MEMORANDUM FOR RESPONDENT

HIDAYATULLAH NATIONAL LAW UNIVERSITY

ATAL NAGAR, INDIA

On behalf of	*Against*
Black Beauty Equestrian	**Phar Lap Allevamento**
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo
-RESPONDENT-	**-CLAIMANT-**

COUNSEL FOR RESPONDENT

ANUSHKA ♦ PALLAVI MISHRA ♦ SHETTY NEHA SANTOSH ♦ VARSHINI SUNDER

TABLE OF CONTENTS

INDEX OF AUTHORITIES ..... **V**

INDEX OF COMMENTARIES V

INDEX OF SCHOLARLY ARTICLES AND REPORTS XI

INDEX OF CASES AND ARBITRAL AWARDS XIV

INDEX OF RULES AND LEGAL SOURCES ..... **XX**

LIST OF ABBREVIATIONS ..... **XXI**

STATEMENT OF FACTS **1**

TIMELINE OF EVENTS **2**

SUMMARY OF ARGUMENTS **4**

ARGUMENTS WITH REGARD TO PROCEDURAL ISSUES **5**

I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION **5**

A. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION 5

1. The parties did not agree for the law of the contract to govern the arbitration agreement 5

i The choice of law clause evinced in Clause 14 of the FSSA does not apply to the arbitration agreement 6

ii The Drafting history does not lead to a clear conclusion 6

2. The main contract assumption has been displaced 8

3. The law of Danubia applies to the arbitration agreement 9

i The law of Danubia was the tacit choice 9

ii In any case, the law of Danubia is most closely connected to the arbitration agreement… 9

iii In any case, the default rule of seat shall apply 10

4. The law of Danubia shall govern the interpretation of the arbitration agreement 11

B. THE TRIBUNAL NEITHER HAS THE JURISDICTION NOR POWER TO ADAPT THE CONTRACT 11

1. The tribunal does not have the jurisdiction to adapt the contract 11

2. The Tribunal does not have the power to adapt the contract 12

i The Arbitration Agreement does not vest the powers with the Tribunal 13
ii The lex arbitri does not allow for adaptation in the present case 13

CONCLUSION **14**

II.THE CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS **15**

A. THE CONTESTED EVIDENCE IS IRRELEVANT TO THE PRESENT CASE AND IMMATERIAL TO ITS OUTCOME 15
1. The two arbitrations do not share an identical background 15
2. The contested evidence is irrelevant to the present case and immaterial to its outcome…. 16
B. THE PRINCIPLE OF GOOD FAITH EXCLUDES THE ADMISSION OF THE CONTESTED EVIDENCE 17
C. THE ADMISSION OF THE CONTESTED EVIDENCE IS EXCLUDED ON THE GROUNDS OF CONFIDENTIALITY 18
1. CLAIMANT has an obligation to not disclose the award 19
2. The CLAIMANT is not entitled to submit the evidence to pursue its legal interest. 19
3. The HKIAC is bound to maintain confidentiality 19
4. Principles of transparency are not applicable to international commercial arbitration. ..20
D. MOREOVER, THE CLAIMANT'S RIGHT TO BE HEARD DOES NOT HINDER THE TRIBUNAL FROM DISMISSING THE REQUEST TO ADMIT THE CONTESTED EVIDENCE. 20

CONCLUSION **21**

ARGUMENTS WITH REGARD TO THE MERITS OF THE CLAIM **21**

III.THE CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF AN OUTSTANDING AMOUNT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE. **21**

A. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL REMUNERATION OF USD 1,250,000 UNDER CLAUSE 12 OF THE FSSA 21
1. The increase in custom tariff does not qualify as hardship under Clause 12 22
i The nature of the event is not comparable to "additional health and safety requirements" 22
ii There is no fundamental distortion of the equilibrium to make the contract more onerous 23
iii The custom tariffs could have been foreseen by the CLAIMANT 24
2. Seller is liable to pay the tariff under the DDP INCOTERMS delivery 25
3. The contract does not contemplate a remedy for price adaptation 26

i The parties had not reached an explicit or implicit consensus on the remedy for price adaptation..27

ii The hardship clause does not provide a recourse for price adaptation 28

B. ALTERNATIVELY, THE CLAIMANT DOES NOT HAVE A REMEDY UNDER ARTICLE 79 OF THE CISG 29

1. The application of Article 79 has been excluded by the parties. 29

2. Prerequisites of Exemption under Article 79 have not been fulfilled. 31

i There was no failure to perform any obligation 31

ii The CLAIMANT could have avoided the consequences of the tariff 31

3. Article 79 does not contemplate the remedy of price adaptation. 32

i Article 79 has no remedy for price adaptation. 32

ii Alternatively, even the high threshold under UNIDROIT Principles has not been met..... 32

CONCLUSION 33

REQUEST FOR RELIEF 34

INDEX OF AUTHORITIES

Index of Commentaries

CITED AS	FULL CITATION	PARAGRAPH(S)
Ashford	Ashford, Peter The IBA Rules on the Taking of Evidence in International Arbitration: A Guide Cambridge University Press (2013).	60, 70
Bennion	Bennion, Francis Bennion on Statutory Interpretation, A Code Lexis Nexis 6th Ed. (2013).	83
Berger/Kellerhals	Berger, Bernhard & Kellerhals, Franz International and Domestic Arbitration in Switzerland Sweet and Maxwell 2nd Ed. (2010).	66
Betz	Betz, Katherine Issues of Evidence in Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence Cambridge University Press (2017).	64
Bianca/Bonell	Bonell, Michael Joachim & Bianca, CM Commentary on the International Sales Law: The 1980 Vienna Sales Convention Fred B Rothman & Co (1987).	97, 115, 123, 128
Binder	Binder, Peter International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions Sweet and Maxwell 3rd Ed. (2009).	35

Black's Law Dictionary	Garner, B.A. Black's Law Dictionary 10th Ed., West (2014).	106
Born	Born, Gary B. International Commercial Arbitration Kluwer Law International, 2nd Ed. (2014).	31, 36, 42, 61, 73, 76
Brunner	Brunner, Christopher Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration Alphen aan den Rijn (2009).	47, 88, 89, 90, 97, 107, 121
Chitty	Chitty on Contracts Volume I, General Principles The Common Law Library Sweet & Maxwell 32nd Ed. (2015).	83
David	David, René L'arbitrage en droit civil, technique de régulation des contrats Mélanges Dédiés À Gabriel Marty (1978).	40
Dicey	Collins, Lawrence & Morse, C.G.J. et al. Dicey, Morris & Collins, The Conflict of Laws Sweet and Maxwell 14th Ed. (2006).	30, 33
Enderlein/Maskow	Enderlein, Fritz & Maskow, Dietrich United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods Oceana Publications (1992).	115, 128
Ferrario	Ferrario, Pietro The Adaptation of Long-Term Gas Sale Agreements	43, 47

	by Arbitrators Wolters Kluwer (2017).	
Gaillard	Gaillard, Emmanuel & Savage, John Fouchard Gaillard Goldman on International Commercial Arbitration Kluwer Law International (1999).	38, 40
Geisinger/Voser	Geisinger, Elliot & Voser, Nathalie International Arbitration - Comparative and Swiss Concepts Nomos Verlagsgesellschaft, 3rd Ed. (2016).	77
Hunter	Redfern, Alan & Hunter, Martin et al. Redfern and Hunter on International Commercial Arbitration Oxford University Press, 7th Ed. (2015).	38, 73
Holtzmann	Holtzmann, Howard & Neuhaus, Joseph A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary Kluwer Law International 1st Ed. (1995).	35
Jäggi/Gauch	Jäggi, Peter/Gauch, Peter Zurcher Kommentar Zum Obligationenrecht Zurich (1980).	107
Kramer	Kramer, Ernst A Berner Kommentar Die Entstehung der Obligation: Die Entstehung durch Vertrag: Inhalt des Vertrages. Kommentar Art. 1- 18 Stämpfli Verlag AG, Bern (1991)	107
Kröll	Kröll, Stefan & Mistelis, Loukas & Viscasillas, Pilar Perales (eds)	120, 124, 125, 131

	UN Convention on Contracts for the International Sale of Goods (CISG) CH Beck/ Hart Publishing (2011).	
Lew/Mistelis/Kröll	Lew, Julian & Mistelis, Loukas & Kröll, Stefan Comparative International Commercial Arbitration Kluwer Law International (2003).	73
Moser/Bao	Moser, Michael J. & Bao, Chiann A Guide to the HKIAC Arbitration Rules Oxford University Press (2017).	53, 54, 72, 72
Moses	Moses, Margaret L. The Principles and Practice of International Commercial Arbitration Cambridge University Press 2nd Ed. (2012).	73
Münchener Kommentar	Schmidt/Gruenewald (eds.) Münchener Kommentar zum Handelsgesetzbuch Volume 4, München, 3rd Ed. (2013).	89
O'Malley	O'Malley, Nathan D. Rules of Evidence in International Arbitration: An Annotated Guide Routledge, 2nd Ed. (2014).	53, 55, 60, 61, 65
OECD Report	Looking Beyond Tariffs: The Role of Non-Tariff Barriers in World Trade OECD Publishing (2005).	84
Off. Cmt.	Official Commentary UNIDROIT Principles of International Commercial Arbitration International Institute for the Unification of Private Law (UNIDROIT), Rome (2016).	115, 133

Ramberg	Ramberg, J. ICC Guide to INCOTERMS 2010 International Chamber of Commerce (2010).	100, 101, 103
Russell	Sutton, David & Gill, Judith & Gearing, Matthew Russell on Arbitration Sweet and Maxwell 24th Ed. (2015).	32
Schlechtriem/Schwenzer	Schlechtriem, Peter & Schwenzer, Ingeborg Commentary on the UN Convention on the International Sale of Goods Oxford University Press, 3rd Ed. (2010).	119
Schwenzer	Schlechtriem, Peter & Schwenzer, Ingeborg Commentary on the UN Convention on the International Sale of Goods Oxford University Press, 4th Ed. (2016).	120, 127
Smeureanu	Smeureanu, Illeana M. Confidentiality in International Commercial Arbitration Wolters Kluwer (2011).	74
Van den Berg	Van den Berg, Albert The New York Arbitration of 1958 Kluwer Law International (1981).	34
Vogenauer	Vogenauer, Stefan Commentary on the UNIDROIT Principles of International Commercial Contracts Oxford University Press, 2nd Ed. (2015).	45, 46, 50, 92, 108
Waincymer	Waincymer, Jeffrey Procedure and Evidence in International Arbitration Kluwer Law International (2012).	61, 76

Weigand	Weigand, Christian Rechtsprobleme einer speziellen Bauschiedsgerichtsbarkeit, in: Nicklisch (ed.). Bau-und Anlagenvertrage, Risiken, Haftung, Streibeilegung, Heidelberg (1984).	107
Williams/Kawharu	Williams, David & Kawharu, Amokura et al. Williams and Kawharu on Arbitration LexisNexis 2nd Ed. (2017).	15
Zweigert/Kötz	Kötz, Hein & Zweigert, Konrad Einfuhrung in die Rechtsvergleichung- auf dem Gebiette des Privatrechts 3rd ed., Tubingen: Mohr Siebeck (1996).	89

Index of Scholarly Articles and Reports

CITED AS	FULL CITATION	PARAGRAPH(S)
Article 22, DSU	Shedd, Daniel T. Dispute Settlement in the World Trade Organization (WTO): An Overview Available at: https://fas.org/sgp/crs/misc/RS20088.pdf.	95
Article XX, GATT	Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance- of- Payments (BOPs) & Waivers Article XX the GATT 1994 Available at: https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf.	84
Berger	Berger, Klaus Peter 'Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense' Arbitration International, Volume 17(1), pp 1–18 (2001).	40, 47
Bernardini	Bernardini, Piero The Renegotiation of the Investment Contract ICSID Review - Foreign Investment Law Journal, Volume 13(2), pp. 411-425 (1998).	45
CISG-AC Op. No. 16	CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6 (2014), Rapporteur: Doctor Lisa Spagnolo Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html.	119

CISG-AC Op. No. 17	CISG-AC Opinion No. 17 Limitation and Exclusion Clauses in CISG Contracts (2015) Rapporteur: Prof. Lauro Gama Jr. Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op17.pdf.	120
Cremades	Cremades, Bernardo M. Good Faith in International Arbitration American University International Law Review 27 Am. U. Int'l L. Rev. 761 (2012).	65
DSP under WTO	Dispute Settlement Procedures under WTO Available at: http://www.meti.go.jp/english/report/downloadfiles/2012WTO/02_16.pdf.	95
Faruque	Faruque, Abdullah Al Possible Role of Arbitration in the Adaptation of Petroleum Contracts by Third Parties Asian International Arbitration Journal, Vol. 2, pp.151-162, (2006).	49
GAIN Report, USDA	USDA Foreign Agricultural Service Global Agricultural Information Network (GAIN) Report Ukraine - Food and Agricultural Import Regulations and Standards – Certification (2017).	98
Hanotiau	Hanotiau, Bernard Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings International Commercial Arbitration, Important Contemporary Questions, pp.261-273-7 (2003)	66

ICC Force Majeure/Hardship	ICC Force Majeure Clause 2003 | ICC Hardship Clause 2003 ICC Publication No. 650 International Chamber of Commerce (2003).	86
ILA Report	Report for the Biennial Conference in Washington DC, International Law Association April 2014.	66
Julie Bedard et al	Bedard, Julie & Ors. Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process 2010 Paris J. of Int'l Arb. 737 (2010).	65
Nicholas	Nicholas, Barry Progress Report of the Working Group on the International Sale of Goods (5th Session) UN Doc: A/CN.9/87, Annex III UNCITRAL Yearbook V, p. 66 (1975).	123
Pilkov	Pilkov, Konstantin Evidence in International Commercial Arbitration 2 Arbitration, CIArb 148 (2000).	54
Rimke	Rimke, Joern Force majeure and hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT PICC Pace Review of the Convention on Contracts for the International Sale of Goods Kluwer Arbitration (1999-2000).	97
Schmitthoff	Schmitthoff, Clive M. Hardship and Intervener Clauses, Journal of Business Law (1980).	49, 111

Secretariat Commentary	Secretariat Commentary on Art. 65 of the 1978 Draft [draft counterpart of CISG Art. 79] Available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html	127
Trakman	Trakman, Leon E. Frustrated Contracts and Legal Fictions 46 Modern Law Review, pp. 39-55 (1983).	49
USDA Report, Argentina	United States Department of Agriculture Animal and Plant Health Inspection Service – Argentina Available at: https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/export/international-standard-setting-activities-oie/sa_by_country/sa_a/ct_animal_argentina.	98
WTO Non-tariff measures	Staiger, Robert W. Non-tariff Measures and the WTO World Trade Organization Economic Research and Statistics Division Stanford, Wisconsin and NBER (2012).	84

Index of Cases and Arbitral Awards

CITED AS	FULL CITATION	PARAGRAPH(S)
	AUSTRALIA	
Australian Broadcasting Corporation	*Australian Broadcasting Corporation* v. *Lenah Game Meats Pvt. Ltd.* High Court of Australia [2001] HCA 63 15 November 2001.	71
	GERMANY	
Iron Molybdenum	Hamburg Appellate Court of Germany 28 February 1997 http://cisgw3.law.pace.edu/cases/970228g1.html	120, 133
	ITALY	
Nuova Fucinati	*Nuova Fucinati v. Fondmetall International* Tribunale Civile [District Court] di Monza 14 January 1993 http://cisgw3.law.pace.edu/cases/930114i3.html	133
	KENYA	
Kundan Singh Construction Ltd.	*Kundan Singh Construction Ltd. v. Tanzania National Roads Agency* High Court of Nairobi Miscellaneous Civil Cause 248 of 2012 18 December 2012.	34
	SINGAPORE	
BCY	*BCY* v. *BCZ* Singapore High Court [2016] SGHC 249 9 November 2016.	23, 26, 30

SWITZERLAND

Reservoir Case	BGE 45 II 386 (1919) Swiss Federal Tribunal.	89

UNITED KINGDOM

Ali Shipping Corp	*Ali Shipping Corp* v. *Shipyard Trogir* Court of Appeals, UK [1999] 1 W.L.R. 314 19 December 1997.	72
Arsanovia	*Arsanovia Ltd. And others* v. *Cruz City 1 Mauritius Holdings* Queen's Bench Division (Commercial Court) [2012] EWHC 3702 (Comm) 20 December 2012.	13
Attorney General	*Attorney General* v. *Guardian Newspapers Ltd. (No. 2)* House of Lords, UK [1988] 3 All Er 545 13 October 1988.	71
Bangladesh Chem. Indus. Corp	*Bangladesh Chem. Indus. Corp.* v. *Henry Stephens Shipping Co.* Court of Appeal, UK [1981] 2 Lloyd's Rep 389.	28
British Movietone News Case	*British Movietone News Limited v. London and District Cinemas Limited* English and Wales High Court [1952] AC 166.	105
Douglas	*Douglas* v. *Hello! Ltd.* Court of Appeal, UK [2001] QB 967 21 December 2000.	71

Electricity Board	*Tamil Nadu Electricity Board* v. *ST-CMS Electric Company Pvt. Ltd.* English and Wales High Court 2007 EWCH 1713 (Comm.) 16 July 2017.	38
England Coast Lines Ltd.	*England Coast Lines Ltd.* v. *Hudig & Veder Chartering NV* Court of Appeal, UK [1971] 2 Lloyd's Rep 39.	30
Hamlyn	*Hamlyn & Co.* v. *Talisker Distillery* House of Lords, UK [1894] AC 202, 208 10 May 1894.	28
Hassneh	*Hassneh Insurance Co. Of Israel* v. *Steuart J. Mew* Court of Queen's Bench, UK [1993] 2 Lloyd's Rep. 243 22 December 1992.	72
Newby	*Newby* v. *Sharpe* Court of Appeal, UK (1878) 8 Ch. D. 39 25 February 1878.	83
Sulamerica	*Sulamerica Cia Nacional de Seguros SA.* v. *Enesa Egenharia SA.* Court of Appeal, UK [2012] EWCA Civ 638 16 May 2012.	30, 32
	UNITED STATES OF AMERICA	
Eastern Air Lines	*Eastern Air Lines In. v. Gulf Oil Corp.* United States District Court, Florida 415 F. Supp. 429 (S.D. Fla. 1975) 20 October 1975.	90

Halpern	*Halpern* v. *Halpern* District Court of Appeal of Florida [3rd District] 436 So. 2d 366 (Fla. Dist. Ct. App. 1983) 16 August 1983.	28
Kinoshita	*In Re. Kinoshita & Co.* United States Courts of Appeals [2nd Circuit] 287 F.2d 951 (1961) 16 March 1961.	41
Texaco	*Texaco Inc.* v. *American Trading Transportation Company Inc.* United States Court of Appeals [5th Circuit] 644 F.2d 1152 (5th Cir. 1981) 14 May 1981.	41
Thai-Lao Lignite	*Thai-Lao Lignite (Thailand) Co. Ltd.* v. *Government of the Lao People's Democratic Republic* United States Court of Appeal [2nd Circuit] Civil Appeal No. 02(f)-91-12-2015 17 August 2017.	28, 32
Wegematic	*United States* v. *Wegematic Corp.* United States Court of Appeals, Second Circuit 360 F.2d 674 5 May 1966.	90
	AD HOC TRIBUNALS	
Methanex Corp.	*Methanex Corp.* v. *USA* (2005) 44 ILM 1345 3 August 2005.	64, 65
Rotterdam Rechtbank	Judgement of 24 November 1994 XXI Y.B. Comm. Arb. 635, 638 (1996).	34
Tokyo Koto Saibansho	Judgement of 30 May 1994 XX Y.B. Comm. Arb. 745, 747 (1995).	34

	ICC	
Himpurna	*Republic of Indonesia* v. *Himpurna California Energy Ltd.* Arrondissementrechtbank, The Hague XXV Y.B Comm. Arbitration 469 (2000).	97
ICC 7373	Award in ICC Case No. 7373 XXYV Y.B. Comm. Arbitration 149 (1999).	28
Karaha Bodas Award	ICC Case No. 2508 Award of 1976, 1977 JDI 939.	133
State Joint Stock Company	*State Joint Stock Company (Uzbekistan)* v. *State Agency (India)* Final Award in ICC Case No. 14667 XL Y.B Comm. Arbitration 51-144 (2015).	32
	ICSID	
Caratube	*Caratube International Oil Company LLP* v. *Republic of Kazakhstan* ICSID Case No. ARB/13/13 27 September 2017.	67
EDF	*EDF (Services) Limited* v. *Romania* ICSID Case No. ARB/05/13 8 October 2009.	64
Inceysa	*Inceysa Vallisoletana S.L.* v. *Republic of El Salvador* ICSID Case No. ARB/03/26 2 August 2006.	64
Libanco	*Libanco Holdings* v. *Turkey* ICSID Case No. ARB/06/8 2 September 2011.	65

INDEX OF RULES AND LEGAL SOURCES

CITED AS:	FULL CITATION
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
GATT	General Agreement on Tariffs and Trade
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
HKIAC Rules 2018	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration
INCOTERMS 2010	International Commercial Terms 2010 published by the International Chamber of Commerce
PICC	UNIDROIT Principles on International Commercial Contracts
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments adopted in 2006)
US Code	The Code of Laws of the United States of America

LIST OF ABBREVIATIONS

&	And
¶ / ¶¶	Paragraph/Paragraphs
§	Section
Ans. to NoA	Answer to Notice of Arbitration
Arb. Int'l	Arbitration International
Art./Arts.	Article/Articles
Aus.	Australia
CIArb	Chartered Institute of Arbitrators
CISG	United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980
CISG-AC	CISG-Advisory Council
Cl.	Clause
CL. Memo	Claimant Memorandum
Cmt.	Comment
Comm.	Commercial
DAP	Delivered At Place
DDP	Delivered Duty Paid
Doc.	Document
DSU	Dispute Settlement Understanding
Dt.	Dated
Ed.	Edition
ed./eds.	Editor/Editors
EU	European Union
Ex.	Exhibit
FSSA	Frozen Semen Sales Agreement
Ger.	Germany
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules 2013	HKIAC Administered Rules 2013
HKIAC Rules 2018	HKIAC Administered Rules 2018
i.e.	id est [that is]
IBA	International Bar Association

IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
It.	Italy
Ken.	Kenya
Ltd.	Limited
No.	Number
NoA	Notice of Arbitration
NTB	Non-tariff Trade Barrier
OECD	Organisation for Economic Co-operation and Development
Off. Cmt.	UNIDROIT Official Commentary
Op.	Opinion
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
PO	Procedural Order
Pvt.	Private
Q.B.	Queen's Bench
SGHC	Singapore High Court
Sing.	Singapore
Switz.	Switzerland
UK	United Kingdom
USA	United States of America
UN	United Nations
UNCITRAL	United National Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
v.	Versus
WTO	World Trade Organisation
Y.B. Comm. Arb.	Yearbook of Commercial Arbitration

STATEMENT OF FACTS

1. Phar Lap Allevamento [CLAIMANT] is a stud farm in Mediterraneo, known for its breeding success in racehorses, particularly, Nijinsky III, which has won many laurels and has sired many up and coming racehorses. Black Beauty Equestrian [RESPONDENT] is a company famous for its broodmare lines with excellent pedigree. The CLAIMANT and the RESPONDENT are hereinafter collectively referred to as the "Parties".

2. In furtherance of its aim to expand business, the RESPONDENT enquired with the CLAIMANT about the availability of frozen semen of Nijinsky III [*Exhibit C1, p. 9*].

3. On 6 May 2017, the Parties concluded a Frozen Semen Sales Agreement [FSSA] for sale of 100 doses of frozen semen of Nijinsky III to the RESPONDENT [*Ex. C1, p. 9*]. The FSSA provided for a narrowly worded hardship clause and a DDP delivery. It also contains an arbitration clause which is narrower than the Model Clause of Hong Kong International Arbitration Centre [HKIAC]. It stipulates that only disputes arising out of the contract shall be decided by arbitration in Vindobona in accordance with the rules of the HKIAC. The underlying contract is governed by the laws of Mediterraneo, which includes the UN Convention on Contracts for the International Sale of Goods [CISG].

4. Before the final delivery of the third shipment, Equatoriana announced custom tariffs on agricultural products from Mediterraneo on 19 December 2017 to come into effect from 15 January 2018. The CLAIMANT despite having knowledge of the news report, did not enquire into the same [*PO 2, ¶ 26, p.58*]. The tariff applied to all agricultural products including frozen horse semen [*Ex. R4, p.36*].

5. Under the wrongful impression that the RESPONDENT had agreed to renegotiate the prices and to fulfill their requirement for an urgent delivery, the CLAIMANT shipped the doses.

6. However, the negotiation for the price adaptation failed. The CLAIMANT subsequently, commenced the arbitration [*Exhibit C8 p.17*]. The CLAIMANT was made aware of another arbitration to which the RESPONDENT was a party. The CLAIMANT has then arranged to acquire the Partial Interim Award through illegal means, which is now seeks to admit before this Tribunal. [*RESPONDENT Mail dt. 03 October 2018, p. 50; PO 2, ¶41, p.61*].

TIMELINE OF EVENTS

21 March 2017	RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III sperm for breeding program.
28 March 2017	RESPONDENT agreed to all terms offered by CLAIMANT, except forum selection clause and DDP terms.
31 March 2017	CLAIMANT discussed its specific apprehensions about additional health and safety requirements.
10 April 2017	RESPONDENT prepared a draft of arbitration clause submitting disputes to HKIAC and *lex arbitri* and *lex causae* to be law of Equatoriana.
11 April 2017	CLAIMANT suggested amendments to draft arbitration clause
12 April 2017	The primary negotiators, Julie Napravnik and Chris Antley, met with an accident and were forced to withdraw from the negotiations.
25 April 2017	Mr. Bouckaert elected as President of Mediterraneo.
5 May 2017	Ms. Cecil Frankel was appointed as the "superminister" for agriculture
6 May 2017	FSSA was signed between parties.
15 November 2017	Mediterraneo imposed 25% tariff on agricultural products from Equatoriana.
19 December 2017	Equatoriana announces 30% on commodities including racehorse semen.
15 January 2018	The 30% tariff imposed by Equatoriana comes into effect.
20 January 2018	CLAIMANT insisted on renegotiation of price, wrongly assumes that the RESPONDENT has accepted the request.
23 January 2018	Third shipment of semen was authorized.
12 February 2018	Failure of renegotiation of the contract.
29 June 2018	Partial Interim Award was passed in the other arbitral proceeding.
31 July 2018	Notice of Arbitration by CLAIMANT.
24 August 2018	Answer to the Notice of Arbitration by RESPONDENT.
2 October 2018	CLAIMANT brought to the notice of the Tribunal RESPONDENT'S other arbitration proceeding.
3 October 2018	RESPONDENT seeks an exclusion of contested documents as evidence.
5 October 2018	Procedural Order No. 1 released.
2 November 2018	Procedural Order No. 2 released.

Mediterraneo
5 May 2017 - Ms. Cecil appointed
15 November 2017 – Imposition of 25% tariffs on agricultural products

FSSA concluded on 6 May 2017

Equatoriana
19 December 2017 – Tariff of 30% announced
15 January 2018 – Tariff comes into effect

Clause 8, FSSA

Shipment 1	20 May 2017
	Delivered and Paid
Shipment 2	3 October 2017
	Delivered and Paid
Imposition of 30% custom tariff before the third shipment	15 January 2018
Shipment 3	23 January 2018
	Delivered and Paid

Clause 5. FSSA
Fees payable upon execution of the agreement.
Agreement executed, contract fulfilled.

Clause 15, FSSA

Deleted words from the Model HKIAC Clause to restrict arbitration to only "disputes arising out of" the contract

Clause 12, FSSA

Hardship caused by additional health and safety requirements and comparable unforeseen events making the contract more onerous

CLAIMANT invokes hardship clause on the ground that the retaliatory tariff is an unforeseen event compared to additional health and safety requirements making the contract more onerous

CLAIMANT requests renegotiations between the parties.

FAILURE OF RENEGOTIATIONS

CLAIMANT approaches the Tribunal to adapt the Contract in light of the changed circumstances despite the fulfillment of contractual obligations.

SUMMARY OF ARGUMENTS

7. The Parties, in their contract, failed to make an express choice with regard to the law governing the arbitration agreement. The CLAIMANT contends that the arbitration agreement, along with its interpretation, is governed by the law governing the main contract. However, the RESPONDENT submits that it is governed by the law of Danubia, the seat of the arbitration. Furthermore, since the arbitration agreements are narrowly interpreted in Danubia, adaptation of contracts is beyond the Tribunal's jurisdiction. Further, since the four corners rule is prevalent in Danubia, the CLAIMANT cannot use the pre-contractual negotiations to supplement the written contract. Therefore, neither the arbitration agreement, nor the seat law vest the power with the arbitrator to adapt the contract **[I].**

8. The CLAIMANT intends to submit a Partial Interim Award and written submissions from arbitration between the RESPONDENT and one of its customers. However, the CLAIMANT is not entitled to submit such evidence as it is irrelevant and immaterial to the outcome of the present case. Contrary to the CLAIMANT'S submission, the two cases do not share an identical background. Furthermore, the contested documents must be excluded from evidence on grounds of breach of confidentiality, the illegal nature of their acquisition and violation of the principle of good faith. The exclusion of such irrelevant, immaterial and inadmissible evidence shall not violate the CLAIMANT'S right to be heard **[II].**

9. The contractual obligations of both the parties have been fulfilled as per Clause 5 of the FSSA. The CLAIMANT is not entitled to seek a remuneration of USD 1,250,000 because the imposition of custom tariff by Equatoriana is not comparable to "additional health and safety requirements" and does not qualify as an event exempted under clause 12 of the FSSA. Furthermore, the narrowly worded hardship does not provide a remedy for renegotiation and price adaptation by the Tribunal. Alternatively, even Article 79 of the CISG is excluded from applying as Clause 12 is specific risk allocation contractual term and shall take precedence over Article 79 **[III]**.

ARGUMENTS WITH REGARD TO PROCEDURAL ISSUES

I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

10. The law which governs the arbitration agreement and its interpretation will, in turn, determine scope of the terminology used in the agreement. The CLAIMANT contends that the arbitration agreement is governed by the law of Mediterraneo [*CL. Memo, ¶2, p.3*]. Contrary to this, the RESPONDENT submits that the law of Danubia governs the arbitration agreement and its interpretation **[A].** Subsequently, given the narrow interpretation of arbitration agreements in Danubia, the Tribunal neither has jurisdiction nor powers to adapt the contract **[B].**

A. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

11. It is submitted that since the parties had not mentioned in writing, which law is to govern the arbitration agreement, it is to be reached by implementing various choice of law analyses. Contrary to the CLAIMANT'S submission that the parties chose the law of Mediterraneo to apply to the arbitration agreement, the RESPONDENT submits that there was no express or implied choice to apply the same [*Ans. to NoA, ¶14, p.31*]. This is because the parties never agreed for the law of the contract to govern the arbitration agreement **[1].** The CLAIMANT contends that the main contract doctrine applies in the present case [*CL. Memo, ¶11, p.5*]. However, this assumption has been clearly displaced **[2].** In fact, it is the law of Danubia that applies to the arbitration agreement **[3].**

1. The parties did not agree for the law of the contract to govern the arbitration agreement

12. The CLAIMANT contends that since the arbitration agreement is enshrined in the same contract as the Sales Agreement, it shall be governed by the same law [*CL. Memo, ¶3, p.3*]. However, the RESPONDENT submits that there exist multiple factors in the contract **[i]** and in the drafting history **[ii]** that run contrary to this claim.

i The choice of law clause evinced in Clause 14 of the FSSA does not apply to the arbitration agreement

13. The RESPONDENT notes that Clause 14 of the FSSA reads "*This Sales Agreement shall be governed by the law of Mediterraneo*" [*FSSA, Cl. 14, p.14*]. Had it read only as "This Agreement", the natural inference would have been that the parties intended the express choice of law to "govern and determine the construction of all the clauses in the agreement which they signed *including the arbitration agreement*" [*Arsanovia (UK)*]. Conversely, the presence of the term "Sales" defeats this inference. Therefore, Clause 14 is only meant to apply to the 'Sales part' of the contract. The placement of this clause before the dispute resolution clause also indicates the same.

14. This is further substantiated by the fact that Clause 14 was not amended even after the dispute resolution clause was changed to arbitration from the erstwhile court's jurisdiction clause [*PO 2, ¶3, p.55*]. Earlier, in the Standard FSSA, there existed a forum selection clause in favour of the courts in Mediterraneo [*PO 2, ¶4, p.55*]. However, subsequent to the negotiations, the parties settled on an arbitration clause, which is why Clause 15 is marked in italics [*PO 2, ¶ 3, p.55*]. However, Clause 14 was never amended to change the general meaning of the term "sales". Therefore, the term "sales agreement" refers only to the "sales" part of the contract, and not to the arbitration clause.

15. Further, and in any event, it is submitted that an international arbitration agreement is presumptively separable from the underlying contract with which it is associated. As a consequence, it is very common for the parties' arbitration agreement to be governed by a different law than the one governing their underlying contract [*Born, p.473; Williams/Kawharu, p.4.8*].

ii The Drafting history does not lead to a clear conclusion

16. The CLAIMANT submits that the drafting history throws light on the intention of the parties [*CL. Memo, ¶5, p.4*]. However, the CLAIMANT has wilfully omitted certain crucial facts and made baseless assumptions from the remainder, in order to mislead the Tribunal.

17. The CLAIMANT alleges to have used the same term "sales agreement" without distinguishing between the arbitration agreement and the rest of the contract [*CL. Memo, ¶7, p.4*]. However, it is the RESPONDENT that used the term first while suggesting the draft of the dispute resolution clause [*Ex. R1, p.33*]. The RESPONDENT stated that "…*the Sales Agreement is governed by the law of Mediterraneo*" and then went on to explicitly state that "*The*

law of this arbitration agreement would be the law of Equatoriana". This can only mean that the term, "Sales Agreement", as the RESPONDENT understood it, excluded the Arbitration agreement.

18. To this draft, the CLAIMANT only changed "*relevant"* portions, reproduced the amended part and reinstated that the law governing the sales agreement "*remains*" [*EMPHASIS ADDED*] the law of Mediterraneo [*Ex. R2, p.34*]. Contrary to the CLAIMANT'S interpretation, the word "remains" would ordinarily mean something that "stays the same". This would indicate a connection to the term as previously suggested by the RESPONDENT in the mail. This shows that the CLAIMANT was merely replicating the meaning of "Sales Agreement" as was understood by the RESPONDENT in the previous mail.

19. The CLAIMANT also states that the arbitration clause was "deleted" and the CLAIMANT'S proposal in the mail was then adopted by the subsequent negotiators [*CL. Memo, ¶9, p.5*]. However, this is incorrect on two grounds. First, the CLAIMANT was only proposing an "amendment" in its relevant part and second, the subsequent negotiators stated that they could not remember with sufficient certainty as to why they didn't include the line about the arbitration agreement [*PO 2, ¶6, p.55*].

20. The CLAIMANT could not have been unaware of the meaning ascertained by the RESPONDENT to the term "sales agreement" in the previous mail as any other interpretation would create an overlap of laws for the arbitration agreement.

21. Furthermore, the note which was found in Mr. Antley's Negotiation file states "Clarify in arbitration clause that *neutral venue and applicable law*" which shows that it was still an open point of discussion and no choice of the parties was established as the negotiators had not finalised the arbitration agreement before the unfortunate accident [*Ex. R3, p.35*].

22. The RESPONDENT never agreed to have the law of the arbitration agreement the same as the main contract. On the contrary, the RESPONDENT always intended for the law of the seat to govern the arbitration agreement and this is evident from the use of the word "also" in the mail [*Ex. R1, p.33*]. This meant that the law of the seat also governs the law of the arbitration agreement, which was suggested to be Equatoriana at that time. Therefore, a unilateral statement by the CLAIMANT does not suffice to draw an implied choice between the parties even at the pre-contractual stage.

2. The main contract assumption has been displaced

23. The CLAIMANT has fallaciously relied on the main contract assumption doctrine to show that the arbitration agreement would also be governed by the same system of law in absence of any express choice [*CL. Memo, ¶12, p.6*]. However, the main contract assumption is rebuttable and there are multiple factors in the present case that displace this assumption. It can be displaced by the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract. [*BCY (Sing.)*]

24. The RESPONDENT submits that choosing Danubia as the seat of the proceedings shows that the parties intended for Danubian law to govern all aspects of the arbitration agreement. Even if this factor alone is unable to displace this presumption, the RESPONDENT submits that the words "sales agreement" as mentioned in the contract and used in the mails clearly distinguishes the arbitration agreement from the entire contract [*As submitted in ¶¶16-22*].

25. Furthermore, Clause 15 is not as broad as the standard arbitration clause given by HKIAC. This becomes apparent when the Model Clause is compared to the Parties' Dispute Resolution Clause.

HKIAC Model Clause	**Clause 15 of the FSSA**
Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.	Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

26. The RESPONDENT submits that anything which suggests that the parties may not have intended to have their arbitration agreement governed by the same law as the main

contract would be a factor to consider [*BCY (Sing.)*]. Therefore, by narrowing down the clause, it was the common intention of the parties to exclude some matters from the ambit of arbitration. If Mediterraneo law applies to the arbitration agreement, given its tendency to broadly interpret the terms, the purpose of narrowing it down would be defeated [*NoA, ¶16, p.7*]. Thus, the parties could never have intended to apply the law of Mediterraneo to the arbitration agreement. Therefore, there was never an implied choice of the parties to apply the law of the contract to the arbitration agreement.

3. The law of Danubia applies to the arbitration agreement

27. The RESPONDENT submits that the law of Danubia applies to the arbitration agreement as it was the tacit choice of the parties **[i].** In any case, being the seat of the arbitration, it is the law with the closest and most real connection to the arbitration agreement **[ii].** Furthermore, the default rule of seat applies in the present matter **[iii].**

i The law of Danubia was the tacit choice

28. The RESPONDENT notes that Danubia is the seat of the arbitration proceedings [*Cl. 15, FSSA, p.14*]. It is submitted that by seating the arbitration in a particular state, the parties impliedly agreed that the arbitration clause should be governed by the law of the seat [*Hamlyn (UK); Bangladesh Chem. Indus. Corp (UK); ICC 7373; Halpern (USA); Thai-Lao Lignite (USA)*]. Since the main contract assumption has already been displaced, the only other viable choice which can be implied from the contract is the seat law.

29. The Danubian Contract Law calls for strict interpretation of terms in the contract and therefore, there is a higher likelihood that the arbitration agreement, in its narrowed down form would further the common intention of the parties, that is, having only certain disputes before the Tribunal [*PO 1, ¶II(3), p.51; As submitted in ¶¶24-26*]. Therefore, the law of Danubia is the implied choice of the parties.

ii In any case, the law of Danubia is most closely connected to the arbitration agreement

30. It is submitted that since Danubia is a common law country, the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract [*PO 2, ¶44, p.61*]. The rules state that when there is no choice of the parties, it is necessary to identify the system of law with which the contract has the closest and most real connection [*Dicey, ¶16R-001*]. Since the parties never reached a consensus as to which law would govern the arbitration agreement,

the RESPONDENT submits that the closest connection test must be applied to ascertain the same. This is also in concurrence with the prevalent three-stage choice of law analysis [*Sulamerica (UK), BCY (Sing.)*]. The RESPONDENT notes that this test is not dependent on the intention of the parties [*England Coast Lines Ltd. (UK)*].

31. The CLAIMANT suggests that since the semen was stored and produced in Mediterraneo, the arbitration agreement is more closely connected to its law [*CL. Memo, ¶21, p.7*]. However, if such matters are used to determine closest connection, it is but obvious that it will always favour the "seller" of the product. On the contrary, when the local law of one country governs the contractual relationship, but the arbitration agreement provides for arbitration in a neutral forum, the parties chosen arbitral seat is often more closely connected than the law they chose to govern the underlying contract as there is an intention to disassociate the arbitration agreement from the host state [*Born, p.518*].

32. Although uncontested by the CLAIMANT, it is submitted that the place of conclusion of the contract, in this case, Mediterraneo, is not indicative of the closest connection [*PO 2, ¶13, p.56; State Joint Stock Company (ICC)*]. In fact, the arbitration agreement is deemed to be most closely connected with the law of the place where the arbitration is to be held, which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective [*Russell, ¶2-121; Sulamerica (UK); Thai-Lao Lignite (USA)*].

iii In any case, the default rule of seat shall apply

33. The RESPONDENT submits that the arbitration agreement will be found to be most closely connected with the law of the place where the arbitration has its seat, which is also the place where the award is to be treated as "made" for the purpose of the New York Convention. [*Dicey, ¶16-016*].

34. It is submitted that Article V(1)(a) provides a default choice-of-law rule, applicable in cases where the parties have not expressly or impliedly chosen the law governing their arbitration agreement. That default rule provides that in the absence of a choice-of-law by the parties, it is the law of the arbitral seat that shall govern the arbitration agreement [*Rotterdam Rechtbank (Ad hoc); Tokyo Koto Saibansho (Ad hoc); Van den Berg, p.124; Born, p.495; Kundan Singh Construction Ltd. (Ken.)*].

35. The Danubia Arbitration Law is a verbatim adoption of the UNCITRAL Model Law [*PO 1, ¶IV, p. 52*]. An interpretation of Articles 34(2)(a)(i) and 36(1)(a)(i) parallels the default seat rule as mentioned in the New York Convention [*Binder, ¶¶7-011, 8-021; Holtzmann pp.*

915, 1058]. Furthermore, applying the Danubian law does not invalidate the arbitration agreement in any way, and is therefore agreeable even under the Validation Principle. Therefore, the law of Danubia will be the law of the arbitration agreement even by applying the default rule of seat as stated by the New York Convention and the Danubian Arbitration Law itself.

4. The law of Danubia shall govern the interpretation of the arbitration agreement

36. The RESPONDENT submits that "[i]f the parties have not chosen which law shall govern the interpretation of the arbitration agreement, the law chosen by the parties to apply to, or the law otherwise applicable to, the arbitration agreement shall govern its interpretation as well." [*Born, p.1394*]. Since the law applicable to the arbitration agreement is the law of Danubia, it shall govern the interpretation of the arbitration agreement as well [*As submitted in ¶¶11-35*].

B. THE TRIBUNAL NEITHER HAS THE JURISDICTION NOR POWER TO ADAPT THE CONTRACT

37. The RESPONDENT submits that the arbitration agreement is governed by the law of Danubia. Subsequent to the narrow interpretation afforded to arbitration agreements by its laws, coupled with the narrow wording of the clause itself, the Tribunal does not have the jurisdiction to adapt the contract **[1].** Further, on an analysis of the various sources of the arbitrator's power, it is submitted that the Tribunal is divested of the power to adapt the contract **[2].**

1. The tribunal does not have the jurisdiction to adapt the contract

38. It is submitted that the Arbitral Tribunal derives its jurisdiction to decide a particular dispute from the arbitration agreement [*Gaillard, p.29; Electricity Board (UK)*]. A Tribunal may validly resolve only those disputes that the parties have agreed that it should resolve [*Hunter, ¶5.91*].

39. It is an undisputed fact that Clause 15 of the FSSA has been narrowly worded compared to the HKIAC Model Clause [*As submitted in ¶25]*. Therefore, the general jurisdiction of the Tribunal has been restricted by the parties so as to only allow the arbitrators to decide on disputes "arising out of the contract" [*FSSA, Cl. 15, p.14*]. This term must be narrowly construed because the law governing the arbitration agreement, as well as its interpretation, is the law of Danubia, which calls for a strict interpretation of terms [*As submitted in ¶¶11-35; PO 1, ¶ II(3), p.51*].

40. The RESPONDENT submits that "adaptation" is not a dispute, *sensu stricto*. A 'dispute' would only exist if the Tribunal is asked to make a 'yes or no' decision with respect to a party's non-performance. This is therefore incompatible with the creative character of decisions required in cases of adaptation [*Berger, p.2; David, p.383; Gaillard p.25*].

41. Furthermore, the dispute must arise 'out of the contract' for the arbitrator to assume jurisdiction. It is therefore limited to a restricted set of claims, based on the parties' contract [*Texaco (USA)*]. In the present case, all the obligations under the contract have already been fulfilled [*FSSA, Cl. 5, p.13*]. The contractual remuneration has been undisputedly paid by the RESPONDENT. There exists no provision for adaptation in the contract. Therefore, there is no scope for any "dispute" regarding price adaptation to arise from the contract itself. The agreement to arbitrate is limited to such matters as enumerated when it refers to disputes "arising out of" the contract [*Kinoshita (USA)*]. What the CLAIMANT seeks from the Tribunal is beyond its reach, and the Tribunal has no jurisdiction to adapt the present contract.

42. Furthermore, even if the Tribunal were to interpret the arbitration agreement, the starting point would be the Danubian Contract Law, which imposes the four corners rule [*Born, p.1321; PO 2, ¶45, p.61*]. Contrary to CLAIMANT'S contention, the CISG also may not be utilised as Danubian law considers the arbitration agreement to be a procedural contract and not a sales agreement [*PO 2, ¶36, p.60*].

2. The Tribunal does not have the power to adapt the contract

43. It is submitted that the matters regarding power of adaptation is not just a matter of substance but also a matter of procedure [*Ferrario, p.84*]. Thus, in order to determine the power of an international arbitrator to adapt or supplement a contract in an individual case, one has to refer simultaneously to three different legal sources: the arbitration agreement, the law applicable to the arbitration (*lex arbitri*) and the law applicable to the substance of the dispute (*lex causae*) [*Berger, p.7*]. The CLAIMANT has completely overlooked the law of the seat while considering the validity of exercising such powers [*CL. Memo, ¶29, p.9*].

44. It is submitted that the arbitration agreement does not authorize the vesting of such powers**[i].** Furthermore, albeit the *lex causae* may allow for such power to be conferred without express authorization, the *lex arbitri* does not allow for the same**[ii].**

i The Arbitration Agreement does not vest the powers with the Tribunal

45. It is submitted that an arbitrator needs express authorisation to exercise his power of creatively adapting the contract. This must be in addition to the usual arbitration agreement [*Bernardini, p.421*]. In the instant case, there are no terms in the contract to suggest the empowerment of the Tribunal to adapt the contract. Furthermore, given the four corners rule in the Danubian contract law, no extraneous evidence can be used to supplement the contract [*PO 2, ¶45, p.61*]. The RESPONDENT submits that the four corners rule restricts the availability of evidence of prior statements. This includes all previous correspondence of parties, written documentation of the negotiations, earlier drafts of the contract, and oral undertakings and statements by one of the parties or their representatives during the course of the negotiations [*Vogenauer, p.373*].

46. Recourse to such evidence can only be taken when there is a necessity for the interpretation of certain terms. It is an undisputed fact that the arbitration agreement was narrowly worded to remove any hints of empowering the Tribunal to adapt the contract [*As submitted in ¶25*]. A contract is said to embody the terms which the parties have agreed [*Vogenauer, p.371*]. If a scenario is clearly not covered by the wording of a clause, such evidence may not be relied upon to supplement the clause, that is, to justify the application to the scenario in the case at hand [*Vogenauer, p.373*]. There are no terms which could refer to adaptation by the Tribunal. Therefore, any prior statements used to vest such power with the Tribunal will be supplementary in nature. It is therefore submitted that pre-contractual negotiations cannot be used to displace this clear intent of excluding adaptation that is apparent from the narrow wording of this clause.

ii The lex arbitri does not allow for adaptation in the present case

47. It is submitted that adaptation of a contract is only possible if it is permitted by the applicable procedural law. [*Brunner, p.493; Berger, p.10; Ferrario, p.77*]. 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 [*Brunner, p.493*].

48. The Danubian Arbitration Law makes no special conferral of such power of adaptation on the Tribunal. The arbitrators are only empowered to adapt the contract when they are vested with the power of deciding as "*ex aequo et bono*" or as "*amiable compositeur*" [*Art. 28(3), Danubian Arbitration Law*]. This, however, requires an express conferral of power which is absent in the present case [*PO 2, ¶36, p.60*].

49. In the common law system, the courts usually excuse the parties from performance of contract; they have no power to adapt or adjust the contract terms in case of fundamental change of circumstances [*Schmitthoff, p.82; Trakman, pp 39–55; Faruque p.155; PO 2, ¶44, p.61*]. Even though the Danubian Contract Law does allow the court to exercise the power to adapt the contract, this is only if they are "authorised" to do so [*PO 2, ¶45, p.61; Article 6.2.3(4)(b), Danubian Contract Law*].

50. The CLAIMANT may contend that in order to check whether the parties authorised such adaptation, one must study the pre-contractual negotiations. However, the prevailing four corners rule in Danubia prevents the same, unless a clause needs any interpretation. [*As submitted in ¶45-46*]. Since the standard arbitration clause was narrowed down, there exist no words which even prima facie suggest adaptation [*FSSA, Cl. 15, p.14*]. Any attempt to draw from the pre-contractual negotiations at this stage would be considered as supplementing the contract, which is strictly prohibited [*Vogenauer, p.371*]. Therefore, since the Tribunal is not vested with the power to adapt the contract under the arbitration agreement and the *lex arbitri*, it cannot adapt the price in the contract.

CONCLUSION

51. The law of Danubia shall govern the arbitration agreement and its interpretation. Since Danubian law calls for a narrow interpretation of arbitration agreements, price adaptation of contracts falls outside the jurisdiction of the arbitral tribunal. Furthermore, since the four corners rule is prevalent in Danubia, the CLAIMANT cannot use the pre-contractual negotiations to supplement the written contract. Therefore, neither the arbitration agreement, nor the seat law vest the power with the arbitrator to adapt the contract.

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

52. Contrary to CLAIMANT'S submissions, the contested evidence is irrelevant to the present case and immaterial to its outcome **[A].** The principle of good faith also excludes the admission of the contested evidence **[B].** The admission of the evidence would lead to breach of confidentiality **[C].** Moreover, the CLAIMANT'S right to be heard does not hinder the Tribunal from dismissing the request to admit the contested evidence **[D].**

A. THE CONTESTED EVIDENCE IS IRRELEVANT TO THE PRESENT CASE AND IMMATERIAL TO ITS OUTCOME

53. The parties agreed that all disputes would be decided in accordance with the HKIAC Rules [*FSSA, Cl.15, p.14*]. Article 22 of the HKIAC Rules provides a framework for handling evidentiary issues arising out of the arbitral process [*Moser/Bao, p.191*]. The RESPONDENT submits that it is within the Tribunal's discretion to declare evidence inadmissible due to lack of relevance and materiality and to apply the strict rules of evidence [*Art. 22.3 HKIAC Rules, 2018; Art. 9.2 IBA Rules; O' Malley, p.269*].

54. The parties agreed that all disputes would be decided in accordance with the HKIAC Rules [*FSSA, Cl.15, p.14*]. Article 22 of the HKIAC Rules provides a framework for handling evidentiary issues arising out of the arbitral process [*Moser/Bao, p.191*]. Further, the IBA Rules are widely referred to and adopted in HKIAC Arbitration [*Moser/Bao, ¶9.22*]. As per the IBA Rules, evidence is admissible if the criteria of both, relevance and materiality are met [*Pilkov, p.148*].

55. The RESPONDENT notes that it is within the Tribunal's discretion to declare evidence inadmissible due to lack of relevance and materiality [*Art. 22.3 HKIAC Rules, 2018; Art. 9.2 IBA Rules; O' Malley, p.269*]. Contrary to CLAIMANT'S submissions, the two arbitrations do not share an identical background **[1].** The contested evidence is irrelevant to the present case and immaterial to the outcome of the case **[2].**

1. The two arbitrations do not share an identical background

56. The CLAIMANT intends to submit documents from an arbitration between the RESPONDENT and one of its customers as evidence [*CLAIMANT Mail dt. 02 October 2018, p.49*]. The CLAIMANT contends that the two cases share an identical background [*CL. Memo, ¶39, p.12*] and further alleges that the *"only difference"* is the RESPONDENT'S contrary claims before the two fora [*CLAIMANT Mail dt. 02 October 2018, p.49*].

57. On the contrary, the two arbitrations differ from one another in the following criteria

Grounds	The other arbitration	Current arbitration
Arbitration Clause	Model HKIAC Arbitration Clause with all additions	Model HKIAC Arbitration Clause with deletions
Hardship Clause	ICC Hardship Clause	Narrow Hardship Clause
Seat	Mediterraneo	Danubia
Law applicable to the arbitration agreement	Law of Mediterraneo	Law of Danubia [*As submitted in* ¶¶*11-35*]

58. The factual scenario underlying the two cases is different as well [*PO2, ¶39, p.60*]. In the other case, the RESPONDENT had asked for renegotiation of price and refused the delivery on non-payment of additional price [*PO 2, ¶39, p.60*]. However, in the present case, the hardship clause does not provide for renegotiation and the frozen semen has already been delivered [*NoA, ¶13, p.6*].

59. Moreover, the other Tribunal had confirmed its power to adapt the contract in case of hardship on invocation of ICC Hardship clause 2003 or the Mediterranean Contract Law under the standard HKIAC arbitration clause [*PO 2, ¶39, p.60*]. In the present case, given the narrowly worded arbitration clause and absence of ICC Hardship clause 2003, as well as the other differences in the factual scenario and the laws applicable, the CLAIMANT cannot submit that the two arbitrations share an identical background.

2. The contested evidence is irrelevant to the present case and immaterial to its outcome

60. Contrary to CLAIMANT'S assertions, the evidence sought to be admitted is irrelevant to the present case [*CL. Memo, ¶38-40, p.12*]. The standard "relevance to the case" refers to the probative value of certain evidence as it relates to a party's burden of proof [*O' Malley, p.269; Ashford, p.165*]. The Partial Interim Award passed in the arbitration is not essential for the CLAIMANT to prove that the FSSA provides for adaptation in case of hardship.

61. Even if the Tribunal considers the contested evidence as relevant to the case, it is not material to its outcome. A document is material when it influences the Tribunal's determination of issues in dispute. [*Waincymer, p.859; O'Malley, p.473; Born, p.2362*].

62. The CLAIMANT contends that the Partial Interim Award would enable the Tribunal to understand the influence of the new tariffs on the equilibrium of contracts, thus leading to clarification of the case [*CL. Memo, ¶42, p.13*]. An award on the Merits has not yet been passed in the other arbitration [*PO 2, ¶39, p.60*].

63. The CLAIMANT might argue that the Partial Interim Award has persuasive value and can enable the Arbitral Tribunal in the correct determination of the dispute. However, the laws applicable and the factual scenario underlying the two cases are different as well [*As submitted in ¶¶56-59*]. Consequently, determination of legal issues in the other arbitration does not in any way affect the outcome of the present case. The contested evidence is therefore irrelevant and immaterial to the outcome of CLAIMANT'S claim and the request to admit such evidence should be denied in its entirety.

B. THE PRINCIPLE OF GOOD FAITH EXCLUDES THE ADMISSION OF THE CONTESTED EVIDENCE

64. The CLAIMANT contends that the Tribunal has a broad discretion in admission of evidence [*CL. Memo, ¶58, p.17*]. However, the Tribunal's discretion is subject to the principle of good faith as it is an implied element of every agreement to arbitrate [*Methanex Corp. (Ad hoc); EDF (ICSID); Betz, p.280; Born, p.2321*]. Furthermore, the parties have a duty to ensure the fair conduct of the arbitration [*Art. 13.5 HKIAC Rules 2018; Art. 9(2)(g) IBA Rules; Inceysa (ICSID)*].

65. It is submitted that the duty to arbitrate in good faith is infringed upon when illegally obtained evidence is used, or attempts are made to illicitly obtain it [*O' Malley, p.225*; *Libanco (ICSID); Methanex Corp. (Ad hoc); EDF (ICSID); Julie Bedard et al., p.737*]. Furthermore, the arbitrators must fulfil their role in good faith and protect the integrity of the proceeding [*Cremades, p.751*].

66. The CLAIMANT attempted to procure the Partial Interim Award as well as the RESPONDENT'S submission in the other case from Mr. Velazquez [*PO 2, ¶39, p.60*]. Upon Mr. Velazquez's inability to provide the same, the CLAIMANT has "*arranged an opportunity to acquire the Partial Interim Award*" against a payment of USD 1000 from a company having a doubtful reputation [*PO 2, ¶39, p.60*]. The RESPONDENT had clarified to the Tribunal that

the "*only source of the information promised*" [*EMPHASIS ADDED*] could either be the illegal hack of its system or breach of the confidentiality agreement by its former employees [*Respondent Mail dt. 03 October 2018, p.50*]. Therefore, despite such notice, the insistence of the CLAIMANT to procure the confidential documents reflects their bad faith. The RESPONDENT submits that the Tribunal must deny the admissibility of the evidence obtained in violation of the parties' obligations to act in good faith [*Berger/Kellerhals, ¶1092*]. Furthermore, the evidence in both these circumstances would have been illegally obtained. The use in the arbitration of data illegally obtained by or on behalf of a party would irreparably taint proceedings [*ILA Report; Hanotiau, p.285*].

67. The CLAIMANT relies on the Caratube case to seek the admissibility of illegally obtained evidence [*CL. Memo ¶59 p.17; Caratube (ICSID)*]. However, the evidence, though illegally obtained was admitted in that case as it was relevant and material to the outcome of the case and the parties were not in violation of the principle of good faith. Furthermore, a State was a party to the contract; therefore it was a matter of public interest. However, in the present case the evidence lacks materiality and relevance and the CLAIMANT has acted in bad faith [*As submitted in ¶¶60-66*].

68. The CLAIMANT contends that it was a third party which conducted the hack [*CL. Memo, ¶59, p.17*]. However, the non-involvement of the CLAIMANT in the illegal hack of the RESPONDENT'S system does not preclude the fact that the CLAIMANT acted in bad faith in procuring the evidence from the third party. Therefore, irrespective of the applicability of the clean hands doctrine, principle of good faith demands that the contested evidence be excluded from admission.

C. THE ADMISSION OF THE CONTESTED EVIDENCE IS EXCLUDED ON THE GROUNDS OF CONFIDENTIALITY

69. The RESPONDENT submits that its confidentiality would be violated if the contested evidence is admitted. Therefore, the CLAIMANT has an obligation to not disclose the award **[1]**. Secondly, the CLAIMANT is not entitled to submit the evidence to pursue its legal interest **[2]**. Furthermore, by admitting the evidence, the HKIAC would be breaching its confidentiality obligations **[3]**. Contrary to the CLAIMANT'S contention, the Principles of transparency are not applicable to international commercial arbitration **[4]**.

1. CLAIMANT has an obligation to not disclose the award

70. The CLAIMANT announced its desire to submit the written submission of the RESPONDENT from the other arbitration [*CLAIMANT Mail dt. 02 October 2018, p.49*]. It is submitted that documents created in preparation of arbitration proceedings are governed by privilege consideration and excluded from evidence [*Ashford, p.148; Art. 9.2(b) IBA Rules*].

71. Furthermore, it is submitted that any person who receives confidential information with the knowledge that it has been acquired through a breach, is obligated to keep it confidential [*Australian Broadcasting Corporation (Aus.); Douglas (UK); Attorney General (UK)*]. In the present case, the CLAIMANT is restricted from submitting the Partial Interim Award, as it was acquired either due to the disclosure by the former employees who had signed an express confidentiality agreement or by an illegal hack [*PO 2, ¶41, p.61*]. And, the CLAIMANT was made aware of such breach [*RESPONDENT Mail dt. 03 October 2018, p.50*].

2. The CLAIMANT is not entitled to submit the evidence to pursue its legal interest.

72. The CLAIMANT states that it is entitled to submit the Partial Interim Award to pursue its legal interest under Article 45.3(a)(1) of the HKIAC Rules [*CL. Memo, ¶49, p.14*]. Contrary to the CLAIMANT'S assertion, the freedom to disclose the award to pursue legal interest provided in Article 45.3(a)(1) extends to a party to an arbitration, with respect to which an award has been passed. [*Moser/Bao, p.191; Art. 41 r/w Art. 45.3 HKIAC Rules 2018*]. In the present case, the CLAIMANT seeks to submit as evidence, a Partial Interim Award passed in an arbitration to which it was not a party. The RESPONDENT notes that the provisions of the HKIAC Rules do not provide for such a submission. Therefore, it is submitted that only an *"arbitrating party"* may be permitted to disclose its award to pursue legal interests against other party or third parties [*Ali Shipping Corp. (UK); Hassneh (UK)*].

3. The HKIAC is bound to maintain confidentiality

73. The admissibility of the contested evidence will result in breach of confidentiality. Confidentiality is inherent to the nature of arbitration [*Lew/Mistelis/Kröll, ¶1-27; Moses, p.3; Hunter, ¶1.96*]. Furthermore, the uniformly accepted privacy in arbitral proceedings necessarily leads to confidentiality [*Born, p.2252*]. The RESPONDENT submits that the dissemination of the confidential award without the consent of the parties is inconsistent with the private nature of arbitration.

74. Furthermore, the other arbitration was conducted under HKIAC Rules 2013, which contain an express obligation on the HKIAC to maintain the confidentiality of the arbitration [*Art. 42.2, HKIAC Rules 2013*]. It is submitted that "*even if the seat of the arbitration is in a jurisdiction where an implied duty of confidentiality is not recognized, parties can ensure that the duty of confidentiality applies by adopting the HKIAC Rules"* [*Moser/Bao, p.191*]. Arbitral Centres remain the ultimate guardians of confidentiality [*Smeureanu, p.85*]. Therefore, the RESPONDENT notes that this Tribunal being constituted under the HKIAC must give due regard to the confidentiality of award passed under the HKIAC Rules, and exclude admission of the Partial Interim Award into evidence.

4. Principles of transparency are not applicable to international commercial arbitration

75. The CLAIMANT contends for the admission of the award under the prevailing principles of transparency evidenced under the UNCITRAL Transparency Rules [*CLAIMANT Mail dt. 02 October 2018, p.49*]. However, the scope of application of such rules does not extend to international commercial arbitrations [*Art. 1.1, UNCITRAL Transparency Rules*].

76. Furthermore, the trend of transparency as claimed by the CLAIMANT has no effect on ongoing arbitrations, and these aspects have retained their presumptively confidential character [*Born, p.2822*]. The other arbitration proceeding is still underway and the award on the merits is yet to be passed [*PO 2, ¶39, p.60*]. Therefore, the principle of transparency cannot be applied in the present case. The CLAIMANT contends that the publication of the award ensures consistency of results in arbitration [*CL. Memo, ¶15, p.15*]. However, such an argument cannot sustain as there is no binding doctrine of precedent in arbitration [*Waincymer, p.798*].

D. MOREOVER, THE CLAIMANT'S RIGHT TO BE HEARD DOES NOT HINDER THE TRIBUNAL FROM DISMISSING THE REQUEST TO ADMIT THE CONTESTED EVIDENCE.

77. Although uncontested by the CLAIMANT, it is submitted that denial to admit the contested evidence shall not violate its right to be heard. The mere refusal to admit irrelevant and immaterial evidence does not establish the denial of the right to be heard [*Geisinger/Voser, p.88*]. The CLAIMANT can present its case without relying on the Partial Interim award. The RESPONDENT therefore, notes that the CLAIMANT'S right to be heard is not violated upon the Tribunal excluding the contested evidence due to lack of materiality and relevance.

CONCLUSION

78. The CLAIMANT is not entitled to submit the evidence from the other arbitration proceeding as it is irrelevant and immaterial to the outcome of the present case. The admission of the evidence would lead to breach of confidentiality. The RESPONDENT submits that the evidence is inadmissible on the grounds of breach of confidentiality, the illegal nature of its acquisition and the principle of good faith.

ARGUMENTS WITH REGARD TO THE MERITS OF THE CLAIM

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

79. The RESPONDENT submits that the CLAIMANT'S submission for an increased remuneration of an outstanding amount of USD 1,250,000 has no scope in the underlying contract [*CL. Memo, ¶63, p.19*]. The contract being limited in nature does not provide any remedy for price adaptation. As the obligor, the CLAIMANT has assumed the risk of the counter tariff imposed by Equatoriana. Considering that the obligations of both the parties have been fulfilled as per the FSSA, the contract has already been completed [*FSSA, Cl. 5, p.14*]. The CLAIMANT is not entitled to an additional remuneration of USD 1,250,000 under Clause 12 of the FSSA **[A]**. Alternatively, the CLAIMANT does not have a remedy under Article 79 of the CISG **[B]**.

A. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL REMUNERATION OF USD 1,250,000 UNDER CLAUSE 12 OF THE FSSA

80. The RESPONDENT submits that the CLAIMANT cannot rely on the hardship clause [*CL. Memo, ¶67, p.19*]. The narrowly worded clause is not applicable in the situation of imposition of retaliatory tariffs by the Government of Equatoriana [*Ex. R5, p.35; PO 2, ¶12, p.56*]. For the reasons set out below, the CLAIMANT is not entitled to any additional remuneration: First, the increase in custom tariff does not qualify as hardship under Clause 12 **[1].** Second, the seller is liable to pay the tariff under DDP delivery obligation **[2].** Third, the contract does not contemplate a remedy of price adaptation **[3].**

1. The increase in custom tariff does not qualify as hardship under Clause 12

81. The imposition of retaliatory tariffs by the Government of Equatoriana is not a hardship under Clause 12, FSSA: The nature of the event is not comparable to *"additional health and safety requirements"* **[i]**. There is no fundamental distortion of the equilibrium to make the contract more onerous **[ii].** The custom tariffs could have been foreseen by the CLAIMANT **[iii]**.

i The nature of the event is not comparable to "additional health and safety requirements"

82. The CLAIMANT has wrongfully submitted that the present imposition of tariffs is comparable to additional health and safety standards against which the hardship exemption can be granted [*CL. Memo, ¶70, p.20*]. The mail sent by Ms. Julie Napravnik on 31st March 2017 explicitly mentioned her apprehensions about changes in delivery terms with particular reference to additional health and safety requirements [*Ex. C4, p.12*]. "At minimum, a hardship clause should be included into the contract to address *such subsequent changes*" *[EMPHASIS ADDED]* indicates the intention of the CLAIMANT to include only those changes which were similar to additional health and safety requirements [*Ex. C4, p.12*].

83. The use of the word "comparable" itself attracts the principle of *ejusdem generis* because it is intended by the parties that the clause must have a limited scope [*Bennion, pp.1108-09; PO 2, ¶12, p.56*]. Applying the *ejusdem generis* principle, the clause must be interpreted to include the objects of the kind as mentioned and is not intended to extend to objects of a wholly different kind [*Chitty, ¶13-065, p.1052; Noscitur a sociis: Newby (UK)*].

84. It is submitted that additional health and safety requirements is not comparable to the present tariffs. The primary distinction between the circumstance mentioned, and the tariff in the instant case is the nature of both the impositions. Any 'health or safety measure' that is imposed on a particular item is a regulatory mechanism and essentially a Non-Tariff Trade Barrier (NTBs) [*OECD Report in WTO – Non-tariff measures, p.6*]. NTBs are measures that governments might take *other than import tariffs* which can impact trade. [*WTO– Non-tariff measures; p.5*]. Governments apply such measures in trade in order to protect human, animal or plant life or health. [*Art. XX, GATT*]. On the other hand, the import tariff regime is primarily a duty, as is the case in the present scenario.

85. CLAIMANT wanted an exemption from additional health and safety requirements and events of a comparable nature [*Ex. C4, p.12; PO 2, ¶21, p.58*]. Moreover, the parties

reached a consensus on a narrowly worded hardship clause [*Ex. R3, p.35; PO 2, ¶21, p.58*]. If the CLAIMANT intention to broaden the hardship clause, it would not have restricted it only to the events listed therein. [*Ex. C4, p.12*].

86. Furthermore, in the ICC Hardship clause, 2003, there is an explicit inclusion of *act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation as one of the grounds of hardship* [*ICC Force Majeure/Hardship, ¶3[d], p.9*].

87. However, as expressed by the RESPONDENT, the intention behind not incorporating the ICC force majeure/hardship clause was that it was considered to be too broad [*PO 2, ¶12, p.56; Ex. C4, p.12; Ex. R3, p.35*]. Going strictly by the contract, the hardship clause only protects the risks laid down therein. The CLAIMANT in consensus with the RESPONDENT agreed to the wording of the present hardship clause wherein the scope was narrowed down and it cannot be extended to include governmental imposition of tariffs which has no similarity to a non-tariff trade barrier.

ii There is no fundamental distortion of the equilibrium to make the contract more onerous

88. The CLAIMANT contends that the threshold of hardship has been agreed by the parties to be quite low, by the use of the phrase "more onerous" instead of "excessively onerous" or "substantially onerous" [*CL. Memo, ¶76, p.22*]. On the contrary, the RESPONDENT submits that the use of the phrases may differ per contract, but to assess the 'hardship', the contractual equilibrium must be fundamentally altered [*Art.6.2.2, Mediterraneo Contract Law*]. Even while considering the key issue of contractual risk allocation, the main objective inquiry must be whether the changed circumstances have made the contract increasingly disproportionate to perform [*Brunner, p.393*].

89. The CLAIMANT contends that their financial position has deteriorated due to the tariff and has fundamentally altered the contractual equilibrium [*PO 2, ¶29, p.59*]. However, deterioration of a party's financial situation is, in principle, that party's own concern and it cannot shift that risk to other party [*Münchener Kommentar, §313 BGB, ¶206*]. The decisive element is not the financial ruin but the fundamental alteration of the equilibrium of the contract [*Reservoir Case (Switz.); Zweigert/Kötz, p.521*]. The obligor's concerned business unit should not normally be relevant as a benchmark [*Brunner, p.438*].

90. Further, for the purposes of determining whether the equilibrium of the contract has been fundamentally altered, the whole contract, including past and future performances up to the agreed termination date must be considered. If the party does not lose money (not at all, or not to the extent of a fundamental alteration) on the entire deal, there will be no situation of hardship [*Brunner, p.462; Eastern Air Lines (USA); Wegematic (USA)*].

91. The RESPONDENT cannot be made liable for the tariff imposition as each party to a contract must bear certain financial risks related to the contract, and must protect their financial reserves accordingly. Past experiences, prolongation of credit line and an anticipation of profitable restructuring plan does not affect the CLAIMANT'S obligation to perform the contract [*PO 2, ¶21, p.58; ¶29, p.58*]. Additionally, the CLAIMANT was initially making a profit of USD 500,000 on the entire transaction. After payment of USD 1,500,000 as tariff, the CLAIMANT was facing a loss of USD 1,000,000 on a transaction of USD 10,000,000.

92. Essentially, the CLAIMANT in the instant case is only facing a loss of a mere 10%, which cannot be said to have fundamentally altered the contractual equilibrium. Even the Mediterraneo Contract Law has stated that loss under 50% cannot be said to constitute as a fundamental change in the equilibrium of the contract [*Vogenauer, ¶8, p.816; As submitted in ¶132-133*].

iii The custom tariffs could have been foreseen by the CLAIMANT

93. Equatoriana has, in the past, imposed direct retaliatory tariffs [*Ex. C6, p.15*]. It has also experienced a ban on artificial insemination for racehorses which had been temporarily lifted, but could be reinstated as an import restriction anytime [*Ex. C1, p.9*]. Despite this impending foreseen risk, the CLAIMANT did not protect itself by including import restriction in the list of events from which an exception could be granted. Had they included the event, the protection would have extended to the import restriction so applied in the form of 30% tariffs as well.

94. It is submitted that the tariff imposed by the Government of Mediterraneo was a controversial measure in the name of national security. [*Ex. C6, p.13; PO 2, ¶23, p.58*]. Post the appointment of President Bouckaert, drastic measures with respect to agricultural products in April 2017, including the appointment of Ms. Cecil Frankel on 5 May 2017 took place [*Ex. C6, p.15*; *PO 2, ¶23, p.58*]. The fact that Equatoriana is a free-trade loving

country does not, ipso facto mean that no retaliatory action shall be taken in circumstances which require a prompt and severe response.

95. The RESPONDENT notes that both the countries are members of the WTO [*PO 2, ¶47, p. 52*]. Under its Dispute Settlement Mechanisms, a complainant is allowed to take counter measures where no agreement of compensation has been reached between the parties within a reasonable period of time, as in the present scenario [*NoA, ¶10, p.6; Art. 22, DSU, p.8*]. When taking countermeasures, it should first seek to target sector(s) that are the same as that to which the dispute concerned is associated, and also that the level of countermeasures should be equivalent to the level of the "nullification or impairment" caused [*DSP under WTO, p.706*].

96. An amicable resolution as contemplated out of Equatoriana would also have, in all probability led to a request for an imposition of retaliatory tariff by the Government of Equatoriana [*NoA, ¶10, p.6*].

97. An unforeseeable event is that which is not expected by a reasonable person [*Brunner p.160*]. The requirement that the impediment must be reasonably unforeseeable is consistent with the basic idea that if the event were foreseeable, the defaulting party should assume the risk of its realisation [*Rimke, p.215*]. Foreseeability should not only relate to the impediment per se, but also to the time of its occurrence. [*Bianca/Bonell, p.580*]. Moreover, an event which has happened in the history is not completely unforeseeable [*Himpurna (ICC); Ex. C6, p.15*].

98. The CLAIMANT contends that frozen semen could not have been considered an "agricultural good" [*CL. Memo, ¶74, p.21*]. On the contrary, frozen semen has been included in agricultural goods for trade purposes by various countries. Horse breeding is categorised as one of the agricultural production businesses related to farm activities [*USDA Report, Argentina; GAIN Report, USDA, p.6*].

99. The term "Livestock" is inclusive of any cattle, sheep, goats, swine, poultry, *equine* animals used for food or in the production of food, fish used for food, wild or domesticated game, or other non-plant life [*7 US Code §6502 (11)*]. For these reasons, the retaliatory measures could have been foreseen.

2. Seller is liable to pay the tariff under the DDP INCOTERMS delivery

100. The CLAIMANT contends that the INCOTERMS 2010 shall not apply as they do not cover relief from liability in case of unforeseeable events [*CL. Memo, ¶68, p.20; Ramberg, p.17*].

On the contrary the RESPONDENT submits that, since there is no hardship, the delivery obligations under INCOTERMS 2010 will govern the relationship between parties, as has been stipulated in the contract [*FSSA, Cl. 8, p.14; PO 2, ¶ 10, p.56; As submitted in ¶¶81-99*].

101. It is undisputed that the parties can give a specific meaning to any contractual term, which will supersede the term's usual meaning. However, under the INCOTERMS 2010 obligations, such a meaning must be mentioned specifically in the clause itself [*Ramberg, p.151*].

102. The CLAIMANT submits that the purpose of DDP delivery was to divest them of all associated risks [*CL. Memo, ¶77, p.22*]. As opposed to this, the RESPONDENT'S rationale behind approaching the seller for a DDP delivery was to benefit from their expertise in shipment of frozen semen [*Ex. C3, p.11*]. The CLAIMANT accepted the DDP delivery, with a few exceptions, which were duly incorporated in the contract [*FSSA, Cl. 8, 13, p.14*].

103. Moreover, the Respondent's payment of USD 200 for a DDP delivery serves no purpose if it also had to bear the additional cost of the tariff [*PO 2, ¶8, p.56*]. Being aware of the INCOTERMS Delivery obligations, the seller could have easily opted out of DDP and chosen for DAP, in which there is no import liability on the exporter. With regard to the apprehensions of the seller, DDP could have still been used even with the addition of the phrase "exclusive of duty, VAT and other import charges" [*Ramberg, p.61*]. However, such an exclusion was conspicuous by its absence, and, the CLAIMANT is liable to pay for the import tariffs.

104. Further, the seller was responsible to get the requisite information about the goods covered in the tariff imposed. The buyer is only required to provide information that the seller needs for transport, upon the request of the seller [*INCOTERMS 2010, DDP, B10*]. Therefore, the RESPONDENT submits that they were under no obligation to inform the CLAIMANT of either the tariff imposed, or whether or not the said tariff affected the subject matter of the contract.

3. The contract does not contemplate a remedy for price adaptation

105. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like. Yet this does not of itself affect the bargain they have made [*British Movietone News (UK)*].

Clause 12 does not provide a remedy for price adaptation as there was no explicit or implicit consensus between the parties for price adaptation **[i],** and the hardship clause lacks a remedy for price adaptation **[ii]**.

i The parties had not reached an explicit or implicit consensus on the remedy for price adaptation

106. The RESPONDENT notes that Ms. Napravnik and Mr. Antley had a discussion on the inclusion of an adaptation clause [*Ex. C8, p.17*]. Mr. Antley had replied that it should *probably (EMPHASIS ADDED)* be the task of the arbitrators to adapt the contract [*Ex. C8, p.17*]. However, he had not given his absolute assent to the suggestion by Ms. Napravnik, and had promised to come up with a proposal on the issue of amendment to contract [*Ex. C8, p.17*]. As defined, a proposal is merely an act of putting forward something for consideration [*Black's Law Dictionary*]. Furthermore, the note found in Mr. Antley's "negotiation file" stated that "connection of hardship clause with arbitration clause" was an open point of discussion [*Ex. R3, p.35*]. The CLAIMANT cannot by itself assume that the parties agreed to a renegotiation-adaptation clause merely by a speculative discussion.

107. An adaptation or termination clause regarding future events can normally not be implied [*Weigand, Art. 18, ¶112*; *Jäggi/Gauch Art. 18, ¶583*; *Kramer, Art. 18, ¶289, Art. 1, ¶11*]. In particular, the mere consciousness of both parties that the deal might possibly not be implemented as envisaged does not turn the parties' mutual performance obligations into conditional ones [*Brunner, p.421*]. It is generally acknowledged that it cannot be assumed that performance obligations are subject to a '*clausula rebus sic stantibus'*, i.e., a condition precedent that the underlying circumstances will not materially change [*Brunner, p.422*]. As a consequence, hardship situations should be dealt with on the basis of objective rather than subjective criteria.

108. Furthermore, the CLAIMANT has wrongly interpreted the neutral statement made by Greg Shoemaker to reach a fallacious conclusion that the RESPONDENT had agreed to the remedy for price adaptation [*Ex. R4, p.36*]. Contrary to CLAIMANT'S submission, the RESPONDENT could not have rejected CLAIMANT'S request, as it would have led to an undue loss for an event for which the CLAIMANT was liable to pay [*CL. Memo, ¶¶88-89, p.25*]. As also, Mr. Shoemaker was not an agent of the RESPONDENT and could not make decisions for which he had not been given any jurisdiction [*Art. 2.2.5, PICC; Vogenauer, ¶21, p.418*]. Keeping in mind the fact that he lacked any legal knowledge to comment upon questions outside the ambit of the FSSA, it was primarily futile to rely on his statement

which in itself was contingent upon its mention in the contract [*Ex. R4, p.36*]. Moreover, Ms. Julie Napravnik being from a legal background could not have lacked knowledge about the fact that hardship exemption could only be claimed for an unperformed obligation [*Ex. C8, p.17*].

109. The FSSA had also explicitly laid down that all fees were payable upon the execution of the agreement and that the shipment was not to be made unless all the fees had been paid by the RESPONDENT [*Ex. C4, p.12; FSSA, Cl. 5, p.14*]. RESPONDENT had duly made the payment for the last shipment on 21st March 2017 as per the FSSA upon which the CLAIMANT was obliged to deliver the remaining 50 doses.

110. Despite the acknowledgement of lack of knowledge as well as authority by Mr. Shoemaker himself, the CLAIMANT wrongly interpreted the statement made by him to mean that the RESPONDENT had assented for the remedy for price adaptation.

ii The hardship clause does not provide a recourse for price adaptation

111. Usually, the hardship clause provides for revision of the contract. Some clauses set out criteria for the revision of the contract. In a case where no agreement between the parties can be reached, hardship clauses provide for sanctions. [*Schmitthoff, p.88*].

112. In the present scenario, the hardship clause was merely inserted in the force majeure clause without giving any recourse to renegotiation or price adaptation. Furthermore, adaptation being both a procedural and substantive issue, the Danubian Law does not allow for adaptation by arbitrators unless expressly so authorised [*PO 1, ¶II, p.51; As submitted in ¶47-50*]. The hardship clause was inserted with a narrow interpretation as agreed to between the parties [*PO 2, ¶12, p.56; Ex. C4, p.12; Ex. R3, p.35*].

113. In an absence of any express mention of price adaptation, there are two implied recourses available as mentioned below, however the CLAIMANT cannot redeem either of these two recourses in light of the facts of the case.

114. The first recourse is to the UNIDROIT Principles. CLAIMANT submits that the parties impliedly included the UNIDROIT Principles as a usage under Art. 9(2), CISG which allows the arbitral tribunal to adapt the contract under Art. 6.2.3 [*CL. Memo, ¶82, p.24*]. However, the RESPONDENT notes that the UNIDROIT principles under Article 6.2.3 may only be applied if all the requirements of Art. 6.2.2 have been met therein.

115. Firstly, by its very nature hardship can only become of relevance with respect to performances still to be rendered [*Off. Cmt. on Art. 6.2.2*]. Disturbances must be avoided. In order to achieve this, measures need to be taken against impediments which are generally looming [*Enderlein/Maskow, p.324*]. Secondly, the parties are under an obligation to counteract the impediments. If a disturbance has already revealed itself, it has to be overcome as quickly as possible; to overcome means to take the necessary steps to preclude the consequences of the impediment [*Bianca/Bonell, p.581*]. Since the parties had performed the contract, and had not taken reasonable measures to avoid the consequences, they cannot seek recourse to the UNIDROIT Principles.

116. The second recourse is the frustration of Contract. In view of the definitions of hardship Art. 6.2.2 and force majeure in Article 7.1.7, under the Principles there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. It is submitted that since the hardship clause was merely included in the force majeure clause, without a specific recourse, it is implied that the consequence of hardship will be similar to that of force majeure i.e. frustration [*Ans. to NoA, ¶9, p.30; Ex. R3, p.35; PO 2, ¶12, p.56*]. In the instant case, since the CLAIMANT has already performed the contract, a frustration of contract cannot be claimed anymore.

117. Therefore, price adaptation has not been consented to by both the parties and does not find a basis in the contract. The CLAIMANT has not fulfilled the requirements under Article 6.2.2 and cannot claim a remedy under UNIDROIT Principles.

B. ALTERNATIVELY, THE CLAIMANT DOES NOT HAVE A REMEDY UNDER ARTICLE 79 OF THE CISG

118. The CLAIMANT claims remedy of adaptation under Article 79 of the CISG stating that the supervening imposition of tariff by Equatoriana was an impediment [*CL. Memo ¶91, p.26*]. Contrary to their submission, by regulating the issue of 'changed circumstances' under Clause 12 of the FSSA, the parties have excluded the application of Article 79 **[1]**. Alternatively, even if Article 79 is deemed to regulate the instant case, exemption cannot be granted as the prerequisites of Article 79 have not been fulfilled **[2]**. Further, Article 79 does not contemplate the remedy of price adaptation **[3]**.

1. The application of Article 79 has been excluded by the parties.

119. Under the CISG, a term used in the contract takes priority over the default provisions dealing with the same subject matter. The parties' freedom to limit and exclude the

remedies available under the CISG stems from the general principle of party autonomy recognized under Article 6 [*CISG AC Op. No. 16, ¶1.1*]. Article 6 makes it clear that CISG only applies subject to the contrary agreement by the parties [*Schlechtriem/Schwenzer, ¶2, p.83*].

120. The parties' agreement on the exemption of liability may also modify, and supersede, the legal regime on exemptions set out in Articles 79 and 80 CISG [*CISG AC Op. 17, ¶2.19*]. RESPONDENT submits that inclusion of a force majeure/hardship clause in the FSSA has precluded Article 79 from applying [*FSSA, Cl. 12, p.14*]. A detailed sales contract that has been drafted in such a way that renders certain provisions of the CISG either obsolete, or inapplicable is an explicit way of opting out of the CISG regime for that matter [*Kröll, Art. 6, ¶24, p.107*]. Further, where the contract makes a provision for a given contingency and one party has assumed the risk of its occurrence, Article 79 is eliminated [*Kröll, ¶89, p.1093, Schwenzer, ¶58, p.1152*]. In such circumstances, the courts give the contractual terms stipulated by the parties precedence over the application of Article 79 [*Iron Molybdenum case (Ger.)*].

121. In addition, the force majeure/hardship clause was an express provision made by the parties into their agreement to allocate the unforeseeable risks, and thus there was a mutual consensus to change the default risk allocation norm of the Convention [*Brunner, p.116*]. The inclusion of Clause 12 stipulates a specific course of action for certain circumstances listed in the clause. The CLAIMANT'S reliance on Article 79 does not take into account that Clause 12 is the only regulatory mechanism available to the parties [*CL. Memo, ¶90, p.25*].

122. The inclusion of the hardship clause was suggested by the CLAIMANT [*EX. C4, P.12*]. The suggestion was readily accepted by the RESPONDENT, by incorporating it in the FSSA [*FSSA, Cl. 12, p.14*]. CLAIMANT always wanted clause 12 to specifically regulate the risk allocation of the hardship. The RESPONDENT was adequately aware of this intention. Thus, a derogation from Article 79 was not a unilateral action.

123. The CLAIMANT has also contended that hardship must be regulated under the aegis of Article 79 [*CL. Memo, ¶91, p.26*]. The RESPONDENT submits that the drafters of the CISG had no intention to include situations governing hardships under the CISG [*Bianca/Bonell, Art. 79, ¶3.1.*2]. Furthermore, there is no gap in Article 79 that must be fulfilled by external aids. Scholars have affirmed that CISG does not provide relief on account of economic hardship [*Nicholas, p.66*].

2. Prerequisites of Exemption under Article 79 have not been fulfilled.

124. In the alternative, even if Article 79 is deemed to apply, only a party which fulfils all its conditions can claim an exemption [*Kröll, Art.79, ¶43, p.1071*]. The CLAIMANT has not fulfilled the following requirements of Article 79, namely: There has been no 'failure to perform' **[i]**; and the CLAIMANT could have overcome the consequences of the impediment **[ii]**.

i There was no failure to perform any obligation

125. Section 4 of the CISG is titled 'Exemptions'. Article 79 begins with the words "*A party is not liable for failure to perform any of his obligations…".* Any performance less than what has been promised by the parties means there has been a breach of contract, and in principle obliges the parties to full compensation [*Kröll, Article 79, ¶1, p.1056*]. However, Article 79 protects the defaulting parties from paying the damages. For the application of Article 79, the primary requirement is non-performance by one of the parties.

126. As soon as the parties fulfil all their contractual obligations, any remedy under Article 79 is extinguished. It is impractical to claim exemption from an obligation already discharged. Clause 5 of the FSSA also dictates that "no semen will be shipped until all fees has been paid." [*FSSA, Cl.5, p.12*] The fact that the CLAIMANT sent the third shipment implies that they understood, according to the terms of the contract, that the buyer has made all the requisite payments. Since there are no obligations left to discharge, the CLAIMANT cannot seek the benefit of Article 79.

ii The CLAIMANT could have avoided the consequences of the tariff

127. A party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance [*Cmt. 7, Secretariat Commentary*]. Even an impediment that the promisor could not have taken into account when concluding the contract does not exempt him if overcoming the impediment or its consequence is both possible and reasonable [*Schwenzer, ¶15, p.1135*]. The starting point of analysis is whether reasonable steps were taken to avoid the impediment from either arising, or, once arisen, from affecting performance abilities of the parties.

128. There exists a general liability on parties to mitigate risks and counteract impediments with regard to the contractual obligations they have assumed [*Enderlein/Maskow, p.324*; *Bianca/Bonell, p.581*]. Article 79 stipulates that the mere fact that the impediment was unforeseeable does not automatically grant exemption from performance.

129. The RESPONDENT submits that the CLAIMANT had not taken the necessary steps to avoid the consequences of the impediment. The CLAIMANT had approximately a month to enquire about the status of the tariffs. The tariffs were announced on 19th December 2019 by executive order and took effect from 15th January 2018 [*PO 2, ¶25, p.58*]. The shipment was due on 21st January 2018 [*FSSA, Cl. 8, p.14*]. It was upon the CLAIMANT to enquire regarding the status of the customs, and the necessary information required for transport [*As submitted in ¶¶100-104*]. The RESPONDENT submits that any reasonable person involved in trade practices, having the kind of experiences and expertise that the CLAIMANT had would have enquired into the nature of the tariff. The CLAIMANT upon reading the newspaper could have enquired into the tariff imposition and thereby dispatched the shipment before 15th January 2018 thus escaping the imposition of tariff. The CLAIMANT under an obligation to act, did not employ all means to overcome the impediment, and therefore cannot seek exemption for a fault on their part.

3. Article 79 does not contemplate the remedy of price adaptation.

130. The RESPONDENT submits that even if Article 79 were applicable in the present case, CLAIMANT is not entitled to seek a remedy for price adaptation. Firstly, Article 79 does not in itself stipulate the remedy of price adaptation **(i)**. Secondly, even if reliance is placed on the UNIDROIT principles, the high threshold of hardship has not been met in the instant case **(ii)**.

i Article 79 has no remedy for price adaptation.

131. The only remedy to a party affected by changed circumstances under Article 79 is exemption from liability. It does not envisage either a duty of renegotiation, or a remedy of price adaptation by courts and tribunals. In principle, the duty to renegotiate can only be established under the CISG regime by a specific stipulation by the parties, which is absent in the instant case [*Kröll, ¶84, p.1091*].

ii Alternatively, even the high threshold under UNIDROIT Principles has not been met

132. The CLAIMANT submits that the UNIDROIT Principles provide a remedy for price adaptation in case of a hardship [*CL. Memo, ¶110, p.30*]

133. Contrary to this, the RESPONDENT notes that if at all the UNIDROIT Principles apply, the high threshold mentioned therein must be met [*Vognaeur, ¶2, p.814*]. The UNIDROIT Principles do not contemplate a violation of *pacta sunt servanda* for merely a minor change

in the contract. Only an alteration amounting to at least 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration [*Nuova Fucinati (It.); Karaha Bodas Award (ICC)*]. The UNIDROIT Principles also do not favour an adaptation if merely the contract has become 'more onerous' rather than 'excessively onerous' [*Off. Cmt. Art.6.2.1, 6.2.2*]. There have been instances where Tribunals have not granted the benefit of hardship even when the market price had arisen upto 300% post contract formation [*Iron Molybdenum Case (Ger.)*]. The primary rationale behind the principle is that one must not take advantage of merely a high price of performance, if it is not absolutely distorting the contractual equilibrium. The RESPONDENT submits that the CLAIMANT was only facing a loss of 10% on the entire transaction, which does not meet the high threshold of hardship given in UNIDROIT Principles, and therefore does not entitle the CLAIMANT to a remedy of price adaptation.

CONCLUSION

134. The tariff imposition by Equatoriana is not exempted as a 'comparable event' under Clause 12, FSSA. Since the parties are governed by DDP INCOTERMS 2010, it is the liability of the seller to pay for any import and/or custom duties. Moreover, Clause 12 is narrowly worded and does not contemplate a remedy for price adaptation. Lastly, reliance cannot be placed on Article 79 of the CISG as it has been specifically excluded in its application by the parties. Even if such a reliance is placed, the CLAIMANT does not fulfil the prerequisites for exemption. For these reasons, the CLAIMANT is not entitled to an additional remuneration of USD 1,250,000.

REQUEST FOR RELIEF

On the basis of the foregoing submissions, RESPONDENT requests the Arbitral Tribunal to find that:

1. the claims submitted by the CLAIMANT are inadmissible;
2. the Law of Danubia governs the Arbitration agreement and its interpretation;
3. the Tribunal neither has the jurisdiction nor the power under the arbitration agreement to adapt the contract;
4. the evidence submitted by the CLAIMANT is inadmissible;
5. the unexpected increase in custom tariff does not qualify as an exempted event under the hardship clause;
6. the Article 79 does not regulate hardship and has been excluded as a remedy by the parties pursuant to Article 6.

Based on these findings, the Arbitral Tribunal is requested to deny the payment of USD 1,250,000 or any other amount from price adaptation to the CLAIMANT.

Vindobona, Danubia, 24 January 2019

Most respectfully submitted,

Anushka

Pallavi Mishra

Shetty Neha Santosh

Varshini Sunder