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WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

MARCH 31 – APRIL 07, 2019

In the matter of arbitration under the Hong Kong International Arbitration Rules, 2018

MEMORANDUM FOR CLAIMANT

ILS LAW COLLEGE

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INDEX OF ABBREVIATIONS

&	And
%	Per cent
§/§§	Section/Sections
ACICA	Australian Centre for International Commercial Arbitration
Agreement	Frozen Semen Sales Agreement
Art./Artt.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CISG-AC	Advisory Council for the Convention on Contracts for the International Sale of Goods
CISG-Online	Internet database on CISG decisions and materials, available at www.globalsaleslaw.org
CJEU	Court of Justice of European Union
Cl. Ex.	CLAIMANT's Exhibit

DDP	Delivery Duty Paid
Ed.	Edition
Edr./Eds.	Editor/Editors
Et al.	Et alii(and others)
Et seq.	Et sequentes(and that which follows)
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Administered Arbitration Rules, Hong Kong International Arbitration Centre
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	Id est (Latin for "that is")

Int'l Arb.	International Arbitration
KKO	Korkeinoikeus (Supreme Court of Finland)
Ltd.	Limited
No.	Number
p./pp.	Page/pages
¶/¶¶	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration
PO	Procedural Order
Res. Ex.	RESPONDENT's Exhibit
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNCITRAL Transparency	UNCITRAL Rules on Transparency in Treaty based

Rules	Investor-State Arbitration, 2014
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts of 2010
USD	United States Dollars
v.	Versus (Latin for "against")
WTO	World Trade Organisation

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TREATIES, CONVENTIONS & RULES

	68/109, U.N. Doc. A/RES/68/109, (Dec. 10, 2014)	
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods, Aug. 14, 1972, 834 U.N.T.S. 107	90
UNCAC	UN General Assembly, "United Nations Convention Against Corruption, Dec. 14, 2005",U.N. Doc. A/58/422, (Oct. 31, 2003)	38
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985, U.N. Doc. A/40/17, annex I and A/61/17, annex I, U.N. Sales No. E.08.V.4	25, 33, 51
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WIPO Arbitration Rules	World Intellectual Property Organisation Arbitration Rules (Jun. 1, 2014)	43

COMMENTARIES/ARTICLES

CITED AS	TITLE	CITED IN ¶
Kuparadze	Anano Kuparadze, "Consequences of the Separability Presumption for the Choice of Law Applicable to Arbitration Agreements", 4(2) J. Soc.Sci. 71 (2015)	27

CISG-AC Opinion No. 3	CISG-AC Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA. Adopted by the CISG-Advisory Council at its 7th meeting, in Madrid, on 23 October 2004	17
CISG-AC Opinion No. 7	CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting, in Wuhan, People's Republic of China, on 12 October 2007	94, 95, 98
Connor & Talib	V. Connor & M. Talib, "Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013", 16(4)Asian D.R. 190 (2014)	53
Dessemontet	François Dessemontet, "Dispute Resolution Proceedings in World Trade Organization and International Commercial Arbitration: A Comparison"6(1) I.J.A.L., 174(2017)	58
Dicey	Dicey *et al.*, *The Conflict of Laws*, (14th ed., 2006)	12
Choi	Dongdoo Choi, "The Tension between Validation and Implied Intent Approaches in Finding the Law for the Agreement to Arbitrate",	28

	Circumstances as grounds for Adjustment or Non-Performance of Contracts: Practical Consideration in International Infrastructure Investment and Finance", American Bar Association Section of International Law Spring Meeting, (2006) available at: https://www.cisg.law.pace.edu/cisg/biblio/fucci.html	
Gary Born	Gary B. Born, "The Law Governing International Arbitration Agreements: An International Perspective", 26 SAcLJ 814(2014)	20
Gillette & Walt	C. Gillettte & S. Walt, *The UN Convention on CISG*(2nd ed., 2016)	101
Girsberger &Zapolskis	D. Girsberger & P. Zapolskis, "Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption",19(1) *Jurisprudencija* 121 (2012)	66
Hale & Slaughter	T. Hale & A. Slaughter, "Transparency: Possibilities and Limitations", 30 Fletcher F. World Aff., 153 (2006)	49
Honnold I	John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*(2nd ed. 1989)	98
Honnold II	John Honnold, *Documentary History of the Uniform*	94

	in *Comparative International Commercial Arbitration* (2003)	
Lindström	Niklas Lindström, "Changed Circumstances and Hardship in the International Sale of Goods", 1 ActScandJurisGent (2006), available at: https://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html	65
Lookofsky	Lookofsky Joseph, "Not Running Wild with the CISG", 29(2)J. L. & Com.141 (2011)	95
Mazzotta	Francesco G. Mazzotta, "CISG Article 78: Endless Disagreement among commentators, much less among courts" in *Pace Review of the Convention on Contracts for the International Sale of Goods*, 123(2003-2004)	103
Miller & Levi	B. Miller & T. Levi, "Choosing the law for International Arbitration Agreements", 7(5) Const. L. Int'l (2012)	15
Mirabal & Derains	J. Sicard-Mirabal & Y. Derains, "Evidence, Burden of Proof and Document Production", in *Introduction to Investor- State Arbitration*, 191 (2018)	34
Moser & Bao	Michael J. Moser & Chiann Bao,"Complex Arbitrations" in *A Guide to the HKIAC Arbitration Rules*, 207 (2017)	57
Mustill	Lord Michael Mustill, "The New Lex Mercatoria:	75

Schlechtriem & Schwenzer I	P. Schlechtriem, I. Schwenzer (eds.), *Kommentar zum Einheitlichen UN – Kaufrecht (CISG),* (I. Schwenzer edr., 4thed., 2004)	67
Schwenzer	Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts", 39(4) V.U.W.L.R. 709 (2008)	81
Schwenzer I	I. Schwenzer *et al.*, *Global Sales and Contract Law* (2012)	72, 78, 86, 95
Secretariat Commentary, Art. 11	"Guide to CISG Article 11," Secretariat Commentary, available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-11.html	17
Secretariat Commentary, Art. 6	"Guide to CISG Article 6", Secretariat Commentary, available at: https://cisg.law.pace.edu/cisg/text/secomm/secomm-06.html	90
Sharma	K.M. Sharma, "Sanctity to Fairness: An Uneasy Transition in the Law of Contracts", 18 N.Y.L. Sch. J. Int'l & Comp. L. 95 (1999)	86
Singh	Kabir Singh *et al.*, "Two Roads Diverged in a Clause – The Law of a Freestanding Arbitration Agreement vs. the Law of an Arbitration Agreement that sits within a Main Contract", Kluwer Arbitration Blog (Jan. 4, 2017) available	15

	at: http://arbitrationblog.kluwerarbitration.com/2017/01/04/two-roads-diverged-in-a-clause-the-law-of-a-free-standing-arbitration-agreement-vs-the-law-of an-arbitration-agreement-that-sits-within-a-main-contract/	
Smeureanu	Ileana M. Smeureanu, "Actors Bound by the Duty to Maintain Confidentiality", in *Confidentiality in International Commercial Arbitration,*Vol. 22, 133 (2011)	47
Trakman	Leon E. Trakman, "Confidentiality in International Commercial Arbitration", 18(1) Arb. Int'l, 1 (2002)	49
Treitel	G. Treitel, *Frustration and Force Majeure*, (3rd ed., 2014)	102
Tuck	Andrew P. Tuck, "Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules", 13 L. and Bus. Rev. of the Americas 875 (2007)	50
Tzeng	Peter Tzeng, "Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements", 27 Am. Rev. Int'l Arb. 327 (2016)	20
U.N. Doc. A/CN.9/264	UNCITRAL, "Analytical Commentary on Draft Text of a Model Law on International	25

CASES/ARBITRAL AWARDS

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Hemofarm DD	Hemofarm DD, MAG International Trading Company and the Sulam Media Co Ltd v Jinan Yongning Pharmaceutical Co Ltd, No. 11 of the Fourth Civil Tribunal of the Supreme People's Court (2 June 2008)	14
FeMo Alloy	FeMo Alloy case, CISG/1996/21, CIETAC Arbitration Proceeding, (2 May 1996), available at: http://cisgw3.law.pace.edu/cases/60502cl.html	91

EUROPEAN UNION

Persia International Bank	Case T-493/10, Persia International Bank v. Council, 2013 E.C.R.	40

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Chinese Goods	Chinese Goods Case, Partial Award, Schiedsgericht der Handelskammer [Arbitral Tribunal] Hamburg, (21 March, 1996), available at: http://cisgw3.law.pace.edu/cases/960321g1.html	95
Iron Molybdenum	Iron Molybdenum Case, 1 U 167/95, (Appellate court Hamburg, Germany), (28 February, 1997) available at: http://cisgw3.law.pace.edu/cases/970228g1.html	91

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Emmott	John Forster Emmott v. Michael Wilson & Partners Limited, [2008] EWCA Civ 184)	47
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Proforce	Proforce Recruit Limited v. The Rugby Group Limited, EWCA Civ 69	87
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Wray	R. v. Wray, [1970] 11 C.R.N.S. 253	34
Sonatrach	Sonatrach Petroleum Corp (BVI) v. Ferrell International Ltd. (2002) 1 ALL ER (Comm) 627	14
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ICC Case No. 5953	ICC Case No. 5953, Award, (1999) No. 5953, Clunet 1990, at 1056 et. Seq	98
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ICC Case No. 9994	ICC Case No. 9994, Award, (2001)	65, 70, 76
ICC Case No. 11869	ICC Case No. 11869, Award (2011) 36 in Yearbook Comm Arb'n 47	20
ICC Case No. 4131	ICC Case No. 4131, Interim Award, IX Y.B. Comm. Arb. 131 (1984)	27
ICC Case No. 9479	ICC Case No. 9479, Award, (1999)	85
ICC Case No. 5294	ICC Case No. 5294, Final Award, XIV Y.B. Comm. Arb. 137, 140-41 (1989)	27
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Temple of Preah Vihear	Temple of Preah Vihear (Cambodia v. Thailand), ICJ Reports 6, at 23-24, (1926)	75

ICSID

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Conoco Phillips	Conoco Phillips Petrozuata v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, Award (10 March 2014)	34
Kilic Insaat	Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award (2 July 2013)	34
Libananco	Libananco Holdings Co v. Republic of Turkey, ICSID Case No ARB/06/09, Decision on Preliminary Issues, (23 June 2008)	39
OPIC Karimum	OPIC Karimum Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14, Decision on The Proposal to Disqualify Professor Philippe Sands, (5 March 2011)	34

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Questech	Questech, Inc. v. Respondent, The Ministry of National Defence of the Islamic Republic of Iran, Case No. 59(191-59-1) Y.B. Com. Arb. 1986, 283-289	102

Rockwell	Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran, Case No. 430(438-430-1), Y. B. Com. Arb. 1990, 239, 243	102

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STATEMENT OF FACTS

1. **THE PARTIES**: Phar Lap Allevamento (**CLAIMANT**) is a company based in Mediterraneo that operates its oldest and most renowned stud farm, and provides facilities for breeding and storage of frozen semen of champion stallions for artificial insemination. Black Beauty Equestrian (**RESPONDENT**) is based in Oceanside, Equatoriana, and is famous in the area of dressage and show jumping.

2. **CONTRACT FORMATION**: On Mar. 21, 2017, RESPONDENT contacted CLAIMANT to purchase 100 doses of frozen semen of Nijinsky III, one of CLAIMANT's most sought after stallions for breeding. CLAIMANT's first offer was communicated on Mar. 24, 2017, at 99.5 USD per dose. On Mar. 28, 2017, considering CLAIMANT's extensive experience in shipment of frozen semen and RESPONDENT's requirement of urgent delivery, RESPONDENT insisted on delivery on DDP basis. CLAIMANT agreed to this on Mar. 31, 2017, but only upon conditions of a price increase, transfer of certain risks to RESPONDENT, and the inclusion of a hardship clause. In the meeting dated Apr. 12, 2017, the parties agreed to explicitly allow contractual adaptation by an arbitral tribunal, in situations where they were unable to reconcile contractual liabilities arising out of changed circumstances. However, this explicit provision was not considered legally necessary. They further agreed on an appropriate arbitration clause. However, these decisions did not reflect in the final Agreement, owing to change in the party representatives.

3. **THE TARIFF**: Before the final shipment under the Agreement, the Mediterranean Government announced a 25% tariff on import of agricultural products from Equatoriana. Surprisingly, a retaliatory tariff of 30% was subsequently imposed by Equatoriana on agricultural imports from Mediterraneo. The application of the tariff to frozen horse semen was also highly unprecedented. However, CLAIMANT undertook the burden of the 30% tariff, with the belief that it would be reimbursed by RESPONDENT.

4. **NEGOTIATIONS:** The parties began negotiations for a price adjustment, and CLAIMANT complied with its delivery obligation of the third shipment on payment of the tariff despite

being financially endangered. This was done placing reliance on RESPONDENT's promise of an equitable solution. Further, CLAIMANT discovered that RESPONDENT had breached the Agreement by reselling doses of the horse semen. When confronted about this during the meeting on Feb. 12, 2018, RESPONDENT abruptly ended negotiations and refused to pay the tariff. Pursuant to this, CLAIMANT sent its Notice of Arbitration on Jul. 31, 2018.

5. **CHOICE OF LAW GOVERNING THE ARBITRATION AGREEMENT:** During the negotiations following the tariff imposition, a dispute arose as to the law governing the arbitration agreement, as Clause 14 did not include an express choice in that regard. RESPONDENT sought to apply the law of the seat of arbitration, whereby an express empowerment would be required for the tribunal to adapt the contract to provide for a price increase. In response, CLAIMANT stated that both parties had agreed to apply Mediterranean law to all provisions of the Agreement. This would grant the tribunal the ability to adapt despite absence of an express reference.

6. **OTHER ARBITRATION PROCEEDINGS:** On Oct. 2, 2018, CLAIMANT informed the Tribunal about another arbitration involving a contract between RESPONDENT and a Mediterranean corporation. RESPONDENT had been negatively affected by the 25% tariff imposed by Mediterraneo, and had raised claims identical to those being raised by CLAIMANT in the present arbitration, thus contradicting their present stance. Information pertaining to this other arbitration reached CLAIMANT through an erstwhile employee of the Mediterranean party in the prior arbitration. Presently, CLAIMANT has arranged for obtaining relevant documents from the other arbitration, and has thus requested the Tribunal to admit the same. The request for admission was opposed by RESPONDENT on Oct. 3, 2018, on grounds of confidentiality and the illegal means of obtaining the documents.

SUMMARY OF ARGUMENTS

7. *Firstly*, the arbitration clause in the Agreement contains express references to the law governing the Agreement and the seat of arbitration. Since the parties have not made an express choice as to the law applicable to the arbitration agreement, the Tribunal should look to their implied choice. Firstly, the presumption that the law of the contract is applicable to each and every provision must prevail, and any argument that the dispute resolution clause is separable is ill founded. Such argument ignores the purpose served by the doctrine of separability. Further, the phrase "*arising out of*" is wide enough to encompass adaptation of the contract. This Hon'ble Tribunal must also take into account pre-contractual negotiations, which clearly evince the parties' intention to allow adaptation of the contract by this Tribunal. These negotiations additionally demonstrate that CLAIMANT at no point agreed to the application of Danubian law to the arbitration clause. Therefore, this Tribunal must validate the parties' intention and hold that Mediterranean law governs the arbitration agreement.

8. *Secondly*, CLAIMANT requests the admission of the Partial Interim Award and submissions made in the other arbitration, as the same would be relevant and material to the adjudication of the present dispute. RESPONDENT has disputed such admission, on account of illegality in the manner of obtaining the documents. However, this Tribunal should solely take into account CLAIMANT's acts in determining whether any duty of confidentiality has been breached in obtaining the documents, and there are no facts to suggest that CLAIMANT was involved in any illegal disclosure. Therefore, CLAIMANT approaches this Tribunal with clean hands. Moreover, since the documents have already been disclosed, this Tribunal is not under an obligation to protect their confidentiality. Additionally, since the RESPONDENT's inadequacy in keeping the documents confidential has led to their disclosure, any possible protection has been waived. In any case, RESPONDENT must not be permitted to abuse its rights under the garb of confidentiality and take contradictory stances at their convenience. Further, prevailing principles of transparency must be adhered to, which necessitate accountability on RESPONDENT's part. Finally, if this Tribunal wishes to adjudicate both

disputes together in a single proceeding, it is empowered to do so under Article 27 of the HKIAC Rules, 2018.

9. *Lastly*, the Agreement must be adapted by this Tribunal to accommodate a price increase in light of the tariff payment undertaken by CLAIMANT. As a result of the tariff payment, CLAIMANT has faced severe losses, leading to the possibility of financial ruin and crossing of the necessary limit of sacrifice. The present circumstance fulfills the ingredients required to qualify as hardship under Clause 12 of the Agreement. In any case, unpredictable trade regulations were not part of CLAIMANT's reasonable obligations under the Agreement, and had expressly been excluded by CLAIMANT in their pre-contractual negotiations. Since the parties did not arrive at a suitable adjustment of the Agreement through renegotiation, primarily due to RESPONDENT's conduct, CLAIMANT is entitled to a price increase to account for the additional costs incurred by them in the course of performance. If it is found that the CLAIMANT cannot take recourse under Clause 12 of the Agreement, it must be noted that CLAIMANT is, in any case, entitled to a price increase under CISG. The mere presence of Clause 12 does not preclude the operation of CISG, which is part of the law governing the Agreement. The current situation sufficiently qualifies as an event of changed circumstances amounting to an impediment under Art. 79, CISG.

ARGUMENTS

PROCEDURAL ARGUMENTS

ISSUE I: THIS TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT, AS THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF MEDITERRANEO.

10. RESPONDENT has alleged that this Hon'ble Tribunal lacks the ability to adapt the contract, and has requested that the claim for additional remuneration on the basis of adaptation be discarded [ANSWER TO NOTICE OF ARBITRATION, P. 29, ¶ 2]. This challenge is premised on the assumption that the law of the seat, i.e. Danubian law, is the law applicable to the arbitration agreement. Under Danubian law, a tribunal may only adapt the contract if the parties have provided an express empowerment to that effect. CLAIMANT respectfully submits that the arbitration agreement is governed by the law of Mediterraneo, as opposed to the law of the seat. Due to the absence of an express choice, the implied choice of the parties concerning the law governing the arbitration agreement must be effectuated **(A).** In this respect, the parties have impliedly chosen to apply the law of the contract to the arbitration agreement **(B)**. Further, the intention of the parties must be validated by applying the law of the contract to the arbitration agreement**(C)**. Additionally, the doctrine of separability is inapplicable in the present case, **(D)** and the arbitration agreement is broad enough to cover the present dispute **(E)**.

A. IN ABSENCE OF AN EXPRESS CHOICE AS TO THE LAW GOVERNING THE ARBITRATION AGREEMENT, THE IMPLIED CHOICE MUST BE EFFECTUATED.

11. The intention of the parties as to the applicable law is deemed to be express when it is recorded in writing [LEW I, ¶ 17-13.] Evidently, the parties have not expressly provided for the law governing the arbitration agreement [NOTICE OF ARBITRATION, P. 6, ¶ 14].

12. Consequently, the law applicable to the arbitration clause is to be determined in accordance with the established common law rules for ascertaining the law of any contract. These rules

require the forum to recognise and give effect to the parties' express choice of law, failing which their implied choice must be identified. [DICEY, ¶ 16R-001].

B. THE PARTIES HAVE MADE AN IMPLIED TO CHOICE TO APPLY THE LAW OF MEDITERRANEO TO THE ARBITRATION AGREEMENT.

13. CLAIMANT submits that the implied choice of the parties is clear as the law of the contract extends to the arbitration clause **(1)** and the conduct of the parties during pre-contractual negotiation evinces their implied choice **(2)**.

1. The law of the contract extends to the arbitration clause.

14. Where the substantive contract contains an express choice of law and the agreement to arbitrate does not, the latter agreement will normally be governed by the law expressly chosen to govern the substantive contract [SONATRACH; HEMOFARM DD; LEW, P. 143]. Absent an explicit reference, the natural inference is that the parties intended the law of the contract to govern the arbitration agreement [SULAMERICA; CHANNEL TUNNEL; SUMITOMO; BLACK CLAWSON; LEIBINGER]. Since the present arbitration agreement is a term contained within the Agreement, it follows that the parties intended for the law of the contract to extend to all the terms. [MUSTILL & BOYD, P. 63].

15. It is imperative to distinguish between a freestanding arbitration agreement and an arbitration agreement contained in a substantive contract. Barring any express choice by the parties, the law governing a freestanding arbitration agreement is the law of the seat, and the law governing the arbitration agreement contained in a contract is the substantive law [BCY V. BCZ; VICTOR & HONG, ¶ 48; SINGH].Since the present arbitration clause is not freestanding, the express choice of law to govern that contract must be taken into account [SULAMERICA; MILLER & LEVI]. This Tribunal must apply the law of the Agreement to each clause [CL. EX. C 5, P.14, ¶ 14], as arbitration is a matter of contract and courts must rigorously enforce the same according to its terms [KLÖCKNER; ARSANOVIA LTD.].

2. The implied choice of the parties can be evinced from their conduct.

16. CLAIMANT submits that pre-contractual negotiations may be relied upon to decipher the intention of the parties **(a)** and that the parties' conduct does not indicate agreement towards a restrictive arbitration clause **(b)**.

a. Pre-contractual negotiations may be relied upon to decipher the intention of the parties.

17. Where the terms of an agreement are unclear, the drafting history and preceding communication may be relied upon to deduce the intention of the parties. Even if RESPONDENT wishes to preclude the admission of pre-contractual negotiation through application of the four corners rule, the same must be admitted as the arbitration clause is unclear [PO 2, P. 32, ¶ 16]. Equatoriana, Mediterraneo and Danubia are all Contracting States of CISG, which provides assistance in contractual interpretation. [PO 2, P. 53]. Statements made by parties during negotiations are binding under CISG, and Art. 8(3) provides for assessment of intention therein [Art. 8(3), CISG; HUBER & MULLIS, P. 71, ¶ 1]. CISG authorizes the tribunal to consider all relevant circumstances of the case including the negotiations and any subsequent conduct of the parties [SECTRETARIAT COMMENTARY, ART. 11; CISG-AC OPINION NO. 3]. In this case, consideration is to be given to pre-contractual negotiations, and RESPONDENT's allegations as to their exclusion are unfounded.

b. The parties' conduct does not indicate agreement towards a restrictive arbitration clause.

18. During the negotiations, RESPONDENT expressly included a choice of law clause for the arbitration agreement, in favour of the law of Equatoriana [RES. EX R 1]. RESPONDENT has alleged that CLAIMANT did not raise any objection to its proposal that the law of the seat should govern the arbitration agreement [ANSWER TO NOTICE OF ARBITRATION, P.30, ¶ 6]. However, RESPONDENT never clarified such intention at any point over the course of negotiations. Although the parties changed the seat of arbitration to Danubia, CLAIMANT did not accede to Danubian law governing the arbitration clause. Rather, CLAIMANT

suggested reliance on the ICC-Hardship Clause for the "*other open point*" on the law governing the arbitration agreement [RES. EX. R 2, P. 34]. The purpose of reliance on the ICC-Hardship Clause was to allow an arbitral tribunal to adapt the terms in the event of a hardship. This is further evinced by Mr. Antley's note, wherein the link between the hardship clause and the arbitration clause was drawn [RES. EX. R 3, P. 35].

19. In its reply to RESPONDENT's proposal concerning the arbitration clause, CLAIMANT made an amendment as to the place of arbitration. However, CLAIMANT only reproduced a part of the arbitration clause and did not intend for it to constitute the whole and complete arbitration agreement [RES. EX. R 2, P. 34]. The only "*other open point*" in this specific chain of correspondence was concerning the law governing the arbitration agreement. This was left for further deliberations in the context of the ICC-Hardship clause. CLAIMANT specified in its email that the reproduced portion should be "*read in its relevant part*" solely in respect of the amendment to the seat of arbitration. Thus, the implied choice cannot point towards a restrictive arbitration clause and conclusively excludes the application of Danubian law.

C. MEDITERRANEAN LAW SHOULD BE APPLIED TO THE ARBITRATION CLAUSE IN ORDER TO VALIDATE THE INTENTION OF THE PARTIES.

20. Although different jurisdictions have different stances on whether the law of the contract or the law of the seat applies to the arbitration clause, the validation principle has gained universal acceptance [TZENG, P. 343]. It is well established that an arbitration agreement should be interpreted so as to validate the intention of the parties that submit their disputes to arbitration [ICC CASE NO. 11869; GARY BORN, ¶ 56; NAZZINI P. 701]. The Agreement should thus be construed in a manner that gives width and flexibility to the words of submission to arbitration [WALTER RAU; THE KIUKIANG CARRIERS].

21. It is more reasonable to hold that the parties intended to give effect to every clause, rather than mutilate one of the most important provisions, which in this case is the hardship clause. [HAMLYN & CO]. The parties' intention is well evinced by the fact that RESPONDENT had agreed, over the course of negotiations, to relegate the power of adaptation to the tribunal [CL. EX. 8, P. 17]. In the face of any defects afflicting the arbitration clause, this Tribunal

should give effect to an interpretation that confers validity to the arbitration agreement, rather than one that invalidates the same [FIRSTLINK; PEARSON, P. 125]. Since the intention to adapt the contract can only be effectuated if the arbitration agreement is governed by the law of Mediterraneo, this intention must be validated by providing for the same.

D. THE ARBITRATION AGREEMENT IS NOT SEPARABLE FROM THE AGREEMENT.

22. The doctrine of separability is a principle of international arbitration law [ELF AQUITAINE], which states that the existence, validity and effectiveness of the arbitration clause must be assessed independently from the main contract [BREMER VULKAN; PREMIUM NAFTA; HARBOUR ASSURANCE; REDFERN, ¶ 2.101]. RESPONDENT's allegations require an application of Art. 16 of Danubian law, which is modeled upon the UNCITRAL Model Law [PO 1, P. 52]. This suggests that an arbitration agreement is a legally separate agreement from the container contract [Answer to Notice of Arbitration, p. 31, ¶ 14]. It is submitted that the doctrine of separability is inapplicable in the context as it has limited application, **(1)** and the scope of Art. 16(1) of the UNCITRAL Model Law is restrictive **(2)**. Further, even if the arbitration agreement is considered as separate, there is no direct inference that the law of the seat must be applied **(3).**

1. The doctrine of separability has limited application.

23. The doctrine of separability merely implies that the agreed mechanism for dispute resolution should survive a situation where the contract no longer subsists [SULAMERICA]. Its sole purpose is to give legal effect to this intention, and not to insulate the arbitration agreement from the substantive contract for any other purpose [POTTOW, P. 170]. However, in the instant case, the question is regarding the application of the law governing the arbitration agreement. It is no manner concerned with the validity of the substantive contract [JOSEPH, ¶ 4.36]. An arbitration agreement is treated as separate only for the above reason, and not for determining the law of the embedded arbitration agreement.

24. Further, courts have drawn a distinction between the words 'separate' and 'separable' [BCY v. BCZ]. The purpose of separability is to give effect to parties' expectation that their

arbitration clause will survive even if the main agreement falls away [PARK, P. 60–61]. Separability does not provide for a distinct agreement from the time the main contract is formed. In this sense, the arbitration agreement is separable and not separate. RESPONDENT has disregarded the intended purpose of the doctrine and its narrow usage.

2. The scope of Article 16(1) of the UNCITRAL Model Law is restrictive.

25. Art. 16 of the Danubian arbitration law stipulates that an arbitration clause forming part of a contract shall be treated as an agreement independent of the other terms of the contract. [ART. 16, UNCITRAL MODEL LAW]. RESPONDENT has relied on Art. 16 to allege that a law other than that of the contract can apply. Art. 16(1) explicitly deals with the impact of the principle on jurisdictional issues and clarifies that these issues concern the existence and validity of the arbitration agreement [PT TUGU]. The purpose of Art. 16(1) is that a finding that the contract is null and void will not necessarily entail the invalidity of the arbitration clause contained therein [U.N. DOC. A/CN.9/264].

26. The words "*for that purpose*" in Article 16(1) limit the application of the doctrine of separability to situations where the validity, existence, or effectiveness of the arbitration agreement is threatened. For other purposes, the arbitration clause continues to be an integral part of the main contract [HARBOUR ASSURANCE].

3. Even if the arbitration agreement is considered separate, there is no direct inference that the law of the seat must be applied.

27. Even if the arbitration clause is considered to be separate from the main contract, there is no absolute rule to suggest application of the law of the seat to the arbitration agreement [KUPARADZE, P. 71]. It simply states the possibility of the application of a different law to the arbitration agreement [ICC CASE NO. 4131; BORN, P.464]. It is often seen in practice that the law applicable to both arbitration agreement and the main contract is the same, even if the arbitration agreement and the contract are deemed to be separate [ICC CASE NO. 5294].

E. THE ARBITRATION AGREEMENT IS BROAD ENOUGH TO ALLOW ADAPTATION.

28. In deciding whether there is an implied choice of law, arbitrators usually look at the circumstances of the particular case, the surrounding facts and "*other objective factors including the language used in the contractual documentation*" [LEW I, ¶ 17-14; CHOI, P. 121]. RESPONDENT has stated that it explicitly limited the wording of the HKIAC Model Clause by deleting any reference that could be interpreted as an empowerment for adaptation of the contract [ANSWER TO NOTICE OF ARBITRATION, P.31, ¶ 13]. The HKIAC Model Clause provides as follows – "*Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force*" [HKIAC MODEL CLAUSE].

29. The final arbitration clause adopted by the parties did not include the words "*in relation to this contract*" and "*disputes regarding non-contractual obligations*". Such fine verbal distinction between apparently wide and narrow clauses must be abandoned [PREMIUM NAFTA; FRANKLIN]. The law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of any alleged narrow wording of the arbitration clause [ANSWER TO NOTICE OF ARBITRATION, P.31, ¶16]. The words "*arising out of the contract*" are flexible enough to connote a close connection between the terms of the contract and the performance thereof [ETHIOPIAN OILSEEDS; FRANCIS TRAVEL; PREMIUM NAFTA; HEYMAN]. There is no necessity to add terms regarding disputes relating to non-contractual obligations [WELSER & MOLITORIS P. 20; KINOSHITA & CO; MEDITERRANEAN ENTERPRISES; TRACER RESEARCH]. Moreover, adaptation is a contractual obligation, as a hardship reference was added to the force majeure clause in the Agreement [CL. EX 5, P.14, ¶ 12].

CONCLUSION TO ISSUE I

30. CLAIMANT submits that the arbitration agreement must be governed by the law of Mediterraneo. Thus, the Hon'ble Tribunal has the power and jurisdiction to adapt the contract despite the absence of an express empowerment to do so.

ISSUE II: THE TRIBUNAL MUST ADMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

31. CLAIMANT submits that the Partial Interim Award and the relevant submissions from the other arbitration, which are yet to be acquired, must be admitted on account of their relevance and materiality **(A)**. Further, the evidence has not been obtained in an illegal manner, **(B)** and confidentiality in respect of the documents has been waived **(C)**. Additionally, enforcement of a supposed right of confidentiality would amount to an abuse of rights on the RESPONDENT's part **(D)** and must be avoided in view of the prevailing principles of transparency **(E)**. Lastly, CLAIMANT submits that the Hon'ble Tribunal has the power to join the buyer from the other arbitration **(F)**.

A. THE EVIDENCE MUST BE ADMITTED ON ACCOUNT OF ITS RELEVANCE AND MATERIALITY.

32. Restrictive rules of evidence have historically been rejected by international arbitral tribunals, which ordinarily hear and consider everything that a party has to say about a dispute. [PIETROWSKI, P. 374]. The disclosed documents should be relied upon in the adjudication of the submitted dispute, as relevance and materiality are the decisive criteria in admission of evidence **(1)**, and the evidence satisfies this requirement **(2)**.

1. Relevance and materiality are the decisive criteria in admission of evidence.

33. The HKIAC Rules, 2018 and the UNCITRAL Model Law confer power on the arbitral tribunal to determine the admissibility, relevance, materiality and weight of evidence, and provide for no other bar in respect of admissibility [ART. 22, HKIAC RULES, 2018; ART. 19(2), UNCITRAL MODEL LAW]. Therefore, this Tribunal has been given a very wide reign in determining the admissibility of evidence.

34. In the absence of explicit directives within the rules administering the arbitration and the law of the seat, guidelines within the IBA Rules are instructive. Notably, they do not exclude the admission of illegally obtained evidence but refer to "*relevance to the case and materiality to its outcome*" as the two decisive criteria for evidence to be admitted [ART. 9(1), IBA RULES]. If

evidence is of substantial probative value, many jurisdictions do not grant forums any discretion to exclude the same, even if it is improperly acquired [SANG; WRAY; BUNNING]. A number of tribunals have adjudicated on the basis of illegally obtained evidence without concerning themselves with the means of procurement [OPIC KARIMUM; KILIC INSAAT; CONOCO PHILLIPS; CORFU CHANNEL; HULLEY (YUKOS MAJORITY)]. Since no precise rule exists that prevents the admission of such evidence, this Tribunal may simply determine what evidence is relevant and material, irrespective of whether it is lawfully or unlawfully obtained [MIRABAL & DERAINS, P. 208].

2. The evidence is relevant and material.

35. CLAIMANT submits that documents from the other arbitration are relevant and material, as they are the best means of demonstrating glaring inconsistencies in RESPONDENT's behaviour. It is evident that RESPONDENT's conduct subsequent to the tariff imposition was not due to belief in any legal entitlement, but rather in order to evade liability in bad faith. RESPONDENT clearly deemed that a 25% tariff constituted hardship under Mediterranean law that was sufficient enough to withhold performance [PO 2, P. 60, ¶ 39]. However, in case of a 30% tariff imposition, RESPONDENT refused to cooperate or renegotiate with CLAIMANT, despite being aware of CLAIMANT's financial constraints [LETTER BY LANGWEILER, 2ND OCT, P. 49]. While parties may be entitled to operate independently based on different contractual terms, the same should not be in violation of mandatory provisions of good faith under Mediterranean law, which governs the contracts in both arbitrations [ART. 1.7, UPICC; PO 1, P. 52]. Furthermore, the offered evidence is crucial for this Tribunal to achieve consistency and uniformity in decision making [*INFRA* ¶ 48 *ET SEQ.*].

B. THE EVIDENCE IS NOT BEING OBTAINED ILLEGALLY BY CLAIMANT.

36. There is no responsibility on the Tribunal to restrict admission of the evidence on account of breach of confidentiality or statutory obligations, as CLAIMANT has not been involved in any illegal act **(1).** Moreover, usage of the evidence would not result in breach of confidentiality under the HKIAC Rules, 2013 **(2)**.

1. CLAIMANT has not committed any illegal act.

37. The illegality involved in the disclosure of the contents of the arbitration is confined either to acts committed by witnesses to the arbitration, or a hack of RESPONDENT's database [LETTER BY FASTTRACK, OCT. 3, 2018, P. 50]. In either case, the illegality does not extend to CLAIMANT who merely obtains information available with individuals who are not bound statutorily or contractually to keep the information confidential.

38. As on Oct. 2, 2018, CLAIMANT was under the impression that Mr. Velazquez was in a position to deliver a copy of the relevant documents [PO 2, P. 60, ¶ 40]. Upon discovering that this was not possible, CLAIMANT extended a payment of 1000 USD to a company for procuring the material [*IBID.*]. It is clear from Ms. Fasttrack's email dated Oct. 3, 2018 that the alleged breach occurred considerably before this transaction [LETTER BY FASTTRACK, OCT. 3 2018, P. 50]. Thus, the payment extended by CLAIMANT is not against the commission of an act contravening any law. No allegation of bribery or corruption can be substantiated, as the prevalent definition for these terms envisages an advantage, financial or otherwise, being provided in order to effectuate the commission of an illegal act [UK BRIBERY ACT, 2010; RUSSELL ON CRIME, P. 381; UNCAC]. Since the company from which the information is sought is not under any obligation to keep the contents of the arbitration confidential, there is no illegality in the procurement of the previously disclosed material.

39. It is respectfully submitted that the documents available from the other arbitration should be admitted by this Tribunal on account of CLAIMANT's clean hands in presenting the same. Awards or decisions in which illegally obtained evidence have been declared inadmissible are premised on the active participation of the party in the illegal disclosure. For instance, in the Methanex case, the Claimant trespassed onto the property of the other party to obtain the impugned documents [METHANEX]. Similarly, in the Libananco case, confidential information came into the possession of the Respondent, the State, as a consequence of court ordered intercepts that deliberately breached attorney-client privilege [LIBANANCO].

40. On the other hand, the CJEU has expressly allowed the admission of WikiLeaks cables into evidence, while emphasising the clean hands of the party relying on such evidence [BLAIR &

GOJKOVIC, P. 243]. Courts have held that since the party requesting admission of the evidence was not involved in the illegal disclosure, the same could not be held against it [PERSIA INTERNATIONAL BANK]. Thus, no bar can be made out in the context of CLAIMANT's conduct in obtaining the material.

2. No obligation of confidentiality will be breached by admitting the evidence.

41. Art. 42 of the HKIAC Rules, 2013 imposes a duty of confidentiality on the parties, the tribunal, the institution, the witnesses, the experts, and the secretary of the tribunal [ART. 42, HKIAC RULES, 2013]. However, this obligation extends only to these aforementioned actors. Introduction of this evidence by CLAIMANT and this Tribunal's assessment thereof does not breach this provision, as it does not involve disclosure of confidential information by anyone bound by Art. 42. Furthermore, beyond this provision, no general rule of confidentiality can be made out [ESSO]. Therefore, RESPONDENT's imputation that this admission could occur only in violation of statutory obligations has no merit.

C. THE CONFIDENTIAL NATURE OF THE DISCLOSED MATERIAL HAS BEEN WAIVED.

42. The IBA Rules state that in deciding to exclude information protected by a legal impediment, a tribunal may consider whether it has been waived by an earlier disclosure [ART. 9(3)(D), IBA RULES]. In the context of disclosure of confidential information, two approaches are used based on the requirements of each case. The first is the strict liability approach, wherein any disclosure results in the loss of protection of confidentiality [VITO GALLO; WIGMORE, §§ 2325-26]. The second approach requires that in order to waive a right to confidentiality, there must be such intent on the part of the right holder. CLAIMANT submits that in these circumstances, the approach of strict liability must be applied, resulting in a waiver of the confidential character of the disclosed documents, irrespective of intent.

43. Some arbitral rules provide that the party that invites a witness to private arbitral proceedings has the responsibility of ensuring that the information disclosed therein remains confidential [ART. 76(B), WIPO ARBITRATION RULES; ART. 22(4), ACICA RULES]. Notably, Art. 42 characterises confidentiality as a duty that the parties are enjoined with, rather than

an entitlement protecting them [HKIAC RULES, 2013]. The approach that requires intent for waiver to be made out is commonly applied in the context of attorney-client privilege, which, as is evident, is a privilege belonging solely to the client.

44. On the other hand, where there exists a requirement of a heightened level of secrecy, the strict liability approach is applied. This is done keeping in mind the necessity to encourage parties that wish to keep information confidential, to diligently instill protective measures in respect of the same [ARES-SERONO]. The level of secrecy required in arbitration must be higher, since the information exchanged therein is in respect of both parties to the arbitration. Further, in assessing whether confidentiality has been waived, courts have also looked to the reasonableness of measures undertaken, as well as the interests of fairness and justice [GLAMIS GOLD; HYDRAFLOW]. RESPONDENT used an outdated firewall on the computer system containing the confidential information, making it susceptible to a hack [PO 2, p. 61, ¶ 42]. It is certainly in the interests of justice that such material be utilised to achieve a uniform resolution of similar disputes. It cannot legitimately be expected that the parties and this Tribunal ignore the value of the information that is legally at their disposal.

D. ENFORCEMENT OF CONFIDENTIALITY WOULD LEAD TO AN ABUSE OF RIGHTS.

45. The parties to this arbitration are under an obligation to conduct themselves in good faith [ART. 1.7, UPICC]. Mediterranean law provides that a typical example of behavior contrary to good faith and fair dealing is the abuse of rights [ART. 1.7, COMMENT NO. 2, UPICC]. The ICSID has described instances of conduct that would be construed as an abuse of rights, one of which involves the usage of a right for a purpose other than that for which it exists [KARAHA BODAS]. CLAIMANT submits that even if this Tribunal were to accept that RESPONDENT is entitled to keep the disclosed documents under some protection of confidentiality, the exercise of this entitlement would amount to an abuse of rights.

46. The rationale for confidentiality in arbitration is to encourage efficient and dispassionate dispute resolution, and to prevent damaging disclosure of commercially sensitive information to the public [BORN, P. 2816]. In the instant case, however, RESPONDENT intends to apply this obligation on information that has already been disclosed, in order to

take contradictory stances in different arbitrations. If RESPONDENT's argument is that the contracts and factual scenarios are different, evidence to this effect may be led in this arbitration without prejudice to any party. Since CLAIMANT has legal access to this evidence and it is apparent that the same issue has been inconsistently agitated by RESPONDENT in different proceedings, shrouding this material under the garb of confidentiality directly points towards an attempt to mislead this Tribunal to their advantage.

47. Where an expert sought to give opposite testimonies on the same issue in different arbitrations, the court carved out an exception from the rule of confidentiality, to test the credibility and value of the evidence [LEEDS ESTATES]. The cloak of confidentiality was never intended to be misused to the extent of leading potentially misleading evidence in arbitrations running in parallel [EMMOTT]. Applying the logic of the Ali Shipping case that confidentiality may be breached for the purposes of 'reasonable necessity' and 'public interest', disclosure of documents used in arbitrations has been permitted so that foreign courts would not be misled by the parties [ALI SHIPPING]. Furthermore, courts and tribunals have ordered disclosure in order to prove inconsistencies [SMEUREANU, P.155].

48. A fundamental requirement of fairness is that a party should be disallowed from denying or alleging certain facts or courses of action owing to that party's previous conduct. This is recognised as a general principle of law and is applied universally [FOUCHARD & GOLDMAN, P. 820]. Therefore, a tribunal must consider if contradictory assertions have been made in different forums and if a party has been selective in introducing evidence [WAINCYMER, P. 789)]. RESPONDENT is attempting to make an argument in this arbitration that the tariff does not amount to hardship under the law of the contract. In the other arbitration, RESPONDENT is in the process of making the opposite argument, in order to derive benefits under that contract. Since this Tribunal is uniquely placed due to the absence of any legal bar from admitting this evidence, ignoring the same would be a gross injustice, and would permit misuse of rights granted to arbitrating parties. Upholding a general right of confidentiality would simply permit RESPONDENT to lead contrary evidence in multiple

arbitrations concerning the same issue, thus stretching the right of confidentiality outside its statutory bounds, and applying it for a reason that was neither contemplated, nor intended.

E. THE EVIDENCE SHOULD BE ADMITTED IN VIEW OF PREVAILING PRINCIPLES OF TRANSPARENCY.

49. The obligation of confidentiality in arbitration is not absolute, and may be subject to factors such as 'public interest' and the 'interest of justice' [TRAKMAN, PP. 9, 10; NOUSSIA P. 92]. The UNCITRAL Transparency Rules were created to serve a public interest in investor state arbitrations that could impact policies affecting individuals in a state [POOROOYE & FEEHILY, P. 285]. The rationale of providing access to investor state arbitrations is that a level of accountability is owed to citizens, which mandates openness in matters that provide insight into the workings of the government [HALE & SLAUGHTER, P. 153].

50. The primary distinction between investment arbitration and commercial arbitration is the participation of a state in the former. Thus, in an investment arbitration, citizens are seen to have a legitimate interest in the outcome of such proceedings, as significant stakeholders [TUCK, P. 912]. It is submitted that the same rationale must be applied by this Tribunal in respect of CLAIMANT. Unlike other cases where arbitral awards only provide persuasive value, the offered documents are far more material in the instant case. Further, they are the best possible means to assess whether RESPONDENT is conducting itself in good faith [PO 2, p. 60, ¶ 39]. Courts have acknowledged exceptions to a duty of confidentiality, stating that no breach occurs by disclosing information where there is a legitimate reason to do so [HASSNEH INSURANCE; MOSKOW CITY COUNCIL]. RESPONDENT owes CLAIMANT a mandatory obligation of good faith, and is therefore accountable to CLAIMANT in the same way that a state is accountable to citizens in the context of investment arbitrations [ART. 1.7, UPICC]. Thus, there exists a legitimate reason to compel transparency.

51. Furthermore, this Tribunal must attempt to be consistent, where consistency is possible. Transparency is seen as a fundamental principle of international economic law, and is included in various international economic agreements [KOTERA, P. 618]. The Preamble of the Transparency Rules evinces its objective of contributing significantly to a harmonized

framework for the fair and efficient settlement of investment disputes. [TRANSPARENCY RULES]. Notably, UNCITRAL Model Law also states the same objective in its Preamble in respect of commercial disputes [UNCITRAL MODEL LAW]. Disclosure has been held to be acceptable if it is necessary for the fair disposal of the action [DOLLING-BAKER].

52. Additionally, Art. 1.6 of Mediterranean law, which is common to both arbitrations, states that in interpreting its principles, regard must be had to uniformity in their application [ART. 1.6, UPICC]. A similar principle is also laid down in CISG [ART. 7, CISG]. In the absence of strict legal fetters to the admission of this evidence, as also the ability to admit the same without breaching any statutory obligations, it is incumbent upon this Tribunal to apply the principles of transparency in order to arrive at a fair and informed decision.

F. THE HON'BLE TRIBUNAL IS EMPOWERED TO JOIN THE BUYER FROM THE OTHER ARBITRATION.

53. Under Art. 27.1(a) of the HKIAC Rules, 2018, a tribunal is empowered to allow an additional party to be joined to the arbitration provided that, *"prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Article 28 or 29"* [ART. 27.1(A), HKIAC RULES, 2018]. An equivalent provision exists under Art. 27.1 of the HKIAC Rules, 2013 [ART. 27.1, HKIAC RULES, 2013]. Therefore, if an additional party satisfies the criteria required for giving rise to a singular arbitration administered by the HKIAC under Artt. 28 or 29, this Tribunal shall have the power to join the additional party to the present arbitration. Uniquely, the HKIAC Rules, 2013 and 2018, do not require express consent of the parties in making this decision. In fact, parties that agree to arbitrate under the Rules waive any objections based on the HKIAC's decision to consolidate proceedings [CONNOR & TALIB, P. 195]. Specifically, RESPONDENT has waived the right to make any objection on the basis of the use of any procedure under Artt. 27 or 28 by acceding to the HKIAC Rules, 2018 [ART. 32.2, HKIAC RULES, 2018].

54. In relation to the requirements under Art. 28, which permits consolidation of proceedings, CLAIMANT submits that all criteria are fulfilled in accordance with Art. 28.1(c). Since the

claims are made under more than one arbitration agreement, the following criteria must be fulfilled [ART. 28.1(C), HKIAC RULES, 2018].

55. Firstly, it is necessary that a common question of law or fact arises in all the arbitrations. This element is satisfied, as both arbitral proceedings are presently hinged primarily on the question of whether imposition of tariff amounts to hardship under Mediterranean law. In the other arbitration, a Partial Interim Award has been made, as per which that tribunal is empowered to adapt the contract should the tariff amount to hardship [PO 2, P. 60, ¶ 39]. Therefore, the issue in need of assessment would be common in both proceedings.

56. Secondly, the rights to relief must be in respect of, or arise out of the same transaction or a series of related transactions. In both cases, the reliefs claimed are the consequence of tariffs that were imposed by a country in retaliation to the other. Any clear adjudication of disputes in both arbitration agreements rests on issues of foreseeability and assumption of risk in respect of the same series of tariffs [NOTICE OF ARBITRATION, P. 6, ¶ 10].

57. Thirdly, the arbitration agreements must be compatible. In this respect, agreements need not be identical, but substantively similar [MOSER & BAO]. This requirement is met as not only are both arbitrations administered by the HKIAC, both contracts are also governed by Mediterranean law [PO 2, P. 60, ¶ 39]. Also, the operative portion of the dispute would involve interpreting the law governing the contract, which is common to both proceedings.

58. The HKIAC has been granted a broad mandate and sufficient flexibility for ordering consolidation for efficiency and expediency [ORDINANCE]. Notably, both Mediterraneo and Equatoriana are members of the WTO [CL. EX. 6, P. 15]. Both governments have historically endorsed the WTO dispute resolution mechanism, which encourages harmonisation of parallel proceedings through consolidation of disputes [DESSEMONTET, P. 177; CL. EX. 6, P. 15]. Thus, this Tribunal has the ability to join the additional party to the present arbitration under Article 27, and is urged to do the same if it is deemed necessary for a fair adjudication.

CONCLUSION TO ISSUE II

59. The Hon'ble Tribunal must admit the Partial Interim Award and the relevant submissions from the other arbitration, as they are material to the proceedings and are unfettered by considerations of illegality.

SUBSTANTIVE ARGUMENTS

ISSUE 3: CLAIMANT IS ENTITLED TO A PRICE INCREASE BY ADAPTATION OF CONTRACT.

60. It is submitted that CLAIMANT is entitled to an excess payment of 1,250,000 USD, or other suitable amount, pursuant to a price increase by allowing adaptation of the Agreement under Clause 12 **(A)** or alternatively under CISG **(B).**

A. CLAIMANT IS ENTITLED TO PRICE INCREASE UNDER CLAUSE 12.

61. Clause 12 of the Agreement provides for CLAIMANT's exemption from responsibility in certain situations of force majeure and hardship. It is submitted that Clause 12 covers the present situation of an unforeseen tariff imposition, as it constitutes hardship caused by unforeseen events, thus making the contract more onerous **(1).** In light of this hardship, the Agreement must be adapted to increase the price payable to CLAIMANT **(2).**

1. Clause 12 covers the present situation of tariff imposition.

62. CLAIMANT has suffered hardship in the course of performance of the Agreement, due to the imposition of a 30% tariff by Equatoriana on inward shipment of agricultural goods, including horse semen **(a)**. The tariff is sufficiently covered by the exemption under Clause 12 for "*comparable unforeseen events*" **(b)**. In any case, CLAIMANT intimated a specific exemption to RESPONDENT in the course of formation of the Agreement, which is enforceable under Clause 12 **(c)**.

a. The tariff is a situation of hardship covered under clause 12.

63. Clause 12 stipulates that CLAIMANT shall neither be responsible for circumstances not within their control, nor for hardship that arises from events making performance more onerous

[CL. EX. 5, CLAUSE 12, P. 14]. The provisions of the Agreement are governed by the law of Mediterraneo, including CISG [CL. EX. 5, CLAUSE 14, P. 14].

64. Mediterranean law stipulates that a situation of hardship arises where an event fundamentally alters the contractual equilibrium **(i)**; the events occur/become known to the disadvantaged party after conclusion of the contract and could not have been accounted for by the disadvantaged party at the time of conclusion **(ii)**; the events are beyond the control of the disadvantaged party and the risk of the events was not assumed by them **(iii)** [ART 6.2.2, UPICC]. The imposition of a 30% tariff by Equatoriana thus sufficiently qualifies as an event that meets the legal threshold of substantial hardship, leading to CLAIMANT's exemption from responsibility under Clause 12.

i. The tariff fundamentally alters the contractual equilibrium.

65. A commercial transaction is based on the equilibrium of reciprocal performances, which imposes the requirement that performance of a contract should maintain its financial equilibrium [ICC CASE NO. 2291]. Economic equilibrium of the contract would be distorted by altering of the 'limit of sacrifice', which is the limit that a party need not exceed for fulfillment of contractual requirements [BERGER, P. 1352; LINDSTRÖM; RUSSI, P. 81]. Financial burden on a party caused by a rise in price has thus expressly been recognized as a fundamental alteration of contractual equilibrium under Mediterranean law [ART. 6.2.3, COMMENT NO. 2, UPICC]. Various courts, tribunals and scholars have upheld the same [ICC CASE NO. 9994; RESERVOIR; KKO 1990:138; CHENGWEI].

66. In ascertaining hardship, primary consideration is to be given to the facts and circumstances of the case [SCHWENZER, P. 716]. An inseparable element when determining situations of hardship, is the possibility of financial ruin [RESERVOIR CASE; BRUNNER, PP. 435-437; GIRSBERGER & ZAPOLSKIS, P. 131], which lowers the threshold for hardship [SCHWENZER, P.716]. The effect of the tariff is thus to be viewed in the context of CLAIMANT's dire financial situation [PO 2, P. 58, ¶ 21]. The tariff imposition resulted in an unprecedented burden on CLAIMANT. When RESPONDENT refused to recompense CLAIMANT for payments made for the tariff, despite knowledge of its financial situation, this resulted in

CLAIMANT incurring fatal losses, and possible bankruptcy [PO 2, P. 59, ¶ 28; PO 2, P. 59, ¶ 29]. These circumstances, cumulatively, have changed the basic assumptions on which the contract was entered into, which necessitates adaptation [ALCOA].

ii. The tariff is an unforeseen event.

67. Foreseeability is not a question of whether the impediment could have occurred in theory, but rather whether a reasonable businessperson in the same situation at the time of contracting could be expected to anticipate it [CESARE, ART. 79, ¶ 2.6.3; SCHLECHTRIEM & SCHWENZER I, ART. 79, ¶ 22; ULRICH, ART. 79, ¶ 32]. Numerous facts in the present case demonstrate the unforeseeability of the tariff. The Equatorianian government, particularly the incumbent party, has always supported free trade, and is not known for resorting to such retaliatory measures [CL EX. 6, P. 15]. Even though the parties provided for some sort of initial monetary allocation of burden, this does not translate to a preemption of the present tariff [ICC CASE NO. 6515 & 6516]. The initial allocation was based on the circumstances prevailing at that time. However, this was not to be maintained at all costs, including the disruption of economic balance. In fact, the parties intended the opposite, and provided for a clause to address the effect of changed circumstances.

68. Further, neither party contemplated that horse semen would fall under the new tariff regime as 'agricultural goods', as this is not common practice [PO 2, P. 58,¶ 26; CL. EX. 7, P. 16; CL. EX. 8 PP. 17-18]. Officials at the relevant Equatorianian ministry were also initially unsure of whether the tariff would affect horse semen [RES. EX. 4, P.36].

iii. CLAIMANT neither had any control over the circumstances, nor did it assume any such risks.

69. The tariff was introduced much after the conclusion of the Agreement, and being a governmental imposition by another State, it was beyond CLAIMANT's sphere of control. Further, although the Agreement was entered into on DDP basis, CLAIMANT expressly excluded such risks during pre-contractual negotiations [CL. EX. 4, P. 12].

b. The tariff is a "comparable unforeseen event" under Clause 12.

70. It is generally accepted that hardship clauses may be of broad nature or of specific nature [RIMKE, P. 229; BRUNNER, PP. 516-517; ZACCARRIA, P. 150]. There is no requirement to exhaustively list out events that constitute hardship [ICC CASE NO. 9994]. The language of Clause 12 expressly evinces the intention not to attribute hardship to specific events.

71. The exemption of responsibility for hardship is contained in the latter section of Clause 12. This was a specific addition to the basic industry template, and was intentionally tailored by the parties, over and above the template force majeure exemptions [PO 2, P. 55, ¶ 3]. This portion of the Clause provides that CLAIMANT is not responsible for *"hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [CL. EX. 5, P. 14]. In light of previous unforeseen health and safety requirements having caused enormous financial tribulation to CLAIMANT, the parties considered it necessary to ensure that events having a similar effect do not cause it further duress [CL. EX. 4, P. 12]. Thus, the risk of changed circumstances of the kind created by the tariff imposition has been excluded from the scope of responsibility to be borne by CLAIMANT.

c. The specific exemption communicated in pre-contractual negotiations must be given effect to.

72. Under the law governing the Agreement, interpretation must be carried out in accordance with the common intention of the parties [ART. 4.1, UPICC]. This intention can be discerned by an analysis of preliminary negotiations [ART. 4.3, UPICC; ART. 8, CISG]. The meaning of contractual terms, as well as the rights and obligations of parties, can be easily clarified by referring to such prior communications [SCHWENZER I, ¶ 26.63]. The language of statements [CHEMICAL PRODUCTS] as well as the context in which they are made, [ENDERLEIN, ART. 8, ¶ 2.1; HUBER & MULLIS, P. 71] are important in this regard.

73. A seller's acceptance to DDP delivery does not translate into a blanket acceptance of all risks. Unforeseen trade regulations can relieve a seller from his obligations, especially when the parties have agreed to this [RAMBERG, PP. 150-151]. CLAIMANT initially proposed a sum

of 1000 USD per dose for costs arising from DDP delivery [CL. EX. 4, P.12]. However, the parties then agreed to lower the risks to be assumed by CLAIMANT, consequently lowering the additional costs attributable to DDP delivery. To effectuate this, the direct additional costs associated with DDP and transportation were finalized at 200 USD.

74. Although CLAIMANT agreed to DDP delivery, this was unequivocally made conditional upon it not being held responsible for "*any further risks associated with such a change in the delivery terms, in particular not those associated with changes in custom regulations or import restrictions*" [CL. EX. 4, P. 12]. Notably, when finalizing the hardship clause, Mr. Krone explicitly made reference to Ms. Napravnik's email dated Mar. 31, 2017, wherein she communicated the aforementioned exclusion of risks [PO 2, P. 56, ¶ 12]. Thus, there is no doubt that RESPONDENT also intended to allow for this exemption.

75. Notwithstanding this direct reference made by Mr. Krone, RESPONDENT's lack of objection to CLAIMANT's communication of this exemption effectively amounts to acceptance. This stems from the rule that if a party declines to object where he could have done so, an inference of assent arises [DELMAR NEWS; ICC CASE NO. 3344; MUSTILL, P. 114; TEMPLE OF PREAH VIHEAR; T. C. MAY; PACKWAUKEE]. Under CISG, silence of a party is to be considered in interpretation, particularly where one party performs a contract without objection to the last statements of the other [SCHLECHTRIEM & SCHWENZER, P. 164].

76. Ms. Napravnik's email dated Mar. 31, 2017 had a tangible and direct effect on the rights and obligations of the parties. RESPONDENT subsequently continued drafting Clause 12, with no objection. The hardship clause must be viewed in light of this implied assent. The fact that the Clause does not expressly contemplate the risk of a potential tariff, does not exempt RESPONDENT from obligations it agreed to undertake. This duty is imposed on the parties by the rule of good faith [ICC CASE NO. 9994].

2. The Agreement allows adaptation of the contract in situations of hardship.

77. Clause 12 alone sufficiently allows for adaptation in situations of hardship **(a)**. In any case, the common intention of the parties to allow adaptation must be given effect to **(b).**

a. Clause 12 allows for adaptation of the contract.

78. A clause providing for circumstances of hardship has two aspects: Firstly, the contemplation of what constitutes hardship, and secondly, the contemplation of what course of action is to be followed upon occurrence of hardship [ZACCARIA, P. 150; SCHWENZER I , ¶ 45.80].

79. To address the first aspect, Clause 12 grants an exemption from responsibility to CLAIMANT in situations of hardship arising out of *"additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [CL. EX. 5, CLAUSE 12, P. 14]. CLAIMANT was clearly not required to bear any burden for this tariff at all, which would then either result in RESPONDENT bearing such burden, or the shipment remaining undelivered. Since RESPONDENT insisted on delivery, CLAIMANT is entitled to a price increase. In the exercise of good faith and fair dealing, CLAIMANT is willing to adapt the price, while forgoing its profits. It is only equitable that RESPONDENT extend a similar courtesy.

80. To address the second aspect, it is submitted that in spite of CLAIMANT's precarious financial state, it undertook the burden of payment with a bona fide belief that this amount would be reimbursed. This was not to be a liability incurred by them [CL. EX. 8, P. 18]. Consequently, the parties should have attempted to renegotiate the terms of the Agreement in good faith **(i).** In light of RESPONDENT's failure to do so, the Agreement must be adapted to factor in the increase in price payable to CLAIMANT **(ii)**.

i. The hardship requires the parties to renegotiate in good faith.

81. It has been widely acknowledged that in case of hardship, it is imperative as well as ideal for parties to renegotiate in good faith to alter the contract [ART. 6:111(3), PECL; ICC CASE NO. 6515 & 6516; BRUNNER, P. 485; FUCCI; URIBE, P. 242; SCHWENZER, P. 721]. Renegotiation has explicitly been provided for under the law governing the Agreement as well [ART. 5, CISG; ART 6.2.3, UPICC].

82. In light of the newly imposed tariff and resultant hardship faced by CLAIMANT, it was imperative to initiate a resolution process. Ms. Napravnik contacted Mr. Shoemaker, as he had been introduced to her as the person in charge of the Racehorse Breeding Programme,

and the authorized person to approach for questions arising out of the Agreement [PO 2, P. 59, ¶ 32; CL. EX. 7, P. 16]. This introduction led to a natural presumption that he would possess solutions for the situation. Mr. Shoemaker assured Ms. Napravnik that a solution would be found, and urged her to authorise the shipment, as RESPONDENT was interested in a long-term relationship with CLAIMANT, and had plans of further purchases [CL. EX. 8, P. 18]. Placing reliance on this assurance, CLAIMANT paid the tariff and sent the last shipment. Thus in light of the RESPONDENT'S statements, CLAIMANT chose to fulfill its obligations even where performance was onerous, with the warranty of what it believed was a commitment by RESPONDENT to enter into negotiations.

83. The command of good faith would be violated where a party's misleading and ambiguous attitude leads the other to perform more than it was required to [ICC CASE NO. 6515 & 6516]. It is evident that RESPONDENT'S only motive was to ensure completion of delivery, and that they did not intend to renegotiate in good faith. In fact, Mr. Shoemaker admitted to tailoring his words to ensure timely completion delivery would be completed [RES. EX. 4, P. 36]. RESPONDENT thus led CLAIMANT to anticipate bona fide negotiations, through false representations and holding out, and later denying their authority to do so [RES. EX. 4, P. 36].

84. While CLAIMANT incurred tremendous losses due to the tariff, RESPONDENT, a competitor in the industry, steadily made profits by reselling 15 doses of the frozen horse semen at a price 20% higher than that charged by CLAIMANT [PO 2, P. 57, ¶ 20]. This was a blatant breach of the Agreement, and was in contravention to CLAIMANT's expectations from the Agreement [PO2, P. 57, ¶ 16; CL. EX. 2 P. 10; CL. EX. 5, P. 13]. RESPONDENT conducted business in a manner that would severely harm CLAIMANT, who had the exclusive right to determine the usage of Nijinsky III's frozen semen, as well as the price to be charged for a particular buyer in particular circumstances [PO 2, P. 57, ¶ 19]. In spite of RESPONDENT's actions, which were solely grounded in opportunistic motivations, it refused to admit liability. Instead, to further its own causes, RESPONDENT made representations knowing that CLAIMANT would complete delivery in reliance, thereafter abruptly ending negotiations in bad faith [CL. EX. 8, P. 18].

ii. The Agreement must be adapted in light of failed negotiations.

85. Upon failure of renegotiations, remedial action may be taken by this Tribunal to adapt the contract and restore contractual equilibrium [ART. 6.2.3(4), UPICC; ART. 6:111(3), PECL; RIMKE, PP. 239-240; BRUNNER, PP. 516-517; ALCOA; SCAFOM; ICC CASE NO. 7365; ICC CASE NO. 9479]. A change in economic circumstances such as the current tariff imposition certainly warrants a re-allocation of costs between parties, and this Tribunal is entitled to reassess the burden of such tariff [ICC CASE NO. 6515 & 6516]. Although Clause 12 does not expressly provide for adaptation, it must be noted that an express provision allowing adaptation of the Agreement is not necessary [FRICK, P. 196]. Thus it is incumbent upon this Tribunal to acknowledge the requirement of a price increase in the circumstances at hand, and accordingly adapt the terms of the Agreement.

b. The parties intended to allow adaptation by the Tribunal.

86. An express provision of the parties' common intention to allow adaptation by the arbitrator was not considered to be, and is not, imperative [CL. EX. 8, P. 17]. As previously submitted, the Agreement must be interpreted according to common intention, which is discernable from pre-contractual negotiations [ARTS. 4.1, 4.3, UPICC; ART. 8(3), CISG]. In light of existing commercial realities, it is necessary to acknowledge that often, actual agreements reside outside the four corners of a written contract. It is only appropriate that a decision maker should know the commercial purpose of the contract, the genesis of the transaction, the background, and the context in which the parties are operating [SHARMA, PP. 156-158; THE DIANA PROSPERITY]. The meaning of contractual terms as well as the scope of rights and obligations arising thereunder can be easily clarified by having regard to prior communications [SCHWENZER I, ¶ 26.37]. This is especially appropriate if the intention of the parties will otherwise remain fruitless [SCHLECHTRIEM & SCHWENZER, P. 158]. If the intended adaptation of the Agreement is disallowed, the purpose of the hardship clause would also remain negated.

87. Further, it is imperative to recognize that under Mediterranean law, a party cannot act in a manner inconsistent with an understanding it has caused the other party to have, upon

which the latter has relied, to its detriment [ART. 1.8, COMMENT NO. 2, UPICC]. CLAIMANT and RESPONDENT had a common intention to provide for adaptation by arbitrators in circumstances of unforeseen hardship, and this was made known to each other during their contractual negotiations [CL. EX. 8, P. 17]. .As aforementioned, these negotiations are relevant to bring forth what parties intended to be the result of an impasse such as the present one [BRITISH TELECOMMUNICATIONS; PROFORCE; YOSHIMOTO; KUWAIT AMINOIL; ARAMCO; SVENSKA PETROLEUM].

88. The representatives that expressed the intention to allow adaptation were admittedly replaced by new representatives prior to the finalization of the Agreement. Nevertheless, the statements of the RESPONDENT's new representative evince that the modus operandi in completing the Agreement was to fully give effect to the instructions and intentions of the previous representatives [RES. EX. 3, P. 35; PO 2, P. 55, ¶ 4]. Thus, where the common intention of the parties to adapt the contract has not been expressly rejected by any provision in the final Agreement, it continues to operate. The termination of the previous representatives' agency does not retrospectively invalidate their acts.

B. CLAIMANT IS ENTITLED TO A PRICE INCREASE UNDER CISG.

89. Under Clause 14, the law governing the Agreement includes application of CISG [CL. EX. 5, CLAUSE 14, P. 14]. In case this Tribunal is of the opinion that the tariff imposition is not covered under Clause 12, the price increase should be effectuated as per Article 79 of CISG. At the outset, it must be noted that the incorporation of Clause 12 in the Agreement does not operate to the exclusion of Article 79 **(1).** Further, Article 79 sufficiently covers the effect of the tariff, and allows for adaptation in light of changed circumstances **(2).**

1. Clause 12 of the Contract does not exclude application of Article 79.

90. Art. 6, CISG is based on Art. 3 of the Uniform Law on International Sale of Goods (ULIS), both of which provide for exclusion of provisions of the law [ART. 6, CISG; ART. 3, ULIS]. Art. 3 of ULIS provides that "*such exclusion may be express or implied.*" This phrase was excluded while formulating Art. 6, CISG as the reference to "*implied*" exclusion could

encourage courts to conclude, on insufficient grounds, that CISG had been wholly excluded [SECRETARIAT COMMENTARY, ART. 6]. In order to give full effect to the intention of the legislators, Art. 6 must be interpreted narrowly.

91. Decisions have construed Art. 79 to operate in tandem with force majeure clauses in contracts, as opposed to being excluded by them. For instance, the Appellate Court of Hamburg found that a seller was not exempt for failing to deliver goods, neither under either Art. 79 nor under a force majeure clause, thus suggesting that Art. 79 was not inapplicable merely by presence of such force majeure clause [IRON MOLYBDENUM]. It has been held that Art. 79 has been used for interpretation of hardship or force majeure clauses, thereby dismissing claims of implied derogation [FEMO ALLOY]. Thus, the mere existence of Clause 12 cannot preclude the application of contractual law under Art. 79.

92. Furthermore, Clause 12 does not provide an exhaustive list of specific events that limit the clause, as it includes the term *"comparable unforeseen events"*. This enlarges the ambit of the clause, enabling CISG to govern any dispute arising therefrom. It can thus be concluded that there is no express or implied exclusion of application of Art. 79 CISG to the Agreement.

2. Article 79 of CISG provides for the requisite adaptation in changed circumstances.

93. CLAIMANT submits that Art. 79 sufficiently provides for allowing adaptation of the Agreement in cases of changed circumstances. At the outset, legislative history should not be relied upon to gauge legislative intent regarding economic hardship under Art. 79 **(a).** Further, hardship constitutes an "*impediment*" as provided for under Art. 79 **(b)**. Pursuant to this, the adaptation of the Agreement can be carried out under CISG **(c).**

a. Legislative history should not be relied upon to gauge legislative intent in relation to economic hardship.

94. Upon a perusal of the legislative history of Art. 79 for guidance on applicability to hardship, it is evidently replete with ambiguity. The Working Group of UNCITRAL rejected a proposal to allow parties to claim contractual avoidance or adjustment when facing

unexpected "*excessive damages*" [HONNOLD II, P. 350]. This may indicate a limited scope for Art. 79. However, upon a closer look, it is noted that after briefly setting out arguments supporting the proposal, the Report simply stated that it was not to be adopted, and it did not reappear in subsequent discussions [UNCITRAL YEARBOOK VIII, P. 57]. In light of this ambiguity, reliance cannot be placed on legislative history to determine legislative intent in this regard [CISG-AC OPINION NO. 7].

b. Hardship constitutes an "impediment" as provided for under Article 79 of CISG.

95. Art. 79 provides an exemption from liability for certain impediments, but does not provide a definition for the term "*impediment*". Thus, changed circumstances that were not reasonably foreseeable at the time of conclusion of the contract, and disproportionately increase the burden of performance, may form an impediment in the sense of Art. 79 CISG [SCAFOM; CHINESE GOODS]. An "*impediment*" must be construed as an obstacle that has prevented performance as was initially foreseen by parties, thereby leaving room for hardship within its scope [COMMENT 9, ICC HARDSHIP, P. 11]. Scholars support a broad interpretation of Art. 79, allowing changes in circumstances that are short of impossibility to be seen as impediments [RIMKE, P. 222-223; SCHWENZER I, P. 713; LOOKOFSKY; ENDERLEIN & MASKOW, P. 324]. A literal interpretation of the wording of this Article thus implies an elastic provision, in which the concept of hardship can effortlessly be contained [CISG-AC OPINION NO. 7, ¶ 26].

96. Since hardship sufficiently fits within the scope of application of Art. 79, upon fulfillment of the ingredients enumerated therein, CLAIMANT is entitled to an appropriate relief. Under Art. 79, a party is exempted from performance if the failure to perform is: (a) due to an impediment beyond its control, (b) unforeseeable, and (c) unavoidable, as the party could not be expected to overcome the impediment or its consequences, and (d) the cause for the failure to perform [SCHLECHTRIEM & SCHWENZER, P. 1067]. The present case satisfies all the above ingredients [*SUPRA* ¶¶ 63-68], therefore entitling CLAIMANT to a suitable remedy.

c. The CISG sufficiently provides for adaptation of the contract.

97. Since hardship is determinately governed by CISG, adaptation of the contract is the requisite remedy for the same. This remedy is available to CLAIMANT under Article 79 **(i).** In any case, general principles which form the basis of CISG must be considered to provide this remedy **(ii).** If hardship is considered not to be governed or settled expressly by CISG or its principles, domestic law must operate **(iii).**

i. Adaptation is a remedy under Article 79.

98. Art. 79(5) enables parties to exercise any right other than damages as a remedy for changed circumstances. The natural corollary of this is that renegotiation and adaptation are permissible remedies under Art. 79(5) CISG. A duty to renegotiate exists under Art. 7(1), which provides that CISG must be interpreted with regard to good faith in international trade [CISG-AC Opinion No. 7; ICC Case No. 5953]. Thus, a party is obliged to assist the other to avoid serious disadvantages as far as possible. This obligation contemplates the corresponding right of the disadvantaged party to adaptation or renegotiation of the contract [ULRICH, ART. 79, ¶ 4; ENDERLEIN, ART. 79, ¶ 6.3; NOS. 6-10; HONNOLD I, ART. 79, ¶ 432.1].

99. The imposition of a 30% retaliatory tariff constituted a radical change of the basic assumptions on which the contract between the parties had been concluded (*SUPRA*¶¶ 64-65). Binding CLAIMANT to the original contract under all circumstances is not in line with CISG's provisions of good faith and fair dealing [ENDERLEIN & MASKOW, P. 324, ¶ 6.3]. Art. 79(5) CISG thus allows this Tribunal to determine what is owed between parties, by adapting the contract to the changed circumstances [SCAFOM].

ii. General principles are to be considered where hardship is governed by, but not expressly settled in the CISG.

100. According to Art. 7(2), CISG, if hardship is governed by, but not expressly settled within CISG, it must be settled in conformity with general principles forming its basis. Consequently, where criteria under Art.79 are met, UPICC may be referred to through Art.

7, and a party would thus be entitled to request renegotiation, and a subsequent adaptation in case of failure thereof [*IBID.*].

101. The Preamble of UPICC states that its principles "*may be used to interpret or supplement international uniform law instruments*." UPICC has a larger sphere of application than CISG, and can be used to complete and interpret the CISG, as it represents the general principles that underlie it [GILLETTE & WALT, P. 309]. Art. 79 CISG has been viewed as containing lacunae in terms of remedies available in a situation of hardship and they have resorted to UPICC to fill these gaps [SCAFOM].

102. Furthermore, the hardship exemption is regarded as a generally recognized principle of law [QUESTECH; ROCKWELL; ICC CASE NO. 7365]. It is uniformly accepted across jurisdictions that hardship and changed circumstances are established concepts regarding onerous contractual performance, and their occurrence sufficiently entitles parties to suitable remedies [BRUNNER, PP. 418-419]. In civil law jurisdictions, the principle of exempting impracticable performance due to changed circumstances has received special statutory and judicial recognition [ART. 1467, ITALIAN CODICE CIVILE; 1942; ARTT. 478-480, BRAZILIAN CIVIL CODE; ART. 1198, ARGENTINE CIVIL CODE; ART. 6:258, DUTCH BW; § 313, GERMAN BGB]. This doctrine has been recognised by other civil law jurisdictions such as Switzerland, Austria, Spain [ICC CASE NO. 8873; ARNALDEZ, *PP.* 500-507; LANDO & BEALE, P. 328; CMS GAS; FLORIDA POWER; ALCOA]. Similarly, common law recognizes exemption in cases of frustration of purpose, which is nothing but "*the mirror image of impracticability*" as provided for in civil jurisdictions [TREITEL, P. 309, ¶ 7-001].

103. The concept of adaptation of contracts has been recognized across provisions of CISG. The remedy of price reduction under Art. 50 can be viewed as a form of adjustment of contracts to remedy disturbed equilibrium arising out of defective or non-conforming goods [FLECHTNER, PP. 191-258, 236-237]. Under Art. 78, a party is entitled to interest on a sum that the other party has failed to pay. However, the mode of determining the rate of interest has not been provided for therein. Courts or tribunals thus have the power to determine the interest rate, either based on general principles of reasonableness and compensation, or

based on the applicable national laws [MAZZOTTA]. Thus the issue of deciding the rate of interest involves problems similar to those faced in hardship under Art. 79. Furthermore, Art. 29 provides for modification of contracts upon an agreement between parties to that effect, thus bolstering the concept of *clausula rebus sic stantibus* under CISG.

iii. CISG provides for hardship by operation of national laws.

104. In the event it is found that hardship is not a general principle forming the basis of the CISG, Art. 7(2) must be applied. This Article mandates that courts and tribunals should settle such issues in conformity with the law applicable under rules of private international law [FUCCI]. In cases governed by CISG, applicable national laws have been prominently been used to adjudicate cases of hardship, by operation of Art. 7(2) [MCC-MARBLE]. Thus, recourse is to be had to domestic law, which is determined by conflict of law rules as applicable to the contract [SCHLECHTRIEM/SCHWENZER, P. 142].

105. In the present case, the conflict of law rules applicable to the Agreement are the Hague Principles [PO 2, P. 61, ¶ 43]. Under Art. 2(1) of the Hague Principles, a contract is to be governed by the law chosen by parties for the same [ART. 2(1), HAGUE PRINCIPLES]. Under Clause 14, the Parties have agreed to apply the law of Mediterraneo, including CISG, to the Agreement [CL. EX. 5, CLAUSE 14, P. 14]. Mediterranean law explicitly provides remedies of renegotiation and adaptation of contracts as per Art. 6.2.3, in situations of hardship. Thus, it is evident that if CISG does not allow remedies for hardship, the applicable national law should effectuate an equitable solution to the CLAIMANT's situation.

CONCLUSION TO ISSUE III

106. CLAIMANT is entitled to an excess payment of 1,250,000 USD, or other suitable amount, pursuant to a price increase by allowing adaptation of the Agreement under Clause 12**,** or alternatively, under the CISG.

REQUEST FOR RELIEF

For the above reasons, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal to hold that,

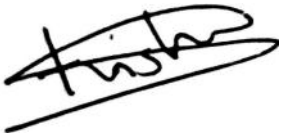
1. This Hon'ble Tribunal has the power under the arbitration agreement to adapt the terms of the Frozen Semen Sales Agreement.
2. Claimant is entitled to submit evidence from the other arbitration proceedings.
3. Claimant is entitled to the payment of 1,250,000 USD or any other amount resulting from an adaptation of the price –
    a. Under Clause 12 of the Frozen Semen Sales Agreement,
    b. In the alternative, under the CISG.

Respectfully signed and submitted by Counsel on Dec. 6, 2018.

RUDHDI WALAWALKAR

ANJALI SINGH

RAINA MITRA



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LISA MISHRA