

SIXTEENTH ANNUAL WILLEM C. VIS (EAST)  
INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
Hong Kong, March 31<sup>st</sup> – April 7<sup>th</sup>, 2019

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Memorandum for RESPONDENT



AMITY LAW SCHOOL, DELHI  
(Affiliated to GGSIP UNIVERSITY)

**On behalf of**

*Black Beauty Equestrian*

*2 Seabiscuit Drive*

*Oceanside*

*Equatoriana*

(RESPONDENT)

**Against**

*Phar Lap Allevamento*

*Rue Frankel 1*

*Capital City*

*Mediterraneo*

(CLAIMANT)

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Counsel *for* RESPONDENT

- Ambika Dilwali
  - Garv Gupta
  - Kopal Mittal
  - Korada Harshvardhan
  - Nalin Dhingra
  - Raashika Kapoor
  - Vivek Sharma
-



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### **LIST OF ABBREVIATIONS**

<b>%</b>	Per cent
<b>&amp;</b>	And
<b>AAA</b>	American Arbitration Association
<b>Art(s).</b>	Article(s)
<b>CAS</b>	Court for Arbitration of Sport
<b>CE</b>	Claimant's Exhibit
<b>Cf.</b>	Confer
<b>Ch.</b>	Chapter
<b>CIF</b>	Cost, Instance and Freight
<b>CISG</b>	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
<b>Cl. Memo.</b>	Claimant Memorandum
<b>Corp.</b>	Corporation
<b>Crit.</b>	Critique
<b>DCFR</b>	Draft Common Frame of Reference
<b>DDP</b>	Delievry Duty Paid
<b>DIP</b>	Droit International Prive
<b>e.g.</b>	Example given (for instance)
<b>ECHR</b>	European Covention on Humar Rights
<b>En</b>	English
<b>Ex.</b>	Exhibit
<b>FAA</b>	Federal Arbitration Act
<b>FOB</b>	Free on Board
<b>FRA</b>	France
<b>GER</b>	Germany
<b>HKIAC</b>	Hong Kong International Arbitration Centre
<b>IBA</b>	International Bar Association
<b>IBA</b>	International Bar Association
<b>ibid.</b>	ibidem (the same)
<b>ICAC</b>	International Commercial Arbitration Court
<b>ICAC</b>	Independent Commission Against Corruption



<b>ICC</b>	International Chamber of Commerce and Industry
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>Incoterms</b>	International Commercial Terms
<b>Int.</b>	International
<b>LCIA</b>	The London Court of International Arbitration
<b>Ltd.</b>	Limited
<b>M/s</b>	Messers
<b>Model Law</b>	UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985
<b>Mr</b>	Mister
<b>Ms</b>	Miss
<b>MST</b>	Mediterranean Standard Time
<b>No.</b>	Number
<b>NYC</b>	New York Convention
<b>p.</b>	Page(s)
<b>Para.</b>	Paragraph(s)
<b>PCA</b>	Permanent Court of Arbitration
<b>PECL</b>	Principles of European Contract Law
<b>PIA</b>	Partial Interim Award
<b>PICC</b>	Principles of International Commercial Contracts
<b>PO</b>	Procedural Order Number
<b>RE</b>	Respondent's Exhibit
<b>Rev.</b>	Reveu
<b>SDLR</b>	San Diego Law Review
<b>Sec.</b>	Section
<b>Sin</b>	Singapore
<b>U.K</b>	United Kingdom of Great Britan and Northern Islands
<b>U.S.A.</b>	United States of America
<b>ULIS</b>	Uniform Law on International Sale of Goods



<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>UNIDROIT</b>	Institut International Pour L' Unification du Droit Prive (French for: International Institute for the Unification of Private Law)
<b>UPICC</b>	The UNIDROIT Principles of International Commercial Contracts
<b>USD</b>	United States Dollar
<b>v.</b>	Versus
<b>VCLT</b>	Vienna Convention on Law of Treaties



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## STATEMENT OF FACTS

The parties to this Arbitration are Phar Lap Allevamento (“CLAIMANT”) and Black Beauty Equestrian (“RESPONDENT”; together the “PARTIES”) CLAIMANT operates Mediterraneo’s renowned stud farm, registered in Mediterraneo. RESPONDENT operates a race horse stable in Equatoriana and is famous for its broodmare lines and is slowly expanding its operations.

21<sup>st</sup> March 2017                      RESPONDENT sent CLAIMANT an invitation to offer for 100 doses of frozen semen from Nijinsky III.

28<sup>th</sup> March 2017                      RESPONDENT expressed their intention for a long-term relationship and requested lowered costs and DDP. The proposed law was that of Mediterraneo and jurisdiction of the courts of Equatoriana.

31<sup>st</sup> March 2017                      CLAIMANT submitted the revised cost accounting for the DDP delivery and declared not to undertake additional costs in the nature of health and safety requirements. CLAIMANT expressed an intention for arbitration in Mediterraneo if jurisdiction of the Mediterranean courts was unacceptable.

10<sup>th</sup> April 2017                      RESPONDENT suggested the HKIAC Model Clause to govern the arbitration agreement with Equatoriana as the seat and law governing the arbitration clause.

11<sup>th</sup> April 2017                      CLAIMANT accepted Danubia as the seat of arbitration agreement.



12<sup>th</sup> April 2017 Ms. Julie Napravnik and Mr. Chris Antley, the negotiators for the PARTIES were involved in a car accident.

6<sup>th</sup> May 2017 The PARTIES finalised and adopted the Frozen Semen Sales Agreement including the hardship clause and the law to be followed.

20<sup>th</sup> May 2017 First shipment of 25 doses is delivered as per schedule.

3<sup>rd</sup> October 2017 Second shipment of 25 doses is delivered as per schedule

November 2017 CLAIMANT'S State imposes 25% tariffs on all agricultural products from RESPONDENT'S State.

December 2017 RESPONDENT'S State implements a 30% tariff on selected goods from CLAIMANT'S State.

21<sup>st</sup> January 2018 RESPONDENT reiterated to CLAIMANT that as per DDP, any costs arising out of delivery were to be borne by CLAIMANT and never submitted to adaption of the AGREEMENT.

12<sup>th</sup> February 2018 CLAIMANT levies allegations on RESPONDENT with regard to breach of a non-existent resale prohibition. From this point on, RESPONDENT has refused to make any further payments for any additional demands by CLAIMANT.



## **SUMMARY OF ARGUMENTS**

### **ISSUE I: RELATING TO THE GOVERNING LAW OF THE ARBITRATION AGREEMENT AND THE POWER OF THE TRIBUNAL TO ADAPT.**

RESPONDENT basis its argument on the PARTIES' intention for the Danubian law to be the juridical seat in the absence of an express and separate choice of law clause. The HKIAC's guidelines as well as the Doctrine of Severability recognized in the substantive laws of the PARTIES affirm law of the seat to be the law governing the arbitration agreement. Applying the closest connection test and the default choice of law rule, law of the seat is favored to be the law governing the agreement to arbitrate. The tribunal is barred from adapting the contract in the absence of an express conferral in the contract, in light of which clause 12 does not provide for adaptation. Danubian law adheres to the "four corners rule" and "parole evidence rule" restricting the interpretation to the clauses in the contract.

### **ISSUE II: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING.**

CLAIMANT is not entitled to submit evidence from the other arbitration since it is either confidential or hacked. Furthermore, tribunal has the power to refuse admittance as CLAIMANT has approached the tribunal with unclean hands and has violated the principle of good faith. Moreover, HKIAC as well as IBA Rules give discretion to the tribunal in allowing for exclusion of evidence. Additionally, admittance of the evidence is violative of RESPONDENT'S right to a fair hearing. Even if the other arbitration is conducted under HKIAC Rules, the two arbitrations cannot be consolidated.

### **ISSUE III: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1,250,000 USD OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE.**

RESPONDENT is not liable to pay any additional cost to CLAIMANT under clause 12 of the AGREEMENT as the present situation is not covered by it. The reliance placed by CLAIMANT on Art. 79 CISG is ill-founded and has no effect as the Article has been excluded by the PARTIES by incorporating clause 12. Alternatively, even if Art. 79 is applied, it does not cover the defence of hardship. Moreover, if hardship is deemed to be under the umbrella of Art. 79 by the Tribunal, the additional tariffs do not constitute hardship. Additionally, the DDP delivery opted by the PARTIES makes CLAIMANT legally obligated to cover any and all costs arising out of the delivery of the goods. CLAIMANT can neither rely upon UNIDROIT PICC nor Mediterranean Contract Law as there is no gap in CISG and adoption of CISG excludes application of domestic law.



## **ARGUMENTS ON PROCEDURE**

### **ISSUE I: RELATING TO THE GOVERNING LAW OF THE ARBITRATION AGREEMENT AND THE POWER OF THE TRIBUNAL TO ADAPT.**

1. The applicable law of the arbitration agreement is the Danubian Law because the law of the seat is the law of the arbitration agreement **(A)**, Further so, the intention of the PARTIES was for Danubian law to apply **(B)** and that the tribunal has no power to adapt **(C)**.

#### **A. LAW OF THE SEAT IS THE APPLICABLE LAW OF THE ARBITRATION AGREEMENT.**

2. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 57, p. 7*], the law of the seat is the applicable law for the arbitration agreement as the doctrine of severability separates clause 15 from the rest of the Agreement **(1)**, Danubian Law has the most real and closest connection to the agreement **(2)** and the default law rule makes Danubian law to be the applicable law **(3)**.

##### **1) Doctrine of severability separates clause 15 from the rest of the contract**

3. The arbitration agreement [*Clause 15, CE 5, p. 14*] is separate from the underlying contract as the presumption of severability makes it independent from the underlying contract. **(a)** The substantive laws of both the PARTIES recognise the doctrine, making the law of the seat to be the governing law for the arbitration agreement. **(b)**

##### **a. There lies an inherent presumption of severability of the arbitration agreement from the underlying contract.**

4. The arbitration agreement is separate from the underlying contract.
5. The Arbitration agreement which forms part of the contract is to be treated as an agreement independent of the other terms of the contract [*Art. 19.2, HKIAC Rules*].
6. In international arbitration, the presumption of severability means that the arbitration agreement is separate and analysed independently from the rest of the underlying contract [*The Presumption of Separability in International Arbitration, Aceris Law LLC*]. The arbitration agreement is considered as a 'severable part' which can be subjected to a law other than the one governing the rest of the contract [*Paul Lagarde, 1991 REV. CRIT. DIP 287*].
7. The arbitration clause is separable from the contract that it is embedded in [*Prima Paint v. Flood & Conklin; Heyman v Darwins Ltd*]. The arbitration agreement is valid in its entirety on the basis of the principle of autonomy which is without any reference to the law governing that agreement [*Cass. 1e civ.; All-Union Export-Import Assoc. Sojuznefteport (Moscow) v. JOC Oil Ltd.*].
8. The arbitration agreement is thus separable from the underlying contract, consequently making the arbitration agreement to be governed by a different law than the one governing the contract [*Born*].



9. Thus, clause 15 of the agreement stands independent from the other clauses of the contract.

**b. The presumption is acknowledged by the substantive laws of both the PARTIES**

10. The arbitration agreement is governed by the law governing the arbitral seat.
11. In the absence of an express choice of law clause, it is the arbitral tribunal that determines the law applicable to the arbitration agreement through the intent of the parties.
12. The presumption of severability of the arbitration agreement from the underlying contract is a well-established principle [*Sec.2, FAA; Robert Lawrence Co v. Devonshire Fabrics Inc.; Prima Paint Corp. v. Flood & Conklin Mfg. Co.*].
13. The law applicable to the agreement is the law of the juridical seat of the arbitration. The *lex arbitri* determines not only the applicable law but also the courts which can exercise supervisory jurisdiction over the proceedings [*XL Insurance LTD v. Owens Corning*].
14. Article 16 of the Danubian as well as that of the Mediterranean Arbitration Law explicitly recognises the doctrine of severability which in turn makes Danubia the juridical seat [*Answer to Notice of Arbitration, para. 14, p. 31*].
15. Thus, clause 15 of the AGREEMENT is separate and further advocates that the law governing the arbitration agreement is not the law of the underlying contract.

**2) Danubian Law has the most real and closest connection to the agreement**

16. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 58, p. 7*], the arbitration agreement has the most real and closest connection with Danubian Law.
17. In the absence of an express or implied choice of law, the arbitration agreement will be governed by the law with which the agreement has its closest and most real connection [*Mustill & Boyd*].
18. The system of law with which the arbitration has the most real and closest connection propels the determination of the applicable choice of law [*Sulamérica Cia Nacional de Seguros SA and Ors v. EnesaEngenbaria SA and Ors*].
19. It is inferred that the arbitration agreement is subjected to the law of the place where the parties choose the seat of their arbitration [*Petrasol BV v. Stolt Spur Inc.*].
20. The law of the seat is the one having the closest connection with such an agreement [*Brekoulakis, Lew and Mistelis, para. 6-69 to 6-71*].
21. The arbitration clause is to be governed by the law of the seat of arbitration having a closer and real connection with the place of the seat. Thus, an agreement to arbitrate has a closer connection with the place where the parties have deliberately chosen to arbitrate, than that with the place of the law of the parent contract [*C v. D*].
22. The law with which the arbitration agreement has its closest and most real connection is the seat of the arbitration [*Abuja International Hotels Limited v Meridien SAS*].





23. An acknowledgement of the seat in the AGREEMENT substantiates that Danubia is the juridical seat.

**3) The 'default rule' favours Danubian law to be the applicable law**

24. The default rule selects the law of the arbitral seat to be the applicable law of the arbitration agreement.

25. The default choice of law rule provides for the application of the law of the arbitral seat to the validity of the arbitration agreement [*Art. V(1)(a), NYC*].

26. In an absence of a choice of law clause, the default rule favours the law to be that of the arbitral seat [*Judgment of 2 October 1931; Judgment of 24 November 1994; Judgment of 30 May 1994; Infowares Ltd v. Equinox Corp*].

27. It is upon the behest of the Tribunal to determine what law is applicable to the arbitration agreement shall be if the same is not expressly intonated [*Art. 14.1, HKIAC Rules*].

28. Thus, where the tribunal finds that no express or implied choice of law has been made, it shall proceed with the default rule of selecting the law of the arbitral seat [*Art. VI (2)(c), European Convention*].

29. The default choice of law rule comes into play upon the absence of a clause either express or implied by the parties. In the present case, the default rule favours the law of Danubia to be the law governing the arbitration agreement.

30. Even if the tribunal were to discredit the Default Law Rule; Hong Kong law shall take precedence in matters of emergency where a decision on choice of law has not been concluded [*Schedule 4, para. 9, HKIAC Rules*]. Thus, CLAIMANT'S claims about Mediterranean law are invalid.

31. Thus, Danubian Law is the applicable law for the arbitration agreement.

**B. THE INTENTION OF THE PARTIES WAS TO APPLY DANUBIAN LAW.**

32. The intention of the PARTIES was for Danubia to be the juridical seat (1), and that in the absence of a choice of law, Danubian Law to be the law for the arbitration agreement (2).

**1) Danubia is the express choice of the juridical seat.**

33. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 58, p. 7*], Danubia was the express choice for the seat; the wording "...seat of the arbitration shall be Danubia." signifies the express choice of the PARTIES.

34. The seat of arbitration determines the applicable law governing the arbitration including the procedural aspects.

35. *Lex arbitri/juridical seat* refers to the law governing the agreement to arbitrate, and the performance of that agreement [*Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*]. The choice of another country as the seat of arbitration inevitably imports an acceptance that the law



of that country relating to the conduct and supervision of arbitrations will apply to the proceedings [*Balco v Kaiser*].

36. It is inferred that the place which the parties have chosen as the seat of arbitration, is the law which they intend to subject the arbitration agreement to [*Petrasol BV v. Stolt Spur Inc.*]. Seat and venue are two different terms. The choice of seat or venue in an arbitration clause signifies the intent of the parties to not just have the place of their arbitration in that country but also the law of that country to be applicable to the arbitration [*M/s Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Pvt Ltd*].
37. Where the parties have chosen the seat themselves and the same has not been chosen by the tribunal, it plays a significant factor in deciding the applicable law for the arbitration agreement [*Institut De Droit International, 237 & 251*].
38. In the present case, the PARTIES have expressly subjected themselves to the four corners of the Frozen Semen Sales Agreement (hereinafter, 'AGREEMENT'), under which Danubia has been expressly selected as the seat of arbitration. The wording seat and in the absence of a choice of law clause, it is the juridical seat which also governs the governing law for the agreement.
39. Thus, Danubian law is the express choice for the juridical seat.

**2) In the absence of a choice of law, Danubian Law is applicable.**

40. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 58, p. 7*], Mediterranean Law will not be the applicable law because no separate choice of law clause had been added by the PARTIES to make it distinct from clause 14. No separate choice of law clause was added in the arbitration agreement which makes the law of the seat the applicable law of the arbitration agreement **(a)**, and that the HKIAC affirms the law of the seat shall apply **(b)**.

**a. No separate choice of law clause for the arbitration agreement has been added.**

41. There has been no separate choice of law clause in the agreement which makes the applicable law of the arbitration agreement to be Danubian Law.
42. Where the parties have added a choice of law clause to be applicable only to a part of the whole contract it shall apply only to that part [*Art. 2, Hague Choice of Law Principle*].
43. Where the PARTIES made an express choice of law clause to be applicable to the general agreement [*Clause 14, PO 2, p. 14*], that clause shall only be applicable to the general agreement and not the arbitration agreement. The arbitration clause not only stands separate from the whole contract but also the choice of law clause which was added by the PARTIES was only in reference to the sales part of the contract.
44. Thus, where there has been no separate choice of law clause for the arbitration agreement, the law of the seat shall be the applicable law of the arbitration agreement.



**b. The HKIAC affirms in its Model Clause, that in the absence of an express choice of the law of arbitration, law of the seat shall apply**

45. In the absence of an express choice of law of the arbitration clause, the law applicable to the seat of arbitration shall apply.
46. The HKIAC Model Clause affirms that in the absence of an express proviso specifying the law applicable to the arbitration agreement, law of the seat governs the law of the arbitration agreement.
47. The law applicable to the arbitration agreement depends upon the institution's model clause and rules adopted by the parties. Parties thus, impliedly choose the law of the seat of the arbitration to govern the agreement to arbitrate [*First Link Investments Corp Ltd v GT Payment Pte Ltd and others*].
48. The law governing the seat of arbitration is the place where the arbitration is to be held and exercises the supervisory jurisdiction that prevails over the agreement to arbitrate in the absence of an explicit reference [*Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd*]. In recognition of the problem as to which law governs the arbitration agreement, HKIAC has added an option in its Model Clause to include a provision to specify the law applicable to the arbitration clause.
49. The provision reads, "The Law of this Arbitration Clause shall be ...". HKIAC specifies that such provision mentioning the law which governs the arbitration agreement should be included particularly where the law of the substantive contract and the law of the seat are different. The HKIAC Model Clause contains an explicit reference to the law governing the arbitration agreement [*Answer to Notice of Arbitration, para. 15, p. 31*].
50. In the case at hand, the PARTIES had adopted the verbatim language of the HKIAC Model Clause for the arbitration agreement. However, PARTIES failed to insert the provision concerning the law applicable to the agreement to arbitrate for reasons unknown.
51. As a result, the agreement does not expressly mention the law governing the arbitration agreement, [*CE 5, Clause 15, p. 14*]. In this instance, the HKIAC Model Clause indicates that the law of the seat shall also be the law governing the arbitration.
52. In the absence of such a stipulation, the Mediterranean Law which governs the underlying contract cannot be presumed to govern the arbitration agreement.
53. Hence, the Danubian Law, which is the seat of arbitration, will also be the law governing the arbitration agreement.

**C. THE TRIBUNAL HAS NO POWER TO ADAPT THE CONTRACT AS IT IS BOUND BY THE SALES AGREEMENT.**



54. The tribunal does not have the power to adapt because of a lack of an express empowerment (1) and the agreement does not contain an adaptation clause (2). Furthermore, the parol evidence rule and the four corners rule limit the scope for interpretation of the agreement (3).

**1) There is an absence of express empowerment of adaptation**

55. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 53, p. 6*], Danubian Law prohibits adaptation of the contract in absence of an express conferral of powers on the tribunal.

56. The contract cannot be adapted if the *lex arbitri* does not permit. The arbitral tribunal can only decide *ex aequo et bono* or as *amiable compositeur* on an express authorization from the parties [*Art. 28(3), UNCITRAL Model*].

57. Tribunal has the power to change the terms of a contract only if the arbitration agreement contains an express authorization to that effect [*Redfern/Hunter, para. 8-20; Berger*]. The arbitral tribunal shall intervene in the contractual relationship between parties when there is an explicit authorization [*Berger, p. 10*].

58. The tribunal shall not unilaterally adapt the contract without express empowerment. While acting *ex aequo et bono* the tribunal shall exercise its powers on an entitlement given effect by the parties [*ICC Case No. 7544*]. The parties authorize the arbitrator to decide the case on the basis of equity, but the power of the tribunal is limited by the law chosen by the parties. The arbitrator is bound by the mandatory rules of the chosen law [*ICC Award No. 2216 of 1974*].

59. If the *lex arbitri* does not allow an arbitral tribunal to adapt a contract, any power to do so under the applicable substantive law becomes moot. An award providing for adaptation rendered by an arbitral tribunal that lacks jurisdiction to do so could be challenged and set aside under the *lex arbitri* [*Art. 34(2)(iii) UNCITRAL Model Law; Art. V(1)(c) NYC; Berger, 10 (Ch. 1) at n. 57*].

60. The Danubian Arbitration Law contains a general standard of application to the conferral of powers to the tribunal under which the contract shall be adapted [*PO 2, para. 36, p. 60*]. The Danubian law recognizes that arbitrators may adapt contracts but require an express empowerment from the parties in the agreement. The express conferral of powers is missing thus, prohibiting the adaptation [*Answer to Notice of Arbitration, para. 13, p. 31*].

61. The broad wordings of the HKIAC Model Clause which could be interpreted as an empowerment for contract adaptation were explicitly reduced to indicate that the contract cannot be adapted. The PARTIES themselves did not include an empowerment so that the contract shall not be adapted.

62. The AGREEMENT does not include an express empowerment of adaptation, restricting the arbitral tribunal's power to adapt.

**2) The Clause 12 of the AGREEMENT is not an adaptation clause.**



63. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 55, p. 6*], clause 12 of the underlying contract does not make reference for adaptation of the contract under changed circumstances.
64. The contract cannot be adapted even when the agreement becomes onerous taking into account unforeseeable considerations at the time of conclusion of the contract [*ICC Hardship and Force Majeure Clause 2003*].
65. Adaptation of a contract is only possible in case of hardship when CLAIMANT is able to prove that the performance of the contract has been rendered excessively onerous and could not have reasonably avoided the consequences of the impediment.
66. The hardship clause was narrowly worded that did not provide for adaptation by the tribunal [*Answer to Notice of Arbitration, para. 19, p. 32*]. RESPONDENT through the witness statement of Julian Krone affirms that it did not intend to enter into a contract wherein the arbitrators had autonomy to decide the financial dimensions [*RE 3, para. 3, p. 35*].
67. Hence, CLAIMANT'S contention for an adaptation of the contract on the basis of clause 12 is meritless. Thus, interpretation shall be restricted to the underlying contract, indicating that the tribunal lacks jurisdiction to adapt the contract.

**3) The Four corner rule and the Parol Evidence Rule limit the interpretation of the agreement.**

68. Contrary to CLAIMANT'S submission [*Cl. Memo., para. 54, p. 6*], tribunal is barred to interpret broadly as in the absence of an adaptation clause, the interpretation of the contract shall be limited to the "four corners rule" and the "parole evidence rule" as provided in the Danubian law.
69. "Four corner rule" excludes all extraneous evidence for the interpretation of contracts and interprets arbitration agreements narrowly whereas the "parol evidence" provides that when the PARTIES conclude an integrated written contract, evidence of antecedent negotiations will not be admissible for the purpose of varying or contradicting the terms of the contract. A written contract containing a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements [*Official Commentary on UNIDROIT Principles, p. 64*].
70. When the parties assent to a writing as final and complete expression of the terms of their contract, evidence of contemporaneous agreements and negotiations shall not be admitted to contradict, vary, or add to terms of the contract [*J. Calamari & J. Perillo, p. 113-14*].
71. The terms and agreements reached during negotiations but not included in the final and complete contract are superseded [*Brown v. Financial Serv. Corp.*].
72. Provisions included in writing, negotiations and communications that state the contrary are barred [*Corbin, The Interpretation of Words and the Parol Evidence Rule; Corbin, The Parol Evidence Rule*].



73. The contracts are interpreted in light of the “four corners rule” as well as the “parol evidence rule” which limits the interpretation of the arbitration agreement to its wording and excludes external evidence [*Answer to Notice of Arbitration, para. 16, p. 32*].
74. The “four corners rule” has the same effect as a Merger Clause in a contract which prohibits the use of prior statements and negotiations [*PO 2, para. 45, p. 61*].
75. The PARTIES intended the AGREEMENT to be final, superseding previous agreements and understandings, precluding them from introducing evidence additional or inconsistent with the terms outside the four corners of the contract.
76. The provision in the AGREEMENT affirms that the PARTIES abide by the terms and conditions set forth in the agreement which itself confines the interpretation within the borders of the underlying contract [*CE 5, para. 15, p. 14*]. CLAIMANT’S claim for an additional remuneration on the basis of the adaptation is not justified in the absence of an explicit empowerment by the PARTIES in the underlying contract [*Answer to Notice of Arbitration, para. 2, p. 29*].
77. The contract lacks an express conferral of the power of adaptation of price by the tribunal barring it from exercising such jurisdiction [*Answer to Notice of Arbitration, para. 9, p. 30*].

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### CONCLUSION TO ISSUE I.

**The tribunal lacks the exclusive jurisdiction and power to adapt the contract. The parties intended for the arbitration clause to be governed by the law of the seat. Danubian law governs the arbitration agreement in the absence of an express and separate choice of law clause. The Mediterranean law is inapplicable as the agreement to arbitrate is separable from the underlying contract. Lastly, the “four corners rule” and “parol evidence rule” confine the interpretation to the terms of the contract.**

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### **ISSUE II: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING.**

78. RESPONDENT strongly objects to CLAIMANT’S ill-disposed and deceptive attempt to submit the partial interim award and other related submissions from the other arbitration.
79. In the arguments that follow, RESPONDENT shall establish that: *First*, illegally obtained evidence is inadmissible **(A)**. *Second*, the tribunal has the power to exclude such illegally obtained evidence **(B)**. *Last*, the admittance of evidence violates the right to a fair hearing of RESPONDENT **(C)**.

#### **A. THE ILLEGALLY OBTAINED EVIDENCE IS INADMISSIBLE.**



80. Tribunal has discretion in determining the admissibility of evidence, which is subject to two limitations widely recognised by different jurisdictions, scholars and practitioners.
81. *First*, evidence obtained in a manner that is contrary to the international public policy shall not be admissible [*AAA International Arbitration Rules; Schlaepfer & Bärtsch; Art. 9(2)(b), IBA Rules*]. *Second*, documents shall not be admissible when protected by a privilege or secret [*Mosk & Ginsburg; Sindler and Wustermann*].
82. It is abundantly clear that the disputed evidence has been sourced either from the two former employees of RESPONDENT whose services were terminated on 6<sup>th</sup> July 2018, or must have been obtained through a hack of RESPONDENT’S computer system [*PO 2, para. 41, p. 61*], which occurred before the commencement of oral proceedings, wherein the hackers managed to retrieve a large amount of data [*PO 2, para. 41-42, p. 61*].
83. RESPONDENT submits that in both the cases, the evidence is secured by illegal means and should not be admitted by the tribunal as it is either obtained by breach of confidentiality **(1)**, or by a hack of RESPONDENT’S computer system **(2)**.
- 1) CLAIMANT is not entitled to submit the evidence obtained through a breach of a duty to confidentiality.**
84. The evidence in dispute has been procured by a breach of duty to confidentiality of the parties involved in the other arbitration.
85. Confidentiality is an absolute obligation on the parties to arbitration. The private nature of arbitration allows parties to keep their disputes away from unwarranted intrusion of competitors [*Bernardo M. Cremades & Rodrigo Cortes p. 27*].
86. Tribunals through this implied duty of confidentiality aid in preserving business relations, and avoid setting adverse judicial precedents [*Charles S. Baldwin, p. 451*].
87. RESPONDENT submits that the PARTIES to instant arbitration are bound by duty to confidentiality.
88. The duty to confidentiality viewed through the eyes of common law is deemed to be an implied condition acting as an absolute obligation onto the parties to arbitration.
89. All arbitration contracts must inevitably contain an implied duty to abstain from any disclosure of documents prepared for and used in the arbitration [*Dolling-Baker v Merrett*].
90. In certain civil countries such as France, there are no exceptions to non-disclosure and confidentiality [*Alexis C. Brown p. 974-975*]. In *Aita v. Ojeh*, it was observed that disclosure from another arbitration violates the privacy of arbitration. The disclosure of confidential documents is unwarranted [*Soci’et’e True North et Soci’et’e FCB International v. Bleustein*].
91. Privacy and confidentiality emanate from the same objectives and expectations that the parties anticipate from the arbitral process [*Born p. 2186; Ali Shipping Corp. v. Shipyard Trogir*].



92. The disclosure of documents to a third party in arbitration is equivalent to opening the doors of the hearing room to that third party [*Hassneh Ins. v. Stewart J. Men*].
93. In the case at hand, the PARTIES have elected Danubia, a common law country as the juridical seat of arbitration [*CE 5, para. 15, p. 14; PO 2, para. 44, p. 61*].
94. The Danubian law deems the PARTIES to have impliedly agreed to the duty of confidentiality while agreeing to arbitrate. In other words, the inherent characteristics of commercial arbitration, in common law, guarantee absolute confidentiality [*Kyriaki Noursia p. 24-25*].
95. CLAIMANT in the present case has paid up a sum of 1000 USD to procure a copy of the partial interim award from another arbitration of which RESPONDENT is a party [*PO 2, para. 41, p. 60-61*]. In ordinary circumstances, the partial interim award could be available as a public document from the HKIAC, subject to the consent of parties to the dispute [*Art. 45.2, HKIAC Rules*].
96. The fact that a company of doubtful reputation was contacted by CLAIMANT for information [*PO 2, para. 41, p. 60-61*] which would have been rather publicly available, leaves a reasonable ground to presume that the evidence was unpublished.
97. Furthermore, in the instant case, it is not only the rights of RESPONDENT which are in grave danger but also the privilege of the opposing party in the other arbitration.
98. Therefore, contrary to CLAIMANT's understanding, it is clear that CLAIMANT has breached the privilege to non-disclosure and confidentiality as provided by the Danubian law of arbitration and the HKIAC Rules in *Art. 45* [*Cl. Memo., para. 64, p. 10*].

**2) CLAIMANT is not entitled to admit the evidence obtained through a hack of the computer system.**

99. In the case at hand, RESPONDENT contends that CLAIMANT has illegally procured the partial interim award and other submissions through a hack of RESPONDENT'S computer systems.
100. The act of hacking into the computer system is considered improper in several arbitrations and any evidence obtained in such circumstances has been held inadmissible [*Conoco Phillips case; Methanex v. USA; Libananco Holdings Co. Limited v. Turkey*]. The hacking of e-mails is an act breaching obligation to negotiate in good faith. [*Conoco Phillips case; Libananco Holdings Co. Limited v. Turkey*].
101. In the present case, RESPONDENT faced a hack of its computer systems three weeks prior to the letter sent on 2<sup>nd</sup> October 2018 [*PO 2, p. 51*]. RESPONDENT submits that tribunals in circumstances involving hacked evidence shall weigh the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith and order the destruction and exclusion from evidence of all privileged and confidential communication [*Libananco Holdings Co. Limited v. Turkey*].





102. Furthermore, in response to CLAIMANT'S bizarre assertion that RESPONDENT'S outdated firewall led them to breaching the computer systems and that there was no agreement between them preventing hacked evidence from being admitted shows the ill-intent of CLAIMANT [*Cl. Memo., para. 83, p. 15; Cl. Memo., para. 96, p. 18*].

103. Thus, the evidence obtained through a hack should be rejected.

**B. TRIBUNAL HAS THE POWER TO REFUSE ADMITTANCE OF THE EVIDENCE.**

104. CLAIMANT has sought permission of the tribunal to introduce the partial interim award and related document from another arbitration of which RESPONDENT is a party [*PO 2, p.50*].

105. RESPONDENT strongly objects to the disclosure of the evidence in dispute [*PO 2, p.51*]. RESPONDENT submits that the tribunal must refuse admittance of the contested material as: *First*, CLAIMANT has come before the tribunal with unclean hands **(1)**. *Second*, there has been a violation of the principle of good faith **(2)** and *third*, the HKIAC and IBA rules allow for exclusion of unlawfully obtained evidence **(3)**.

**1) CLAIMANT has approached the tribunal with unclean hands.**

106. *'He who comes into equity must come with clean hands'* [*Keystone Driller Co. v. General Excavator Co.*].

107. CLAIMANT is involved in the illegal procurement of the evidence. RESPONDENT submits that CLAIMANT has acted with malice and has come before the tribunal with unclean hands.

108. The doctrine of unclean hands provides that the party seeking to introduce unlawfully obtained evidence must not have played any role in its procurement. The party introducing evidence must not unlawfully engage in disclosure of the evidence [*Ballester & Arias, p. 730; Lamm; Pham; Moloo*].

109. Under this doctrine, for a party to lose its right to submit documents, two conditions must be met: *First*, the party must act illegally or it must be aware of an illegal action of a third person attributable to it, and *second*, it must be a beneficiary of the unlawful act [*Anenson*].

110. Whenever party seeking remedy violates conscience, in his prior conduct, then the forum for redressal shall be shut against him in the preliminary stage itself. No remedy shall be awarded to such party [*Keystone Driller Co. v. General Excavator Co.*].

111. *Ex turpi causa* or the clean hands doctrine breathes on a principle of public policy. The tribunal will not aid a party where it would appear that the tribunal supports such party in its illegal conduct or encourages others in similar acts [*Euro-Diam Ltd v Bathurst*].

112. To preserve the essence of commercial arbitration, arbitrators are duty bound to address concerns of fraud and corruption in the arbitration [*Cremades & Cairns*].

113. In the present case, CLAIMANT, against a payment of 1000 USD to a company with a doubtful reputation, arranged a copy of the Partial Interim Award [*PO 2, para. 41, p. 61*]. CLAIMANT is



cognizant of the fact that the arbitral proceedings are private and confidential and that the evidence has been illegally obtained.

114. Therefore, CLAIMANT fulfils the above-mentioned criteria wherein it is a participant and a beneficiary of an unlawful act leading to the procurement of the evidence. The contested evidence must therefore, not be admitted as CLAIMANT has come before the tribunal with unclean hands.

**2) There has been a violation of the principle of good faith.**

115. RESPONDENT submits that CLAIMANT has violated its duty to act in good faith.

116. Parties have an obligation to arbitrate fairly and in good faith, this principle applies to all arbitrations, where the duty of the tribunal is to ensure that all parties to the dispute comply with such duty to act in good faith [*Libananco Holdings Co. Limited v. Turkey, para. 79*].

117. The concept of good faith implies the responsibility to inculcate honest and fair behaviour. Such conduct must be devoid of malice or any intention to deceive. Sincere intention of parties is of paramount importance and must not be undermined [*Duarte Gorjão Henriques*]. Parties are required in law to do everything necessary to ensure a fair and efficient arbitration [*Art. 13.5, HKIAC Rules; Art. 14.5, LCIA Rules*].

118. The tribunal has the discretion to sanction parties for breaches of good faith by way of the imposing of costs or any other means also available under the IBA Rules [*Art. 9.7, IBA Rules*].

119. The parties in arbitration owe to each other and to the Tribunal a general legal duty to conduct themselves in good faith during arbitration proceedings [*Methanex v. USA*].

120. CLAIMANT in the present dispute has taken a lawless route in gathering confidential information. CLAIMANT cannot use such unjust means against the bona fide expectations of RESPONDENT where the documents generated in one private hearing be used against it in another [*Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha*].

121. Arranging via an under the table transaction, a copy of the partial interim award and other documents [*PO 2, para. 41, p. 61*] protected by privilege to non-disclosure is against the principle of good faith and must not be permitted. The material in dispute under all circumstances must be rejected as CLAIMANT has violated the basic duty of maintaining fairness in arbitration.

**3) HKIAC and IBA rules give the power of excluding illegally obtained evidence to the tribunal**

122. CLAIMANT's request for submission of the contested evidence should be dismissed in its entirety. The partial interim award and the related submission are being procured from an unlawful source. RESPONDENT shall show that: *First*, the HKIAC rules empower the tribunal to exclude evidence (a). *Second*, IBA Rules supplement the HKIAC Rules (b).

**a. HKIAC Rules allow for exclusion of evidence**



123. The tribunal has the power of excluding any documents, exhibits or other evidence if it deems them to be inappropriate [*Art. 22.3, HKIAC Rules*].
124. The Tribunal also determines the admissibility, relevance, materiality and the weight of the evidence including whether to apply strict rules of evidence [*Art. 22, HKIAC Rules*]. Material in dispute must at the very outset be rejected as *first*, it is irrelevant to the case at hand and *second*, it is immaterial to the outcome of the present case.
125. Contrary to CLAIMANT's assertion [*Cl. Memo., para. 71, p. 12*] the requested material is irrelevant to the present proceeding and thus is not admissible. RESPONDENT highlights that the issues, pleadings and arguments of the other arbitration have no bearing to the present dispute.
126. It is the case of RESPONDENT that a partial interim award, delivered in circumstances unknown from a different set of arbitrators, involving a different subject matter are irrelevant [*Cl. Memo., para. 72, p. 12*]. CLAIMANT with bare minimum knowledge of factual matrix of the other arbitration is trying its best to delay the instant proceedings. Ironically, CLAIMANT bases its illegal probe on a very falsified notion of meeting justice and arriving at the "truth" [*Cl. Memo., para. 95, p. 18*].
127. RESPONDENT submits that the documents from other proceedings have no bearing whatsoever on this dispute and therefore, two arbitrations must remain separate.
128. Material document is one that is needed to allow complete consideration of the legal issues presented to the tribunal [*KaufmannKohler & Bärtsch, p. 18*].
129. The contested documents are not required in the present case and do not pertain to it. Evidence even though relevant can be excluded by the tribunal if it is not material. [*Virginia Hamilton*].
130. CLAIMANT's request to submit the documents from other arbitration amounts to nothing short of a fishing expedition. 'Fishing expedition' is where a party requests production of a very vaguely identified group of documents in the hope of finding supporting material in the adversary's evidence [*Marghitola*]. Apart from the fact that RESPONDENT is party at dispute in both the proceedings, there is no other link between the two arbitrations.
131. Irrespective of how similarly situated a party may be against a third party in a different arbitration, neither the parties nor the tribunal can claim to be heard in consonance with the other dispute [*Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha*].
132. The two arbitrations must be kept private. The very purpose of holding private hearings provided under *Article 22.7* of the HKIAC rules is to confine proceedings to the parties to a dispute. Opening its doors to third parties is against the very essence of arbitration.

**b. IBA Rules supplement the HKIAC rules in taking evidence**



133. IBA Rules reflect the international practice [*Kreindler*, p. 157; *Marghitola*, p. 34; *Redfern/Hunter*, para. 6.95; *Born*, p. 2347 *et seq.*; *El-Ahdab/Bouchenaki*, p. 98] and are frequently used in arbitration [*Born*, p. 2348; *Hill*, p. 9; *Marghitola*, p. 33; *Müller*, p. 78].
134. The IBA rules of evidence are designed to supplement and fill in gaps left in the procedural framework rules with respect to taking of evidence [*IBA Commentary*].
135. HKIAC Rules provide that an evidentiary document can be refused on the grounds of being irrelevant or immaterial however they do not define as to what constitutes ‘relevant’ or ‘material’. RESPONDENT submits that in such circumstances, a wider statute such as the IBA Rules can provide the ideal definition in accordance with the international standards.
136. The arbitral tribunal, under the IBA rules provides protection to documents and other evidence from non disclosure that may be covered by certain privileges, under the applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege [*Art. 9.2(b)*, *IBA Rules*].
137. It has been suggested that a tribunal should look for prima facie relevance and not merely possible relevance [*Brower & Sharpe*].
138. A material document has also been described as one which ‘would contribute to the clarification of the case...’ [*Yoon & Richardson; UNCITRAL Draft Guidelines for Preparatory Conferences*].
139. The Tribunal must exercise its discretion in deciding on the admissibility of alleged confidential documents [*Art. 9(2) (e)*, *IBA rules*; *Muller*, p. 71; *Perkins*, p. 273] with reference to the IBA rules on evidence [*Park, SDLR*, p. 676; *Armbriüster/Wächter*, p. 216]. RESPONDENT submits that the reliance on confidential evidence is against the very essence of privity among parties.
140. In absence of a concrete provision in the HKIAC Rules providing definite guidance on admittance of illegally obtained evidence, the next best source of international standard is the IBA Rules. In the present matter, the IBA Rules makes it clear that that the conduct of CLAIMANT in gathering evidence illegally is frowned up in the international arena

**C. ADMITTANCE OF EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING VIOLATES THE RIGHT TO FAIR HEARING OF RESPONDENT.**

141. RESPONDENT submits that contrary to the belief of CLAIMANT, the admittance of the partial interim award and related submissions obtained from the other arbitration proceeding are bad in law and in gross violation of the right to fair hearing of RESPONDENT.
142. RESPONDENT shall establish that: *First*, the tribunal is statutorily required to conduct fair and efficient proceedings **(1)**. *Second*, the admittance of the disputed evidence is against the principle of



“Equality of Arms” (2). Third, any request for consolidation must not be accepted by the tribunal for it is against the bona fide expectations of the parties involved (3).

**1) Tribunal is duty bound by the HKIAC Rules to conduct a fair hearing.**

143. The admittance of the partial interim award and related documents pertaining to the other arbitration is violative of the duty of conducting a fair proceeding.
144. The HKIAC and the parties in the present dispute are obligated to do everything necessary to ensure the fair and efficient conduct of the arbitration proceedings [*Art. 13.5, HKIAC Rules*].
145. Conducting the proceedings in a non-confidential fashion undermines privity of arbitral hearings and runs contrary to the expectations and agreements of the parties [*Born, p. 2816*].
146. Contrary to the assertions of CLAIMANT [*Cl. Memo., para. 74, p.13*], the admittance of the evidence from other arbitration proceeding is malafide and unwarranted [*Soci t  True North et Soci t  FCB International v Bleustein*]. More so, it is pertinent to note that the partial interim award from the other arbitration proceeding has been delivered under circumstances that are *in toto* out of the context of the present arbitration. The reliance on such adversary evidence is held to be unnecessary and barred by several tribunals [*Aita v. Ojeh, Alexis C. Brown p. 974-975*].
147. Therefore, RESPONDENT requests the tribunal to not allow admittance of the disputed evidence as it acts as an impediment in the fair conduct of the instant arbitration and deviates the attention of the tribunal into irrelevant and immaterial considerations.

**2) The admittance of the disputed evidence breaches the principle of “Equality of Arms”.**

148. CLAIMANT through its “*fishing expedition*” has obtained material illegally that is expressly subjected to confidential privilege of the parties involved in the other arbitration. RESPONDENT submits that CLAIMANT’S lack of respect for equality of arms violates the principles of justice and fairness.
149. “Equality of Arms” envisages procedural equality among the parties to a dispute. The equal treatment of the parties is an inherent element of the right to a fair proceeding [*Ofner and Hopfinger v Austria; Methanex v. USA; Art. 6, ECHR; Art. 15(2), UNCITRAL Rules*].
150. In *Libananco*, the contending party had obtained a catena of e-mails, containing confidential information, exchanged between the parties and their spokespeople. The tribunal stressed upon the importance of confidentiality and legal privilege and ordered the destruction and exclusion of all privileged and confidential communication [*Libananco Holdings Co. Limited v. Turkey*].
151. In the present case, RESPONDENT opposes this illegitimate effort of CLAIMANT of getting the evidence admitted. The PARTIES and the Tribunal have a responsibility to ensure a fair arbitration. CLAIMANT by making this appeal is seeking to breach equity in the arbitral procedure.



152. Hence, RESPONDENT contends that respect for the arbitration procedure should be maintained and no unwarranted requests be granted.

**3) The Tribunal should not allow for the consolidation of proceedings.**

153. RESPONDENT opposes the consolidation of this arbitration with the other arbitration. The two arbitrations are unrelated and must remain separate. CLAIMANT also concedes to the following assertions of RESPONDENT [*Cl. Memo., para. 78*].

154. HKIAC conducts two arbitral proceedings concurrently only when either of the following prerequisites are satisfied: *First*, the parties must agree to consolidate the proceedings. *Second*, the claims in two or more arbitrations are made under the same arbitration agreement. *Third*, when a common question of fact or law arises out of multiple arbitral proceedings concerning the same or related transactions [*Art. 28.1, HKIAC Rules*].

155. RESPONDENT does not agree to consolidation of the two arbitration proceedings. In absence of such authorization from RESPONDENT, the tribunal should not consolidate the two proceedings in accordance with the HKIAC Rules [*Art. 28.1(a), HKIAC Rules*].

156. More so, the two arbitrations are governed by two separate arbitration agreements [*PO 2, para. 15, p. 14*]. Even if there is a common question of law or fact relating to adaptation of the contract, it does not arise out of the same commercial transaction [*PO 2, para. 39, p. 60*].

157. In *Oxford Shipping*, when deciding on a question of holding two proceedings simultaneously, it was held that it was unlikely that the parties had envisioned that the evidence given in one case could be viewed and examined by anyone else other than the other party to the arbitration agreement.

158. It is implicit that “strangers” would be excluded from the hearings, irrespective of any similarity between the cases. Neither the parties nor the tribunal can insist that the dispute be heard or determined concurrently or in consonance with any other dispute [*Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha*].

159. Therefore, the two arbitration proceedings should in no case be consolidated for none of the essential pre-requisites for consolidation set by HKIAC are met in the instant case.

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### CONCLUSION TO ISSUE II

**The procurement of contested evidence is illegal. Admitting the material is not in line with international principles such as clean hands and good faith. Additionally, the documents are irrelevant and immaterial to the outcome of the present case. Furthermore, CLAIMANT’s request for consolidation has no legal basis. Hence, the evidence in dispute must neither be submitted nor admitted.**

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## **ARGUMENTS ON MERIT**

### **ISSUE III: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1,250,000 USD OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE.**

160. CLAIMANT is not entitled to claim hardship under clause 12 of the AGREEMENT **(A)**. Also, CLAIMANT cannot rely upon Art. 79 CISG to claim hardship **(B)** neither can it invoke the UNIDROIT Principles of International Commercial Contracts to request for hardship **(C)**.

#### **A. CLAIMANT CANNOT CLAIM HARDSHIP UNDER CLAUSE 12 OF THE AGREEMENT.**

161. Hardship cannot be invoked under clause 12 of the AGREEMENT as the PARTIES deviated from the ICC hardship clause since it was too broad **(1)** [PO 2, para. 4, p. 30] and chose to include the wordings of a Force Majeure Clause with the term “hardship”. The 30% increase in tariffs affecting the last shipment is not sufficient to amount to hardship in the present case **(2)**; and, hence CLAIMANT is not entitled to any amount under clause 12. Clause 12 provides for increase in cost due to health and safety requirements and the increased tariffs do not fall under this umbrella **(3)**. Additionally, RESPONDENT did not breach the AGREEMENT. **(4)**. Thus, the present case does not constitute hardship under clause 12 of the AGREEMENT **(5)**.

#### **1) Clause 12 of the AGREEMENT deviates from the ICC Hardship Clause 2003.**

162. PARTIES intentionally did not incorporate the ICC Hardship Clause 2003 as its ambit was considered to be too broad. Hence, it is not applicable to this dispute. PARTIES adopted the wordings of a Force Majeure Clause with the term ‘hardship’ to account for specific circumstances and not the ICC Hardship Clause.

163. The ICC Hardship Clause is only applicable when the parties incorporate it into their contract by its term or by expressly referring to it [Notes on ICC Hardship and Force Majeure Clause 2003].

164. During the negotiations, RESPONDENT clearly expressed its desire not to adopt the ICC Hardship Clause since it was too broad. In accordance with this, PARTIES inculcated a narrower clause to account for unforeseen changes in the AGREEMENT [PO 2, para. 12, p. 56].

165. The wording of clause 12 that was finally incorporated in the AGREEMENT is narrower and applies to only such situations as specifically mentioned in the clause. The aforementioned clause is not an all-encompassing hardship clause, but only accounts for the specific mentioned instances. Thus, it deviates from ICC Hardship Clause 2003.

166. The Hardship Clause was deemed to be too broad by PARTIES. Hence, during the negotiations prior to the contract, PARTIES chose not to adopt it and instead agreed upon the wordings of a



Force Majeure Clause with the term “hardship” included. Thus, the scope of hardship within clause 12 is narrower than the ICC Hardship Clause 2003.

## **2) Not hardship under ICC Hardship Clause 2003**

167. Hardship is not an excuse for adaptation of contract even when the contract becomes onerous than that was undertaken or foreseeable at the time of the conclusion of the contract [*Notes on ICC Hardship and Force Majeure Clause 2003*].
168. Hardship is accepted as an excuse only when the party claiming hardship is able to prove that the performance of the contract has been rendered excessively onerous *and* could not have been reasonably overcome.
169. CLAIMANT’S contention that the performance is excessively burdensome is frivolous and *mala fide*. The tariffs increased the cost *only* of the last shipment by 30% which only increases the cost of performance of the entire contract by 15%.
170. It is important to take heed of the fact that the increased cost of performance only comes to an effective increase of 10% for CLAIMANT which is not onerous and an accepted risk in cases of international sale of goods. [*Schwenzer*]
171. The present situation does not make the obligations of CLAIMANT to become more onerous as a 10% loss is a minimal risk that is undertaken in any international commercial transaction. [*Azerdo Da Silveira*]
172. Hence, CLAIMANT’S contention that the increased tariffs amount to hardship is legally inaccurate and its claim warrantless.

## **3) Tariffs are not comparable to the health and safety requirements.**

173. The tariffs imposed by the State of Equatoriana on agricultural goods increased the cost of the last shipment by 30% as they are applicable on horse semen as well. However, clause 12 of the AGREEMENT specifically accounts for hardship caused by health and safety requirements and not tariffs.
174. In line with what the CLAIMANT has asserted, the tariffs are not comparable events to the health and safety requirements [*Cl. Memo., para. 102, p. 20*].
175. PARTIES’ intent behind clause 12 excludes hardship caused by any circumstance, save for the one expressly provided under the clause [*Art. 8(1), CISG*].
176. The intention behind the wording of clause 12 was to account for hardship caused *only* by health and safety requirements as CLAIMANT had an experience where it paid additional costs of such nature [*PO 2, para. 21, p. 58*].
177. In the present case, the additional costs arise out of tariffs and not any health or safety requirements, thus, not falling in the ambit of clause 12 of the AGREEMENT.





178. CLAIMANT cannot invoke hardship under clause 12 of the AGREEMENT as it is primarily a Force Majeure Clause dealing with specific instances of hardship.
179. Though clause 12 of the AGREEMENT accounts for similar nature of additional costs, tariffs cannot be seen as comparable events because the intention behind the two forms of trade control are different in the fundamental sense.
180. Tariffs, by nature are a representation of the State's foreign policy and relation. However, the health and safety requirements are levied on specific goods with an intention to make the exporter, i.e. CLAIMANT adhere to the safety regulations of the importing country. This is done to make the product comply with the prevailing standards of the importing country, primarily with the intent to safeguard the citizens of the country.
181. Tariffs and health and safety requirements are not comparable events as the intention behind them is inherently different. Hence, CLAIMANT cannot invoke hardship under clause 12 as it provides for hardship only in specific instances.
- 4) RESPONDENT did not commit any breach.**
182. RESPONDENT did not breach the AGREEMENT as contested by CLAIMANT [*Cl. Memo., para. 137, p. 27*].
183. As per the 'four corners rule', the AGREEMENT is the only binding part on PARTIES and the evidence being relied upon by CLAIMANT is hearsay.
184. As per the 'four corners rule', no other document except the final contract can be held binding on the contracting parties.
185. RESPONDENT is not bound by any other condition other than the AGREEMENT. CLAIMANT'S assertion that RESPONDENT acted in breach of the AGREEMENT is incorrect as RESPONDENT is only bound by the AGREEMENT. The AGREEMENT contains no restriction as to the resale of the frozen semen.
186. CLAIMANT'S reliance on Art. 2.1.1 of the UNIDROIT Principles is bad in law as issues related to breach of contract are covered under clause 15 of the AGREEMENT which is the arbitration agreement governed by Danubian law. Thus, 'four corners rule' is applicable to all cases of breach alleged by CLAIMANT [*Cl. Memo., para. 139, p. 27*].
187. In the present case, there is no clause barring RESPONDENT from reselling the frozen semen in the AGREEMENT or clause 15. Thus, there was no such prohibition agreed between the PARTIES and no obligation upon RESPONDENT to not resell the frozen semen that it had purchased from CLAIMANT. Also there was no prohibition contained in the general conditions available on CLAIMANT'S webpage [*PO 2, para. 2, p. 55*].



188. The AGREEMENT neither contains a stipulation nor bars the reselling of the frozen semen procured by RESPONDENT from CLAIMANT. CLAIMANT’S argument is incorrect when it levies such ill-founded allegations against RESPONDENT.
189. Therefore, RESPONDENT did not violate any of the provisions contained in the AGREEMENT and did not breach the contract.
190. Additionally, RESPONDENT did not resell any of the doses of the horse semen it had purchased from CLAIMANT. By relying on unsupported statements of a third person, CLAIMANT has erroneously accused RESPONDENT of reselling.
191. Relying solely on the statements of a third person without any proof or evidence of the same is against the principle of good faith. [Art. 7(1), CISG]
192. CLAIMANT’S allegation that RESPONDENT resold certain doses of frozen semen are baseless and unsupported. These allegations are based solely on the statements of an Equatorian breeder [PO 2, para. 20, p. 57]. These statements are meritless as there is no actual market for the resale of frozen horse semen [PO 2, para. 19, p. 57]. Moreover, RESPONDENT does not have a history of reselling such products [PO 2, para. 18, p. 57].
193. CLAIMANT is blaming RESPONDENT without any proof, simply to demand additional payment. The figure given by CLAIMANT, i.e. 1,420,000 USD is wrong and demanded with *mala fide* intention.
194. Thus, RESPONDENT has not committed fraud or breach of contract and in no way did it deceive CLAIMANT.

**5) Additional tariffs do not constitute hardship under clause 12 of the AGREEMENT.**

195. CLAIMANT cannot claim hardship under clause 12 of the AGREEMENT as a mere increase of 30% is an accepted risk in international transactions. [Schweznier]
196. Any party to a contract is bound to accept the dynamic nature of an international market and cannot deviate from its obligations by claiming a change in circumstance for minor fluctuations in market conditions [UNCITRAL Secretariat’s Commentary, 18].
197. The 30% increase in tariffs which affected only the last shipment between the PARTIES cannot be said to cause hardship as it is neither unprecedented in an international commercial transaction nor does it excessively impact the overall costs of the contract.
198. Contrary to CLAIMANT’S contention of tariffs being excessively burdensome, the increase in cost of the last shipment only constitutes an increase of 15% of the total contract value [Cl. Memo., para. 105, p. 21].
199. Therefore, the PARTIES deviated from the broader ICC Hardship Clause 2003 and agreed on a narrower wording under clause 12. Additionally, the tariffs are not comparable events to health and safety requirement and hence are outside the ambit of clause 12 of the AGREEMENT. The



present situation does not constitute hardship under ICC Hardship Clause 2003 and *ipso facto* can not fall under clause 12 of the AGREEMENT.

**B. CLAIMANT’S DEMAND OF ADDITIONAL PAYMENT UNDER ART. 79  
CISG IS MERITLESS**

200. CLAIMANT’S claim of 1,250,000 USD against a price adaptation due to hardship under Art. 79 of the CISG is false as Art. 79 cannot to be applied to the present issue due to inclusion of clause 12 in the AGREEMENT **(1)** ; Art. 79 is a Force Majeure Clause and cannot be said to cover hardship **(2)**; and even if Art. 79 is applied, the present case does not constitute hardship **(3)**.

**1) Incorporation of clause 12 in the AGREEMENT excludes the application of Art. 79 CISG.**

201. The PARTIES added clause 12 to the AGREEMENT to account for certain provisions which may alter the performance of the contract. The clause provided for hardship and force majeure in specific circumstances and hence, the inclusion of a separate provision excludes the application of Art. 79 CISG.

202. Art. 6 CISG excludes the application of specific provisions of the convention if the contracting parties have opted out by including a specific provision to that effect.

203. CISG can be opted-out implicitly by the parties. Many tribunals expressly admit the possibility of this [*UNCITRAL Digest, para. 9*], as long as the parties’ intent to exclude CISG is clear and real [*Schwenzer (2010), p. 103*]. If the parties want to exclude the CISG, they have to tacitly or explicitly agree on an exclusion of the application of this Convention [*Boiler Case*]. Majority of delegations of the diplomatic conference opposed the requirement of express exclusion [*United Nations Publication, E.81.IV.3*].

204. This is justified by the fact that an express reference to the possibility of an implicit exclusion was eliminated from CISG text , “lest the special reference to implied exclusion might encourage courts to conclude, on insufficient grounds, that CISG had been wholly excluded” [*UNCITRAL Secretariat’s Commentary, 17*]. The lack of an express reference to an implicit exclusion must not be regarded as precluding such a possibility [*Ferrari, p. 16*].

205. If the choice is only in relation to a limited issue which is covered by the CISG, then the choice may amount to a derogation from the CISG in regard to those matters, but not a full exclusion [*Judgement of 2 November 2004*].

206. By reference to an INCOTERM by one party to the contract to decide the burden of costs excludes the application of the CISG if the other party performance the contract in accordance with such INCOTERM [*Schwenzer, para. 28, p. 116*].



207. The PARTIES included clause 12 in the AGREEMENT to account for unforeseeable changes which may affect the performance of the contract. This explicit clause dealing with such situations impliedly excludes the application of Art. 79 of the CISG as the PARTIES have chosen a separate provision to take effect in such situations. CLAIMANT'S claim for additional payment under Art. 79 CISG is not backed by law as the Article is not applicable to the present AGREEMENT [*Cl. Memo., para. 123, p. 24*].

208. Art. 8(1) CISG clearly lays down that the intent of the parties should be deduced from their actions and statements. The reference to ICC Hardship and Force Majeure Clause in the drafting of clause 12 shows the clear and real intention of the PARTIES to derogate from the provisions of the CISG dealing with such instances [*RE 3, p. 34*].

209. In addition, the DDP that the PARTIES agreed to, by nature demands the seller to undertake the risks associate with delivery of the contracted goods.

210. Thus, the PARTIES intentionally excluded the application of Art. 79 CISG by including and adopting clause 12 in the AGREEMENT and opting for Delivery Duty Paid which decides the division of risks between the PARTIES.

**2) Art. 79 CISG does not apply to hardship situations as there is no gap in the Convention.**

211. The CISG is an exhaustive substantive law that governs international sale of goods. CLAIMANT cannot invoke the defense of hardship under Art. 79 or any other provision under CISG as Art. 79-80 provide an exhaustive list of exemptions for a party.

212. Exemption of performance under the contract by claiming hardship is at odds with the general principles of CISG which favour the performance of agreement even when it has been rendered more difficult. Hence, preserving the principle of *pacta sunt servanda*.

213. If the Tribunal admits the gap in CISG, it would be a gross violation of the principles of uniformity of law which was the driving force behind the CISG.

214. Art. 79 CISG is a Force Majeure Clause which cannot be relied upon by CLAIMANT for hardship. Art. 79 should be interpreted as per its ordinary meaning (a), preparatory work of the Article (b) and judicial decisions (c) which have excluded hardship from its scope.

**a. Ordinary Meaning, Object, and Purpose of Art. 79 CISG excludes hardship.**

215. According to the "traditional view" hardship is excluded from the scope of application of Art. 79 CISG [*Petsche, p. 150,155*].

216. Art. 31 of the VCLT calls for a treaty to be interpreted in good faith and in accordance with the ordinary meaning of the terms of the treaty in their context in the light of its purpose [*Vienna Convention on the Law of Treaties 1969, Art. 31*].



217. The term ‘impediment’ used in the text of Art. 79 relates to the situation of making performance of contract impossible, and not merely difficult or excessively onerous for the disadvantaged party [*Petsche, p. 157*].
218. Art. 79 CISG is intended to define the boundaries of the obligor's performance in an exhaustive manner [*Bonell, para. 3.1.2; Honnold, para. 432.2 n. 16 (Ch. 1); Schlechtriem/Schwenzler para. 31; Brunner, para. 27, Art. 4 CISG, para. 49*].
219. There are no other exemptions available under the Convention besides the ones covered in Art. 79-80, which also means that there is no space for the application of the hardship defence [*Petsche, p. 159*].
220. When the rule of Art. 31 VCLT is applied to the text of Art. 79 CISG, its ordinary meaning, object and the purpose is examined, there is no place for hardship under the provisions of Art. 79 CISG.
221. The performance of the AGREEMENT has merely become more expensive for CLAIMANT. It cannot constitute ‘impediment’ under Art. 79 as it deals explicitly with situations where the performance becomes impossible.
222. The lack of a hardship provision in CISG shows the clear intent of the drafters to not provide for such a situation as the exemptions given under CISG are an exhaustive law and CLAIMANT’S defence of hardship under Art. 79 is an excuse to not carry out their legal obligations under the AGREEMENT.
223. Thus, Art. 79 is not a hardship clause and the reliance placed by CLAIMANT on it has no merit.

**b. The drafting history of the CISG show the intent to exclude hardship from the Convention.**

224. Art. 32 of the VCLT makes a reference to the drafting history of the legislature to determine the intent of the law. The general legislative intent of the drafters of CISG was to exclude hardship as they rejected the Norwegian Proposal to include it under the Convention [*Petsche, p. 163-166*].
225. The Convention’s legislative history offers a lot of support for the argument that Art. 79 CISG contains strict rules about the exemption from liability and does not easily excuse the non-performing party [*Rapporteur Prof. Alejandro M. Garro para. 27*].
226. Comments of members of the UNCITRAL Working Group about proposals, and also the replacement of the term “circumstances” from Art. 74 ULIS with the term “impediment” concludes that there was a consensus among the drafters against hardship being under Art. 79 CISG. The Committee established by the UNCITRAL reviewed the propositions of the working group and specifically rejected the proposed article on hardship [*Schmidt-Ahrend, p. 19; Bridger p. 89-91*].



227. CLAIMANT'S demand of price adaptation as a remedy of hardship under Art. 79 CISG is contrary to the provision of law as the drafters of the CISG specifically intended to exclude hardship from Art. 79.

228. Thus, the claim of hardship under Art. 79 is mistaken in law as CISG does not recognise hardship as an exemption from duties arising from the contract and CLAIMANT has erroneously interpreted the Article [*Cl. Memo., para. 127, p. 24*].

**c. Courts and Tribunals do not recognise hardship under Art. 79.**

229. It has been almost unanimously accepted in courts, judicial decisions and scholarly articles, that Art. 79 does not cover situations of hardship within its ambit [*Schwenzger*].

230. Italian court determined that a seller cannot rely on hardship (*eccesiva onerosità sopravvenuta*) as a ground for avoidance, as the CISG does not contemplate such a remedy in Art. 79 or elsewhere [*Nuova Fucinatti S.p.A. v. Fondmetall International A.B.*].

231. In *Nuova Fucinatti S.p.A. v. Fondmetall International A.B.*, a Swedish buyer and an Italian seller, concluded a sales contract for the delivery of 1000 tons of iron chrome. The price of the goods rose by 30% after the contract was concluded and before the delivery, and on that ground, the seller claimed hardship under CISG. The court did not allow the party to invoke a hardship defence, because: “Under the Convention the remedy of dissolution is associated with breach, whereas the excessive onerosness doctrine does not fit within the structure of the Convention when invoked either as a defence or as a reason to avoid the contract.”

232. The significant change of price of the contracting goods is not recognised as impediment as under Art. 79 CISG [*Vital Berry Marketing NV v Dira-Frost NV*].

233. More often, Art. 79 decisions have found “impediment” to be most similar to standards for impossibility and hence, have not construed it to include commercial hardship [*Nuova Fucinatti S.p.A. v. Fondmetall International A.B.; Vital Berry Marketing NV v. Dira-Frost NV*].

234. CLAIMANT'S reliance on the Scafom International Case [*Cl. Memo., para. 132, p. 26*] is ill-founded. In the *Scafom Case*, Belgian Supreme Court directly resorted to general principles of law of international trade, which is hardly the same as the principles underlying the Convention. Principles underlying the convention are found in the convention's text, while on the other hand, general principles of law of international trade are contained in some other, external sources which govern a much wider area of commercial law [*Flechtner, p. 95*].

235. Reliance placed upon the Scafom International Case by CLAIMANT to claim hardship is good-for-naught as the Belgian Court erred in judgement while interpreting the principles upon which the convention is based. [*Petsche*]



236. Various other judicial pronouncements as mentioned above clearly lay down the scope of Art. 79 which does not accept hardship as an exemption.

237. The Article does not offer an umbrella to the defence of hardship by Courts and Tribunals. It has been explicitly excluded from the ambit of CISG and any defence of hardship under thereto is not valid.

238. Thus, Art. 79 CISG or any other article under the Convention cannot be deemed to encompass hardship within its ambit.

**3) Alternatively, the present situation does not constitute hardship under Art. 79 CISG.**

239. Even if Art. 79 is deemed to include hardship, CLAIMANT cannot invoke the Article as it has not met the threshold needed to constitute hardship under Art. 79.

240. Under Art. 79 CISG, a promisor is obligated to accept substantially increased costs and even a loss resulting from the transaction in order to overcome an impediment [*Schwenzer(2010)*].

241. It is argued that an increased price is foreseeable for a company involved in international trade [*CISG-online 1067; Steel Ropes Case; Porter Textil GmbH v. J.P.S. BVBA; Société Romay AG v. SARL Bebr France*].

242. The disadvantaged party seeking to invoke the hardship defense under CISG has to prove that the situation of changed economic circumstances is so severe that it relieves the party from its obligations. The performance has to go beyond the “limit of sacrifice” [*Schlechtriem/Schwenzer, Commentary*].

243. For a situation to constitute hardship under Art. 79, the party’s relationship, that is their sales contract need to be taken into consideration [*Schwenzer, p. 715*]. If the contract is highly speculative, the presumption must be in the promisee’s favour, that is, that the obligor has assumed the risk of changed circumstances especially in cases of price fluctuations which result in the transaction being a loss [*Steel Ropes Case; Scafom International Case*].

244. Conditions laid down by Art. 79 CISG are not fulfilled as the threshold of hardship is not met **(a)** and CLAIMANT is obliged to undertake any risk associated with delivery as it opted for DDP. **(b)**

**a. The additional tariffs imposed do not result in hardship.**

245. Even a 100% price fluctuations is not severe enough to enable the disadvantaged party to escape obligations under Art. 79 CISG.

246. This is because international markets are more speculative than domestic ones, and consequently, a higher threshold is expected to be met to grant an exemption from liability [*Schwenzer*].

247. It should be noted that price fluctuations which are in such lower range of 70%-100% are to be associated with a usual risk which the party engaged in a certain type of trade usually assume and



therefore will be considered foreseeable [*Scafom International Case; Société Romay AG v. SARL Behr France; Steel Ropes Case*].

248. Even where a party proves that the change in circumstances was unforeseeable, the hardship defence cannot be granted if the threshold is not met [*2012 UNCITRAL Digest*].
249. In speculative transactions, even a price fluctuation of 300% is not sufficient to excuse the disadvantaged party from non-performance and liability for damages under Art. 79 CISG [*Iron Molybdenum Case; Steel Bars Case; Nuova Fucinati v Fondmetall International*].
250. In the FerroChrome case [*Nuova Fucinati S.p.A. v. Fondmetall International A.B.*], the cost price of contracted goods increased by 30% after the conclusion of contract and before delivery as in the present case. However, the court explicitly stated that a mere 30% increase cannot be said to amount to hardship in cases on international sale of goods.
251. The increased tariffs of 30% affected only the last shipment of CLAIMANT. This resulted in an increased cost of 1,500,000 USD. This cost amount to only 15% of the total contract value.
252. Considering that CLAIMANT has a profit margin of 5%, the actual loss is only of 10% of the contracted price amounting to 1,000,000 USD. As pronounced by various scholars and courts, a fluctuation of price is a risk that the parties undertake in the case of an international contract.
253. CLAIMANT cannot claim that this situation constitutes as hardship [*Cl. Memo, para. 114 and 115, p. 22*] as a basic degree of risk and uncertainty are a part and parcel of international commercial transactions and such a minimal increase in the cost of performance for CLAIMANT cannot be said to go beyond the threshold of sacrifice.
254. Hence, such an insignificant change in market conditions does not meet the threshold of hardship and CLAIMANT'S declaration of a loss of 30% is a wrong and misleading figure.
- b. CLAIMANT is dutybound to bear the costs of delivery as per DDP.**
255. Under DDP, the seller is expected to bear any and all costs arising out of the delivery of the goods [*UNDP Practice Series, Shipping and Incoterms, November 2008*].
256. By including a reference to a particular ICC Incoterm in the contract, the parties incorporate the set of rules of that term in that contract. Court decisions and arbitral awards recognise the contractual nature of the Incoterms rules' binding force. Even if the parties don't expressly refer to a specific Incoterms rule, the Incoterms rules *may* become part of the contract since they reflect generally recognised principles and practices.
257. This was expressed in the BP Oil Case, where the US Federal Court equated the parties' inclusion of a CFR term with '*incorporation*' of the Incoterms version of that term: 'even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2) of the CISG' [*Lookofsky*].





258. In a situation where the seller assumes the obligation to deliver certain amount of goods to the buyer and cannot perform his obligation due to an increase in the cost of performance, e.g. because of the increase of import duties to his country, the seller has to be expected to try to obtain the goods from another source or still obtain the goods despite a higher cost of transfer, until this increase in costs reaches the relevant threshold or the so-called “limit of sacrifice” [*Schlechtriem/Schwenzler, p. 1142*].
259. In a DDP contract, where there is a customs duty liability, the overseas supplier is responsible for acquittal of that liability and will be regarded as the owner for Customs entry purposes [*Acta Universitatis Bohemiae Meridionalis*].
260. Under clause 8 of the AGREEMENT, DDP was specifically included by the PARTIES to decide the terms of delivery and the burden of risks associated therewith. The inclusion of the said INCOTERM casts an obligation on CLAIMANT to undertake the risks associated with the delivery which includes any fluctuations in the tariffs and import costs.
261. CLAIMANT cannot escape its obligations by claiming hardship. The defence of hardship cannot be granted when CLAIMANT agreed to undertake the risks in the first place.
262. Therefore, CLAIMANT is legally bound to bear the additional tariffs as per the nature of the DDP INCOTERM which both the PARTIES explicitly agreed to in the pre-contractual negotiations and inculcated in the AGREEMENT.

**C. RESPONDENT IS NOT LIABLE TO PAY ANY COMPENSATION UNDER UNIDROIT PICC.**

263. CLAIMANT’S contention that the UNIDROIT Principles create an obligation onto RESPONDENT to pay the claimed amount of 1,250,000 USD is meritless as the UNIDROIT Principles are not applicable in the case **(1)** ; and even if they are applied the situation does not constitute as hardship under PICC **(2)**.

**1) The UNIDROIT PICC cannot be used to supplement the CISG.**

264. The reliance placed on UNIDROIT by CLAIMANT is bad in law as PICC cannot be used to interpret and expound upon the CISG as UNIDROIT was drafted as a separate law and not supplementary to CISG **(a)**. The scope of application of the two laws are contrasting **(b)**; and UNIDROIT PICC are not general principles of international law **(c)**.

**a. UNIDROIT was drafted as a distinct law from the CISG.**

265. UNIDROIT Principles cannot be considered to contain general principles on which the CISG is based since they came into existence fourteen years after the CISG was enacted [*Schwenzler (2010), p. 117*].



266. They are an instrument of soft law, drafted by a different institution. PICC were drafted by UNIDROIT, an institution which is separate from the United Nations, unlike UNCITRAL (whose Working Group No. 6 drafted the CISG).
267. The UNIDROIT PICC prepared by the study group on European Civil Code on its own is not sufficient to interpret the CISG having regard ‘to its international character’ [*Schwenzer/Hachem, p. 93*].
268. Moreover, it has been noted that UNIDROIT Principles were much more influenced by the civil law systems, while CISG was intended to be a compromise between civil and common law approaches, more suitable for international trade [*Schwenzer*].
269. The prevailing view in legal fraternity is that UNIDROIT Principles and other external sources cannot be used to supplement the CISG [*Tepes̆, p. 688*]. UNIDROIT Principles are not suitable to use in application of Article 7(2) CISG as general principles underlying the CISG [*Schwenzer*].
270. The autonomous interpretation of the CISG has been defined through a negative definition by scholars– “no external concepts to interpret the CISG” [*Stefan Kröll/Loukas A Mistelis/Pilar Perales Viscasillas*].
271. In response to CLAIMANT’S demand of damages under UNIDROIT, it is imperative to take note of the fact that the UNIDROIT Principles, in themselves are not applicable on the present dispute. Hence, any reliance placed on them has no merit [*Cl. Memo., para. 149, p. 29*].
272. CLAIMANT has erred in its application and interpretation of the UNIDROIT as regarding them to be supplementary laws to the CISG. This is inconsistent with the accepted legal practices observed by various scholars and tribunals.
- b. The scope of application of UNIDROIT is distinct and cannot be applied with CISG.**
273. The scope of application of the two instruments are significantly different. While CISG is dealing exclusively with international contracts of sale of goods [*Art. 1(1) CISG*] UNIDROIT Principles have a different scope of application as they have been designed to cover a set of general commercial contracts’ principles [*Tepes̆, p. 688*].
274. The CISG has been used a guide law for many of the provisions of UNIDROIT Principles. However, this similarity of the provisions is merely a logical consequence of CISG being used as a model for the adoption of UNIDROIT Principles, and should not be used as a negation of the glaring differences between the scopes of application of the two instruments [*Tepes̆, p. 688*].
275. The CISG was chosen as the governing law for the AGREEMENT by the PARTIES [*CE 5, para. 14, p. 14*]. The express inclusion of the choice of law excludes the application of PICC or any other domestic laws.



276. The AGREEMENT between the PARTIES is a contract of international sale of goods and hence falls under the ambit of the CISG rather than UNIDROIT.

277. The scope of application of UNIDROIT PICC and CISG are distinct and PICC cannot be said to be a supplementary law to the CISG. Thus, cannot be applied in the present dispute.

**c. UNIDROIT PICC are not general principles of international law.**

278. There is an important difference between general principles on which CISG is based, and general principles of international trade law or commercial law [*Flechtner; Tepes*].

279. Article 7(2) CISG provides that internal gaps in the Convention are to be filled in by the general principles on which the CISG is based. UNIDROIT Principles are not general principles underlying the CISG. Providing that UNIDROIT Principles can be used as means to interpret or supplement uniform law instruments unnecessarily opens the door to the possibility that these instruments starts becoming perceived as principles on which the Convention is based [*Tepes, p. 692*].

280. In the Scafom International Case, instead of trying to fill the supposed gap with the general principles on which CISG is based, Belgian Supreme Court directly resorted to general principles of law of international trade, which is hardly the same as the principles underlying the convention. Principles underlying the convention are found in the convention's text, while on the other hand, general principles of law of international trade are contained in some other, external sources which govern a much wider area of commercial law [*Flechtner, p. 95*].

281. CLAIMANT is mistaken in its reference to UNIDROIT by accepting the PICC as general principles of *lex mercatoria*. The usage of the Principles to fill the contended gap in the CISG by relying upon 7(2) CISG is an erroneous contention.

282. Art. 7(2) of the CISG is used to fill external gaps in the CISG by resorting to generally accepted principles of international law. However, the UNIDROIT PICC are not such principles and the CLAIMANT'S dependence on the same has no standing.

283. Therefore, UNIDROIT Principles (as well as other uniform law instruments such as Principles of European Contract Law or Draft Common Frame of Reference) should not be directly used to supplement the CISG.

**2) Mediterranean Contract Law is also not applicable to the present case.**

284. The domestic law of Mediterraneo is not applicable in the present dispute as domestic law cannot be applied in cases where the parties have chosen CISG as the governing law.

285. The application of CISG precludes the application of domestic sales and contract law [*Schlechtriem/Schwenzger*].



286. The rule that is to be derived and accepted in general is to exclude domestic law for all those cases whose facts are addressed by the CISG. Such a rule is in accordance with the internationalist interpretation of the CISG as laid down in Art. 7(1) of the Convention.
287. The CISG takes precedence over domestic law and choice of legal rules with regard to the sale of goods [*Michael Bridge*].
288. If one were to hold otherwise, unification of the law of sales would be undermined in a very important area [*Schwenzler*]. CLAIMANT'S resort to the Mediterranean Contract Law is against the principles of unification which was the fountain head of all provisions of the CISG.
289. It would be an undue circumvention of the CISG if CLAIMANT could avoid the contract on the basis of a domestic remedy.
290. Thus, applicability of domestic remedies have been precluded.
- 3) Alternatively, if Mediterranean Contract Law is applied, the additional tariffs do not meet the threshold of hardship.**
291. If the Tribunal chooses to apply the Mediterranean Contract Law which is the verbatim adoption of UNIDROIT PICC, the increase of tariffs by a mere 30% do not result in hardship.
292. In principle, the risk of increase in the cost of performance is to be borne by the obligor [*Azerdo Da Silveira*].
293. A cost increase even up to 50% does not qualify as hardship in cases of international commercial arbitration [*Brunner*]. The '50% or more' rule was not included in the commentary on the 2004 edition of the UNIDROIT Principles and it was mentioned in the *travaux préparatoires* that this threshold was criticised in legal literature as 'too low and in any event rather arbitrary' [UNIDROIT Working group 2003].
294. The international practice demonstrates that arbitrators have not granted relief merely because the costs of performance have increased by 50% or less compared to what had been agreed in the contract [*Brunner; Houtte van, H.*].
295. The occurrence of events must fundamentally alter the equilibrium of the contract in order to establish hardship [Art. 6.2.2 UPICC]. The contractual equilibrium must be altered by at least 100 percent to be deemed fundamental [*Brunner*].
296. Many authors and practitioners agreed with the establishment of such a '50% or more' rule [*Perillo, J. M.; Jenkins, S. A.; Rimke, J.*].
297. Moreover, there are virtually no records of awards made where arbitrators had granted relief in cases of a mere 50% alteration [*Van Houtte, H.*].



298. Fluctuations of prices are foreseeable events in international commercial contracts and far from rendering the performance impossible; if they result in an economic loss, such loss must be deemed to be included in the normal risk of commercial activities.
299. Here, the additional tariffs amounted to an increase in cost of the last shipment by 30% and a net loss of only 10% to CLAIMANT which is an accepted risk in case of an international sale of good and hence, insufficient to amount to hardship.
300. Thus, CLAIMANT cannot establish hardship or claim any reimbursement under UNIDROIT or Mediterranean Contract Law even if the Tribunal choses to apply these two laws.

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### CONCLUSION TO ISSUE III

**RESPONDENT is not liable to pay any additional cost to CLAIMANT under clause 12 of the AGREEMENT as the present situation is not covered by the clause. Also, the reliance placed by CLAIMANT on Art. 79 CISG is ill-founded and has no effect as the Article has been excluded by the PARTIES by incorporating clause 12. Alternatively, even if Art. 79 is applied, it does not cover the defence of hardship. Moreover, if hardship is deemed to be under the umbrella of Art. 79 by the Tribunal, the additional tariffs do not constitute hardship as they affect the overall contract value by a mere 15% which is an accepted risk. Additionally, the DDP delivery opted by the PARTIES makes CLAIMANT legally obligated to cover any and all costs arising out of the delivery of the goods. The UNIDROIT PICC cannot be relied upon as there is no gap in the CISG and neither are they accepted as general principles of international commercial law. Furthermore, neither can CLAIMANT rely upon Mediterranean Contract Law as CISG excludes the application of domestic law.**

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**REQUEST FOR RELIEF**

In light of the submissions made above, RESPONDENT respectfully request the Tribunal to find that:

1. The Tribunal lacks the jurisdiction and the power to adapt the contract under Danubian Law of Arbitration;
2. CLAIMANT is not entitled to submit evidence from other arbitration proceedings;
3. CLAIMANT is not entitled to the payment of 1,250,000 USD from RESPONDENT against any claim to adaptation,
4. RESPONDENT has neither committed any breach of the AGREEMENT nor has it committed fraud, and is not obligated to pay any additional amount to CLAIMANT, and;

CLAIMANT has to bear the costs of the arbitration.

Respectfully submitted,

New Delhi, India

January 24, 2019

Handwritten signature of Ambika Dilwali in black ink.

**Ambika Dilwali**

Handwritten signature of Garv Gupta in black ink.

**Garv Gupta**

Handwritten signature of Kopal Mittal in black ink.

**Kopal Mittal**

Handwritten signature of Korada Harshvardhan in black ink.

**Korada Harshvardhan**

Handwritten signature of Nalin Dhingra in black ink.

**Nalin Dhingra**

Handwritten signature of Raashika Kapoor in black ink.

**Raashika Kapoor**

Handwritten signature of Vivek Sharma in black ink.

**Vivek Sharma**



**CERTIFICATE AND CHOICE OF FORUM**

I GARV GUPTA, on behalf of the Team for AMITY LAW SCHOOL, DELHI (AFFILIATED TO GGSIP UNIVERSITY) hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

Our School is competing in both Vis East Moot and Vienna Vis Moot.

We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

Vis East Moot in Hong Kong, or

Vienna Vis Moot

Authorised Representative of the Team for AMITY LAW SCHOOL, DELHI (AFFILIATED TO GGSIP UNIVERSITY)

Name GARV GUPTA

Signature