SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

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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INDEX OF ABBREVIATION

&	And
Apr	April
Arb	Arbitration
Art.	Article
Aug	August
C	CLAIMANT
Chap	Chapter
CISG	United Nation convention on contracts for international sale of Goods
Ex. C	CLAIMANT Exhibit
Ex. R	RESPONDENT Exhibit
Feb	February
FSSA	FROZEN SEMEN SALES AGREEMENT
Hf. Letter	Letter of Horace Fasttrack
Jan	January
Lex-Arbitri	The law of the Seat of Arbitration
Ltd	Limited
Mar	March
No.	Number
Not. Of Arb	Notice of Arbitration
Nov	November
Oct	October
¶	Paragraph
¶¶	Paragraphs

Pg. /Pp.	Page/Pages
PO	Procedural Order
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Ans. Not. Of Arb.	Answer to Notice of Arbitration
Sep	September
The problem	The Case in Hand
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDRIOT Principles	International Institute for the Unification of Private Law
V.	Versus

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Statement of Facts

1. Phar Lap Allevamento (hereinafter "**CLAIMANT"**) is a company registered and located in Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm covering all areas of the equestrian sport. Black Beauty Equestrian (hereinafter "**RESPONDENT"**) in Oceanside, Equatoriana is famous for its broodmare lines.

2. Equatoriana, Mediterraneo, and Danubia are all contracting states of the CISG. The general contract law of Equatoriana, Mediterraneo is the UNIDROIT Principles on International Commercial Contracts. Danubia adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.

3. **In the year 2017,** the Equatorianian government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease. As a result thereof, the ban on artificial insemination for racehorses has been temporarily lifted in Equatoriana.

4. **On 21st March 2017**, RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III for its newly started breeding program.

5. CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen for 99.500 USD in accordance with the Mediterranean Guidelines for Semen Production and Quality.

6. RESPONDENT replied to CLAIMANT's offer thereby rejecting the delivery terms and the forum selection clause while insisting on a delivery based on DDP. RESPONDENT clarified that DDP means that all risks have to be borne by CLAIMANT. RESPONDENT further expressed its non-acceptance of the courts of Mediterraneo.

7. **On 31st March 2017,** CLAIMANT accepted the DDP delivery. For the health and security requirements, the parties have added a hardship clause into their Frozen Semen Sales Agreement (hereinafter "FSSA").

8. **On 10th April 2017,** RESPONDENT agreed on the Law of Mediterraneo to govern the FSSA, not the arbitration agreement. RESPONDENT prepared the first draft for the dispute resolution clause which is based on the model clause of HKIAC and states that the seat of arbitration shall be Equatoriana.

9. **On 11th April 2017,** CLAIMANT suggested a neutral country as the seat of arbitration which was Danubia. CLAIMANT did not mention a word about wanting the law of Mediterraneo to be applicable to the arbitration agreement.

10. As the parties were not be able to agree on a hardship clause as well as a forum selection clause, the parties started negotiations. While the negotiations had continuance, **on 12thApril 2017,** the two negotiators got injured in a car accident, which jeopardized the finalization of the FSSA.

11. **On 6th May 2017,** CLAIMANT and RESPONDENT signed the contract.

12. The newly elected president of Mediterraneo announced the imposition of 25% tariffs on agricultural products from Equatoriana. After that the Equatorianian government imposed 30% tariffs on agricultural products coming from Mediterraneo.

13. CLAIMANT was informed by the customs authorities about the newly imposed tariffs of 30% on agriculture products.

14. **On 31st July 2018**, CLAIMANT initiated arbitration proceedings against RESPONDENT. **On 2nd October 2018**, CLAIMANT insisted to submit evidence from another arbitration proceeding of RESPONDENT's although it harms the confidentiality of arbitration.

Summary of Argument

ISSUE I: Mediterraneo law does not governs the arbitration agreement, and the tribunal has not the jurisdiction under arbitration agreement to adapt the contract. Parties have not agreed on the choice of law clause and that is why Danubia law governs the arbitration agreement.

ISSUE II: CLAIMANT is not entitled to submit evidence of RESPONDENT's involvement in another arbitral proceeding which was initiated by RESPONDENT for the purposes of adapting a contract. The Tribunal does not have the authority to determine the admissibility of evidence.

ISSUE III: CLAIMANT is not entitled to the payment of 1.250.000 USD resulting from an adaptation of the price under article 12 of FSSA. Moreover, the imposition of the tariffs does not constitute hardship. Besides that, CLAIMANT is not entitled to the additional payment under articles 8 and 79 of CISG.

ISSUE 1: THE ARBITRATION AGREEMENT DOES NOT GIVE THE TRIBUNAL THE JURISDICTION TO ADAPT THE CONTRACT

1. The tribunal does not have the power to adapt the contract under the arbitration agreement since the arbitration agreement is governed by the law of Danubia (A); and the interpretation of the arbitration agreement under the four corner rules will not allow the adaptation of the contract (B).

A. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA

2. CLAIMANT argues that the parties did not agree to have a separate law and therefore comes to the conclusion that the law of Mediterraneo should govern the arbitration agreement as it is the proper law of the contract [*Ans. Not. Of Arb., pg. 7, ¶ 15*]. However, this allegation of CLAIMANT is baseless as it is the Danubian law which applies to the arbitration agreement.
3. The matter of *severability* in relation to a contract is allowed for a choice of law [*Gralf- Calliess, pg. 72*].The parties may choose the law applicable to "the whole contract *or to only part* of it." Accordingly, if the parties choose a law for only a part of the contract, the chosen law will govern only that part, and not *all* of the contract. In such a case, the rest of the contract will be governed by the otherwise applicable law, thus producing a contractual *severability [C. Symeonides, pg. 24]*.
4. RESPONDENT submits that the law of Mediterraneo only governs the sales agreement not the arbitration agreement as the parties agreed to subject the arbitration agreement to a separate law (I); the parties did not agree that the proper law of the contract should also govern the arbitration agreement. (II).

I. The law of Danubia applies to the arbitration agreement as the parties agreed to subject the arbitration agreement to a separate law.

5. In regard to the arbitration clause, RESPONDENT's proposal how to draft the arbitration agreement had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract [*EX R1, Pg. 33 ¶ 2*]. RESPONDENT's proposal reads:

- "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.

  The seat of arbitration shall be Equatoriana.

  The law of this arbitration clause shall be the law of Equatoriana.

  The number of arbitrators shall be three.

  The arbitration proceedings shall be conducted in English."

6. A Choice of law agreement is a separate contract that is distinguished from the main contract (*e.g.*, the sales contract) *[Principles on Commercial Contracts, pg. 57]*. A choice of law agreement is autonomous and independent from the contract that contains it *[Principles on Commercial Contracts, pg. 57]*.

7. Even when the agreement is part of the contract, the agreement must be judged separately from the main contract *[Principles on Commercial Contracts, pg. 60]*.

8. In the case at hand, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement, therefore the law of Danubia governs the arbitration agreement.

II. The parties did not agree that the proper law of the contract would also govern the arbitration agreement

9. CLAIMANT argues that RESPONDENT allegedly agreed to the law of Mediterraneo to be applicable to the arbitration agreement. By contrast, RESPONDENT solely and exclusively agreed on a choice of law for the sales agreement knowing that it is completely independent from the arbitration agreement [*Ans. Not. Of Arb., pg. 6, ¶ 14*].

10. Following CLAIMANT's approach that there needs to be an explicit provision of the parties for a law to be applicable to the arbitration agreement, it is definitely not the Mediterranean law which applies to the arbitration agreement.

11. Since, (a) the arbitration agreement is a complete different agreement to the Sales agreement, which means for the Mediterranean law to apply to the arbitration agreement, there should have been such an express provision. However, the Parties neither expressly (b), nor impliedly (c)

agreed on the application of the Mediterranean Law. (d) By default, it is the lex arbitri which applies to the arbitration agreement happening to be the Danubian Law.

a. An arbitration agreement is separable from the main contract

12. CLAIMANT argues that the arbitration agreement is part of the sales agreement and should be governed by the same law. [*Not. of Arb., Pg., 7, ¶ 15*]. CLAIMANT however misjudges that despite being part of another contract, the Arbitration Agreement is still a separate agreement governed under rules which are independent from the main agreement.

13. The doctrine of separability allows the Tribunal to evaluate the validity of the arbitration clause independently from the main contract in which it appears *[Goldman at 210; Stefan M. at 102; Three Salient Problems at 5; Born at 67; Robert H. at 2; see also Assurance v. Kansa; Paint v. Conklin; export v. Joc; Gosset v. Société]*. Further, the principle of separability was initially intended as means of isolating the arbitration agreement from laws affecting the main contract [Gaillard E. & Savage J.]

14. The Danubian Arbitration Law, as the law of the place of arbitration, has expressly adopted the doctrine of separability in Art. 16(1). For the purpose of determining the existence or validity of an arbitration agreement, Art. 16(1) provides that *"an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" [see also Union v. G.A.P.]*. In the case Harbour Assurance Co. (UK) Ltd v. Kansa General Insurance Co Ltd, the House of Lords held that when parties conclude a contract containing an arbitration clause, they are considered as concluding not one, but two agreements, In this case, the court confirmed that the arbitration agreement is a separate and independent contract from the main contract. [Harbour v. Kansa].

15. In addition, Luttrell in his book [*Luttrell 2011 Int'l Trade & Bus. L. Rev 406]* argues that an arbitration agreement becomes an autonomous contract within the main contract. Therefore, this has the effect that the arbitration contract may be governed by a different body of law to the rest of the main contract [*Doctrine of separability, a comparative study, pg. 18, § 3.3*]. The author explains that the primary objective of subjecting the arbitration clause to a different body of law from that of the main contract is to ensure that the arbitration clause is more readily enforceable in the preferred jurisdiction. In this regard, the author cites an example of how it would be advisable for an English businessman contracting with another businessman in Kuwait to subject their arbitration clause to English law so as to avoid the application of the Kuwaiti arbitration law which has Sharia informed

proscriptions. According to this, these would ensure that the validity of the arbitration clause is not put at risk of the undesirable Kuwait laws.

16. Here, the arbitration agreement may be part of the main contract, this however does not change the fact that it should be seen as a separate agreement which is not governed by the same rules as the main contract. RESPONDENT certainly acknowledges the consensual provision no. 14 of the FSSA that the Sales Agreement shall be governed by the law of Mediterraneo, however this provision clearly differentiates between FSSA and arbitration agreement, leading to the conclusion that any provision or rule agreed on for the FSSA does not in any way affect the arbitration agreement.

b. There was no explicit agreement of the parties as to the application of the Mediterranean law to the arbitration agreement

17. CLAIMANT's approach that there needs to be an expressive agreement for a law to be applicable to the arbitration agreement, does not lead to the application of the Mediterraneo Law to the arbitration agreement as there was no such expressive provision. Statements and other conduct of the parties are to be interpreted according to their intent as per the CISG *[Art. 8(1), 8(2)]*. Art. 8 CISG provides a comprehensive mechanism for the interpretation of all contractual terms, including Arbitration Clauses [*CISG Advisory, PP. 231*].

18. Since the CISG emphasizes the private autonomy of the parties, the content of the contract is first determined by their common intent [*Kröll et al. Art. 8 § 2; Peter Schlechtriem, Ulrich Schroeter § 221a; Peter Schlechtriem, Ingeborg Schwenzer, Art. 8 § 11; Case No. HOR.2005.82/ds; Case No. 00296/2010; Case No. 03-4165-JAR*].

19. In this case, the parties did not have an express agreement to apply the Mediterranean law to the arbitration agreement. The e-mail correspondence as found in the exhibits produced by both CLAIMANT and RESPONDENT do not point to such a fact. The only express agreements for applying the Mediterraneo law is [*FSSA, Clause 14*]:

    - This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG).

20. There is no provision other than Clause 14 mentioning the application of the Mediterranean law. Clause 14 however solely applies to the Sales Agreement. Therefore the Mediterranean law does not apply to the arbitration agreement.

c. There was no implicit agreement of the parties as to the application of the proper law to the arbitration agreement

21. GThe question arises whether there was at least an implied agreement as to the application of the Mediterranean law to the arbitration agreement as CLAIMANT alleges it to be. Because of the fact that the Parties agreed to have the Mediterranean law governing the FSSA, CLAIMANT draws the conclusion that "in such a situation it would only make sense for the parties to have agreed on the law of Mediterraneo" [*CLAIMANT memo, pg. 10, ¶ 8*] for the arbitration agreement as well. Since "under that law arbitration agreements are to be interpreted broadly and it grants the Tribunal jurisdiction" [*FSSA, Clause 14*]. Thereby, CLAIMANT misjudges that a law being profitable to one party does not automatically make it applicable for both; especially, when the key dispute is about whether the Tribunal is granted jurisdiction or not.
22. Pursuant to Art. 8(2) CISG, the understanding of a person with the same knowledge and background in the same circumstances as the addressee is relevant to determine the intent of the parties [*Ferrari et al. p. 180; Peter Schlechtriem, Ingeborg Schwenzer, Art. 8 § 11; Award No. 91877; Case No. 3PZ97/18; Case No. 2000 NZCA 350*].
23. RESPONDENT's proposal on the arbitration agreement being governed by the law of the seat of arbitration which happened to be Equatoriana had made clear that RESPONDENT never intended to apply the same law to the Arbitration Agreement as was applied to the Sales Contract. RESPONDENT clearly distanced itself from the Mediterranean law being also applicable to the Arbitration Agreement. It consciously decided for a law which was not associated with CLAIMANT's place of business but with the place of arbitration [*EX. R1, Pg. 33, ¶ 2*].
24. CLAIMANT had changed the suggested place of arbitration but had not objected to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement, stating that "we would largely accept your proposal with an amendment as to the place of arbitration" [*EX. R2, Pg. 34, ¶ 3*]. That amendment being that "as the Place of Arbitration Shall be a neutral place, it is now the law of the new place of arbitration which applies to the arbitration agreement", here happening to be Danubia.
25. The first draft of the arbitration agreement actually contained an express choice of law provision for the arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12th April 2017. They had

to be replaced for the finalization of the contract [EX. C5, pg. 13]. It was subsequently merely forgotten by the two new negotiators to include that provision in the final version, because the two other negotiators neither left any instructions for the new ones nor did they were available to respond to potential questions.

26. Therefore, there was also no implied agreement of the parties to apply the proper law of the contract to the arbitration agreement.

d. The Law of Danubia applies to the arbitration agreement as Danubia is the place of the arbitration

27. The arbitration clause and its interpretation are governed by the law of Danubia and not, as CLAIMANT alleges, by the law of Mediterraneo.

28. Additionally, in the absence of a choice of law by the parties, an arbitral tribunal should apply the law of the place of arbitration *[Seventh Secretariat, Art. 16, A.3.; HUSSLEIN-STICH, p.86;* HUNTER M, *§§2.92 ET seqq.;* ALEXANDER J. BĚLOHLÁVEK, pg. 4; *Passarini, Andrea, pg. 4]*.

29. In addition, if there is no express choice of Law to govern the arbitration agreement, but the parties have chosen the seat of the arbitration, the contract will frequently be governed by the law of that country on the basis that the choice of the seat is to be regarded as an implied choice of the Law governing the contract. [Egon Oldendorff v. Libera Corporation (1995) 2 Llyold's Rep. 64; (No.2.)(1996)) 2 Llyold's Rep. 380; Halmyn and Co. v. Talisker Dilstillery (1894) A.C. 202; N.V. Kwik hoo Tong Hnadel Mastchappij v. James Finaly C. Ltd (1927) A.C. 604; The Njegos (1936) P. 90].

30. In our case, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract as there is neither an express nor an implied choice of such law in the arbitration clause. However, the place of arbitration agreed upon by the parties is Danubia, which is why the Danubian Law [*EX. R2, Pg. 34, ¶ 3*] should govern the arbitration agreement.

B. THE INTERPRETATION OF THE ARBITRATION AGREEMENT SHOULD BE BASED ON THE FOUR CORNER RULES

31. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [*PO2, Pg. 6, ¶ 45*]. Art. 4.3 of the UNIDRIOT principles provides the "four corners rule", i.e. that the interpretation of the arbitration

agreement is limited to its wording and no external evidence may be relied upon [*UNIDRIOT, Art. 4.3*].

32. The "Four corners rule" says that the meaning of an unambiguous agreement is to be determined from the words of the contract alone. "The rule bars the parties to a written contract that is 'clear on its face'- meaning that a reader who is competent in English but unaware of the agreement's context would think the writing admitted of only one meaning. The judge alone determines what the contract means when no extrinsic evidence is presented. [*The law of interpreting contracts, Pg. 17*].
33. Additionally under the "four corners rule" to determine the parties' intention, due regard is to be given to what the parties actually stated in the deed, not what they allegedly meant." [*Ranch v. Double*].
34. In the present case, the arbitration agreement itself, which is to be treated as a separate contract for its interpretation under the four corners rules, contains no choice of law wording. Unlike many other contracts the choice of law clause for the main contract, the sales agreement, is not contained in the arbitration clause. Instead, it is included in a separate clause preceding the arbitration agreement.
35. Reliance on the drafting history and preceding communication is excluded if the wording is certainly clear. In clause 14 of the case it is clearly mentioned that *"This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)"* [*FSSA, Clause 14*]. There is nothing mentioned about the arbitration agreement to be governed by the law of Mediterraneo. As there is no other way to interpret this provision, the Contract is clear and unambiguous, hence the intent of the parties is to be construed only from the text of the Contract which is why the arbitration agreement is not governed by the Mediterranean law.

Conclusion of Issue I

36. Since the Sales contract is separated from the arbitration agreement, and the four corners rule applies to the latter, an interpretation of the parties' intent results in having agreed on the law of Danubia to be applicable to their arbitration agreement.

ISSUE 2: THE CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

A. The arbitral tribunal has the authority to rule on the admissibility of evidence, but the evidences are not admissible

37. It has been undisputedly agreed by the RESPONDENT and the CLAIMANT in the Arbitration Agreement dated 06th May 2017 that any dispute arising out of the contract would be resolved by HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted [*FSSA, Clause 15*].
38. Further the parties have agreed to conduct the proceedings on the basis of the newest version of the Hong Kong Arbitration Rules during the telephone conversation had with the Arbitral Tribunal on 04th October 2018, i.e. the HKIAC Rules 2018, which officially enters into force in November 2018 [*PO1, ¶ 2*]. Therefore it has been agreed by the parties that they will conduct the arbitration proceedings in consistence with the HKIAC Rules 2018. To that end, RESPONDENT demonstrates a) The inadmissibility of evidence obtained through a breach of confidentiality by CLAIMANT and b) The inadmissibility of evidence through an illegal hack of RESPONDENT's computer system.

a. Inadmissibility of evidence obtained through breach of confidentiality by CLAIMANT

39. Under Art. 31 (2) of the 2006 UNCITRAL Model Law confidentiality is perceived to be a key advantage of international commercial arbitration, the issue of confidentiality is addressed in different ways by national arbitration laws and institutional rules. Though it is often cited as a cornerstone of arbitration, the extent of confidentiality in an arbitration proceeding depends on the applicable laws as well as the parties' agreement. At hand, there is no other agreement between the parties other than the HKIAC Rules 2018.
40. Hong Kong is one of few jurisdictions where the duty of confidentiality is expressly codified by statute [*Arbitration act 1996; Arbitration act 1974; Arbitration Act 2010*]. "The Arbitration Ordinance prevents parties from communicating any information relating to the arbitral proceedings or an award" [*Arbitration Ordinance, pg. 18*] at the annual breeder conference CLAIMANT's CEO heard about the other Arbitration from Mr. Kieron Velazquez, He is the new CEO of one of CLAIMANT's regular customer but until the 30 May 2018 had been working for the Mediterranean buyer in the other arbitration [*PO2, Pg. 60, ¶ 40*].

41. The Arbitration Ordinance also provides that arbitration related court proceedings and judgments shall also be confidential unless parties agree otherwise. As the parties to the arbitration did not conclude any agreement and did not direct otherwise that tribunal would have relied upon, the tribunal should rely of the HKIAC-Rules as these provisions were adopted to safeguard the confidentiality of arbitral proceedings as well.
42. As discussed in further detail below, the confidentiality obligations contained in Art. 42 of the HKIAC-Rules are wider in scope than under the Arbitration Ordinance [*Commentary on HKIAC-Rules 2013, confidentiality*]. Parties to commercial disputes involving sensitive commercial information or trade secrets could greatly benefit from the HKIAC-Rules' provisions on confidentiality. The point to be made, even if the seat of the arbitration is in a jurisdiction where an implied duty of confidentiality is not recognized, parties can ensure that the duty of confidentiality applies by adopting the HKIAC-Rules [*Commentary on HKIAC-Rules 2013, confidentiality*].
43. CLAIMANT invoked the Art. 45 of the HKIAC-Rules for the breach occurred. Confidentiality of an Arbitral Agreement administered under the HKIAC Rules 2018 is governed by Art. 45 of the rules. Art. 45.3 (a) (i) states 'Art. 45.1 does not prevent the publication, disclosure or communication of information referred to in Art. 45.1 by a party or by party representative to protect or pursue a legal right or interest of the party" [*CLAIMANT Memo, Pg. 9, ¶ 15*].
44. Contrary to CLAIMANT contention, the Art. 45.3 (a) provides that the duty of confidentiality does not prevent a party from instituting legal proceedings to (1) protect or pursue its legal right or interest or (2) enforce or challenge the confidential award in legal proceedings before a court or other judicial authority.
45. Here however there is no legal right for CLAIMANT which should be pursued and CLAIMANT also does not want to challenge the award. Instead CLAIMANT damaged the confidentiality of arbitration; For example, a party may wish to disclose the confidentiality information in an arbitral award if it wishes to argue that the prior award precludes subsequent claims in judicial proceedings by virtue of a matter finally decided on its merits by a court having competent jurisdiction [*shipping Pty Ltd v Jinhui Shipping*].
46. Art. 45.3 (b) also provides that a party may disclose the information referred to in Art. 45.1 to any government body (eg. the Department of Justice), any regulatory body (eg. the securities and Exchange Committee or the Hong Kong Monetary Authority), any court (including any Hong

Kong court), or any tribunal but the party must be obliged by law make the publication, disclosure, or communication [*Commentary on HKIAC-Rules 2013, Confidentiality*]. CLAIMANT has no law relying on to submit the evidence obtained illegally.

47. Confidentiality is a contractual creation and thus the breach of confidentiality should be treated as any other breach of contract [*Chapter 5: Breach of Confidentiality, PP. 161 – 184*] so the CLAIMANT was contractually obliged to a duty of confidentiality and the breach of confidentiality should be assumes as "any other breach of contract", Which is why CLAIMANT is not allowed to invoke the information obtained as evidence in this proceeding.
48. In the case A. I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd. decided that, the Bulgarian Foreign Trade Bank ("Bulbank") accused A.I. Trade Finance ("AIT") of committing a gross breach of contract by releasing a confidential partial award. The underlying dispute posed a question of risk transfer in a loan contract concluded by Bulbank with an Austrian bank, the payment rights of which were subsequently transferred to AIT.
49. The dispute was resolved through arbitration under the Arbitration Rules of the United Nations Economic Commission (ECE Rules) in Stockholm, based on the arbitration agreement in the loan contract between Bulbank and the Austrian bank. In a "partial decision," the arbitral tribunal asserted jurisdiction and held that the arbitration agreement in the original loan contract also bound AIT. Subsequently, a representative of AIT submitted a copy for publication to Mealey's International Arbitration Report. Based on this allegedly impermissible disclosure, Bulbank requested the tribunal to declare the arbitration agreement void.
50. The tribunal rejected Bulbank's contention and rendered a final award. Bulbank filed an action with the Stockholm City Court to set aside the final award, contending that the communication of the partial award in breach of arbitral confidentiality injured the arbitration agreement so seriously that it rendered it null and void. The Stockholm City Court found that the Swedish arbitration law contained an implied duty of confidentiality, unless otherwise agreed upon by the parties.
51. The ECE Rules governing the Bulbank arbitration did not affect this duty. The City Court held that the breach of the implied duty of confidentiality was a fundamental breach of the arbitration agreement and constituted a sufficient ground to nullify the arbitral award. To that end as the duty of confidentiality should apply to award and to proceedings as well, RESPONDENT alleges that if so happens the consequences would be the same happened in the A. I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd, invoking the duty of confidentiality under HKIAC-Rules 2018.

52. Affirming the good faith principle The Court of Appeals, stated "the making public of information in arbitration proceedings could be viewed as a breach of the duty of good faith [*Final Act, 15-12 Mealey's Int'l; Confidentiality in International Commercial Arbitration; Swedish Supreme Court, 14 Mealey's Int'l Arb., Pg. 163-164*].

b. Inadmissibility of illegally obtained evidence though a hack of the RESPONDENT's computer system

53. Contrary to CLAIMANT's suggestion "In the arbitral context, it will usually be subject to broad discretionary rights of the tribunal. Numerous rules indicate that the tribunal shall determine the admissibility, relevance, materiality and weight of evidence [*UNCITRAL Rules 2010 Art. 27(4); HKIAC Rules Art. 23.10; Swiss Rules 2012 Art. 24.2; SCC Rules Art. 26(1); IBA Rules on the Taking of Evidence in International Arbitration 2010 Art. 9.1*]." [*CLAIMNAT Meme, Pg. 12, ¶ 22*] the UNCITRAL Rules are not applicable to the case at hand.
54. CLAIMANT introduced the ICSID case in which the Kazakhstan government's computer network was hacked and, consequently, the CLAIMANTs obtained access to and relied on thousands of confidential documents that were published following the hacking [*Salah Hourani v. Republic of Kazakhstan]." [CLAIMANT Memo, Pg. 12, ¶ 23*].
55. Thereby, CLAIMANT drew the conclusion that its own action being very similar to the CLAIMANT in the ICSID case, is allowed as well. CLAIMANT however misjudges the applicability of the case. Firstly the arbitration is between two states, secondly the case was held before the International Court of Justice which is a court, not a tribunal for commercial purposes and thus can have other confidentiality standards. Thirdly, there is no fact to show any evidence which was obtained through a hack of computer system by any of the parties and the ICJ have allowed that evidence.
56. As for the above mentioned points, a tribunal does not have authority to rule on evidences as admissible, whenever they were obtained through breach of Confidentiality or an illegal hack of the other party's computer system. Summarizing, the CLAIMANT should not 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.

B. CLAIMANT COULD ARGUE THAT THE TRIBUNAL CAN CONSOLIDATE BOTH ARBITRATIONS

57. RESPONDENT do agree on Consolidation of the arbitrations based on Art. 28.1 of the HKIAC 2018 "HKIAC shall have the power, at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, to consolidate two or more arbitrations" if the circumstances exist which under 28.1.a & b & c the conditions are "(a) the parties agree to consolidate, but in our case the RESPONDENT did not agree to the Consolidation of the both Arbitrations and not even the other party involve in a separate Arbitration with RESPONDENT; or (b) all of the claims in the arbitrations are made under the same arbitration agreement.
58. In our case, parties have agreed on HKIAC-Rules 2018 but the other Arbitration is occurring under HKIAC-Rules 2013 which shows that there is a difference between both Arbitration agreements; or the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible," which none of the three above mentioned criteria are possible to be applied.
59. Moreover, one of the most important changes of the 2013 amendments relates to the joinder of third parties (Art. 14) and to the consolidation of arbitration proceedings (Art. 15). The arbitral tribunal is entitled to rule on the admissibility of the joinder of a third party upon request of a party of the proceedings or of the third party.

Conclusion of issue II

60. It has been undisputedly agreed by the parties in the arbitration agreement that any dispute arising out of this contract would be resolved by HKIAC administrated arbitration rules. Moreover CLAIMANT should not be entitled to submit evidence form the other arbitration proceedings on the basis on the assumption that this evidence had been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

ISSUE III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1.250.000 USD OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

I. CLAIMANT is not entitled to the additional payment under clause 12 of the contract

61. RESPONDENT submits that the imposition of the tariffs from Equatoriana was foreseeable and assumed by CLAIMANT (1); and should therefore not be considered as a hardship (2); Further, RESPODENT acted in good faith (3).

1. The imposition of the tariffs from Equatoriana was foreseeable and assumed by CLAIMANT under part (d) article 6.2.1 of UNIDROIT

62. Since both Parties agreed to settle any disputes arising out of the contract by the application of Mediterranean law, which is verbatim adoption of the UNIDROIT Principles on International Commercial Contracts, the Tribunal should apply the Principles of International Commercial Contracts, published in 2016 by the UNIDROIT Institute, Rome.
63. For this purpose according to part (c) and (d) of 6.2.2 Art. of UNIDROIT, Hardship requires the presence of the following conditions: "the events are beyond the control of the disadvantaged party; and the risk of the events was not assumed by the disadvantaged party" [*UNIDROIT*].
64. If the circumstances were foreseeable, the parties could have contractually arranged the consequences; if they had not done so, it is either because they were negligent or because they tacitly accepted the risk [*Daniel Girsberger, pg. 17*].

    In the present case, Clause 12 of the contract should be interpreted narrowly, because when restarting the negotiation Mr. Krone told Mr. Ferguson that the ICC-Hardship Clause suggested by Ms. Napravnik was considered by RESPONDENT to be too broad, leading to the conclusion that the hardship should be interpreted narrowly [*PO2, Pg. 56, ¶ 12*]. For this reason the scope of hardship is limited and not too broad that constitute the newly imposed tariffs as well.
65. Two months before the last shipment of 50 doses, Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana. While Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, the imposition of the tariffs from Equatoriana were a reaction to the highly controversial measures by the newly elected President of Mediterraneo [*Ex C 6, Pg. 15, ¶ 2; Not of Arb. Pg. 6, ¶ 9*]

66. The tariffs were announced on 19th December 2017 by executive order and took effect on 15th January 2018 *[PO2, pg. 58, para 25*] so between these dates CLAIMANT had enough time to investigate and become aware of the issue as well as prepare for the consequences.
67. Therefore, the imposition of the tariffs from the Equatorianan government was foreseeable for CLAIMANT.

2. The imposition of the tariffs from Equatoriana should not be considered as a hardship

68. Under clause 12, the Seller shall not be responsible for "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex C 6 para 12, pg14*].
69. A party is also not entitled to use the hardship exemption only because the contract turned out to be less profitable than expected at the time of conclusion of the contract *[Daniel Girsberger, pg. 17]***.** The presence of this condition constitutes hardship: "Unforeseeability at the time when a contract was entered into". *[Alain Pietrancosta, pp. 14-15. and 253*].
70. Moreover, two months before the last shipment of 50 doses was due, Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana [*Not. of Arb., Pg. 6, ¶ 9]*. After that, while Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, the imposition of the tariffs from Equatoriana were a reaction to the highly controversial measures by the newly elected President of Mediterraneo [*Ex C 6, Pg. 15, ¶ 2; Not of Arb. Pg. 6, ¶ 9*].
71. Thus the tariffs were just a reaction to the measures from Mediterraneo. Furthermore, after the tariffs had already been imposed and CLAIMANT began preparing the last shipment on 20th January 2018, CLAIMANT became aware of the fact that the newly imposed tariffs are also applicable to the shipment [*EX C 7, Pg. 16, ¶ 1*].
72. Nevertheless, CLAIMANT did not take any precautionary measures. Further, CLAIMANT just sent the last shipment on 23th January and thereby impliedly accepted the burden of the 30 per cent tariffs. Be it out of pure negligence or not, this implies acceptance of the risks. Therefore, the imposition of the tariffs from Equatoriana does not constitute a hardship.

3. RESPONDENT acted in good faith according to article 1.7 of UNIDROIT

73. CLAIMANT argued that, the RESPONDENT had not conducted the renegotiations in good faith, by the inducement made by Mr. Shoemaker during the telephone conversation he had with Ms. Napravnik on the 21st January 2018 [*CLAIMANT memo, Pg. 18, ¶ 34*]. This can be confirmed by the statement made by Mr. Shoemaker on behalf of the RESPONDENT, which he stated that, "my primary concern was to ensure that the remaining 50 doses were actually shipped", "this shows that Mr. Shoemaker had no intention of carrying out fair dealing in good faith, he had only been interested in obtaining the shipment rather than dealing in good faith."[*CLAIMANT memo, Pg. 18, ¶ 34*].
74. Pursuant to Art. 7.1 Of the UNIDROIT Principle, "Each party must act in accordance with good faith and fair dealing in international trade" [*Art. 7.1 UNIDROIT*].
75. CLAIMANT exploited the statement of Mr. Shoemaker by adding just "my primary concern was to ensure that the remaining 50 doses were actually shipped" but the intention of Mr. Shoemaker as in his witness statement was "my primary concern was to ensure that the remaining 50 doses were actually shipped, some of which were urgently needed given that the start of the breeding season". [*Ex R, Pg. 36, ¶ 3*].
76. Moreover, Mr. Shoemaker made clear in hic telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs but he would verify that with the persons involved in drafting [*Ans. Not. of Arb., Pg. 30, ¶10*]. Given RESPONDENT's interest in a delivery of the outstanding doses and CLAIMANT's threats to stop delivery it is obvious that Mr. Shoemaker could not reject CLAIMANT's request outright [*Ans. Not. of Arb., Pg. 30, ¶10*].
77. Further, CLAIMANT previously had to "deliver the goods, as required by the contract" under Art. 30 CISG. Clause 8 of the FSSA reads the "Seller will ship the third and last shipment of 50 doses will be DDP on 23rd January 2018" [*EX C 5, pg. 14, ¶ 8*]. So, it was the CLAIMANT obligation for delivering the goods under the contract and CISG. [*Ex R 4, pg. 36, ¶ 3*]
78. Moreover, RESPONDENT did his obligation in good faith because under Art. 53 of the CISG it is RESPONDENT's duty to "pay the price for the goods and take delivery of them as required by the contract and this Convention [*Art. 53, CISG*].farther, According to Clause 6 of the FSSA the purchase price has to be paid in two instalments [*FSSA, clause 6*]. The first instalment of US$ 5,000,000 is due on 18th May 2017, the second instalment of US$ 5,000,000 is due on 21th January 2018". For this purpose RESPONDENT performed his obligation and acted in good faith.

II. CLAIMANT is not entitled to the additional payment under CISG provisions

79. RESONDENT submits that, an interpretation of the parties' intent under Art. 8 of the CISG reveals that it was CLAIMANT's duty to bear the tariffs. (A); Art. 79 is not applicable in to the present problem (B); Even if Art. 79 was applicable, CLAIMANT would not be exempted from bearing the risks of the contract (C).

A. The intention of the parties were that the cost of the tariffs should be borne by CLAIMANT under article 8 of CISG

80. Analyzing the parties' intention they had while incorporating clause 12 to the FSSA, it reveals that CLAIMANT is not entitled to any additional payment.
81. Based on Art. 8(1) CISG "for the purposes of this Convention statements made by and other conduct of 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.
82. Further, under Art. 8 (3) "in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case [*CISG*]
83. Where it is not possible to use the subjective intent standard in Art. 8 (1) to interpret a party's statements or conduct [*U.S. District Court*] one must resort to a more objective analysis [*Arbitral award No. 8324*] as provided for by Art. 8 (2).
84. Under this provision, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. [*Digest; Kantonsgericht St, Pg. 71*].
85. In the present case, the parties have agreed on a DDP delivery [*PO2, Pg. 56, ¶ 10*], which means that all risks had to be borne by CLAIMANT [*Ex R 4, Pg. 36, ¶ 4*]. "Seller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen. The first shipment of 25 doses DDP will be on 20 May 2017; the second shipment of 25 doses will be DDP on 3 October 2017; the third and last shipment of 50 doses will be DDP on 23 January 2018" [*Clause 8, FSSA*].
86. Clause 8 of FSSA states, that the risks of the last shipment constitute DDP delivery as well, and the tariffs took effect on 15th January 2018 [*PO2, pg. 58, ¶25*] and it mean the risk of the tariffs which happened before last shipment on 23th January should be bear by CLAIMANT.
87. Therefore, According to the interpretation of the parties' intent under art 8 CISG, it is CLAIMANT who should bear the tariffs.

B. Article 79 of CISG is not applicable

88. CLAIMANT could argue that Art. 79 of CISG is applicable and provide remedy for the present dispute but in the present case pursuant to Art. 6 of the CISG the parties may exclude the application of this Convention or, vary the effect of any its provisions [*CISG, Art. 6*]. By including the force majeure clause into the contract the Parties have provided for a special regulation of the present case between the parties and excluded the application of Art. 79 CISG. [*SUBSTANCE, Pg.32, ¶ 30*].
89. Art. 79 provides that "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his 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" [*Art. 79 CISG*].
90. Further, Federal Arbitration court recognized that the situation raised an issue concerning the scope of Art. 79, its discussion suggests that Art. 79 applies when a seller deliver non-conforming goods [*CLOUT case No. 271*].
91. This article is irrelevant for the present dispute as it specifies the circumstance in which a party "is not liable" for failing to perform its obligation, as well as the remedial consequences if the exemption from liability applies [*Digest, pg. 388*]. But the present case is about the increase of the contract price, not exemption from liability under Art. 79 [*Ans. Not. of Arb. Pg. 32, ¶ 21*]
92. Moreover, Art. 79 is not applicable first, because the parties opted out of this rule by aids of art. 6 since by incorporating their own hardship clause/ force majeure into the contract. So by including the force majeure clause in to the contract the Parties have provided for a special regulation of the problem and excluded application of Art. 79 under Art. 6 of CISG [*SUBSTANCE, Pg.32, ¶ 30*].
93. Second, art. 79 is for failure performance, RESPONDENT performed its duties and paid the purchase price on two installments. The first instalment of US$ 5,000,000 is due on 18th May 2017 and the second instalment of US$ 5,000,000 is due on 21th January 2018 [*FSSA, clause 6*].
94. Third, Art. 79 deals with damages, we do not have damages but additional costs. For the above reasons the concept of art.79 does is completely different from the present dispute so, it does not provide remedy [*Ans. Not. of Arb., Pg.32, ¶ 21*]. In light of the above reasons, Art. 79 is not applicable.

C. Even if article 79 was applicable, CLAIMANT would not be exempted from bearing the risks of the contract under Incoterm 2010

95. "Incoterms cannot relief from obligations and exemptions from liability in case of unexpected or unforeseeable events" [*Jan Ramberg, Pg. 14, ¶ 2]*.

96. Parties may be relieved from obligations, or from the consequences of non-performance, if they can benefit from exemptions under the applicable law or terms of their contract other than those concerning the Incoterms rules. [*ICC Publication No.650*]

97. Moreover, CLAIMANT is not exempted or obtained a reduction in the additional tariffs charged in the last shipment [*PO2, Pg. 58, ¶ 27*]. For this purpose, CLAIMANT is not exempted from liability.

Conclusion of issue III

98. In conclusion, the imposition of tariffs by the Equatorianian government was indeed foreseeable for CLAIMANT and therefore does not constitute hardship. Furthermore, on the basis of a DDP delivery, which the parties agreed on, all the risks should be borne by CLAIMANT. Besides, Art. 79 is not applicable and does not provide any remedy for the present dispute.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsels make the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsels respectfully requests this Tribunal to declare that:

The arbitration agreement does not give the tribunal the jurisdiction to adapt the contract **(ISSUE ONE)**

CLAIMANT is not entitled to submit evidence regarding other arbitration proceeding to Arbitral Tribunal. [**ISSUE TWO**]

CLAIMANT is not entitled to 1.250.000 USD resulting from an adaptation of the price. [**ISSUE THREE**]

Respectfully Submitted,

Shahrbano Khaliqi, Muzhgan Mirmast, Ismail Noorzad

Counsels for RESPONDENT

Certificate and Choice of Forum

To be attached to each Memorandum

I Basira Paigham, on behalf of the Team for (name of School)

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

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Balkh University

Name Basira Paigham

Signature