Nova University of Lisbon - School of Law

Work Project: 26th Annual Willem C. Vis International Commercial Arbitration Moot

12th – 18th April 2019 in Vienna, Austria

Work Project submitted for the obtainment of the master's degree in Law:

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August 2019

Anti-Plagiarism Statement

We declare that the essay presented is of our exclusive authorship and that all use of contributions or texts from others is duly identified. We are aware that the use of extraneous elements constitutes a serious ethical and disciplinary breach.

Lisbon, 1 August 2019.

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Table of Abbreviations

AAA	American Arbitration Association
Art./Arts.	Art./Arts.
CISG	United Nations Convention on Contracts for the International Sale of Goods
E.g.	*Exempli gratia* (for example)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
Fn.	Foot note
HKIAC	Hong Kong International Arbitration Centre
HKIAC 2013 Rules	HKIAC Administered Arbitration Rules of 2013
HKIAC Rules	HKIAC Administered Arbitration Rules of 2018
I.e.	*Id est* (that is)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council in 29 May 2010
Ibid	In the same source
ICC	International Chamber of Commerce
In casu	In the case at hand
Inter alia	Among other things

Model Law	UNCITRAL Model-Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006
Mr. / Ms.	Mister / Missus
No.	Number
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
P. / pp.	Page / pages
Parties	CLAIMANT and RESPONDENT
Per se	By or in itself or themselves
PIA	The partial interim award from another arbitral proceedings that CLAIMANT intents to submit as evidence
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Supra	See above
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	Principles UNIDROIT Principles of International Commercial Contracts (2016)
US	United States

USD	United States Dollars
V.	Versus (against)

Introduction

The present Work Project aims to introduce the two Memoranda we composed while representing the Nova University of Lisbon – School of Law in the 26th Willem C. Vis International Commercial Arbitration Moot. Additionally, we will report on several aspects of the competition.

We will firstly explain on what the Vis Moot consists of and how it is organised, and then reflect upon our perspective on the competition itself and on our performance. Subsequently, we will analyse this edition's problem and the three issues we had to address. Since our team was composed of three members, each one of us focused on one of the issues. Thus, that is the only section of the Work Project that will be addressed individually by the respective student. The written Memoranda submitted by our team will be found in Annexes I and II.

The Willem C. Vis International Commercial Arbitration Moot

The word "moot", as an adjective, stands for something which is open to discussion or debatable[1]. Moot courts, or mock proceedings, are quite familiar to law schools, giving students the opportunity to take part in simulated judicial or arbitral proceedings involving both written submissions and oral hearings. The Willem C. Vis International Commercial Arbitration Moot is the most renowned international moot court, gathering students and arbitration practitioners from all over the world every year in Vienna. The first edition of the competition was held in 1993-1994, where only 11 teams participated[2], and has been growing ever since, with a record of 376 participating teams in the written phase in this 26th edition, from 87 countries[3].

The Willem C. Vis Moot, named after the Dutch scholar Willem Cornelis Vis, whose career was largely focused on international commercial transactions and dispute resolution procedures, aims to encourage the study of arbitration and international commercial law through their application to a specific fictional case designed every year by the Association for the Organisation and Promotion of the Willem C. Vis International Commercial Arbitration Moot (hereinafter, "the Problem"). The Problem always comprises a dispute between two companies based in different countries, which arises in the context of a transaction of goods under the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG"). Additionally, the parties agree either on institutional or on *ad hoc* arbitration having the seat in Danubia. Danubia is a country which has adopted the UNCITRAL Model Law on International Commercial Arbitration (hereinafter "Model Law") and is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NYC"). Furthermore, the parties decide on a particular set of arbitration rules to be applicable[4].

For around six months, students from all over the world have to immerse themselves in the universe of international commercial arbitration and get acquainted with the applicable legal instruments, as well as with the different approaches from civil and common law countries to the same issue. This hands-on method motivates the younger generations to pursue a career in

[1] Lexico Dictionary. Moot Definition. Available at: https://en.oxforddictionaries.com/definition/moot *(consulted on* 20 May 2019).
[2] Institute of International Commercial Law, Pace Law School. *Inaugural Willem C. Vis International Commercial Arbitration Moot - Registered Teams* (1993-94). Available at: http://www.cisg.law.pace.edu/cisg/moot/participants1.html (consulted on 20 May 2019).
[3] Programme of the 26th Annual Willem C. Vis International Commercial Arbitration Moot (12–18 April 2019), Vienna. Available at: https://vismoot.pace.edu/media/site/previous-moots/26th-vis-moot/programme.pdf P. 19 (consulted on 17 July 2019).
[4] Official webpage of The Annual Willem C. Vis International Commercial Arbitration Moot. Available at: https://vismoot.pace.edu/site/about-the-moot (consulted on 30 May 2019).

arbitration and contributes to the training of skilled professionals to deal with dispute resolution from an international perspective, fundamental in today's globalized world.

1. Organisation of the Moot

The Moot is organised in two phases: written and oral. In the written stage, the students have to write a Memorandum for CLAIMANT and later one for RESPONDENT, which must be concise and strongly supported by authorities.

When the fictional case is published, the students must get acquainted with all the documents it is composed of. This includes the notice of arbitration, the response to the notice of arbitration, the written communications between the parties, the contract celebrated between them, the witness statements and other pieces of evidence, among others. After analysing all the materials, the students must research authorities on the topics under discussion and draw a strategy to support their client's position in the dispute.

Each team will have around three months to write the Memorandum for CLAIMANT. After that, each participating team will be assigned one Memorandum written by another team and will have around two months to prepare a Memorandum for RESPONDENT answering to it. In this phase, the students must detach from the position they had been working on for months and create a new strategy for the opposing party. Our team had to answer to the Memorandum for CLAIMANT written by the University of Lausanne.

After the written stage is concluded, it is time to start preparing for the oral hearings. Although the research and the construction of the arguments are already done, the students must develop their oral skills in order to deliver the arguments in a concise manner before the arbitral tribunal. At this stage, guidance by the coaches, who are generally experienced lawyers, is particularly relevant.

Each team member must create its own speech (or speeches) advocating the position of one of the parties. This will be followed by repeated practice of the delivery of the speeches, minding the language, the tone, the mannerisms, the due deference to the arbitral tribunal. Moreover, it is fundamental to prepare the answers to all the questions that the panel of arbitrators might ask. The goal is that each student, in the role of a counsel, is able to explain his or her client's arguments through a simple yet logic rhetoric. In each round, two members of the team will be granted a total of thirty minutes to deliver their speeches - fifteen minutes for the procedural issues and the other fifteen for the substantive issues, including eventual interventions by the arbitrators to ask questions. That is why time management will also have to receive its fair share of attention. The practice of the speech is an ongoing process until the very last day of pleadings in Vienna.

In order to practice for the oral rounds, several universities, law offices and arbitral institutions all over the world organise pre-moots, which take place before the final event in Vienna. These pre-moots are the closest experience the teams will have to the competition in Vienna, on a smaller scale. Nonetheless, they are fundamental to practice and to improve the speeches under the pressure of being before a panel composed by lawyers, arbitrators, academics or coaches from other teams. The panels usually give very useful feedback that will help to improve the speeches before the competition in Vienna. Moreover, the pre-moots are also a great opportunity to meet some members of the other teams and to create an international network.

This year, our team attended the IV Madrid Pre-Moot, the III Lisbon Vis Pre-Moot and the XII Belgrade Open Pre-Moot, which were paramount for our preparation for the final competition in Vienna. We achieved exceptional results, receiving the awards for "Best Claimant" and "Best Team" in Madrid, being first runner up in Lisbon and being ranked fourth amongst 79 teams in Belgrade, where the biggest and most recognised pre-moot takes place. This strengthened our confidence before Vienna, making us believe that it would be possible to get a good score on behalf of Nova University. Besides the Pre-Moots, we organised video conferences to practice for the hearings with almost fifteen teams from all over the world, which also had a significant contribution to our improvement.

After all this preparation, the teams gather in Vienna for a whole week, where besides the competition itself, they have the opportunity to attend several conferences about the topics involved in the Problem, as well as networking events.

The competition starts with the general rounds. In these rounds, each team will compete against four other teams before arbitral tribunals composed of three arbitrators, who will score each team member individually between 0 and 100. Then, all the teams will be ranked according to the average team score and the best 64 teams will compete in the knock-out rounds. In these rounds, the losing team will be immediately out of the competition, while the winning team will continue on to the next phase, until the very final.

In the general rounds, our team competed against the University of Georgia, from the United States of America; the University of Business and Technology (UBT), from Kosovo; the University of Lausanne, from Switzerland and the Beijing Normal University, from China. In the knock-out rounds, we competed against the University of Costa Rica.

In the end, we accomplished our goal of being one of the 64 teams passing to the final rounds, ranking 22nd among the 372 teams who participated in the oral hearings. Additionally, our team was distinguished with an honourable mention for the Werner Melis Award for Best Memorandum

for Respondent, which means that our Memorandum for Respondent was amongst the best 30 of the competition.

In sum, it was a very intense week, combining several rounds and all the preparation they entail with social events. However, it was all worth it.

2. Our perspective

When the three of us were invited by Professor Francisco Pereira Coutinho to be a part of the team that would be representing the Nova University of Lisbon in the 26th Willem C. Vis Moot, we all hesitated for different reasons: Carolina wanted to start her law practice immediately, Catarina Carreiro wanted to be a judge instead of a lawyer and Catarina Cerqueira did not even hold a bachelor's degree in Law. However, embracing this competition turned out to be the best decision we could have made.

In terms of professional growth, there is a lot to earn by spending six months analysing the Problem, developing legal arguments for two opposing parties, conducting deep research on "hot" legal issues and writing Memoranda. Indeed, defending two opposing perspectives substantially improves one's reasoning skills. Furthermore, the fact that there is a limit of 35 pages for each Memorandum requires one to write in a concise manner, which we are sure will be very helpful in our future professional life.

On what concerns the oral phase, it was probably the aspect of the experience where we could most directly and immediately see our improvements. When we started preparing the speeches for the oral component of the competition, we scheduled video conference sessions with other teams in order to practice. The first few sessions left us with the feeling that there was still a lot of work to do, especially in terms of answering questions concisely and being more flexible with the arguments. However, in the course of many video conferences, practice rounds with the team and pre-moots, we could notice our improvement as oralists and progressively started to properly enjoy the adrenaline of the pleadings. Finally, it is worth noting that this experience strongly developed our legal English skills, both written and oral.

However, the Vis Moot is not only about what was mentioned above. There is a social component that brings a myriad of advantages. Firstly, the networking that may prove useful in the future, connected also to the professional advantages. Secondly, there are events and parties organised during the pre-moots and the Moot itself that make all the hard work more bearable. These moments of fun and stress relief helped us carry out the work with a much more positive attitude.

Furthermore, having the opportunity to go abroad and explore new places adds even more value to this experience. We now look back at the days we spent abroad in pre-moots and in Vienna as some of the most enriching of our lives.

While the Vis Moot is extremely well organised, there is still room for improvement. For example, on what concerns the arbitrators, we sometimes felt they were not completely familiar with the

facts of the case nor, in some cases, with the functioning of the Moot itself. The participants spend months analysing the Problem and their knowledge and use of the facts is supposed to be judged in the pre-moots and in Vienna. If the arbitrators do not have a good knowledge of the case, they cannot perform that task properly. Moreover, this lack of knowledge can unduly benefit participants who are not completely accurate regarding the facts.

All in all, the valuable lessons we took from this experience will certainly follow us throughout the rest of our lives. This is a unique opportunity to learn more about a growing field in international law while meeting practitioners from all over the world. It is something we would recommend to every law student.

3. The Problem

The Problem of the 26th edition of the Vis Moot, released on the first week of October 2018, is related to a contract for the sale of frozen racehorse semen for breeding purposes (hereinafter "Contract"). The Parties to that agreement are Phar Lap Allevamento, the seller, and Black Beauty Equestrian, the buyer.

Phar Lap Allevamento (hereinafter "CLAIMANT") is a company based in Mediterraneo holding a famous stud farm dedicated to several equestrian sports. CLAIMANT provides racehorses for breeding through natural coverage. In the other sections of horse sports, it also offers frozen horse semen for breeding purposes.

Black Beauty Equestrian (hereinafter "RESPONDENT") is a company based in Equatoriana which is famous for its broodmare lines. RESPONDENT is building up a racehorse breeding programme and is therefore interested in finding matching stallions for the mares it has acquired.

As a result of a foot and mouth disease crisis in Equatoriana, restrictions on the transportation of living animals were imposed. Since this was jeopardising the breeding of racehorses, the country lifted the existing ban on artificial insemination for these animals. As such, on the 21st of March, RESPONDENT contacted CLAIMANT asking for 100 doses of frozen semen from their star stallion, Nijinski III[5]. Although this was an unusual request, as CLAIMANT would not commonly sell frozen racehorse semen nor such a high number of doses to the same breeder, RESPONDENT's request was accepted.

In the email from 24 March 2017, CLAIMANT set the price on 99.500 USD per dose. Attached to this email, CLAIMANT sent a template of a frozen semen sales agreement, containing a forum selection clause providing for jurisdiction of the courts in Mediterraneo and a choice of law provision in favour of the law of Mediterraneo to govern the contract, as well as a *force majeure* clause[6]. RESPONDENT answered by agreeing with all of CLAIMANT's terms except for three: the price, the applicable law to the contract connected with the dispute settlement mechanism and the delivery terms.

On what concerns the law applicable to the contract and the dispute resolution mechanism, RESPONDENT would not accept that CLAIMANT's law applied to the contract while CLAIMANT's courts had jurisdiction. RESPONDENT was willing to accept the applicability of the law of Mediterraneo to the contract if jurisdiction was given to the courts in Equatoriana[7]. CLAIMANT did

[5] Exh. C1, p. 9 of the Problem.
[6] Exh. C2, p. 10 of the Problem.
[7] Exh. C3, p. 11, § "Applicable Law and Dispute Resolution" of the Problem.

not agree and suggested for arbitration in Mediterraneo[8]. By its turn, RESPONDENT finally accepted that the law governing the main contract would be CLAIMANT's national law but suggested a dispute resolution clause providing for arbitration in Equatoriana and for the applicability of Equatorianian law specifically to the arbitration agreement[9]. In response, CLAIMANT explained that "consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committee" and proposed arbitration in Danubia, which is a neutral country[10]. However, CLAIMANT was silent regarding the applicable law to the arbitration agreement, adding that this offer was "naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo".

In the end, the dispute resolution clause agreed upon (hereinafter "Arbitration Agreement") read as follows[11]:

> *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.*
>
> *The seat of arbitration shall be Vindobona, Danubia.*
>
> *The number of arbitrators shall be three.*
>
> *The arbitration proceedings shall be conducted in English.*

As one can see, there is no mention as to the law applicable to the Arbitration Agreement itself.

Regarding the delivery terms, RESPONDENT proposed for Delivery Duty Paid (hereinafter "DDP"), since it had urgency in the delivery and CLAIMANT was more experienced with the transportation of frozen semen. This INCOTERM makes the seller responsible for all costs and risks until the goods are made available for the buyer in his or her country, which includes the payment of customs duties[12]. Despite having accepted it, CLAIMANT had some concerns with this change in the delivery terms. In this sense, CLAIMANT answered saying it was "not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions"[13]. It also referred to a past

[8] Exh. C4, p. 12, ¶5 of the Problem.
[9] Exh. R1, p. 33, ¶1 of the Problem.
[10] Exh. R2, p. 34, ¶2 of the Problem.
[11] Exh. C5, p. 14, Clause 15 of the Problem.
[12] International Chamber of Commerce – *Incoterms 2010*. Available at: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/ (consulted on 17 July 2019).
[13] Exh. C4, p. 12, ¶4 of the Problem.

experience where unforeseeable additional health and safety requirements increased the cost of performance of the contract by 40% and thereby destroyed the commercial basis of the deal. Therefore, CLAIMANT believed that, to avoid situations like these, "[a]t minimum, a hardship clause should be included into the contract to address such subsequent changes"[14].

Although CLAIMANT proposed reliance on the ICC Hardship Clause, RESPONDENT rejected it because it considered it to be too broad for the purposes of the contract[15]. CLAIMANT's template of the Sales Agreement already contained a *force majeure* clause, to which the Parties added the hardship component[16]. In the end, Clause 12 (hereinafter "Hardship Clause") read as follows:

> ***Seller shall not be responsible*** *for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither* ***for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*** (emphasis added).

On what concerns the price, since CLAIMANT was assuming more risks by accepting DDP delivery, the Parties agreed on a higher price than the one proposed initially: 100 000 USD (500 USD more).

Before the contract was signed, the initial negotiators - Ms. Napravnik on behalf of CLAIMANT and Mr. Antley on behalf of RESPONDENT - were involved in a severe car accident on 12 April 2017. Both the Arbitration Agreement and the Hardship Clause negotiated by them were included in the contract by the new negotiators - Mr. Ferguson on behalf of CLAIMANT and Mr. Krone on behalf of RESPONDENT - who performed that task based on the emails exchanged by their predecessors and on a note left by Mr. Antley. They were the ones who signed the Contract on 6 May 2017.

On 25 April 2017, before the signing of the contract, a new President, Mr. Bouckaert, was elected in Mediterraneo. He later imposed a tariff of 25% on agricultural products from Equatoriana, which entered into force on 15 November 2017. As a retaliation, Equatoriana imposed a 30% tariff on all agricultural goods from Mediterraneo. This tariff was announced on 19 December 2017 and took effect from 15 January 2018 onwards.

On 20 January 2018, before shipping the third and last instalment of horse semen, CLAIMANT learned that the shipment was subject to the 30% tariff imposed by the Government of Equatoriana. CLAIMANT then contacted RESPONDENT requesting for a solution and stating that it

[14] Exh. C4, p. 12, ¶4 of the Problem.
[15] Exh. R3, p. 35, yellow note of the Problem.
[16] PO2, p. 56, ¶12 of the Problem.

had put the shipment on hold but could still authorise it until the evening of the next day. On the morning of the next day, Mr. Shoemaker, the veterinary responsible for RESPONDENT's racehorse breeding programme, called Ms. Napravnik. According to his witness statement, he told her he was not a lawyer and had to confirm with his superiors if CLAIMANT was obliged to deliver or not. Concerned about ensuring the delivery, he affirms having stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price"[17]. CLAIMANT then proceeded to deliver the last shipment, which arrived on the agreed date, and paid for the tariff, trusting that a solution would be found afterwards.

CLAIMANT later found out that RESPONDENT was reselling doses of Nijinski III's frozen semen at a price 20% higher. On a meeting on 12 February 2018, CLAIMANT confronted RESPONDENT with that discovery, which led RESPONDENT's CEO to refuse to continue cooperating with CLAIMANT and deny any adaptation of the price. Therefore, CLAIMANT initiated the present arbitral proceedings seeking adaptation. However, RESPONDENT denies the powers of the Arbitral Tribunal to adapt, claiming that the Parties never agreed on that remedy for cases of hardship.

After the Arbitral Tribunal was constituted, CLAIMANT revealed that it had found out about another arbitration where RESPONDENT was involved, which could be relevant to the present proceedings. The other proceedings concern a contract for the sale of a mare to Mediterraneo. RESPONDENT, the seller in that contract, was asking for an adaptation of the contract as a result of an unforeseeable change of circumstances - the imposition of the 25% tariff by Mediterraneo - , which leads CLAIMANT to allege a contradictory behaviour by RESPONDENT. Besides, in that arbitration, that arbitral tribunal issued a partial interim award deciding that, if RESPONDENT was effectively in a situation of hardship, the arbitral tribunal would have the competence to adapt the price of the contract. Based on these two reasons, CLAIMANT intends to submit the partial interim award from the other proceedings as evidence. RESPONDENT, in turn, objects to that submission, affirming that it would violate the confidential nature of the other arbitration proceedings and that the evidence was obtained through unlawful means, either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

Given the circumstances described *supra*, the questions that the participating teams were requested to address in their Memoranda are the following[18]:

[17] Exh. R4, p. 36, ¶4 of the Problem.
[18] PO1, pp. 52-53, §III(1)

I. Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;

II. Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of Respondent's computer system;

III. Is CLAIMANT entitled to the payment of USD 1,250,000 or any other amount resulting from an adaptation of the price

A. under clause 12 of the contract

B. or under the CISG?

As CLAIMANT, when addressing the first procedural issue (I), we sustain that the Mediterranean law is applicable to the Arbitration Agreement, and therefore the Arbitral Tribunal has jurisdiction and powers to adapt the Contract. However, even if the Tribunal considers that the Mediterranean law is not applicable, the Tribunal still has the powers to adapt, whether according to general principles of contract interpretation or, alternatively, under the law of Danubia. In RESPONDENT's Memorandum, we advocate that the law of Danubia, not the Mediterranean law, is applicable to the interpretation of the Arbitration Agreement. Therefore, the Arbitral Tribunal does not have the powers to adapt the Contract. But even if the Tribunal decides not to apply the Danubian law, it still does not possess the powers according to an international approach.

Regarding the second procedural issue (II), we advocate that CLAIMANT is entitled to submit the evidence, since it is relevant to the case and material to its outcome. Moreover, even if the evidence was obtained through an illegal hack or through a breach of a confidentiality agreement, the fact that CLAIMANT was not involved in any unlawful act makes it admissible. As RESPONDENT, we object to the submission of the partial interim award by CLAIMANT, alleging that it is not relevant to the case nor material to its outcome. In any case, this piece of evidence was obtained unlawfully and its submission would be a breach of confidentiality.

Finally, on what concerns the substantive issue (III), as CLAIMANT, we allege that CLAIMANT is facing hardship and is entitled to an adaptation of the Contract under the Hardship Clause or, alternatively, under the CISG. In either case, adaptation is the remedy to be applied. As RESPONDENT, we defend that this is not a situation of hardship neither under the Hardship Clause

nor under the CISG and that, in any case, adaptation is not an available remedy under either of them.

Procedural Issues

Issue I: Does this Tribunal have the jurisdiction or the powers to adapt the Contract under the arbitration agreement?

Carolina Roque

The first procedural issue relates to the powers of the Arbitral Tribunal to adapt the Contract upon the tariff imposed by the Government of Equatoriana, which caused CLAIMANT to pay 30% more of the price of the last shipment.

First and foremost, one must draw a distinction between the matter of jurisdiction and the matter of the powers to adapt the contract. The jurisdiction is a procedural matter, closely connected to the Arbitration Agreement celebrated between the Parties in order to submit every dispute that arose between them to arbitration. The Parties do not question the jurisdiction of the Arbitral Tribunal, since this is a dispute concerning the risk allocation agreed by them in the Contract. Considering that the Contract contains a valid Arbitration Agreement, the Tribunal has jurisdiction to decide on the matter.

As such, the question that remains is whether the Tribunal has the power to adapt the Contract. This power may derive not only from the arbitration agreement and the law applicable to its interpretation, but also from the Hardship Clause celebrated between the Parties[19]. At this stage, we will only address the matter of the law applicable to the interpretation of the Arbitration Agreement, since the Hardship Clause as the source of this Tribunal's power to adapt the Contract will be addressed in Issue III.

In the present case, the Parties celebrated a Contract where they agreed that the law of Mediterraneo would be applicable to the substance of the dispute[20]. One of the clauses in the Contract was the Arbitration Agreement, providing for Danubia as the seat of the arbitration[21]. However, there was no reference as to the law applicable to the Arbitration Agreement itself.

This is not an unusual situation: typically, parties choose a law applicable to the main contract and a seat for the arbitration, but more often than not, they do not make an express choice of the law

[19] BEISTEINER, Lisa Barbara - *The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective.* In: Klausegger, Christian; Klein, Peter, et al. (eds), *Austrian Yearbook on International Arbitration* (2014), pp. 77 – 122. P. 81, 110

[20] Exh. C5, p. 14, Clause 14 of the Problem.

[21] Exh. C5, p. 14, Clause 15 of the Problem.

applicable to the arbitration agreement[22]. Even though it might not seem like a relevant issue to address at the time of the signing of the contract, the truth is that there is a vast array of problems that can arise from the lack of an express choice of law applicable to the arbitration agreement. Agreements to arbitrate are usually the last issue to be addressed in contract negotiations, created in a hasty decision, which usually leads to an incomplete or inappropriate arbitration clause[23]. The so-called *Midnight Clauses*, where the parties to the agreement fail to include important details - such as the law applicable to the arbitration clause - will most likely result in a lengthy and onerous proceeding. In fact, in the past years we have witnessed a growing number of conflicts resulting from this absence of choice, where tribunals are forced to come up with a criterion to decide under which law they shall analyse the validity, enforcement or interpretation of the arbitration agreement. This has led several Arbitral Institutions, such as the HKIAC, to include this express choice of applicable law to the arbitration agreement in their model clause, in order to avoid unpredictable decisions with a high likelihood of being challenged.

Arbitration agreements are considered to have a dual nature, since they provide the agreement to submit every dispute that arises between the parties to arbitration (substantive nature) and at the same time establish the procedural framework for the arbitration proceedings (procedural nature)[24]. When there is no choice by the parties concerning the law applicable to the arbitration agreement, the tribunal is left to decide whether to apply the substantive law, *i.e.*, the law of the main contract, or the procedural law, *i.e.*, the law of the seat of the arbitration[25].

In the present case, the question of the law applicable to the interpretation of the arbitration agreement is particularly relevant. This is because, on the one hand, under the law of the main Contract, *i.e.*, the law of Mediterraneo, "a standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal the same powers as a court has under the provision"[26]. On the other hand, under the law of the seat, *i.e.*, the law of Danubia, arbitration agreements are to be interpreted narrowly and an express conferral of powers is required in order for the Tribunal to adapt the Contract. Therefore, the law applicable to the interpretation of the Arbitration Agreement will determine the Tribunal's powers to adapt the Contract.

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[22] NAZZINI, Reto - *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*. In*: International and Comparative Law Quarterly*, 65(3), (2016), pp. 681-703. Available at: https://doi.org/10.1017/S0020589316000233 (consulted on 23 May 2019).

[23] REDFERN, Ian; HUNTEr, Martin J. - *Redfern and Hunter on International Arbitration*, Oxford University Press (2009). P. 72.

[24] WAINCYMER, Jeffrey - *Procedure and Evidence in International Arbitration,* Kluwer Law International (2012). P. 130

[25] REDFERN, Ian AND HUNTER, Martin J. - *Law and Practice of International Commercial Arbitration*, Fourth Edition, (2004). P. 158**:** "The real choice [today] - in the absence of any express or implied choice by the parties – appears to be [only] between the law of the seat and the law which governs the contract as a whole".

[26] PO2, p. 60, ¶39 of the Problem.

1. The Three Stage Test

The growing number of cases related to the absence of an express choice of law concerning the arbitration agreement led several courts to adopt the three-stage test put forward in the 2012 decision of the England Court of Appeal in the Sulamérica case[27]. In this case, the dispute originated in an insurance policy against various risks concerning the construction of a hydroelectric generating plant in Brazil. The policy contained an arbitration clause providing for arbitration in London and an express choice of the Brazilian law to govern the contract. However, similarly to the present case, there was no choice of law concerning the arbitration agreement. When the dispute arose, the court had to decide which law to apply to the arbitration agreement in order to determine its enforceability. This decision was particularly relevant since, under the law of the main contract, *i.e.*, the law of Brazil, the arbitration agreement would only be enforceable with the consent of both parties, thus undermining its purpose.

The Court then established a three-stage enquiry to determine the law applicable to the arbitration agreement in a case-by-case analysis: firstly, the tribunal must determine if there is an express choice of law; secondly, if there is an implied choice of law and subsidiarily, the tribunal must determine which law has the closest and most real connection to the arbitration agreement. This test has been considered preferable to the strictly procedural approach, where arbitration agreements are inevitably subject to the law of the seat, inasmuch as it is more coherent with the principle of party autonomy, by respecting the parties' intentions[28]- the true cornerstone of arbitration. Only if there was no agreement between the parties would the tribunal look for a default rule, such as the closest connection test.

Therefore, we decided to follow this international practice and base our arguments on this test as both CLAIMANT and RESPONDENT.

2. The law of the main Contract

The law of the main Contract is the law CLAIMANT intends to see as applicable to the interpretation of the Arbitration Agreement, since it would grant the Tribunal powers to adapt the Contract.

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[27] Sulamérica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors [2012] EWCA Civ 638 (England and Wales Court of Appeal – Civil Division, 16 May 2012). Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2012/638 (consulted on 5 May 2019).

[28] Hoi Seng Victor and Jun Hong Tan - *The Law governing the arbitration agreement: BCY v. BCZ and beyond* (2018). Available at: https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/Current-Issue/ctl/eFirstSALPDFJournalView/mid/494/ArticleId/1259/Citation/JournalsOnlinePDF (consulted on 5 July 2019).

Those who consider the law of the substance of the dispute as the better approach do it on the basis that it would be unreasonable to assume that the choice of law clause, whose purpose is to fix the law for the whole contract, would not cover the arbitration clause which is an integral part of the former[29]. The existence of a clear choice of law clause has been construed as a "strong indicator" of the parties' intention of having one law governing their relationship[30]. As the Singapore High Court noted in the 2016 decision in BCY v. BCZ[31], if their intention was otherwise, it is not unreasonable to expect them to specifically provide so.

Hence, in our Memorandum for CLAIMANT, and following the above-mentioned three-stage test, we firstly argued that there was an express agreement between the Parties to have the law of Mediterraneo to govern the Arbitration Agreement, since the Contract celebrated between the Parties already contained an express choice of law clause: Clause 15[32]. Secondly, if the Tribunal was to hold that there was no express agreement, then it had to consider the law of Mediterraneo as an implied choice made by the Parties, following the international practice that considers the choice of law of the main contract as an implied choice to the law governing the arbitration agreement[33]. Lastly, in case the Tribunal decided that there was no choice of law whatsoever made by the Parties, the law of Mediterraneo was the one with the closest and most real connection to the Arbitration Agreement, given that: (i) the Parties agreed that the production and quality standards have to be in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards*[34], (ii) the applicable general conditions are those of CLAIMANT[35], (iii) the final negotiations and the signing of the Contract took place in Mediterraneo[36] and (iv) Clause 14 of the Contract establishes the law of Mediterraneo as the one applicable[37].

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[29] BERGER, Klaus Peter - *Re-examining the Arbitration Agreement: Applicable Law - Consensus or Confusion?* In: BERG, Albert Jan van den (ed) - 13 *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Kluwer Law International (2007), pp. 301-334. P. 318

[30] Sulamérica case – Op. Cit.

[31] BCY v. BCZ (High Court of The Republic of Singapore, 17 August 2016). Available at: https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/bcy-v-bcz-(for-release)-(08-11-2016)-pdf.pdf (consulted on 23 May 2019).

[32] Exh. C5, p. 14, Clause 15 of the Problem.

[33] LEW, Julian D. M. - *The Law Applicable to the Form and Substance of the Arbitration Clause.* In: BERG, Albert Jan van den (ed) - *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 9 ICCA Congress Series, Kluwer Law International (1999), pp. 114-145. P. 143; BERMANN, George A. - *International Arbitration and Private International Law,* The Hague Academy of International Law (2017). P. 147; Sulamérica Case – Op Cit.; Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v. Vsc Steel Company Ltd (England and Wales High Court - Commercial Court, 19 December 2013). Available at: http://www.bailii.org/ew/cases/EWHC/Comm/2013/4071.html (consulted on 20 May 2019).

[34] Exh. C2, p. 10, ¶5 of the Problem.

[35] Exh. C2, p. 10, ¶5 of the Problem.

[36] PO2, p. 56, ¶13 of the Problem.

[37] Exh. C5, p. 14, Clause 14 of the Problem.

After demonstrating that the law of Mediterraneo was the applicable law to the interpretation of the Arbitration Agreement, we argued that the wording of the latter grants the Tribunal the power to adapt the Contract. This is in line with the law of Mediterraneo, which considers that a standard arbitration agreement is sufficient to grant an arbitral tribunal the same powers that a court would have under the same conditions[38]. Thus, there was no need to expressly mention the Arbitral Tribunal's power to adapt the Contract in the Arbitration Agreement. Particularly, since that was the true intention of the Parties. In fact, under the law of the Contract, the interpretation of the Arbitration Agreement is also subject to the CISG, whose Art. 8 establishes that the intention of the parties must be taken into account by analysing all the relevant circumstances such as the negotiations. Hence, as part of Issue III we analysed the emails exchanged between the negotiators and their witness statements to sustain that the Parties had indeed demonstrated their willingness to have the arbitrators adapt the Contract in the event that they could not compromise.

Thus, when applying the law of the Contract, the Tribunal would have the powers to adapt the Contract to the change of circumstances.

3. The law of the seat

The law of the seat of the arbitration, Danubia, is the one RESPONDENT intends to see as applicable to the interpretation of the Arbitration Agreement, since this would not grant the Tribunal the power to adapt. Indeed, the law of Danubia requires an express authorisation by the parties in order for arbitral tribunals and courts to adapt contracts[39], which in the present case was never granted. Moreover, and according to this law, arbitration agreements are to be interpreted narrowly[40], which means that the powers of the Arbitral Tribunal would be very restricted, and thus would not include creative tasks such as the power to adapt the Contract[41].

The law of the seat, or the *lex arbitri*, is the procedural law of the seat of arbitration which is applicable to the arbitration proceedings. Tribunals have considered that, by choosing a seat, the parties are automatically choosing the procedural law of the same place to govern certain aspects of their proceedings[42]. Particularly, since the law of the seat does provide for the legal framework of the arbitration proceedings, which means that by choosing the seat, the parties also chose the

[38] PO2, p. 60, ¶39 of the Problem.
[39] PO2, p. 61, ¶45 of the Problem.
[40] Notice of Arbitration, p. 7, ¶15 of the Problem.
[41] BERGER, Klaus Peter - *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense*. In: 17(1) Arbitration International (2001), pp. 1–18. P. 2.
[42] BERGER, Klaus Peter – Op. Cit. *Re-examining the Arbitration Agreement*….: Pp. 315, 345; WAINCYMER, Jeffrey – *Op. Cit.* P. 169

foreign controlling law and the supervisory courts[43]. Thus, it has also been upheld that this should be the default applicable law to the arbitration agreement in the event that the parties did not specifically provide otherwise.

This argument is based on the premise that an agreement to arbitrate will be more closely connected to the law of the seat as the place of performance of the arbitration agreement[44], particularly given the tribunal's duty to render an enforceable award. Art. V(1)(a) New York Convention supports this presumption by providing that recognition and enforcement of an award may be refused if it does not comply with "the law of the country where the award was made"[45].

We based our Memorandum for RESPONDENT on these arguments and, following the same logic of the three-stage test, argued that there was an express agreement between the parties during the negotiations or, at least, an implied agreement on having the law of the seat as applicable to the Arbitration Agreement, since that would be the only rational option for both Parties. Furthermore, it would be unreasonable to assume that the Parties would choose a neutral seat - Danubia - and, therefore, a neutral law to the proceedings, and deliberately exclude it from the Arbitration Agreement, which has a predominantly procedural nature. In any case, the Tribunal would have to apply the law of the seat since it was the one with the closest connection to the Arbitration Agreement[46].

Our position as RESPONDENT is further supported by the principle of separability, enshrined in the applicable rules, according to which the arbitration agreement is to be treated as a separate agreement from the main contract (Art. 16(1) Model Law and Art. 19(2) HKIAC Rules). This principle ensures the validity of the arbitration agreement when the main contract is considered null or void, which is not questioned by neither one of the Parties. Besides, this principle allows the arbitration agreement to be governed by a different law than the one governing the main contract[47]. Thus, the crucial point to make by invoking the principle of separability is that the law of the main contract should not be automatically extended to the arbitration agreement. Such an approach would be in line with the principle of party autonomy, since it would grant effectiveness to the Parties agreement to apply a different law to the main contract.

After establishing the law of the seat, Danubia, as applicable to the Arbitration Agreement, it is time to interpret the former accordingly. Under this law, the arbitration agreement requires an

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[43] *Ibid.*
[44] REDFERN, Ian and HUNTER, Martin J. - *Redfern and Hunter on International Arbitration,* Oxford University Press (2009). P. 316; BERGER, Klaus Peter – Op. Cit. *Re-examining the Arbitration Agreement.* P. 315; Sulamérica Case – Op. Cit.
[45] Arts. 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law also provide for the law of the seat as a default rule.
[46] BERGER, Klaus Peter – Op. Cit. *Re-examining the Arbitration Agreement.* P. 315.
[47] BORN, Gary – *International Commercial Arbitration*. Second Edition, Kluwer Law International (2014). P. 475-476.

express authorisation by the parties in order for the tribunal to be empowered to adapt the Contract. Furthermore, the law of Danubia follows the four corners rule on contract interpretation, which means that a contract must be interpreted by analysing merely the four corners of the paper: the tribunal can only rely on external evidence for that effect if the wording is considered ambiguous. Indeed, according to this law, arbitration agreements are considered to have a predominantly procedural nature, and for that reason they are not subject to the CISG[48]. RESPONDENT's argument will then rely on the fact that there is no expressly written conferral of powers in the Contract: neither in the Arbitration Agreement nor in the Hardship Clause. Furthermore, RESPONDENT will argue that the Arbitration Agreement is clear on what concerns the powers of the Arbitral Tribunal. Therefore, there is no ambiguity which would justify taking into consideration the previous negotiations between the Parties. This is why, under the Danubian law, we cannot rely on the negotiations to conclude that there was an intention to confer powers to adapt.

All in all, under the law of the seat, the Tribunal was not empowered to adapt the Contract upon a change of circumstances.

While this is a fictional case, it has demonstrated that the absence of choice of the law applicable to the arbitration agreement may be crucial in arbitral proceedings: in case the Tribunal decided on the law of the Contract, and in the event of hardship, CLAIMANT could be granted the adaptation of the Contract; on the other hand, if the Tribunal decided on the law of the seat, RESPONDENT would be relieved from that burden.

[48] PO2, p. 60, ¶36 of the Problem.

Issue II: Is the Partial Interim Award that CLAIMANT intends to submit admissible as evidence?

Catarina Carreiro

The second procedural issue is related to the admissibility of evidence that was unlawfully obtained. According to the applicable rules, a piece of evidence is admissible if it is relevant to the case and material to its outcome (Art. 22.3 HKIAC Rules[49] and Art. 19(2) Model Law[50]). Likewise, Art. 9(2)(b) IBA Rules provides for the same criteria. Although this set of international rules was not expressly agreed to by the Parties, the Tribunal can use it as guidelines[51], since it provides for "an efficient, economical and fair process for the taking of evidence in international arbitration"[52]. Besides, the fact that the piece of evidence at hand was obtained unlawfully could determine its rejection by the Tribunal *per se*.

The piece of evidence underlying this issue is a Partial Interim Award (hereinafter "PIA") related to an ongoing arbitration between RESPONDENT and a third party. These other arbitration proceedings, which are also governed by the HKIAC-Rules, relate to a contract which RESPONDENT - the seller - celebrated with a third party - the buyer - concerning the sale of a mare. The sale was affected by the 25% tariff imposed by Mediterraneo, the buyer's country. In light of the increase in costs caused by the tariff, RESPONDENT is requesting the other arbitral tribunal to adapt the contract[53].

When CLAIMANT found out about this arbitration, after the present proceedings had already commenced, it manifested its intention to submit the PIA of the other proceedings as evidence. CLAIMANT alleges that the admission of the PIA would demonstrate RESPONDENT's contradictory behaviour, as in the other arbitration proceedings RESPONDENT is defending the exact opposite claim of what it is defending in the present ones. Indeed, RESPONDENT is requesting contract adaptation due to a 25% import tariff, while denying it to CLAIMANT in the present proceedings, where the tariff at stake is even heavier, amounting to 30%[54].

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[49] Art. 22.3 HKIAC Rules reads as follows: [t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence".

[50] Art. 19(2) Model Law reads as follows: "(...) [t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence".

[51] Art. 19 Model Law reads as follows: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) **Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate**" (emphasis added).

[52] Foreword of the IBA Rules on the Taking of Evidence in International Arbitration, p. 3; BORN, Gary – *International Commercial Arbitration: Commentary and Materials*, Second Edition, Kluwer Law International (2001). P. 485.

[53] PO2, p. 60, ¶39 of the Problem.

[54] CLAIMANT'S email of 2 October 2018, p. 50 of the Problem.

Furthermore, CLAIMANT believes that the admission of the PIA would lead the Arbitral Tribunal to decide that it does have the powers to adapt the Contract, since the other arbitral tribunal decided, in the PIA, that it had those powers. Thus, this partial decision would have a persuasive effect on this Tribunal.

1. Relevance and Materiality

Firstly, it is important to establish that concerning the admissibility of evidence, arbitration rules confer great discretionary powers to arbitral tribunals[55]. This is particularly relevant in arbitration proceedings where the applicable rules determine that a decision made by the Tribunal is not subject to appeal, such as the present ones (Art. 2(2) HKIAC Rules), in order to ensure that the parties have a fair opportunity to present their case. Nonetheless, arbitral tribunals must balance the parties' right to present their case with the need for an efficient procedure - time and cost-wise - and, therefore, cannot admit every single piece of evidence submitted by the parties.

Thus, there are prerequisites to be analysed by arbitral tribunals in order to admit or to exclude evidence, such as relevance and materiality, which are recognised as basic requirements[56]. While relevance of a piece of evidence concerns the general relation between the evidence and the case, materiality is related to the outcome of the case[57].

The two arbitration proceedings in question relate to two different contracts and circumstances. The discussion then revolves around the similarities and disparities between the contracts and the circumstances underlying each of the arbitrations in order to justify or reject the relevance and materiality of the PIA. In this sense, CLAIMANT will focus on the similarities to defend the relevance and materiality of the PIA, such as the fact that the other contract also contains a hardship clause and its arbitration clause is based on the same model clause used in the present proceedings. Furthermore, we highlighted the fact that RESPONDENT is requesting adaptation of a contract based on an import tariff even lower than the one at stake in the present proceedings, recognising adaptation as the adequate remedy for cases of changes of circumstances. On the other hand, RESPONDENT will rely on the differences: for instance, the fact that the hardship clauses and arbitration agreements have different wordings, being different and broader in the contract underlying the other arbitration proceedings. This legitimates the difference in RESPONDENT's

[55] PILKOV, Konstantin - *Evidence in International Arbitration: Criteria for Admission and Evaluation.* In: *The International Journal of Arbitration, Mediation and Dispute Management* (2014), pp. 147-155. Available at: https://www.researchgate.net/publication/308405085_Evidence_in_International_Arbitration_Criteria_for_Admission_and_Evaluation (consulted on 30 May 2019). P. 147.
[56] PILKOV, Konstantin – Op. Cit. P. 154.
[57] PILKOV, Konstantin – Op. Cit. Pp. 148-149; WAINCYMER, Jeffrey – Op Cit. Pp. 858-859.

position, and therefore the cases cannot be compared. Due to these reasons, the PIA lacks relevance and materiality.

2. The unlawful obtainment of the PIA

Besides relevance and materially, it is fundamental to address the matter of the unlawful obtainment of the PIA. Although it is not known with certainty how it was obtained, the Problem reveals that it was either through a breach of a confidentiality agreement by two of RESPONDENT's former employees or by a hack of RESPONDENT's computer system[58]. According to RESPONDENT, this hack had occurred three weeks before CLAIMANT contacted the Tribunal about this piece of evidence and "the hackers managed to retrieve a considerable amount of data"[59].

Even though there is no specific provision on how to deal with unlawfully obtained evidence in the applicable law, there is a widely recognised doctrine known as the "clean hands" doctrine[60]. Essentially, if the party who seeks to introduce a piece of evidence was involved in the unlawful act of its obtainment, the evidence is not admissible. This is based on the belief that a party cannot benefit from its own wrongdoing. On the other hand, if the party was not involved in the unlawful action, the piece of evidence is deemed to be admissible.

At first glance, it may seem clear that CLAIMANT was not involved in any unlawful act, since it was not bound by a confidentiality obligation regarding the evidential material nor did it hack into RESPONDENT's computer system itself. Additionally, CLAIMANT is not even in the possession of the PIA yet. These were the main arguments we used for CLAIMANT. Given the absence of strict rules on the admissibility of unlawfully obtained evidence, we mainly relied on case law to support our position, *inter alia* on the case ConocoPhilips v. Venezuela, where Venezuela sought to introduce illegally obtained evidence published online in the arbitral proceedings. Although the arbitral tribunal denied its own jurisdiction to decide on the admissibility of the evidence, one of the arbitrators, Georges Abi-Saab, advocated a very convenient position for CLAIMANT: ignoring such relevant and material evidence would lead to a faulty decision, which would "put or risk putting the credibility and integrity of the tribunal into question", since the tribunal would be

[58] Respondent's email of 3 October 2018, p. 51 of the Problem; PO1, p. 53 of the Problem.
[59] Respondent's email of 3 October 2018, p. 51 of the Problem.
[60] Methanex Corporation v. United States of America (Arbitral Tribunal constituted under the NAFTA Treaty, August 2005). Available at: https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (consulted on 17 May 2019)*; Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8. Available at:* https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf (consulted on 17 May 2019)*; Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12*. Unpublished decision. Source: http://arbitrationblog.kluwerarbitration.com/2016/09/28/admissibility-of-improperly-obtained-data-as-evidence-in-international-arbitration-proceedings/ (consulted on 17 May 2019).

shutting itself into "a virtual reality in order to fend off probable objective reality"[61]. Therefore, since CLAIMANT was not involved in any illegal activity and considering that the evidence is relevant and material, we argued that the Tribunal should admit it.

On the other hand, as RESPONDENT, we focused on the fact that CLAIMANT arranged the opportunity to acquire the PIA against payment of 1000 USD from a company with a doubtful reputation as to where it gets its information from, who refuses to reveal its sources[62]. While one could argue that this does not pose any problem, since nowadays it is quite common to buy specific information from companies, at the same time it is arguable that buying this information from a company with a doubtful reputation demonstrates that CLAIMANT did take some part in the obtainment of the evidence. This is because CLAIMANT actively searched for the PIA while being perfectly aware of its unlawful obtainment and confidential nature. Thus, as RESPONDENT, we argued that CLAIMANT did not have "clean hands", since it breached good faith and procedural fairness, which are paramount to any arbitration proceedings. As RESPONDENT, one of the leading cases we relied on was the Methanex v. USA case[63]. In this case, the claimant had illegally obtained confidential materials and sought to introduce them in the proceedings. The tribunal stated that it would be wrong for the claimant to introduce such evidential material, highlighting the parties' duty to conduct themselves in good faith and to respect the equality of arms between them, the principles of equal treatment and procedural fairness. It held that the claimant had violated this standard, offending basic principles of justice and fairness, thus deeming the evidence inadmissible. This fitted RESPONDENT's position perfectly. Furthermore, we argued that if the Tribunal considered the PIA admissible, it would be encouraging unfair methods of obtaining evidence, as it would be giving juridical effects to an unlawful act. However, arbitral tribunals, as the guardians of the due process, shall prevent such mischievous activities from happening[64].

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[61] ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30. Although this is an investment arbitration case, we relied on it as the standard to admit illegally obtained evidence is the same, *i.e.,* the tribunal's general discretion and procedural fairness - lacking any specific rules; ABI-SAAB, Georges - *Dissenting Opinion (Decision On Respondent's Request For Reconsideration).* PP. 60-61. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3121.pdf (consulted on 29 May 2019).

[62] PO2, PP. 60-61, ¶41 of the Problem.

[63] Methanex Corporation v. United States of America – Op. Cit. Although this is an investment arbitration case, we relied on it as the standard to admit illegally obtained evidence is the same, *i.e.,* the tribunal's general discretion and procedural fairness - lacking any specific rules.

[64] DE COSSÍO, Francisco González - *La prueba ilícita: propuestas para manejar los retos que suscita en arbitrajes.* In: 2014(20) *Spain Arbitration Review, Revista del Club Español del Arbitraje*; Wolters Kluwer España (2014), pp. 33 – 41. P. *36;* United States v. John P. Calandra (USA Supreme Court, 8 January 1974). Available at: https://supreme.justia.com/cases/federal/us/414/338/ (consulted on 18 May 2019).

3. Transparency v. Confidentiality

Confidentiality is indicated as one of the key advantages of arbitration over litigation, protecting the parties' interests by averting that their business is jeopardised because of an arbitral proceeding, while avoiding the "aggravation of the dispute by public comments made during the proceedings"[65].

However, the relevance attributed to confidentiality started to decrease in the past years, with several authorities questioning the existence of an implied duty of confidentiality or even its conception as an absolute right in arbitration proceedings[66]. In fact, we have recently witnessed an increasing concern with the need for transparency in order to ensure the credibility of arbitration as an alternative dispute resolution system[67]. Indeed, a more transparent arbitration system brings predictability and certainty in the application of law, while contributing to its development[68]. Additionally, if every award were to be published, "tribunals would have greater incentives to make defensible, persuasive and careful decisions", improving the quality of the decisions[69].

Bearing this in mind, we had to weigh CLAIMANT's right to present its case against RESPONDENT's right to confidentiality in parallel proceedings. On CLAIMANT's side, we argued that, in the conflict between confidentiality and transparency, the latter should prevail in the present case. This is mainly because the submission of the PIA would provide for a better decision making of the Tribunal - since it would give the Tribunal a "bigger picture" of the case. Furthermore, to allow the Tribunal to access a previous decision by another arbitral tribunal concerning an identical case would contribute to the legitimacy of arbitration as a system of dispute resolution, assuring predictability and certainty in the application of the law and quality of the decision.

In spite of that, the truth is that the parties of both arbitrations agreed on a specific set of arbitration rules - the HKIAC Rules - which grant the confidentiality of the proceedings*, as per* Art.

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[65] HAY, Emily – *Winds of Change? Confidentiality and in International Commercial Arbitration*. In Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* (2018), (© Carlos González-Bueno Catalán de Ocón; Dykinson, S.L. 2018) pp. 211 – 230. P. 212

[66]Esso Australia Resources Ltd and Others v. The Honourable Sidney James Plowman And Others (High Court of Australia, 7 April 1995). Available at: https://jade.io/article/67885 (consulted on 14 July 2019); Bulgarian Foreign Trade Bank Ltd, V. A.I. Trade Finance Inc (Swedish Supreme Court, 27 October 2000). Available at: https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1083535&propId=1578 (consulted on 14 July 2019).

[67] Nowadays, several arbitration statutes predict measures to promote greater transparency, such as the publication of redacted versions of arbitral awards (*e.g.* HKIAC Rules, AAA Rules, ICC Rules). Cf. SCHIMMEL, Daniel; SHOPE, John A.; HAINSWORTH, Amanda and TSUTIEVA, Diana - *Transparency In Arbitration.* Available at: - https://foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration_practical%20law_mar2018.ashx (consulted on 22 July 2019).
; BORN, Gary B. – Op. Cit., p. 2807.

[68] HAY, Emily – Op. Cit. P. 224.

[69] GARY, Born – Op. Cit *International*… P. 2822

42 HKIAC 2013 Rules and Art. 45 HKIAC 2018 Rules. In this regard, as RESPONDENT, we focused on confidentiality being a cornerstone in *these* arbitration proceedings. Hence, admitting the PIA would be a manifest violation of the applicable rules. Furthermore, we advocated that transparency concerns are unjustifiable in the present case, considering that the PIA does not even relate to the case nor could it influence the Tribunal's decision.

In case the Arbitral Tribunal decided in favour of CLAIMANT and found the evidence relevant and material, it would be promoting CLAIMANT's fundamental right to present its case (Art. V (1)(b) NYC). Indeed, due to their great flexibility on what concerns the admissibility of evidence, arbitral tribunals generally "admit almost any evidence submitted to them in support of parties' position", safeguarding the parties' right to present the case[70]. This could avoid a future challenge of the award or the refusal of its recognition based on considerations of due process, according to Art. V (1)(b) NYC[71]. On the other hand, if the Tribunal followed RESPONDENT's position, finding the PIA inadmissible, it could avoid a challenge of the final award based on public policy considerations, connected to the unlawful nature of the obtainment of this piece of evidence, according to Art. V (2)(b) NYC[72].

Concluding, while CLAIMANT essentially defends that the evidence is admissible because it is relevant and material to the case and that, even though it was unlawfully obtained, CLAIMANT did not take any part in its obtainment, RESPONDENT advocates the opposite: that the evidence is neither relevant nor material and the fact that it was unlawfully obtained makes it inadmissible *per se*.

[70] LEW, Julian D. M.; MISTELIS, Loukas A. – *Comparative International Commercial Arbitration*, Kluwer Law International (2003), pp. 99-127. P. 561; PILKOV, Konstantin – Op. Cit. P. 150.
[71] GARY, Born – Op. Cit *International*… PP. 3495, 3523.
[72] PILKOV, Konstantin – Op. Cit. P. 154.

Substantive Issue

Issue III: Is CLAIMANT entitled to an adaptation of the price either under the Hardship Clause or under the CISG?

Catarina Cerqueira

The substantive issue is related to changes of circumstances during the life of a contract, particularly hardship. The doctrine of hardship, whose origins can be traced back to Roman law, is present in several legal systems: for instance, in French Law (*imprévision*), in German Law (*Wegfall der Geschäftsgrundlage*) and in Italian Law (*eccessiva onerosità sopravvenuta*)[73]. Accordingly, depending on the hardship clause at stake, parties are entitled to request avoidance, revision or even adaptation of a contract when faced with a change of circumstances, usually required to be unforeseeable, that renders performance of a contractual obligation extremely burdensome, despite being still possible[74]. This constitutes an exception to the principle of *pacta sunt servanda*, which dictates that the parties have to perform their contractual obligations as agreed upon[75].

In the present case, CLAIMANT is requesting an adaptation of the Contract - in the form of a payment of 1,250,000 USD - as a consequence of the import tariff imposed by the Government of Equatoriana, since it considers that it is facing a situation of hardship. CLAIMANT is basing its request on the Hardship Clause that the Parties agreed upon, containing its own requirements, and, alternatively, on the CISG. By its turn, RESPONDENT upholds that this is not a situation of hardship and that, in any case, adaptation is not the remedy to be applied.

1. The Hardship Clause

The Hardship Clause that the Parties agreed upon contains the requirements for an event to be considered to cause hardship: it has to be an additional health and safety requirement or, otherwise, comparable to additional health and safety requirements, unforeseen and make the Contract more onerous.

It is clear for both Parties that the import tariff at stake is not an additional health and safety requirement. Therefore, in order for CLAIMANT to prove that this event is causing hardship, it has to demonstrate that the other three requirements are met. For RESPONDENT, it suffices to prove

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[73] GARRO, Alejandro M. - *CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG*, CISG Advisory Council (2007). Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (consulted on 10 May 2019). ¶26.

[74] GARRO, Alejandro M. – Op. Cit. *CISG-AC Opinion No. 7*... ¶26.

[75] KRÖLL, Stefan Michael – *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*. In: *19 Studies in Transnational Economic Law*. P. 458

that one of the requirements is not met to make its case and demonstrate that CLAIMANT is not facing hardship under the Hardship Clause.

The Parties chose the law of Mediterraneo, including the CISG, to be applicable to the Contract[76]. According to Art. 8(1) CISG, contracts must be interpreted taking into consideration the intention of the Parties. If that intention cannot be determined, then one must interpret them according to the understanding of a reasonable third person under the same circumstances, following Art. 8(2) CISG. Resorting to the negotiations will contribute to determine that intention and that understanding, as provided for in Art. 8(3) CISG.

Regarding the first requirement, the intention of the Parties plays an important role in establishing whether the imposition of the tariff is comparable to additional health and safety requirements. This is because, in the email where CLAIMANT requested a hardship clause, it mentioned that it knows from past experiences that "unforeseeable additional health and safety requirements" can increase the cost of performance of a contract and destroy the commercial basis of the deal[77]. In fact, tariffs like the one at stake can have these same consequences. However, it is debatable whether this is enough to conclude that the intention of the Parties was to consider them as comparable to additional health and safety requirements. We chose to not mention this criterion in our Memorandum for RESPONDENT since it was not included in the CLAIMANT's Memorandum we responded to.

In the above-mentioned email, CLAIMANT also stated that, despite accepting DDP delivery, it was not willing to take over any further risks, in particular those connected to "customs regulations or import restrictions"[78]. However, as RESPONDENT, we discredited this assertion, mentioning that instead of exempting CLAIMANT from all these risks, as it requested, the Parties rather chose to narrow down the exemptions in the Hardship Clause.

On what concerns the second requirement - unforeseeability -, it is important to bear in mind that the tariff by Equatoriana was imposed as a retaliation to the tariff by Mediterraneo. As such, it might be worth considering the foreseeability of both tariffs. On the one hand, a newspaper article submitted as an exhibit considers the imposition of both tariffs as a surprise[79]. Indeed, neither country had ever imposed tariffs on agricultural goods or on horse semen. On the other hand, there are some facts that make it possible to sustain that the tariffs were actually foreseen. For instance, shortly before the conclusion of the Contract, Mediterraneo had elected a new president

[76] Exh. C5, p. 14, Clause 14 of the Problem.
[77] Exh. C4, p. 12, ¶4 of the Problem.
[78] Exh. C4, p. 12, ¶4 of the Problem.
[79] Exh. C6, p. 15 of the Problem.

who had shown protectionist tendencies in his election program. Besides, Equatoriana did respond with a retaliation in a similar situation in the past.

Lastly, regarding the onerousness requirement, the question to address is whether the loss incurred by CLAIMANT can be considered as "more onerous" under the terms of the Hardship Clause. CLAIMANT is, in fact, facing a cost increase of 30% in the shipment of the last instalment of frozen semen. On top of that, it is going through financial difficulties, and will invoke these circumstances as a way of reinforcing the idea that it is in a situation of hardship. However, RESPONDENT will argue that a 30% increase in the last shipment, which corresponds to a 15% increase in the totality of the Contract, should not be considered as onerous enough. Additionally, RESPONDENT will discredit CLAIMANT's financial situation by defending that it must not be taken into account when assessing the fulfilment of the onerousness requirement. Indeed, the fact that a party is in financial distress increases the impact of an onerous event. However, on the other hand, according to the principle of party autonomy, parties are free to decide whether to enter into a contractual relationship or not[80]. The fact is that CLAIMANT was already in a strained financial situation before signing the Contract, and still chose to do it. Therefore, the question remains as to whether this should weigh on the decision of who should be responsible for the payment of the extra costs.

Besides determining whether CLAIMANT was facing a situation of hardship under the Contract, the Parties had to sustain what was the proper remedy to be applied in such cases. Hardship clauses can provide for various different solutions. For example, Art. 6.2.3 UNIDROIT Principles establishes that, firstly, the parties should renegotiate; if the parties do not reach an agreement, either of them can resort to court, which will have two options: either to terminate the contract or to adapt it. By its turn, the ICC Hardship Clause provides that, upon a failure of the renegotiations, a party can terminate the contract.

In casu, the Hardship Clause starts by stating that "[s]eller shall not be responsible". Although, at first glance, the meaning of this remedy might seem unclear, we can look at the fact that this part of the clause was already included in the pre-existing *force majeure* clause to which the Parties added the hardship component[81], and undoubtedly applies to the *force majeure* component. Hence, one can defend that this remedy corresponds to exemption from liability for non-performance, which is the usual remedy for cases of *force majeure*, since in these cases performance becomes impossible[82].

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[80] SUND-NORRGÅRD, Petra - *Introduction to the Law of Contracts.* In: HERBOTS, Jacques (Volume Editor), BLANPAIN, Roger (General Editor), HENDRICKX, Frank (General Editor) - Finland, *IEL Contracts*, Kluwer Law International (2017), pp. 21-40. §1, ¶36.

[81] PO2, p. 55, ¶3 of the Problem.

[82] *E.g.*, the ICC Force Majeure Clause 2003 (4) establishes that "[a] party successfully invoking this Clause is [...] relieved from its duty to perform its obligations under the contract […]".

However, it is arguable whether this is to be applied in cases of hardship, particularly in the present case where CLAIMANT already performed. While CLAIMANT advocates that it was the intention of the Parties to provide for a different remedy - adaptation of the Contract - in cases of hardship, RESPONDENT differs and stands for the application of the remedy that is expressly written in the Hardship Clause. In fact, the first negotiators discussed the possibility of adaptation. When CLAIMANT's Ms. Napravnik mentioned the importance of the mechanism of adaptation, RESPONDENT's Mr. Antley answered that it should "probably" be the task of the arbitrators to adapt[83]. However, this was not expressly included in the Contract. Whether that discussion established the intention of the Parties to adapt the Contract or not, will be interpreted differently by both sides.

2. The CISG

CLAIMANT contends that, if the Tribunal considers that the Contract must not be adapted under the Hardship Clause, then it must be adapted under the CISG, which is applicable by choice of the Parties[84]. Within the CISG, the question revolves around Art. 79. There are two issues related to the applicability of this provision to this case: whether it is applicable to hardship and whether the Parties derogated from it.

While it is unquestioned that Art. 79 CISG is applicable to *force majeure*, it is disputable whether it also applies to hardship. This is because this provision refers to a failure to perform due to an "impediment". The question, then, is to ascertain if this "impediment" is something that prevents performance of the contract for one of the parties, or if it can also refer to an event that renders performance excessively difficult, while still possible. This is where scholarly and jurisprudential opinions are divided.

As CLAIMANT, we relied on authors such as Professors Peter Schlechtriem[85] and John Honnold[86] to defend the applicability of Art. 79 to cases of hardship. Professor Schlechtriem warns against "the danger that courts will find a gap in the Convention and invoke domestic laws and their widely divergent solutions" if hardship is not considered to be included in the scope of this provision[87]. The position adopted in the CISG Advisory Council Opinion about Art. 79 is also in favour of

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[83] Exh. C8, p. 17, ¶4 of the Problem.
[84] Exh. C8, p. 14, Clause 14 of the Problem.
[85] SCHLECHTRIEM, Peter - *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (1986). Available at: https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html (consulted on 16 May 2019). P. 102, fn 422a.
[86] HONNOLD, John O. - *Uniform Law for International Sales under the 1980 United Nations Convention*. Third Edition, Kluwer Law International, (1999). ¶432.2.
[87] SCHLECHTRIEM, Peter – Op. Cit. P. 102, fn 422a.

the applicability of this provision to hardship, advocating that its wording "does not expressly equate the term "impediment" with an event that makes performance absolutely impossible"[88]. The leading case to defend CLAIMANT's position is the Scafom v. Lorraine Tubes case, where the Supreme Court of Belgium held that an event causing hardship can constitute an "impediment" in the sense of Art. 79 CISG[89].

As RESPONDENT, we relied on authors such as Professor Bruno Zeller[90] and Dionysios Flambouras[91], who consider that Art. 79 CISG is not applicable to cases of hardship. The leading case on this position is the Nuova Fucinati v. Fondmetall International case[92], where the District Court of Monza sustained that, although the CISG was not applicable to that case, if it was, the seller could not base its claim on it to ask for avoidance in a situation of hardship, because Art. 79 does not govern those situations. RESPONDENT will also rely on the legislative history of Art. 79, which demonstrates that, during its drafting, a proposal which would include the doctrine of hardship in its scope was rejected[93].

Furthermore, in its Answer to the Notice of Arbitration, RESPONDENT alleged that, by including a *force majeure* and hardship clause in the Contract, the Parties derogated from Art. 79 CISG in the sense of Art. 6 CISG. Art. 6 states the following: "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions". It does not clarify what constitutes a derogation and what does not; particularly, whether including a clause governing the same matter in a contract constitutes a derogation *per se*. Therefore, RESPONDENT will have to rely on authors and/or case law to demonstrate that the Hardship Clause derogates Art. 79, as CLAIMANT will do to demonstrate the opposite.

The Parties also have to prove whether the requirements of Art. 79(1) are met so that CLAIMANT's situation can be considered as hardship. To RESPONDENT, this works as a subsidiary argument: even if the Tribunal considers that Art. 79 is applicable to this case, its requirements are not met,

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88 GARRO, Alejandro M. – Op. Cit. *CISG-AC Opinion No. 7.* … ¶3.1.

89 Scafom International BV v. Lorraine Tubes S.A.S (Belgium Court of Cassation, 19 June 2009). Available at: http://cisgw3.law.pace.edu/cases/090619b1.html (consulted on 10 May 2019).

90 ZELLER, Bruno - *Article 79 Revisited*. In: 14 The Vindobona Journal of International Commercial Law and Arbitration (2010), pp. 151-164. P. 153

91 FLAMBOURAS, Dionysios - *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108* (2002). In: *Guide to Article 79 - Comparison with Principles of European Contract Law (PECL)*. Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html (consulted on 12 June 2019). §7

92 Nuova Fucinati S.p.A. v. Fondmetall International A.B (District Court Monza, Italy, 14 January 1993). Available at: http://cisgw3.law.pace.edu/cases/930114i3.html (consulted on 10 May 2019).

93 GARRO, Alejandro M. - *Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)* (2005). In: *Guide to This Article - Use of the UNIDROIT Principles to help interpret CISG Article 79*. §IV, ¶11; LINDSTRÖM, Niklas - *Changed Circumstances and Hardship in the International Sale of Goods*. In: *1 Nordic Journal of Commercial Law* (2006). §IV 2.2

and therefore CLAIMANT is not experiencing hardship under this provision. Art. 79(1) demands that there is an impediment beyond the disadvantaged party's control "and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences". Similarly to what was previously stated regarding the Hardship Clause, while CLAIMANT has to prove that all these criteria are met, for RESPONDENT it suffices to prove that one of them is not.

The unforeseeability requirement is common to both the Hardship Clause and Art. 79(1) CISG. On what concerns the threshold of onerousness, it might seem unclear by the wording of the provision, which merely talks about an "impediment". Doctrine and case law consider that the threshold is met when the obligor is facing a disproportionate burden beyond a "limit of sacrifice"[94]. Whether that limit is surpassed in the present case or not is debatable.

According to Art. 79(1), the obligor has a duty to avoid or overcome the event, or its consequences. The fulfilment - by CLAIMANT - of the duty to overcome the consequences of the event can be called into question. This is because the newspaper article submitted as evidence by CLAIMANT announcing the imposition of the tariff by Equatoriana - and revealing that it applied to agricultural goods from Mediterraneo - was published almost one month before the tariff entered into force[95]. RESPONDENT will argue that CLAIMANT must have had confirmed at that moment if the tariff applied to frozen horse semen - since we know for a fact that both Parties read the article. If CLAIMANT had done so, it could have averted the payment of the tariff by sending the shipment earlier.

CLAIMANT will further argue that, even if the Tribunal considers that Art. 79 CISG does not apply to hardship, there is a gap in the Convention. According to Art. 7(2) CISG, gaps will be filled in conformity with the general principles of the Convention "or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law"[96]. CLAIMANT will then rely on the UNIDROIT Principles, alleging that they embody the general principles of the CISG, and that, in any case, they are the applicable law if we resort to the second option of Art. 7(2). This is because the Parties chose the law of Mediterraneo to be applicable to the Contract, and the Mediterranean Contract Law is a verbatim adoption of the UNIDROIT Principles.

[94] GARRO, Alejandro M. – Op. Cit. *CISG-AC Opinion No. 7*. ¶38; Scafom International BV v. Lorraine Tubes S.A.S – Op. Cit.
[95] Exh. C6, p. 15 of the Problem.
[96] Art. 7(2) CISG.

Therefore, it is important to analyse whether or not CLAIMANT is facing hardship according to these Principles[97].

On the other hand, when referring to the application of Art. 79 CISG, RESPONDENT will resort to the legislative history of the CISG to sustain that the doctrine of hardship was rejected, which would imply that there is no gap to fill. However, it is still important, as RESPONDENT, to address the application of the UNIDROIT Principles, mainly because they are applicable to the Contract as the Contract Law of Mediterraneo. Even if RESPONDENT advocates that the provisions of the UNIDROIT Principles on hardship were derogated by the Hardship Clause, it is prudent to build a subsidiary argument. As such, while CLAIMANT will demonstrate that it is facing hardship under the requirements of the UNIDROIT Principles, RESPONDENT will argue the opposite.

Finally, the last question regarding Art. 79 CISG is whether the remedy for the present case can be adaptation, as requested by CLAIMANT. Art. 79(1) starts by stating that "[a] party is not liable for a failure to perform", which indicates that the remedy is exemption from liability for non-performance. However, in the present case, performance was already completed. At the same time, it is arguable whether this remedy is the one to trigger under the CISG also in cases of hardship and not only in cases of *force majeure*. CLAIMANT will, once again, advocate the existence of a gap on what concerns the remedy for hardship and will argue in favour of the application of general principles or, alternatively, of the law of Mediterraneo[98]. RESPONDENT, in turn, will claim that the existent remedy in Art. 79(1) cannot be ignored and is the only one to be applied and that, in any case, there are no general principles in the CISG from which to extract the remedy of adaptation.

To conclude, in the face of a hardship clause that sets specific requirements for a situation to be considered to cause hardship, there is room for debate as to whether the imposition of the tariff by Equatoriana fits the description. Both Parties will come up with different interpretations of the facts and of their common intention, also in relation to the remedy to be applied. CLAIMANT will, alternatively, invoke the applicable law to pursue its claim. However, the controversy surrounding Art. 79 CISG – whether it applies to hardship and whether it provides for adaptation – makes it no less of a hard task.

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[97] Art. 6.2.2 UNIDROIT Principles sets the definition of hardship. According to this provision, "[t]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."

[98] Art. 6.2.3 UNIDROIT Principles governs the effects of hardship. This provision establishes that, in the absence of an agreement between the parties, one of them may resort to the court, which may terminate the contract or adapt it.

Conclusion

The Willem C. Vis Moot turned out to be one of the most enriching experiences of our lives - both on a professional and on a personal level. Throughout these six months we improved our researching, written, oral and legal English skills while visiting new countries and meeting outstanding students and law practitioners from all over the world, providing for a real cultural exchange.

In the written phase we learned patience and persistence and that there is always room for improvement. In the oral phase we learned the importance of preparation, confidence and due deference towards the arbitral tribunal. Besides, during this process we learned that teamwork really does make the dream work. It is with great satisfaction that we finished this experience bringing *home* the results we achieved, promoting Nova's name in the international arbitration community.

To Nova University of Lisbon - School of Law, we would like to express our gratitude for encouraging the participation in competitions such as the Vis Moot, allowing students to develop not only their legal skills but also their soft skills, essential in today's working environment. We would also like to thank Professor Francisco Pereira Coutinho for introducing us to the world of moot courts. We would never imagine that such a demanding academic experience could be so rewarding at the same time. Finally, a special appreciation to our coaches, Rute Alves and André Pereira da Fonseca, for the extraordinary support: for the late hour meetings, for the patience, for the valuable inputs, for galvanising our growth.

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Annexes

Memorandum for CLAIMANT (I) and Memorandum for RESPONDENT (II) prepared by the team of the Nova University of Lisbon - School of Law.

TWENTY-SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, APRIL 13TH – 18TH APRIL 2019

NOVA UNIVERSITY OF LISBON, SCHOOL OF LAW

MEMORANDUM FOR CLAIMANT

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

COUNSEL FOR CLAIMANT

CAROLINA ROQUE • CATARINA CARREIRO • CATARINA CERQUEIRA

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

¶/¶¶	paragraph/paragraphs
§	Section
Art./Arts.	Article/Articles
cf.	*confer* (see)
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	*exempli gratia* (for example)
ed.	Edition
et al.	Et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
fn.	foot note
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules of 2018
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration

ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce
in casu	in the case at hand
i.e.	*id est* (that is)
Infra	Below
inter alia	among other things
Ltd.	Limited
Mr. / Ms.	Mister / Miss
No.	Number
NoA	Notice of Arbitration
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
p. / pp.	page / pages
PECL	Principles of European Contract Law
Quod non	Not the case in the present issue
Supra	See above
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model-Law on International Commercial Arbitration
UNIDROIT Principles	Principles UNIDROIT Principles of International Commercial Contracts (2016)

US	United States
US$	United States Dollars
v.	*versus* (against)

STATEMENT OF FACTS

Phar Lap Allevamento ("**CLAIMANT**") is a company based in Mediterraneo that manages the oldest and most renown stud farm in the country. CLAIMANT is well known for its success regarding the breeding of racehorses, additionally selling frozen semen from its champions studs.

Black Beauty Equestrian ("**RESPONDENT**"), is a company located in Equatoriana famous for its broodmare lines. Recently, RESPONDENT established a racehorse stable and it is currently building up its own racehorse breeding program.

21 March 2017 — Acknowledging its outstanding reputation, RESPONDENT contacted CLAIMANT asking for one hundred doses of frozen semen from Nijinski III, the star among CLAIMANT's stallions, to be used in its newly started breeding program.

24 March 2017 — Despite its extraordinary nature, CLAIMANT accepted RESPONDENT's request under certain conditions namely, that the doses would not be resold to third parties without CLAIMANT's express written consent.

28 March 2017 — Due to RESPONDENT's urgency in obtaining the doses and being CLAIMANT more experienced concerning the shipment of frozen semen, RESPONDENT insisted on a delivery on the basis of Delivered Duty Paid ("**DDP**").

31 March 2017 — CLAIMANT accepted DDP delivery with a relevant condition, *i.e.*, the creation of a hardship clause to temper some additional risks, such as import restrictions.

6 May 2017 — The Parties concluded the Frozen Semen Sales Agreement ("**Contract**"), which included an arbitration agreement granting this Arbitral Tribunal ("**Tribunal**") jurisdiction to decide on any dispute that arose from the former.

19 December 2017	After two of the three installments of frozen semen were shipped, the Government of Equatoriana announced the imposition of a 30% tariff upon all agricultural goods from Mediterraneo.
20 January 2018	Immediately after finding out that the newly imposed tariff applied to horse semen, CLAIMANT contacted RESPONDENT so that a solution would be found.
23 January 2018	With certainty that an agreement would be reached, CLAIMANT paid the 30% tariff and timely delivered the last installment.
12 February 2018	In order to negotiate the adaptation of the Contract, the Parties had a meeting. However, no agreement was reached, since RESPONDENT's CEO got aggressive and put an end to the negotiations.
31 July 2018	As it turned out clear that no solution could be reached, CLAIMANT submitted its Notice of Arbitration ("**NoA**") to reestablish the initial equilibrium of the Contract.
24 August 2018	RESPONDENT filed its Answer to the NoA ("**ANoA**").
2 October 2018	After finding out about other arbitration proceedings in which RESPONDENT is advocating the exact opposite position, CLAIMANT required the Tribunal to submit evidence from these arbitration proceedings ("**Evidence**").

INTRODUCTION

1. People in glass houses should not throw stones. Yet, RESPONDENT is advocating two contradictory positions at the same time. Indeed, the Parties agreed that in case of hardship the Contract would be adapted. However, RESPONDENT is now denying adaptation while requesting the very same solution in other identical arbitration proceedings.

2. International business is a complex and ever-changing world. Conscious of this, CLAIMANT insisted on the inclusion of an adaptation clause in the Contract, in order to narrow down its sphere of risk. Although the Parties' agreed on delivery DDP, the point was never to burden CLAIMANT with the all the possible negative outcomes: no business man would sanely put himself in this position. And RESPONDENT is aware of this. Nonetheless, RESPONDENT seeks to exempt itself from the agreed terms in a vile attempt to make the Contract terms ambiguous.
3. With regards to the procedural issues, this Tribunal has jurisdiction to adapt the Contract, *as per* the Parties' agreement (**Issue I**). Furthermore, the Tribunal must admit the Evidence that demonstrates RESPONDENT's contradictory behavior (**Issue II**). On the merits, CLAIMANT is entitled to receive outstanding contractual payments as a result of the adaptation of the Contract due to a situation of hardship (**Issue III**).

ARGUMENTS

ISSUE I: THE TRIBUNAL HAS JURISDICTION AND POWERS TO ADAPT THE CONTRACT

4. The Parties to these arbitration proceedings are bound by an arbitration agreement allowing them to initiate arbitration in accordance with the HKIAC Rules of 2018 [*Exh. C5, p.14 (Clause 15); PO1, p. 52, §II*].
5. RESPONDENT claims that this Tribunal lacks jurisdiction to adapt the Contract [*ANoA, p. 31, ¶¶12/13; PO2, p. 61, ¶48*]. Contrary to RESPONDENT' ill-founded allegations, CLAIMANT will demonstrate that the Tribunal does have jurisdiction and powers under the arbitration agreement to adapt the Contract. Firstly, because the Parties agreed on the law of Mediterraneo to govern the interpretation of the arbitration agreement **(A)**. Secondly, the scope of the arbitration agreement allows the Tribunal to adapt the Contract **(B)**. Thirdly, if the Tribunal does not find the law of Mediterraneo to be applicable, it would still have the powers to adapt the Contract, relying on an interpretation according to general principles of contract interpretation **(C)**. In any event, even if the Tribunal would decide to apply the law of Danubia, it would have powers and jurisdiction to adapt the Contract **(D)**.

A. The Parties agreed on the law of Mediterraneo to govern the interpretation of the arbitration agreement

6. CLAIMANT will demonstrate that it is the law of Mediterraneo that governs the interpretation of the arbitration agreement. Firstly, there was an express agreement of the Parties **(1)**. Secondly, even if the Tribunal considers that there is no evidence of an express agreement, it must hold that there was an implied choice by the Parties to have the Mediterranean law governing the interpretation of the arbitration agreement **(2)**.

1. There was an express agreement between the Parties to apply the law of Mediterraneo to the arbitration agreement

7. The Parties agreed to arbitrate under the HKIAC Rules, which provide that the Tribunal "shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties" [*Art. 36 HKIAC Rules*]. Even though this article refers specifically to the "substance" of the dispute, one can assume that, in the "spirit of these Rules" [*Art. 13.9 HKIAC Rules*], the Tribunal shall apply also the rules of law agreed to by the Parties on what concerns the arbitration agreement. The principle of party autonomy tells us that it could not be in any other way [*Redfern/Hunter II, p. 315*]. Thus, the Tribunal must rely on the law of Mediterraneo to construe the arbitration agreement.
8. The facts show that in any moment did RESPONDENT make clear that it was against the application of the law of Mediterraneo to the arbitration agreement. On the contrary, the evidence enclosed to the proceedings shows that the Parties reached an agreement on what would be the applicable law. The need for special approval by the creditors' committee [*Exh. R2, p. 34, ¶2*] is enough to demonstrate that the hypothetical application of another law is mere fiction.
9. Early in the negotiations, Ms. Napravnik provided RESPONDENT with an offer for one hundred doses of frozen semen from Nijinski III, including CLAIMANT's terms and conditions [*Exh. C1, p. 9*]. RESPONDENT accepted most of the terms, excluding two points: (1) price and delivery and (2) applicable law and dispute resolution [*Exh. C3, p. 11*].
10. RESPONDENT expressly stated that it did not consider appropriate that "[CLAIMANT's] law applies **and** [CLAIMANT's] courts have jurisdiction" (emphasis added), clearly indicating that the issue would lay on the simultaneous application of Mediterranean Law **and** court jurisdiction to decide on future disputes. RESPONDENT confirms it by stating that "[it] could

accept the application of the law of Mediterraneo if the courts of Equatoriana have jurisdiction" [*Exh. C3, p. 11, ¶3*].

11. Ms. Napravnik asserted that CLAIMANT could never submit an eventual dispute to the jurisdiction of the courts of Equatoriana [*Exh. C4, p. 12, ¶5*]. Alternatively, she suggested arbitration in Mediterraneo [*Exh. C4, p. 12, ¶6*].
12. Until such moment, the negotiations concerned the choice of national court's jurisdiction, which would have to apply the *lex fori* [*Marques, p. 8*]. Thus, by suggesting the application of Mediterranean Law and Mediterraneo's court's jurisdiction, CLAIMANT made clear that its intention was to have the Mediterranean Law to rule all the relevant aspects of their commercial relationship, *i.e.*, both the Contract and the arbitration agreement.
13. Notwithstanding, Mr. Antley sent an email to Ms. Napravnik with a draft of the arbitration agreement suggesting the place of arbitration to be in Equatoriana and submitting the arbitration clause to the law of Equatoriana as well [*Exh. R1, p. 33, ¶1*].
14. Ms. Napravnik's answer did not leave any room for doubt: either to submit a contract to a foreign law **or** to provide for dispute resolution in the country of the counterparty would require CLAIMANT to have a "special approval by the creditors' committee, a board in which all financing banks are included" [*Exh. R2, p. 34, ¶1*]. This would clearly extend the negotiations, thus exceeding RESPONDENT's window of opportunity on what concerns the lifting of the ban, making them more challenging on both parties.
15. "To avoid any further futile discussion", Ms. Napravnik suggested for arbitration in a neutral country (Danubia), presented a different draft for the arbitration agreement and pointed out that it was under the condition that the law applicable to the Contract would remain the law of Mediterraneo [*Exh. R2, p. 34, ¶¶1,5*].
16. Ms. Napravnik's email could not be any clearer: CLAIMANT's proposal was to have a neutral seat of arbitration **provided that** the law of the Contract as a whole, including the arbitration agreement itself, was submitted to the law of Mediterraneo. This would be the only way for the Parties to avoid the need for special approval by the creditors' committee.
17. To submit the arbitration clause, which is to be considered as having a contractual nature [*Lew/Mistelis, p. 100; Waincymer, p. 130*], to a law other than Mediterraneo's, would not be coherent with Ms. Napravnik's statement in this email nor with all the previous communications between the Parties.
18. Both Mr. Krone and Mr. Ferguson - Mr. Antley and Ms. Napravnik's successors, respectively - were aware of the former communications between the Parties, namely those referred *supra*

[¶¶ *9-16*]. On his witness statement, Mr. Krone claims that he was aware of RESPONDENT's main strategy, and further admits that it felt no need to attend Mr. Antley's note regarding the applicable law since "[t]he draft of the contract had already a (...) choice of law clause in favour of the law of Mediterraneo" [*Exh. R3, p. 35*], inasmuch that question had been clarified in the previous communications between the Parties.

19. Thus, it is safe to say that there was a true meeting of the minds [*Zeller, §II; Chemical Products Case*]. Indeed, the fact that the Parties did not include a particular provision related to this subject in the Contract does not mean that there was no express agreement on this matter, but merely a conscious decision that both Parties made to apply the law of Mediterraneo to the Contract as a whole.

2. If the Tribunal considers that there was no express agreement, it must hold that there was an implied choice by the Parties to have the Mediterranean law governing the interpretation of the arbitration agreement

20. Even if the Tribunal considers that there is no evidence of an express agreement, it must hold that there was an implied choice by the Parties to have the Mediterranean law governing the interpretation of the arbitration agreement since the latter was selected by the Parties to govern the Contract **(a)** and the principle of separability, although recognised by all relevant legal instruments, has no interference with this understanding **(b)**.

a. The law applicable to the arbitration agreement is the one that governs the Contract

21. Art. 36.1 HKIAC Rules determines that the Tribunal shall decide on the substance of the dispute in accordance with the rules of law agreed upon the parties, and failing such an agreement, according to the rules it deems appropriate. Indeed, this article refers to the "substance of the dispute" but given that there is no express rule concerning specifically the applicable law to the arbitration agreement, we shall look for the solution "in the spirit of these Rules" [*Art. 13.9 HKIAC Rules*].

22. Contrary to what RESPONDENT claims [*ANoA, p. 31, ¶14 in fine*], it is generally accepted in international commercial arbitration proceedings that in the absence of an express choice of law to the arbitration agreement by the parties, the law of the Contract is to be considered as an implied choice [*Lew, p. 143; Bermann, p. 147, ¶166; ICC Case No. 6840, Sulamerica v. Enesa; Habas Sinai*].

23. The rationale behind extending the Parties' choice of law to the arbitration agreement is that "it would be artificial to assume that the choice of law clause, whose purpose is to fix the law for the whole contract, does not cover the arbitration clause which is an integral part of that contract" [*Berger, p. 318; ICC Case No. 2626*].
24. The law of the seat has also been considered as a possible implied choice of law by the parties, although merely in the absence of a choice concerning the main contract [*Lew/Mistelis, p. 107, NTPC v. Singer*], which is not the case, since the Parties agreed that the Law of Mediterraneo should govern the Contract [*Exh. C5, p. 14, (Clause 14)*].
25. Additionally, the choice of the law of the Contract has been considered preferable to the law of the seat since the latter concentrates on the sheer activity of arbitration, and not on the content of the matters under dispute [*Waincymer, p. 136*]. Moreover, case law shows that the law of the seat is "not determinative of the will of the parties", as opposed to the law applicable to the main contract [*Arsanovia v. Cruz City*]. Courts have applied the law of the seat exceptionally, in cases where the law of the main contract would not grant the effectiveness of the arbitration agreement and/or award [*Born, pp. 486, 593*; *Sulamerica v. Enesa*].
26. The choice of the law of Mediterraneo arose as a rational option for both Parties, forasmuch as it is the one that has the closest and strongest connection to their relationship: (i) the production and quality standards have to be in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards* [*Exh. C2, p. 10,* ¶*5*], (ii) the applicable general conditions are those of CLAIMANT [*Exh. C2, p. 10,* ¶*5*], (iii) the final negotiations and signing of the Contract took place in Mediterraneo [*PO2, p. 56,* ¶*13*] and (iv) Clause 14 of the Contract, settles the Law of Mediterraneo as the one applicable [*Exh. C5, p. 14*].
27. As The Hague decision in the *Owerri Comercial* well explained: "[n]eedless to say, parties, in general, would prefer - excluding special circumstances which do not arise in this case - to submit the validity of the arbitration clause to the same law to which they submitted the main agreement of which the arbitration clause forms a part".

b. The principle of separability does not interfere with this understanding

28. The essence of the doctrine of the principle of separability in arbitration states that the validity of an arbitration clause is not bound to that of the main contract and vice versa [*Lew/Mistelis, p. 102*], ensuring that the jurisdiction of the tribunal is not affected by the invalidity of the main contract.

29. As Gary Born explains, the two contracts are separable, but not separate [*Born, p. 476*]. This is to say that the arbitration agreement and the main contract may be governed by different rules, even though this is not a constraint. Hence, this concept must not be exaggerated [*Chuprunov, p. 34*], under the penalty of using it in a sense contrary to its original purpose. Indeed, the principle of separability shall be applied "with great care outside of the scope of its "traditional domain", *i.e.* other than in relation to the issues regarding validity, formation and termination of the "main" contract." [*Chuprunov, p. 41*].
30. In fact, Tribunals have resorted to the doctrine of separability only when the validity of the arbitration agreement itself is challenged. Art. 16(1) UNCITRAL Model Law (**"Model Law"**) has been construed as supporting this understanding, by stating that an arbitration agreement shall be considered as an independent agreement of the rest of the terms of the contract **for the purpose** (emphasis added) of ruling on its own jurisdiction [*BCY v. BCZ Case*]. This Tribunal cannot disregard that Art. 19(2) of the HKIAC Rules, applicable *in casu,* states an identical rule.
31. RESPONDENT is not raising any issue related to the validity of the Contract. Thus, contrary to RESPONDENT's allegations [*ANoA, p. 31, ¶14*], the principle of separability does not constitute any obstacle to the applicability of the Contract's law.

B. The scope of the arbitration agreement allows the Tribunal to adapt the Contract

32. RESPONDENT alleges that the Tribunal lacks jurisdiction to decide the case, since the claim surpasses the scope of interpretation, by requesting the adaptation of the Contract [*ANoA, p.31, ¶12*]. However, the issue of whether the Parties did actually confer such power to the Tribunal is a matter of contract interpretation [*Berger II, p. 3*].
33. In view of the above, the Tribunal must consider the intention of the Parties **(a)**, in light of either a subjective **(i)** or objective **(ii)** interpretation, and the principle of synchronized competences under the law of Mediterraneo **(b)**.

1. The intention of the Parties was to grant the arbitrators the powers to adapt the Contract

34. The arbitrators' duty and powers to solve a dispute is primarily originated by the arbitration agreement, which reflects the common intention of the Parties to submit a particular dispute to arbitration [*Berger, p. 5; Gaillard/Savage p. 11*].
35. As expounded above, the law of Mediterraneo governs the interpretation of the arbitration agreement [*¶¶6-31*]. Thus, one has to interpret the said agreement in accordance with the

Arbitration Law of Mediterraneo which provides for a broad interpretation of arbitration agreements, undoubtedly allowing for an increased remuneration [*NoA, p. 7, ¶16*].

36. This interpretation is not rare. Other legal systems have also adopted this broad view of the arbitrators' powers, as long as they originated in the **common intention of the Parties** [*Gaillard/Savage, p. 27 and 29*].

a. Under a subjective interpretation, the intention of the Parties was to grant the arbitrators the powers to adapt the Contract

37. The Contract is subject to the CISG and thus to its rules of interpretation [*Exh. C5, p. 14, (Clause 14)*]. Furthermore, there is consistent jurisprudence in Mediterraneo, that in sales contracts governed by the CISG, the latter also applies to the [...] interpretation of the arbitration clause contained therein [*PO1, p. 53, ¶4*]. According to Art. 8(1) CISG, "statements made by [...] a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was" [*Chemical Products Case; Wine Case; Coffee Case*]. One of the aspects of this disposition is the question of *imputable awareness,* meaning that the other party "could not have been unaware" of that intention. In order to interpret the intention of the Parties, one must consider "all the relevant circumstances of the case, including the negotiations", as *per* Art. 8(3) CISG [*Chemical Products Case; Wine Case*].

38. Moreover, the UNIDROIT Principles, which are also applicable either as the general contract law of Mediterraneo [*PO1, p. 52, ¶4*] or as gap-filling provisions of CISG [*Perillo, §a.; Felemegas, Ch. 4 §6(c); Bund, p. 392; Scafom v. Lorraine Tubes*], take the same view of the CISG. They provide a subjective notion of contract interpretation according to what was the common intention of the Parties [Art. 4.1 UNIDROIT Principles].

39. In this case, there are no doubts. Ms. Napravnik specifically said to Mr. Antley that it was essential for CLAIMANT to have a mechanism that would ensure the adaptation of the Contract in the event that they could not compromise [*Exh. C8, p. 17, ¶5*].

40. Additionally, Mr. Antley himself suggested, on behalf of RESPONDENT, that it should be for the arbitrators to adapt the Contract in that case, in accordance to what Ms. Napravnik's understanding [*Exh. C8, p. 17, ¶5*]. Thus, by acknowledging the issue and suggesting that it should be the arbitrators' duty, RESPONDENT made CLAIMANT aware that it understood the arbitrators' powers in an equal manner.

41. In light of the above, and in accordance to both Art. 8(1) CISG or Art. 4(1) UNIDROIT Principles, it is indisputable that the Parties agreed that in the absence of an agreement between them, it would be the arbitrators' task to adapt the Contract. The fact that they did not explicitly include a reference in the Contract, does not mean that there was no express agreement between the Parties.

b. Under an objective interpretation, the intention of the Parties was to grant the arbitrators the powers to adapt the Contract

42. Should the Tribunal decide that there was an absence of common intention, the question shall be determined by an objective interpretation. For that, under both Art. 8(2) CISG and Art. 4(2) UNIDROIT Principles, one shall consider what would be the understanding of a reasonable third person of the same kind, under the same circumstances [*Chemical Products Case*]. Nevertheless, all the relevant circumstances of the case must be weighted, including the negotiations, according to Art. 8(3) CISG and Art. 4.3 UNIDROIT Principles.
43. Ms. Napravnik underlined the importance of having an adaptation clause, *i.e.*, a hardship clause, specifically dealing with changes associated with "customs regulation and import restrictions" [*Exh. C4, p. 12, ¶4*].
44. Additionally, RESPONDENT not only accepted to include the hardship clause in the Contract as it did not raise any objection to it. As seen *supra* [**¶40**], Mr. Antley himself, on behalf of RESPONDENT, suggested that it should be the arbitrators' task to adapt the Contract in case of need, according to what CLAIMANT envisioned [*Exh. C8, p. 17, ¶5*].
45. A literal interpretation of this would lead any reasonable third person, in the same circumstances as RESPONDENT [*Art. 8(2) CISG; Art. 4(2) UNIDROIT Principles; Chemical Products Case*], to interpret that it was CLAIMANTS' intention to create a mechanism that allowed the Tribunal to adapt the Contract in the absence of an agreement between the Parties. Moreover, any reasonable third person would have construed that it was the common intent of the Parties to give the arbitrators' the power to adapt the Contract.

2. The principle of synchronized competence under the law of Mediterraneo grants the arbitrators the power to adapt the Contract

46. The commonly known principle of synchronized competences states that, in general terms, an arbitrator will have at least the same competences as a state court judge [*Beisteiner; Berger II, p. 7*]. This principle is largely recognised in Mediterraneo, since there is consistent

jurisprudence that "[a] standard arbitration agreement is considered sufficient to grant an Arbitral Tribunal the same powers as a court has under the provision" [*PO2, p. 60, ¶39*].

47. Thus, since the system of law to apply, *i.e.*, the general contract law of Mediterraneo, allows the court to adapt the Contract in case of hardship [*Art. 6.2.3 (4) UNIDROIT; Bernardini, p. 214; Berger II, p. 8*], it is clear that it provides arbitrators with the necessary flexibility to adapt the Contract [*Horn, p. 179-180*].

C. If the Tribunal does not find the law of Mediterraneo to be applicable, it would still have the powers to adapt the Contract, relying on an interpretation according to general principles of contract interpretation

48. An international dispute requires for an international approach. Thus, even if the Tribunal does not find the law of Mediterraneo to be applicable, then it must deny the application of the law of Danubia as well. The valid solution would be an interpretation of the arbitration agreement by international norms, including universally accepted principles and rules. This interpretation may regard either the existence, validity or scope of the arbitration agreement [*Bachand, p. 393*]

49. Considering that (i) the Parties are foreign, (ii) the seat was chosen as a neutral place [*Marques, p. 26; Exh. R2, p. 34, ¶1*], (iii) the arbitration proceedings are governed by international rules [*HKIAC Rules*] and that (iv) there is no express wording on the Contract concerning the applicable law to the arbitration agreement, it is safe to say that the Parties intention was to internationalize their dispute resolution process [*Bachand, p. 394*].

50. This corresponds to the opinion of French courts by mention to the Parties discernible common intentions [*supra, ¶¶37-47*]. According to this approach, the arbitration agreement remains autonomous from the provisions of any national law [*Redfern/Hunter, p. 171; Dalico Decision*], such as Danubia or Mediterraneo. In this case, the Tribunal would have to construe the scope of the arbitration agreement in the context of the Parties common consent according to general principles of interpretation.

51. Firstly, one must attend the principle of good faith in the sense that the Parties' true intention at the time of the signing shall prevail over what they claim on the arising of the dispute [*Waincymer, p. 140; Gaillard/Savage, p. 825*]. Thus, as seen *supra* [*¶¶37-47*], one must take into consideration the common intention of the Parties during the negotiations of the arbitration agreement, and not to what RESPONDENT claims at this moment.

52. Secondly, one must also attend to the principle of effective interpretation [*Gaillard/Savage, p. 826*], meaning that the interpretation shall be made in accordance to a practical effect, relying on the assumption that the Parties intended their agreement to be an effective mechanism for the settlement of their disputes [*Waincymer, p. 141; ICC Case No 2321*]. It would not make any sense to have the Tribunal to solve some of the disputes, while having a court deciding the rest [*Premium Nafta Products*].

53. Nonetheless, the UNIDROIT Principles have also been used as a manifestation of "general principles of law" [*4(b) Preamble UNIDROIT Principles*] and as means of "interpreting and supplementing international uniform law" [*5 Preamble UNIDROIT Principles*] . Hence, even if the Tribunal decided not to apply the law of Mediterraneo, it would still have the necessary powers to adapt the Contract, since that corresponds to the Parties true intention according to general principles of contract interpretation.

D. Even if the Tribunal finds the law of Danubia to be applicable, it still has jurisdiction and powers to adapt the Contract

54. RESPONDENT alleges that the law of Danubia is the one applicable [*ANoA, p. 31, ¶13*] and that this law adheres to the "Four Corners Rule" for interpretation of contracts [*ANoA, p. 32, ¶16*], excluding any external evidence, such as drafting history and preceding communication, to assist on the interpretation. However, CLAIMANT will demonstrate that if the Tribunal considers the law of Danubia to be applicable (*quod non*), it would still have powers to adapt the Contract, since the CISG will be applicable to the interpretation of the arbitration agreement either way **(a)** and that excludes the Parol Evidence Rule **(b)**.

1. The CISG is applicable to the interpretation of the arbitration agreement

55. It has been argued that the CISG shall be applicable to the interpretation of arbitration agreements if the former applies to the contract where the arbitration clause is written [*Born, p. 505; Schmidt-Ahrendts, §1.2*]. Accordingly, the Contract celebrated between the Parties is undoubtedly submitted to the CISG [*Exh. C5, p. 14 (Clause 14)*]. Moreover, either one of the countries involved, *i.e.,* Equatoriana, Mediterraneo or Danubia, are Contracting States of the CISG [*PO1, p. 53, ¶4*].

56. Thus, it is unarguable that the CISG rules on interpretation of the contracts mentioned above [*supra ¶¶37, 38, 42*] will be applicable to the interpretation of the arbitration agreement, even if Danubian Law is applicable.

2. Exclusion of the Parole Evidence Rule

57. Art. 8(3) CISG has been construed as overriding any domestic rules that would bar a Tribunal from considering the relevance of previous agreements, in accordance with the growing opinion that the "Parole Evidence Rule" has been an embarrassment for the administration of modern transactions [*Honnold, p. 121*].
58. Thus, and contrary to what RESPONDENT states [*ANoA, p. 32, ¶16*], the application of the CISG reliefs Tribunals from any domestic rules, such as the "Parol Evidence Rule", that would inhibit them from considering any evidence between the Parties that might be relevant [*MCC Marble Ceramics v. Ceramica Nova Case, Calzaturificio Claudia v. Olivieri Footwear Case; Filanto v. Chilewich Case*].
59. The same applies to arbitrations submitted to rules that rely on the Tribunal's discretion to decide on the relevance, materiality and admissibility of the evidence, such as the HKIAC Rules [*Art. 22.2 HKIAC Rules*]. In these cases, Tribunals have reckoned that where Parties have agreed to institutional rules investing arbitrators with the power to decide on the admissibility of the evidence, they must accept that the same Tribunal may choose not to apply rules of evidence related to contract interpretation, such as the Parole Evidence Rule [*BQP v BQQ Case*].
60. Hence, by choosing the HKIAC Rules as applicable to the arbitration proceedings, the Parties implicitly accepted that the Tribunal may decide to value external evidence, *i.e.,* the negotiations between the Parties, as it should.
61. Finally, and consequently, even if the Tribunal would consider the Law of Danubia to be applicable, it would still have jurisdiction to adapt the Contract, given that the CISG is still applicable to the interpretation of the arbitration agreement and that there are exceptions applicable to the Parol Evidence Rule.

CONCLUSION ON ISSUE I

62. The Parties agreed to grant the Tribunal the necessary powers to the adapt the Contract, since they agreed on the law of Mediterraneo to govern the interpretation of the arbitration agreement. Indeed, there is no doubt that the scope of the arbitration agreement allows it. Nonetheless, if the Tribunal decides that the law of Mediterraneo is not applicable, it must rely on an anational approach and construe the arbitration agreement according to general principles of contract interpretation, that would still grant him the necessary powers to adapt

the Contract**.** In any event, even if the Tribunal would decide to apply the law of Danubia, it would have powers and jurisdiction to adapt the Contract.

ISSUE II: THE TRIBUNAL MUST ADMIT THE EVIDENCE

62. The Tribunal must admit the Evidence in order in order to guarantee CLAIMANTS' right to present the case **(A)**. Moreover, the Evidence is relevant to the case and material to its outcome, which reinforces CLAIMANTS entitlement to submit the Evidence **(B)**. Lastly, there are no further grounds that could possibly justify the inadmissibility of the Evidence **(C)**.

A. The Tribunal must admit the Evidence in order to guarantee Claimants right to present the case

63. Considering that the relevant legal instruments applicable to this case provide for the general principle that all the evidence must be admitted in arbitration, CLAIMANT will demonstrate that the Tribunal must admit the Evidence, in order to guarantee its right to present the case.
64. The Tribunal has the power to decide on "the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" [*Art. 22.2 HKIAC Rules*]. The same wording is found in Art. 19 Model Law, which should be taken into consideration by the Tribunal since law of the seat of the arbitration is a largely verbatim adoption" of the latter [*PO2, p. 57, ¶14; Born, pp. 1566-1567]*]. Likewise, Art. 9 IBA Rules of Evidence (**"IBA Rules"**), has an identical wording and must be considered by the Tribunal as guidelines [*IBA Rules, p. 3; Born III, p. 485; Tidewater v. Venezuela*]. Indeed, they "provide an efficient, economical and fair process for the taking of evidence in international arbitration", being "particularly useful when the parties come from different legal cultures" [*IBA Rules, p. 2; NoA, p. 7, ¶15; PO2, p. 61, ¶44*].
65. These extremely broad evidentiary provisions grant the Tribunal great flexibility in the admission of evidence [*Mehren/Salomon, p. 285*]. The drafting history of the Model Law confirms such purpose, as opposed to following strict legal rules on evidence [UN *Yearbook,* p. 7*8; Brekoulakis, p. 879; Born I, p. 2306*].
66. Due to this great flexibility, arbitral tribunals generally "admit almost any evidence submitted to them in support of parties' position" [*Lew/Mistelis, p. 561*]. This general principle of admissibility of all evidence submitted by the parties is crucial, because it safeguards the parties' right to present the case [*Pilkov, p. 150*]. Indeed, "[c]oncerns as to due process will typically be the main reason why tribunals are reluctant to limit or exclude evidence" [*Waincymer, p.* 793]. Furthermore, exclusion of evidence by arbitral tribunals can easily result

in the challenge of awards [*Art. V New York Convention of 1958 (**"NY Convention"**)*; *Born I, p. 3495*] and even in the refusal to recognize them [*Born I, p. 3523; Iran Aircraft Industries v. Avco Corporations*].

67. Therefore, *in casu*, the Tribunal must admit the Evidence in order to guarantee CLAIMANT's right to present the case.

B. The Evidence is relevant to the case and material to its outcome

68. Furthermore, the Evidence is relevant to the case and material to its outcome, which reinforces CLAIMANT's right to submit it.

69. The concepts of relevance and materiality are referred to in Art. 22.3 HKIAC Rules and in Art. 9(2)(a) IBA Rules. The former provides that if the Tribunal finds the evidence relevant to the case and material to its outcome, it must request its production. The latter provides that if those features are not shown, then evidence shall not be admitted.

70. While relevance concerns the general relation between the evidence and the case, materiality is related to the outcome of the case [*Pilkov, pp. 148-149; Waincymer pp. 858-859*].

71. Firstly, the Evidence is relevant because the dispute in the other arbitration proceedings is identical to the present case. The only difference is that RESPONDENT was the one affected by a surprising tariff [*p. 50, ¶2*], consequently sustaining what it is *in casu* denying. Indeed, the Evidence will clarify, on the one hand, .that CLAIMANT is entitled to receive outstanding payments, as a result of the 30% tariff paid [*NoA, p. 6, ¶13; Exh. C8, p. 18, ¶3*], and, on the other hand, that RESPONDENT's allegations concerning the Tribunal's lack of jurisdiction [*ANoA, p. 31, ¶12*] are ill-founded. The other arbitral tribunal decided it had jurisdiction to adapt the Contract in cases of hardship [*PO2, p. 60, ¶39*]. It is, hence, crystal clear that CLAIMANT is entitled to submit the Evidence, because the latter has a logical connection to what it purports to prove in the present case [*Pilkov, p. 148; Cane/Shub, p. 91*].

72. Secondly, the Evidence is material as it can strongly influence the outcome of the present case by demonstrating RESPONDENT's inconsistent and highly contradictory behavior. In fact, it cannot be ignored that RESPONDENT is vigorously defending the exact opposite claim in the other proceedings [*p. 50, ¶2; PO2, p. 60, ¶40*]. Therefore, RESPONDENT itself recognizes that the remedy that CLAIMANT is, in the case at hand, requesting, is the only adequate one.

73. Hence, the submission of the Evidence will solidly undermine RESPONDENT's general credibility [*Waincymer, p. 789*], since the falseness of RESPONDENT's allegations will be exposed [*Marghitola, p. 80*].

C. There are no further grounds that could possibly justify the inadmissibility of the Evidence

74. Moreover, the Tribunal must hold that there are no further grounds that could possibly justify the inadmissibility of the Evidence.

75. The criterion of admissibility [*Art. 22.2 HKIAC Rules; Art. 19 Model Law; Art. 9(1) IBA Rules*] is "purely legal" and grants broad discretion to the Tribunal [*Pilkov, p. 150*]. Hence, all evidence must be admitted [*supra* ¶¶*63-73*], unless parties have agreed otherwise or if there are any further ground for its inadmissibility [*Art. 9(2) IBA Rules; Commentary on the IBA Rules pp. 25-27; Pilkov, p. 150; Born I, p.p 2311-2312; Waincymer, p. 792; Freedman, p. 741; Irenton, p. 233*].

76. Although RESPONDENT alleges that the Evidence is confidential and, therefore, should not be admitted [*p. 51, ¶2*], the Tribunal must hold that even if the Evidence was obtained through an illegal hack of RESPONDENT's computer system [*p. 51, ¶3; PO2, p. 61, ¶42*], its submission does not interfere with considerations of fairness or equality of the arbitration proceedings **(1)**. Additionally, even if the Evidence was obtained through a breach of a confidentiality agreement, transparency shall prevail to the detriment of confidentiality **(2)**.

1. Even if the Evidence was obtained through an illegal hack of RESPONDENT's computer system, CLAIMANT is still entitled to submit it

77. Even if the Evidence was obtained through an illegal hack of RESPONDENT's computer system, CLAIMANT is still entitled to submit it because CLAIMANT was not involved in the possible illegal obtainment of the Evidence nor actively trying to acquire it **(a)**. Alternatively, the Tribunal may, *ex officio*, require the production of the Evidence **(b)**.

a. CLAIMANT was not involved in the potential illegal act nor was it actively searching for the Evidence

78. The Tribunal must admit the Evidence because its admission does not breach fairness [*Art. 9(2)(g) IBA Rules*]. Firstly, CLAIMANT was not involved in the disclosure of the Evidence. Secondly, CLAIMANT was not actively searching for it.

79. In fact, it was a company which provides intelligence on the horseracing industry that obtained the Evidence [*PO2, pp. 60-61, ¶41*]. CLAIMANT was not involved in any hypothetical

illegal activity related to the procurement of the Evidence. Therefore, the submission of Evidence by CLAIMANT is legitimate [*Waincymer, p. 797; Reisman/Freedman, p. 745; Corfu Channel Case*].

80. Contrary to what happens when a party seeking reliance on the evidence is involved in the illegal act [*Methanex v. United States*], it has been widely recognised that if the party who requests to present the evidence has not played any role in its illegal obtainment, the evidence must be admitted [*Caratube v. Kazakhstan*].
81. This position is clearly reflected in case law. For instance, in *ConocoPhilips v. Venezuela*, Venezuela sought to rely on illegally obtained evidence published online. Although the arbitral tribunal denied its own jurisdiction, Georges Abi-Saab, one of the arbitrators, could not be any clearer: ignoring the glaring evidence would lead to a faulty decision, which would "put or risk putting the credibility and integrity of the tribunal into question", since it would be shutting itself into "a virtual reality in order to fend off probable objective reality" [*Abi-Saab, pp. 22-23*]. That is precisely what would be at risk in the present case if the Tribunal would ignore the Evidence.
82. Furthermore, CLAIMANT only learned about the other arbitration proceedings through a conversation with Mr. Kieron Velazquez, at the annual breeder conference [*PO2, p. 60, ¶40*], which demonstrates that CLAIMANT was not actively researching for the Evidence.
83. In light of the above, despite the way the Evidence might have been obtained, it is, in fact, vital to properly lead this Arbitration. The Tribunal cannot simply "pass over" such glaring evidence [*Abi-Saab, p. 23*]. Hence, CLAIMANT respectfully requests the Tribunal to admit the Evidence.

b. Alternatively, the Tribunal may, *ex officio,* request the production of the Evidence by RESPONDENT

84. The Parties agreed on the application of the HKIAC Rules [*cf. Art. 19 Model Law; Born I, p. 2338*], expressly empowering the Tribunal to order the production of evidence which is relevant to the case and material to its outcome [*Art. 22.3 HKIAC Rules*].
85. Indeed, the Evidence is relevant to the case and material to its outcome, as it was demonstrated [*supra ¶¶68-72*; *cf. Art. 3(7) IBA Rules; Azurix Corp Argentine Republic*].
86. Therefore, the Tribunal may, *ex officio,* request the production of the Evidence by RESPONDENT. In doing so, the Tribunal will be granting consistency and certainty of the

decisions, values which are pursued by the HKIAC Rules [*e.g. see* Arts. 28.1(c) *Arts. 29 and 30.1(a) HKIAC Rules; Cleary Gottlieb, p. 2*].

2. Even if the Evidence was obtained through a breach of a confidentiality agreement, transparency must prevail

87. Even if the Evidence was obtained through a breach of a confidentiality agreement, it must be admitted nevertheless, according to the most recent paradigm in arbitration concerning transparency.

88. Contrary to RESPONDENT's allegations [*p. 51, ¶2*], CLAIMANT did not sustain the applicability of the UNCITRAL Rules on Transparency to this arbitration. In fact, they are rather applicable to investor-State arbitration [*Art. 1 UNCITRAL Rules on Transparency*]. However, these rules do reflect the demand for greater transparency in arbitration in general, a paradigm that has been developing in the past years [*Born, p. 2821*; *Comrie-Thomson*[1]*, pp. 276-277*]. Accordingly, transparency must prevail in detriment to confidentiality. The Tribunal is requested to hold that CLAIMANT is not bound by any confidentiality agreement concerning the other arbitration proceedings **(a)** and that the HKIAC Rules allow the disclosure of the Evidence **(b)**.

89. Furthermore, by admitting the Evidence, the Tribunal will contribute to the legitimacy of arbitration as a system of dispute resolution **(c)** without affecting confidentiality **(d)**.

a. CLAIMANT is not bound by any confidentiality agreement concerning the other arbitration proceedings

90. Even if the Evidence might have been obtained through a breach of a confidentiality agreement by RESPONDENT's former employees concerning the other arbitration proceedings, the Tribunal must still admit the Evidence.

91. Indeed, CLAIMANT is not bound by any obligation of confidentiality related to the other arbitration proceedings. The confidentiality obligation only binds the people involved in the proceedings, *inter alia* the parties and RESPONDENT's former employees [*Exh. p. 50, ¶3; PO2, pp. 60-61, ¶41; Arts. 42.1 and 42.2 2013 HKIAC Rules; Born I, p.* 2789]. CLAIMANT is a third party to that agreement.

[1]http://www.kluwerarbitration.com/document/kli-joia-340207?q=%22greater%20transparency%22%20AND%20%22commercial%22

92. Therefore, CLAIMANT, not being bound by any confidentiality agreement related to the other arbitration proceedings, is free to submit "materials produced in or in connection with" it [*Born, pp. 2788-2789*].

b. The HKIAC Rules allow the admission of the Evidence

93. Art. 45 HKAC Rules provides for the confidentiality of the arbitration proceedings. However, this obligation is not absolute, since confidential information can be disclosed to pursue a "legal right or interest" before this Tribunal [*Art. 45.3 HKIAC Rules*]. The *ratio* of this exception is to balance confidentiality with "the need for disclosure of information in certain exceptional cases", namely, in order to guarantee *res judicata* [*p. Guide (…) HKIAC Rules, p. 182*].

94. These exceptions exist to ensure certainty, avoiding contradictory decisions. Notably, this is one of the reasons behind the change of paradigm in arbitration [*infra* ¶¶ *95-100*], resulting in a more transparent system of dispute resolution, contributing for its legitimacy [*Hay, pp. 215-216*].

c. The submission of the Evidence will contribute to the legitimacy of arbitration as a system of dispute resolution

95. The submission of the Evidence will contribute to the legitimacy of arbitration as a system of dispute resolution, providing for better decision-making and ensuring certainty and predictability of the decision.

96. First of all, given that the dispute of the other proceedings is identical to the case at hand, the Evidence will contribute to the Tribunal's wider comprehension of RESPONDENT's highly contradictory behavior [*p. 49, ¶2*]. Indeed, the similarities between the cases are of great significance: (i) the main negotiator in the two underlying contracts was Mr. Antley [*Exh. C8, p. 17 ¶2; PO2, p. 60, ¶39*] (ii) a DDP delivery was agreed upon, (iii) the parties provided for a hardship clause [*Exh. C5, p. 13 (Clause 12); PO2, p. 60, ¶39*], (iv) a choice of law the in favor of Mediterraneo [*NoA, p. 7 ¶19; PO2, p. 60, ¶39*] and (iv) a model HKIAC arbitration clause [*Exh. C5, p. 13 (Clause 15); PO2, p. 60, ¶39*]. Furthermore, RESPONDENT required the same remedy: the adaptation of the Contract on the basis of the hardship clause and of Art. 6.2.3. of Mediterraneo's general contract law [*PO2, p. 60, ¶39*]. However, RESPONDENT is acting contradictorily by, *in casu*, denying any adaptation on the grounds of the Contract and even of the CISG.

97. Bearing that in mind, and despite the fact that in arbitration there is no rule of precedent, the Tribunal must admit the Evidence. The publication of previous decisions generates a positive and inevitable persuasive effect that cannot be ignored, since it grants predictability and certainty to the application of the law, especially in similar cases [*Villaggi, pp. 13-14, 17-18; Hay p. 227*; *Licensor v. Licensee*; *Fireman's Fund Insurance Company v. United Mexican States*], and quality to the decisions [*Born I, p. 2822*]. It would be seriously detrimental to have two completely contradictory decisions concerning jurisdiction, when the facts are identical. Therefore, the previous partial award must be admitted by this Tribunal [*Dow Chemical Award*].
98. Moreover, confidentiality has no longer the importance it had in the past [*Cremades/Cortés, p. 27*; *Esso Australia Resources v. Plowman*; *Bulgarian Foreign Trade Bank v. A.I. Trade Finance*] and the benefits of the publication of arbitral awards have been widely recognised [*Villaggi, pp. 13-14; Hay pp. 223-224; Ruscalla, p.* 13].
99. The changes towards a more transparent system have been especially notable in investment treaty arbitrations, due to its inherent public interest. Although differences between these kinds of arbitration are noted, commercial arbitration is going towards the same direction due to the benefits that arise from greater transparency [*Born I, p. 2823*; *Buys, p. 121*], namely, certainty and predictability of the decisions [*Comrie-Thomson, p. 279*]. In this regard, several arbitration statutes have been modified in order to promote greater transparency [*namely, AAA Rules, ICC Rules, CAM Rules, SMA Rules*], including the HKIAC Rules [*e.g. Art. 45.5 HKIAC Rules; cf. Born I, p. 2807*].
100. In conclusion, the Tribunal is requested to admit the Evidence so as to ensure the legitimacy of arbitration as a system of dispute resolution, "contributing to the rule of law, *i.e.*, legal certainty, predictability, accountability of decision-makers, and prevention of arbitrariness" [*Hay, pp. 222-223*].

d. The Tribunal must take into consideration that confidentiality will not be strongly affected

101. Lastly, the Tribunal must take into consideration that confidentiality will not be strongly affected, since the Evidence will remain confidential.
102. Indeed, given that the present arbitration proceedings are also subject to a confidentiality provision [*Art. 45 HKIAC Rules*], it will be guaranteed that the said Evidence will be outside the public sphere - at least on what concerns these arbitration proceedings.

103. Moreover, only by admitting the Evidence will the Tribunal be balancing both of the Parties' interests. Undeniably, the balance between greater transparency and confidentiality "is not always a zero-sum game" [*Hay, p. 230*]. In fact, the standard for transparency in arbitration proceedings can be reflected in multiple aspects [*UNCITRAL Working Group II, ¶31*] that do not necessarily lead to the abolition of confidentiality *e.*g, in the publication of final "sanitized" awards [*Smeureanu, pp. 82-83*]. Also in a case of privileged evidence [*(9(2)(b)(e) IBA Rules*], the Tribunal could ensure such privileged documents would only be produced with the condition that they would not be distributed outside of the arbitration proceedings [*Kubalczyk, p. 101*].
104. Finally, the Tribunal should, at least, admit the submission of the interim award, considering it is a "potentially public document for the purposes of supervision by the Courts or enforcement" [*cf. Hassneh Insurance and Others v. Stewart J. Mew*] which entails the position of both parties.
105. All in all, only by admitting the Evidence, the Tribunal will be balancing the Parties' interests and confidentiality would still be preserved.

CONCLUSION ON ISSUE II

106. CLAIMANT is entitled to submit the Evidence, even if it was wrongfully obtained, considering that CLAIMANT was not involved in any unlawful act. Furthermore, even if the Evidence was obtained through a breach of confidentiality by RESPONDENT's former employees it would still be kept confidential in the present arbitration proceedings. Therefore, by admitting the Evidence, the Tribunal would be promoting transparency and thus contributing for the legitimacy of arbitration as a system of dispute resolution.

ISSUE III: CLAIMANT IS ENTITLED TO RECEIVE OUTSTANDING CONTRACTUAL PAYMENTS AS A RESULT OF THE IMPOSITION OF THE TARIFF BY THE GOVERNMENT OF EQUATORIANA

107. The Parties entered into a contractual relationship from which CLAIMANT was to have a profit margin of 5% [*PO2, p. 59, ¶31*]. However, as a consequence of the imposition of an unforeseen 30% tariff by the Government of Equatoriana, CLAIMANT now makes a loss of 25% [*NoA, p. 7, ¶18*]. Since this event is undoubtedly outside CLAIMANT'S sphere of risk, it should not be the one to bear these costs.

108. CLAIMANT is facing a situation of hardship that requires the adaptation of the Contract according to the hardship clause agreed to by the Parties (**"Hardship Clause"**) **(A)**. Should the Tribunal consider that the Hardship Clause does not provide for this solution, the same conclusion must be reached according to the CISG **(B)** and to the general contract law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles **(C)**. As a result of the adaptation of the Contract, CLAIMANT is entitled to receive US$ 1,500,000, or, in any event, no less than US$ 1,250,000 **(D)**.

A. The Hardship Clause provides for the adaptation of the Contract as a result of the imposition of the tariff

109. As a consequence of the decision to deliver the goods on the basis of DDP [*Exh. C4, p. 12, ¶4*], the Parties agreed on the Hardship Clause [*Exh. C5, p. 14 (Clause 12)*].

110. The Tribunal "shall decide the case in accordance with the terms of the contract" [*Art. 36.3 HKIAC Rules; cf. Exh. C5, p. 14 (Clause 15); Art. 28(4) Model Law*]. By analysing the Hardship Clause, it is inevitable to conclude that it provides for the adaptation of the Contract as a result of the imposition of the tariff, since this situation is a case of hardship under its terms **(1)** and that requires an adaptation of the Contract **(2)**.

1. The imposition of the tariff is a case of hardship under the terms of the Hardship Clause

111. The imposition of the tariff by the Government of Equatoriana is a case of hardship under the terms of the Hardship Clause since it fulfills all its criteria **(a)** and that is in accordance with the intention of the Parties **(b)**. In any case, should the Tribunal find that the wording of the Hardship Clause is too ambiguous to draw a conclusion on this matter, the Tribunal should apply the *contra proferentem* rule, interpreting it according to CLAIMANT'S view **(c)**.

a. The imposition of the tariff fulfills all the criteria laid out in the Hardship Clause

112. Taking into consideration the criteria expressly laid out in the Hardship Clause, it is inevitable to conclude that it includes the imposition of the 30% tariff by Equatorianian Government, since this event is comparable to additional health and safety requirements **(i)**, was unforeseen **(ii)** and makes the Contract more onerous on CLAIMANT **(iii)**.

i. The imposition of the tariff is "comparable" to "additional health and safety requirements"

113. The imposition of the tariff is a "comparable" event to "additional health and safety requirements" under the terms of the Hardship Clause.

114. Indeed, additional health and safety requirements that are imposed after the conclusion of a contract can result in a case of hardship. This was the situation CLAIMANT faced not long ago, when a 40% increase in its costs almost led to its insolvency [*PO2, p. 58, ¶21*]. CLAIMANT mentioned this past experience when requesting the creation of a hardship clause, making it clear that this was the type of situation it was trying to avoid [*Exh. C4, p. 12, ¶4*].

115. Similarly, in the present case, following measures imposed by a foreign government, CLAIMANT's costs increased by 30%, deteriorating even more its already strained financial situation [*PO2, p. 59, ¶29*].

116. Therefore, the situation that CLAIMANT is facing is "comparable" to "additional health and safety requirements".

ii. The imposition of the tariff was "unforeseen"

117. The Hardship Clause requires an event to be "unforeseen" in order to fit into the category of hardship. Indeed, unforeseeability is a usual requirement for cases of hardship [*Art. 6.2.2(b) UNIDROIT Principles; Art. 6:111(2)(b) PECL; ICC Hardship Clause 2003, (2)(a) Azerdo da Silveira, p. 323;*], including under the CISG, as will be explained in detail below [*infra ¶161*].

118. In the present case, it is undeniable that both the tariff imposed by the President of Mediterraneo and the following retaliation by the Government of Equatoriana were completely unpredictable. In fact, "[u]ntil 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo" [*PO2, p. 58, ¶25*].

119. Regarding Mediterraneo's tariff, it was not even part of President Bouckaert's strategy papers and election manifesto [*NoA, p. 6, ¶9*]. Furthermore, the new minister for agriculture, trade and economics, Ms. Cecil Frankel, which is "one of the most ardent critics of free trade" and "had been an outspoken protectionist for years", was only appointed on the day before the conclusion of the Contract [*PO2, p. 58, ¶23*].

120. Concerning the retaliatory measure by Equatoriana, it would be impossible to predict such a measure in a country where the Government "has always been an ardent supporter of free trade [...], had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries" [*NoA, p. 6, ¶10*]. Equatoriana's President came from the Progressive Liberals and only once an Equatorianian Government had taken retaliatory measures under similar circumstances, which happened during the rule

of a Prime Minister from the National Party, which was more critical to free trade [*NoA, p.7, ¶19*]. This retaliation was also considered a total surprise by the press [*Exh. C6, p. 15, ¶2*].

121. Besides, it came as a total surprise that racehorse frozen semen was included in the tariff as an agricultural good, since it is usually differentiated from pigs, sheep or cattle [*NoA, p. 6, ¶11; PO2, p. 58, ¶26*].

122. Moreover, both Mediterraneo and Equatoriana are part of the World Trade Organization [*PO2, p. 61, ¶47*], which is an international organization promoting free trade.

123. In view of the above, this situation fulfills the unforeseeability criterion provided for in the Hardship Clause.

iii. The tariff makes the Contract "more onerous" on CLAIMANT

124. The Hardship Clause also comprises an onerosity requirement, which is in line with what is usually perceived as hardship [*cf. Lindström, §I; Azerdo da Silveira, p. 323; CISG-AC 7, ¶38; Art. 6.2.2 UNIDROIT Principles; Art. 6:111(2) PECL; ICC Hardship Clause 2003, (2)(a)*], including under the CISG, which will be demonstrated further below [*infra*, *¶152*].

125. As demonstrated above, the imposition of the tariff resulted in a loss of 25% for CLAIMANT [*supra, ¶117*], which proves that it makes the fulfilment of the Contract more onerous.

126. CLAIMANT'S financial difficulties must also be taken into account when assessing the fulfilment of the onerosity requirement [*cf. Brunner, pp. 436-437*]. Indeed, CLAIMANT is in a strained financial situation [*PO2, p. 57, ¶15; PO2, p. 59, ¶29*]. After being close to insolvency in 2014, CLAIMANT could obtain new loans from the creditor's committee. However, the extension of the loans is dependent on the achievement of certain milestones [*PO2, p. 58, ¶21*], and this will be significantly endangered if CLAIMANT does not receive outstanding contractual payments [*PO2, p. 59, ¶29*].

127. Besides being aware of CLAIMANT's financial situation [*PO2, p. 58, ¶22*], RESPONDENT also knows about the impact that the 30% tariff had on the latter [*PO2, p. 59, ¶28*].

128. In conclusion, the tariff makes the Contract more onerous on CLAIMANT under the terms of the Hardship Clause. On the contrary, RESPONDENT would not be financially endangered if it bears the additional costs resulting from the imposition of the tariff [*PO2, p. 59, ¶30*].

129. On the basis of the above, all the criteria required by the Hardship Clause were met, classifying the situation that CLAIMANT is facing as hardship.

b. It was the intention of the Parties to include in the Hardship Clause tariffs such as the one at stake

130. The interpretation of the Hardship Clause must be carried out according to the rules of contract interpretation enshrined in Art. 8 CISG and Arts. 4.1-4.3 UNIDROIT Principles [*supra*, ¶¶*37-38*], which require that the intent of the Parties is taken into account. In order to determine the intent of the Parties, the Tribunal must analyse the negotiations between them [*supra*, ¶*37*].

131. If one is to analyse the whole process of the negotiations, it leaves no room for doubt: the intention of the Parties was to include in the Hardship Clause events such as the tariff imposed by the Government of Equatoriana.

132. Firstly, CLAIMANT accepted RESPONDENT's suggestion of delivery on the basis of DDP under certain conditions: it was not willing to take risks associated with "changes in customs regulation or import restrictions" [*Exh. C4, p. 12,* ¶*4*], which includes the tariff at hand. Later, Mr. Krone, which was aware of the Parties' intention from the starting of the negotiations [*PO2, p. 55,* ¶*5*], suggested the wording of the hardship clause "[w]ith reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017" [*PO2, p. 56,* ¶*12*]. Furthermore, RESPONDENT resorts to the above-mentioned email by CLAIMANT in its ANoA to justify the creation of a hardship clause but sheds a light on "the risk of changing health and security requirements" [*ANoA, p. 30,* ¶*4*], conveniently ignoring the part where CLAIMANT mentioned "customs regulation and import restrictions". By resorting to that email, RESPONDENT is clearly placing importance on it to interpret the Parties' will in order to conclude whether the tariff constitutes hardship.

133. Secondly, after referring to "past experiences" relating to "unforeseeable additional health and safety requirements" that increased "the cost by up to 40%", CLAIMANT requested a hardship clause [*Exh. C4, p. 12,* ¶*4*]. This can only lead to the conclusion that CLAIMANT, when asking for the inclusion of such a clause, was asking for protection in cases where performance became significantly more onerous, *i.e.*, in cases similar to its past experience.

134. Thirdly, by agreeing on a DDP delivery, CLAIMANT's aim was obviously not to place an extra burden on itself - especially during a strained financial situation [*PO2, p. 57,* ¶*15; PO2, p. 59,* ¶*29*] - but rather to guarantee that both Parties could benefit from its experience in the transportation of frozen semen [*NoA, p. 7,* ¶*18; Exh. C8, p. 17,* ¶*5*]. In fact, RESPONDENT was the one to propose such a solution on the basis of CLAIMANT's further experience [*Exh*

C3, p. 11, ¶*2*]. It is only logical that CLAIMANT insisted on a hardship clause so that it could be protected from certain risks, tariffs on imports included [*Exh. C4, p. 12,* ¶*4*].

135. Considering all the facts above, it is inevitable to conclude that RESPONDENT knew, or at least ought to have known that, with the Hardship Clause, CLAIMANT intended to leave heavy tariffs on imports out of its sphere of risk.

136. Should the Tribunal consider that the intention of the Parties cannot be established, it is undeniable that a reasonable third person of the same kind as RESPONDENT, when confronted with these facts, would reach the same conclusion [*Art. 8(2) CISG; Art. 4.2 UNIDROIT Principles; Chemical Products Case*].

c. If the Tribunal finds the wording unclear, it should apply the *contra proferentem* rule

137. Should the Tribunal find that the wording of the clause is not clear enough to conclude whether the tariff is included, then it should interpret it against RESPONDENT applying the *contra proferentem* rule.

138. According to this rule, if the terms of a certain provision are ambiguous, the provision should be interpreted against the party that drafted it [*Art. 4.6 UNIDROIT Principles and Comment; Art. 5:103 PECL; Rosett, p. 288; Gaillard/Savage, p. 827; Nordic American Shipping A/S v. Bayoil Inc.*].

139. The wording of the Hardship Clause was drafted by Mr. Krone [*PO2, p.56,* ¶*12*], RESPONDENT's representative replacing Mr. Antley after the accident.

140. Therefore, if the Hardship Clause is considered to be ambiguous, it should be interpreted against RESPONDENT, placing the 30% tariff within its scope.

2. The Contract should be adapted under the Hardship Clause

a. The Hardship Clause provides for the adaptation as a remedy to cases of hardship

141. By stating that "[s]eller shall not be responsible", the force majeure and hardship clause clearly provides for CLAIMANT's exemption of liability in cases of non-performance, since it expressly refers to "lost semen shipments", and in cases of delayed performance, *i.e.*, in cases of force majeure [*Exh. C5, p. 14 (Clause 12)*].

142. It is generally recognised that, in cases of hardship, the Parties have a duty to renegotiate the contractual terms [*Brunner, p. 480; Horn, p. 28*]. Albeit CLAIMANT's best efforts to comply with that duty, RESPONDENT made it impossible to reach an agreement [*Exh. C8, p. 18,* ¶*4*].

Thus, the only possible solution is adaptation of the Contract by this Tribunal [*Art. 6.2.3(4)(b) UNIDROIT Principles; cf. Arts. 6:111(2) and 6:111(3)(b) PECL; ICC Harship Clause 3003 (2); Lindström, §II; Brunner, p. 214; Horn, p. 26; ICC Case n. 16369*].

143. This is in accordance with the Parties' intention [*Art. 8(1) CISG*], since, when Ms. Napravnik mentioned to Mr. Antley that "it was important to have a mechanism in place which would ensure an adaptation of the Contract for the unlikely event that the Parties could not agree on an amendment", the latter agreed by stating that that should be the task of the arbitrators in the absence of an agreement by the Parties [*Exh. C8, p. 17, ¶4*].

144. Additionally, Ms. Napravnik stated that such clarification should be included "irrespective of the fact that from a legal point of view that was not necessary" [*Exh. C8, p. 17, ¶4*], since this is the expected remedy for these cases, as demonstrated above [*supra, ¶142*]. Due to the fact that the contractually agreed price was already paid and the goods were already delivered, the most appropriate type of adaptation in this case is adaptation of the price.

145. Furthermore, the fact that RESPONDENT accepted CLAIMANT's request to start renegotiations to "solve the issue of adaptation" demonstrates that RESPONDENT acknowledged the situation of hardship and the consequent need for adaptation of the Contract [*PO2, p. 60, ¶35*]. Thus, in the present case, it was the Parties' intention to provide for adaptation as a remedy to cases of hardship.

146. In light of the above, it is undeniable that the Hardship Clause provides for the adaptation of the Contract as a consequence of the imposition of the 30% tariff on agricultural goods from Mediterraneo by the Equatorianian authorities.

B. Alternatively, the CISG provides for the adaptation of the Contract as a result of the imposition of the tariff

1. We are upon a case of hardship under Art. 79 CISG

147. Besides addressing cases of force majeure, Art. 79(1) CISG, which was not derogated by the Parties **(a)**, is also applicable to cases of hardship **(b)**, which includes the tariff imposed by the Government of Equatoriana **(c)**.

a. The Parties did not derogate Art. 79 CISG under the terms of Art. 6 CISG

148. Contrary to RESPONDENT's allegations [*ANoA, p. 32, ¶20*], the Hardship Clause does not derogate Art. 79 CISG under the terms of Art. 6 CISG.

149. Firstly, as stated in the latter, Art. 12 CISG establishes the terms under which parties may "derogate from or vary the effect of" CISG provisions. Art. 12 concerns the non-applicability

of Arts. 11 and 29 and of Part II of the CISG in certain cases. Art. 79 is not related to the said provisions nor included in Part II.

150. Secondly, the CISG works as a back-up legal system to the Contract [*cf. Honnold, ¶76*]. Thus, it is clear that the latter specifies matters concerned with hardship without derogating the CISG provision that governs the same matter.

151. Therefore, notwithstanding the existence of the Hardship Clause in the Contract, provisions in the CISG that regulate the same issue are still applicable.

b. Art. 79 CISG is applicable to cases of hardship

152. Indeed, it is widely accepted that the word "impediments" in Art. 79 CISG includes economic impediments, placing the figure of hardship within its scope [*cf. Lindström, §IV, ¶2.1; Azerdo da Silveira, p. 328; Honnold, ¶432.2; CISG-AC 7, ¶3.1; Scafom v. Lorraine Tubes*].

153. Art. 7(1) requires that, when interpreting the CISG, "regard is to be had to its **international character** and to the need to promote **uniformity** in its application and the observance of **good faith** in international trade" (emphasis added). Hence, Art. 79 must be interpreted as addressing both cases of force majeure and of hardship, as CLAIMANT will demonstrate bellow.

154. Firstly, the figure of hardship is provided for in jurisdictions all over the world [*cf. Horn, pp. 18-20; CISG-AC 7, ¶26; Azerdo da Silveira, p. 322*], as well as in international legal instruments that reflect international practices concerning sales law, such as the UNIDROIT Principles [*Arts. 6.2.2-6.2.3 UNIDROIT Principles; cf. Kotrusz, p. 139*]. Therefore, taking into account the international character of the CISG, it is only logical to construe Art. 79 CISG as including hardship.

155. Secondly, to promote the uniform application of the CISG, it is crucial to place hardship within the scope of Art. 79, otherwise there is the risk that divergent solutions of national laws will be applied [*Schlechtriem I, fn. 422a*].

156. Thirdly, in light of the international doctrine of good faith, which requires parties to act reasonably [*Powers, p. 352*], it is only fair to conclude that Art. 79 must include a "limit of sacrifice", beyond which a party cannot reasonably be expected to perform, due to the excessive onerosity [*cf. Rimke, p. 224; CISG-AC 7, ¶38, Lindström, §IV, ¶2.1*].

157. Furthermore, the history of the drafting of the CISG leads to the same conclusion. In fact, during the drafting process hardship was seen as being within the scope of Art. 79 [*Schlechtriem II, p. 236*]. Besides, the deletion of the word "only" from Art. 7(3) has been construed as

meaning that, in cases of dramatic changes of circumstances, *i.e.*, hardship, contractual relations should not continue under the original terms [*Azerdo da Silveira, p. 334; Honnold, ¶435.1*].

158. In light of the above, Art. 79 must be interpreted as including cases of hardship.

c. The tariff at stake is within the scope of Art. 79

159. The situation CLAIMANT is facing fulfills the requirements of Art. 79(1). Therefore, this situation is considered a case of hardship under the CISG.

160. Firstly, it is obvious that this event constitutes an impediment beyond CLAIMANT's control, since it is a measure taken by the Government of the country where RESPONDENT's company is based [*cf. Egyptian Cotton Case*].

161. Secondly, CLAIMANT "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract" [*Art. 79(1) CISG*]. As demonstrated above [*supra*, ¶¶118-123], the imposition of the tariff was completely unforeseen. Therefore, it would not be reasonable to consider that CLAIMANT could have predicted the event.

162. Lastly, CLAIMANT "could not reasonably be expected [...] to have **avoided** or **overcome** [the impediment], or its consequences" (emphasis added) [*Art. 79(1) CISG*]. It would be impossible for CLAIMANT to **avoid** the event or its consequences, since the imposition of tariffs on imports is completely out of its sphere of control, and CLAIMANT was not entitled to any exemption or reduction in the tariff [*PO2, p. 58, ¶27*]. On what concerns the **overcoming** of the situation, and despite of the fact that the tariff creates an extremely heavy burden, CLAIMANT still performed the Contract, according to what is required. On a clearly unprivileged position, CLAIMANT still attended RESPONDENT's needs, after the latter had expressed how important the delivery of the goods was [*Exh. C8, p. 18, ¶2*]. CLAIMANT acted in such manner since it was led to believe by Mr. Shoemaker that it would get the price adaptation it was entitled to [*NoA, p. 6, ¶13; Exh. C8, p. 18, ¶¶2-3*].

163. Besides, CLAIMANT complied with the requirement laid out in Art. 79(4), since it informed RESPONDENT about the impediment right after it came to know about its existence [*Exh. C7, p. 16*].

164. On the basis of the above, it is evident that the tariff is within the scope of Art. 79.

2. Should the Tribunal consider that Art. 79 CISG is not applicable to cases of hardship, the gap should be filled through Art. 7(2) CISG

165. Should the Tribunal consider that Art. 79 CISG does not cover cases of hardship, it is inevitable to conclude that there is a gap in the CISG [*Schlechtriem II, p. 236*]. Gaps in the CISG must be filled "in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." [*Art. 7(2) CISG*].

166. Hardship undeniably falls within the scope of the CISG, since the CISG applies to "the rights and obligations of the seller and the buyer" [*Art. 4 CISG*]. Hence, Art. 7(2) CISG is applicable [*cf. McKendrick, p. 1025; Kotrusz, p. 126*]. Art. 7(2) presents two alternatives to fill gaps in the CISG: resort to the general principles of the CISG or resort to the law applicable by virtue of the rules of private international law. One must attend the second only when the first one did not allow for the filling [*cf. Art. 7(2) CISG; Kotrusz, p. 134; McKendrick, p. 1023, Bonell, pp. 82-83*].

167. The general principles contained in the CISG provide the necessary guidance to fill the gap, as will be demonstrated below.

a. This is a case of hardship according to the general principles of the CISG

168. By resorting to the general principles of the CISG, one is necessarily led to conclude that the imposition of the tariff is a case of hardship.

169. The general principles of the CISG might not always be expressly stated in it, but sometimes they have to be extracted from other provisions [*Lindström, §IV, ¶3; Koneru, p. 116*] and from its "substance, structure and spirit" [*Azerdo da Silveira, p. 339*].

170. Secondly, further to the fact that the Parties chose to apply the UNIDROIT Principles as the general contract law of Mediterraneo, and without disregard for what is stated below [*infra* ¶¶*185-186*], it is generally accepted that the general principles of the CISG are incorporated in the UNIDROIT Principles [*Scafom v. Lorraine Tubes, §IV; Magnus, §6b; Felemegas, Ch. 4, §2*] Therefore, these Principles can serve the purpose of filling gaps in the CISG [*Felemegas, Ch. 4, §6(c); Bund, p. 392*].

171. Art. 6.2.2 UNIDROIT Principles defines hardship as situations where "the occurrence of events fundamentally alters the equilibrium of the Contract [...] **because the cost of a party's performance has increased** [...]" (emphasis added). In the present case, the equilibrium was altered due to the increase in the cost of CLAIMANT's performance, which resulted in a loss of 25%, when the profit margin used to be of 5% [*NoA, p. 7, ¶18*].

172. The same provision further lays down the criteria for a situation to be considered as hardship, which are all met in the present case. Paragraph (a) requires that "the events occur or become known to the disadvantaged party after the conclusion of the contract".

173. The Contract was concluded on 6 May 2017 [*Exh. C5, p. 13, ¶1*], the tariff was imposed on 19 December 2017 [*Exh. C6, p. 15, ¶1*] and the inclusion of horse frozen semen became known to CLAIMANT on 20 January 2018 [*PO2, p. 58, ¶26*]. Regarding paragraph (b), which requires unforeseeability at the time of the conclusion of the Contract, as demonstrated above [*supra,* ¶¶*118-123*], the imposition of the tariff was undeniably unpredictable. Since this is a tariff on imports imposed by a foreign government, it is obvious that it is outside CLAIMANT's control under the terms of paragraph (c). Lastly, as already established, the risk of such tariffs was not assumed by CLAIMANT under the terms of paragraph (d) [*supra*, ¶¶*132-136*].

174. Therefore, this constitutes a situation of hardship under Art. 6.2.2 UNIDROIT Principles.

3. The Contract should therefore be adapted under the general principles of the CISG

175. Art. 79 CISG, although addressing hardship, only provides for a remedy for cases of non-performance, *i.e.*, exemption from liability. Since there is no provision expressly providing for a remedy in cases of hardship, particularly when the obligation was performed, the gap will have to be filled according to the general principles of the CISG [*supra, ¶166*].

176. It is indeed generally accepted that the remedy for cases of hardship is provided for in the CISG [*Azerdo da Silveira, p. 328; CISG-AC 7, ¶3.2*].

a. The Contract should be adapted according to the CISG

177. Considering that there is a gap as to adaptation as a remedy for hardship, the gap can be filled by applying the general principles of the CISG [*Schlechtriem II, p. 236*].

178. Firstly, the Tribunal must consider the principle of good faith [*Secretariat Commentary, p. 18; Bonell, p. 80; CISG-AC 7, ¶40; Schlechtriem II, p. 236; cf. Kotrusz, pp. 134-135; Azerdo da Silveira, fn. 1354*]. Applying the principle of good faith to a case of hardship, such as the present, means that the Parties should find alternative contractual terms after the change of circumstances [*cf. Rosett, p. 290; Azerdo da Silveira, p. 324; CISG-AC 7, ¶40; Schlechtriem II, p. 236*].

179. Art. 50 CISG also contains a general principle that allows for an adaptation of the Contract in situations of hardship [*Azerdo da Silveira, p. 344; Schlechtriem II, p. 237*]. According to this

article, the buyer is allowed to alter the price of the goods as a result of the disequilibrium of the Contract. This Tribunal cannot disregard that, in the present case, the tariff also caused a disequilibrium, being CLAIMANT the disadvantaged part, when it did not assume the risks in question.

180. As stated above, the UNIDROIT Principles can serve the purpose of filling gaps in the CISG, since they are considered to contain CISG's general principles [*supra*, ¶¶*38, 170*]. Indeed, they have been used to fill the gap in the CISG concerning the remedy for cases of hardship [*Scafom v. Lorraine Tubes*].

181. In accordance with Art. 6.2.3 UNIDROIT Principles, CLAIMANT will demonstrate that the only appropriate remedy *in casu* is the adaptation of the Contract. The first remedy put forward by Art. 6.2.3, in its paragraph (1), provides for the request for renegotiations as a remedy, which "shall be made without undue delay and shall indicate the grounds on which it is based". Indeed, CLAIMANT requested renegotiations without undue delay, *i.e.*, on the same day it found out that the tariff included horse semen, and properly expressed the grounds for that request [*Exh. C7, p. 16; PO2, p. 58,* ¶*26*].

182. However, the renegotiations were unsuccessful since RESPONDENT made it impossible to reach an agreement [*supra*, ¶*142*]. Thus, pursuant to paragraph (3), CLAIMANT resorted to this Tribunal.

183. Subsidiarily, paragraph (4) provides for two different possible remedies. Terminating the Contract, as provided for in paragraph (4)(a), is not a proper solution to this case, since CLAIMANT's obligation was performed [*NoA, p. 6,* ¶*13*] and this was the last shipment agreed to by the Parties [*Exh. C5, p. 14, (Clause 8)*]. Therefore, the only remedy available that is suitable to the present case is the one established in Paragraph (4)(b) - adaptation of the Contract in view of restoring its equilibrium.

184. In view of the above, the imposition of the tariff constitutes a case of hardship which requires the adaptation of the Contract under the principles of the CISG.

C. Additionally, the general contract law of Mediterraneo provides for the adaptation of the Contract as a result of the imposition of the tariff

185. If the Tribunal considers that there is a gap in the CISG concerning hardship and that it cannot be filled by its general principles, then the Tribunal must resort to the second alternative of Art. 7(2) CISG. In order to fill the gap, this provision requires the resort to the law applicable by virtue of the rules of private international law. According to these rules,

the applicable law is the general contract law of Mediterraneo [*Art. 2(1) Hague Principles, PO2, p. 61, ¶43*].

186. According to the general contract law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 53, ¶4*], the tariff at hand constitutes a case of hardship, as CLAIMANT demonstrated supra [*supra, ¶¶171-174*]. Therefore, the Contract should be adapted under Art. 6.2.3 of the UNIDROIT Principle [*supra ¶¶181-183*].

D. CLAIMANT is entitled to receive 30% of the price of the last shipment or, in any event, no less than 25%

187. When adapting the Contract, the Tribunal must restore its equilibrium [*Art. 6.2.3(4)(b) UNIDROIT Principles; cf. Lindström, §II; Horn, p. 28; Maskow, p. 663; Zaccaria, p. 171*]. *In casu,* this means that CLAIMANT should receive the total amount of the tariff paid.

188. In order to restore the equilibrium of the Contract, there must be "a fair distribution of the losses between the parties" [*Art. 6.2.3 UNIDROIT Principles; Comment 7*].

189. Hence, firstly, the Tribunal must consider the risk assumed by the aggrieved Party [*UNIDROIT Principles, Art. 6.2.3, Comment 7; Brunner, p. 392; Azerdo da Silveira, p. 345*]. As demonstrated above, the Parties clearly left import tariffs outside CLAIMANT's sphere of risk [*supra, ¶132-136*].

190. Secondly, the Tribunal must take into account the benefit RESPONDENT received from CLAIMANT's performance [*Art. 6.2.3 UNIDROIT Principles, Comment 7*]. Indeed, on the one hand, CLAIMANT delivered all the doses, fulfilling its contractual obligations [*NoA, p. 6, ¶13*]. On the other hand, RESPONDENT resold a considerable amount of the doses charging 20% more than the contractual agreed price the Parties' [*NoA, p. 8, ¶20; PO2, p. 57, ¶20*]. By doing so, RESPONDENT not only breached the agreement between the Parties, but also made profit out of this breach.

191. The Contract provided that the frozen semen was to be used for the breeding of defined mares "and others **after information of the Seller**" (emphasis added) [*Exh. C5, p. 13, ¶3*]. This express information requirement was added by CLAIMANT in order to "prevent the resale of the doses" [*PO2, p. 57, ¶16*]. Hence, by failing to inform CLAIMANT that it would resell the doses, they ended up being used in non-authorized mares [*PO2, p. 57, ¶20*].

192. Furthermore, it was never CLAIMANT's intention to allow the reselling, nor did RESPONDENT ever show the intention to resell [*Art. 8(1) CISG*]. CLAIMANT stated that it would normally not sell such an amount of doses to a single breeder for "obvious reasons" [*Exh. C2, p. 10,*

¶*2*]. It is unquestionable that these obvious reasons referred to CLAIMANT's intention of not authorizing the reselling of the frozen semen without its "express written consent" [*Exh. C2, p. 10,* ¶*3*]. CLAIMANT's reasons to impose such a requirement relate to the fact that the price of the frozen semen depends on the mares for which it will be used [*PO2, p. 57,* ¶*19*]. Therefore, naturally, CLAIMANT wanted to have control of the use of Nijinski III's frozen semen.

193. Moreover, RESPONDENT, with its email from 21 March 2017, asked for the frozen semen of Nijinski III for its "purposes" of building a racehorse breeding programme [*Exh. C1, p. 9*]. Nowhere in that email can one find a reference to reselling purposes, neither explicitly nor implicitly, nor did RESPONDENT have the habit of reselling frozen semen [*PO2, p. 57,* ¶*18*].

194. Therefore, in the present case, restoring the equilibrium of the Contract - by promoting a fair distribution of the losses - means adapting the Contract to a point where CLAIMANT is restored to its initial position, having a profit margin of 5% [*NoA, p. 7,* ¶*18*].

195. On the basis of the above, the Tribunal is requested to hold that the Parties should be restored to their initial position. Thus, RESPONDENT should pay 30% of the price of the last shipment, which corresponds to the amount of the tariff - US$ 1,500,000.

196. Should the Tribunal consider that the Parties should not be restored to their initial position, RESPONDENT should at least pay 25% of the price - which corresponds to US$ 1,250,000 -, so as to mitigate CLAIMANT's loss.

CONCLUSION ON ISSUE III

197. According to either the Hardship Clause, the CISG and the general contract law of Mediterraneo, CLAIMANT is facing a situation of hardship that requires the adaptation of the Contract. In order to restore the Contract's equilibrium, CLAIMANT is entitled to the payment of US$ 1,500,000. In any event, CLAIMANT must receive, at a minimum, the amount corresponding to its loss - US$ 1,250,000.

REQUEST FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to adapt the Contract;
2. The Evidence from the other arbitration proceedings must be admitted;
3. The situation that CLAIMANT is facing corresponds to a case of hardship;

4. CLAIMANT is entitled to receive outstanding contractual payments as a result of the adaptation of the Contract:

    4.1. 30% of the price of the last shipment corresponding to the amount of US$ 1,500,000.

    4.2. In any event, no less than 25% of the price of the last shipment US$ 1,250,000.

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

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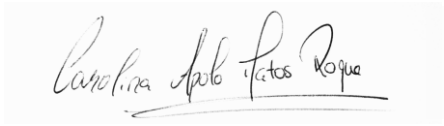
CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Lisbon, 6 December 2018,



CAROLINA ROQUE CATARINA CARREIRO CATARINA CERQUEIRA

TWENTY-SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, 13 APRIL TO 18 APRIL 2019

NOVA UNIVERSITY OF LISBON, SCHOOL OF LAW

MEMORANDUM FOR RESPONDENT

Arbitral Proceedings No. HKIAC/A18128

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

COUNSEL FOR RESPONDENT:

CAROLINA ROQUE • CATARINA CARREIRO • CATARINA CERQUEIRA

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TABLE OF ABBREVIATIONS

¶/¶¶	paragraph/paragraphs
§	Section
AAA	American Arbitration Association
AAA Rules	AAA's Commercial Disputes Arbitration Rules and Mediation Procedures
ANoA	Answer to Notice of Arbitration
Apud	in the writings of
Arbitration Clause	
Art./Arts.	Article/Articles
Cf.	*confer* (see)
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Memo.	Memorandum for Claimant of the University of Lausanne
DAA	Dutch Arbitration Act
E.g.	*exempli gratia* (for example)
EC	European Convention
Ed.	Edition
Et. al.	*Et alii* (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
Fn.	foot note
GAA	German Arbitration Act

HKIAC	Hong Kong International Arbitration Centre
HKIAC 2013 Rules	HKIAC Administered Arbitration Rules of 2013
HKIAC Rules	HKIAC Administered Arbitration Rules of 2018
I.e.	*id est* (that is)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council in 29 May 2010
Ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
In casu	in the case at hand
Infra	Below
Inter alia	among other things
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules
Ltd.	Limited
Model Law	UNCITRAL Model-Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006
Mr. / Ms.	Mister / Missus
No.	Number
NoA	Notice of Arbitration
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
P. / pp.	page / pages
Parties	CLAIMANT and RESPONDENT

PECL	Principles of European Contract Law
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Quod non	Which it does not
SAA	Swedish Arbitration Act
Sect.	Section
Supra	See above
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model-Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	Principles UNIDROIT Principles of International Commercial Contracts (2016)
UNIDROIT Principles 1994	Principles UNIDROIT Principles of International Commercial Contracts (1994)
US	United States
US$	United States Dollars
V.	Versus (against)
Working Group	United Nations Commission on International Trade Law

STATEMENT OF FACTS

Black Beauty Equestrian ("**RESPONDENT**") is a company based in Equatoriana famous for its broodmare lines. RESPONDENT is currently building up its own racehorse breeding program, with the intention of becoming a leading breeder. For that purpose, RESPONDENT has invested in promising first-class mares and it is now seeking matching stallions.

Phar Lap Allevamento ("**CLAIMANT**") is a company located in Mediterraneo that manages a renown stud farm. Additionally, CLAIMANT offers frozen semen from its top-class racehorses.

21 March 2017 — As a result of a temporary lifting of a ban on artificial insemination for racehorses in Equatoriana, RESPONDENT contacted CLAIMANT asking for one hundred doses of frozen semen from the champion stallion Nijinski III.

24 March 2017 — Taking into account RESPONDENT's exceptional reputation in other sections of horse sports, CLAIMANT accepted to provide RESPONDENT with the number of doses requested.

28 March 2017 — Acknowledging CLAIMANT's greater experience in the delivery of frozen semen, RESPONDENT asked for a delivery on the basis of Delivered Duty Paid ("DDP").

31 March 2017 — CLAIMANT accepted DDP delivery against a price increase and expressed its concerns with the additional risks taken, proposing the creation of a hardship clause to temper some of those risks, which RESPONDENT accepted.

10 April 2017 — RESPONDENT proposed an arbitration agreement governed by the law of Equatoriana and providing for arbitration in the same country.

11 April 2017 — Since choosing the arbitration seat in the country of the counterparty would require a special authorization from CLAIMANT's creditors' committee, CLAIMANT suggested that the arbitration would be seated in a neutral country: Danubia.

6 May 2017	CLAIMANT and RESPONDENT ("**Parties**") concluded the Frozen Semen Sales Agreement ("**Contract**"), which included a narrow hardship clause ("**Hardship Clause**") and an arbitration agreement ("**Arbitration Agreement**"), conceding limited powers to the Arbitral Tribunal ("**Tribunal**").
19 December 2017	The Government of Equatoriana imposed a 30% tariff on all agricultural goods from Mediterraneo as a retaliation against the tariff imposed by the latter. This came as no surprise, since Equatoriana had already had a similar reaction. At the time, CLAIMANT failed to confirm whether horse semen was included in the goods.
20 January 2018	Only three days before the last shipment was due, CLAIMANT sent an email to Mr. Shoemaker, the veterinary responsible for RESPONDENT's breeding program, urging for a solution under the penalty of keeping the shipment on hold.
21 January 2018	Mr. Shoemaker contacted CLAIMANT. However, since he lacked the necessary powers to bind RESPONDENT to a legal solution, he merely highlighted the importance of a timely delivery. CLAIMANT then agreed to unlock the shipment and to pay the tariff.
12 February 2018	After CLAIMANT's insistence on changing the contractual terms, RESPONDENT accepted to meet in order to clarify that the slight cost increase resulting from the tariff did not amount to hardship, and therefore no renegotiations were needed.
31 July 2018	As the Parties did not reach an understanding, CLAIMANT submitted its Notice of Arbitration ("**NoA**") requesting the Arbitral Tribunal ("**Tribunal**") to adapt the Contract so that it would reflect the cost increase caused by the tariff, although the Parties did not confer such powers to the arbitrators.
24 August 2018	By its turn, RESPONDENT filed its Answer to the NoA ("**ANoA**").

2 October 2018 CLAIMANT informed the Tribunal about other arbitration proceedings in which RESPONDENT was involved. Although the referred proceedings were confidential, CLAIMANT actively tried to obtain confidential documents with the intention of submitting them as evidence.

At last, a company accepted to provide the Partial Interim Award that had been issued ("**PIA**") against the payment of a significant amount.

INTRODUCTION

1. Contracts must be performed in accordance with what was agreed upon by the parties. The business world would not survive if every slight change of circumstances could result in a complete alteration of the contractual terms by one of the parties. CLAIMANT is clearly now attempting to evade the risks that it specifically assumed when agreeing on a delivery on the basis of DDP.

2. In a demonstration of good will, RESPONDENT accepted to limit CLAIMANT's sphere of risk with the Hardship Clause. Nonetheless, not every minor difficulty represents hardship, especially not when it ought to have been expected. Perfectly aware of this, CLAIMANT is yet stating that a trivial increase of 15% of the overall cost is to be supported by RESPONDENT, ignoring the risks it assumed. Notwithstanding, neither the Hardship Clause **(Issue III)** nor the law applicable to the Contract **(Issue IV)** support CLAIMANT's misleading allegations.

3. On what concerns procedural issues, CLAIMANT's inconsistencies have tainted these proceedings. Firstly, CLAIMANT is trying to manipulate the Parties' Arbitration Agreement regarding the powers of the Tribunal by asking for the adaptation of the contractual terms (**Issue I**). Secondly, CLAIMANT is seeking reliance on confidential documents obtained in an unlawful manner by itself (**Issue II**).

ARGUMENTS

ISSUE I: THE TRIBUNAL DOES NOT HAVE JURISDICTION NOR THE POWERS TO ADAPT THE CONTRACT

4. This Tribunal does not have the necessary jurisdiction or powers to adapt the Contract. RESPONDENT will demonstrate that the Parties agreed on the Contract Law of Danubia to govern the interpretation of the Arbitration Agreement **(A)**. The latter excludes any adaptation powers of the Tribunal without an express conferral by the Parties [*ANoA, p. 31,*

¶*13*]. Thus, the scope of the Arbitration Agreement has to be construed accordingly **(B)**. But even if the law of Danubia was not applicable, the Tribunal would still not have the necessary powers to adapt the Contract **(C)**.

A. The Parties agreed on the law of Danubia to govern the interpretation of the Arbitration Agreement

5. As CLAIMANT states [*Cl. Memo., p. 4,* ¶*6*], there is no specific provision within the final version of the Arbitration Agreement regarding the applicable law to its interpretation. Nonetheless, the Parties expressly agreed to have the law of Danubia as the one governing the interpretation of the Arbitration Agreement **(1)**. If the Tribunal does not consider so, it must hold that the Parties impliedly agreed on the law of Danubia for the interpretation of the Arbitration Agreement **(2)**.

1. There was an express agreement between the Parties to apply the law of Danubia to the Arbitration Agreement

6. Contrary to what CLAIMANT wrongfully states [*Cl. Memo., p. 5,* ¶*7*], there was in fact an agreement between the Parties concerning the applicable law to the interpretation of the Arbitration Agreement. Therefore, one must apply the first criterion on Art. 36.1 HKIAC Rules, which provides that the Tribunal "shall decide the substance of the dispute in accordance with the rules of law **agreed upon by the parties**" (emphasis added) [*Art. 36.1 HKIAC Rules*]. Even though this article refers specifically to the "substance" of the dispute, in the "spirit of these Rules", the Tribunal must always decide in accordance with the rules of law agreed to by the Parties on what concerns the Arbitration Agreement [*Art. 13.1, 13.9 HKIAC Rules*]. Indeed, the principle of party autonomy tells us that it could not be in any other way [*Redfern/Hunter II, p. 315*]. Thus, the Tribunal must rely on the law of Danubia to construe the Arbitration Agreement.

7. RESPONDENT made clear to Ms. Napravnik that the logical option would be to apply the same law of the seat to the interpretation of the Arbitration Agreement and CLAIMANT agreed. Indeed, in the very first draft of the Arbitration Agreement, RESPONDENT specifically chose a model clause that contained an explicit reference to the law governing it, in the hope of avoiding the uncertainties resulting from the absence of choice [*Exh. R1, p. 33,* ¶*1*]. Furthermore, RESPONDENT highlighted the fact that arbitration would have its seat in Equatoriana and would be governed by the law of that same country [*Exh. R1, p. 33,* ¶*1*].

8. Ms. Napravnik said that it would be impossible to provide for dispute resolution in the country of the counterparty, *i.e.*, Equatoriana, as it would burden CLAIMANT with the need

for a "special approval by the creditors committee" [*Exh. R2, p. 34, ¶1*]. Because of that and in order "[t]o avoid any further futile discussion", Ms. Napravnik herself suggested for arbitration in a neutral country, disregarding the question of the applicable law [*Exh. R2, p. 34, ¶1*]. In its turn, as a demonstration of its willingness to facilitate the commitment between the Parties, RESPONDENT promptly accepted it, logically assuming that the Arbitration Agreement would be submitted to the same neutral law of the place, *i.e.*, the law of Danubia. CLAIMANT's position of submitting the interpretation of the Arbitration Agreement to the law of one of the Parties would not be coherent with the purpose of choosing a neutral place for the arbitration as agreed by the Parties.

9. Additionally, Ms. Napravnik expressly assured that the offer would be on the condition that "the law applicable to the **Sales Agreement** remains the law of Mediterraneo" (emphasis added) [*Exh. R2, p. 34, ¶4*]. By not raising any objections as to RESPONDENT's proposal of having the law of the seat governing the Arbitration Agreement, CLAIMANT agreed with it. Hence, there was a true meeting of the minds concerning the applicability of the law of Danubia to govern the Arbitration Agreement [*Schlechtriem II, p. 221; Zeller, Part II (iii); Chemical Products Case*].

10. In conclusion, although an express reference was not included in the Arbitration Agreement, the Tribunal must hold that there was an express agreement made by both Parties in order to apply the law of the seat to the interpretation of the Arbitration Agreement.

2. If the Tribunal considers that there was not an express agreement, it must hold that there was an implied choice by the Parties

11. As Claimant stated, in the absence of an agreement by the Parties, the Tribunal must decide in accordance with the rules it deems appropriate [*Cl. Memo., p. 5, ¶7; Art. 36.1 HKIAC Rules*]. Thus, if the Tribunal considers that there was not an express agreement between the Parties, it should consider the law of the seat as applicable to the interpretation of the Arbitration Agreement, since there was an implied choice **(a)**. This understanding complies with the internationally recognised principle of separability **(b)**.

a. There was an implied choice to apply the law of the seat to the Arbitration Agreement

12. CLAIMANT asserts that the Parties made an implied choice of the law that should govern the Arbitration Agreement during the negotiations [*Cl. Memo., p. 7, ¶20*]. RESPONDENT cannot disagree with this statement. However, this choice was made when the Parties decided the seat for the arbitration and not when they decided the law applicable to the Contract.

13. Contrary to what CLAIMANT states [*Cl. Memo., p. 7, ¶21*], in the absence of an express choice of law concerning the interpretation of the arbitration agreement by the parties, it is generally accepted that the law of the seat is to be considered as an implied choice of the parties to the agreement [*Arts. 34(2)(a)(i), 36(1)(a)(i) Model Law; Art. VI (a) and (b) EC; Sect. 1059(2) (1.a) and 1060(2) GAA; Art. 1073 DAA; Sect. 48 SAA; Berger I, p. 316; Jec v. Ringling, XL Insurance v. Owens Corning*]. The rationale behind this understanding is the closest connection test [*Berger I, p. 315; C v. D*]. Indeed, an agreement to arbitrate will be more closely connected to the law of the seat as the place of performance of the arbitration agreement than with any other country [*Redfern/Hunter, p. 161; Berger I, p. 315; Sulamerica Case*].

14. The relevance of the law of the seat as the closest to the proceedings is undisputed, especially if we consider the Tribunal's duty to render an enforceable award [*Lew/Mistelis, p. 125*; *ICC Case No. 5485*]. As it is generally recognised, to determine the validity or to interpret the arbitration agreement according to the same rules of the place of arbitration is the most prudent way to ensure an enforceable award. Indeed, an award that does not comply with those norms can be annulled or enforcement can be refused on the basis of Art. V(1)(a) of the New York Convention, supporting the presumption that the law applicable to the arbitration agreement shall be that of the place of arbitration [*Lew/Mistelis, p. 125; Waincymer, p. 168; Lew, p. 142; Redfern/Hunter, p. 161; Matermaco v. PPM Cranes; Sulamerica Case*].

15. Hence, the choice of the seat must be construed as an indirect choice by the Parties of the "external" controlling law and of the key supervisory court, which determines the legal framework of the arbitration process [*Berger I, pp. 315, 345; Waincymer, p. 169; India v. McDonnell Douglas*].

16. Moreover, and contrary to CLAIMANT's attempt to deceive this Tribunal [*Cl. Memo. p. 7, ¶21*], a general choice of substantive law in a commercial contract is widely construed as dealing merely with the balance of the contract and not with the arbitration agreement itself [*Waincymer, p. 135*]. Furthermore, extending the general choice of the governing law clause to the Arbitration Agreement would be completely incoherent with the Parties agreement of having Danubia as the seat while having the substance of the dispute ruled by the law of another country [*Berger I, p. 320; XL Insurance v. Owens Corning*].

17. Therefore, by choosing Danubia as the seat of the arbitration, this Tribunal must consider that the Parties have impliedly chosen the law of the same country to rule the interpretation of the Arbitration Agreement. Any contrary decision might lead to an unenforceable award that frustrates the whole purpose of the Arbitration Agreement itself.

b. The applicability of the law of the seat to the Arbitration Agreement complies with the principle of separability

18. The principle of separability is enshrined in all leading arbitration laws [*Art. 19.2 HKIAC Rules, Art. 16 Model Law; Waincymer, p. 132*]. Accordingly, the Arbitration Agreement should be treated as an independent agreement of the other terms of the Contract [*ibid.*]. Indeed, as recognised by CLAIMANT itself, this doctrine "ensures that the arbitration clause does not share the fate of the main contract when the validity of the latter is affected" [*Cl. Memo., p. 6, ¶13*].

19. However, while it does not imply that the law of the arbitration agreement is necessarily different from the law of the contract [*Cl. Memo., p. 6, ¶13*], it certainly excludes an automatic extension of the law of the contract to the arbitration agreement [*Berger I, p. 319*; *Bulbank Case*]. Indeed, the hybrid character of the arbitration agreement, involving both substantive and procedural aspects, as opposed to the nature of the main contract, must not be disregarded [*Berger I, p. 319*].

20. The question of separability must be analysed simultaneously with the principle of party autonomy, meaning that the parties do have the freedom to choose the law applicable to their arbitration agreement. The latter might be different from the one of the contract, as in fact it is a common practice [*Born, p. 472*]. In this sense, this Tribunal must not disregard that both Parties deliberately decided to place the choice of law applicable to the Contract in a different clause from the Arbitration Agreement [*Exh. C5, p. 14, (Clause 14), (Clause 15); ANoA, p. 32, ¶17*]. Thus, the fact that the Parties agreed on the law of Mediterraneo to rule the Contract must not be seen as an implied choice for the same law to rule the Arbitration Agreement.

21. In light of the above, the Tribunal must hold that the Parties did agree on the law of Danubia to govern the interpretation of the Arbitration Agreement, either expressly or impliedly. Hence, this Tribunal must decide accordingly, relying on the Danubian law.

B. In light of the Danubian law, the Arbitration Agreement does not grant this Tribunal the necessary powers to adapt the Contract

22. CLAIMANT holds that the four corners rule is not applicable to the case at hand [*Cl. Memo., p. 5, ¶11*]. However, RESPONDENT will shed light on the fact that, since the Arbitration Agreement must be construed according to the Danubian law [*supra, ¶¶6-21*], the four corners rule is applicable *in casu* **(1)**. The Danubian law also provides that, in order to adapt the Contract, this Tribunal is bound to an express authorisation by the Parties, which was

never granted **(2)**. Thus, the Tribunal must hold that this Arbitration Agreement excludes the possibility of the adaptation of the Contract by the Tribunal.

23. The Parties chose the law of Danubia to govern the Arbitration Agreement [*supra, ¶¶6-21*]. Thus, this Tribunal must rely on the Danubian Contract Law to interpret the Arbitration Agreement and on the Danubian Arbitration Law for all procedural matters not settled by the HKIAC Rules, such as the case at hand.

24. Danubian Contract Law is a "largely verbatim adoption of the UNIDROIT Principles" with two substantial differences [*PO2, p. 61, ¶45*]. Firstly, the rule for the interpretation of contracts is the four corners rule, which excludes any external evidence when the wording is clear [*ANoA, p. 32, ¶16; PO2, p. 61, ¶45*]. Secondly, the Tribunal is only invested with the powers to adapt contracts when expressly authorised by the Parties [*PO2, p. 61, ¶45*].

25. On what concerns the arbitration law, Danubia has adopted the Model Law [*PO1, p. 52, ¶4*]. However, there is consistent jurisprudence in Danubia demonstrating that Art. 28(3) Model Law contains a general standard requiring an express authorisation to the conferral of exceptional powers to the arbitral tribunal [*PO2, p. 60, ¶36*]. The adaptation of contracts is included in the notion of exceptional powers [*ibid.*].

26. Consequently, since the Parties did not confer such authorisation, the Tribunal lacks the powers to adapt the Contract.

1. The four corners rule is applicable and excludes any external evidence for the interpretation of the Arbitration Agreement

27. CLAIMANT argues that the four corners rule shall not be applied since there is "no mention about the **applicable law** to the interpretation of the arbitration agreement" (emphasis added) and RESPONDENT's argumentation is contradictory [*Cl. Memo., p. 7, ¶17*]. CLAIMANT's position is misleading, when not just plain wrong.

28. The interpretation of the Arbitration Agreement is governed by the law of Danubia, which adheres to the four corners rule [*supra ¶¶6-21*; *ANoA, p. 32, ¶16*]. Accordingly, when the wording is clear, no external evidence may be relied upon [*Lummus Global Amazonas v. Aguaytia Energy Del Peru*]. It is RESPONDENT's submission that the Arbitration Agreements' wording is clear on what concerns the powers granted to the Tribunal. Hence, CLAIMANT wrongfully applies the four corners rule when it alleges that it is not applicable because there is no wording concerning the applicable law [*Cl. Memo., p. 7, ¶17*].

29. Instead, CLAIMANT should have analysed the wording concerning the powers granted to the arbitrators. According to the four corners rule, one can easily determine that the Tribunal does have the powers to decide on any dispute concerning the "existence, validity, interpretation, performance, breach or termination" of the Contract [*Exh. C5, p. 14 (Clause 15)*]. It is crystal clear that the Tribunal was not granted with the powers to decide on contract adaptation, since those were not explicitly included in the Arbitration Agreement [*Berger II, p. 3; cfr. ICC Case No. 7544*]. The claim raised by CLAIMANT exceeds the general powers for the interpretation of the Contract, since the adaptation of the contract requires exceptional powers [*Berger II, p. 6*].

30. Furthermore, RESPONDENT's argumentation was never inconsistent. Contrary to CLAIMANT's ill-founded allegations [*Cl. Memo., p. 7, ¶17*], RESPONDENT merely resorted to the negotiations as a subsidiary argument. According to the four corners rule, it is RESPONDENT's submission that this Tribunal must only rely on external evidence, *i.e.*, the negotiations, if (*quod non*) it considers that the wording of the Arbitration Agreement is not clear [*NoA, p. 7, ¶¶15-16; ANoA, p. 31, ¶15*].

31. Therefore, the Tribunal must consider the wording of the Arbitration Agreement clear on what concerns the powers granted to the Tribunal, excluding the possibility of adaptation of the Contract.

2. This Tribunal is bound to an express authorisation by the Parties, which was never granted

32. CLAIMANT defends that the Tribunal does not need to be specifically authorised by the Parties to adapt the Contract [*Cl. Memo., p. 9, ¶31*]. CLAIMANT is once again wrong and RESPONDENT will demonstrate why.

33. Firstly, the Danubian Contract Law requires an express authorisation by the Parties in order for the Tribunal to adapt the Contract [*Art. 6.2.3 (4)(b) Danubian Contract Law; PO2, p. 61, ¶45*].

34. Additionally, there is consistent jurisprudence regarding Art. 28(3) Danubian Arbitration Law according to which an express authorisation by the parties is required to the "conferral of exceptional powers to the arbitral tribunal" [*PO2, p. 60, ¶36*]. This includes adaptation powers [*ibid.*].

35. While CLAIMANT states that the drafters of Art. 28(3) Model Law did not discuss this prerequisite concerning contract adaptation [*Cl. Memo., p. 10, ¶33*], it neglects that the matter

was addressed during the drafting of the Model Law [*Holtzmann/Neuhaus, p. 1116*]. Indeed, when discussing the possibility of creating a provision that addressed the adaptation of contracts by the arbitrators, the drafters reiterated that an authorisation by the parties was decisive [*Holtzmann/Neuhaus, p. 1132*]. Notwithstanding, the Working Group decided not to include a provision concerning substantive law in a procedural code such as the Model Law [*Holtzmann/Neuhaus, p. 1117*]. The jurisprudence in Danubia follows the same understanding, requiring for an express authorisation by the parties on what concerns exceptional powers for the adaptation of contracts [*PO2, p. 60, ¶36*].

36. In view of the above, it is clear that this Tribunal must construe the powers conceded to the arbitrators narrowly, taking into consideration the law of Danubia and the four corners rule. Furthermore, and considering that there was no express conferral of powers for contract adaptation, this Tribunal must dismiss CLAIMANT's submission.

C. Even if the Tribunal does not find the law of Danubia to be applicable, it does not have the powers to adapt the Contract

37. If, *quod non*, this Tribunal considers that Danubian law shall not be applicable to the interpretation of the Arbitration Agreement, the Tribunal still lacks the necessary powers to adapt the Contract.

38. An international dispute requires an international approach. Thus, even if the Tribunal does not find the law of Danubia to be applicable, it must deny the application of the law of Mediterraneo as well. Only an interpretation of the Arbitration Agreement according to international norms, including universally accepted principles and rules, would be valid.

39. Considering that (i) the Parties are foreign, (ii) the seat was chosen as a neutral place [*Exh. R2, p. 34, ¶1; Marques, p. 26*], (iii) the arbitration proceedings are governed by international rules (HKIAC Rules) and that (iv) there is no express wording on the Contract concerning the applicable law to the Arbitration Agreement, it is safe to say that the Parties' intention was to internationalise their dispute resolution process [*Bachand, p. 394*]. Accordingly, the Arbitration Agreement remains autonomous from the provisions of any national law, such as Danubia's or Mediterraneo's [*Redfern/Hunter, p. 171; Dalico Decision*]. In this case, the Tribunal must rely on general principles of interpretation to construe the scope of the Arbitration Agreement according to the Parties common intention.

40. The Tribunal must consider the Parties intention **(1)**, either under a subjective **(a)** or an objective interpretation **(b)**. Furthermore, an express authorisation by the parties has been required by international tribunals **(2)**. Lastly, the *pacta sunt servanda* principle must prevail

(3). Therefore, and regardless of the criteria, this Tribunal must hold that it does not have the necessary powers to adapt the Contract.

1. The Parties' intention was never to allow the adaptation of the Contract by the Tribunal

41. In the absence of an express choice of law, the interpretation of arbitration agreements has relied upon general principles of contract interpretation [*Born, p. 1321; Waincymer, p. 135; ICC Case No. 7929; Insigma v. Alstom*]. To that effect, tribunals must interpret the wording in accordance with the real and common intent of the parties [*ibid.*]. In this regard, a meeting of the minds is decisive [*Born, p. 1322; Judgment of 29 February 2008 Swiss Federal Tribunal*].

42. Since all the countries involved are Contracting States of the CISG, and the Contract itself is subject to the CISG - and, consequently, to its rules of interpretation - the interpretation of the Arbitration Agreement must follow Art. 8 CISG [*PO1, p. 52, ¶4; Exh. C5, p. 14 (Clause 14); Schlechtriem, p. 38-39*]. Firstly, according to Art. 8(1) CISG, one must construe the Parties' intention subjectively **(a)**. Should the Tribunal consider that it is not possible to derive such intention, the Arbitration Agreement must be interpreted according to the objective criteria on Art. 8(2) CISG **(b)**. In order to interpret the intention of the Parties, one must consider "all the relevant circumstances of the case, including the negotiations", as *per* Art. 8(3) CISG [*Chemical Products Case; Wine Case*]. In any event, this Tribunal must conclude that it was not the Parties' intention to allow the adaptation of the Contract.

a. Under a subjective interpretation, it was the Parties intention to exclude any exceptional powers from the Tribunal, such as the ones concerning contract adaptation

43. According to Art. 8(1) CISG, "statements made by [...] a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*"* [*Schlechtriem, p. 38*; *Chemical Products Case; Wine Case; Coffee Case*]. During the negotiations, RESPONDENT made clear that its proposal for the arbitration clause was based on HKIAC Model Clause, but that it had "**narrowed down** and **streamlined a little the fairly broad wording of the clause**" (emphasis added) [*Exh. R1, p. 33, ¶1*]. Hence, RESPONDENT's intention to delete any reference which could be interpreted as an empowerment for contract adaptation, or any other exceptional conferral of powers for that matter, could not be clearer [*Exh. R1, p. 31, ¶13*]. In particular, RESPONDENT also felt the need to expressly mention it to CLAIMANT [*ibid.*]. Moreover, by answering that it largely accepted RESPONDENT's proposal "with an amendment as to the **place of arbitration**" alone (emphasis added), CLAIMANT

made RESPONDENT aware that it agreed with the remaining of the proposal, *i.e.*, that it understood the dispute resolution clause in an equal narrow way [*Exh. R2, p. 34, ¶3*].

b. Under an objective interpretation, it was the Parties intention to exclude any exceptional powers from the Tribunal, such as the ones concerning contract adaptation

44. Should the Tribunal decide that there was an absence of common intention, the question must be determined by an objective interpretation. In this respect, the Tribunal must consider what would be the understanding of a reasonable third person of the same kind as the Parties, under the same circumstances [*Art. 8(2) CISG; Schlechtriem, p. 38; Chemical Products Case*].

45. When RESPONDENT suggested the dispute resolution clause, it made very clear that its proposal had restricted the otherwise fairly broad wording of the HKIAC Model Clause [*Exh. R1, p. 33, ¶1*]. Any reasonable third person in the same circumstances as CLAIMANT would understand that it was RESPONDENT's intention to exclude the conferral of any exceptional powers to the Tribunal [*Art. 8(2) CISG; Chemical Products Case*]. This would naturally include the powers to adapt the Contract. Furthermore, any reasonable third person would understand CLAIMANT's reply as accepting all of RESPONDENT's suggestions, with the only exception as to the neutral place of arbitration [*Exh. R2, p. 34, ¶3*].

46. In conclusion, under either a subjective or objective interpretation, this Tribunal must hold that it was never the Parties' intention to grant exceptional powers to the Tribunal, such as the ones concerning the adaptation of the Contract.

2. The Tribunal lacks the powers to adapt the Contract, since there was no express authorisation by the Parties

47. In case the Tribunal finds the law of Danubia not applicable and in accordance with an international approach, the Tribunal still lacks the powers to adapt the Contract, since there was no express authorisation by the Parties.

48. The arbitration agreement is the basic source of the arbitrator's powers [*Berger II, p. 5; Gaillard/Savage p. 11*]. The trend in international arbitration case law is to construe the arbitrator's powers in a rather narrow and conservative way, thus excluding the necessary powers for contract adaptation [*Berger II, p. 5; Gaillard/Savage, p. 25; Redfern/Hunter, p. 524; Himpurna Case*]. The creative nature of contract adaptation has been interpreted as requiring

an express authorisation by the parties, as in fact it is required by the Danubian law [*ANoA, p. 31, ¶13; Berger II, p. 5, Gaillard/Savage, p. 25*, *Beisteiner, p. 109; Brunner, p. 493; Aminoil Case*].

49. Besides the absence of any reference in the Arbitration Agreement concerning contract adaptation by the Tribunal [*supra, ¶¶22-36*], the Hardship Clause must also not be construed as empowering the Tribunal in that sense. Indeed, there is no conferral of any creative competence nor any guidelines as to the scope and extent to which the adaptation would be accomplished [*Berger II, p. 5*].

50. Moreover, to free arbitrators from the application of strict rules of law would resemble a decision *ex aequo bono* or as an *amiable compositeur*, which also requires an express authorisation by the Parties [*Art. 36.2 HKIAC Rules; Art. 28(3) Model Law; Berger II, p. 2; Born, p. 284*]. In fact, even when the parties expressly grant these powers, the arbitrators must be cautious when interpreting clauses empowering them to rule in equity as enabling them to adapt the contract to future circumstances [*Gaillard/Savage, p. 26; Mexican Construction Company v. Belgian Company*].

51. Therefore, according to an anational approach, this Tribunal does not have the necessary powers to adapt the Contract.

3. By adapting the Contract, the Tribunal would be disregarding the principle of *pacta sunt servanda*

52. Finally, one may easily understand that to grant the Tribunal the powers to modify what was originally decided between the Parties overrules the principle of *pacta sunt servanda* as an expression of party autonomy [*Ferrario, p. 138; Gaillard/Savage, p. 27; Bernini, p. 197; ICC Award Nº. 1512*]. According to this principle, "parties must adhere to the contractual terms on which they agreed" [*Beisteiner II, p. 80*].

53. Furthermore, there is an uncontroversial presumption that the parties to international contracts are commonly experienced professionals, responsible for the necessary precautions against unforeseen events [*Berger II, p. 6; Gaillard/Savage, p. 25; French transporter v. English company*]. *In casu,* this means that if the Parties decided not to include the possibility of the adaptation of the Contract by the Tribunal, this remedy must not be imposed upon them.

54. Thus, allowing for the adaptation of the Contract would be a violation of the principle of *pacta sunt servanda* inasmuch as it modifies what was originally agreed between the Parties.

CONCLUSION ON ISSUE I

55. In view of the above, it is RESPONDENT's submission that this Tribunal does not have the necessary powers to adapt the Contract. Firstly, the Parties agreed on the law of Danubia to govern the interpretation of the Arbitration Agreement, which leads to a narrow interpretation of its scope. Secondly, even if the Tribunal were to disregard the law of Danubia and use an anational approach, it would still lack the necessary powers to adapt the Contract.

ISSUE II: THE TRIBUNAL MUST REFUSE THE SUBMISSION OF THE PARTIAL INTERIM AWARD BY CLAIMANT

56. The Partial Interim Award must not be admitted by the Tribunal as evidence. Firstly, it is irrelevant to the case and immaterial to its outcome **(A)**. Secondly, the circumstances in which it was obtained preclude its admissibility **(B)**. Lastly, it is confidential **(C)**.

A. The Partial Interim Award is not relevant to the case nor material to its outcome

57. The two basic prerequisites regarding the admissibility of evidence are relevance and materiality [*Pilkov, p. 154; Marghitola, p. 48*]. While relevance concerns the general relation between the evidence and the case, materiality is related to the outcome of the case [*Pilkov, pp. 148-149; Waincymer pp. 858-859*].

58. These criteria are referred to in Art. 22.3 HKIAC Rules, which provides that the tribunal may request the production of relevant and material evidence. Thus, this was the criteria chosen by the Parties by agreeing upon the HKIAC Rules [*Exh. C3, p. 14 (Clause 15)*]. Furthermore, according to Art. 9(2)(a) IBA Rules, the tribunal must exclude evidence that is not relevant nor material. Although not legally binding, the IBA Rules must also be considered by the Tribunal. They "provide an efficient, economical and fair process for the taking of evidence in international arbitration", being "particularly useful when the parties come from different legal cultures" [*IBA Rules, p. 2; NoA, p. 7, ¶15; PO2, p. 61, ¶44*].

59. Hence, despite the fact that arbitral tribunals do possess discretion in the admission of evidence [*Cl. Memo., pp. 12-13 ¶¶49-50*], this power is limited when there are grounds for the refusal of evidence [*Art. 22.2 HKIAC Rules; Art. 9(1)(2) IBA Rules; Art. 19(2) Model Law; Pilkov, p. 147; Waincymer, p. 792; The People v. O'Brien; P. v. Q.; Jones v. University of Warwick*]. Namely, when the prerequisites of relevance and materiality are not met, a piece of evidence should not be admitted [*Art. 9(2)(a) IBA Rules; Pilkov, p. 154; Boykin/Havalic, pp. 34-35; Marghitola, p. 48; Singh v. Singh*].

60. In this sense, and contrary to what is alleged by CLAIMANT [*Cl. Memo., pp. 15-17, ¶¶66-76*], RESPONDENT will demonstrate the irrelevance of the PIA to the present case **(1)** and the immateriality to its outcome **(2)**, which must lead to the refusal of the PIA by the Tribunal.

1. The Partial Interim Award is not relevant to the case

61. Evidence is considered relevant when it has a "logical connection" with what it is purported to prove in the case [*Pilkov, p. 148; Born, p. 2362*]. If this prerequisite is not verified, the evidence should not be admitted [*Art. 9(2)(a) IBA Rules; Boykin/Havalic, pp. 34-35; Singh v. Singh*]. In this regard, CLAIMANT wrongfully alleges that the PIA is relevant because the facts laid out in it "are similar if not identical to those of the Parties' dispute" [*Cl. Memo., p. 16, ¶¶70-72*]. However, the irrelevance of the PIA will be demonstrated by RESPONDENT.

62. Indeed, the PIA lacks any "logical connection" with what it purports to prove in the case, since the dispute in the other arbitration proceedings is not comparable to the case at hand [*Pilkov, pp. 148-149; cf. Waincymer pp. 858-859*].

63. On the one hand, the parties involved in the other arbitration proceedings agreed on a much broader hardship clause [*ICC Hardship Clause 2003; PO2, p. 60, ¶39*] and, more importantly, on a much broader arbitration clause, *i.e.*, the Model HKIAC-Arbitration Clause "**with all additions**" (emphasis added) [*PO2, p. 60, ¶39*]. Furthermore, the law of Mediterraneo was expressly chosen by the other parties to govern their arbitration agreement. This law provides for a broader interpretation of the arbitration clause, granting arbitral tribunals the power to adapt contracts [*NoA, p. 7, ¶¶15-16; ANoA, p. 31, ¶13*]. Consequently, the other arbitral tribunal decided that it had powers to adapt the contract [*PO2, p. 60, ¶39*].

64. On the other hand, in the present case, the Hardship Clause and the Arbitration Agreement do not allow the adaptation of the Contract by the Tribunal, since they were narrowed down deliberately [*ANoA, p. 30, ¶¶4, 9; Exh. R3, p. 35, ¶3; PO2, p. 56, ¶12; ANoA, p. 31, ¶13; Exh. R1, p. 33*]. Additionally, the Arbitration Agreement is governed by the Danubian law, which requires the Parties' express empowerment for the adaptation of the Contract by the Tribunal. Such express authorisation was never granted [*supra, ¶¶32-36*].

65. Hence, the clauses in the contracts underlying both proceedings are completely different and governed by laws of distinct jurisdictions. This necessarily demands different legal consequences. In other words, CLAIMANT is comparing "apples to oranges".

66. All in all, as RESPONDENT is allowed to affirm by its own opponent in the other arbitration proceedings [*p. 50, ¶3*], CLAIMANT's assertions are taken out of context and its allegations of

contradictory behaviour are ill-founded. The Tribunal must, thus, find the PIA manifestly irrelevant.

2. The Partial Interim Award is not material to the outcome of the case

67. The criterion of materiality depends on the criterion of relevance. While a piece of evidence can be relevant and not material, the opposite is not possible [*Pilkov, p. 149*]. Accordingly, since the PIA is not relevant to the case, it is neither material to its outcome. However, should this Tribunal find the PIA relevant, it still cannot be considered material.

68. Firstly, on what concerns materiality, "factual rather than legal issues are meant" [*Marghitola, p. 53; cf. Waincymer, p. 859*]. As it is recognised by CLAIMANT itself, the fact that the arbitral tribunal of the other proceedings has considered that it had the power to adapt the contract is merely a "legal issue" [*Cl. Memo., p. 17,* ¶*74*].

69. Secondly, evidence is only material if it is needed to influence the tribunal's decision on the case [A*rt. 22.3 HKIAC Rules; Art. 9(2)(a) IBA Rules; Born, p. 2362; Marghitola, pp. 52-53; Waincymer, p. 859*, *Dessemontet, pp. 28-29; Lummus Global Amazonas v. Aguaytia Energy del Peru; OLG, 2 Sch 04/99*]. Contrary to what CLAIMANT affirms [*Cl. Memo., p. 17,* ¶*74*], the PIA could not have any persuasive effect on this Tribunal's decision, considering that there are no doubts that the facts concerning both cases are completely different and independent [*supra,* ¶¶*63-65*].

70. In conclusion, due to PIA's lack of relevance and materiality, the Tribunal must refuse the submission.

B. The Tribunal must not admit unlawfully obtained evidence

71. Besides relevance and materiality, there are other widely recognised grounds for the refusal of evidence [*Art. 9(2) IBA Rules; Commentary on the IBA Rules pp. 25-27; Born, pp. 2311-2312; Pilkov, p. 150; Waincymer, p. 792; Freedman, p. 741; Irenton, p. 233*]. Indeed, on what concerns the admissibility of evidence, the tribunal's discretionary powers and the parties' autonomy are more limited [*Arts. 9(2) IBA Rules; Pilkov p. 154*]. For instance, in principle, illegally obtained evidence is inadmissible, considering it is contrary to international public policy [*Pilkov, p. 154; Peiris, p. 315*].

72. In this case, it is RESPONDENT's submission that since the PIA was unlawfully obtained, it must not be admitted by this Tribunal. Taking into account the circumstances in which it was obtained, this Tribunal must consider that CLAIMANT was involved in the disclosure of

the PIA **(1)**. Furthermore, the inadmissibility of the PIA would have an important deterrent effect **(2)**.

1. CLAIMANT was involved in the disclosure of the Partial Interim Award

73. When analysing the admissibility of illegally obtained evidence, the Tribunal should weight two competing interests: the truth *versus* the refusal of any juridical effects to anti-juridic acts [*De Cossío, p. 36; BGE, 5P.308/1999; BGH, XII ZR 210/04*]. To that effect, the Tribunal is required to evaluate the importance of the PIA. *In casu*, the importance is inexistent [*supra, ¶¶61-70*]. Then, the Tribunal must take into account the nature of the illegal act and the circumstances under which it was committed, especially **who** committed it [*Waincymer, p. 797; Peiris, p. 332; Giovannini/Mourre*, p. 184*; Wirth, p. 184; The People v. O'Brien; BGE, 5P.308/1999; Jones v. University of Warwick*].

74. If the PIA was obtained by an illegal hack of RESPONDENT's computer system, this severely violates its right of privacy. Thus, the refusal of the PIA by this Tribunal is demanded [*Peiris, p. 324; De Cossío, p. 37; Wirth, p. 184; Weeks v. US; Mapp v. Ohio; Lebel Case*].

75. Furthermore, some tribunals have in fact admitted illegally obtained evidence. However, contrary to what had happened in this case, the party seeking to rely on the referred evidence had not contributed to its disclosure [*Waincymer, p. 797; Methanex v. USA; Libananco Holdings v. Turkey; Caratube v. Kazakhstan*]. It is believed that a party cannot benefit from its own wrong, according to the "clean hands doctrine" [*ibid.*]. Contrary to what is alleged by CLAIMANT [*Cl. Memo. p. 13, ¶51*], the Tribunal must consider that CLAIMANT contributed to the disclosure of the PIA.

76. In fact, CLAIMANT was actively trying to acquire RESPONDENT's submissions and the PIA. Promptly after hearing about the other proceedings, CLAIMANT tried to acquire them from Mr. Velazquez [*PO2, pp. 60-61, ¶41*]. Since the latter could not arrange them, CLAIMANT contacted a company with "a doubtful reputation to where it gets its information" in order to obtain a copy of the PIA [*PO2, pp. 60-61, ¶41*]. Then, CLAIMANT paid to this doubtful company the considerable amount of 1000 US$ exclusively for the purpose of obtaining and using the PIA in the current proceedings [*PO2, pp. 60-61, ¶41*].

77. It is, thus, crystal clear that CLAIMANT's hands are not clean at all. If it did not hack RESPONDENT's computer system itself, CLAIMANT at least actively contributed to the disclosure of the PIA. Therefore, CLAIMANT did not respect the standard for good faith and fairness in the arbitration proceedings, strongly contributing to the breach of RESPONDENT's

right to privacy [*Art. 13.5 HKIAC Rules, Art. 18 Model Law; Art. 9(2)(g) IBA Rules; Boykin/Havalic, pp. 33-34; Methanex v. USA*].

78. For the reasons set out above, it is inevitable that this Tribunal finds the PIA inadmissible. Otherwise procedural fairness would be disregarded, which can lead to an annulment of the award [*Art. 13.5 HKIAC Rules, Art. 18 Model Law; Art. 9(2)(g) IBA Rules, Art. V(d) NY Convention; De Cossío, p. 36; Boykin/Havalic, pp. 33-34; Methanex v. USA; Persia Bank Case; Bible Case;* FFU Case; *A.N., Case No. 2830/2013]*.

2. The inadmissibility of the Partial Interim Award would have a deterrent effect

79. The quest for the truth must be balanced against the quest to not give juridical effects to anti-juridic acts [De *Cossío, pp. 35-36*]. Either if the evidence was obtained through a breach of a confidentiality agreement or through hacking, by accepting the submission of the PIA, the Tribunal would be giving juridical effects to an unlawful act. On top of that, the admission of the PIA would not by any means contribute to the quest for the truth [*supra, ¶¶61-70*].

80. Besides, the Tribunal must discourage the resort to unfair methods of obtaining evidence, under the penalty of sending the message that all means to obtain evidence are valid [*De Cossío, p. 36; Couleur, p. 397*; *Adair v. M'Garry; US v. Calandra*].

C. Confidentiality does constrain the discretionary power of the Tribunal

81. Moreover, it is worth noting that confidentiality is the cornerstone of arbitration [*Colin Yc Ong, pp. 169-170; Cremades/Cortés, p. 26; Moser/Bao, p. 281; Moser/Cheng, p. 7; Born, p. 2780; Dessemontet, p. 1; Queen Mary Survey, p. 3*; *Insurance v. Lloyd's Syndicate; Ali Shipping v. Shipyard Trogir; Myanma Yaung Chi Oov. Win Win Nu*]. Consequently, the confidential nature of a piece of evidence constitutes a sufficient ground for its exclusion [*Art. 9(2)(e) IBA Rules; Danube Case; Chorzów Case*].

82. Contrary to what CLAIMANT asserts [*Cl. Memo., p. 13-15; ¶¶53-65*], RESPONDENT submits that confidentiality does constrain the admissibility of the PIA, considering that it is not publicly available **(1)**, the HKIAC Rules forbid its disclosure **(2)** and a balance of interests leads to its inadmissibility **(3)**.

1. The Partial Interim Award is not publicly available

83. If CLAIMANT had not been involved in the unlawful act [*supra, ¶¶73-78*] and if the PIA was publicly available, one may defend that the evidence could be admitted [*Bible Case*]. However,

CLAIMANT's allegation that the PIA is publicly available [*Cl. Memo., p. 52,* ¶*55*] is misleading and plainly runs against the facts of the case.

84. Firstly, CLAIMANT itself had to contact a specialised company in order to obtain the PIA [*PO2, pp. 60-61,* ¶*41*]. One cannot simply assume that the company would sell the PIA to anyone who wished to obtain it, especially taking into account its doubtful reputation [*ibid.*]. Secondly, CLAIMANT had to pay a considerable amount in order to have access to it [*ibid*]. Hence, by not being easily accessible, the PIA cannot be considered as public.

85. Additionally, contrary to what CLAIMANT alleges [*Cl. Memo., p. 14* ¶¶*56-57*], RESPONDENT ensured the confidentiality of the PIA, since it was kept in its private computer system, not accessible to the public [*Dessemontet, p.18*]. The trivial fact that RESPONDENT's computer's firewall was outdated does not destroy the confidential nature of the PIA [*PO2, p. 61,* ¶*42*].

86. Maintaining its confidential nature and not having been voluntarily disclosed by RESPONDENT, the PIA cannot be used in the present arbitration proceedings [*Dessemontet, pp. 15-16; Smeureanu, p. 111-112; Caratube International Oil v. Kazakhstan*].

87. In any case, even if the PIA could be easily accessible by anyone, its confidentiality character would be preserved, given that it was obtained unlawfully, either by a breach of a confidentiality agreement or by hacking [*p. 51,* ¶*3; PO1, PO1, p. 53, b.; Wee Shuo Woon v. HT S.R.L.*].

88. Therefore, the PIA remains protected by confidentiality, which constrains its admission.

2. The applicable procedural rules forbid the disclosure of the Partial Interim Award

89. Contrary to CLAIMANT's allegations [*Cl. Memo., p. 14,* ¶¶*58-60*], the PIA is protected under the rules of confidentiality of HKIAC 2013 Rules.

90. Indeed, the parties in the other arbitration proceedings agreed to arbitrate under the HKIAC 2013 Rules [*PO2, p. 60,* ¶*39*]. By agreeing to do so, the mentioned parties, the arbitral tribunal and other third parties involved in the proceedings are "bound by an express duty of confidentiality" [*Art. 42.1 HKIAC 2013 Rules; Moser/Bao, p. 282; Colin Yc Ong, p. 170*]. Accordingly, the very existence of the arbitral proceedings and the PIA cannot be revealed [*ibid.*].

91. Although there are exceptions to the confidentiality duty laid out in Art. 42.3 HKIAC 2013 Rules, they are not applicable *in casu*. Namely, in a wrongful attempt to support its submission, CLAIMANT indicates the exception laid out on Art. 45.3(d) HKIAC 2018 Rules,

which lacks any parallel with the HKIAC 2013 Rules. Even if the Rules of 2018 would be applicable, the referred exception would never justify a disclosure of the PIA.

92. Even though Art. 45.3(d) HKIAC Rules allows the disclosure of confidential awards for the purposes of a joinder of additional parties or consolidation of arbitrations - as CLAIMANT stated [*Arts. 27, 28 HKIAC Rules; Cl. Memo., p. 14, ¶59*] - these issues are not to be addressed in the current proceedings [*PO1, pp. 52-32, ¶III*]. Firstly, as CLAIMANT asserts, one of the prerequisites is that both proceedings must raise a "common question of law of fact" [*Cl. Memo., p. 14, ¶59*]. Moreover, and besides the facts underlying both proceedings being utterly different [*supra, ¶¶63-66*], the question of law raised is also incomparable. The powers of the arbitral tribunal and the question concerning whether or not adaptation is due strongly depends on the contract clauses, which are different *in casu* [*supra, ¶¶63-66*]. In any case, the applicability of Arts. 27 and 28 HKIAC Rules in the terms of Art. 45.3(d) require other prerequisites which are obviously not met. Namely, there is no agreement between the parties concerning joinder nor the rights to relief claimed arise from are "the same transaction of a series of related transactions" [*Art. 27.1(a)(b), 28.1(c)*].

93. Furthermore, although not expressly raised by CLAIMANT, Art. 42.3 is also not applicable. The disclosure of the PIA could not protect any legal right or interest of Claimant. In the other proceedings, the arbitral tribunal merely decided that the contract agreed between the parties granted the Tribunal powers to adapt [*PO2, p. 60, ¶39*]. In the present case, the Contract does not grant such powers [*Art. 42.3 HKIAC 2013 Rules; supra, ¶¶22-54*]. Furthermore, it is recognised that the reference to "court" or "judicial authorities" does not include arbitral tribunals [*Art. 42.3 HKIAC 2013 Rules; Moser/Bao, p. 286; S.B.P. & Co v. Patel Engineering Ltd*].

94. Thus, Respondent respectfully requests the Tribunal to consider the PIA inadmissible, since its disclosure is not authorised by the rules applicable to the other proceedings.

3. A balance of interests leads to the inadmissibility of the Partial Interim Award

95. CLAIMANT asserts that, when analysing the admissibility of illegally obtained evidence, the Tribunal should balance, on the one hand, the confidential nature of the evidence and, on the other hand, its necessity to the proceedings [*Cl. Memo., p. 15, ¶62; Boykin/Havalic, p. 37, FFU Case*]. It is RESPONDENT's submission that such balance of interests will necessary lead to the conclusion that the PIA should not be admitted as evidence in the current proceedings.

96. Firstly, the PIA maintains its confidential nature, since it is not in the public domain [*supra, ¶¶83-88*]. Furthermore, the applicable rules demand its non-disclosure [*supra, ¶¶89-94*].

97. Secondly, the PIA is not relevant to the case nor material to its outcome [*supra, ¶¶57-70*]. Thus, there is no "persuasive authority regarding the legal issues at hand" [*Cl. Memo., p. 15, ¶63*], since the underlying facts in both arbitrations are completely different [*supra, ¶¶63-66*].

98. Finally, the Tribunal must not disregard that CLAIMANT was involved in the unlawful obtainment of the PIA, by paying 1000 US$ to a company with "doubtful reputation" in order to obtain confidential material to be used in the current proceedings, breaching procedural fairness [*supra, ¶¶73-78*].

99. In light of the above, a balance of interests will inevitably lead to the inadmissibility of the PIA by the Tribunal [*A.N., Case No. 2830/2013*].

CONCLUSION ON ISSUE II

100. It is RESPONDENT's submission that the PIA must not be admitted by the Tribunal as evidence. Besides being completely irrelevant and, consequently, immaterial, CLAIMANT actively contributed to its unlawful obtainment, breaching its procedural duties. Furthermore, the PIA is protected by confidentiality.

SUBSTANTIVE ISSUES

101. The imposition of the import tariff by the Government of Equatoriana is clearly within CLAIMANT's sphere of risk. Therefore, CLAIMANT is not entitled to the payment of US$ 1,250,000, neither under the Hardship Clause **(Issue III)**, nor under the law applicable to the Contract **(Issue IV)**.

ISSUE III: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER THE HARDSHIP CLAUSE

102. When negotiating the terms of the Contract, the Parties agreed on delivery on the basis of DDP [*Exh. C3, p. 11, ¶2; Exh. C4, p. 12, ¶3*]. Accordingly, CLAIMANT assumed all costs and risks until the moment when the goods were brought to the place of destination and were made available to RESPONDENT [*Buydaert, pp. 88-89; Ramberg, p. 149; Lima Pinheiro, p. 513*]. This naturally includes import duties [*ibid.; Bergami, p. 3*]. Nonetheless, the Parties chose to temper some of those risks in a hardship clause [*Exh. C5, p. 14 (Clause 12)*]. The Hardship Clause states that "[s]eller shall not be responsible [...] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Exh. C5, p. 14 (Clause 12)*]. Therefore, the cost increase resulting from the

imposition of the tariff does not constitute a case of hardship **(A)**. But even if it did, the Hardship Clause does not provide for adaptation of the Contract as a remedy **(B)**.

A. The imposition of the tariff is not a case of hardship under the terms of the Hardship Clause

103. Contrary to CLAIMANT's allegations [*Cl. Memo., p. 19, ¶¶87-105*], the present change of circumstances does not constitute hardship under the terms of the Hardship Clause, since the latter provides for a narrow definition of hardship **(1)** and the imposition of the tariff falls outside its scope **(2)**.

1. The Hardship Clause provides for a narrow definition of hardship

104. The interpretation of the Contract must be carried out according to the rules of contract interpretation enshrined in Art. 8 CISG, which establishes both a subjective and an objective method of interpreting statements and conducts by a party [*Art. 8(1)(2) CISG; supra, ¶42*]. The negotiations between the Parties must be taken into consideration [*Art. 8(3) CISG; supra, ¶42*].

105. Contrary to what CLAIMANT alleges [*Cl. Memo., p. 19, ¶¶88-97*], both a subjective **(a)** and an objective **(b)** interpretation of the Hardship Clause reflect a narrow definition of hardship, demonstrating the Parties' intent to exclude from the Hardship Clause tariffs like the one at stake.

a. A subjective interpretation of the Hardship Clause reflects a narrow definition of hardship

106. The subjective interpretation method in the CISG requires that "statements made by [...] a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was" [*Art. 8(1) CISG; cf. Chemical Products Case; Wine Case; Coffee Case*]. *In casu*, this will lead to the conclusion that the Hardship Clause reflects a narrow definition of hardship, leaving import tariffs like the one at stake outside its scope.

107. Acknowledging it would be was assuming additional costs by agreeing on a DDP delivery, CLAIMANT required a price increase [*Exh. C4, p. 12, ¶3*]. Furthermore, CLAIMANT stated that it was not willing to "take over any further risks associated with such a change in the delivery terms", or that "[a]t minimum, a hardship clause should be included into the contract" [*Exh. C4, p. 12, ¶4*]. Exempting CLAIMANT from all the risks was definitely not an option for RESPONDENT [*ANoA, p. 30, ¶4*]. Hence, the Parties chose to regulate some risks associated with DDP in the Hardship Clause, opting for the second path proposed by CLAIMANT and

excluding the first one. Indeed, exemption from all the risks would render the DDP clause meaningless.

108. Moreover, RESPONDENT rejected CLAIMANT's proposal of the ICC Hardship Clause claiming that it was too broad [*PO2, p. 56, ¶12; ANoA, p. 30, ¶4; Exh. R3, p. 35*]. Consequently, the Hardship Clause was formulated in a narrower way. Indeed, it applies specifically to "additional health and safety requirements" and to "comparable" events that must fulfill strict criteria concerning unforeseeability and onerosity [*Exh. C5, p. 14 (Clause 12)*].

109. Additionally, RESPONDENT asked for DDP delivery because, *inter alia*, CLAIMANT had experience with "the necessary export and import documentation" [*Exh. C3, p. 11, ¶2*]. Therefore, it was clear that CLAIMANT would be the one responsible for everything that concerned imports and exports, as CLAIMANT expressly admitted in the NoA [*NoA, p. 7, ¶18*]. This Tribunal must not disregard the Parties' conduct after the conclusion of the Contract, since it is determinative of their intention [*Art. 8(3) CISG*].

110. As consequence, the Hardship Clause must be interpreted narrowly, under the penalty of its core purpose being neglected and the will of the Parties being disregarded. A subjective interpretation of the Hardship Clause undoubtedly indicates that the Parties' intent was to place import tariffs inside CLAIMANT's sphere of risk.

b. An objective interpretation of the Hardship Clause reflects a narrow definition of hardship

111. In case the Tribunal considers that the intention of the Parties cannot be determined, it must resort to the objective method enshrined in Art. 8(2) CISG. Accordingly, a reasonable third person of the same kind as both CLAIMANT and RESPONDENT would still reach the conclusion that the Hardship Clause provides for a narrow definition of hardship. Consequently, import tariffs fall outside its scope.

112. Contrary to what CLAIMANT alleges [*Cl. Memo., p. 20, ¶94*], the fact that the Hardship Clause refers to "comparable unforeseen events making the contract more onerous" does not lead a reasonable third person to conclude that this definition is open to any event that slightly alters the contractual balance [*Exh. C5, p. 14, (Clause 12)*]. In order to be considered as cases of hardship, these "events" have to meet the criteria expressed in the Hardship Clause, which *in casu* are not met [*infra, ¶¶116-130*]. Therefore, it is wrong to conclude that such wording provides for a broad definition of hardship.

113. Furthermore, and contrary to CLAIMANT's allegations [*Cl. Memo., pp. 20-21, ¶95*], any reasonable third person would find it irrelevant that CLAIMANT entered into a contractual relationship hoping to overcome its financial difficulties. If the purpose of the Contract was to protect CLAIMANT from financial harm, the economic basis of the Contract as a sales agreement would be destroyed [*Exh. C2, p. 10, ¶3*]. If CLAIMANT considered itself to be particularly sensitive to certain risks, like import tariffs, it should have insisted on mentioning them expressly in the Hardship Clause. Indeed, parties are free to negotiate contractual terms, including what stays within their particular sphere of risk [*Art. 1.1 UNIDROIT Principles; Art. 1:102 (1) PECL; Sund-Norrgård, §1, ¶36; Alpa, p. 120; Makale, p. 82; Fucci, p. 11; Carlsen, §II B*]. Since CLAIMANT did not propose such express reference, the present change of circumstances must be judged in light of the "comparable unforeseen events making the contract more onerous" criterion [*Exh. C5, p. 14 (Clause 12)*].

114. Lastly, it is common sense that the international trade environment is in constant change [*Zaccaria, p. 136; Schwenzer, p. 709*]. As CLAIMANT itself recognised, during trade wars, one usually witnesses "the imposition of exceptional and unexpected tariffs" [*Cl. Memo., p. 21, ¶96*]. Bearing this in mind, CLAIMANT could have taken additional precautions and be prepared for the consequences that might come from any change of circumstances that could alter the equilibrium of the contract [*Kessedjian, p. 416; Gaillard/Savage, ¶36; Berger II, p. 6; French transporter v. English company*]. However, the Parties opted for a narrow definition of hardship, which must fulfil strict criteria.

115. In light of the above, both a subjective and an objective interpretation of the Hardship Clause demonstrate that it provides for a narrow definition of hardship, leaving import tariffs inside CLAIMANT's sphere of risk.

2. The imposition of the tariff falls outside the scope of the Hardship Clause

116. Contrary to what CLAIMANT states [*Cl. Memo., p. 19, ¶88*], RESPONDENT does not consider the Hardship Clause as only applicable to additional health and safety requirements. In fact, the Hardship Clause also allows an exemption from "comparable" events, as long as they are **unforeseen** and **make the contract more onerous** [*Exh. C5, p. 14 (Clause 12)*].

117. It is RESPONDENT's submission that the imposition of the tariff does not fulfil neither the unforeseeability **(a)** nor the onerosity requirements **(b)**. Thus, it falls outside the scope of the Hardship Clause.

a. The imposition of the tariff does not fulfil the unforeseeability requirement

118. It is generally recognised that if an event is foreseeable, the aggrieved party cannot invoke hardship, since it is considered to have assumed that risk [*Tallon, p. 580; CMS v. Argentina case; ICC Case No. 8486*]. Contrary to what CLAIMANT affirms [*Cl. Memo., pp. 21-22, ¶¶99-101*], the imposition of the tariff by the Government of Equatoriana was foreseeable.

119. This trade war was initiated by Mediterraneo, which had already shown signs of protectionist tendencies, particularly on what concerns agricultural goods [*Exh. C6, p. 15; PO2, p. 58, ¶23*]. In this context, CLAIMANT, a company based in Mediterraneo, should have been aware of the prospect of import tariffs being imposed by its own country against third states. Even so, CLAIMANT chose to enter into an international sales contract involving agricultural goods.

120. Additionally, CLAIMANT itself admits that "unexpected tariffs" are to be expected during trade wars [*Cl. Memo., p. 21, ¶96*]. Accordingly, CLAIMANT must have had predicted that if a trade war was started by Mediterraneo against Equatoriana, a retaliation by the latter would follow. Indeed, this is not the first time that the Equatorianian Government retaliates in such manner [*NoA, pp. 7-8, ¶19; Exh. C6, p. 15, ¶2*].

121. Therefore, the Tribunal must find the imposition of the tariff by Equatoriana to be foreseeable.

b. The imposition of the tariff does not fulfil the onerosity requirement

122. Contrary to CLAIMANT's submission [*Cl. Memo., p. 22, ¶¶102-105*], the onerosity requirement in the Hardship Clause is not fulfilled, since the present change of circumstances is not significant **(i)**. Furthermore, CLAIMANT's financial situation must not be taken into account to that effect **(ii)**.

i. The change of circumstances is not significant

123. The consequences of the imposition of the tariff are not significant in order to be considered as a situation of hardship.

124. According to the internationally recognised principle of *pacta sunt servanda*, parties must perform their contractual obligations even when the circumstances change after the conclusion of the contract; otherwise, the "certainty of law would collapse" [*Zaccaria, p. 135; cf. Rimke, p. 197; Azevedo da Silveira, p. 199*]. In this sense, adapting contracts as a result of slight changes in the circumstances "would be **fatal** for international trade" (emphasis added) [*Lindström, §I*]. Therefore, exceptions to this principle must only be allowed in extreme cases [*Kessedjian, p. 416; ICC Case No. 8486*]. This is to say that only from a certain "limit of

sacrifice", where performance has become **excessively** onerous, is a party in hardship [*Brunner, p. 499; cf. Gulf Oil v. FPC; ICC Case No. 8486*].

125. The present tariff corresponds to 30% of the last shipment, which represents only 15% of the price of a total of three shipments [*Exh. C5, p. 14 (Clause 8); Exh. C7, p. 16, ¶1*]. Thus, this tariff must not be regarded as a significant change of circumstances [*Art. 6.2.2, Comment 2, UNIDROIT Principles 1994; Nuova Fucinati v. Fondmetall International; American Trading Production v. Shell Int'l Marine*].

126. In conclusion, the present change of circumstances is not significant in order to justify coverage by the Hardship Clause.

ii. CLAIMANT's financial situation must not be taken into account

127. CLAIMANT's financial situation must not be taken into account to the effect of determining whether this is a case of hardship, contrary to CLAIMANT's submission [*Cl. Memo., p. 22, ¶103*].

128. According to the principle of party autonomy, parties are free to enter into contractual relationships with whom they wish and to define its terms as they wish [*Makale, p. 82; Sund-Norrgård, §1, ¶36; Magnus, §5(b), ¶1*]. Since parties are responsible for that choice, the financial situation of a party before the change of circumstances is not relevant to determine whether it is in hardship or not. Therefore, and taking into account that contracts necessarily come with risks, CLAIMANT should take full responsibility for entering into a contractual relationship when it was already in an unfavorable financial situation [*Exh. C8, p. 17; PO2, p. 59, ¶29; Papp, p. 430*].

129. In conclusion, bearing in mind that the present change of circumstances is not significant and that CLAIMANT's financial situation must not be taken into account, the onerosity requirement included in the Hardship Clause is not fulfilled.

130. In light of the above, CLAIMANT is not facing a situation of hardship under the Hardship Clause agreed to by the Parties.

B. The Hardship Clause does not entitle CLAIMANT to the adaptation of the contractual price

131. Even if the Tribunal considers that CLAIMANT is facing hardship pursuant to the Hardship Clause, CLAIMANT is not entitled to the adaptation of the contractual price.

132. Besides the fact that this solution is not expressly mentioned in the Hardship Clause nor anywhere else in the Contract, it was not the intention of the Parties to provide for adaptation nor would a reasonable third person make such interpretation [*Art. 8(1)(2) CISG*].

133. Despite having discussed the possibility of adaptation, CLAIMANT and RESPONDENT only had a "tentative agreement" on the matter [*Exh. C8, p. 17, ¶5*]. As a result, the possibility of adaptation was not included in the Contract, which clarifies the intent of the Parties [*Art. 8(1) CISG*]. Instead, the remedy provided for in the Hardship Clause is exemption from responsibility [*Exh. C5, p. 14 (Clause 12)*]. Indeed, it would be wrong to impose a remedy other than the one agreed upon by the Parties, under penalty of going against their will [*Arts. 36.1, 36.3 HKIAC Rules; cf. Berger II. p. 6; ARAMCO-Award*].

134. A reasonable third person would also interpret the Hardship Clause in the same way [*Art. 8(2) CISG*]. Besides the fact that its wording is crystal clear concerning the remedy for hardship, it is widely accepted that, in the absence of a clause providing for renegotiation or adaptation, a party is not obliged to renegotiate contractual terms and the principle of *pacta sunt servanda* must prevail [*Brunner, pp. 481-482; McKendrick, p. 150; Berger II, p. 6*].

135. For all these reasons, should the Tribunal consider that the present change of circumstances puts CLAIMANT in a situation of hardship, CLAIMANT is not entitled to the adaptation of the Contract.

CONCLUSION TO ISSUE III:

136. According to the Hardship Clause, the cost increase resulting from the imposition of the tariff does not put CLAIMANT in a situation of hardship. In any case, the Hardship Clause does not entitle CLAIMANT to an adaptation of the contractual price. Hence, this Tribunal is respectfully requested to reject CLAIMANT's prayer for RESPONDENT to cover 25% of the cost increase, which corresponds to US$ 1,250,000.

ISSUE IV: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER THE LAW GOVERNING THE CONTRACT

137. CLAIMANT argues that even if the current change of circumstances is not covered by the Hardship Clause, CLAIMANT is still entitled to the payment of US$ 1,250,000 under the CISG, under the UNIDROIT Principles or, alternatively, by reason of RESPONDENT's conduct [*Cl. Memo., pp. 24-30, ¶¶112-145*].

138. However, neither the CISG **(A)** nor the UNIDROIT Principles **(B)** provide for the adaptation of the Contract as a result of the imposition of the tariff. Furthermore, RESPONDENT is not undertaking contradictory behaviour **(C)**.

A. CLAIMANT is not entitled to the adaptation of the contractual price due to hardship under Art. 79 CISG

139. CLAIMANT argues that it is entitled to the adaptation of the Contract under Art. 79 CISG [*Cl. Memo., p. 24, ¶¶114-130*]. Nevertheless, Art. 79 CISG is not applicable to the Parties' dispute **(1)**. Even if the Tribunal considers otherwise, the requirements set by this provision are not met **(2)**.

1. Art. 79 CISG is not applicable to the Parties' dispute

140. Art. 79 CISG does not govern the Parties' dispute since it is not applicable to cases of hardship **(a)**. Should the Tribunal consider that it is, this article does not provide for the adaptation of the Contract **(b)**. In any case, the Parties derogated from it **(c)**.

a. Art. 79 CISG does not govern hardship

141. Art. 79 CISG provides for exemption from liability in cases of non-performance caused by an impediment, when the latter is beyond the control of the aggrieved party. Additionally, it requires that the same party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences" [*Art. 79 CISG; Flechtner, p. 85*].

142. It is beyond doubt provision applies to cases of *force majeure*, where performance of a party's obligations becomes impossible [*Lindström, §III 4.1*; *Flambouras, §7; Nuova Fucinati v. Fondmetall International*]. However, contrary to CLAIMANT's allegations [*Cl. Memo., p. 25, ¶¶119-121*], this provision does not apply to cases of hardship [*Zeller II, p. 153; Flambouras, §7 Nuova Fucinati v. Fondmetall International*].

143. As CLAIMANT submits, the legislative history and the *trávaux préparatoires* of the CISG must be taken into account in order to interpret this provision [*Cl. Memo., p. 25, ¶119; Flambouras, §3; Honnold, ¶88*]. This will inevitably lead to the conclusion that the doctrine of hardship is not present in Art. 79 CISG [*Flambouras, §3*]. In fact, during the drafting phase of this provision, there was a proposal to address the doctrine of hardship, which was rejected [*Garro, §IV, ¶11; Lindström, §IV 2.2; CISG-AC 7, ¶29; Zaccaria, p. 164; Flambouras, §3; Flechtner, p. 89; Schwenzer, p. 712*]. The legislative history also demonstrates that exemption can only be

granted in cases of impossibility of performance, not when it has become merely "more difficult or unprofitable" [*Flambouras, §3; Rimke, p. 223*].

144. Hence, Art. 79 CISG does not govern hardship, but rather cases of *force majeur*e, where performance has become impossible.

b. Should the Tribunal consider that Art. 79 governs hardship, this provision does not allow the adaptation of the Contract

145. Contrary to what is alleged by CLAIMANT [*Cl. Memo., pp. 25-26, ¶¶122-125*], Art. 79 CISG does not provide for the adaptation of the Contract.

146. Neither Art. 79 nor any other provision of the CISG provides for adaptation of a contract in situations of hardship [*Zeller II, p. 153; CISG-AC 7, ¶40; Flechtner, p. 93*]. Although there were proposals in this sense during the negotiations, they were rejected [*Lindström, §IV 2.2; Garro, §IV, ¶10*].

147. Firstly, contrary to CLAIMANT's allegations [*Cl. Memo., p. 26, ¶123*], Art. 79 CISG does contain a remedy: exemption from liability. Accordingly, if CLAIMANT considers that Art. 79 governs hardship, it cannot simultaneously argue that there is a gap concerning the remedy only because the existent remedy is not the one it finds more favourable [*cf. Flechtner, p. 97*; *Cl. Memo., p. 26, ¶¶123-124*]. Being exempted from liability means that, if a party fulfils the criteria described in this provision and does not perform its obligations, the counterparty is not entitled to damages [*Art. 79(5) CISG; Azerdo da Silveira, pp. 200-201*]. The available remedy does not apply to the present case, since CLAIMANT already performed.

148. Secondly, CLAIMANT argues that the gap concerning the remedy must be filled by the general principles of the CISG, under the terms of Art. 7(2) CISG [*Cl. Memo., p. 26, ¶123*]. However, if the Tribunal considers that there is a gap to be filled by resorting to the general principles of the CISG, there is no principle from where to extract the possibility of adaptation of a contract [*Garro, §IV, ¶15*]. On the contrary, one of the general principles of the CISG is "strict liability in the performance of the seller's obligations" [*McKendrick, p. 1025*].

149. When applying Art. 7(2) CISG, CLAIMANT invokes the principles of *favor contractus* and the duty to cooperate [*Cl. Memo., p. 26, ¶123*]. However, one cannot derive the remedy of adaptation from these principles. Regarding the principle of *favor contractus*, no one is claiming the invalidity of the Contract, nor would the Contract become invalid if it was not adapted. In its turn, the duty to cooperate must not lead to a solution that goes against the will of the Parties, since this would disregard the principle of *pacta sunt servanda*, which also underlies the

CISG [*Zaccaria, p. 135; Magnus II, §4(b)*]. This duty means, *inter alia*, that parties should not "jeopardize the contractual purpose" [*Magnus, §5(b), ¶11*]. This is what CLAIMANT is doing by asking for a remedy upon which the Parties did not agree.

150. Therefore, any claims regarding the possibility of adaptation of the Contract pursuant to Art. 79 CISG or to the general principles of the CISG are ill-founded.

c. In any case, the Parties derogated from Art. 79 CISG

151. Contrary to CLAIMANT's submission [*Cl. Memo., pp. 24-25, ¶¶116-118*], and in case the Tribunal considers that Art. 79 CISG applies to hardship, the Parties derogated this provision by including a *force majeure* and hardship clause in the contract.

152. Art. 6 CISG allows for the derogation of CISG provisions [*Schlechtriem, p. 35; Huber, p. 236; Bonell, pp. 53-54; Case no. 48 of 2005*]. It is widely recognised that adopting provisions in a contract that provide for different solutions than the ones in the CISG constitutes derogation [*Secretariat Commentary, ¶1; Bonell, pp. 54, 58*]. No express agreement to derogate provisions is required [*Bonell, p. 55*]. Accordingly, the CISG only applies subsidiarily [*Magnus, §5(b), ¶1; Honnold, ¶2; Azerdo da Silveira, p. 254*]. Hence, if one considers that Art. 79 CISG governs both *force majeure* and hardship, when the Parties included a *force majeure* and hardship clause in the Contract, they derogated from the former [*Lindström, §III 4; Bonell, pp. 51, 56; Honnold, ¶2*].

153. In light of the above, CLAIMANT cannot base its claim on the CISG, since Art. 79 CISG does not apply to hardship and does not provide for the adaptation of the Contract. In any case, the Parties derogated from it.

2. Should the Tribunal consider that Art. 79 CISG governs the Parties' dispute, the requirements set by this provision are not met

154. If the Tribunal considers that Art. 79 CISG applies to hardship, the requirements set out in this provision are not met.

155. Art. 79 CISG applies to cases when the aggrieved party is faced with an "impediment beyond his control" [*Art. 79(1) CISG; Schwenzer, p. 712*]. Even though the imposition of the tariff is evidently beyond CLAIMANT's control, it cannot be considered as an impediment. The drafters of this provision intended to restrain the meaning of this word in comparison to its predecessor [*Lindström, §III 4.1; Flambouras, §3*]. Therefore, a narrow interpretation must be carried out [*Flambouras, fn. 8; Dai, p. 133*]. Accordingly, a 30% increase in the cost of the last shipment, which represents a 15% increase in the cost of all shipments, does not impede

performance. Moreover, and as stated by CLAIMANT itself [*Cl. Memo., p. 26, ¶127*], the impediment must constitute a disproportionate burden that surpasses the "limit of sacrifice" of the obligor [*Rimke, p. 224*; *Berger III, pp. 538, 544; CISG-AC 7, ¶38; Lindström §IV, ¶2.1; Uribe, p. 241; Azerdo da Silveira, pp. 346-347; Scafom v. Lorraine Tubes*]. However, the present change of circumstances does not place a disproportionate burden on CLAIMANT [*supra, ¶¶122-130*].

156. Additionally, the aggrieved party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract" [*Art. 79(1) CISG*]. CLAIMANT could have taken this event into account, since it was foreseeable, as demonstrated above [*supra, ¶¶118-121*].

157. Furthermore, CLAIMANT did not fulfil its duty to overcome the consequences of the imposition of the tariff [*Art. 79(1) CISG*]. Overcoming means making the necessary to "preclude the consequences of the impediment" [*Tallon, p. 251; cf. Fucci, p. 32*]. *In casu*, CLAIMANT read the newspaper article published on the day after the announcement of the tariff, which mentioned expressly that the tariff applied to agricultural goods [*PO2, p. 58, ¶26*]. Nevertheless, imprudently, CLAIMANT did not confirm whether horse semen was included in its scope [*Exh. C7, p. 16, ¶1; PO2, p. 58, ¶26*]. Indeed, the tariff was announced on 19 December 2017 but only took effect from 15 January 2018 onwards [*PO2, p. 58, ¶25*]. That creates a time window of almost one month, providing CLAIMANT with reasonable time to enquire about the specific products to which the tariff applied and to contact RESPONDENT proposing an earlier delivery. Had CLAIMANT sent the shipment slightly more than a week earlier, the shipment could have arrived to Equatoriana on 14 January 2018. It is hence crystal clear that CLAIMANT could have averted the extra costs [*American Trading Production v. Shell Int'l Marine*].

158. Lastly, Art. 79(4) requires a notice "within a reasonable time after the party [...] knew or ought to have known of the impediment". CLAIMANT surely ought to have known of the impediment shortly after the imposition of the tariff, since it read the newspaper article published the day after the tariff was announced [*PO2, p. 58, ¶26*]. However, the facts show that CLAIMANT warned RESPONDENT about the increased cost only three days before the last shipment was due [*Exh. C7, p. 16*]. It is argued that, in these cases, the disadvantaged party consequently becomes "estopped from invoking the hardship exemption" [*Brunner, p. 400*].

159. Thus, even if the Tribunal considers that Art. 79 CISG applies to hardship, the present change of circumstances is not within its scope.

B. The UNIDROIT Principles do not provide for the adaptation of the Contract as a result of the imposition of the tariff

160. Contrary to what CLAIMANT alleges [*Cl. Memo., pp. 27-28, ¶¶132-135*], the UNIDROIT Principles cannot be used as general principles of the CISG to fill its gaps **(1)**. But even if the Tribunal applies the UNIDROIT Principles as the law applicable to the Contract, CLAIMANT is not facing hardship and is not entitled to the adaptation of the Contract **(2)**.

1. The UNIDROIT Principles cannot be used as general principles of the CISG to fill its gaps

161. Even if the Tribunal considers that there is a gap in the CISG concerning hardship, the gap must not be filled by the UNIDROIT Principles, contrary to CLAIMANT's submission [*Cl. Memo., pp. 27-28, ¶¶132/134-235*].

162. Using the UNIDROIT Principles to fill gaps would be against the requirement in Art. 7(2) that the general principles must be found within the CISG [*Huber, p. 235*]. Indeed, applying principles found in external legal instruments would be against the CISG's goal to promote uniformity [*Art. 7(1) CISG*]. Furthermore, there is no guarantee that any provision found in the UNIDROIT Principles really reflects the general principles of the CISG [*Kotrusz, p. 152; Flechtner, pp. 95-97*]. While the CISG was ratified by Contracting States, the UNIDROIT Principles were drafted by a group of independent private experts, which makes it unfair to use them to fill gaps in the former [*Kotrusz, p. 146; Flechtner, pp. 96-97*].

163. Consequently, the UNIDROIT Principles cannot be used as gap-fillers of the CISG.

2. Even when applying the UNIDROIT Principles as the contract law of Mediterraneo, CLAIMANT is not facing hardship and is not entitled to the adaptation of the Contract

164. The general contract law of Mediterraneo, which is applicable to the Contract, is a verbatim adoption of the UNIDROIT Principles [*Exh. C5, p. 14 (Clause 14); PO1, p. 53, ¶4*]. However, by creating the Hardship Clause, the Parties decided to specifically regulate hardship, thus derogating from Arts. 6.2.2 and 6.2.3 UNIDROIT Principles [*cf. Art. 6.2.2, Comment 7*]. Consequently, the more detailed terms of the Hardship Clause must prevail [*Ad Hoc Arbitration (Brazil) 2005*].

165. Nevertheless, should the Tribunal resort to the UNIDROIT Principles as the general contract law of Mediterraneo, CLAIMANT is still not entitled to the adaptation of the Contract, since the imposition of the tariff is not a case of hardship under Art. 6.2.2 UNIDROIT Principles **(a)**. Should the Tribunal consider otherwise, the Contract must still not be adapted under Art. 6.2.3 UNIDROIT Principles **(b)**.

a. The imposition of the tariff is not a case of hardship under Art. 6.2.2 UNIDROIT Principles

166. Art. 6.2.2 UNIDROIT Principles lays out the criteria for an event to be considered as hardship. It is RESPONDENT's submission that they are not met in the present case.

167. Firstly, this provision requires that the equilibrium of the contract is changed "fundamentally" [*Art. 6.2.2 UNIDROIT Principles; ICC Case No. 9479; Ad Hoc Arbitration (Brazil) 2005*]. *In casu*, this means that the increase in CLAIMANT's costs should have been "substantial" [*Art. 6.2.2 UNIDROIT Principles, Comment 2a*]. One should, however, bear in mind that CLAIMANT's costs in the last shipment only increased by 30%, corresponding to 15% of the cost of all three shipments, which cannot be considered as a fundamental change [*supra, ¶¶123- 126*].

168. Secondly, "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract" [*Art. 6.2.2(b) UNIDROIT Principles*]. However, the imposition of the tariff by the Government of Equatoriana was predictable [*supra, ¶¶118- 121*].

169. Most importantly, a situation can only be considered as hardship if the disadvantaged party did not assume the risk of the event [*Art. 6.2.2(d) UNIDROIT Principles; Fucci, p. 11*]. As it follows "from the very nature of the Contract", CLAIMANT assumed the risk of tariffs on imports by accepting DDP delivery [*supra, ¶102; Art. 6.2.2 UNIDROIT Principles, Comment 3d*].

170. In light of the above, CLAIMANT is not in hardship pursuant to Art. 6.2.2 UNIDROIT Principles.

b. Should the Tribunal consider that the imposition of the tariff is a case of hardship, the Contract must not be adapted under Art. 6.2.3 UNIDROIT Principles

171. Even if the Tribunal would come to the conclusion that CLAIMANT is facing hardship (*quod non*), Art. 6.2.3 UNIDROIT Principles does not provide for the adaptation of the Contract in the present case, contrary to what is stated by CLAIMANT [*Cl. Memo., p. 28, ¶¶136-139*].

172. Although Art. 6.2.3(4)(b) UNIDROIT Principles provides for the adaptation of contracts alternatively to their termination, several requirements must be fulfilled. Namely, the aggrieved party must have firstly requested renegotiations "without undue delay" [*Art. 6.2.3(1) UNIDROIT Principles*]. Otherwise, this would "affect the finding as to whether hardship actually existed and, if so, its consequences for the contract" [*Art. 6.2.3 UNIDROIT Principles, Comment 2*]. However, CLAIMANT did not fulfil this requirement [*supra, ¶158*].

173. Moreover, the aggrieved party is precluded from withholding performance [*Art. 6.2.3(2) UNIDROIT Principles; Fucci, p. 31; Lando, p. 39*]. Nonetheless, when it learned about the applicability of the tariff, CLAIMANT put the shipment on hold and even threatened to keep it that way if RESPONDENT did not agree to its conditions [*Exh. C7, p. 16*]. Claims for adaptation of contracts have been rejected based on, *inter alia*, the fact that the aggrieved party withheld performance [*Alterra v. CETAC; V. D. v. AB DNB*].

174. Therefore, Art. 6.2.3 UNIDROIT Principles does not provide for the adaptation of the Contract in the present case.

C. RESPONDENT is not undertaking contradictory behaviour

175. Contrary to what CLAIMANT alleges [*Cl. Memo., p. 29, ¶140- 144*], RESPONDENT's conduct is not contradictory.

176. Firstly, Mr. Shoemaker never bound RESPONDENT to an adaptation of the Contract. Three days before the last shipment, after learning that the goods would be affected by the tariff, CLAIMANT urged RESPONDENT's veterinary, Mr. Shoemaker, in order to find a solution under the penalty of keeping the shipment on hold [*Exh. C7, p. 16; Exh. R4, p. 36, ¶1*]. Nevertheless, CLAIMANT was well aware that Mr. Shoemaker did not have any legal training that would allow him to comprehend the problem from a legal perspective and had not been involved in the negotiations [*Exh. R4, p. 36, ¶4*].

177. Moreover, after receiving CLAIMANT's email, Mr. Shoemaker did all in its power to seek an answer from the legal department personnel, which unfortunately was not available [*PO2, p. 59, ¶34*]. Under the pressure caused by CLAIMANT's threat to keep the shipment on hold only three days before delivery was due, and understanding the importance of a timely delivery, Mr. Shoemaker contacted CLAIMANT [*Exh. C7, p. 16, ¶3; Exh. C8, p. 18, ¶2; Exh. R4, p. 36, ¶3*]. Besides making clear that he did not have the powers to authorise an additional payment, he never stated whether the situation required price adaptation or not [*Exh. C8, p. 18, ¶2*; *Exh. R4, p. 36, ¶4*]. In fact, Mr. Shoemaker merely said that an agreement on the price would be found "**if** the contract provides for an increased price in the case of such a high

additional tariff" (emphasis added), which it does not [*Exh. R4, p. 36,* ¶*4*]. Therefore, and as advised by a legal expert, Mr. Shoemaker never bound RESPONDENT to an adaptation of the price [*Exh. R4, p. 36,* ¶*4*].

178. Secondly, the fact RESPONDENT resold doses of frozen semen is not relevant to the present case. Contrary to CLAIMANT's allegations [*Cl. Memo., p. 29,* ¶*143*], there is no resale prohibition neither in the Contract, nor in CLAIMANT's general conditions [*Exh. C5, pp. 13-14; PO2, p. 55,* ¶*2*].

179. Finally, concerning the other arbitration proceedings, the parties adopted the ICC Hardship Clause 2003, which is broader than the Hardship Clause [*supra,* ¶*108; PO2, p. 60,* ¶*39*]. Besides, the facts in the other arbitral proceedings are different from the ones at stake in the present case [*supra,* ¶*63-65*]. Thus, one cannot draw a comparison.

180. All in all, RESPONDENT's conduct cannot by any means be perceived as contradictory.

CONCLUSION ON ISSUE IV

181. Should the Tribunal consider that the Hardship Clause does not entitle CLAIMANT to adaptation of the Contract, resorting to the applicable law will necessarily lead to the same conclusion. The present change of circumstances does not constitute a case of hardship neither under the CISG nor under the UNIDROIT Principles. Besides, there is no contradictory behaviour from RESPONDENT on which CLAIMANT can base its request. Therefore, this Tribunal is respectfully requested to reject CLAIMANT's prayer for RESPONDENT to cover 25% of the cost increase, which corresponds to US$ 1,250,000.

REQUEST FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have the jurisdiction nor the powers to adapt the Contract;
2. The Partial Interim Award from the other arbitration proceedings must not be admitted;
3. The situation that CLAIMANT is facing does not correspond to a case of hardship;
4. CLAIMANT is not entitled to receive the outstanding contractual payments of US$ 1,250,000 as a result of the adaptation of the Contract.

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

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CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Lisbon, 24 January 2019

Carolina ROQUE

Catarina CARREIRO

Catarina CERQUEIRA