SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

CHINA-EU SCHOOL OF LAW

AT THE CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW

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

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TABLE OF ABBREVIATIONS AND DEFINITIONS

¶/¶¶	paragraph/paragraphs
%	per cent
Art./Arts.	Article/Articles
Ch.	Chapter
CISG	United Nations Convention on the International Sale of Goods (1980)
Cl. Ex.	CLAIMANT's Exhibit
ed.	Edition
e.g.	*exempli gratia* (for example)
et al.	*et alii* (and others)
fn.	footnote
HKIAC	Hong Kong International Arbitration Center
ICC Rules	Rules of Arbitration of International Chamber of Commerce (2012)
i.e.	that is
inter alia	among other things
Letter Fasttrack	Ms. Fasttrack's letter of 3 October 2018
Letter Langweiler	Mr. Langweiler's letter of 2 October 2018
lex arbitri	law of the seat of arbitration
No.	number/numbers
NoA	Notice of Arbitration
p./pp.	page/pages
para./paras.	paragraph/paragraphs
pacta sunt servanda	Agreements must be kept

PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
PO 1	Procedural Order No. 1 of 5 October 2018
PO 2	Procedural Order No. 2 of 2 November 2018
Resp. Ex.	RESPONDENT's Exhibit
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollars
v	*versus* (against)
Vol.	volume
WTO	World Trade Organisation

LEGAL TEXTS

CISG	United Nations Convention on Contracts for the International Sale of Goods
HKIAC Rules	Hong Kong Arbitration Rules 2018
IBA Profession 2011	IBA International Principles on Conduct for the Legal Profession
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
PECL	Principles of European Contract Law
PICC	UNIDROIT Principle on International Commercial Contracts (2016)
Transparency Rules of UNCITRAL	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

STATEMENT OF FACTS

1. The Parties to these proceedings are Phar Lap Allevamento (*hereinafter* "CLAIMANT") and Black Beauty Equestrian (*hereinafter* "RESPONDENT"). CLAIMANT, located in Mediterraneo, is a company whose racehorse section provides stallions for breeding. RESPONDENT, incorporated in Equatoriana, is a company famous for its broodmare lines that produce world champions in jumping and dressage.

2. On **21 March 2017** RESPONDENT contacted CLAIMANT with its intention to buy 100 doses of frozen semen of Nijinsky III, a star stallion, from CLAIMANT, since a ban on artificial insemination for race horses had been lifted in Equatoriana.

3. On **28 March 2017** RESPONDENT objected to a forum selection clause to the courts of Mediterraneo CLAIMANT suggested, and proposed a change of delivery term to Incoterm DDP.

4. On **31 March 2017** CLAIMANT accepted Incoterm DDP as the delivery term but asked for the inclusion of a hardship clause and arbitration clause.

5. On **10 April 2017** RESPONDENT agreed the sales part of the Frozen Semen Sales Agreement is governed by Mediterranean law and proposed an arbitration clause to CLAIMANT. The suggested clause is a tailored version of the HKIAC Model Clause which writing "[a]ny dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof . . . . The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana. . . ."

6. On **11 April 2017** CLAIMANT replied it would largely accept RESPONDENT's proposal with an amendment as to the place of arbitration from Equatoriana to Danubia, and confirmed the law governing the sales part remained to be Mediterranean law. CLAIMANT also suggested reliance on the ICC Hardship Clause.

7. In a meeting on **12 April 2017** with CLAIMANT, the negotiator from RESPONDENT wrote down in a note a list of issues for further negotiation, including arbitration clause, applicable law and hardship clause, and expressly wrote "ICC hardship clause suggested by

CLAIMANT too broad". On the same day after the meeting, both negotiators were injured in a car accident. Their successors did not further discuss on the arbitration clause.

8. **On 6 May 2017**, the Parties concluded the Frozen Semen Sales Agreement, which consists of two parts: the sales part (*hereinafter* "the Main Contract") and an arbitration agreement (*hereinafter* "the Arbitration Agreement"). The Parties also included a narrow hardship clause into the force majeure clause into the Main Contract. However, the choice of law of the Arbitration Agreement was not included. Subsequently, two shipments with a total of 50 doses of frozen horse semen were shipped.

9. On **20 January 2018**, shortly before the last shipment was due, CLAIMANT sent an e-mail to RESPONDENT about 30% tariffs newly imposed on the frozen horse semen by the government of Equatoriana.

10. On the morning of **21 January 2018** RESPONDENT called CLAIMANT but no final solution regarding the tariffs was reached. RESPONDENT only stated that a solution would be found *if* the Frozen Semen Sales Agreement provided so.

11. CLAMANT made the last shipment on **23 January 2018**.

12. In a meeting on **12 February 2018** the negotiation between CLAIMANT and RESPONDENT failed.

13. On **2 October 2018** CLAIMANT tried to introduce the Partial Interim Award from the other arbitration RESPONDENT acted as a "claimant" under the HKIAC Administered Arbitration Rules (*hereinafter* "HKIAC Rules"). The Partial Interim Award proffered by CLAIMANT is from a company with a doubtful reputation which can only get it either through an illegal hacker or from a former employee of RESPONDENT, who was under a contractual obligation to keep the award confidential.

ISSUE A: THE TRIBUNAL HAS NO JURISDICTION OR POWER TO ADAPT THE MAIN CONTRACT.

14. Under the Frozen Semen Sales Agreement between CLAIMANT and RESPONDENT, which consists of two parts: the sales part (*hereinafter* "the Main Contract") and an arbitration agreement (*hereinafter* "the Arbitration Agreement"), there were three installments of frozen horse semen for a set price of US$10,000,000, shipped under the Incoterm DDP. RESPONDENT paid the agreed contract price in full; nonetheless, CLAIMANT now seeks an additional payment as a contract adaptation, because of the increased tariffs involved. It argues that the Tribunal has the jurisdiction and power to do that under Clause 12, which is a *force majeure* clause with a hardship reference, and Clause 15, which is the Arbitration Agreement [*Cl. Ex. 5*]. RESPONDENT disagrees.

15. It is RESPONDENT's position that the Tribunal does not have jurisdiction or power to adapt the Main Contract under the Arbitration Agreement concluded by the Parties, because Danubian law, which requires an express authorization for the Tribunal to order contract adaptation and adopts the four corners rule, should be applied to the Arbitration Agreement **(A)**; and in this case, the Tribunal lacks an express authorization to adapt the Main Contract **(B)**.

A. DANUBIAN LAW, WHICH REQUIRES AN EXPRESS AUTHORIZATION FOR THE TRIBUNAL TO ORDER CONTRACT ADAPTATION AND ADOPTS THE FOUR CORNERS RULE, SHOULD BE APPLIED TO INTERPRET THE ARBITRATION AGREEMENT.

16. To determine whether the Tribunal has the jurisdiction or power to adapt the Main Contract, it is necessary to resort to the part of the agreement that constitutes the Arbitration Agreement, as it is a source of both jurisdiction and power of the arbitral tribunal [*Redfern/Hunter/Blackaby/Partasides, pp. 314, 341; Welser/Molitoris, p. 18*]. Further, it is necessary to ascertain which law should govern the interpretation of the Arbitration Agreement. In this case, although the Parties explicitly agreed upon the law applicable to the Main Contract – Mediterranean law, the law applicable to the Arbitration Agreement is absent thereof. CLAIMANT argues that Mediterranean law, which provides for broad interpretation of arbitration agreements and allows extrinsic evidence to interpret arbitration

agreements, should be applied [*NoA, ¶¶15-16; Cl. Memo., ¶¶34, 48*]. Contrary to such position, it is RESPONDENT's position that Danubian law, which requires an express authorization for the Tribunal to order contract adaptation [*PO 2, ¶36*] and adopts the four corners rule [*PO 1, ¶2*], should be applied to the interpretation of the Arbitration Agreement.

17. RESPONDENT's position is based on the following reasons: according to the doctrine of separability, the Arbitration Agreement should be subject to a separate conflict of law analysis **(a)**; the three-step inquiry for the law governing the arbitration agreement established in the *Sulamérica case* should be followed in this case **(b)**; following the three-step inquiry, the law of the seat of arbitration, Danubian law, is the implied choice of the Parties to interpret the jurisdiction and power of the Tribunal **(c)**.

a. According to the doctrine of separability, the Arbitration Agreement should be subject to a separate conflict of law analysis.

18. Contrary to CLAIMANT's position that there is no room for the doctrine of separability when the issue of validity is not at stake [*Cl. Memo., ¶32*], RESPONDENT argues that the function of this doctrine does not end there. An important effect of this doctrine is that the arbitration agreement should be treated as an independent agreement and thus be subject to a separate conflict of laws analysis [*Born 2014, p. 476*].

19. As CLAIMANT argues, one of the effects of the separability presumption is to insulate the arbitration agreement from the invalidity or non-existence of the underlying contract [*Cl. Memo., ¶32*]. However, another inevitable consequence of the separability doctrine is that the two separable agreements *could* be subject to two different legal regimes [*ICC Award No. 1507, p. 216; ICC Award No. 4131, p. 133; Born 2014, p. 476*]. More specifically, it is necessary to analyze the law governing the arbitration agreement separately from the law governing the main contract [*Born 2014, p. 464; Bernardini 1999, p. 197; Nazzini, p. 683*], no matter whether or not in the end the two agreements are governed by different laws. The underlying rationale is that the arbitration agreement, characterized as a "procedural contract" [*VIAC case, p. 352; Tobler case, p. 179; BGH 1957 case, p. 200; Berger 2006, p. 320*], is related to, but distinct from, the substantive contract between the parties [*Westacre case, p.*

582; Fiona Trust case, pp. 22-23; El Nasharty case, ¶26; Born 2014, p. 360]. Therefore, the autonomy of the arbitration agreement speaks against an automatic extension of the choice of law clause for a main contract to govern its interpretation. [*ICC Award No. 3380, p. 927; Berger 2006, p. 320; Craig/Park/Paulsson, ¶5.05*].

20. Thus, RESPONDENT argues that the doctrine of separability entails a separate conflict of laws analysis in regard to the Arbitration Agreement.

b. The three-step inquiry for the law governing the arbitration agreement established in *Sulamérica case* should be followed in this case.

21. It is widely accepted that a tribunal should conduct a three-stage enquiry into the proper law governing the arbitration agreement: firstly, into any express choice by the parties; secondly, into any implied choice by the parties; and thirdly, into the closest and most real connection with the arbitration agreement. These inquiries ought to be embarked upon in that order and separately [*Sulamérica case, ¶25; FirstLink case, ¶11; BCY case, ¶40*].

c. Following the three-step inquiry, the law of the seat of arbitration, Danubian law, is the implied choice of the Parties to interpret the jurisdiction and power of the Tribunal.

22. It is RESPONDENT's position that, in this case, there is no express choice on the law governing the Arbitration Agreement **(i)** and Danubian law is the implied choice of the Parties to interpret it **(ii)**.

i. There is no express choice of the law governing the Arbitration Agreement in this case.

23. CLAIMANT argues that Mediterranean law is "the only law expressly designated" in the Frozen Semen Sales Agreement, and thus the Parties "expressly selected the law of Mediterraneo as the law applicable to the entirety of the contract" including the Arbitration Agreement [*Cl. Memo., ¶¶24, 46*]. RESPONDENT disagrees with this position.

24. An "express" choice means the choice that is "made known distinctly and explicitly, and leaving no inference or implication, as distinguished from that which is inferred from conduct" [*Black's Law Dictionary; Oxford Dictionary*]. Notably, the HKIAC Model Clause contains a provision stating that "[t]he law of this arbitration clause shall be the law of . . .

(Hong Kong law)" [*HKIAC Model Clause*]. This amounts to an express choice. However, such express choice on the law governing the Arbitration Agreement is absent in this case.

ii. Danubian law is the implied choice of the Parties to interpret the Arbitration Agreement.

25. As stated in the *FirstLink case*, in the absence of an express choice on the proper law to govern the arbitration agreement, there will be a direct competition for an implied choice between the law governing the underlying contract and the law of the seat of arbitration [*FirstLink case, ¶16*].

26. CLAIMANT argues that Mediterranean law is the implied choice of the Parties, because "absence of a designation of a separate law governing the Arbitration Agreement demonstrates that the Parties intended to incorporate the law of Mediterraneo into the Agreement by reference" [*Cl. Memo., ¶36*]. RESPONDENT disagrees and argues that the better view is that the law of the seat of arbitration, Danubian law, should be considered as the implied choice of the Parties to govern the Arbitration Agreement.

27. There are a number of reasons why the law of the seat is the implied choice of law governing the Arbitration Agreement. Firstly, the Parties intended to choose a neutral law to govern the Arbitration Agreement **(1)**. Secondly, the law of the seat of arbitration has the closest connection with the Arbitration Agreement **(2)**. Thirdly, it is reasonable to argue that the Parties in arbitration choose the law which could facilitate the efficient operation of the arbitral proceedings **(3)**.

1. The Parties intended to choose a neutral law to govern the Arbitration Agreement.

28. One of the common objectives of an international arbitration agreement is to provide a neutral forum to resolve the disputes between the parties [*Queen Mary Survey 2018, p. 7; Born 2014, p. 73; Reisman, p. 235*]. The neutrality refers in particular to the composition of an arbitral tribunal and the use of neutral procedures and rules [*Born 2014, p. 75*]. Moreover, the neutrality desire is also reflected in the choice of the seat of arbitration. According to the Queen Mary Survey 2018, when parties choose the seat, they normally consider the neutrality and impartiality of the local legal system as a significant factor [*Queen Mary*

Survey 2018, pp. 10-11; see Queen Mary Survey 2015, p. 14; Queen Mary Survey 2010, pp. 17-18]. Therefore, when parties designate the seat, they often intend to choose that neutral and impartial law of the seat to govern the arbitration agreement.

29. The neutrality of rules means that the rules do not provide a systemic advantage to either one of the parties, *i.e.*, the rules are not national laws of either party [*Born 2014, p. 2063; Mistelis, p. 363*]. The desire for neutral rules to govern the arbitration agreement will become more acute when substantive commercial obligations of the parties already are not governed by a neutral law [*C v D, ¶1; Glick/Venkatesan, p. 145*]. This is exactly the case at hand.

30. In this case, the Parties had already designated Mediterranean law, which is the law of CLAIMANT's home state, to govern the Main Contract [*Cl. Ex. 5*]. Being such, the neutrality for the law governing the Arbitration Agreement will come to the fore. Also, CLAIMANT itself when choosing arbitration as a dispute resolution method puts great emphasis on the neutrality aspect. According to PO 2, CLAIMANT's Creditors Committee had declared that "there was no need to seek approval for the consent to arbitration clauses, as long as the place of arbitration was in *a neutral country* with a functioning judicial system" (emphasis added) [*PO 2, ¶14*]. Therefore, it is reasonable to conclude that the Parties intended their Arbitration Agreement to be governed by a neutral law. In this case, Danubian law, which is the law of a third neutral country, and not the law of CLAIMANT's home state, satisfies the Parties' expectation.

2. The law of the seat of arbitration has the closest connection with the Arbitration Agreement.

31. It is noteworthy that in practice, the identification of the system of law with which the arbitration agreement has its closest and most real connection is likely to be an important factor in deciding which law is the parties' implied choice [*see Sulamérica case, ¶25; Dicey/Morris/Collins, ¶32-006*]. Therefore, it is important to consider which law has the closest connection with the Arbitration Agreement in this case. The presumption that the arbitration agreement is closely connected with the law of the seat of arbitration is broadly

expressed by legislation and judicial practice in many jurisdictions [*Sulamérica case, ¶32; C v D, ¶26; Dicey/Morris/Collins*, *¶16-016; Redfern/Hunter/Blackaby/Partasides, ¶2-90; Bernardini 1999, p. 201*]. The underlying rationale is that the arbitration agreement is characterized as a procedural contract and the courts of the seat exercise supporting and supervisory jurisdiction over the arbitral proceedings [*Sulamérica case, ¶32*]. Therefore, the Arbitration Agreement is considered much more intimately intertwined with Danubian law than Mediterranean law in this case.

3. It is reasonable to argue that the Parties in arbitration chose the law which could facilitate the efficient operation of the arbitral proceedings.

32. CLAIMANT's argument that Mediterranean Arbitration Law should be applied to the interpretation of the Arbitration Agreement [*NoA, ¶¶15-16*] cannot stand either, because it will cause unnecessary conflicts between the rules of different legal systems. When parties enter into an arbitration agreement, they generally expect a relatively quick and efficient dispute resolution regime [*Queen Mary Survey 2018, p. 8; UNCITRAL Explanatory Note, ¶15; Sussman, p. 2*]. It is indeed possible that more than one national system of laws could play roles in international arbitration [*Channel Tunnel Group case, pp. 357-358*]. However, the efficient operation of the arbitral proceedings demands less friction within the legal framework applied. The desire for a single legal framework in one arbitration in emphasized by numerous authorities [*Born 2014, pp. 1618-1619; see Union of India case, p. 50*]. As Petrochilos puts it, "courts [have] recognized that it would be both practical and appropriate to gather, as much as possible, the substantive rules and remedies pertaining to an arbitration under one law and jurisdiction" [*Petrochilos, p. 64*]. Therefore, RESPONDENT argues that to achieve the objective of a harmonious legal framework for the conduct of the arbitral proceedings, it is more preferable for the law of the seat, namely Danubian law in this case, to govern the Arbitration Agreement.

33. The question faced by the Tribunal is of procedural nature. On one hand, the function of the arbitration agreement is "to provide machinery to resolve disputes" [*Westacre case*]. On the other hand, the law of the seat often governs a wide range of issues regarding the procedural

conduct of the arbitral proceedings and the relationship between arbitration and national courts [*Born 2014, p. 1531; Petrochilos, p. 6*]. Since the substances and processes of arbitration are closely intertwined [*XL Insurance case, p. 20*], many aspects of the arbitration agreement are readily and inevitably caught by the law of the seat [*Sulamérica case, ¶29; Glick/Venkatesan, p. 143*]. As observed by Berger, application of the law of the seat to the arbitration agreement will help achieve "decisional harmony between the arbitration agreement as the basis of this system and the procedure itself" [*Berger 2006, p. 321; see FirstLink case, ¶15*]. Therefore, it is recognized that it is rare that the law governing the arbitration agreement differs from *lex arbitri* [*Channel Tunnel Group, pp. 357-358; Black Clawson case, p. 453*].

34. In conclusion, in this case, to optimize the Parties' demand for neutrality and efficient operation of the arbitral proceedings and considering Danubian law has the closest connection with the Arbitration Agreement, it should be found that the Parties, by designating Danubia as the seat of arbitration, intended the entirety of their Arbitration Agreement to be governed by Danubian law.

B. IN THIS CASE, THE TRIBUNAL LACKS AN EXPRESS AUTHORIZATION TO ADAPT THE MAIN CONTRACT.

35. Under Danubian law, the courts in Danubia, a common law country, hold the view that when the tribunal is to adapt a contract, an express authorization from the parties is required [*PO 2, ¶¶36, 44*]. CLAIMANT argues that both the Arbitration Agreement and Clause 12 of the Main Contract are considered to expressly authorize the Tribunal to adapt the Main Contract [*Cl. Memo., ¶¶48-49, 53*]. RESPONDENT disagrees and argues that there is no express authorization, neither in the Arbitration Agreement **(a)** nor in Clause 12 **(b)**.

a. There is no express authorization in the Arbitration Agreement.

36. Danubian law adopts a four corners rule, which excludes extraneous evidence to interpret the Arbitration Agreement [*PO 1, ¶2*]. In other words, when interpreting the Arbitration Agreement in line with the four corners rule, one must interpret it only according to its wording. In this case, the wording gives no express authorization for the Tribunal to adapt

the Main Contract.

37. The term "adapt" means to make changes in order to meet the new circumstances [*Black's Law Dictionary; Oxford Dictionary*]. An express authorization to adapt requires the intention of adaptation to be set forth in words [*Black's Law Dictionary; Oxford Dictionary*]. There are cases where the tribunal adapted the contract having an express authorization to do so. By way of example, in the *Esso case*, the parties concluded a contract for the sale of natural gas for a period of 15 years. The express authorization for contract adaptation was given by the wording "in default of agreement within 90 days . . . *the matter referred to arbitration to determine* the Comparator and *the consequent adjustment to the price*" (emphasis added) [*Esso case, ¶8*]. In another case, the *ICC Award No. 5744*, the parties concluded a standard arbitration agreement with terms added that expressly authorized the tribunal to adapt the contract, namely "[a]ll disputes arising out of the contract *including a change of the contract itself* . . ." (emphasis added) [*ICC Award No. 7544; Berger 2001, p. 5, after fn. 24 in Clunet 1062, 1063*].

38. However, the Arbitration Agreement in the case at hand stipulates only that "*[a]ny 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 . . .*"(emphasis in original) [*Cl. Ex. 5*]. No terms embody the meaning of "adaptation".

39. Therefore, there is no express authorization in the Arbitration Agreement for the Tribunal to adapt the Main Contract.

b. Neither is there an express authorization in Clause 12.

40. CLAIMANT further argues that the Parties allowed the Tribunal to adapt the Main Contract through the incorporation of Clause 12 addressing the hardship [*Cl. Memo., ¶48*]. RESPONDENT disagrees. It is RESPONDENT's position that neither can Clause 12 be regarded as empowering the Tribunal to adapt the Main Contract.

41. In general, the mere inclusion of a hardship clause is not an express authorization for the

tribunal to adapt the contract [*Bernardini 1998, pp. 416-417, 421; Model Agreement, Art. 34(12); Model Agreement for Petroleum Exploration & Production, Art. 16(6)*]. An expressly drawn arbitration agreement is required in addition [*Bernardini 1998, p. 421*].

42. This position is supported by the *Quintette case*. The hardship clause in this case provided that "[b]oth parties agree to use their best effort to solve any hardships or difficulties arising from such unforeseeable circumstances in the spirit of mutual good will and cooperation" [*Quintette case; Ferrario, p. 186*]. It was found that the hardship clause here did not constitute authorization for the tribunal to adapt the contract, neither expressly nor impliedly [*Quintette case; Ferrario, p. 186*]. Thus, the tribunal reasoned that it had to also have recourse to an arbitration agreement that contained adaption language [*Quintette case, ¶14; Ferrario, p. 186*]. Therefore, both a hardship clause and an arbitration agreement should be positively examined to give a way to contract adaptation in cases as the one the Tribunal faces [*Quintette case; Bernardini 1998, p. 421; Ferrario, p. 186*].

43. Applying the reasoning in the *Quintette case*, both factors are also absent in the instant case. On one the hand, Clause 12 is essentially a *force majeure* clause with a narrow hardship reference that only states "[s]eller shall not be responsible for . . . *hardship* . . ." (emphasis in original), rather than in an express way to authorize adaptation [*PO 2, ¶12; Cl. Ex. 5; Resp. Ex. 3*]. On the other hand, as argued above, the Arbitration Agreement likewise fails to expressly include contract adaptation for arbitrable disputes [*Cl. Ex. 5; see supra ¶38*].

CONCLUSION ON ISSUE A

44. In conclusion, Danubian law is the law governing the Arbitration Agreement. Further, under Danubian law, the Tribunal has no jurisdiction or power to adapt the Main Contract.

ISSUE B: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT THE EVIDENCE IN ISSUE.

45. CLAIMANT requests the Tribunal to admit the Partial Interim Award from the other confidential arbitration proceedings in which RESPONDENT acted as a "claimant" [*Cl.*

Memo., ¶57; Letter Langweiler, p. 50]. CLAIMANT's intention is to show RESPONDENT's conflicting positions in the two cases [*Cl. Memo., ¶57*]. However, it is noteworthy that CLAIMANT could only secure the Partial Interim Award by buying it from a corporation with a doubtful reputation [*PO 2, ¶41*], and that corporation could only obtain the award through either an illegal hacker or a former employee of RESPONDENT, who was under a contractual obligation to keep the award confidential [*PO 2, ¶41*]. In either case, this raises a policy concern, which RESPONDENT wishes to point out. Cyber intrusion [*ABA Tech Report*] or outright theft is becoming prevalent and is being used to target arbitration proceedings, which are otherwise intended to be strictly confidential [*Ross; Zagger*]. The admission of the evidence in this case would go against industrial efforts to diminish the number of such incidents [*see Cyber Security Protocol*].

46. CLAIMANT, on the other hand, chooses to turn a blind eye to this issue and insists on introducing the evidence, basing its arguments on itself having "clean hands" in obtaining the evidence [*Cl. Memo., ¶59*], no violation of confidentiality [*Cl. Memo., ¶64*], and its need to "to present the case" [*Cl. Memo., ¶67*]. However, contrary to CLAIMANT's position, it is RESPONDENT's position that the Partial Interim Award should not be admitted in this proceedings as admitting it would endanger the confidential nature of the Partial Interim Award and would infringe RESPONDENT's right to present its case **(A)**; CLAIMANT has "unclean hands" over obtaining the evidence **(B)**; and not admitting it would not infringe CLAIMANT's opportunity to present its case **(C)**.

A. ADMITTING THE MATERIAL WOULD ENDANGER THE CONFIDENTIAL NATURE OF THE PARTIAL INTERIM AWARD AND WOULD INFRINGE RESPONDENT'S RIGHT TO PRESENT ITS CASE.

47. Contrary to CLAIMANT's position that the confidentiality of the Partial Interim Award should not render it inadmissible [*Cl. Memo., ¶61*], confidentiality is, in fact, a key question to consider when deciding the admissibility of evidence [*Waincymer, p. 798*]. It is RESPONDENT's position that the Tribunal should not admit the Partial Interim Award, as admitting it would endanger its confidential nature **(a)** and would infringe RESPONDENT's right to present its case **(b)**.

a. The Partial Interim Award enjoys a confidential nature and should not be admitted as evidence.

48. Contrary to CLAIMANT's position [*Cl. Memo., ¶¶62-65*], the Partial Interim Award enjoys a confidential nature **(i)**; the transparency or consistency concern has no influence on its confidential nature **(ii)**; and, the Partial Interim Award does not lose this nature as it is not in the public domain **(iii)**.

i. The Partial Interim Award enjoys a confidential nature.

49. CLAIMANT argues that the Partial Interim Award is just private and not confidential [*Cl. Memo., ¶62*]. However, the Partial Interim Award in this case was issued under the HKIAC Rules [*Letter Langweiler, p. 50*]. According to Art. 45 HKIAC Rules, it definitely enjoys a confidential nature [*HKIAC Rules, Art. 45*].

50. Moreover, the confidential nature of arbitration, and its attendant paperwork, is recognized by cases, *e.g.*, the *Ali Shipping case*. In the *Ali Shipping case*, the English Court of Appeals denied the use of a previous arbitration award in subsequent court proceedings on the basis that the use of the materials would amount to a breach of a party's implied obligation of confidentiality in respect of the first arbitration [*Ali Shipping case*]. The Court held that, "the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the other arbitration proceedings" [*Ali Shipping case, ¶43*].

51. CLAIMANT also argues that the Tribunal might "accept the evidence without revealing the nature of the evidence to the rest of the world" [*Cl. Memo., ¶63*]. However, as pointed out in the *Ali Shipping case*, even an arbitrator's duty of confidentiality in subsequent proceedings could not cure "the damage that the objecting party perceived" as emerging "from an adverse decision resulting from, or influenced by, the disclosures sought" from the previous arbitration [*Ali Shipping case, ¶44*].

ii. The transparency or consistency concern has no influence on the confidential nature.

52. CLAIMANT argues that a duty of confidentiality would harm the transparency and consistency of arbitration awards and, thus, public interest favors admitting the evidence

[*Cl. Memo., ¶62*]. However, neither transparency nor consistency of arbitration awards is considered a goal in the context of commercial arbitration.

53. On one hand, transparency is not a significant concern in commercial arbitration – like the current one. CLAIMANT argues the transparency issue relying on the sources pertaining to investor-state arbitration [*Letter Langweiler, p. 50*]. Such argument should not be accepted because investment arbitration concerns the interests of a state, which in turn represents its people and, therefore, favors transparency over confidentiality [*Böckstiegel, p. 586*]. However, such public interest does not stand in commercial arbitration. In fact, according to Böckstiegel, the different pursuits of confidentiality and transparency are probably the most striking difference between commercial and investment arbitration [*Böckstiegel, p. 587*]. The pursuit of transparency, as now evidenced in the Transparency Rules of UNCITRAL [*Letter Langweiler, p. 50*], is directed at treaty-based investor-State arbitration [*Transparency Rules of UNCITRAL*], rather than at commercial arbitration.

54. On the other hand, CLAIMANT only briefly argues the issue of consistency without elaborating and providing authorities [*Cl. Memo., ¶62*]. However, consistency is not a major concern for commercial arbitration, either, as "there is no binding doctrine of precedent in arbitration" [*Waincymer, p. 798*]. Therefore, the Partial Interim Award enjoys a confidential nature, which is worth protecting.

iii. The Partial Interim Award does not lose its confidential nature as it is not in the public domain.

55. CLAIMANT argues that the information about how to acquire the Partial Interim Award is "within the public sphere of knowledge" and therefore there is no need to keep it confidential [*Cl. Memo., ¶65*]. However, what CLAIMANT in fact wants to provide to the Tribunal is the Partial Interim Award itself, not the information about how to acquire it [*Letter Langweiler, p. 50*]. The burden of proving the public character rests on the party claiming that a material is already in the public domain [*Smeureanu/Lew, p. 112*], but CLAIMANT fails to carry its burden.

56. It is RESPONDENT's position that the Partial Interim Award was not in the public domain.

Information is only in the public domain if it is realistically accessible to a member of the general public and it must "be available *in practice*, not just in theory" (emphasis added) [*Spycatcher case, p. 30; ICO 2013, ¶16;*]. Only when anyone wishing to access the information "can easily do so" will the information become in the public domain [*Mosley case, ¶36*], *e.g.*, information being published [*ICO 2013, ¶37*], or when it can be easily found using a simple Internet search [*ICO 2013, ¶18*].

57. CLAIMANT relies upon the *Caratube case* to argue that publicly available information is in the public domain and thus could be admitted as evidence [*Cl. Memo., ¶64*]. However, a radical distinction should be made between the *Caratube case* and the current case. The evidence in the *Caratube case* was "leaked on a publicly available website known as 'KazakhLeaks'" [*Caratube case, ¶150*]. In contrast, the Partial Interim Award has not been published, nor could it be found easily online.

58. Further, the "publicly available" test for public domain in the *Caratube case* did not consider the proliferation of information in the globalized Internet age of today [*Wee case, ¶36*]. In fact, according to the *Wee case*, material would only be considered as having entered the public domain when it has *actually been made known to the public* [*Wee case, ¶19*]. A potential, abstract accessibility is vastly different from the access in fact and much of the information, although accessible, is not accessed by the public, whether from lack of interest or time or even ignorance [*Wee case, ¶36*]. Consideration must be given to such factors as the likelihood of the information being accessed by the public and the degree to which the information has in fact been accessed [*Wee case, ¶37*].

59. In this case, the Partial Interim Award is not publicly known and the likelihood of it being accessed by the public is rather low. Not many people know how to acquire it, considering that CLAIMANT itself only became aware of it after Mr. Velazquez's instruction [*PO 2, ¶41*]. Therefore, the Partial Interim Award, which is not in public domain, does not lose its confidential nature and should be protected.

b. Admitting the evidence would infringe RESPONDENT's right to present its case.

60. Apart from damaging the confidential nature of the Partial Interim Award, admitting the evidence would infringe RESPONDENT's right to present its case. This right entails the right to *present its position on disputed issues of fact and law* [*Born 2014, p. 3225; see OLG München 2011 case; see also OLG München 2009 case*].

61. Were the Partial Interim Award to be admitted as evidence, RESPONDENT would need to reveal some information in the other arbitration beyond that Award in order to be able to fully present its position. This is because the allegations made by CLAIMANT regarding the Partial Interim Award do not reflect the complete reality of the case, as they are taken out of context [*Letter Fasttrack, p. 51*]. Revealing the surrounding facts of that previous case would contravene RESPONDENT's confidentiality obligation not to disclose or to communicate any information relating to the other arbitration [*HKIAC, Art. 45.1*].

62. In such a situation, RESPONDENT could not present its position on this disputed issue and RESPONDENT's right to present its case would be infringed. Thus, the Partial Interim Award should not be admitted as evidence.

B. CLAIMANT HAS "UNCLEAN HANDS" IN ACQUIRING THE PARTIAL INTERIM AWARD.

63. Contrary to CLAIMANT's position that it acquired the Partial Interim Award fortuitously and thus has "clean hands" [*Cl. Memo., ¶¶59-60*], it is RESPONDENT's position that CLAIMANT, in fact, has "unclean hands" in acquiring the Partial Interim Award and, thus, the material should not be admitted by the Tribunal.

64. The "unclean hands" principle means that "if some form of illegal or improper conduct is found . . . claims will be barred and any loss suffered will lie where it falls" [*Llamzon, p. 316*], which finds practice in courts [*see Dering case*] and international arbitrations [*see Gustav case, ¶125*].

65. The two components to constitute an "unclean hands" claim are "unclean conduct" and "reciprocity" [*Anenson, p. 1858*]. These requirements are met in this case.

66. Firstly, the "unclean conduct" need not necessarily be illegal [*Precision case, p. 815*]. Rather, "unconscionable," or deriving from a "bad motive" will do [*Keystone case, p. 247; see Shewchuk case, ¶1971; Poll, pp. 67-68*]. A conduct that does not conform to "minimum ethical standards" may also satisfy the threshold [*Precision case, p. 816; Morton case, p. 492*]. Here, CLAIMANT argues that it simply "received" the information about the other arbitration at the annual breeder conference [*Cl. Memo., ¶60*]. However, this is not the full story. CLAIMANT knew from Mr. Velazquez that the other arbitration was also conducted under the HKIAC Rules [*Letter Langweiler, p. 50; PO 2, ¶40*]. Therefore, CLAIMANT knew or should have known that the Partial Interim Award should be kept confidential and the company, from which it learned it could buy the material, could not obtain it through legal channels. However, CLAIMANT still deliberately chose to proceed with purchasing the Partial Interim Award from that company with doubtful reputation [*PO 2, ¶41*], with a specific intent to take advantage of it. Thus, this buying act should be deemed as "unclean conduct".

67. Secondly, the inadmissibility injunction asked by RESPONDENT fulfills the "reciprocity" element. According to the *Niko case*, the "reciprocity" requires a nexus between the relief forming the objection and the unclean conduct [*Niko case, ¶483*]. In essence, the reciprocity means that the remedy sought must be "protection against continuance of that violation in the future", not damages for past violations [*Guyana case, ¶¶420-421*; *Niko case, ¶481*]. In line with that, RESPONDENT requests the Tribunal to deny the admission of the Partial Interim Award. The objection of RESPONDENT is to ask for the inadmissibility injunction from the Tribunal – rather than asking damages for past infringements.

68. Therefore, considering that the two requirements needed for the application of the "unclean hands" principle are met in this case, the evidence should not be admitted.

C. THE PARTIAL INTERIM AWARD IS NOT RELEVANT TO THE CASE, NOR MATERIAL TO ITS OUTCOME.

69. One important standard to consider when deciding on the admission of the evidence is whether it is relevant to the case and material to its outcome [*IBA Rules, Art. 9(2)(a); BGE*

116 II 639, ¶4(c); Arroyo, p. 1552]. In this case, CLAIMANT argues that "[t]he interest of justice favors the admission of evidence" as "allowing a party . . . to present all evidence it deems relevant serves an important part of the arbitration process" and "the opportunity to fully present its case" [*Cl. Memo., ¶¶66-67*]. However, if the material is not relevant to the case, nor material to its outcome, not admitting the evidence will not infringe CLAIMANT's opportunity to present its case. It is RESPONDENT's position that the Partial Interim Award is not relevant to the case, nor material to its outcome, as the evidence is targeted at the credibility of RESPONDENT **(a)** and cannot help to clarify the facts of this current case **(b)**.

a. The evidence is targeted at the credibility of RESPONDENT's legal position.

70. The arbitral tribunal should reject evidence, if the evidence is not relevant for the clarification of facts [*IBA Rules, Art. 9(2)(a); BGE 116 II 639, ¶4(c); Arroyo, p. 1552*]. While the HKIAC Rules, the IBA Rules, and the Commentary of the IBA Rules of Evidence Review Subcommittee do not define "relevant to the case" [*HKIAC Rules, Art. 22.3; IBA Rules, Art. 3(3)(b), Art. 9(2)(a)*], the relevance of evidence is generally defined as the need for evidence to support an important contention in the petitioning party's case [*O'Malley, ¶3.69*].

71. Evidence should be used to support the factual allegations [*Waincymer, p. 743*]. Evidence aimed at attacking the credibility of a party should be deemed irrelevant to the case. By way of example, Webster and Bühler argue that evidence is irrelevant to the case if it only concerns the credibility of a witness [*Webster/Bühler, ¶25-68; see Marghitola/Lew, p. 51; Ashford, Appendix A, no. 10*]. In a similar way, if the evidence aims only to destroy the credibility of an opposing party, it should not be admitted.

72. In the current case, the evidence is aimed at attacking the credibility of RESPONDENT's legal position. This evidence proposed by CLAIMANT is to show the "contradictory" submissions of RESPONDENT regarding the contract adaptation in two different cases [*Letter Langweiler, p. 49; Cl. Memo., ¶68*]. However, there is no rule prohibiting RESPONDENT from taking different positions in different arbitration cases. Importantly, the two cases have different backgrounds [*PO 2, ¶39; Cl. Ex. 5*]. Firstly, the other arbitration

relied on the ICC Hardship Clause, while in this case, there is only a *force majeure* clause with a hardship reference. Secondly, the other arbitration relied on a standard HKIAC Model Clause, while in this case, the HKIAC Model Clause has been tailored by the Parties. Thirdly, the parties in the other arbitration explicitly chose Mediterranean law which provides for broad interpretation of arbitration agreements and allows extrinsic evidence to interpret arbitration agreements [*PO 2, ¶39*] , while in this case, Danubian law, which requires an express authorization for the tribunal to decide on the contract adaptation [*PO 2, ¶36*] and adopts the four corners rule [*PO 1, ¶2*], is the choice of the Parties to govern the interpretation of the Arbitration Agreement [*see supra ¶¶25-34*]. As such, the lawyer appointed by RESPONDENT argues differently in these two different cases. Moreover, it is commonly recognized that lawyers should treat the interest of their clients as paramount [*IBA Profession 2011, Art. 5*] and should take whatever lawful and ethical measures to vindicate a client's endeavor [*Horvath/Wilske, p. 365*].

73. Therefore, since the Partial Interim Award is only proffered by CLAIMANT to argue the so-called contradictory positions and speculate on the credibility of RESPONDENT, it is not relevant to the case, thus, should be deemed inadmissible.

b. The evidence cannot help to clarify the facts in this current case.

74. Apart from irrelevance, neither is the Partial Interim Award material to the outcome. The term "materiality" means that the arbitral tribunal must deem it necessary that evidence is needed as an element to allow the complete consideration whether a factual allegation is true or not [*Raeschke-Kessler, p. 657; see Kaufmann-Kohler/Bärtsch, p. 18*]. For evidence to be material and therefore admissible, the evidence must be related to the claims and issues, and due consideration should be given to the matters sought to be established by a particular evidence [*Hamilton, p. 70*]. The UNCITRAL Draft Guidelines for Preparatory Conferences in Arbitral Proceedings suggest that documentary evidence "must be such that it likely contributes to *the clarification of the case*" (emphasis added) [*UNCITRAL Draft Guideline, p. 17; see Ceccon, p. 73*]. In the *Methanex case*, the tribunal considered the question of materiality of the evidence proffered without "clean hands" and concluded that the evidence

with only "marginal evidential significance" should be excluded [*Methanex case,* ¶*56*].

75. In this case, the Partial Interim Award in the other proceedings in which RESPONDENT was the claimant cannot clarify the facts in this current case. As alluded to above, the facts and circumstances in the current proceedings and in the other proceedings differ in hardship clauses, arbitration clauses, seats of the arbitration, and the law applicable to the arbitration agreements [*see supra* ¶*72*]. As such, the Partial Interim Award in the other proceedings cannot help to answer the question of whether the Arbitration Agreement in this case provides the jurisdiction or power to the Tribunal to adapt the Main Contract. Nor can it help to clarify the question whether CLAIMANT is entitled to adaptation under Clause 12 of the Main Contract or the CISG.

76. Therefore, the evidence is neither relevant to this case nor material to its outcome and should not be admitted by the Tribunal.

CONCLUSION ON ISSUE B

77. In conclusion, admitting the evidence would endanger the confidential nature of the Partial Interim Award and would infringe RESPONDENT's right to present its case. Further, CLAIMANT has "unclean hands" in acquiring the Partial Interim Award. Finally, not admitting the evidence would not infringe CLAIMANT's opportunity to present its case, as the Partial Interim Award is not relevant to the current case nor material to its outcome. Therefore, the evidence should not be admitted by the Tribunal.

ISSUE C: CLAIMANT IS NOT ENTITLED TO THE ADAPTATION OF THE MAIN CONTRACT NEITHER UNDER CLAUSE 12 NOR UNDER THE CISG, AND THUS IS NOT ENTITLED TO THE PAYMENT OF ANY AMOUNT.

78. The Main Contract in issue fixed the price for the doses of frozen horse semen and called for shipment in three installments. Before the third shipment was delivered, there were 30% additional tariffs imposed on the goods. After CLAIMANT fulfilled its contractual obligation by delivering, it asked for contract adaptation to cover its losses. Yet, the facts indicate that there is no legal basis for contract adaptation, neither in the Main Contract nor

in statutory provisions. However, even if the Tribunal were to find there is a legal basis for the remedy of adaptation, the requirements cannot be met.

79. Therefore, it is RESPONDENT's position that CLAIMANT is not entitled to a payment of US$ 1,250,000 or any other amount resulting from the adaptation of the Main Contract neither under Clause 12 of the Main Contract **(A)** nor under the CISG **(B)**.

A. CLAIMANT IS NOT ENTITLED TO CONTRACT ADAPTATION UNDER CLAUSE 12 OF THE MAIN CONTRACT.

80. CLAIMANT argues that it is entitled to an additional payment of US$ 1,250,000 based on Clause 12 of the Main Contract. It is RESPONDENT's position that this should not be accepted, because Clause 12 does not provide for the possibility to adapt the Main Contract **(a)**. In the alternative, even if it were to contain the possibility of contract adaptation, this remedy would not be available to CLAIMANT as the requirements of Clause 12 are not fulfilled **(b)**.

a. Clause 12 does not provide for the possibility of contract adaptation.

81. It is RESPONDENT's position that both the wording **(i)** and the actual intent of the Parties **(ii)** show that Clause 12 of the Main Contract does not, and was never meant to, provide for the possibility of contract adaptation.

i. The wording of Clause 12 indicates that it is an obligation exemption clause rather than a contract adaptation clause.

82. Clause 12 writes "[s]eller shall not be responsible for lost semen shipments… or acts of God [,] *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis in original) [*Cl. Ex. 5*].

83. "Responsible" equals to "liable", and it means "compellable to make satisfaction, compensation, or restitution" [*Black's Law Dictionary*]. Thus, Clause 12 allows CLAIMANT not to be compelled to make compensation for certain events regulated in the contract, but no contract adaptation may derive from such terminology.

84. In other words, Clause 12 can serve as a shield rather than a sword for CLAIMANT. It cannot serve as a legal basis for CLAIMANT to ask for contract adaptation.

ii. Under Article 8(1)(3) CISG, there is no consensus of the Parties to include the possibility of contract adaptation in Clause 12.

85. Contracts should be interpreted according to the actual intention of the declaring party that is known to the other party [*Cl. Memo., ¶77; CISG, Art. 8*]. CLAIMANT argues that the inclusion of a hardship clause in the Main Contract reflects the Parties' intent to empower the Tribunal to adapt the Main Contract [*Cl. Memo., ¶¶76-79*]. However, CLAIMANT conveniently omits the fact that the hardship mechanism invited by both Parties contains no contract adaptation as a remedy.

86. According to Art. 8(1)(3) CISG, the negotiation history shall be referenced to determine the intent of the Parties [*CISG, Art. 8(1)(3)*]. The negotiation history here indicates that the Parties' intent was merely to introduce a narrow version of the ICC Hardship Clause into the Main Contract. Specifically, on 11 April 2017, CLAIMANT itself suggested in its email that "[*c*]*oncerning the other open point, we would suggest reliance on the ICC-Hardship clause"* [*Resp. Ex. 2*]. Mr. Antley, on behalf of RESPONDENT, did not object to rely on the ICC Hardship Clause, except he mentioned in his notes for the future negotiations that "*ICC hardship clause suggested by Claimant [was] too broad"* [*Resp. Ex. 3*].

87. When restarting the negotiation after the car accident involving the original negotiators, the new negotiators, from both CLAIMANT and RESPONDENT, narrowed the clause and included it as Clause 12 of the Main Contract [*Resp. Ex. 3*]. Thus, the facts show that the Parties agreed to include a hardship reference based on the ICC Hardship Clause and, moreover, to further narrow it.

88. Notably, the ICC Hardship Clause itself does not include contract adaptation as a remedy. According to Paragraph 3 of the ICC Hardship Clause 2003, "where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract" [*ICC Hardship Clause 2003*]. Unlike the UNIDROIT Principles of International Commercial Contracts (*hereinafter* "the PICC") and the Principles of European Contract Law (*hereinafter* "the PECL"), which do refer to such a

remedy, the ICC Hardship mechanism simply does not [*Kessedjian, p. 425*].

89. If the ICC Hardship mechanism does not provide for the possibility of contract adaptation, *a fortiori,* a narrower version of the ICC Hardship Clause cannot provide for it either.

90. In conclusion, both the literal meaning and the Parties' intent indicate that Clause 12 does not contain contract adaptation as a remedy.

b. In the alternative, even if Clause 12 were to allow for contract adaptation, its requirements must be met cumulatively, and they are not met in this case.

91. CLAIMANT argues, rather simplistically, that "the retaliatory tariff made CLAIMANT's performance under the contract more onerous" [*Cl. Memo., ¶85*], thus the Main Contract should be adapted and "CLAIMANT is equally entitled to the payment of US $1,250,000 under the CISG" [*Cl. Memo., ¶87*]. However, CLAIMANT omits the fact that there are three requirements under Clause 12 of the Main Contract, namely "unforeseeability", "comparability" and making the Main Contract "more onerous". These requirements are cumulative. It is RESPONDENT's position that neither the requirement of "comparability" **(i)** nor of making the Main Contract "more onerous" are met in this case **(ii)**. Accordingly, the Tribunal shall not adapt the Main Contract.

i. The increased tariffs are not comparable to "additional health and safety requirements".

92. As written in Clause 12, in order for an event to cause hardship under Clause 12, it must be comparable to "additional health and safety requirements" [*Cl. Ex. 5*]. This is not the case for the additional tariffs involved in the instant case. Both CLAIMANT and RESPONDENT are member states of the WTO [*PO 2, ¶47*]. According to the rules of the organization, the tariffs are not comparable to health and safety requirements and should not be considered such by this Tribunal.

93. To elaborate, according to Black's Law Dictionary, to analyse whether two items are comparable, one can put two or more products side by side, and they are considered comparable if they are common enough [*Black's Law Dictionary*]. In practice, a comparability analysis is to compare two or more issues in terms of relevant attributes, so-

called "comparability factors". The two items are regarded comparable if the factors are sufficiently similar [*Agenda Item 6*]. Returning to the WTO, in this case, the attributes of the tariffs in issue are contradictory, rather than similar to "additional health and safety requirements".

94. The WTO Sanitary and Phytosanitary Measures Agreement allows member states to set their own requirements to protect health and safety [*Understanding the Sanitary and Phytosanitary Measures Agreement*]. According to Art. 2 of this Agreement, when analysing "additional health and safety requirements", there are four attributes to be considered. Firstly, these requirements are non-tariff measures. Secondly, the aim is to protect a country's human, animal or plant life or health, for the protection of the environment or to meet other consumer interests. Thirdly, these measures should be based on science and follow the principle of proportionality. Lastly, these measures should not arbitrarily discriminate the countries.

95. The tariffs of Equatoriana in issue have contradictory attributes and, therefore, are not comparable to health and safety requirements. The tariffs have the specific aim of retaliation for the previous restriction imposed by Mediterraneo [*Cl. Ex. 6*]. Therefore, firstly, the tariffs are retaliatory in nature. Secondly, the tariffs were not imposed to protect human, animal or plant life or health, because the increased tariffs cover all agriculture products in general [*Cl. Ex. 6*]. Thirdly, the tariffs were not imposed to the necessary extent of health and safety protection, thus violating the principle of proportionality. Lastly, these 30% tariffs were decided arbitrarily "after a very short period of unsuccessful discussions" and were imposed on agricultural goods only from Mediterraneo, so that they are clearly discriminatory [*NoA, ¶10; Cl. Ex. 6*]. Therefore, with contradictory attributes to the ones that health and safety requirements possess, these tariffs are contradictory, instead of comparable to "health and safety requirements".

ii. According to the negotiation history, the increased tariffs do not meet the requirement of making the Main Contract "more onerous".

96. The second requirement for hardship is "more onerous". More onerous, means more

troublesome or burdensome [*Black's Law Dictionary*]. Within the context of "hardship", this requirement should be decided on a case-by-case basis considering the circumstances of a particular case [*ICC Award No. 2508; Fucci, p. 70*]. Accordingly, the "more onerous" requirement is not met in this case.

97. The starting point to determine this requirement has to be the Main Contract itself, since it is up to the parties to define their respective spheres of risk in the contract [*Steel Ropes case; Katz, p.379*]. The threshold for "more onerous" can be determined by simple contract interpretation [*Schwenzer, p. 715*]. According to Art. 8 (1)(3) CISG, we can refer to the negotiation history for the intention of the Parties. The negotiation history illustrates that the actual increased costs are far lower than the price increase CLAIMANT anticipated when it drafted Clause 12 of the Main Contract [*CISG, Art. 8(1)(3)*].

98. During the negotiation, CLAIMANT indicated its unwillingness to take the risk of additional health and safety requirements, which could increase the cost by 40% of the contract price, basing it on its past experience [*PO 2, ¶21; Cl. Ex. 4*].

99. Notably, in our case, there is no 30% cost increase due to the additional tariffs, as alleged by CLAIMANT. It is only 15% of costs increasing for CLAIMANT. The 30% increased tariffs are only for the last 50 out of 100 doses of frozen horse semen. As such, there is actually only a 15% increase in costs for CLAIMANT, which is far lower than the 40% increase CLAIMANT anticipated.

100. Therefore, the Tribunal shall find that the increased tariffs do not make CLAIMANT's performance more onerous.

101. In conclusion, Clause 12 does not provide for the possibility of contract adaptation. However, if the Tribunal were to find that Clause 12 offers CLAIMANT such possibility, the increased tariffs do not fulfil the requirements for contract adaptation, namely they are neither "comparable to additional health and safety requirements" nor make the Main Contract "more onerous" to it. Hence, CLAIMANT should not be entitled to any mount of payment under Clause 12.

B. CLAIMANT CANNOT BASE ITS CLAIM ON CONTRACT ADAPTATION UNDER THE CISG, EITHER.

102. Contrary to CLAIMANT's position [*Cl. Memo., ¶88*], it cannot base its claim for contract adaptation on the law applicable to the Main Contract, either. This is because neither Art. 79 CISG **(a)** nor Art. 9 CISG in conjunction with Art. 6.2.3 PICC allow for this **(b)**.

a. CLAIMANT cannot base its claim on Art. 79 CISG.

103. CLAIMANT argues in its Memorandum that it is further entitled to a contract adaptation under the CISG as the law applicable to the Main Contract [*Cl. Memo., ¶88*]. RESPONDENT rejects this position on two grounds. Firstly, Clause 12 as a *force majeure* clause derogates Art. 79 CISG **(i)**. Secondly, even if the Tribunal were to find that there is no derogation, Art. 79 CISG is not available to CLAIMANT for four further reasons **(ii)**.

i. Article 79 CISG has been derogated by Clause 12 of the Main Contract.

104. Foremost, it is RESPONDENT's position that Clause 12 is a derogation from Art. 79 CISG and, therefore, Art. 79 CISG need not be considered. Such a derogation from the CISG is possible under its Art. 6. According to this article, a derogation means that "parties may modify the provisions of the CISG" [*Kröll/Mistelis/Viscasillas, Art. 6, ¶¶1, 25*].

105. CLAIMANT argues that a derogation of the CISG must be express [*Cl. Memo., ¶89*]. RESPONDENT disagrees with that. It is only necessary to expressly agree to other terms in the contract – terms that contradict the CISG. This is supported by the very source that CLAIMANT seeks to rely on when making its argument: "If the choice [of other provisions] is only in relation to a limited issue (e.g., risk, anticipatory breach, payment of price) which is covered by the CISG, then the choice may amount to a derogation from the CISG in relation to those matters" [*namely, CISG Adv. Council Op. No. 16, ¶4.11*]. As such, the derogation itself can be done either impliedly or expressly [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶57*]. In the case at hand, Art. 79 CISG was derogated by the insertion of Clause 12 in the Main Contract, which contains a *force majeure* clause [*PO 2, ¶12*] exempting CLAIMANT from liability in certain cases.

106. It is further RESPONDENT's position that in cases where the contract contains such a

force majeure clause, there is no space for the application of Art. 79 CISG. This is, for example, evidenced in the *Corn case*, in which the arbitration tribunal found that where a parties' contract contains a *force majeure* provision, this provision prevails over Art. 79 CISG, because Art. 79 CISG has a *force majeure* character [*Corn case*]. Furthermore, a derogation is allowed in this case, since Art. 79 CISG is a non-compulsory provision [*Silveira, Ch. III, p. 253*].

107. The Parties' intent was to keep the *force majeure* clause with its hardship reference in a narrow shape [*Resp. Ex. 3; see supra ¶86*]. The Incoterm DDP was to remain the basic rule and the Parties did not want additional provisions to govern the same issue, because this could have potentially made a *force majeure* clause more broadly applicable and thus contradict the Parties' intent. As a consequence, only "certain risks" selected by the Parties, *i.e.,* additional health and safety requirements, and not all risks should be allocated to RESPONDENT [*NoA, ¶7*]. Thus, the *force majeure* clause in the Main Contract was the only exemption rule the Parties wished to have. Since it governs the same aspect as the exemption rule of Art. 79 CISG, it constitutes a derogation from it [see *Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶57*].

108. To conclude, Art. 79 CISG is not available as a legal ground to CLAIMANT, as it has been derogated by Clause 12. CLAIMANT cannot base its claim for a price increase resulting from contract adaptation on it.

ii. In the alternative, even if the Tribunal were to find that Art. 79 CISG has not been derogated, it is not applicable in this case for four further reasons.

109. Even in an unlikely event where the Tribunal were to find Art. 79 CISG not to be derogated in this case, there are four further reasons why CLAIMANT cannot rely on it. Firstly, Art. 79(1) CISG refers to "impediments", which do not include hardships in general **(1)**. Secondly, the wording of Art. 79 requires a case of non-performance **(2)**. Thirdly, contract adaptation, the remedy requested by CLAIMANT, is not a remedy available under the CISG **(3)**. Lastly, contrary to CLAIMANT's position, the requirements of Art. 79(1) CISG are not met here, because the tariffs do not form an impediment **(4)**.

1. Article 79 CISG does not include hardships.

110. RESPONDENT first opposes CLAIMANT's view that the tariffs as a hardship are included under the CISG [*Cl. Memo., ¶¶91, 94*]. It is RESPONDENT's position that the word "impediment" in Art. 79(1) CISG only includes an impossibility to perform, but not a hardship.

111. Impediments are external, "objective circumstances that prevent the performance" of the contract [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶11*]. The performance of the contract must thus be essentially impossible. CLAIMANT now argues that excessively onerous circumstances, *i.e.,* a hardship, may constitute an impediment under Art. 79 CISG, and further argues that the imposed tariffs of 30% form such a hardship [*Cl. Memo., ¶94*]. This should not be accepted.

112. It is RESPONDENT's position that the legislative history of the CISG proves that hardships were not meant to be included within it. When a law needs to be interpreted, one often refers to the legislative history of the law to interpret its meaning, especially for a uniform international law like the CISG. Furthermore, "[w]hen important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the Convention's legislative history. In some cases, this can be decisive" [*Honnold 1995*]. RESPONDENT therefore argues that in order to establish the CISG's intention in regard to hardships, we ought to look at the drafting history of Art. 79 CISG.

113. During the drafting of the CISG, there was a request from Norway to explicitly include a provision regarding hardships, which was rejected, because the majority of countries did not want to include such a clause [*Honnold 1989, p. 350*]. Thus, the drafting history supports RESPONDENT's position that "hardships" were never meant to be governed by the CISG [*Petsche, p. 165*].

114. The CISG Advisory Council Opinion No. 7 itself admits that "as of the time of the drafting of this opinion, no court has exempted a party from liability on the grounds of economic hardship" [*CISG Adv. Council Op. No. 7, ¶31*]. On the contrary, cases in which the plaintiff tried to rely on this theory were rejected by the court [*Corn case; Steel Ropes case; Nuova*

Fucinati case; Petsche, p. 148]. This is in line with the fact that the CISG first and foremost upholds the general principle of *pacta sunt servanda* [*Schwenzer, p. 714*].

115. It is, hence, concluded that the CISG deliberately does not include hardships. For this reason, Art. 79 CISG cannot act as a remedy to CLAIMANT.

2. Article 79 CISG requires a non-performance, while CLAIMANT has performed here.

116. Another reason why the provision of Art. 79 CISG is not available to CLAIMANT is that it requires a non-performance [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶5*]. This is evidenced by the wording "failure to perform" [*CISG, Art. 79(1)*], which means that there is a barrier to the performance of one party [*Rimke, p.222*]. However, CLAIMANT has performed in this case: it is undisputed between the Parties that CLAIMANT has delivered all 100 doses as required by the Main Contract [*NoA, ¶13*].

117. It is RESPONDENT's position that by performing the Main Contract, *i.e.,* the delivery of the doses, CLAIMANT assumed the responsibility and waived its right of relying on the hardship clause. Even though Mr. Shoemaker, on behalf of RESPONDENT, had only told CLAIMANT's Ms. Napravnik that a contract adaptation would be done "*if* the contract provides" for it (emphasis added) [*Resp. Ex. 4*]. Contrary to CLAIMANT's position [*Cl. Memo., ¶103*], this was only conditional, as evidenced by the word "if", and not a definite promise to re-negotiate, let alone adapt the contract. CLAIMANT decided to ship the goods.

118. This is further proven when looking at case law under Art. 79 CISG. RESPONDENT is not aware of cases where a party had first performed and then asked for a contract adaptation. On the contrary, there is a number of cases involving a non-performance [*Agristo N.V. case; CIETAC 2005 case*]. In neither case were the goods delivered, *i.e.,* the seller performed, before the proceedings were started.

119. Thus, the fact that CLAIMANT had performed establishes another reason why it cannot rely on Art. 79 CISG.

3. Contract adaptation is not a remedy available under the CISG.

120. It is further RESPONDENT's position that CLAIMANT has no legal ground to ask for contract adaptation as a remedy under the CISG. CLAIMANT argues that Art. 79 CISG allows for a contract adaptation and a price increase [*Cl. Memo., ¶92*]. This is to be rejected, as the CISG knows no mechanism for contract adaptation.

121. When looking at the wording of Art. 79(1) CISG, it states: "A party is not liable for a *failure* to perform" (emphasis added). Thus, Art. 79(1) CISG explicitly only refers to a party's liability for damages, so that it only covers an exemption from damages and no other remedies. While Art. 79(5) CISG, on which CLAIMANT relies, does state that Art. 79 CISG does not prevent "either party from exercising any right other than to claim damages", this only refers to a party's rights because of non-performance of the other party, *e.g.* Art. 50, which grants the buyer a right to price reduction [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶55*]. This is the opposite to CLAIMANT's claim, who, as the seller, seeks a price increase.

122. Furthermore, scholars have pointed out that "[t]he CISG does not contain any provision that would allow for an amendment of the contract or renegotiations in situations of hardship" [*Lindström; Petsche, p. 168; Zeller, p. 153*] and "lacks a legal base for price adjustment" [*Kröll/Atamer, Art. 79, ¶86*]. Therefore, CLAIMANT cannot base its request on Art. 79 CISG.

4. The requirements of Art. 79(1) CISG are not met here.

123. Even if the Tribunal were to find that Art. 79 CISG may be employed, contrary to CLAIMANT's position [*Cl. Memo., ¶¶93-94*], the requirements of Art. 79(1) CISG are not cumulatively met here. It lists four requirements: "an impediment beyond [party] control . . . that [the party] could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" [*CISG, Art. 79(1)*]. The problem in question here is that of whether there is an "impediment". It is RESPONDENT's position that this is not the case: Even if hardships were generally accepted to fall under Art. 79(1) CISG, the tariffs in this *individual* case would not, as they do not meet the high threshold set out by the CISG.

124. If the tariffs of 30% were to be recognized as an impediment under Art. 79(1) CISG, they would have to make the performance "excessively onerous" [*Schwenzer, p. 714*]. When exactly this threshold has been met is to be determined on a case-by-case analysis. Numerous authorities agree that even a price increase of 100% is not sufficient [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶30*]. For example, courts refused a reliance on Art. 79(1) CISG with a price increase of 100% [*Société Romay case*] and even 300% [*OLG Hamburg 1997 case*]. Even more, RESPONDENT would like to point out to the Tribunal that the tariffs only applied to 50 doses, not the contract in whole. Therefore, the

total increase is only 15%. This price increase lies substantively underneath the mentioned threshold and is not severe enough to pass the required test of "excessively onerous".

125. Further, CLAIMANT argues that its (poor) financial condition bears on the issue of "excessively onerous", without citing any authority [*Cl. Memo., ¶101*]. The financial situation of one party, however, is generally its own responsibility and risk and must therefore be borne by the party in question, even if the circumstances become more onerous [*Liu*]. For example, the German Schiedsgericht of the Handelskammer Hamburg (Arbitral Tribunal) had to decide a case in which a seller of Chinese goods encountered higher cost of providing the goods, as CLAIMANT did in the case at hand with the introduced tariffs. When sued by the buyer for damages because of the contract termination, the seller claimed exemption from liability under Art. 79(1) CISG, based on financial difficulties it was facing. The Schiedsgericht in its judgement stated that financial difficulties, however, are not a "totally exceptional event", therefore do not lead to excessive onerousness and thus denied the claim [*Chinese Goods case*].

126. The same standard should be applied by the Tribunal in this case: the mere fact that CLAIMANT has financial difficulties neither forms an impediment under Art. 79(1) CISG nor does the financially more stable party have a duty to "save" its contracting partner. Further, CLAIMANT provides no authority as to why RESPONDENT, simply based on the fact that it manages its business more efficiently, should shoulder the price increase [*Cl. Memo., ¶102*].

127. Considering these facts, RESPONDENT argues that the tariffs in this case do not meet the threshold of an "impediment" under Art. 79(1) CISG. Further, since this article's requirements must be met cumulatively, and they were not in this case, Art. 79(1) CISG is therefore not applicable here.

128. To conclude, firstly, it is RESPONDENT' position that Art. 79 CISG has been derogated. Even if the Tribunal were to find that there was no derogation here, Art. 79 CISG would still not be available to CLAIMANT in the case at hand.

b. CLAIMANT is not entitled to the payment under Art. 9 CISG together with the PICC.

129. CLAIMANT also seeks to base its claim on Art. 9(2) CISG in conjunction with Art. 6.2.2 and Art. 6.2.3 of the PICC. It argues that the PICC apply to the Main Contract as

"international usage" under Art. 9(2) CISG, and that it has suffered a hardship under Art. 6.2.2 PICC, thus is entitled to contract adaptation under Art. 6.2.3 PICC [*Cl. Memo., ¶104*]. However, it is RESPONDENT's position that CLAIMANT is not entitled to any payment under the PICC because the PICC are not applicable to the Main Contract **(i)**. In the alternative, even if the PICC were applicable, the requirements of Art. 6.2.2 PICC are not met here **(ii)**.

i. The PICC are not applicable to the Main Contract.

130. Contrary to CLAIMANT's allegation that the PICC apply to the Main Contract as "international usage" [*Cl. Memo., ¶104*], it is RESPONDENT's position that the PICC are not applicable to the Main Contract, since the agreed usage of the "Incoterm DDP" prevails over "international usage".

131. Article 9(1) CISG stipulates that "[t]he parties are bound by any usage to which they have agreed" [*CISG, Art. 9(1)*]. Incoterms can be an example of agreed usage [*Kröll/Mistelis/Viscasillas, Art. 9, ¶15; Pamboukis, p. 112; Carbonneau/Audit, p. 177*]. Article 9(2) CISG stipulates that "[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" [*CISG, Art. 9(2)*]. In the case of a conflict between an agreed usage (Art. 9(1) CISG) and an international usage (Art. 9(2) CISG), the former prevails by virtue of the principle of autonomy of the parties [*CISG-Online 1278; Kröll/Mistelis/Viscasillas, Art. 9, ¶5; Pamboukis, p. 115*]. This hierarchy rule is also evidenced by a judgment of the US Court of Appeals (11th Circuit) made on 12 September 2006, in which the court concluded that "in the absence of an express agreement as to a term's meaning", "the parties' usage of a term in their course of dealings controls that term's meaning in the face of a conflicting customary usage of the term" [*CISG-Online 1278, p. 8*].

132. In Clause 8 of the Main Contract, the Parties agreed on the Incoterm DDP (Delivery Duty Paid) [*Cl. Ex. 5*]. Under DDP, the seller has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities [*ICC, Incoterms® Rules 2010*]. However, CLAIMANT has based its claim for contract adaptation on Art. 6.2.3 PICC and asks that the 30% import tariffs imposed by Equatoriana shall be paid by RESPONDENT, the buyer, rather than CLAIMANT, the

seller [*Cl. Memo., ¶73*], which contradicts the rules under the DDP.

133. Therefore, the PICC are not applicable to the Main Contract.

ii. In the alternative, even if the PICC were applicable, the requirements of Art. 6.2.2 PICC are not met here.

134. However, were the Tribunal to find the PICC to still be applicable in this case, it is RESPONDENT's position that the case would not meet its requirements because the 30% tariffs imposed by Equatoriana do not fundamentally alter the equilibrium of the Main Contract **(1)**, and the risk of paying increased retaliatory tariffs was assumed by CLAIMANT **(2)**.

1. The 30% tariffs imposed by Equatoriana do not fundamentally alter the equilibrium of the Main Contract.

135. One essential requirement of hardship stipulated in Art. 6.2.2 PICC is that "the occurrence of events fundamentally alters the equilibrium of the contract" [*PICC, Art. 6.2.2*]. The Official Comment to the 1994 edition of the PICC provides that an alteration amounting to 50% or more of the cost is likely to amount to a fundamental alteration [*Official Comment to PICC 1994, pp. 182-183*]. However, this 50% threshold was dropped from the 2004 version of the PICC because the figure 50% had been criticized on the grounds that it was too low and arbitrary [*Vogenauer/Kleinheisterkamp, p. 719*]. Therefore, an alteration which amounts to less than 50% of the cost will not be fundamental, and in all likelihood the threshold will be set at a higher level [*Vogenauer/Kleinheisterkamp, p. 719*]. Other scholars hold the opinion that at least a cost increase of 100% is needed to amount to a fundamental alteration [*Schwenzer, p. 717*].

136. The tariffs in this case are not severe enough to pass the required test of "fundamentally alters the equilibrium of the contract". In the present case, the tariffs imposed by Equatoriana are only 30% of the price [*NoA, ¶10*]. Since the tariffs only affect the third shipment, a total of 50 doses, the cost of CLAIMANT only increases by 15% [*see supra ¶99*], which is far lower than the threshold of 50%.

137. Therefore, the 30% tariffs imposed by Equatoriana do not fundamentally alter the equilibrium of the Main Contract.

2. The risk of paying the increased retaliatory tariffs was assumed by CLAIMANT.

138. One of the requirements of Art. 6.2.2 PICC for hardship is that "the risk of the events was not assumed by the disadvantaged party" [*PICC, Art. 6.2.2*]. Contrary to CLAIMANT's allegation that the risk of paying increased retaliatory tariffs was not assumed by CLAIMANT [*Cl. Memo., ¶119*], it is RESPONDENT's position that, on the contrary, the risk was indeed assumed by CLAIMANT.

139. The Parties agreed on the application of the Incoterm DDP [*Cl. Ex. 5*] under which CLAIMANT, the seller, has the obligation of paying any duty both for export and import [*ICC, Incoterms® Rules 2010*]. Although a hardship clause is provided in Clause 12, it only applies to the events that are comparable to "additional health and safety requirements" [*Cl. Ex. 5*]. However, as analyzed above in paragraphs 92-95 [*see supra ¶92-95*], retaliatory tariffs are not comparable to additional health and safety requirements. Thus, the risk of paying the increased retaliatory tariffs was assumed by CLAIMANT subject to the DDP delivery terms, rather than was assumed by RESPONDENT by the alleged falling under the scope of hardship clause in Clause 12.

140. To conclude, the PICC are not applicable in this case. Alternatively, even if the PICC were applicable, the requirements of Art. 6.2.2 PICC are not met here. Therefore, CLAIMANT cannot request a contract adaptation pursuant to Art. 9(2) CISG in conjunction with the PICC.

CONCLUSION ON ISSUE C

141. RESPONDENT thus argues that the Tribunal should not adapt the Main Contract because neither Clause 12 of the Main Contract nor the CISG allows for this. CLAIMANT's claim therefore lacks a legal basis.

REQUEST FOR RELIEF

Based on the foregoing and arguments to be presented at a hearing on this matter, RESPONDENT respectfully requests the Tribunal:

1) To find the Tribunal has no jurisdiction or power to adapt the Main Contract;

2) To find that CLAIMANT is not entitled to submit the Partial Interim Award as evidence in issue;

3) To reject the claim for an additional payment of US$ 1,250,000 or any other amount raised by CLAIMANT resulting from the adaptation:

a) Under Clause 12 of the Main Contract; or

b) Under the CISG.

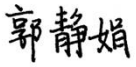
CERTIFICATE

China-EU School of Law, January 24, 2019.

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

Anne Berlips

GUO Jingjuan



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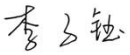
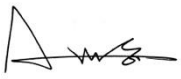


TAO Zhilin

WANG Chengyue



WANG Lulu

Certificate and Choice of Forum
To be attached to each Memorandum

I 王成岳 WANG Chengyue, on behalf of the Team for (name of School)

China-EU School of Law at the China University of Political Science and Law

hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐□Vis East Moot in Hong Kong, or
☐□Vienna Vis Moot

Authorised Representative of the Team for (School name) China-EU School of Law at the China University of Political Science and Law

Name 王成岳 WANG Chengyue
Signature