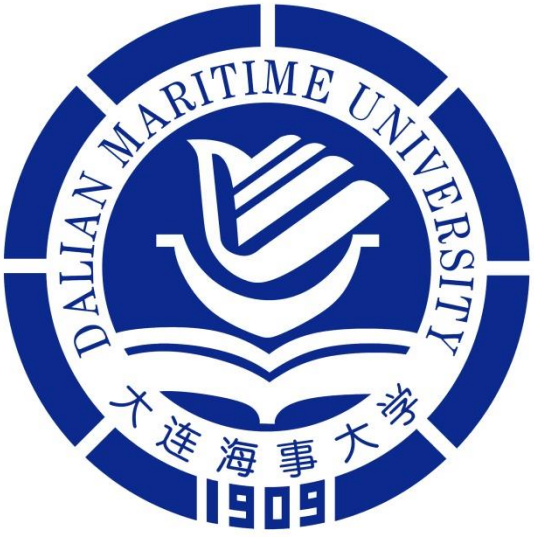
SIXTEENTH ANNUAL
WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG

On Behalf Of:	Against:
Phar Lap Allevamento	**Black Beauty Equestrian**
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**



DALIAN MARITIME UNIVERSITY

CHENG ZHU ZILEI LIN LINYU QIAO HUANJIA YAO
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JUNRU YANG MENGYING WANG BO ZHANG
YIMING LI ZHIYUN TU LINGZHI LIU LINGRUI LI

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Cited as	Sources
CISG	United Nations Convention on the International Sale of Goods
Model law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
NY Convention	The New York Convention, 1958
ULIS	The Uniform Law on International Sale of Goods
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC Hardship Clause	International Chamber of Commerce Hardship Clause (2003)
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
UNIDROIT Principles	UNIDROIT Principles for International Commercial Contracts (2016)

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IBA Commentary	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration	47, 54
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Black's Law Dictionary	Black's Law Dictionary (8th ed. 2004)	108, 129
Tung/Lin	Sherlin Tung and Brian Lin. Austrian Yearbook on International Arbitration 2018. Manz'sche Verlags- und Universitätsbuchhandlung 2018	51
Schmidt-Kessel	Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sales of Goods (CISG)	109
Poorooye/Feehily	Avinash Poorooye, Ronan Feehily. Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance. 22 Harv. Negot. L. Rev. 275 (2017)	51
Smeureanu	Ileana M. Smeureanu. Confidentiality in international commercial arbitration. Kluwer Law International 2011	60, 62, 65, 67, 68

UNCITRAL Digest 2016	UNCITRAL Digest of Case Lawon the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition)	111，126
Misra/Jordans	Joyiyoti Misra, Roman Jordans. Confidentiality in International Arbitration: An Introspection of the Public Interest Exception. Kluwer Law International 2006	65
Dessemontet	François Dessemontet. Arbitration and Confidentiality	65
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TABLE OF ABBREVIATIONS

%	Percentage
Art.	Article
CISG	United Nations Convention on Contracts for the international Sale of Goods
Cl.	Claim(ant)
DOF	Disclosure of funder
DP	Declaration Prasad
Ex.	Exhibit
ed	Edition
et al.	et al (and others)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ibid.	ibidem (in the same place)
IBA	International Bar Association
i.e.	id est (that is)
LP	Limit Partner
Ltd	Limited
NOA	Notice of Arbitration
No(s).	Number(s)
para./ ¶/¶¶	Paragraph/ Paragraphs
PO2	Procedural Order No 2
p./pp.	Page/Pages
RAR	Refusal to Agree to Removal
Re.	RESPONDENT
ANOA	Answer to the Notice of Arbitration
RSD	Refusal to Step Down
ULIS	The Uniform Law on International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

USD	United States Dollars
v.	Versus

STATEMENT OF FACTS

1. PHAR LAP ALLEVAMENTO ("CLAIMANT") is a company located in Mediterraneo. It is committed to operate stud farm and famous for its breeding success regarding racehorse but has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures.

2. BLACK BEAUTY EQUESTRAIN ("RESPONDENT"), a company in Equatoriana, is known for its broodmare lines and decide to establish a racehorse stable.

3. 2017.3.21 RESPONDENT, after meeting CLAIMANT at Equestrian World last year, send to the latter an email inquiring about the availability of 100 doses of frozen semen from Nijinsky III for its newly started breeding program and Informing CLAIMANT the temporary permission of artificial insemination for race horse in Equatoriana.

4. 2017.3.24 CLAIMANT submitted the offer that CLAIMANT was willing to sell 100 doses in several installments, with a price of 99,500USD per dose and replied that the purchase would be based on the standard "FROZEN SEMEN SALES AGREEMENT" (hereinafter the Agreement) and informed RESPONDENT of the basic conditions.

5. 2017.3.28 RESPONDENT accepted most of the terms of CLAIMANT's offer, including the general applicability of CLAIMANT's general terms and condition but wonder to change price, delivery term, application of law and the court of jurisdiction.

6. RESPONDENT excepted a better price in light of the size of the and insisted on a delivery basis of DDP due to the urgency delivery and CLAIMANT's greater experience in the shipment of frozen semen.

7. 2017.3.31 CLAIMANT accepted a delivery DDP and increase the price to 1000USD per dose, in accordance with the additional costs associated with a DDP delivery. Meanwhile, CLAIMANT expressly stated that CLAIMANT were not willing to take over any further risks associated with such a change in the delivery terms and suggested to include a hardship clause to address such subsequent changes.

8. 2017.4.10 RESPONDENT send CLAIMANT a draft, based on the model clause suggested by the HKIAC, that streamlines the broad wording of the clause, provides for arbitration in Equatoriana and submits the arbitration clause to the law of Equatoriana.

9. 2017.4.11 CLAIMANT changed the seat of arbitration from Equatoriana to Danubia, informed RESPONDENT of its internal policy and suggested reliance on the ICC-Hardship clause when concerning the other point.

10. 2017.4.12 Ms. Napravnik, the negotiator of CLAIMANT, and Mr. Antley, the negotiator of RESPONDENT, had a short meeting in the morning, discussing upon the newest proposal for the dispute resolution clause and the hardship clause. Mr. Antley replied that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree and promised that he would come back with a proposal the next morning. Then Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia.

11. 2017.5.6 CLAIMANT, represented by John Ferguson, and RESPONDENT, represented by Julian Krone, concluded a sale agreement. Mr. Krone suggested the wording which was finally added to the force majeure clause in clause 12 with reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017. Then they agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract.

12. 2017.12.20 Government of Equatorian, which has always been one of the biggest supporters of free trade, imposed a tariffs of 30% on all agricultural goods from Mediterraneo as a retaliation for the previous restriction, 25% tariffs on agricultural products form Equatoriana, imposed by Mr. Bouckaert.

13. 2018.1.20 In preparing the final shipment of 50 doses of frozen semen from Nijinsky III to RESPONDENT, CLAIMANT was just informed by the customs authorities that the imposed tariffs of 30% on agricultural products are applicable to the shipment. Thus, CLAIMANT put the shipment presently on hold and had called RESPONDENT to find the solution urgently.

14. 2018.1.21 Mr. Shoemaker, who was responsible for the development of the racehorse breeding program of RESPONDENT, indicated that he would clarify the legal situation and an agreement on the price would be found if the contract provides for an increased price in the case of such a high additional tariffs.

15. 2018.1.22 Ms. Napravnik authorized the shipment as planned.

16. 2018.7.6 Two former employees of RESPONDENT who had been witness in the other arbitration were fired.

17. 2018.7.13 CLAIMANT submitted its Notice of Arbitration.

18. 2018.8.24 RESPONDENT filed its response to the Notice of Arbitration.

19. 2018.10.2~3 CLAIMANT provided the arbitral tribunal with evidence, which was objected by RESPONEDNT, regarding another arbitration which RESPONDENT was involved. This evidence was sold by a company with bad reputation and the evidence was disclosed from employees or hackers.

SUMMARY OF ARGUMENT

ISSUE1： THE TRIBUNAL HAS THE JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF MEDITERRANEO SHOULD GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

The Parties to the arbitral proceeding are bound by an arbitration agreement allowing them to initiate arbitration in accordance with HKIAC Rules. This agreement additionally provides that the seat of arbitration shall be Vindobona, Danubia, the arbitration law of which is a verbatim adoption of Model Law, CLAIMANT will demonstrate that the arbitration agreement should be governed by the law of Mediterraneo, and under the law of Mediterraneo, the tribunal has the power to adapt the contract. Even if the arbitration agreement is subject to the law of Danubia, the tribunal still has the power to adapt the contract because of the express empowerment from the Parties.

ISSUE 2： CLAIMANT SHOULD 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.

Contrary to RESPONDENT's allegations, even if the evidence was obtained through a breach of confidential agreement or an illegal hack of RESPONDENT's computer, CLAIMANT still has the right to submit it. CLAIMANT will illustrate that the evidence to be submitted is prima facie relevant to the case and material to its outcome, thus satisfying the requirement stipulated in Art. 9.2 (a) IBA Rules, and the evidence does not fall within the scope of exclusion stipulated in Article 9.2 (b)-(f) IBA Rules, in particular, the evidence does not fall within the scope of exclusion provided in Article 9.2 (g) IBA Rules.

ISSUE3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT UNDER CLAUSE 12 OF THE CONTRACT IN ACCORDANCE WITH ARTICLE 8 CISG.

After a long-term negotiation, the Parties concluded the Agreement on 6th May, 2017. During the contracting negotiations, CLAIMANT had expressed the unwillingness to undertake any further

risks with a change of DDP. Therefore, risks associated with customs regulation and import restrictions were transferred to RESPONDENT through parties' consensus under CISG. According to the Agreement, hardship under Clause 12 governed the additional tariffs in present case under Article 8 CISG. To settle the disputes on hardship, there was an adaptation mechanism to adapt the contract under hardship in the contract pursuant to Article 8 and Article 11 CISG. The derogation of delivery DDP justified the payment of US$1,500,000, at least US$ 1,250,000 to make up for the loss.

ISSUE 4: CLAIMANT IS ALSO ENTITLED TO THE PAYMENT UNDER THE CISG.

Since the present is subject to hardship mechanism, and although the provisions in CISG do not include hardship directly, the convention still suggests possible remedy in present case via applying Article 6.2 UNIDROIT Principles under Article 9(2) CISG. The additional tariffs meet all requirements set forth in Article 6.2 UNIDROIT Principles and CLAIMANT could resort to the tribunal to adapt the contract to get the payment accordingly.

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF MEDITERRANEO SHOULD GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

1. The Parties to the arbitral proceeding are bound by an arbitration agreement allowing them to initiate arbitration in accordance with HKIAC Rules [*Cl. Ex. 5*]. This agreement additionally provides that the seat of arbitration shall be Vindobona, Danubia, the arbitration law of which is a verbatim adoption of Model Law [*PO1 ¶ III.4*]. CLAIMANT will demonstrate that the arbitration agreement should be governed by the law of Mediterraneo (**A**), and under the law of Mediterraneo, the tribunal has the power to adapt the contract (**B**). Even if the arbitration agreement is subject to the law of Danubia, the tribunal still has the power to adapt the contract because of the express empowerment from the Parties (**C**).

A. The arbitration agreement should be governed by the law of Mediterraneo.

2. Contrary to RESPONDENT's allegations, the law of Mediterraneo was the Parties' choice of law governing the arbitration agreement (**I**). And the doctrine of separability does not prevent the arbitration agreement from being governed by the same law as the main contract (**II**). Furthermore, since the application of different laws may lead to different outcomes, in order to resolve all the disputes in a single arbitration proceeding, the principle of pro-arbitration points to the law of Mediterraneo (**III**).

I. The law of Mediterraneo was the Parties' choice of law governing the arbitration agreement.

3. The principle of party autonomy is well recognized when it comes to the law governing the arbitration agreement [*Article 34(2)(a)(i), Article 36(1)(a)(i) Model Law; Article 5 NY Convention; Blackaby et al., p. 186, ¶ 3.97; Born, Law and Practice, p. 560*]. Considering this principle, the law of Mediterraneo should apply, because the Parties expressly chose it as the law governing the arbitration agreement (**1**). Furthermore, in the absence of an express choice, the Parties' implied choice of law should apply, which was the law of Mediterraneo (**2**).

(1) The Parties expressly chose the law of Mediterraneo as the law governing the arbitration agreement.

4. Since both the law of Mediterraneo and the law of Danubia are an adoption of UNIDROIT Principles in general, the Parties have no dispute on applying UNIDROIT Principles for interpretation of the arbitration agreement. In accordance with Article 4.1 UNIDROIT Principles, *a contract shall be interpreted according to the common intention of the parties*.

5. In the present case, on one hand, it was CLAIMANT's intention to apply the law of the main contract. In the

e-mail on 11 April, CLAIMANT mentioned that "*a contract submitted to a foreign law requires special approval by the creditor's committee*" [*Re. Ex. 2*]. In this regard, CLAIMANT deleted the sentence concerning the law governing the arbitration agreement and stated that "*the law applicable to the Frozen Semen Sales Agreement remains the law of M*" [*Re. Ex. 2; PO2 ¶ 50*]. By doing so, it made objection to RESPONDENT's intention to apply the law of the place of arbitration, and expressed its own intention to apply the law of Mediterraneo. Furthermore, in the final contract, the sentence concerning the law governing the arbitration agreement was not included as well [*Cl. Ex. 5*]. Hence, it was clear that CLAIMANT did not intend the arbitration agreement to be governed by a separate law, but instead, intended it to be governed by the law of Mediterraneo.

6. On the other hand, RESPONDENT was aware of CLAIMANT's intention and accepted it. In fact, it never occurred to Mr.Krone that the arbitration agreement should be governed by a separate law. To begin with, during the conclusion of the final contract, although he had full access to the first draft of the arbitration clause provided by Mr. Antley, he added only the sentences concerning the number of arbitrators and the language of arbitration to the final contract, leaving the sentence about the law governing the arbitration agreement [*PO2 ¶ 4; Re. Ex. 1; Cl. Ex. 5*]. Considering the four corners rule under the law of Danubia, Mr. Krone could not have done so if he intended to apply the law of Danubia. Furthermore, according to Mr. Krone, he did not know that the "applicable law" in the negotiation file was referring to the law of the main contract [*Re. Ex. 3*]. In this regard, at the time of the conclusion of the contract, Mr. Krone did not intend the arbitration agreement to be governed by a separate law.

7. In view of the above, it was the Parties' common intention to apply the law of Mediterraneo to the arbitration agreement, and the law of Mediterraneo was the Parties' express choice of law.

(2) <u>In the absence of an express choice, the Parties' implied choice of law should apply, which was the law of Mediterraneo.</u>

8. Even if the tribunal finds that there was no such express choice of law between the Parties, their implied choice of law should apply, which was the law of Mediterraneo. When an arbitration agreement is contained in the main contract, there is a strong presumption that the arbitration agreement is also subject to the law governing the main contract, as is stated in the judgment of the case Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd: "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract" [*Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd*]. Such a presumption makes sense "whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat" [*Kröll et al., p. 106, ¶ 6-24; Sulamérica CIA Nacional de Seguros SA v. Enesa Engenharia SA; Leibinger v. Stryker Trauma GmbH*], unless there are other factors pointing to a different conclusion [*Sulamérica CIA Nacional de Seguros SA v. Enesa Engenharia SA; BCY v. BCZ*].

9. In the case at hand, there were no such factors pointing to any other conclusions. Even if the tribunal finds that there was no common intention between the Parties to apply the law of Mediterraneo, the Parties at least

showed no other intention. The arbitration clause was drafted on the basis of HKIAC model clause, and the first draft was provided by the negotiator of RESPONDNET [*Re. Ex. 1*]. According to the note of HKIAC model clause, the provision concerning the governing law of the arbitration agreement "*should be included particularly where the law of the substantive contract and the law of the seat are different*", but it was not included by RESPONDENT in the final contract. In this regard, RESPONDENT showed no other intention. Therefore, since the arbitration clause is only part of the underlying contract, and the acceptance of the contract entails the acceptance of the arbitration clause, it is reasonable to imply that the express choice of law – the law of Mediterraneo – was intended to govern the contract as a whole, including the arbitration clause.

II. The doctrine of separability does not prevent the arbitration agreement from being governed by the same law as the main contract.

10. RESPONDENT alleged that due to the doctrine of separability acknowledged by Article 16 Model Law, the reference in the choice of law clause merely determines the law applicable for the main contract and does not constitute an implicit choice for the arbitration agreement [*ANOA ¶ 14*]. Such an allegation cannot stand. In fact, both Article 16 Model Law and Article 19(2) HKIAC Rules deal only with the validity of the arbitration agreement, having nothing to do with its applicable law **(1)**. Besides, just because the arbitration clause is a separate part of the contract, it does not mean that it has to be governed by a different system of law **(2)**.

(1) Both Article 16 Model Law and Article 19(2) HKIAC Rules deal only with the validity of the arbitration agreement, having nothing to do with its applicable law.

11. Article 16(1) Model Law acknowledged the doctrine of separability. According to it, "*...For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*." However, this article deals with the validity of the arbitration agreement only, referring to no other aspects of this doctrine. As is stated in the Digest of Model Law: "*Although the separability principle may have other consequences—such as permitting the arbitration clause to be governed by a different law than the law applicable to the contract in which it is contained—, article 16 (1) only deals explicitly with the impact of the principle on jurisdictional issues*" [*Digest of Model Law, Art. 16, ¶ 6*]. And A Guide to the UNCITRAL Model Law expresses a similar opinion [*Holtzmann /Neuhaus, p. 479*].

12. When it comes to HKIAC Rules, Article 19(2) states that, "*...For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement.*" Similar to Article 16(1) Model Law, this provision relates to nothing more than the validity of an arbitration agreement.

13. The usage of the doctrine of separability is not unlimited. Lord Justice Moore-Bick dealt with this problem well in the case Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA. In the judgment he said:

"The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes. In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate" [*Sulamérica CIA Nacional de Seguros SA v. Enesa Engenharia SA*].

14. As a result, since the wordings used in both Model Law and HKIAC Rules are limited, the usage of this doctrine should be limited in accordance. In this regard, the doctrine of separability *in casu* does not deal with the governing law of the arbitration agreement.

(2) Just because the arbitration clause is a separate part of the contract, it does not mean that it has to be governed by a different system of law.

15. Even if the tribunal believes that the doctrine of separability means the potential applicability of different governing law to the arbitration agreement and the underlying contract, the difference of governing laws is simply a possibility, rather than a necessity. As is stated by Gary Born in his International Commercial Arbitration: "The separability presumption does not generally mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract…The essential point, however, is that, where the arbitration clause is a separate agreement, a separate conflict of laws analysis must be performed with regard to that separate agreement" [*Born, p. 463*]. In fact, in many cases the same law governs both the arbitration agreement and the underlying contract [*Leibinger v. Stryker Trauma GmbH; BCY v. BCZ*].

16. Therefore, contrary to RESPONDENT's allegations, the doctrine of separability is not a barrier to the application of the law of Mediterraneo on the arbitration agreement in the case at hand.

III. Since the application of different laws may lead to different outcomes, in order to resolve all the disputes in a single arbitration proceeding, the principle of pro-arbitration points to the law of Mediterraneo.

17. The principle of pro-arbitration indicates that "a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims". By doing so, all the relevant disputes can be resolved in a single proceeding [*Born, p. 1325*].

18. The pro-arbitration principle should apply, because it underlies Model Law [*Born, p. 1319*]. Article 8(1) Model Law prescribes that, "*A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*" It allocates the burden of proving the invalidity of an arbitration agreement on the party resisting enforcement, and confines the grounds for such invalidity to generally-applicable contract law defenses. As a result, Model Law formulates a pro-arbitration attitude [*Born, p. 231-*

233]. Considering the mandatory nature of Article 8 [*Digest of Model Law, Art. 8, ¶ 8*], in the present case, it is necessary to take the underlying pro-arbitration principle into consideration.

19. Moreover, this principle caters to the likely objectives of a rational business man and serves important public interests. It is because when the parties include an arbitration agreement in their contract, they usually intend to resolve all disputes between them by this method [*Blackaby et al., p. 114, ¶ 2.65*]. This opinion was accepted by the United Kingdom House of Lords in the case Fiona Trust & Holding Corporation and others v. Privalov and others, where according to the Court, "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction" [*[2007] UKHL 40*]. The present situation does not fall into the scope of exception stated in that case.

20. In the case at hand, the Parties make different submissions about the law of the arbitration agreement. Under the law of Mediterraneo, the tribunal has the power to adapt the contract; while under the law of Danubia, the tribunal may not be able to do so. In this regard, for the aim of resolving all the disputes in a single arbitration proceeding, the principle of pro-arbitration points to the law of Mediterraneo.

B. Under the law of Mediterraneo, the tribunal has the jurisdiction and power to adapt the contract.

21. In the case that the arbitration agreement is governed by the law of Mediterraneo, CLAIMANT insists that according to the arbitration agreement, the tribunal has the jurisdiction to adapt the contract (**I**), and according to the law of Mediterraneo, the tribunal has the power to adapt the contract (**II**).

I. According to the arbitration agreement, the tribunal has the jurisdiction to adapt the contract.

22. When it comes to the jurisdiction of the tribunal, an arbitral tribunal may validly resolve only those disputes that the parties have agreed that it should resolve [*Blackaby et al., p. 334, ¶ 5.91*].

23. In the case at hand, the law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of the wording [*NOA, p. 7, ¶ 16*]. Hence, although the wording of the present arbitration agreement was reduced by the Parties, it still constitutes an empowerment for the tribunal to adapt the contract. In this regard, the tribunal has the jurisdiction for adaptation.

II. According to the law of Mediterraneo, the tribunal has the power to adapt the contract.

24. The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law

[*Blackaby et al., p. 306, ¶ 5.06*].

25. The law of Mediterraneo is a verbatim adaptation of the UNIDROIT Principles [*PO1 ¶ III.4*], and according to Article 6.2.3 UNIDROIT Principles, "*if the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium*." And according to Article 1.11 UNIDROIT Principles, *"court" includes an arbitral tribunal*. Therefore, the tribunal here has the power to adapt the contract.

26. In view of the above, when the arbitration agreement is governed by the law of Mediterraneo, the tribunal has the jurisdiction and power to adapt the contract.

C. Even if the arbitration agreement is subject to the law of Danubia, the tribunal still has the power to adapt the contract because of the express empowerment from the Parties.

27. Even if the arbitration agreement is governed by the law of Danubia, the tribunal still has the jurisdiction and power to adapt the contract, because the arbitration agreement constitutes an express empowerment from the Parties (**I**). Furthermore, the preliminary negotiation also indicates such an express empowerment (**II**).

I. The arbitration agreement constitutes an express empowerment from the Parties allowing the tribunal to adapt the contract.

28. In order to narrow down the broad wording of HKIAC model clause, the Parties deleted the expression of "*controversy, difference or claim*", "*relating to the contract*" and "*regarding non-contractual obligations arising out of or relating to the contract*". And the final clause in the contract prescribes that, "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC)*" [*Cl. Ex. 5*]. RESPONDENT alleged that by doing so, the Parties excluded disputes concerning contract adaptation [*ANOA, p. 31, ¶ 13*]. However, considering the divergent understandings of the formulae used, such allegation is without legal basis.

29. First, most arbitration clauses provide for arbitration of all "disputes" or "differences," while some clauses also refer to "claims" or "controversies." Generally, the word "dispute" in the arbitration agreement has been held to encompass a wide jurisdiction in the context of the particular agreement, and may encompass any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings [*Blackaby et al., p. 114, ¶ 2.68; Born, p. 1347; Tjong Very Sumito v. Antig Inv. Pte Ltd*].

30. Second, authorities all around the world have adopted different interpretations of "arising out of" clauses. In recent years, both American and English courts tend to give it a broad interpretation. For instance, it was found by the U.S. Court of Appeals in Sweet Dreams Unlimited, Inc.v. Dial-A-Mattress that, "'arising out of' reaches all disputes having their origin or genesis in the contract, whether or not they implicate interpretation of performance of the contract per se" [*Sweet Dreams Unlimited, Inc.v. Dial-A-Mattress*]. And in The Playa Larga, it was believed by the English court that the expression of "any dispute arising out of this contract" covered a

claim in conversion [*Empresa Exportadora de Azucar v. Industria Azucarera Nacional SA*]. Also, in the case Fiona Trust & Holding Corporation and others v. Privalov and others, the English Court of Appeal held that, "the words 'arising out of' should cover every dispute except a dispute as to whether there was ever a contract at all" [*Fiona Trust & Holding Corporation and others v. Privalov and others, [2007] EWCA Civ 20*]. Hence, the term "arising out of" is understood differently by different authorities, and is sometimes given a really broad interpretation.

31. Third, there is no uniform understanding of the term "relating to" as well; however, courts in almost all jurisdictions have concluded that the phrase "relating to" extends an arbitration clause to a broad range of disputes, including both contractual and non-contractual claims [*Nokia Corp. v. AU Optronics Corp.; Tigra Tech. v. Techsport Ltd*].

32. As a result, although the Parties narrowed the arbitration clause a bit, there is no evidence indicating the exclusion of disputes concerning contract adaptation. In this regard, by referring "*any dispute arising out of this contract*" to arbitration, the present arbitration clause still constitutes an express empowerment allowing the tribunal to adapt the contract.

II. The preliminary negotiation also indicates such an express empowerment.

33. RESPONDENT alleged that due to the four corners rule under the law of Danubia, "*the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon*" [*ANOA, p. 32, ¶ 16*]. However, the four corners rule does not prevent all extrinsic evidence from being used for interpretation **(1)**. Moreover, the present situation falls into the exceptions of the four corners rule **(2)**. And the preliminary negotiation indicates that the parties agreed to empower the tribunal to adapt the contract **(3)**.

(1) The four corners rule does not prevent all extrinsic evidence from being used for interpretation of the contract.

34. Danubian Contract Law for international contracts is a largely verbatim adoption of UNIDROIT Principles and the four corners rule under Danubian law has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles [*PO2 ¶ 45*]. According to Article 2.1.17 UNIDROIT Principles, when the writing completely embodies the terms on which the parties have agreed, it "*cannot be contradicted or supplemented by evidence of prior statements or agreements*", but "*such statements or agreements may be used to interpret the writing*". Therefore, the four corners rule does not prevent all extrinsic evidence from being used for interpretation of the contract.

35. In the case at hand, as has been demonstrated before, by referring "*any dispute arising out of this contract*" to arbitration, the present arbitration clause constitutes an express empowerment from the Parties allowing the tribunal to adapt the contract. At least, if the preliminary negotiation indicates that the Parties intended for an empowerment for adaptation, it does not contradict or supplement the writing contract. In this regard, it is reasonable to turn to the preliminary negotiation.

(2) The present situation falls into the exceptions of the four corners rule.

36. The four corners rule has exceptions such as mistakes of facts caused by fraud or duress, null and void contract, ambiguity, prior valid agreement, etc [*Urquico, p. 304-310*]. And ambiguity arises when the written documents are obviously incomplete on its face or are expressed in ambiguous language [*Corbin, p. 621, ¶ 2*].

37. In the present case, the wording of the arbitration agreement, as has been demonstrated before, is ambiguous. Although RESPONDENT insists that the deletion of several words lead to the exclusion of the tribunal's jurisdiction and power to adapt the contract, CLAIMANT has understood it as the opposite. Therefore, the present situation falls into the exceptions of the four corners rule, and external evidence can be used for interpretation in accordance.

(3) The premilinary negotiation indicates that the parties agreed to empower the tribunal to adapt the contract.

38. Considering Article 2.1.17 UNIDROIT Principles and the existing ambiguity of the arbitration agreement, external evidence can be used for interpretation of it. According to the preliminary negotiation of the contract, the Parties never expressed the intention to prevent the tribunal from adapting the contract; instead, they both intended an empowerment for adaptation.

39. During the meeting of the previous negotiators, Ms. Napravnik emphasized that "*it was important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment*", and Mr. Antley replied that "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*". And this was also Ms. Napravnik's preference and understanding of the existing provisions [*Cl. Ex. 8*]. In this regard, there was common intention between the Parties for an empowerment of adaptation.

40. Therefore, the arbitration agreement should be interpreted as an express empowerment allowing the tribunal to adapt the contract, since it was in accordance with the common intention of the Parties and their understanding of the existing provisions.

41. In conclusion, the arbitration agreement should be governed by the law of Mediterraneo; therefore the tribunal has the jurisdiction and power to adapt the contract. And even if the tribunal finds that the arbitration agreement should be governed by the law of Danubia, it still has the jurisdiction and power to adapt the contract, because of an express empowerment made by the Parties.

ISSUE 2: CLAIMANT SHOULD 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.

42. When it comes to exclusion of evidence, both HKIAC Rules and Model Law provide no specific guidance, but instead leave the tribunal with broad discretion [*Article 22 HKIAC Rules; Article 19 Model Law*]. In this regard, the widely accepted IBA Rules may apply.

43. On one hand, IBA Rules are applicable in the present case. According to Article 22.2 HKIAC Rules, the arbitral tribunal may determine "*whether to apply strict rules of evidence*". And according to the preamble of IBA Rules, "*…arbitral tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures*". As a result, even in the lack of agreement between the Parties, the tribunal can still apply IBA Rules.

44. On the other hand, it is advisable to apply IBA Rules here. In practice, IBA Rules are regarded as "an internationally applicable standard" or "best practices" [*Marghitola, p. 33; O'Malley, p. 6, ¶ 1.15; Born, p. 2363*] and are commonly adopted or referred to in HKIAC arbitration [*Moser/Bao, p. 272, ¶ 9.155*]. In A Guide to the HKIAC Arbitration Rules, the arbitral tribunal is suggested to use strict rules of evidence like IBA Rules for the following reason: First, the rules themselves have evolved based on years of judicial and legislative experience and expertise. They are rational and designed to achieve fairness. Second, the rules are comprehensive and should cover most situations. They will therefore be a source of persuasive guidance to the tribunal. Third, if the tribunal were to make decisions on evidential issues based on its own whims and without any rational basis, the parties may have legitimate grounds to feel aggrieved [*Moser/Bao, p. 272, ¶ 9.154*].

45. Article 9.2 IBA Rules provides grounds for exclusion of evidence, and the list of exclusionary rules set forth is widely accepted as comprehensive in providing for the accepted objections which may be raised in international arbitration [*O'Malley, p. 268, ¶ 9.04*].

46. *In casu*, contrary to RESPONDENT's allegations [*Problem, p. 50, ¶ 2*], even if the evidence was obtained through a breach of confidential agreement or an illegal hack of RESPONDENT's computer, CLAIMANT still has the right to submit it. CLAIMANT will illustrate that the evidence to be submitted is *prima facie* relevant to the case and material to its outcome, thus satisfying the requirement stipulated in Article 9.2 (a) IBA Rules **(A)**, and the evidence does not fall within the scope of exclusion stipulated in Article 9.2 (b)-(f) IBA Rules **(B)**, in particular, the evidence does not fall within the scope of exclusion provided in Article 9.2 (g) IBA Rules **(C)**.

A. The evidence to be submitted is *prima facie* relevant to the case and material to its outcome, thus satisfying the requirement stipulated in Article 9.2 (a) IBA Rules of Evidence.

47. Article 9.2(a) of IBA Rules stipulates that the arbitral tribunal shall exclude evidence which is not sufficiently relevant to the case or material to its outcome [*IBA Commentary, p. 25*]. It deserves to be mentioned that HKIAC Rules and Model Law also require relevance and materiality of evidence. In fact, evidence needs only to be prima facie relevant to the case and material to the outcome (**I**), and the evidence in this case satisfies such requirement (**II**).

I. Evidence needs only to be *prima facie* relevant to the case and material to the outcome.

48. Evidence needs only to be *prima facie* relevant and material to the resolution of the parties' dispute [*Born, p. 2363; Marghitola, p. 54; Waincymer, p. 859*]. In this scenario, *prima facie* means that the evidence submitted by the parties appears likely to contain information that will be material to resolve disputed issues [*Born, p. 2363*]. The rationale behind is that, at the stage of document disclosure, it is impossible to decide whether particular documents in fact contain information that is material to the outcome of the case.

II. The evidence in this case satisfies the requirement of *prima facie* relevance to the case and materiality to the outcome.

49. Relevance means that the document is useful to establish the truth of its factual allegations on which its legal conclusions are based [*Moser/Bao, p. 274, ¶ 9.161*]. And a document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn [*Moser/Bao, p. 274, ¶ 9.161; Marghitola, p. 52; Waincymer, p. 858*].

50. *In casu*, the submitted award satisfies the *prima facie* requirement stated above. It helps to prove that RESPONDENT has made contradict allegations in different cases under the same circumstance. In fact, the factual backgrounds of the two cases are almost the same – in both cases, the importing country imposed unforeseeable and excessive tariffs on animal products during the process of trading, both arbitration agreements are subject to the law of Mediterraneo and are based on HKIAC model clause, and both contracts contain a hardship clause. At the same time, the two cases have similar controversial issues as well, i.e. whether the arbitral tribunal has the jurisdiction and the powers to adapt the contract price when the sale had been affected by the unforeseen tariffs. However, in that arbitration, "*RESPONDENT who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances.*"[*Problem, p. 49, ¶ 2*] If both allegations made by RESPONDENT in the two cases – which were highly contradictory – are supported, it will be against the aim of consistency of results, and is therefore not a desirable outcome.

51. It is necessary to maintain the consistency of results in international commercial arbitration. On one hand, consistency is of great value, for it promotes both predictability and a more reasonable conclusion. It prevents the frequently criticized phenomenon of inconsistent application of law in similar arbitration matters [*Tung/Lin,*

p. 83]. Additionally, it provides a degree of predictability to the parties, allowing them to make informed decisions to ensure their chances of win or avoid unnecessary disputes [*Poorooye/Feehily, p. 313*]. Consistency promotes wider acceptance of awards. In this regard, although arbitral awards are exclusively binding only on the parties involved, they can have a strong persuasive value in substantially similar cases. On the other hand, according to Article 13.9 HKIAC Rules, in matters not expressly provided for, the tribunal should act in the spirit of the Rules. Consistency reflects the spirits of the Rules, because there are advanced regulations about arbitration consolidation, joinder of additional parties and concurrent proceedings in HKIAC Rules, and one of the purpose of establishing these regulations is to avoid the risk of inconsistent awards [*Moser/Bao, p. 316, ¶ 10.86*].

52. In view of above, since the award of another arbitration submitted by CLAIMANT is helpful to prove factual issues and is necessary for complete consideration of the case, it is both relevant to the case and material to the outcome. Hence, the evidence satisfies the requirement stipulated in Article 9.2 (a) IBA Rules.

B. <u>The evidence does not fall within the scope of evidential exclusion stated in Article 9.2 (b)-(f) IBA Rules of Evidence.</u>

53. Article 9.2(b)-(g) IBA Rules further list grounds for exclusion of evidence. However, *in casu*, the related evidence does not fall within the scope of them.

54. Article 9.2(b) IBA Rules provides that the arbitral tribunal may exclude evidence in case of legal impediment or privilege. A legal impediment can be defined as an order of a public authority or a rule of law which prohibits disclosure. Examples of a legal impediment include an order of a public prosecutor preventing disclosure of specific documents, and data privacy laws prohibiting the disclosure of personal data [*Marghitola, p. 90*]. And legal privilege is to protect documents and other evidence that may be covered by certain privileges under the appropriate applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege [*IBA Commentary, p. 25*]. Obviously in the present case, there are no such orders from public authorities, rules of law or privileges.

55. Moreover, since CLAIMANT has its own opportunity to acquire the "Partial Interim Award" as evidence [*PO2 ¶ 41*], the circumstances mentioned in Article 9.2(c) and Article 9.2(d) IBA Rules, i.e. unreasonable burden of producing the evidence or loss or destruction of the documents, is irrelevant here.

56. There is no commercial or technical confidentiality as stipulated in Article 9.2(e) IBA Rules *in casu* as well. The reason is that technical and commercial confidentiality usually contains the following elements: business related facts; known only by a limited number of persons; not obvious; the company has an economic interest to maintain secrecy; the company intends to keep secret [*Marghitola, p. 92*].

57. In addition, since the case does not contain special political or institutional sensitivity, the evidence does not fall within the scope of Article 9.2(f) IBA Rules.

58. In conclusion, the evidence to be submitted by CLAIMANT cannot be excluded on the basis of Article 9.2(b)-

(f) IBA Rules.

C. The evidence does not fall within the scope of exclusion provided in Article 9.2 (g) IBA Rules of Evidence.

59. According to Article 9.2(g) IBA Rules, evidence can be excluded when considerations of fairness and equality are compelling. CLAIMANT will demonstrate that the evidence to be submitted does not fall within the scope of exclusion provided by this provision, because it has already been in the public domain (**I**). And even if the tribunal finds that the evidence is not in the public domain, it is still admissible because such admission does not incur inequality or unfairness (**II**).

I. The evidence is admissible because it has already been in the public domain.

60. "Information in the public domain" refers to the openly accessible information that the parties acknowledge from external sources before or in the course of the proceedings, even if it relates to the opposing party [*Smeureanu, p. 77*]. And according to the Black's Law Dictionary, the information is public when it is open and available for all to use, share or enjoy. Once made public, an award falls in the public domain [*Smeureanu, p. 75*].

61. The case Department of Economics Policy & Development of the City of Moscow v. Bankers Trust Company and International Industrial Bank provides additional insight as to the meaning of "public domain". In that case, a copy of the judgment was published on a legal research website ("Lawtel") and reached some 15,473 subscribers in summarized form via newsletter. The Court found that because the judgment for setting aside was available only to a limited number of persons (i.e., Lawtel's subscribers), the judgment did not penetrate into the public domain. Telling from this case, to determine whether the related information has been made public, it is important to see whether it can be reached by an uncertain group of persons.

62. As long as the evidence is in the public domain, it cannot be excluded either for reasons of confidentiality [*Smeureanu, p. 111; Waincymer, p. 789*] or illegal obtaining. In the ICSID case Caratube International Oil Company LLP v. Republic of Kazakhstan, the government system of RESPONDENT was hacked and the documents were leaked on a publicly available website known as "KazakhLeaks". However, the tribunal still authorized the submission of the non-privileged documents, because they were "lawfully available to the public".

63. In the present case, the award was sold by a company and was available for anyone at the price of 1000 USD [*PO2 ¶ 41*]. The group of persons who can reach it was uncertain. It was therefore in the public domain, and can be admitted by the tribunal.

II. Even if the tribunal finds that the evidence is not in the public domain, it is still admissible because such admission does not incur inequality or unfairness.

64. Even if the tribunal finds that the evidence is not in the public domain, it is still admissible no matter whether

it was obtained through a breach of a confidentiality agreement **(1)** or an illegal hack of RESPONDENT's computer system **(2)**. In both cases, such admission does not incur inequality or unfairness.

(1) The evidence obtained through a breach of a confidentiality agreement is admissible.

65. Assuming that the evidence had been obtained through a breach of a confidentiality agreement, it is still admissible. In fact, although confidentiality is of great importance in international commercial arbitration [*Esso Australia Resources Ltd. and others v. The Honarable Sidney James Ploman and others; Moser/Bao, p. 385-386; Smeureanu, p. 14; Misra/Jordans, p. 1*], the obligation of confidentiality is not absolute [*Moser/Bao, p. 387, ¶ 12.32; Smeureanu, p. 94; Dessemontet, p. 9, ¶ 1; Dundas, p. 26–29*]. According to the recent case law, although national courts respect party-agreed terms of confidentiality in arbitration-related claims, they do not hesitate to lift such confidentiality obligations if it is necessary for protection of the parties' legitimate interests or the more general public interest [*Smeureanu, p. 108; Esso Australia Resources Ltd. and others v The Honarable Sidney James Ploman and others; Hassneh Insurance Co. of Israel and others v. Steuart J. Mew; Insurance Co. v. Lloyd's Syndicate*].

66. In particular, limitations of the confidentiality obligation include considerations of transparency **(a)** and fair disposal of the case **(b)**.

a. The confidentiality obligation should be limited for considerations of transparency.

67. International commercial arbitration has moved towards recognizing limitations to confidentiality [*Smeureanu, p. 94; Rogers, p. 1312, ¶ 25; Carmody, p. 96*]. For example, press reports and trade publications have publicized pending international disputes, awards are increasingly published in either redacted or complete form, various harmonization efforts have produced published codifications of arbitral procedures, and projects for enhanced availability of information about arbitrators are underway [*Born, p. 2820*].

68. And the trend towards transparency becomes obvious if we turn to arbitration rules made by arbitral institutions. In many of them, partial or entire publication of awards in redacted form is allowed, even without approval from the parties [*Smeureanu, p. 94*]. In particular, HKIAC Rules provides conditions for publication of awards, i.e. a request for publication addressed to HKIAC, deletion of all references to the parties' names and no objection from the parties within the time limit fixed by HKIAC [*Article 42.5 HKIAC Rules 2013*]. It should be noted that compared with the 2013 version, the latest version of HKIAC Rules no longer requires a request from the parties [*Article 45.5 HKIAC Rules*].

69. The rationale behind is that, transparency promotes efficiency between parties, consistency of results and predictability in international commercial arbitration. In addition, it may contribute to higher quality of decision-making and decision-explaining, because tribunals may feel better incentives to make careful decisions under the pressure of publication. Moreover, publication of awards may also have positive effects on the speed of decision-making [*Born, p. 2821*].

70. *In casu*, RESPONDENT made totally opposite allegations in different arbitrations. As has been explained

above, the exclusion of the evidence may lead to inconsistent resolution of disputes, while its admission promotes a more reasonable outcome. In this regard, considering the trend towards transparency in international commercial arbitration and the values behind, the evidence here should be admitted.

b. The confidentiality obligation should be limited for considerations of fair disposal of the case.

71. For considerations of fair disposal of another case, the confidentiality obligation can be limited [*Dundas, p. 26–29; Insurance Co. v. Lloyd's Syndicate; Nassé v. Science Research Council (SRC)*], as is held by the court in the case Hassneh Insurance Co. of Israel v. Mew, "if it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail." And usually, the evidence needs to satisfy the requirement of being "reasonably necessary" for the aim of fair disposal [*Hassneh Insurance Co. of Israel and others v. Steuart J. Mew; Dolling-Baker v. Merrrett; Nassé v. Science Research Council (SRC)*].

72. In the case Science Research Council v Nasse, the court concluded that the proceedings could not be regarded as being fairly disposed of, if a party who had a slim chance of success without inspection of documents but a very strong chance of success with it was denied inspection. And that court found that the wording "necessary" includes, but is not limited to, the case where the party applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless it obtained the order [*Nassé v. Science Research Council (SRC)*]. In another case Dolling Baker v. Merrett, the court held that the evidence was of necessity when there was no other less costly mean to obtain information needed to secure a fair treatment of the case [*Dolling Baker v. Merrett*].

73. In the present case, RESPONDENT rejects extraneous evidence where it is to its detriment but immediately thereafter relies upon it where it is in its favor [*Problem, p. 49, ¶ 1*]. On one hand, if both allegations are supported, the results will undoubtedly be against fairness and reasonability. On the other hand, considering the fact that under HKIAC Rules, Model Law and IBA Rules, the parties are not obliged to voluntarily disclose evidence which is adverse to its position, CLAIMANT may never have other access to the evidence; and even if there is, the present means is the least costly one. Since the evidence may exert an important influence on CLAIMANT's chance of success, it is of reasonable necessity for the fair disposal of the present case. As a result, the submission of the evidence should not be rejected.

(2) The evidence obtained through an illegal hack of RESPONDENT's computer system is admissible.

74. Assuming that the evidence had been obtained through an illegal hack of RESPONDENT's computer system, it is still admissible, because illegality is not a separate reason for exclusion under Model Law, HKIAC Rules and IBA Rules, and there are hardly established rules in international commercial arbitration to exclude illegally obtained evidence **(a)**. Furthermore, the admission of the evidence in the present case is not against equality and fairness **(b)**. In addition, in any event, RESPONDENT bears the burden of providing *prima facie*

evidence as to the source of the evidence **(c)**.

a. Illegality is not a separate reason for exclusion under Model Law, HKIAC Rules and IBA Rules, and there are hardly established rules in international commercial arbitration to exclude illegally obtained evidence.

75. As have been mentioned before, Model Law and HKIAC Rules deal with the criteria of admitting evidence in a general way. Both of them provide no specific guidance as to the admission of illegally obtained evidence, and the issue is therefore subject to the discretion of the tribunal [*Article 22 HKIAC Rules; Article 19 Model Law*]. In the present case, it is advisable to turn to IBA Rules for guidance. Article 9.2 IBA Rules lists grounds for exclusion of evidence. Nevertheless, illegality is not listed as a separate reason for exclusion.

76. Since none of the rules referred to deal with illegally obtained evidence, and considering in particular the fact that IBA Rules is often recognized as the "best practice" in the field of rules of evidence [*Marghitola, p. 33; O'Malley, p. 6, ¶ 1.15; Born, p. 2363*], it is reasonable to conclude that, in international commercial arbitration, there are hardly established rules to exclude illegally obtained evidence.

b. The admission of the evidence in the present case is not against equality and fairness.

77. Article 9.2(g) IBA Rules stipulates that the evidence can be excluded *when considerations of fairness and equality are compelling*. In general, equality and fairness require equal treatment of the Parties and a full opportunity for them to present their cases [*Born, p. 2172; Waincymer, p. 15; O'Malley, p. 319, ¶ 9.115*]. In the present case, the admission of evidence will not lead to inequality and unfairness.

78. First, since the evidence is not used to challenge the submissions of RESPONDENT, but instead supports CLAIMANT's own submissions, the admission of it will not impair RESPONDENT's opportunity to be heard. In the case Schenk v. Switzerland, when dealing with the illegally obtained telephone conversation, the Court held that although the evidence was unlawfully obtained, it does not mean that the whole trial was unfair. According to the Court, since the applicant had the opportunity to challenge the authenticity of the evidence and to oppose its use, the trial was fair [*Schenk v. Switzerland*]. Likewise, in the case at hand, even if the evidence is admitted, RESPONDENT still has a full opportunity to challenge its authenticity and to bring evidence in support of its own defense, and therefore it still enjoys a full opportunity to present its case.

79. Second, it should be noted that even if the evidence was illegally hacked, CLAIMANT itself was not involved in it. What CLAIMANT did was simply buying the evidence from a company, without knowledge of the actual source of the evidence. CLAIMANT was totally in good faith. On the other hand, RESPONDENT was at least partly responsible for the illegal hack, because it "*had used an outdated firewall to protect its computer system which had made it easy for the hackers to enter the system.*" [*PO2 ¶ 41*]

80. Third, the admission of evidence will not lead to unfairness of the outcome. Instead, it will promote fairness, because with the admission of the evidence, the tribunal can avoid inconsistent results and unreasonable profits

made by RESPONDENT through the arbitration proceedings.

81. In this regard, the admission of evidence will not lead to inequality and unfairness.

82. It deserves to be mentioned that in order to exclude the evidence, the fairness and equality considerations have to be compelling. The term 'compelling' means that documents should only be excluded in serious cases [*Marghitola, p. 93; Waincymer, p. 868*]. Therefore, IBA Rules adopted a relatively high standard as to the exclusion of evidence, and are in favour of disclosure [*Waincymer, p. 868*].

c. <u>In any event, RESPONDENT bears the burden of providing *prima facie* evidence as to the source of the evidence.</u>

83. Normally, a party proposing a claim bears the consequential duty to provide related evidence，as it is stipulated in Article 22 HKIAC Rules: "*Each party shall have the burden of proving the facts relied on to support its claim or defense.*" That is to say, a mere allegation is not a sufficient basis for supporting one's stance. Particularly, when one party asks for an exclusion of evidence which is claimed to have been illegally obtained, available cases have specified that it should bear the burden of providing *prima facie* evidence to support its position [*O'Malley, p. 322*].

84. In ICC Case No. 7047 (1994), a government entity in a dispute with a private party sought to have certain evidence declared inadmissible. One of the reasons was that the evidence had been illegally obtained. However, the tribunal in that case noted that without evidence proving that actual laws had been broken, the objection could not accept could not be accepted [*ICC Case No. 7047 (1994)*].

85. Similarly, *in casu*, since RESPONDENT claims that the evidence to be submitted by CLAIMANT was procured illegally, it bears the burden of providing *prima facie* evidence to support its allegation. If it fails to do so, such objection cannot be supported, and CLAIMANT will have the right to submit the evidence.

86. In view of the above, on the basis of the assumption that the evidence had been through an illegal hack of RESPONDENT's computer system, CLAIMANT should still be entitled to submit it.

87. In conclusion, CLAIMANT should 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.

<u>ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT UNDER CLAUSE 12 OF THE CONTRACT IN ACCORDANCE WITH ARTICLE 8 CISG.</u>

88. After a long-term negotiation, the Parties concluded the Agreement on 6th May, 2017. During the negotiation of the Agreement, CLAIMANT had expressed the unwillingness to undertake any further risks with the change of the delivery term. Therefore, risks associated with the change of customs regulation and import restrictions

were transferred to RESPONDENT through parties' consensus **(A)**. According to the Agreement**,** and pursuant to the interpretation rules under Article 8 CISG, hardship under Clause 12 governs the additional tariffs in present case **(B)**. Pursuant to Article 8 and Article 11 of the CISG, in circumstances where hardship could be found, there is an adaptation mechanism to adapt the contract **(C)**. The derogation of delivery DDP justified the payment of US$1,500,000, at least US$ 1,250,000 to make up for the loss **(D)**.

A. Risks associated with customs regulation were transferred to RESPONDENT through parties' consensus.

89. DDP term itself had left space for parties' autonomy, which was the risk-transferring consensus **(I)**. The final use of DDP indicates that the prerequisites proposed by CLAIMANT in respect to the application of DDP were accepted by RESPONDENT **(II)**.

I. DDP term used in the Agreement can be derogated by the parties' mutual consent.

90. RESPONDENT may argue that it was the seller's responsibility to take the risks at issue. However, as an international commercial practice, Incoterms is open to derogation by parties' autonomy. The DDP term applied in the case at hand had been derogated by the parties.

91. As defined by ICC, DDP, short for Delivered Duty Paid, means that "*the seller is responsible for all the costs and risks in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, or pay any duty for both export and import and to carry but also to carry out all customs formalities"* [*Incoterms rules 2010*].

92. Incoterms rules were recognized as a commercial practice, which nature is not mandatory and the International Chamber of Commerce determines their content and uniform application [*Ch. Pamboukis, p.126*] Due to its non-mandatory force, the Parties are free to change its content as long as mutual consent has been reached. When such consent existed and conjunct with the original meaning, it shall prevail over the origin content of Incoterms rules. Such principle of the parties' autonomy is also recognized by CISG [*Ch. Pamboukis, p.109*]. In present case, there existed a prevailing consent.

II. The purpose of switching delivery terms from EXW to DDP was not to transfer the risks.

93. Firstly, CLAIMANT had used EXW as the delivery term in all former contract [*PO2 ¶ 9*]. When RESPONDENT offered to conclude the contact on the basis of DDP, it expressly stated that the choice to insist on DDP was made in consideration of the urgency of delivery and CLAIMANT's "*much greater experience in the shipment of frozen semen including the necessary export and import documentation"* [*Cl. Ex. 3*]. Such statement indicated that even for RESPONDENT, the initial purpose to the change of the delivery term was not to burden CLAIMANT with additional costs or risks associated with by DDP terms.

94. Furthermore, when replying to RESPONDENT's request, CLAIMANT made clear that "*we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those*

associated with changes in customs regulation" [*Cl. Ex. 3*]. Such intention was known or could not been unaware to RESPONDENT pursuant Article 8(1) CISG.

95. As CLAIMANT stated in the email dated on 31 March 2017, there were two prerequisites in respect to change of the delivery term from EXW to DDP. The first prerequisite is that CLAIMANT would not take further risks associated with customs regulation and import restrictions. Such purpose was ensured by the inclusion of a hardship clause expressed in the email that "*a hardship clause should be included into the contract to address such subsequent changes"* [*Cl. Ex. 4*]. Second was a price increase of 1000 USD in every doses of frozen semen and the reason of it was that CLAIMANT was not familiar with procedures or costs of import since the Transportation LLP of CLAIMANT which used to organize the delivery of the frozen semen had been sold to an outside investor in the course of the restructuring in 2016 [*PO2 ¶ 9*]. The final increase of 500 USD was the result of negotiations between Parties.

96. In fact, the final contract did include a hardship clause as Clause 12, the contract price was increased and the contract delivery was conducted under DDP [*Cl. Ex. 5*]. Apart from the contract itself, during the negotiation between Mr. Krone and Mr. Ferguson who are two the final negotiators, there was a discussion on the inclusion of a hardship clause, which was later included as Clause 12 [*PO2 ¶ 12*].

97. All the facts justified the conclusion that RESPONDENT had accepted all the prerequisites to use DDP term, including the prerequisite that all the additional risks in relation to customs regulation and import restrictions were to be transferred to RESPONDENT and CLAIMANT take no such risks.

B. Pursuant to Article 8 CISG, hardship under Clause 12 covers the additional tariffs in the present case.

98. Considering the change of delivery term as well as the following risks, the Parties managed to incorporate a hardship clause into the Agreement to satisfy CLAIMANT's request to transfer the risks with respect to customs regulation and import restrictions under DDP to RESPONDENT. Therefore, apart from health and safety requirements, hardship clause in Clause 12 may also be triggered by comparable unforeseen events which make the contract more onerous **(I)**. In light of Article 8 CISG, comparable unforeseen events covers the additional tariffs in the present case **(II)**.

I. Apart from health and safety requirements, hardship clause in Clause 12 may also be triggered by comparable unforeseen events which make the contract more onerous.

99. As Clause 12 of the Agreement, circumstances of hardship had been expressly stipulated **(1)**. Even if such circumstances cannot be found, in the intent of the Parties, hardship clause in Clause 12 should be understood in the same way under Article 8(1) CISG **(2)**.

(1) Circumstances giving rise to hardship had been expressly stipulated.

100. The italic part in Clause 12 which is "*neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* was added during the negotiation on the basis of hardship clause [*PO2 ¶ 3*]. Such provision was to stipulate the circumstances giving rise to hardship, which made it easy to come to the conclusion that hardship clause was also caused by comparable unforeseen events, instead of the health and safety requirements only.

(2) Even if such circumstances cannot be found, in the intent of the Parties, hardship clause in Clause 12 should be understood in the same way under Article 8(1) CISG.

101. Even if such circumstances cannot be found, hardship in Clause 12 should be understood in the same way in the intent of the Parties.

102. According to Article 8(1) CISG, "*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*." Pursuant to the statement in Part A of ISSUE 3, the inclusion of hardship was to transfer the risks in respect of customs regulations and import restrictions under DDP. Therefore, in the Parties' intent, the scope of hardship should cover not only health and safety requirements but also all customs regulation and import restrictions associated with the change of delivery term.

103. In conclusion, in the intent of the Parties, it is reasonable to believe that Clause 12 provided hardship clause, which was not only caused by health and safety requirements, but also other comparable unforeseen events that make the contract more onerous, both arise under delivery DDP.

II. In light of Article 8 CISG, comparable unforeseen events cover the additional tariffs in the present case.

104. In Clause 12, comparable unforeseen events in hardship clause required three basic elements, which additional tariffs in present case satisfied. First, the additional tariffs in present case are comparable with health and safety requirements under Article 8 CISG **(1)**. Second, apparently, in eyes of a reasonable third person, the occurrence of the sudden tariffs was unforeseen under Article 8(2) CISG **(2)**. Third, the additional tariffs did make the contract more onerous **(3)**. Thus, the additional tariffs were in line with general regulations of hardship.

(1) First, the additional tariffs in present case are comparable with health and safety requirements under Article 8 CISG.

105. On one hand, in Parties' intent, the 30% tariffs is comparable with health and safety requirements **(a)**. On the other hand, based on principle of *Contra Proferentem,* the 30% tariffs is also comparable with health and safety requirements **(b)**.

a. The 30% tariffs is comparable with health and safety requirements under Article 8(1) CISG.

106. Pursuant to Article 8(1) CISG, in CLAIMANT's intent, the events which are comparable with health and safety requirement are all further risks under the delivery DDP, especially customs regulations and import restrictions, such as health and safety requirements. In the contracting negotiations, CLAIMANT had expressed the unwillingness take over any further risks under DDP, in particular customs regulation or import restrictions and requested for an inclusion of hardship to achieve the purpose, which RESPONDENT knew and suggested the wording of hardship with reference to the risks mentioned by CLAIMANT [*PO2 ¶12*]. Therefore, the scope of hardship should contain all customs regulations and import restrictions under DDP. According to the Black's law dictionary, customs laws are laws that govern the exemption or the payment of the duties that are put on imported goods [*Black's Law Dictionary*], and thus tariffs should be a kind of customs regulations or import restrictions. In other words, 30% additional tariffs are comparable with health and safety requirements.

b. Based on principle of *Contra Proferentem*, the 30% tariffs are also comparable with health and safety requirements.

107. Even if RESPONDENT had a different interpretation of the sphere of hardship, it should be understood in the way of CLAIMANT. According to Schmidt-Kessel, under the interpretation rule in Article 8(2) CISG, *Contra Proferentem* is founded on the basic principle under Article 7(2) CISG that the party drafted or otherwise supplied the formulation of a certain term must bear the risk of its possible ambiguity, which means that unclear terms are to be interpreted against the drafter, and in accordance with addressee's understanding [*Schmidt-Kessel, p. 168*]. In present case, with reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017, it was Mr. Julian Krone, successor of RESPONDENT, who *suggested the wording of hardship which was finally added to the contract* [*PO2 ¶ 12*]. As a matter of fact, the understanding of CLAIMANT goes against RESPONDENT's position that event would be comparable only when it leads to high test expenses. Therefore, since the word "comparable" in Clause 12 is ambiguous, it should be interpreted against RESPONDENT. In other words, it should be understood in the way of CLAIMANT.

108. To sum up, as both are customs regulations or import restrictions under DDP, the 30% additional tariffs in present case are comparable with health and safety requirements.

(2) Second, in eyes of a reasonable third person, the occurrence of the sudden tariffs was unforeseen under Article 8(2) CISG.

109. Where it is impossible to use the subjective intent standard in Article 8(1) CISG to interpret a party's statements or conducts, one must resort to "a more objective analysis" as provided for by Article 8(2) CISG [*UNCITRAL Digest 2016, Art. 8, ¶ 11*]. Article 8(2) governs that if the preceding paragraph is not applicable,

statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable third person of the same kind as the other party would have had in the same circumstance.

110. In present case, there're no negotiations, practices which the parties have established between themselves usages or any subsequent conducts of Parties to determine what was unforeseen, so Parties' intent could not be told.

111. The Government of Equatoriana had always been an ardent supporter of free trade, and it was unforeseeable that Equatoriana would take retaliatory tariffs against Mediterraneo **(a)**. Even if such tariffs could be foreseen, it was unforeseen that the newly imposed tariffs would apply to racehorse semen **(b)**.

a. <u>It was unforeseeable that Equatoriana would take retaliatory tariff against Mediterraneo under Article 8(2) CISG.</u>

112. However, the additional tariffs were sudden and unforeseen for a reasonable third person.

113. Firstly, as stated in the Peak Business News on 20th December, 2017, *Equatoriana has always been one of the biggest supporters of the existing system of free trade and the various governments of it have always tried to solve disputes amicably* [*Cl. Ex. 6*]. Therefore, generally speaking, it's not likely for Equatoriana to impose high import tariffs.

114. Secondly, as a member of WTO, faced with Mediterraneo's severe tariffs, Equatoriana was supposed to solve it through the relevant WTO dispute resolution mechanism, Dispute Settlement Body (DSB), which is provided by World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It stipulated that regarding to retaliatory action, Members of WTO must follow DSU procedures in determining the amount of trade retaliation to be imposed and must obtain authorization from the DSB in accordance with DSU procedures before suspending WTO tariff concessions or other WTO obligations in the event the defending Member has failed to comply [*Shedd p. 10*].

115. Thirdly, it's undeniable that there's one exception that Equatoriana had taken retaliatory measures against a third country for import restrictions. Nevertheless, the retaliation by Equatoriana was taken by National Party, whose attitude toward international trade was more critical and completely different with the current leading party, Progressive Liberals.

116. In summary, the 30% additional tariffs could not be foreseen by CLAIMANT.

b. <u>It was unforeseen that the newly imposed tariffs would apply to racehorse semen under Article 8(2) CISG.</u>

117. Even if Equatoriana's retaliatory tariffs on agricultural products could be foreseen, it was beyond all expectations that the newly imposed tariffs would apply to semen used for artificial insemination in racehorse breading. On one hand, according to the Harmonized Commodity Description and Coding System (HS-code),

which is commonly used for customs and commodities inspection, animal semen belongs to Animal & Animal Products. And HS-code does not specify that Animal Products is included in agricultural products [*Harmonized Commodity Description and Coding System*]. Therefore, racehorse semen was not expected to be in the list of agricultural products. One the other hand, actually, Parties did read the newspaper article about the retaliatory tariffs in the Peak Business News, however, not cross their mind that the frozen semen could be considered to be an "agricultural good" so that the tariffs would apply to it. Only when Ms. Napravnik asked for customs clearance on 19 January 2018 was she told by email, which *she only read in the morning of 20 January 2018, that the tariff applied to semen as well* [*PO2 ¶ 26*]. As a matter of fact, RESPONDENT had failed to foresee the tariffs imposition on semen, it's baseless to request CLAIMANT to foresee it.

118. All in all, there's no reasonable possibility that CLAIMANT could foresee neither such surprising tariffs nor its imposition on racehorse semen.

(3) Third, the additional tariffs did make the contract more onerous.

119. As Professor Schwenzer stated in her article, to ascertain whether any alteration amounts to hardship, primary consideration is to be given to the circumstances of the individual cases [*Schwenzer p.716*]. In present case, CLAIMANT was suffering a terrible financial ruin. In fact, the last two years have been financially difficult for CLAIMANT due to several reasons. Through extensive restructuring measures and a considerable cut of the work force CLAIMANT has been able to stay in business. Furthermore, CLAIMANT's profit plan would be seriously endangered if CLAIMANT had to bear the 1,250,000 USD. Once CLAIMANT failed to do so, it would lose one of its main credit line. As a result, to get a new credit line and stay in business, CLAIMANT would have to sell its dressage part. More importantly, to establish a long term cooperating relationship, the profit margin of CLAIMANT in this deal was just 5%, which made it more onerous for CLAIMANT to shoulder the 30% tariffs.

120. In conclusion, to determine whether the 30% had made the contract more onerous, CLAIMANT's financial difficulty must be considered. Considering that CLAIMANT would fail on its restructuring plan, the 30% certainly make the contract more onerous.

C. There was an adaptation mechanism to adapt the contract under hardship in the contract pursuant to Article 8 and Article 11 CISG.

121. In light of the explanation above, all further risks especially customs regulations and import restrictions under delivery DDP had been transferred to RESPONDENT in the way of an inclusion of hardship. To achieve the purpose of transferring the risks under DDP, there would be an adaptation mechanism.

122. Furthermore, according to ICC Arbitration Case No. 6281 of 1989, the Tribunal held that the seller could be relieved of the obligation to deliver the goods at the contract price only if the contract contained a price adjustment clause, or in case of frustration of the contract, which wars sudden, substantial and unforeseeable [*ICC Case No. 6281 (1989)*]. The frustration of the contract had been proved in the discussion above, and in

present case, there's an agreed adaptation mechanism in the contract in light of Article 11 CISG **(I)**, which could adapt the contract for unlikely events, containing hardship **(II)**.

I. There's an agreed adaptation mechanism in the contract pursuant to Article 11 CISG.

123. The former negotiators of CLAIMANT and RESPONDENT, Ms. Napravnik and Mr. Antley had reached an agreement of including an adaptation mechanism into the contract for unlikely events.

124. In light of Article 11 CISG, "*a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses".* Meanwhile, a contract governed by the Convention can be proven by any means, including witnesses. In judicial practice, one court, for instance, stated that under the CISG, evidence of the oral conversations between seller and buyer, relating to the terms of the purchase, could be admitted to establish that an agreement had been reached between the parties [*UNCITRAL Digest 2016, Art. 11, ¶ 7*].

125. In present case, When Mr. Antley and Ms. Napravnik last met on April 12th 2017, they had reached an agreement on an adaptation mechanism of the contract for unlikely events. When Ms. Napravnik suggested adding an adaptation mechanism into the contract, "*Mr. Antley replied it should be the task of the arbitrators"* [*Cl. Ex. 8*], which indicated he's agreement on the adaptation mechanism but the financial discretion should belong to the Tribunal.

126. To sum up, it's beyond doubt that there's an agreement between Parties to incorporate an adaptation mechanism into the contract. In other words, even though the adaptation mechanism was not expressly provided in the contract, in light of Article 11 CISG such mechanism was a part of the contract.

II. The agreed adaptation mechanism could adapt the contract for unlikely events, containing hardship under Article 8 CISG.

127. According to witness statement of Ms. Napravnik, *"the adaptation mechanism was to adapt the contract when Parties could not reach an agreement for unlikely events"* [*Cl. Ex. 8*]. When Ms. Napravnik requested for an adaptation mechanism, she specifically mentioned "*to include an express reference into the hardship clause or the arbitration clause to avoid any doubts"* [*Cl. Ex. 8*]. In light of Article 8(1) CISG, such mention revealed CLAIMANT's intent that the adaptation mechanism was to settle disputes under hardship and to empower the Arbitral Tribunal with financial discretion to adapt the contract. In light of OXFORD Dictionary and Black's Law Dictionary, "unlikely" usually means not the thing that you would normally think of or expect [*Oxford Advanced Learner's English-Chinese Dictionary*] and "unforeseen" typically means something not expected [*Black's Law Dictionary*]. Therefore, it's apparent that unlikely events contain circumstances under hardship for hardship is also circumstance unforeseeable and unpredictable, thus, once circumstances of hardship happened, the contract could be adapted if Parties could not reach an agreement.

128. Furthermore, as soon as learning about the 30% sudden tariffs on the last 50 dose of semen by Equatoriana, which understood as a circumstance of hardship according to explanation above, Ms. Napravnik instantly got in touch with the person in charge of RESPONDENT, Mr. Shoemaker and requested for an increase of price [*Re. Ex. 4*]. In light of Article 8(3) CISG, such reaction of CLAIMANT indicated the existence of an adaptation mechanism in the contract and illustrated that present circumstance is covered by hardship as well as unlikely events which need an adaptation.

129. In short, there was an adaptation mechanism to adapt the contract by the Arbitral Tribunal while unlikely events happened, that is circumstances of hardship in Clause 12 could apply to the adaptation clause.

D. The derogation of delivery DDP justified the payment of US$1,500,000, at least US$1,250,000 to make up for the loss.

130. Since CLAIMANT had transferred risks of customs regulations and import restrictions under DDP to RESPONDENT, it is RESPONDENT the one should be responsible for the 30% additional tariffs. In fact, CLAIMANT had already paid for the tariffs, therefore, CLAIMANT is entitled to a payment of US$ 1,500,000 **(I)**. Even if US$1,500,000 was not reasonable, CLAIMANT is entitled to a payment of US$1,250,000 **(II)**.

I. CLAIMANT is entitled to a payment of US$1,500,000 under a derogation of DDP.

131. As mentioned above, the Parties reached an agreement to transfer the further risks to RESPONDENT which constituted the derogation of DDP. Furthermore, Mr. Shoemaker was certain that a solution would be found through negotiation and urged CLAIMNAT to authorize the shipment as planned [*Cl. Ex. 8*], which convinced CLAIMANT to ship the third installment. Therefore, RESPONDENT should undertake the tariffs and pay for a price adaptation.

132. Facts are that the price was US$100,000 per dose, the number of last shipment was 50 [*Cl. Ex. 5*] and the tariffs Equatoriana Government imposed was 30% [*Cl. Ex. 6*]. Therefore, the amount was paid on the basis of 50*100,000*30%=1,500,000.

133. In conclusion, in either way, DDP term in contract had been derogated as the seller only took the responsibility to prepare needed documentation while all other risks remain to be buyers'. On the basis of such derogation, CLAIMANT is entitled to a payment of US$1,500,000 resulting from a price adaptation based on the risks allocation of Parties.

II. Even if US$1,500,000 was not reasonable, CLAIMANT is entitled to a payment of US$1,250,000 to cover the loss.

134. It's beyond doubt that RESPONDENT should be responsible for all tariffs in present case. However, if the Tribunal considered the US$1,500,000 was not reasonable, CLAIMANT is at least entitled to a payment of US$1,250,000 to cover the loss.

135. In present case, RESPONDENT had breach the contract that it resold the racehorse semen. "*CLAIMANT was approached on 2 February 2018 by another breeder from Equatoriana which was enquiring about the prices of frozen semen from another stallion. During the conversation he told CLAIMANT that he had been very happy with the Nijinski III semen which he had bought from RESPONDENT for 120,000 USD. He knew that 15 doses had been sold to 10 different breeders, all of which had bought just one or two doses"* [*PO2 ¶20*]. In other words, RESPONDENT had profited 20% from resale in this deal. However, at the same time, CLAMIANT not only lost the whole profit margin of 5%, but also suffering 25% loss resulting from the 30% additional tariffs [*NOA ¶18*]. Furthermore, "*CLAIMANT had been financially difficult for the last two years due to several reasons even extensive restructuring measures and a considerable cut of work force"* [*Cl. Ex. 8*]. CLAIMANT struggles to stay in business, making it hard to pay for the 30% tariffs, let alone burdening it all by itself.

136. Considering the equilibrium of the contract and the principle of fairness, Tribunal should make a fair distribution of the losses between the parties, especially considering CLAIMANT's struggling to stay in business. Therefore, US$1,250,000 should be paid to CLAIMANT to make up for the loss at minimum.

137. To sum up, customs regulations and import restrictions under DDP had been transferred to RESPONDENT, which the inclusion of hardship helped to achieve the purpose. Furthermore, the additional 30% tariffs were subject to the hardship clause in Clause 12 and could be adapted by the Arbitral Tribunal. Since RESPONDENT should be responsible for the 30% additional tariffs in present case owing to retaliation from Equatoriana, CLAIMANT is entitled to a payment of US$1,500,000, at least US$ 1,250,000 to make up for the loss.

ISSUE 4: CLAIMANT IS ALSO ENTITLED TO THE PAYMENT UNDER THE CISG.

138. Although the provisions in CISG do not include hardship directly, the convention still suggests possible remedy in present case via applying Article 6.2 UNIDROIT Principles under Article 9(2) CISG **(A)**. The additional tariffs meet all requirements set forth in Article 6.2 UNIDROIT Principles and CLAIMANT could resort to the tribunal to adapt the contract to get the payment accordingly **(B)**.

A. It is Article 6.2 UNIDROIT Principles instead of Article 79 CISG that applies to present case.

139. Since the question of whether CISG contains hardship is a highly controversial one, and CLAIMANT, who has fully performed the contractual duty could not seek remedy of exemption under Article 79 CISG, no direct solution in CISG could be applicable to present case (**I**). However, Article 6.2 UNIDROIT Principles could be applied as a binding usage under Article 9(2) CISG and the remedy it provides could be resorted to in present case (**II**).

I. No direct solution in CISG could be applicable to the present case.

140. Whether Article 79 CISG deals with hardship remains a highly controversial problem among scholars. Some believe that CISG does not contain a special provision dealing with questions of hardship [*Schwenzer, III, para.2*], and it is recognized that there is no room to consider hardship under Article 79 CISG [*Schlechtriem, Article 79, para 39*]. And according to the drafting history of Article 79 CISG, the working group finally rejected the doctrine of hardship [*Advisory Counsel Opinion7, page 29*]. On the contrary, today it is more or less accepted in court and arbitral decisions as well as in scholarly writing that Article 79 does indeed cover issues relating to hardship. However, which cases of hardship amount to an impediment under Article 79 and what remedies the aggrieved party may resort to are still matters of dispute [*Schwenzer, page 713*]. If one views hardship as an impediment under Article 79 CISG, it is questionable whether an adaptation of the contract is possible. It can hardly be conceived that there is a gap in the CISG that can be filled by giving the court or tribunal the power to adapt the contract to the changed tariffs in present case.

141. Besides, regardless of the debate about whether hardship is covered by Article 79 CISG, the prerequisite to invoke impediment is non-performance of a contracting party. Article 79 CISG governs the promisor's exemption from liability to pay damages if he is not able to perform his obligations in accordance with the contract due to an unforeseeable impediment beyond his control, and exemption of the promisor under Article 79 CISG will often be considered in typical cases of so-called *force majeure,* such as natural phenomena and catastrophes, state interventions, financial capacity [*Schwenzer, p.1140, para.17*]. To be more exact, the remedial consequence of exemption is invoked only when impediment causes the non-performance of a party. However, in present case, the CLAIMANT has already performed all contractual duties, therefore Article 79 CISG could not be applied.

II. Article 6.2 UNIDROIT Principles could serve as an international trade usage under Article 9 (2) CISG to determine the contract in present case.

142. Usages that the parties "*have impliedly made applicable to their contract*" are addressed in Article 9(2) CISG, and in any case, any applicable usage has the same effect as a contract [*12 April 2002(Finland)*]. Since UNIDROIT Principles meets the requirements of an international trade usage in Article 9(2), it could be applicable to adapt the contract **(1)**. Even if UNIDROIT Principles couldn't fulfill these prerequisites in Article 9(2) CISG as a set of usages as a whole, Article 6.2 could still be used as a single usage to determine the content of the contract **(2)**.

(1) UNIDROIT Principles met the prerequisites of international trade usages made applicable to the contract under Article 9(2) CISG.

143. By virtue of Article 9(2) CISG, CLAIMANT and RESPONDENT may be bound by a trade usage even in the absence of an affirmative agreement under Article 9(1) as shown in the contract, provided the parties "knew or ought to have known" of the usage and the usage is one that, in international trade, "is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned [*13 April 2006(Russian Federation)*]." One court has construed Article 9(2) as providing that "the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties [*CLOUT case No. 579*]."

144. In the field of international trade, as amply demonstrated by the extensive body of case law and bibliographic references on the UNILEX database, the UNIDROIT Principles has been well received generally and has not given rise in practice to any significant difficulties of application [*UNIDROIT principles 2016, p.8*].

145. Therefore, it could be concluded that parties ought to have known the UNIDROIT Principles which has been widely known to and regularly observed by parties in the same field. Besides, CLAIMANT and RESPONDENT never expressly rejected to resort to the UNIDROIT Principles. In light of these, the UNIDROIT Principles constitute usages of the kind referred to in Article 9(2) of the Convention [*Russian Federation*]and reflect international trade usages [*ICC Case No. 9333 (1998)*], which has the same effect as a contract [*12 April 2002(Finland)*].

(2) Even if UNIDROIT Principles couldn't meet the requirements of Article 9(2) CISG, Article 6.2 UNIDROIT Principles still fulfills these prerequisites individually.

146. For the correct application of Article 9(2) CISG it is important to examine individually whether the requirements are met for each rule concerned in it. The threshold for consideration of sets of rules and corresponding usages like UNIDROIT Principles committed to writing is much higher, since the requirements of paragraph2 must be met for all of the rules contained therein [*CISG Digest，p.189, ¶ 16*].

147. In light of this, whether UNIDROIT Principles could be treated as binding international trade usages applicable to the contract might cause ambiguity in understanding of another contracting party despite of reasons aforementioned. However, even if UNIDROIT Principles might not represent a trade usage in it entirely, individual provisions of UNIDROIT Principles can readily deemed trade usages insofar as the prerequisites under Article 9(2) CISG are met [*CISG Digest： p.189, ¶ 16*].

148. The contender for Article 6.2 UNIDROIT Principles "hardship" was found to be a word which was in use in contracts in a number of different countries, while Article 6.2 UNIDROIT Principles may said to be a step ahead of many domestic legal systems and influence them [*Commentary, p.711,¶ 3*].The requirement that the parties knew or ought to have known of a usage before it will be binding under Article 9(2) CISG has been described as requiring that the parties either have places of business in the geographical area where the usage is established or continuously transact business within that area for a considerable period[*UNCITRAL Digest 2016, Art9, ¶.12*]. Therefore, Article 6.2 UNIDROIT Principles is naturally known to CLAIMANT and RESPONDENT as well as parties in the same field and has been observed by them, so Article 6.2 UNIDROIT Principles could be viewed as an international trade usage in accordance with the requirements of Article 9(2) CISG, which could determine the content of the contract between the parties.

149. Furthermore, although during the conclusion of the contract RESPONDENT rejected the inclusion of ICC hardship clause for it's too broad [*Re. Ex. 3*], however, this rejection couldn't extend to the application of Article 6.2 UNIDROIT Principles because these two hardship provisions are not the same. For one thing, the constituents of hardship set forth in these two provisions are different. For another, the remedial consequences by invoking hardship are disparate. Therefore, unlike ICC hardship clause, Article 6.2 UNIDROIT Principles could still be applicable in present case.

B. CLAIMANT could resort to the tribunal to adapt the contract pursuant to Article 6.2 UNIDROIT Principles and is entitled to the payment.

150. Since the occurrence of the additional tariffs had met all the requirements of hardship under Article 6.2.2 UNIDROIT Principles **(I)**. CLAIMANT was entitled to the payment according to Article 6.2.3 UNIDROIT Principles by adapting the contract (**II**).

I. The occurrence of the additional tariffs had met all the requirements of hardship under Article 6.2.2 UNIDROIT Principles.

151. Article 6.2.2 UNIDROIT Principles primarily deals with the definition of hardship, which contains two elements. The first requires the situation fundamentally to alter the equilibrium of the contract (**1**). The second consists of four matters in Article 6.2.2 UNIDROIT Principles, including events that occur or become known to the disadvantaged party after the conclusion of the contract (**2**); events that could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract (**3**); events that are beyond the control of the disadvantaged party (**4**); and risk of the events that was not assumed by the

disadvantaged party (**5**). A tribunal must have regard to all five matters identified in these provisions [*Commentary, p.717, ¶ 1*].

(1) The additional tariffs fundamentally altered the equilibrium of the contract.

152. The equilibrium of the contract can be affected in two principal ways, either by increasing the cost of performance to one of the contracting parties or reducing in the value of performance to a contraction party [*Commentary, p.717, ¶ 2*].

153. Whether or not an event can be described as "fundamental" very much depends on the facts and circumstances of the particular case. [*Commentary, p.719, ¶ 7*] In cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered [*Schwenzer, p. 716; Brunner, p. 438-441*]. Moreover, this fundamental alteration must produce such a disproportionate change in the parties' equilibrium to the extent that had it existed at the time of the agreement, they would not have consented to the contract [*Tabor, p. 578-579*].

154. In the present case, the imposition of the tariffs alters the equilibrium of the contract, causing a highly increase of the cost to perform to CLAIMANT. Moreover, CLAIMANT has been making losses since 2014 primarily due to the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. The past experience of suffering from a 40% increase of lost nearly resulted in the insolvency of CLAIMANT. Since the automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively, the abrupt tariffs of US$1,250,000 will lead to the plan to make a profit in 2018 of US$300,000 after US$180,000 in 2017 be seriously endangered. What's worse, the precondition for the entry into a new credit was probably to sale dressage part of CLAIMANT to the largest competitor. So the financial ruin of the obligor at present case is imminent, resulting to a lower threshold of hardship.

155. Undoubtedly, if CLAIMANT should pay for the tariffs fully, the plan of being profitable in 2017 and 2018 respectively will be seriously endangered. So, had the additional tariffs existed at the time of the agreement, CLAIMANT would not have consented to the contract.

156. To sum up, the event of imposition additional tariffs constitutes a "fundamental alteration" under the Article 6.2.2 UNIDROIT Principles.

(2) The event occurred to CLAIMANT after the conclusion of the contract.

157. The contract was finally concluded on the date of May 6, 2017 [*Cl. Ex. 5; PO1*]. And the increasing tariffs was imposed at Dec 19, 2017[*Cl. Ex. 6; PO1*]. So the event, which has given rise to the fundamental alteration in the equilibrium of the contract, occurred after the conclusion of the contract. And the requirement of Article 6.2.2(a) UNIDROIT Principles was met.

(3) The event could not reasonably have been taken into account by CLAIMANT at the time of the conclusion of the contract.

158. This criterion is similar to the wording "unforeseen" set forth by Clause 12 of the contract. Therefore, as argued in ISSUE 3, the facts of the present case fulfilled the requirement of Article 6.2.2(b) UNIDROIT Principles.

(4) The events were beyond the control of CLAIMANT.

159. According to the Commentary on UNIDROIT Principles, the act of rulers and governments are generally beyond ones' control [*Commentary, p.721, ¶ 14*].

160. The tariffs on animal product imposed by Equatoriana Government [*Cl. Ex. 7*], is both objective and external to CLAIMANT. As an ordinary business corporation, it was far beyond CLAIMANT's strength to control an act of a government authority, let alone the retaliation act of other country's government. Therefore, the requirement of "uncontrollable" was satisfied.

(5) The risk of the events was not assumed by CLAIMANT.

161. Referring to the E-mail of 31 March 2017, the precondition to adapt the change of delivery terms is to include a hardship clause to address the changes such subsequent changes which includes the changes in customs regulation or import restriction [*Cl. Ex. 4*]. With reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017 [*Cl. Ex. 4*] Mr. Krone (successor negotiator of RESPONDENT) suggested the wording which was finally added to the *force majeure* clause in clause 12 [*PO2 ¶ 12*].

162. Though RESPONDENT hasn't made an expressly consent to the proposal of CLAIMANT to transfer the further risks associated with such a change in the delivery terms, the conduct of RESPONDENT to include a hardship clause into clause 12 was an implied permission.

163. As discussed above, the risks associated with customs regulation has transferred to RESPONDENT through parties' consensus, so the risk of such an event was not assumed by CLAIMANT.

II. CLAIMANT was entitled to the payment according to Article 6.2.3 UNIDROIT Principles by adapting the contract.

164. In the case at hand, only when Ms. Napravnik asked for customs clearance on 19 January 2018 was she told by e-mail, which she only read in the morning of 20 January 2018, that the tariffs applied to semen as well. [*PO2 ¶ 26*] Since the additional tariffs were in line with the definition of "hardship" under the Article 6.2.2. In order to seek relief, CLAIMANT was eligible to resort to Article 6.2.3 UNIDROIT Principles. After the occurrence of the event, CLAIMANT has requested renegotiations without undue delay (**1**) but the parties failed to reach an agreement within a reasonable time, so CLAIMANT was entitled to resort to the court (**2**). In light of CLAIMANT has already performed the contractual obligation entirely, it's more reasonable to adapt

the contract than to terminate it (**3**). With a view to restore the equilibrium of the contract, the parties should share the risk and thus CLAIMANT was entitled to the payment of US$1,250,000 (**4**).

(1) According to Article 6.2.3(1) UNIDROIT Principles, CLAIMANT was entitled to request renegotiations without undue delay and should indicate the grounds on which it is based.

165. As soon as being informed by the customs authorities Ms. Napravinik has tried to call Mr. Shoemaker but failed, so she sent an E-mail to Mr. Shoemaker promptly in the morning of the same day, requesting Mr. Shoemaker to call her back as soon as possible in order to find a solution in that regard before the delivery of the last shipment [*Cl. Ex. 7; PO1*]. In that E-mail, Ms. Napravnik has also expressed that the additional tariffs *make this shipment 30% more expensive* [*Cl. Ex. 7; PO1*], which constituted an event of hardship and entitled CLAIMANT to make the request.

166. Since CLAIMANT has requested the renegotiation without undue delay and indicate the grounds on which it is based expressly, the requirement under Article 6.2.3(1) UNIDROIT Principles has been met.

(2) Upon failure to reach agreement within a reasonable time CLAIMANT may resort to the court under Article 6.2.3(3) UNIDROIT Principles.

167. In order to solve the issue of adaptation at the senior management level, CLAIMANT initiated the meeting of 12 February 2018 took place in a hotel in Equatoriana [*PO2 ¶ 35*].

168. When confronted with CLAIMANT's discovery of breaching resale prohibition in the meeting, Ms. Kayla Espinoza, RESPONDENT's CEO, got very angry and aggressive. She stopped the negotiations and refused to pay any additional amount for the tariffs [*Cl. Ex. 8; PO1*]. An agreement on a solution was almost impossible to be reached by the parties through negotiation within a reasonable time. So the CLAIMANT was entitled to resort to the court.

(3) It's more reasonable for the court to adapt the contract than to terminate it in the present case.

169. According to the commentary of UNIDROIT Principles, the text of Art6.2.3 refers to two responses open to a tribunal in the event of hardship. The first is to terminate the contract. Although this is the first remedy mentioned, it is likely that a tribunal will be slow to resort to termination preferring, where possible, to adapt the contract [*Commentary; Art 6.2.3, ¶ 6*].

170. In the case at hand, since the CLAIMANT has already performed the obligation entirely, it's not only possible but also more reasonable for the Tribunal to adapt the contract.

(4) <u>The parties should share the risk to restore the equilibrium of the contract, thus CLAIMANT was entitled to the payment of US$1,250,000 or any other amount.</u>

171. In order to restore the equilibrium of the contract, the court will seek to make a fair distribution of the losses between the parties. And the price adaption will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance [*Official Commentary; Art 6.2.3,* ¶ *7*].

172. In the present case, CLAIMANT has actually burdened all the risk of the additional tariffs while RESPONDENT, who resold 15 doses of semen at a 20 percent higher price [*PO2* ¶ *20*], has not only benefited a lot from the performance of CLAIMANT, but also has the potential to earn more with the remaining semen. As discussed in ISSUE 3, CLAIMANT has paid for the additional tariffs of US$1,500,000, while the profit margin of the last shipment was only US$250,000. CLAIMANT claims for the payment of US$1,250,000 to make up for the losses at least. And it's also fair to distribute the majority of losses to RESPONDENT that may still benefit from that performance. In that way, the distribution of risks is proportional so that the equilibrium of the contract would be restored.

<u>REQUEST FOR RELIFE</u>

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

1. Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen.

2. Black Beauty Equestrian bears the costs of the Arbitration.