESPONDENT.

II. UNDER THE LAW OF DANUBIA, THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE SALES AGREEMENT

16. CLAIMANT argues that the Tribunal has the power to adapt the Sales Agreement [*Cl. Br. p. 8, ¶ 7*]. CLAIMANT also argues that the CISG applies to the arbitration agreement and allows the Tribunal to adapt the Sales Agreement in light of the Parties' subjective and objective intention [*Cl. Br. pp. 9-10, ¶ 21-24*]. However, RESPONDENT submits that the interpretative obligations under Mediterranean law and the CISG to the arbitration agreement are irrelevant to the Tribunal's power to adapt [**A**] since the arbitration agreement is governed by the law of Danubia. RESPONDENT further submits that the arbitration agreement cannot be interpreted to confer upon the Tribunal the power necessary to adapt the Sales Agreement [**B**].

A. The Interpretative Obligations under Mediterranean Law and the CISG to the Arbitration Agreement are Irrelevant to the Tribunal's Power to Adapt

17. The arbitration agreement is governed by the law of Danubia and not by the law of Mediterraneo. While recognising that the Tribunal may adapt contracts, the law of Danubia requires an express empowerment as the basis of that authority [*ANoA, p. 31, ¶ 13*]. Thus, if the Tribunal



had been expressly and contractually authorised, it would acquire the competence to adapt contracts and therefore would not be in violation of *pacta sunt servanda* [Berger (2004), p. 5]. However, such a conferral of power is lacking, as acknowledged by CLAIMANT [Cl. Br. p. 9, ¶ 22]. As a result, the Tribunal lacks power to adapt the Sales Agreement [ANoA, p. 31, ¶ 13].

18. Therefore, it is irrelevant whether or not the law of Mediterraneo, which favours a wide interpretation of arbitration agreements, allows the Tribunal to adapt the Sales Agreement even without an express conferral of such power [Cl. Br. p. 8, ¶ 17]. Equally, it is immaterial whether Art. 8 of the CISG, as CLAIMANT appears to argue, forms the basis for the Tribunal to adapt the Sales Agreement. The application of the CISG to the interpretation of arbitration agreements is peculiar only to Mediterranean jurisprudence [PO.1, p. 52, ¶ 4]. Neither Mediterranean law nor CISG is relevant to the Tribunal's power under the arbitration agreement to adapt the Sales Agreement; this is a matter that should be determined solely in accordance with Danubian law.

B. The Arbitration Agreement Cannot be Interpreted in Favour of Conferring Power to the Tribunal to Adapt the Sales Agreement

19. The law of Danubia adheres to the “four corners rule” to interpret contracts, including arbitration agreements [NoA, p. 32, ¶ 16]. That is, the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [UNIDROIT Art 2.1.17]. In particular, reliance on the drafting history and preceding communication is to be excluded if the wording is sufficiently clear [*Id.*]. RESPONDENT submits that CLAIMANT'S request for an increased remuneration, which requires the Tribunal to adapt the Sales Agreement, does not fall within the scope of disputes ‘arising out of this contract’ (1) and that the Parties’ preceding communication cannot be used to supplement the clear wording of the arbitration agreement (2). RESPONDENT further submits that even if the Tribunal were to take into account this extrinsic evidence, the Tribunal would find that the alleged intent of the Parties in relation to the adaptation of the Sales Agreement is not sufficiently clear (3).

1. CLAIMANT'S Request for an Increase in Remuneration does not Fall within the Scope of Disputes “Arising Out of this Contract”

20. Parties to an arbitration may choose to exclude certain disputes from the scope of their arbitration agreement [Born (2008), pp. 1384-1385]. One way to achieve this is by introducing



amendments to the institutional rules that parties have agreed to employ [*Born (2016)*, pp. 62-63]. Prior to the conclusion of the Sales Agreement, CLAIMANT and RESPONDENT had agreed on a modified arbitration agreement that was based on the HKIAC Model Clause [*Res. Ex. R1*, p. 33, ¶ 2]. This arbitration agreement had been narrowed down and streamlined to reduce the broad wording of the Model Clause [*Res. Ex. R2*, p. 34, ¶ 4]. In particular, the references to “controversy, difference or claim”, “relating to this contract”, “or any disputes regarding non-contractual obligations arising out of or relating to it” had all been removed [*HKLAC Model Clause 2018*]. In effect, the Parties had made a conscious decision to ensure that only certain disputes are capable of being arbitrated.

21. The Tribunal’s power to adapt the Sales Agreement can be derived from three different legal sources: the arbitration agreement, the law applicable to the arbitration, and the law applicable to the substance of the dispute [*Berger (2004)*, pp. 7-8]. However, in the present dispute, only the *lex arbitri* deals with the issue of adaptation, and it requires an express empowerment in order for the Tribunal to adapt the contracts [*ANoA*, p. 31, ¶¶ 12-13]. CLAIMANT is not requesting the Tribunal to order a payment on the basis of an interpretation of the contract but actually asks for its adaptation for which the Tribunal has to be expressly empowered under the law of Danubia [*Id.*].

2. The Parties’ Alleged Intention in Relation to the Adaptation of Contract Cannot be Used to Supplement the Clear Wording of the Arbitration Agreement

22. CLAIMANT alleges that the Parties’ mutual intention was to grant the Tribunal power to adapt the contract, appearing to base its argument on the fact that the Parties took great interest discussing the inclusion of a hardship clause [*Cl. Br.* p. 9, ¶¶ 21-22]. CLAIMANT further argued that it was RESPONDENT who suggested leaving the question of adaptation of contract to the Tribunal [*Id.*]. While RESPONDENT acknowledges that such discussions took place, these pre-contractual communications cannot be used to vary or supplement the arbitration agreement which is clear and unambiguous due to the “four corners rule” [*ANoA*, p. 32, ¶¶ 16-17].

23. The “four corners rule” in substance is largely similar to *Art 2.1.17 of the UNIDROIT Principles* [*PO.2*, p. 16, ¶ 45]. It provides that a contract in writing cannot be contradicted or supplemented by evidence of prior statements or agreements. This extrinsic evidence cannot be admitted in that parties should not be able to allege with impunity that there were other terms which were not incorporated into the final written document [*McKendrick*, p. 162; *Jacobs/Batavia*, p. 5]. Upon



signing the Sales Agreement, the Parties have understood and undertaken the obligation to abide by the terms and conditions as set forth in the agreement [*Cl. Ex. C5, p. 14, ¶ 15*]. There is no provision within the four corners of the Sales Agreement that expressly provides for the Tribunal to adapt [*Id.*]. Therefore, CLAIMANT cannot rely on the purported mutual intent of both Parties to augment the arbitration agreement or the Sales Agreement to grant the Tribunal the power of adaptation.

3. The Alleged Intention of the Parties in Relation to the Adaptation of the Sales Agreement is Not Sufficiently Clear

24. Even if the Tribunal were to consider the extrinsic pre-contractual evidence, i.e. the Parties' mutual intent in relation to the adaptation of contracts, RESPONDENT respectfully submits that the Tribunal would still come to the conclusion that the Parties did not intend, let alone agree to empower the Tribunal to adapt the Sales Agreement.

25. CLAIMANT portrays an incomplete set of facts that have obscured two important considerations [*Cl. Br. p. 9, ¶¶ 21 – 23*]. First, while Ms. Napravnik, proposed having a mechanism for adaptation in the contract to Mr. Antley, stated that adapting the contract should probably be the task of the arbitrators [*Cl. Ex. C8, p. 17, ¶ 4*]. This cannot be taken to mean that at that point, Mr. Antley had agreed to grant the arbitrators the authority to adapt contracts. Second, although Mr. Antley, following the discussion, did promise to come back with a proposal, he did not make any promise of including the suggested mechanism for adaptation in the proposal [*Id.*]. Therefore, there was no clear intention or agreement to adapt contracts that can be sufficiently inferred or deduced from the pre-contractual negotiations between the Parties.

III. CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM UNRELATED ARBITRAL PROCEEDINGS

26. On the assumption that this evidence has been obtained either through a breach of confidentiality agreement or illegal hack of RESPONDENT'S computer system, RESPONDENT submits that it should not be admitted. RESPONDENT respectfully requests that the Tribunal exercise their full discretion in determining the admissibility of the evidence.

27. In acknowledging the Tribunal's full discretion, RESPONDENT directs the Tribunal towards international best practices in determining admissibility based on efficiency and fairness (A),



as well as each Party's full opportunity to present their case (B). By adhering to fundamental procedural requirements, RESPONDENT thus submits that there will be no issues with enforcement at a later stage (C). In any event, RESPONDENT is of the position that the PIA is not sufficiently significant to justify facilitating unlawful procurement of evidence (D).

A. The Tribunal Should Use Their Broad Discretion to Exclude the Evidence Based on International Best Practices

28. The Parties have not expressly decided on a specific law to govern evidence. RESPONDENT asks the Tribunal to consider use of the IBA Rules of Evidence as this procedural framework is commonly used due to its position as the 'international standard' and 'best practice' for effective document production [*Salomon/Friedrich*, p. 568; *Marghitola*, p. 33; *Emanuele & Molfa*, p. 58]. The laws of Mediterraneo, Equatoriana, and Danubia do not contain specific rules on the taking of evidence [*PO. 2*, p. 61, ¶ 46]. RESPONDENT submits that the evidence must be excluded based on several criteria under the IBA Rules of Evidence.

29. Contrary to CLAIMANT'S position that none of the exclusions under Article 9(2) of the IBA Rules of Evidence apply, RESPONDENT submits that CLAIMANT has failed to address several relevant exceptions [*Cl. Br. pp. 12-13*, ¶ 33]. Admitting the PIA will infringe fairness and equality in the arbitral procedure (1), and run counter to the limited scope of the unrelated arbitration between RESPONDENT and a third-party. (2)

1. The Evidence Should Be Excluded Under Article 9(2)(g) of the IBA Rules of Evidence

30. The ambit of Article 9(2)(g) assures procedural economy, proportionality, and equality in every case [*Commentary on the IBA Rules of Evidence*]. Thus the broad aim of the Article is to achieve fair, effective, and efficient hearings [*Id.*]. To view Article 9(2)(g) in conjunction with its broad aim, the Tribunal may utilize the grounds of fairness and procedural economy to exclude evidence or deny production requests. In order to meet the aim of Article 9(2)(g) RESPONDENT invites the Tribunal to note that part of their duties include ensuring efficient and proper conduct of proceedings (i), and that RESPONDENT'S right to respond would be deprived in the event that the evidence is admissible (ii).



i. It is the Tribunal's Duty to Ensure Reasonably Efficient and Proper Conduct of the Case

31. It is crucial that the Tribunal ensures reasonable efficiency and proper conduct of the proceedings, as these are some of the inherent advantages of international arbitration [*JJ/Transwestern*].

32. Since CLAIMANT is the Party raising the evidence, the burden of proof rests with CLAIMANT to prove the authenticity of the evidence. However, both CLAIMANT and RESPONDENT are incapable of proving its authenticity as CLAIMANT's source refused to disclose their source and RESPONDENT is bound by confidentiality [*PO. 2, p. 61 ¶ 41*]. Therefore, if this evidence was to be considered admissible, it would further delay the proceedings as the authentication process is far from straightforward. Not only would CLAIMANT be raising evidence that they themselves are unable to authenticate, but RESPONDENT would also be unable to comment on its accuracy.

ii. The Admission of Evidence Should Not Deprive an Adverse Party Their Right to Response

33. Procedural fairness is a fundamental principle in international arbitration [*Waincymer, p. 752*]. In pursuit of procedural fairness, reasonable opportunity must be afforded to parties in order to present their case. However, granting both parties a full opportunity is subject to the condition that the evidence would not cause another party to be at a substantial disadvantage [*Dombo Bebeer/Netherlands, ¶ 35; Fraport/Phillipines, ¶ 133*]. Pursuant to Article 9(2)(g), the Tribunal may refuse to admit evidence that would put RESPONDENT in a position where they do not have a fair opportunity to respond [*Id.*].

34. If the Tribunal were to admit the PIA, RESPONDENT would not be given reasonable opportunity to address the evidence before it as RESPONDENT is under an express obligation to keep the previous proceedings confidential [*Letter to Fasttrack, p. 51, ¶ 1*]. As noted above, RESPONDENT cannot comment on or verify the accuracy of the PIA provided by CLAIMANT in comparison with the one that has been produced in the previous arbitration. RESPONDENT would thus be defenseless to the admission of evidence, as they do not have the capacity to authenticate it.



35. On the presumption that the evidence is false, RESPONDENT will only be able to challenge the evidence on the ground of authenticity of source after the evidence is submitted to the Tribunal [*Waincymer*, p. 774]. Since RESPONDENT cannot positively deny or confirm the evidence by submitting the original PIA, RESPONDENT will only be limited to question the source of the evidence. RESPONDENT submits that they would be in an unfair position, as there is a clear risk that the Tribunal would already be influenced by the evidence before a challenge can be made (1). Should the Tribunal dismiss the challenge, RESPONDENT is left with no alternate avenue to pursue due to confidentiality requirements (2).

36. Alternatively, in the event that the evidence will be accurate, the PIA can only display the jurisdiction of the Tribunal to adapt the contract and the position taken by RESPONDENT in the previous proceeding [*PO2*, p. 60, ¶ 39]. CLAIMANT'S purpose of submitting the evidence is to indicate the contradictory behaviour of RESPONDENT and claim that RESPONDENT should not act in a manner that is different from the previous proceeding [*Cl. Br.* p. 15, ¶ 43]. CLAIMANT'S allegation would suggest that the application of an equitable estoppel in the current dispute is “to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding” [*Konstantinidis/Chen*, p. 937; *Davis/Wakelee* p. 689; *Galt/Phoenix*, p. 726]. In order for CLAIMANT to state that there is an equitable estoppel, it is necessary for the parties in the different arbitrations to be the same [*Galt/Phoenix*, p. 726; *Officer/Owens*, p. 342], and the party seeking to invoke the estoppel must be the adverse party in the previous proceeding [*Konstantinidis/Chen*, p. 937].

37. The circumstances in the current dispute are insufficient to satisfy the existence of an equitable estoppel based on the above requirements. Both arbitrations consist of different parties, as CLAIMANT is not an adverse party in the previous proceeding. Unlike the above principle on equitable estoppel, which can be observed in the United States, CLAIMANT has failed to establish that Danubian law provides any such provisions or circumstances that give rise to equitable estoppel. In the absence of any form of estoppel, the decision of a previous arbitration is only binding to parties belonging to that proceeding [*Blackaby, Partasides, Redfern & Hunter*, p. 563].

38. RESPONDENT maintains their position that the allegations made by CLAIMANT do not reflect reality and have been isolated from any relevant context [*Letter by Fasttrack*, p. 50, ¶ 3].



However, should the Tribunal operate on the presumption that RESPONDENT has adopted an alternate position in the previous arbitration, RESPONDENT submits that there is no legal impediment preventing RESPONDENT from doing so.

2. The Evidence Should Be Excluded Under Article 9(2)(e) of the IBA Rules of Evidence

39. Confidentiality is often regarded as one of the hallmarks of international commercial arbitration, and is often the determinative factor in selecting this dispute resolution mechanism over others [*Knabr & Reinisch*, p. 97; *Hanotiau*, pp. 89-90]. On par with the trend seen in international commercial disputes, arbitration has been consensually selected by the Parties, meaning that all of its fundamental features should be maintained. The evidence should be excluded to preserve confidentiality (i), to avoid indirectly supporting the unlawful procurement of evidence (ii), and in recognition of the questionable authenticity of the evidence (iii).

i. The General Standard of Confidentiality Cannot Be Breached by Admitting This Evidence

40. Article 9(2)(e) of the IBA Rules of Evidence specifies both commercial and technical aspects of confidentiality. Possession of the PIA by CLAIMANT could only have occurred in the event that contractual and statutory obligations had been violated [*Letter by Fasttrack*, p. 50, ¶ 1]. As the previous arbitration, which was also commenced under the HKIAC Rules, is protected by Article 42: there is an express obligation to ensure the confidentiality of proceedings [*Id.*]. Although CLAIMANT is not bound to the terms of confidentiality within RESPONDENT'S previous arbitration, RESPONDENT submits that CLAIMANT should be fully aware of the confidentiality terms and standards, since CLAIMANT themselves is subject to the same standards under the HKIAC Rules in the present arbitration.

41. On the assumption that the evidence had been obtained through a breach of confidentiality agreement, two of the former employees of RESPONDENT were identified as one of the sources of the leak [*Letter by Fasttrack*, p. 50, ¶ 3]. Both employees were under a contractual obligation to keep all information about the other arbitral proceeding confidential [*PO. 2*, p. 61, ¶ 41]. To admit the evidence would severely undermine the importance of confidentiality agreements, as well as negate any form of repercussion.



42. Alternatively, the PIA could have been obtained by a hack of RESPONDENT'S computer system [*Letter by Fasttrack*, p.50, ¶ 3]. In several investment arbitration cases, where transparency is generally more highly prioritized, evidence obtained by means of illegal hack was not admissible [*Hay*, p. 212]. RESPONDENT intends to draw a comparison between the trend seen in investment arbitration and apply it to commercial arbitration, indicating that despite the increased propensity towards transparency, illegally obtained evidence was still not admissible for specific and relevant reasons that will be outlined by RESPONDENT.

43. CLAIMANT, or any party on their behalf, had the capacity to illegally hack into RESPONDENT'S computer system due to the nature of its firewall [*PO. 2*, p. 61, ¶ 42]. To simplify, the hackers were in a position where they were able to exploit their capabilities due to a difference in technological prowess. Similarly, an investment arbitration case saw that the government had been able to intercept email communications by government surveillance [*Libananco/Turkey*]. The ICSID Tribunal in this case made the decision to protect privileged information and ultimately excluded the evidence from the proceedings, despite acknowledgement that the government surveillance was not unlawful. In comparing the circumstances surrounding the method used to obtain the evidence, RESPONDENT submits that the privileged information must be protected. Even though investment arbitration must take public interests into consideration, the protection of confidential information was held to be of utmost importance. RESPONDENT asks the Tribunal to consider the gravity of confidentiality, particularly in comparison with investment arbitration.

ii. Admitting the Evidence would be Facilitating Unlawful Procurement of Evidence

44. Using the Tribunal as a mechanism to facilitate and condone illegally obtained evidence cannot be justified. On these particular facts, CLAIMANT had already made arrangements to obtain the PIA from a company with a doubtful reputation [*PO. 2*, p. 61, ¶ 41]. Thus the decision to admit illegally obtained evidence would mean that such methods would indirectly be endorsed by the Tribunal, causing the depletion of one of the core characteristics of arbitration. The trust that parties place in arbitration being confidential would be questionable in the future, as even illicit means of obtaining evidence would be considered acceptable to breach confidentiality agreements.



45. CLAIMANT has submitted that they should not be held accountable for the actions of third parties, including that of the horse racing intelligence company [*Cl. Br. p. 17, ¶ 48*]. RESPONDENT submits that CLAIMANT cannot be permitted to use third parties as puppets in their endeavours towards obtaining confidential evidence without incriminating themselves.

46. The Tribunal may thus consider their inherent long-term duty to protect the integrity and legitimacy of the arbitral process [*Cohen & Morril, p. 994*]. Public trust in arbitration will waver in light of facilitated unauthorized intrusions; if computer hacking appears to threaten the integrity of arbitration, it *de facto* becomes the Tribunal's duty to act against it [*Id.*]. RESPONDENT submits that use of illegally obtained data either by, or on behalf of a party involved would irreparably taint the arbitral proceedings [*Cohen & Morril, p. 995*].

iii. The Authenticity of the Evidence is Questionable

47. RESPONDENT submits that the evidence is not necessarily genuine to RESPONDENT'S other dispute. The time and consideration spent on whether or not this evidence is admissible may be futile as CLAIMANT cannot ascertain its authenticity, despite being the Party raising it. The high level of importance entrusted to documentary evidence means that it must be accurate and authentic [*O'Malley, p. 23*]. As is often the case with illegally obtained evidence, failure to extract evidence from a valid and trustworthy source raises concerns on its validity. The company that CLAIMANT contacted has a doubtful reputation as to where the information is sourced from and maintains full privacy in its sources [*PO. 2, pp. 60-61, ¶ 41*].

48. Since international arbitration does not require documentary evidence to be validated by witnesses, it largely operates on the presumption that evidence raised is valid [*Waincymer, p. 828*]. Thus when discussing evidence, there are several fundamental presumptions that facilitate smooth evidential procedure. First and foremost is that documents submitted should emanate from the source indicated [*Id.*]. On this ground, the company has refused to disclose its sources in the present case, and RESPONDENT'S previous arbitration is protected by Art. 42 of the HKIAC Rules [*PO. 2, p. 61, ¶ 41*]. Secondly, the document has been received by the addressee. However, on this point, CLAIMANT has not even seen the PIA, and is therefore not yet in possession of it [*PO. 2, p. 60, ¶ 41*]. Lastly, the copy must be an accurate representation of the original. Since the latter two presumptions cannot be confirmed, neither Party will be able to confirm the validity of the PIA.



49. As CLAIMANT'S efforts to admit the evidence is by utilizing unclear and unauthenticated means, RESPONDENT respectfully asks the Tribunal to exercise their discretion and find that it should not be admitted. To consider the long-term consequences, the Tribunal's decision to admit this particular piece of evidence, only to find that it is not a valid or original copy of the PIA, would only result in greater inefficiency and delays to the current proceeding.

B. CLAIMANT Has a Full Opportunity To Present Their Case Without Admission of this Evidence

50. RESPONDENT concurs with the statement made by CLAIMANT where parties have the right to present evidence relevant to their case. [*Cl. Br. p. 13, ¶ 35*]. Pursuant to Article 9(2)(a) of the IBA Rules of Evidence, the Tribunal may refuse to admit evidence without violating the right to be heard, if the evidence lacks sufficient relevance to the case (1) or lacks materiality to its outcome (2) [*P.196/2003*]. Hence, unlike the statement made by CLAIMANT that CLAIMANT'S right to a full case would be violated if the evidence was not admitted [*Cl. Br. p. 13, ¶ 35*]. RESPONDENT submits that CLAIMANT would not be deprived of a full opportunity as the evidence submitted by CLAIMANT is not relevant or material to the current dispute.

1. The Evidence is Not Relevant to the Present Arbitration

51. The standard for “relevancy” is determined by whether the evidence is relevant to the substantive issue of the case and whether the evidence is likely to be necessary for a party to prove an allegation [*ADF/United States; O'Malley, p. 270, ¶ 9.09*]. Furthermore, the standard of relevancy also refers to the probative value of the evidence as it relates to a party's burden of proof [*AAPL/Sri Lanka*]. In the current dispute, the burden of proof fall on CLAIMANT to prove, on a balance of probabilities, that the evidence from the previous arbitration is relevant to the current dispute [*O'Malley, p. 55*].

52. In the current dispute, the PIA does not represent the entirety of the previous proceeding. The information contained in the PIA is insufficient for it to make an impact in the current dispute. In two separate international commercial arbitrations, there are a multiplicity of avenues for the proceedings to be different, including but not limited to a different course of dealing, where a different approach was taken by parties to negotiate, or different clauses drafted by the parties. All of these independent characteristics can be used to determine the outcome of a business dealing. On



the facts, the Sales Agreement in both arbitrations were drafted and agreed on by different negotiators, Mr. Antley in the previous proceeding and Mr. Julian Krone in the current dispute [*PO 2*, p. 60, ¶ 39; *Res. Ex. R4*, ¶ 35]. The nature of the negotiation stages are prone to differ, and ultimately affect the formation of the contract. These two disputes cannot be treated as relevant to one another based purely on surface-level observations.

53. CLAIMANT'S statement that Mr. Velazquez's knowledge of the previous arbitral proceedings is sufficient to satisfy the relevancy requirement is inaccurate as the current dispute is between CLAIMANT and RESPONDENT [*Cl. Br. p. 13*, ¶ 37]. Therefore, Mr. Velazquez's knowledge on the facts of the previous proceeding involving a different set of parties will not assist the Tribunal in deciding on the matters in the current dispute.

2. The Evidence is Not Material to the Outcome of the Current Proceeding

54. Materiality is one of the fundamental elements in determining the admissibility of evidence [*Blackaby, Partasides, Redfern & Hunter*, p. 382]. It is insufficient for the documents to be relevant to a disputed issue; the requested documents must also be "material" to the resolution of the case as a whole, not just to the resolution of particular issues. [*Blackaby, Partasides, Redfern & Hunter*, p. 382; *Born (2008)*, p. 2362]

55. In determining whether evidence is "material to the outcome" of the arbitration, the Tribunal may consider whether the evidence would affect their deliberations in reaching a final award; if the Tribunal had come to a decision, it then becomes a question of whether the evidence would modify that decision [*Watkins Johnson Co/Iran*]. As such, if the Tribunal finds that there is no "reasonable likelihood" that the evidence would affect its final award or if the evidence is of very little probative value to the issue in the dispute the Tribunal may refuse to admit the evidence. For the Tribunal to decide otherwise would only delay completion of the arbitration or otherwise disrupt the proceedings [*William Ralph Clayton/Canada; Century Indemnity Co*].

56. In order to satisfy the standard of materiality, CLAIMANT must also show that the deliberation of the Tribunal will be affected. Evidence provided must be capable of shedding new light onto the case. The PIA merely shows that the Tribunal in that case had the jurisdiction to adapt the contract, which was included in a choice of law clause in favour of Mediterranean law in the



previous arbitration [*PO. 2, p. 60, ¶ 39*]. That aspect of the evidence will not be material to the current dispute as the jurisdiction of the Tribunal will be decided on the facts and circumstances specific to the present dispute. Furthermore, the statement made by CLAIMANT that the PIA may determine how RESPONDENT intended to interpret the Sales Agreement is baseless and incorrect [*Cl. Br. p. 14, ¶ 38*]. At best, it would only disclose limited set of facts from the previous arbitration, none of which are capable of determining RESPONDENT'S actual intention in the current dispute.

57. Therefore, CLAIMANT'S evidence would not be material to the outcome of the current dispute as the PIA will not unveil new information that is capable of affecting the Tribunal's deliberation. RESPONDENT submits that the Tribunal is advised to exercise their discretion under Article 9(2)(a) and exclude the evidence on the grounds of being irrelevant and immaterial to the outcome of the case.

C. The Award Rendered in This Arbitration Will Be Enforceable

58. The Parties are able to corroborate on the ground that an award may be set aside under Article V(1)(b) of the NY Convention. However, the drafting history of the NY Convention reveals that this Article was intended to protect parties from discrimination in procedure [*Travaux Préparatoires on the NY Convention*]. Although the Article was ultimately expanded to cover other serious breaches of due process, the ability for a party to present their case is still subject to general requirements of reasonableness.

59. CLAIMANT'S statement that one of the main reasons to admit evidence is ensuring due process and having a case fully heard fails to take into account the warnings provided by the same source of academic opinion [*Cl. Br. p. 15, ¶ 41*]. The notion of a full opportunity to present a case does not presumptively take the reins on the Tribunal's power to determine admissibility of evidence [*Waincymer, p. 793*]. Furthermore, RESPONDENT submits that the evidence in question does not infringe due process and therefore need not be a determinative factor in the Tribunal's decision.

60. Despite the fact that Article V(1)(b) is commonly used by parties opposing recognition and enforcement, as CLAIMANT has raised preemptively, majority of such claims are unsuccessful [*Gallaird & Savage, p. 1001*]. The application of Article V(1)(b) is generally restrictive. While most of the analysis surrounding this Article regards the procedure and notice provided to the parties, the



element of a party's ability to present their case is also incorporated; however, the latter has been interpreted narrowly by a number of courts [*Ukraine/Shenyang*].

61. Discussion on ability to present one's case has been viewed literally instead of figuratively, as most cases surround the physical ability of respective counsels to appear before the tribunal [*Ukraine/Shenyang; Israel/Germany; Consorico/Briggs*]. CLAIMANT has thus misconstrued the application of Article V(1)(b) to the present case as the limitations on enforcement are not applicable [*Cl. Br. p. 15, ¶ 41*].

62. CLAIMANT'S extension of Article V(1)(b) to include that a party must be able to present their *whole* case is misplaced and inaccurate [*Cl. Br. p. 15, ¶ 41*]. RESPONDENT submits that there is no legal basis for the imposition of such an extreme standard of the ability to present one's case. The more accurate statement, under Article 18 of the UNCITRAL Model Law, permits that each party shall be given a *full* opportunity to present his case. This should be interpreted as the same as having a reasonable opportunity, meaning that the case has been adequately presented [*Waincymer, p. 185*]. Limitations like this are meant to prevent abuse by parties in presenting any and all evidence, as it does not entitle parties to ignore proper procedure [*Id.*]. Therefore, CLAIMANT'S standard of presenting their *whole* case is far too broad to be complied with.

63. Thus there will be no long-term issues with enforcement of the arbitral award, should the Tribunal decide that the evidence should not be admitted. Based on our specific circumstances, non-admission of the evidence does not violate due process nor does it prevent CLAIMANT from presenting their case.

D. The PIA is Not Sufficiently Significant to Justify Facilitating Unlawful Procurement of Evidence

64. The issuance of a PIA generally means that matters such as jurisdiction or preliminary points of construction are settled [*Kaplan/Morgan, p. 72*]. Thus it is erroneous for CLAIMANT to submit that the PIA in RESPONDENT'S previous proceeding was decided '*in favor*' of RESPONDENT, as the PIA only acknowledged that the Tribunal had the power to adapt the contract [*Cl. Br. ¶ 26; PO. 2, p. 60, ¶ 39*]. The PIA should not be admitted because the duty of this Tribunal is only to the Parties of this dispute (1), and CLAIMANT is not even aware of the contents of the PIA (2).



1. The Tribunal's Duty is to the Parties to the Arbitration Only

65. RESPONDENT respectfully submits that arbitral tribunals owe a duty, first and foremost, to the Parties to the dispute, as opposed to future tribunals. Antithetical to CLAIMANT, RESPONDENT is of the position that the Tribunal can perform the aforementioned duty while simultaneously ensuring that the proper decision is rendered, without the use of this extrinsic evidence [*Cl. Br. p. 15, ¶ 42*].

66. It must be noted that the PIA is not conclusive of the Tribunal's decision whether or not to adapt the contract, thus admitting the evidence is not a move towards greater transparency. CLAIMANT'S reference to authorities that support increased efficiency and consistency in arbitration, through admission of evidence, does not fully take into account the author's full context in the following ways [*Cl. Br. p. 15, ¶ 42*].

67. First, it is with reference to final awards, which contains material benefits and insight on the manner by which decisions are rendered [*Born (2008), p. 2822*]. Contrary to CLAIMANT'S assertion that the PIA would serve as guidance for future tribunals, RESPONDENT reiterates that only the jurisdiction was revealed, which was already in line with existing Mediterranean jurisprudence [*PO. 2, p. 60, ¶ 39*]. CLAIMANT'S statement that the evidence would 'allow consistency that protects arbitral proceedings' displaces the well-established parameters of arbitration, as Parties enter into arbitration as they are not bound by previous decisions [*Béguin, p. 15*].

68. Second, propositions on the increase in transparency has been made subject to the protection of confidentiality through mechanisms such as excerpted form and redacted names [*Born (2008), p. 2822*]. Since the PIA is not evidence of the Tribunal's perspective on adaptation itself, the only effect it serves is providing evidence that RESPONDENT is engaged in another proceeding. CLAIMANT'S intention to use the evidence for reasons of increased transparency in the arbitral process altogether thus does not incorporate practical measures that must be taken. Admission of evidence without the aforementioned precautions means that the Tribunal would knowingly facilitate a breach of confidentiality or permit evidence obtained by computer hack.



2. CLAIMANT Currently Does Not Have The PIA In Their Possession And is Therefore Unaware of its Contents

69. Furthermore, CLAIMANT does not have the PIA, although they have arranged to obtain it [PO. 2, p. 60, ¶ 39]. CLAIMANT'S blatant admittance that they are lacking the PIA, coupled with their adamance in submitting that the evidence is admissible, is indicative of the weakness of their case. RESPONDENT submits that by virtue of attempting to convince the Tribunal of the admissibility of evidence that they have not yet seen is a last-ditch effort in light of knowing that their claim is unlikely to be successful at present state.

70. RESPONDENT thus submits that admitting illegally obtained evidence, without actual knowledge of the contents of such evidence, is not sufficient grounds to breach the confidentiality, being the cornerstone of arbitration [*Knabhr & Reinisch*, p. 97]. The PIA only shows that RESPONDENT is engaged in another arbitration in an alternate position. As established above, there is no legal impediment preventing RESPONDENT from doing so. Therefore, the evidence should not be admitted in this arbitration as CLAIMANT themselves are not aware of its contents.

IV. CLAIMANT IS NOT ENTITLED TO CLAIM FOR AN INCREASED REMUNERATION UNDER CLAUSE 12 OF THE SALES AGREEMENT OR UNDER ART. 79 OF THE CISG

71. RESPONDENT submits that the tariff imposed by the Government of Equatoriana does not amount to hardship falling within the narrow ambit of Clause 12 of the Sales Agreement (A). Even if the Tribunal concludes that it does, the tariff does not constitute hardship under Clause 12 as it did not fundamentally alter the equilibrium of the Sales Agreement (B). Moreover, the inclusion of Clause 12 constitutes a derogation of Art. 79 in the sense of Art. 6 of the CISG (C). In the event that the Tribunal considers that there was no derogation of Art. 79, Art. 79 does not expressly regulate hardship situations nor does it provide for the remedy of increased remuneration (D). Lastly, the Tribunal should not allow for a price adaptation under the Sales Agreement (E).

72. RESPONDENT submits that CLAIMANT is not entitled to any increase in price as there was no agreement as to price adaptation during negotiations [*Cl. Ex. C8*, p. 18, ¶ 2]. For the purposes of Art. 29(1) of the CISG, an oral agreement may be sufficient for the purposes of modifying a contract [*Di Matteo, Dhooge, Greene, Maurer, & Pagnattaro*, p. 331; *Eisenlen*, p. 13; *Shoes Case*,



pp. 6, 17; Dividing Wall Panels Case, p. 11]. In the present dispute, there was no clear intention from RESPONDENT of creating a contractual obligation. Following the imposition of the tariffs, Ms Napravnik had telephoned Mr. Shoemaker to reach a solution on the price [*PO. 2, p. 59, ¶ 32; Cl. Ex. C8, p. 18, ¶ 2*].

73. Mr. Shoemaker had made clear that his understanding of the contract was that CLAIMANT would bear the increased cost of performance, and that he would have to verify with the drafters of the Sales Agreement [*ANoA, p. 30, ¶ 10*]. Throughout the conversation, Mr. Shoemaker had assured Ms. Napravnik that he had no authority to agree on an adaptation [*Res. Ex. R4, p. 36, ¶ 4*]. Moreover, he had reassured CLAIMANT that ‘a solution would be found through negotiation’ as advised by his wife who is a lawyer as he did not have legal background [*Cl. Ex. C8, p. 18, ¶ 2; Res. Ex. R4, p. 36, ¶ 4*]. It is indisputable that a unilateral attempt to modify an agreement would fail where there was no indication that the other party had accepted the new terms [*Chateau/Sabaté, p. 4*]. Based on these circumstances, CLAIMANT'S attempt to unilaterally modify the Sales Agreement clearly fails.

A. The Tariff Imposed by the Government of Equatoriana Does not Amount to Hardship Falling Within the Narrow Ambit of Clause 12 of the Sales Agreement

74. The hardship clause within Clause 12 of the Sales Agreement dictates that CLAIMANT should not be responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex. C5, p. 14, Clause 12*]. RESPONDENT submits that the narrow wording of Clause 12 under the Sales Agreement does not cover the present impediment, which is alleged to be the imposition of the tariff.

75. First, the tariff is not a hardship that was caused by health and safety requirements or unforeseen comparable events under Clause 12 of the Sales Agreement (1). Second, CLAIMANT'S offer of delivery DDP at a lower price during negotiations did not contain any requirement for RESPONDENT to indemnify all delivery risks associated with delivery DDP under the Sales Agreement (2). Hence, it is submitted that the tariff does not fall within the narrow ambit of Clause 12 of the Sales Agreement.



1. The Imposition of the Tariffs is Unconnected to Health and Safety Requirements nor is it a Comparable Unforeseen Event which Are Not Governed by Clause 12 of the Sales Agreement

76. Even if it is assumed that the Parties had foreseen the imposition of the tariff by the Government of Equatoriana, this was not ultimately included in the hardship clause [*NoA*, p. 7, ¶ 19; *Cl. Ex. C5*, p. 14, Clause 12]. It is admitted that during negotiations, CLAIMANT had specifically raised several concerns that they were not willing to take over risks associated with changes in customs regulations or import restrictions [*Cl. Ex. C4*, p. 12, ¶ 4]. However, general tariff measures not triggered by health and safety or comparable requirements were not accounted for in Clause 12 of the Sales Agreement [*Cl. Ex. C4*, p. 12, ¶ 4; *Cl. Br.* p. 22, ¶ 69]. If the much larger risk of general tariffs is not linked to health, safety and comparable concerns, CLAIMANT should have ensured that it was included into Clause 12.

77. RESPONDENT had indicated its intention from the outset that they had wanted a narrow hardship reference through rejecting CLAIMANT'S suggested ICC-Hardship Clause as being too-broad [*Res. Ex. R3*, p. 35, ¶ 4]. It was also common ground that both Parties had intended for Clause 12 to be interpreted more narrowly compared to the proposed ICC-Hardship Clause [*P.O.* 2, p. 56, ¶ 12]. Hence, RESPONDENT submits that CLAIMANT ought to bear the cost of the tariffs as CLAIMANT had accepted the narrow hardship clause.

78. CLAIMANT mistakenly asserts that the 30% tariff constitutes a “comparable hardship” to the health and safety requirements, as provided under Clause 12 of the Sales Agreement [*Cl. Br.* p. 20 ¶ 59]. RESPONDENT submits that the focus of Clause 12 is not on the actual value of the cost of performance, rather it is with regards to the comparable nature of the event.

79. In aiding the Tribunal’s interpretation on what amounts to “comparable events” under Clause 12, RESPONDENT utilizes the *ejusdem generis* canon of interpretation in contracts. The *ejusdem generis* principle of interpreting contracts is where general words such as “comparable events” follows a list of specifics or items of the same class as those listed [*Baetens*, p. 133; *Waibel*, pp. 25-46; *Lambourn/McLellan*]. The *ejusdem generis* principle looks at the likely intentions of the drafters in considering the applicability of *ejusdem generis* [*Islam/ex parte Shah*]. Whenever possible, the terms of a



contract must be interpreted literally and given practical effect, which reduces redundancy [*Helnan/Egypt*].

80. On the present facts, the class specified in Clause 12 refers to “additional health and safety requirements” [*Cl. Ex. C5, p. 14, Clause 12*]. It cannot not be construed that such a class would be inclusive of the imposition of tariffs which is a governmental interventionist measure. Hence, the *ejusdem generis* principle sheds light that it was never the intention of the Parties’ to have the imposition of the tariff constitute hardship. As such, CLAIMANT should not assert that the tariff is a comparable hardship to “health and safety requirements” [*Cl. Br. p. 20, ¶ 59*].

81. Moreover, CLAIMANT has fallaciously asserted that the 30% tariff amounts to the same type of situation as health and safety regulations. CLAIMANT had stated that the main reason behind the 30% tariff was national security due to Equatoriana’s recent foot and mouth disease [*Cl. Br. p. 23, ¶ 73-74; Cl. Ex. C6, p. 15*]. In fact, the Government of Equatoriana’s imposition of tariff was a retaliatory measure following unsuccessful discussions with the Government of Mediterraneo, as they had previously imposed a tariff on all agricultural goods from Equatoriana [*NoA, p. 6, ¶ 10*]. In light of the above, RESPONDENT submits that the tariff is not an event comparable to health and safety regulations.

2. CLAIMANT'S Offer of Delivery DDP at a Lower Price During Negotiations Did Not Contain Any Requirement for RESPONDENT to Indemnify All Delivery Risks

82. In any case, even if the Tribunal were to decide that the ambit of Clause 12 of the Sales Agreement is wide enough to encapsulate the imposition of the tariff, RESPONDENT submits that it does not amount to a hardship under Clause 12 of the Sales Agreement [*Cl. Ex. C5, p. 14, Clause 12*]. With regards to the interpretation of Clause 12, the general principles of law regarding the hardship defence will have to be adhered to [*Brunner, p. 204*]. The Tribunal must look at the Sales Agreement in an objective manner, CLAIMANT must not have assumed the risk of the tariff under the Sales Agreement, and the 30% tariff must amount to a ‘fundamental alteration’ [*ICC 9994, pp. 79-80; Brunner, p. 204-205*]. In interpreting the contract, the Tribunal would also consider functional and equitable considerations and the explicit or implicit intention of the Parties [*Brunner, p. 204; Zweigert & Kötz, pp. 535, 536*].



83. CLAIMANT erroneously argues that, pursuant to the Parties' contractual negotiations, RESPONDENT had implicitly agreed to waive CLAIMANT'S liability for most, if not all, the risks commonly associated with DDP delivery [*Cl. Br. p. 21, ¶ 68-69*]. CLAIMANT infers such intent through RESPONDENT'S agreement to only spend an extra 200 USD per dose for the transportation and delivery DDP of the frozen semen, instead of the 1000 USD per dose insisted by CLAIMANT [*Cl. Br. p. 21, ¶ 68-69; PO. 2, p. 56, ¶ 8*]. Although the removal of certain risks associated normally with a DDP delivery obligation had been offered by RESPONDENT to lower the overall price, no particular figure can be attributed to the removal of the risks [*PO. 2, p. 56, ¶ 8*]. Hence, CLAIMANT cannot argue that the low delivery DDP cost is attributable to CLAIMANT being indemnified against most or all of the risks under the Sales Agreement. The risks that CLAIMANT was protected against were drafted with the qualifications stated in Clause 12.

84. Furthermore, CLAIMANT has no basis to argue that merely because it had offered RESPONDENT a lower cost of delivery, there was an implied agreement by the latter to absorb all risks associated with DDP delivery in the future [*Cl. Br. p. 21, ¶ 69*]. The Parties had never discussed or agreed on any such wide indemnification of delivery-associated risks. The payment of 200 USD per dose in comparison of the total payment of 100, 000 USD for the dose merely constitutes 0.2% of the overall transaction. This is clearly disproportionate to requiring RESPONDENT to bear an unlimited risk of tariff increases, which in the present case amounts to 1.3 mil. USD.

85. It should also be noted that, CLAIMANT asserts that RESPONDENT was aware of CLAIMANT'S financial difficulties [*Cl. Br. p. 24, ¶ 75; Cl. Br. p. 30, ¶ 97*]. First, RESPONDENT had merely heard rumours about it [*P.O. 2, p. 58, ¶ 22*]. Second, CLAIMANT fails to establish how the knowledge of its alleged internal financial difficulties could impact the scope of the well negotiated and limited hardship clause. Arbitral tribunals will typically allow hearsay evidence to be submitted, but are not bound to do so [*Sanders, p. 168*]. The general attitude of tribunals has been to attribute less weight to hearsay evidence, or to exclude it altogether [*Waincymer, pp. 743-824; Nicaragua/U.S.A., ¶ 68; Petroleum/Inter-American; Rosenne, p. 1090*]. Hence, RESPONDENT submits that the unspecific rumours in the market should be excluded as evidence as it may be inaccurate and has the possibility of misleading the Tribunal.



86. In summary, Clause 12 of the Sales Agreement is limited to tariff increases and other risks arising out of health and safety requirements or comparable unforeseen events alone. CLAIMANT is thus effectively asking the Tribunal to rewrite Clause 12 to include a much larger risk of general tariff increases, without any basis.

B. Even if the Government of Equatoriana’s Imposition of Tariff Falls Within the Ambit of Clause 12 of the Sales Agreement, it does not Constitute Hardship

87. The general approach regarding hardship situations utilizes an objective criteria, and if the seller had assumed the risk under the Sales Agreement, the seller would be prevented from raising the hardship defence [*Brunner*, p. 204]. RESPONDENT acknowledges that the retaliatory measure by the Government of Equatoriana was not foreseen [*NoA*, p. 6, ¶ 10]. This is particularly since the trade history of Equatoriana suggests that they are ardent supporters of free trade [*Id.*; *ICC 8486*, pp. 162-173]. However, RESPONDENT submits that the 30% increased cost of performance does not amount to a fundamental shift in the equilibrium of the Sales Agreement, and thereby does not amount to hardship.

88. The question as to whether the 30% tariff imposed by the Equatoriana Government is “fundamental” will depend upon the circumstances of the case [*Official Comment On The UNIDROIT Principles (2004)*]. It is submitted that the percentage of cost is a preferred threshold test of the hardship exemption, as it promotes predictability amongst hardship cases. [*Brunner*, p. 226] The trend amongst court decisions have been that cost increases below the range of 100% do not entitle the obligor to be exempt from hardship [*ICC 6281*, p. 3; *ICC 2508*; *Fucinati/Fondmetal*]. These decisions are also in line with CISG commentators who opine that the increase in cost of performance should be at least 100% for the equilibrium of the contract to be fundamentally altered [*Enderlein & Maskow*, ¶ 6.3; *Berger (2015)*, ¶¶ 24-66].

89. Based on the circumstances of the case, the imposition of tariff by the Government of Equatoriana had merely resulted in an increased cost of performance of 30%, which is insufficient to exempt CLAIMANT from hardship [*NoA*, p. 6, ¶ 10]. The rationale behind the strictness of the hardship defence is that tribunals would not allow parties to escape from a bad bargain merely because the contract has become particularly onerous and unattractive to them [*Neal-Cooper/Texas*



Gulf, p. 13]. As such, the Tribunal should not allow for CLAIMANT to be exempt from hardship merely because the Sales Agreement had become onerous for them.

90. CLAIMANT further asserts that they would be ‘destroyed in business’ [*Cl. Br. p. 24*, ¶ 75; *Cl. Br. p. 30*, ¶ 97]. While RESPONDENT sympathizes with CLAIMANT’S alleged plight, a party cannot be permitted to shift their burden to the other party regardless of their individual circumstances [*Bamberger*, ¶ 206]. A party should not be unduly favoured due to the impact on their financial circumstances, as the focus of the impracticability analysis is upon the nature of agreement between both Parties and expectation of Parties [*Brunner*, p. 230; *Alimenta/Cargill*, p. 3]. Taken collectively, RESPONDENT should not be liable for the cost of tariffs regardless of whether they were aware of the impact of the tariffs on CLAIMANT’S financial situations due to the reasons aforementioned [*Cl. Br. p. 22*, ¶ 67; *PO.2, p. 59*, ¶ 28].

C. The Inclusion of Clause 12 of the Sales Agreement Constitutes a Derogation of Art. 79 in the Sense of Art. 6 of the CISG

91. RESPONDENT submits that the inclusion of the *force majeure* and hardship clause into the Sales Agreement meant that the Parties have provided for a special regulation of the problem of changed circumstances. This would thereby exclude the application of Art. 79 of the CISG as it constitutes a derogation in the sense of Art. 6 of the CISG.

92. The legislative history of Article 6 indicates that an intention to derogate from the CISG need not necessarily be express, as such intention may also be implied from facts pointing to a real and not fictitious agreement between parties [*Goldstajn*, p. 97; *Honnold*, pp. 107-108]. The Tribunal will infer from the words and conduct of the parties to determine whether there was an intention to derogate in the sense of Art. 6 of the CISG. Following which, the Tribunal will also weigh the facts of the case appropriately against the requirement of a clear manifestation of intent [*CISG-AC Advisory Opinion No. 16*, ¶ 3.5; *Art. 8(2) & 8(3) of the CISG*; *Schroeter*, p. 472-473].

93. RESPONDENT urges the Tribunal to consider the fact that the negotiations surrounding the Parties’ agreement to include the narrow hardship reference was precisely to cater to the issue of additional health and safety requirements or comparable unforeseen events making the contract more onerous. It is common ground that both Parties had intended for the hardship clause to be



narrow [*P.O. 2, p. 56, ¶ 12*]. Thus, this would effectively derogate the provisions of Art. 79 of the CISG since CLAIMANT'S concerns had been addressed through the insertion of the hardship clause.

94. In addition, contrary to CLAIMANT'S contention, Art. 79 of the CISG cannot be relied on as it merely addresses a situation which impedes a party's performance or obligation under the contract, as opposed to catering for the problem of changed circumstances [*Cl. Br. p. 28, ¶ 91*]. As will be argued *infra* [IV(D)(1)], even if the Tribunal were to consider Art. 79 of CISG as a possible avenue for CLAIMANT, CLAIMANT had already performed its obligations under the Sales Agreement by transporting the final delivery of semen [*NoA, p. 6, ¶ 13*]. The tariff did not prevent CLAIMANT from performing their obligations under the Sales Agreement.

D. Art. 79 of the CISG Does Not Expressly Regulate Hardship Situations, nor Does it Provide for the Remedy of Increased Remuneration

95. In the event that the Tribunal finds that Art. 79 of the CISG had not been derogated by both Parties in the sense of Art. 6 of the CISG, RESPONDENT submits that: Art. 79 of the CISG does not regulate hardship (1), nor does it provide for the remedy of increased remuneration of contract (2).

1. Art. 79 of the CISG Does Not Regulate Hardship Situations

96. CLAIMANT has mistakenly argued that Art. 79 of the CISG also regulates situations involving economic hardship [*Cl. Br. p. 29, ¶ 93*]. RESPONDENT acknowledges that the drafting history of Art. 79 of the CISG is not conclusive enough to preclude economic hardship falling under the protection of Art. 79. However, tribunals have routinely denied petitions for Art. 79 exemption grounded in hardship stemming from changes in market prices [*CISG-AC Advisory Opinion No. 7*]. Such examples include sellers' failure to deliver goods caused by an increase in cost, or where the market price of the goods have increased drastically [*Tomato Concentrate Case; ICC 6281; Iron Molybdenum Case; Ferrochrome Case*].

97. CLAIMANT further cites the *Steel Tubes Case*, being the only decision to have allowed for economic hardship to constitute as an impediment [*Cl. Br. p. 29, ¶ 96*]. RESPONDENT submits that the decision of the *Steel Tubes Case* is controversial, as it distorts the meaning of the CISG and



violates the mandate to interpret the Convention with regard for its international character [*Flechtner, p. 84*]. The Belgian Supreme Court in the *Steel Tubes Case* had reached a decision by interpreting the scope and meaning of Art. 79(1) of the CISG in accordance to the good faith provision of French law. In reaching this decision, the Belgian Supreme Court did not engage into an analysis of the requirements of Art. 79(1) of the CISG nor did it evaluate whether the change of circumstances of the particular case would trigger that provision [*Arroyo, p. 9*].

98. Although the decision has been termed by scholars as being a landmark decision, the legal analysis on which it stands is flawed and has resulted in incongruence with settled decisions *pre-Steel Tubes Case*. A Bulgarian steel manufacturer could not find relief from even a 200% increase in market price in a Bulgarian Court, whereas a Belgian buyer could be relieved of at least a 70% change in prices if pursued in the Belgian Supreme Court [*Hansebout, pp. 1-3; Nagy, p. 32; Steel Ropes Case*].

99. In the present case, the imposition of 30% tariff by the Government of Equatoriana is a significantly lower percentage as opposed to the 70% change in prices of steel tubes in the *Steel Tubes Case*. As such, even if this Tribunal were to accept the possibility of economic hardship as an impediment beyond control, the 30% tariff could not justify awarding the possibility of damages under Article 79(5) of the CISG. This is because the trend of cases brought under Art. 79 of the CISG prior to the *Steel Tubes Case* have decided that a price increase or decrease of more than 100% would not be sufficient [*Nagy, p. 29; Steel Ropes Case; Automatic Diffractameter Case*].

100. Taken collectively, RESPONDENT submits that CLAIMANT'S efforts to satisfy the elements of Art. 79 of the CISG after having cited the controversial *Steel Tubes Case*, being the first ever case to decide that economic hardship could amount to an impediment, is unjustifiable. The Belgian Supreme Court in the *Steel Tubes Case* had not embarked on such a procedure but had merely relieved the Belgian buyer in light of the principle of good faith in French Law [*Cl. Br. pp. 30-31, ¶¶ 98-100*]. Furthermore, RESPONDENT submits that the 30% tariff by the Government of Equatoriana would not justify relieving CLAIMANT from the increased costs as it is significantly lower than decided case laws by various tribunals, regardless of CLAIMANT'S financial situation.



2. Art. 79 of the CISG Does Not Provide for the Remedy of Increased Remuneration of Contract

101. In the event that the Tribunal were to allow for the imposition of 30% tariff to amount to an impediment beyond CLAIMANT'S control under Art. 79 of the CISG, RESPONDENT submits that Art. 79 of the CISG does not provide for the relief of an increased remuneration under the contract. It is submitted that the notion of contract adaptation is striking, particularly because the exemption provisions of Art. 79 of the CISG does not allow the court or tribunal to adapt the contract terms nor does it constitute a gap in the Convention [*Flechtner*, p. 91; *Klepac* p. 35].

102. CLAIMANT'S use of the *Steel Tubes Case*, being the first decision to supplement Art. 79 of the CISG with the UNIDROIT Principles, was to demonstrate the gap-filling mechanism in Art. 7(1) and 7(2) of the CISG [*Cl. Br.* p. 31, ¶ 101]. Article 7(2) of the CISG requires that the matters governed under the CISG that are not expressly settled are to be settled in conformity with the general principles of the CISG, or in conformity with the law applicable by virtue of the rules of private international law. It is submitted that the gap-filling provision of Art. 7(2) of the CISG is to be filled by looking *within* its provisions to determine its general principles, and not by looking outside the CISG to determine general international law principles [*Flechtner*, p. 84].

103. Such an approach is questionable as the UNIDROIT Principles are considered to encompass the general principles of international trade such as the rules governing international contracts and not only the principles of the CISG [*Klepac*, p. 39; *Gotanda*, p. 3; *Tepes*, p. 688]. Even if it is assumed that an internal gap may exist in the Convention with respect to the availability of a hardship defence, the autonomous interpretation of the Convention is defined through a negative definition [*Kroll, Mistelis & Viscasillas*, p. 138]. This means that no external concepts should be allowed to interpret the CISG, or in our case, the UNIDROIT Principles [*Cl. Br.* p. 32, ¶ 105].

104. To summarize, the analysis of the Belgian Supreme Court in the *Steel Tubes Case* is controversial as the Belgian Supreme Court had directly resorted to general principles of law of international trade under the UNIDROIT Principles. This is hardly the same as the principles underlying the Convention, which can be found in the Convention's text [*Flechtner*, p. 95]. As such, RESPONDENT urges the Tribunal to consider that Art. 79 of the CISG should not be



supplemented with the UNIDROIT Principles due to the aforementioned reasons, notwithstanding the controversial decision in the *Steel Tubes Case*.

E. The Tribunal Should Not Allow for a Price Adaptation Under the Sales Agreement

105. RESPONDENT submits that this Tribunal should not allow for a price adaptation since CLAIMANT is not entitled to request for RESPONDENT to renegotiate as CLAIMANT had misconstrued Mr. Shoemaker's statement as an affirmative agreement to do so (1) [*Cl. Br. pp. 25-26, ¶ 82-83*]; and contrary to CLAIMANT'S assertions, RESPONDENT had not acted in bad faith (2) [*Cl. Br. pp. 31-32, ¶ 101-104*].

1. Mr. Shoemaker's Statement Could Not Be Construed as an Affirmative Agreement to Renegotiate the Sales Agreement

106. CLAIMANT asserts that Mr. Shoemaker had authority to authorize an agreement to renegotiate the Sales Agreement [*Cl. Br. pp. 24-25, ¶ 78-79*]. It is submitted that although an agent of a company has the ability to bind the company, such authority is not present in light of contrary intention [*Freeman Lockyer/Buckhurst*].

107. Although RESPONDENT had told CLAIMANT that Mr. Shoemaker was in charge of the entire racehorse breeding program, and may have given CLAIMANT the impression that Mr. Shoemaker has the ostensible authority to authorize renegotiations, the main reason RESPONDENT had assured CLAIMANT that "a solution would be found through negotiations" was because he had no authority to authorize additional payments outside of the contract without speaking to RESPONDENT'S management team which was unavailable at the time [*PO. 2, p. 59, ¶ 32; Res. Ex. R4, p. 36*].

108. Furthermore, Mr. Shoemaker had also made clear in the phone call that he would clarify the legal situation with RESPONDENT'S legal department [*Res. Ex. R4, p. 36, ¶ 4*]. The plain wording of Mr. Shoemaker's statement should be interpreted according to its regular and ordinary meaning, which does not imply that the solution would be price adaptation of the Sales Agreement [*Cl. Ex. C8, p. 18, ¶ 2*]. Hence, contrary to CLAIMANT'S assertions, Mr. Shoemaker had displaced any possibility of being in the position to authorize renegotiations of the Sales Agreement, in which



CLAIMANT cannot then assert that RESPONDENT had reneged from their promise to renegotiate the Sales Agreement.

2. RESPONDENT Had Not Acted in Bad Faith

109. CLAIMANT had interpreted the principle of good faith as reasonableness, which implies an ethical standard of behaviour requiring one to be judicial and fair [*Cl. Br. p. 31, ¶ 101-102, van der Velden, p. 54*]. However, RESPONDENT submits that contrary to CLAIMANT'S allegations, CLAIMANT had also not acted in good faith [*Cl. Br. p. 31, ¶ 102*]. CLAIMANT had made false allegations regarding RESPONDENT'S action of reselling the semen without providing any proof of such allegations. As such, any reasonable person in RESPONDENT'S circumstance would also have been enraged particularly after hearing untruthful allegations. [*Cl. Br. pp. 25-26, ¶ 82-83; ANoA, p. 31, ¶ 11; Cl. Ex. C8, p. 18, ¶ 3*].

110. Furthermore, contrary to CLAIMANT'S false accusation of RESPONDENT being unfair towards them in refusing to bear the 30% tariff, RESPONDENT had already bore several risks relating to the horse semen [*Cl. Br. p. 31, ¶ 102*]. This includes not being guaranteed nor being provided warranty of the fertilizing capacity of the semen, the tank rental, handling fees associated with delivery of the semen, as well as the frozen semen not being insured by CLAIMANT [*Cl. Ex. C5, p. 14, Clause 2, 10, 13*].

111. As in every sales contract, both Parties would be expected to bear their fair share of risks under the contract. CLAIMANT cannot falsely accuse RESPONDENT of being unfair towards them, when CLAIMANT themselves ought to have ensured that they were being reasonable towards RESPONDENT by means such as not imposing a strict timeline of 24 hours on the integrity of the shipment [*Cl. Ex. C5, p. 14, Clause 11*]. The fact that RESPONDENT is not being guaranteed nor provided warranty of the fertilizing capacity of the semen is already a significantly large risk that RESPONDENT had undertaken to bear under the Sales Agreement [*Cl. Ex. C5, p. 14, Clause 2*]. The whole purpose of RESPONDENT entering into the Sales Agreement may be frustrated if major quantities of the horse semen were found to be defective [*Id.*]. Hence, CLAIMANT should not be allowed to argue that RESPONDENT had acted in bad faith, when CLAIMANT themselves have not been acting in good faith.



112. Additionally, although RESPONDENT had urgently needed 6 out of the 50 doses as agreed to be delivered for the second instalment delivery of horse semen, CLAIMANT cannot argue that RESPONDENT should have revealed their intentions so that CLAIMANT would not be required to bear 1.3 mil. USD in tariffs and could have paid 180, 000 USD instead [*Cl. Br. p. 32, ¶ 103*]. RESPONDENT had made clear from the outset that aside from the 6 doses required urgently, they had wanted to ensure the remainder was available for the beginning of the 2018 breeding season [*PO. 2, p. 59, ¶ 33; P.O. 2, p. 56, ¶ 11*].

113. Based on the above, RESPONDENT humbly requests that the Tribunal bear in mind the inconsistencies in CLAIMANT'S arguments, as CLAIMANT has presented an incomplete summary of the facts and has omitted important details leading to the conclusion of the Sales Agreement. Although it is unfortunate that what could have been a fruitful long-term relationship between CLAIMANT and RESPONDENT had irretrievably broken down, it is contrary to RESPONDENT'S wishes to be responsible for a burden which it had never contemplated to bear.

PRAYER FOR RELIEF

For the reasons stated above, RESPONDENT respectfully requests that the Tribunal:

- (1) Declare the law of Danubia as the governing law of the arbitration agreement;
- (2) Reject CLAIMANT'S request to adapt the Sales Agreement;
- (3) Find that the evidence raised by CLAIMANT is inadmissible;
- (4) Reject the claim for additional remuneration raised by CLAIMANT; and
- (5) Order CLAIMANT to pay RESPONDENT'S costs in this arbitration.

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

A handwritten signature in black ink, appearing to read 'Matthew Lum Jun Liang'.

\s\ Matthew Lum Jun Liang

A handwritten signature in black ink, appearing to read 'Robin Ho Ming Teck'.

\s\ Robin Ho Ming Teck

A handwritten signature in black ink, appearing to read 'Rachel Tee Zi Wei'.

\s\ Rachel Tee Zi Wei

A handwritten signature in black ink, appearing to read 'Wong Wen Sheng'.

\s\ Wong Wen Sheng