TWENTY SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

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

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TABLE OF ABBREVIATIONS

Abbreviation	Name
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980
Cl.	Claimant
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC 2018 Rules	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules of Taking on Evidence in International Arbitration
Incoterms	Incoterms rules 2010
Para.	Paragraph
Pg.	Page
PO	Procedural Order
Resp.	Respondent
HU Memo	Hokkaido University Memorandum
USD	United States Dollars

STATEMENT OF FACTS

1. CLAIMANT, Phar Lap Allevamento, is a Mediterranean company that operates a stud farm covering all aspects of equestrian sport and sells frozen semen of its championship stallions for artificial insemination. RESPONDENT, Black Beauty Equestrian, is an Equatorianan company, possessing world champion show jumping horses because of its broodmare line.

2. The Equatorianan Government had imposed serious restrictions on the transportation of all living animals – including frozen semen. However, following pressure from the Equatorianan racehorse breeding industry, the ban on registration of racehorses, which were conceived by artificial insemination, was temporarily lifted. As a result, RESPONDENT inquired with CLAIMANT to buy the frozen semen of Nijinsky III, one of the most successful racehorses ever, owned by CLAIMANT.

3. CLAIMANT worked with RESPONDENT after an agreement for the former to provide the latter with 100 doses of Nijinsky III's frozen semen for an agreed amount of US $100,000 per dose. This agreement would create a total of US $10 million to be transferred from RESPONDENT to CLAIMANT.

4. RESPONDENT made clear to CLAIMANT that it wished for an arbitration agreement that was governed by the law of the place of arbitration, and not by the law of the contract. CLAIMANT's response to this included a change in place of arbitration to Danubia but did not reject to RESPONDENT's proposal. The law of Danubia provides that arbitrators may adapt contracts but requires an express empowerment to do so. In the FSS Agreement, such an express conferral of powers is absent.

5. The agreement established that RESPONDENT would transfer this sum in two separate payments, each worth US $5 million. The first payment was due on 18 May 2017, and the second payment due 21 January 2018. In turn, CLAIMANT would ship three separate instalments of the frozen semen to RESPONDENT.

The first shipment would consist of 25 doses on 20 May 2017, the second shipment would contain a further 25 doses on 3 October 2017, and the third shipment would contain the final 50 doses on 23 January 2018. Contrary to CLAIMANT's insinuations, the contractual document between CLAIMANT and RESPONDENT (the FSS Agreement) does not contain any resale prohibition. Therefore, if RESPONDENT had indeed resold doses of frozen semen (bearing in mind CLAIMANT's absence of proof), it is completely irrelevant to the case at hand. Further, the fact that CLAIMANT did not take steps to include a prohibition on resale portrays CLAIMANT being prepared to take risks under the contract because it needed to finalise the deal.

6. CLAIMANT adhered to its contractual obligations in shipping the first two instalments to RESPONDENT. Subsequently, the Equatorianian Government imposed tariffs of 30% on 19 December 2017, which would affect the frozen semen as these tariffs applied to it. Following negotiations between CLAIMANT and RESPONDENT, in which the former first offered for the frozen semen to be picked up from its premises ('EXW'), the parties came to an agreement for a delivery on the basis of DDP. The Inco-term DDP stands for "Delivery Duty Paid". CLAIMANT now wishes to adapt the contractual price of the frozen semen because of incurring duties/tariffs following their imposition by the Equatorianan Government. CLAIMANT has no right to ask for such an alteration of the price either under the FSS Agreement or the CISG.

7. As a result of the imposition of the tariffs, CLAIMANT's anticipated profit margin of 5% was obsolete, and instead would incur a loss of 25%. While neither party is responsible for the imposition of the tariffs, they are imposed by RESPONDENT's home country (Equatoriana), in response to an increasingly "protectionist" style government in Mediterraneo, where similar duties/tariffs were placed on imported goods from Equatoriana. CLAIMANT puts forward an unfounded argument that such circumstances were unforeseeable and thus blames RESPONDENT for its out-of-pocket losses. However, CLAIMANT has not taken into consideration the brewing political climate between the two States, in addition to the lucrative deal it had made under the FSS Agreement with RESPONDENT in making such claims.

8. Further, contrary to CLAIMANT's insinuations, RESPONDENT did not agree to a price adaptation and made it clear that the former would need to bear the costs and would verify with persons involved in the drafting. The shipment was thus made in RESPONDENT's interest in a delivery of the outstanding doses following CLAIMANT's threats to stop delivery which resulted in Mr. Shoemaker's coercion to accept.

9. CLAIMANT has now referred the matter for arbitration to determine whether the price adaptation can come to fruition as well as to determine its entitlement to the US $1.25 million. Furthermore, CLAIMANT also asserts that it is not inequitable for RESPONDENT to be responsible for the increased price caused by the tariffs. RESPONDENT in turn is challenging the Arbitral Tribunal's jurisdiction to hear the claim as well as challenging the means in which CLAIMANT acquired the information of RESPONDENT's conduct in another arbitration, and thus use it as evidence.

SUMMARY OF ARGUMENTS

The seat of arbitration should determine the law to be applied

1. Respondent will establish that the arbitration agreement is governed by Danubian law. The tribunal should favour the law which has the closest, and most real connection with the seat of arbitration. The parties chose Danubia as the neutral seat of arbitration, and therefore the law of Danubia has the closest connection with the seat, and the intentions of the parties.
2. Furthermore, through an examination of the pre-contractual negotiations, it becomes apparent that the parties intended to conduct a neutral arbitration, and they were going to do this by applying Danubian law to the arbitration. There is nothing to evidence an intention of either party to submit the arbitration to the law of Mediterraneo. By submitting the arbitration to the law of Mediterraneo, the parties would negate the neutral aspect of the arbitration. It is clear that the neutrality offered by conducting a Danubian arbitration was of the utmost importance to each party.
3. The doctrine of severability means that the arbitration agreement operates as a separate and distinct contract, which can be, and usually is, governed by separate rules and laws to the main agreement.

Evidence obtained by CLAIMANT was in breach of confidentiality obligations

4. The Tribunal has jurisdiction under the Danubian arbitration law and the HKIAC Rules to exclude improperly obtained evidence. International arbitral practice recognises that the Tribunal maintains discretion to exclude improperly obtained evidence and, in this case, should exclude the evidence CLAIMANT seeks to admit. To exclude such evidence would still allow CLAIMANT to have a reasonable opportunity to be heard. The evidence CLAIMANT seeks to admit is not probative evidence - it has limited relevancy and materiality.
5. Alternatively, the lack of clarity about how CLAIMANT was made aware of such evidence is irrelevant as the breach of confidentiality that had to occur to obtain this evidence which CLAIMANT benefits is enough to be improperly obtained. This Tribunal should consider the implications of not upholding confidentiality obligations in an arbitration conducted by the same institution. Should the Tribunal exclude this evidence, the award will not be at risk of being

set aside due to not having "the full opportunity to be heard." The grounds to challenge an arbitration award are usually limited to a serious breach of natural justice, not for parties to remedy the effects of risky business strategy.

CLAIMANT is not entitled to price adaptation

6. Further, the way CLAIMANT seeks for the contract to be adapted to be entitled to $US1.25 million is inadmissible under the FSS Agreement and the CISG. The parties clearly intended for Clause 12 in the FSS Agreement to be a *force majeure* clause, rather than one of hardship as asserted by CLAIMANT. In addition to this, the onerousness of the imposed duties/tariffs does not create a circumstance in CLAIMANT being prevented from its performance under the FSS Agreement. The wording of Clause 12 should be construed narrowly to arrive at such an interpretation which feeds the meaning intended by the parties.
7. CLAIMANT also undertook an assumption of risk in incorporating the Incoterm "DDP" into the FSS Agreement, and thus the implementation of duties/tariffs was in fact foreseeable given the brewing political climate between Mediterraneo and Equatoriana. This agreement binds CLAIMANT to bearing the costs and risks involved with bringing the goods to the place of destination, as well as those associated with exportation and importation.
8. Finally, the CISG does not permit such a price adaptation as sought by CLAIMANT because the imposition of the duties/tariffs were foreseeable as mentioned above. This fails to satisfy key Articles within the CISG on which CLAIMANT relies, in addition to the requirement of the duties/tariffs preventing CLAIMANT's performance under the FSS Agreement. The imposition of the duties/tariffs do not prevent CLAIMANT from fulfilling its contractual obligations, but rather make it "more onerous" rather than reaching "impossibility" or being "excessively onerous".
9. Thus, the Arbitral Tribunal should find that the claim is inadmissible because of its lack of jurisdiction and powers, exclude CLAIMANT's improperly obtained evidence and reject the claim for additional remuneration in the amount of $US1.25 million.

ARGUMENT

ISSUE 1: THE TRIBUNAL DOES NOT HAVE POWERS UNDER THE FSS AGREEMENT TO ADAPT THE CONTRACT OF SALE.

I. The Arbitral Tribunal cannot adapt the FSS Agreement without express empowerment, of which there is none.

A. Danubian law is the law applicable to the FSS Agreement.

1. REPONDENT submits that several veins of authority have developed surrounding the proper method of determining the law applicable to a separable arbitration agreement. Following each of these methods, the Tribunal should find that Danubian law is the proper law to apply to the Arbitration Agreement in question.

2. Contrary to CLAIMANT's submission, the contra proferentem rule is a rule of last resort. Yet, more importantly it was CLAIMANT who deleted the choice of law in relation to the arbitration clause. Therefore, contra proferentem would be contra claimant (i.e. not in favour of CLAIMANT).

3. It is further submitted that the argument that adaptation of the contract meant an agreement on Mediterraneo law is incorrect. Danubian Law also allows for adaptation of the contract by the tribunal. All that is required is express authorisation.

B. The FSS Agreement had an implied choice of law.

4. RESPONDENT submits that in the *Sulamerica Case*, Lord Justice Moore-Bick set down the three-step rule in determining the law applicable to an Arbitration Agreement:

i. first, determining whether the parties had made an express choice of law; failing which,

ii. second, whether the parties had made an implied choice of law, with a rebuttable presumption that the parties intended that the law governing the substantive contract apply to the arbitration agreement; failing which,

iii. third, which law had the closest and most real connection to the Arbitration Agreement.

5. In the current case, the Arbitration Agreement clearly had no express choice of law included, and so attention moves to the second step of the test. In determining whether the parties in the *Sulamerica Case* had impliedly chosen the law applicable to the Arbitration Agreement, Lord Justice Moore-Bick looked first to the law which governed the substantive agreement and considered whether the parties had impliedly chosen for that law to also govern the Arbitration Agreement. He rejected this conclusion on two grounds:

i. first, because a choice of Brazilian law (the law governing the substantive contract) governing the Arbitration Agreement would have led to an inequitable outcome, where the agreement arrived upon could only be enforced with one party's consent; and, [*Sulamerica Case, Para. 30*]

ii. second, because the parties' choice for the seat of arbitration to be London meant that they had agreed that English laws relating to the conduct and supervision of arbitrators would apply to the proceedings. This 'tend[ed] to suggest that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and jurisdiction of the arbitrators.' [*Sulamerica Case, Para. 29*]

6. Subsequently, RESPONDENT submits that by applying these grounds to the current case, while Lord Justice Moore-Bick's first reason does not find any footing, his second remains highly persuasive. It is likely that, in choosing Danubia as the seat of arbitration, the parties had agreed to have the laws of Danubia apply to the conduct and jurisdiction of the arbitrators. This indicates that the parties had impliedly agreed for Danubian law to apply to all aspects of the arbitration agreement, which includes the Arbitrators' power under the arbitration agreement to adapt the contract of sale.

7. Accordingly, by applying the third stage of his test, in determining which law had the closest and most real connection to the arbitration agreement then under consideration, Lord Justice Moore-Bick acknowledged that it was

the law of the seat of arbitration that would have the closest and most real connection, as it was the law which 'will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective'. [*Sulamerica Case, Para. 32*]

8. Applying this to the current case, Danubian law, being the law of the seat of arbitration, has the closest and most real connection to the arbitration agreement, and thus should be the law, which governs it.

9. In its submissions, CLAIMANT argued that Mediterraneo Law has the closest and most real connection pursuant to Clause 15 of the Sales Agreement. The tribunal cannot accept this submission because the connecting factors relating to which party has the closed connection is in accordance with the main agreement not the arbitration clause.

C. The parties' agreement on Danubia as the seat of the arbitration creates a strong presumption that the parties intended Danubian law to govern the arbitration agreement.

10. Another method which has developed in identifying the proper law applicable to an arbitration agreement is to look exclusively to the contracting parties' discernible common intentions. [*Redfern & Hunter, Para. 3.33*].

11. Art 8 of the CISG provides guidance in discerning common intentions. To paraphrase, a party's actions are to be interpreted according to the other party's knowledge (or inability not to know) of that party's intentions; and, if inapplicable, then the actions should be interpreted according to what a reasonable person in the other party's position would have understood. [*Art. 8(1) and (2) CISG*] The party's intentions should be discerned by an examination of all relevant circumstances of the case [*Art. 8(3) CISG*].

12. Applying these guiding principles, RESPONDENT, or a reasonable person in RESPONDENT'S position, would have interpreted

CLAIMANT'S actions with the knowledge that their intention was to have Danubian law be applicable to the arbitration agreement.

13. Though Ms Napravnik indicates in her Witness Statement that there was conversation around allowing the Arbitrators the ability to adapt the sale contract, it cannot be said that it was clearly CLAIMANT'S intention for the law of Mediterraneo to apply to the Arbitration Agreement. At that point in time, it had not been decided whether the proposed amendment should be included in the hardship clause or arbitration clause [*Cl. Ex. C8, Para. 4*], and a conclusion could not be made that CLAIMANT wished to have Mediterraneo law apply to the Arbitration Agreement. Therefore RESPONDENT, or a reasonable person in RESPONDENT'S position, could not have understood that such was CLAIMANT'S intention.

14. The parties in fact intended that the law of Danubia apply to the Arbitration Agreement, as demonstrated by the email in which Ms Napravnik had amended the arbitration agreement to include Danubia as the seat of arbitration [*Resp. Ex. R2*]. If the tribunal were to look at the preceding email contained in RESPONDENT'S Exhibit R1, which contained the Arbitration Agreement as it was originally proposed, it would notice that the draft indicated that the seat of arbitration and law applicable to arbitration were both of the same origin, Equatoriana. Following this pattern, it is only logical for RESPONDENT, or a reasonable person in RESPONDENT's position, to conclude that, upon Ms Napravnik's amendment of the seat of arbitration, it was CLAIMANT'S intention for the law of Danubia to apply to the Arbitration Agreement.

15. Throughout their negotiations, there was no indication as to CLAIMANT's intention to submit the Arbitration Agreement to the law of Mediterraneo. It thus cannot be said that this was the parties' common intention, and so the law of Meditteraneo should not apply to the Arbitration Agreement.

D. The parties' wish to have the arbitral proceedings conducted in a neutral country demonstrates their intention for Danubian law to apply.

16. A further indication of the parties' intention for Danubian law to apply to the Arbitration Agreement can be found in their wish to have the arbitral proceedings be conducted in a neutral country [*Resp. Ex. R2 &* R3].

17. Parties to an international contract of sale often choose for their dispute resolution to occur in a neutral forum, so as to ensure they 'insulate the dispute resolution mechanism from the national law of either party.' [*Glick and Venkatesan, Pg. 145, Para 9.07B*] The parties to this contract are no exception. CLAIMANT, in proposing Danubia as the seat of arbitration, did so due to its position as a neutral country [*Resp. Ex. R2*]. On RESPONDENT'S part, in Mr Krone's Witness Statement, he indicates that RESPONDENT would have included an express statement as to Danubian law being applicable to the Arbitration Agreement [*Resp. Ex. R3*], demonstrating RESPONDENT'S acceptance of Danubia as a neutral forum. It is highly unlikely that, having regard to the drafting history of the Arbitration Agreement, the parties intended for either party's domestic law to be applicable to the dispute resolution mechanism.

18. Though CLAIMANT may rely on the *BCY Case* to demonstrate the inapplicability of neutrality in determining the law of an arbitration agreement, the present case can clearly be distinguished from the scenario in the *BCY Case*. In that case, neither party had any material connection to the law governing the sale and purchase agreement, and so New York law (the law that governed the sale and purchase agreement) was seen to be just as neutral as Singaporean law (the law of the seat of arbitration); the argument that Singaporean law should be favoured due to its neutrality therefore had no bearing on the case [*BCY Case, Para 63*]. However, CLAIMANT'S position that the law applicable to the Arbitration Agreement be the law of Mediterraneo clearly indicates a biased choice of law in favour of CLAIMANT, being the party's domestic law. As the presumption that the law applicable to the Arbitration Agreement should be the law applicable to the substantive agreement is rebuttable, the parties' intentions for a neutral forum clearly indicate that the proper law to apply in the present case ought to be the law of Danubia.

II. The doctrine of severability applies to Clause 15 of the FSS Agreement, meaning it is an independent contract to the matrix contract.

19. Severability of an arbitration agreement is considered the cornerstone of International Commercial Arbitration and is imperative to the effective operation of an international system of arbitration [*Born, Para. 349]*.

20. The importance of the autonomous nature of the arbitration clause is recognized in numerous jurisdictions and is also recognized in the UNCITRAL Model Law [*Harbour Case*]. Clause 15 is considered and is referred to both parties as an arbitration clause.

21. The arbitration clause is autonomous and separable from other clauses in an agreement (*Fiona Trust Case; Sulamerica Case*). Clause 15 operates as an autonomous clause, that deals with wholly separate issues to the matrix FSS agreement.

22. CLAIMANT'S submissions do not address the issue of severability however RESPONDENT submits that the doctrine of severability does not only, or largely, operate for the preservation of the arbitration agreement in situations where the matrix contract is void. The doctrine of severability will often have the effect of having a matrix contract and arbitration agreement governed by separate laws [*Born Para. 412*].

23. The HKIAC 2018 Rules provide for the isolation of the arbitration clause from a matrix contract and empowers the tribunal to make findings related to the arbitration clause [*HKIAC 2018 Rules Article 19.2*].

24. Both Mediterraneo and Danubia recognise the doctrine of separability as portrayed in RESPONDENT's Answer to Notice of Arbitration [*Pg. 31, Para. 14*].

25. Clause 15 comprises an agreement relating to the procedural method for resolving disputes, which may arise out of the main contract. Clause 15

sets out a framework for the future of the agreement and is not directly related to the matters covered within the matrix agreement.

26. Clause 15 therefore deals with separate issues to the matrix contract and is considered a separate contract.

A. The doctrine of severability means that Clause 14 is irrelevant to Clause 15 and therefore the Arbitral Tribunal should not apply Mediterraneo law to the arbitral proceedings.

27. Contrary to Claimant's assertion [*HU* Memo, *Para.* 14] it has not been established that the law of Mediterraneo governs the arbitration agreement. This statement is based on the presumption that the arbitration agreement is governed by the law of the matrix contract.

28. The doctrine of severability means that the only elements Clause 15 shares with the matrix contract is the identity of the parties, the date and the place of execution [*Czernich, Para. 74*].

29. The applicable law of the arbitration agreement contained in Clause 15 must be determined independently of the matrix contract [*Czernich, Para.74; Born*].

30. While Clause 14 has the effect of making the matrix contract subject to Mediterraneo law, it does not affect the separate contract contained in Clause 15, as Clause 15 operates as a separate contract and there is no reference to the law of Mediterraneo in Clause 15.

31. There is no choice of law provision contained in Clause 15.
It is open to the tribunal to make a finding on the choice of law, wholly independent of the choice of law provision contained in Clause 14.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE OBTAINED FROM OTHER HKIAC ARBITRATION PROCEEDINGS.

I. The Tribunal has jurisdiction under the Danubian arbitration law and the HKIAC Rules to exclude improperly obtained evidence.

A. International arbitral practice recognises the existence of an exclusionary rule in relation to improperly obtained evidence.

32. RESPONDENT does not dispute that the Tribunal has jurisdiction to include and exclude evidence. The Tribunal may determine the admissibility, relevance, materiality and weight of any evidence. [*DAL, Art. 19.2; HKIAC 2018 Rules, Art 22.*2].

33. Arbitral tribunals frequently apply "international principles to issues concerning the admissibility and weight of evidence.' [*Blair QC, Pg. 237*].

34. Several international arbitration investment tribunals in different investor-state disputes arising under different treaties where Members found that improperly obtained evidence should be inadmissible. In the *Methanex* case under the *North American Free Trade Agreement* (NAFTA), the tribunal concluded that it would be wrong to introduce evidential materials obtained by the investor unlawfully in the case of Methanex where the documents they sought to rely on were obtained through dumpster diving.

35. Contrary to CLAIMANT'S submission, the improperly obtained evidence CLAIMANT wishes to rely on can and should be excluded by the Tribunal. To allow CLAIMANT to rely on documents they have been unlawfully obtained would offend general duties of good faith, basic principles of justice and fairness that are required of all parties in international arbitration. [*Blair QC, Pg. 251*].

36. Further, the Tribunal can adopt the IBA Rules of the Taking of Evidence in International Arbitration [*IBA Rules*] as an international standard for including or excluding evidence [*IBA Rules Art. 9.2(a), (e) and (g)*].

37. Art 9.2 (e) of the *IBA Rules* in particular allows the Tribunal to consider grounds of commercial or technical confidentiality that may be compelling [*IBA Rules, Art. 9.2(e)*]. The *Libananco Case* under the *Energy Charter Treaty* (ECT) recognised the importance of confidentiality and legal privilege [*Libananco Case*]. The Tribunal concluded that all confidential communication should be excluded as evidence in order to avoid situations of severe prejudice.

38. Further, even if the evidence has been obtained lawfully by CLAIMANT, the confidentiality obligations that are required of the parties in RESPONDENT'S other arbitration have been breached. This arbitration is conducted in accordance with Art. 42 of the *HKIAC 2013 Rules* to expressly agree to keep the proceedings confidential. [*Letter from Fasttrack, 3 October 2018, Pg. 50*]. Therefore, admission of the evidence would not only result in condoning a breach of confidentiality but more seriously a breach of arbitral confidentiality provisions in an arbitration conducted under the same institution.

39. Further, to allow CLAIMANT to benefit from this breach in confidentiality would be contrary to considerations of proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling [*IBA Rules, Art 9.2 (g)*].

B. The exclusion of improperly obtained evidence is not inconsistent with a party's "full opportunity to be heard".

40. The parties right to be given the full opportunity to present their case pursuant to Art. 18 of the DAL has not been violated. The standard for

the denial of a party to present their full case is substantially high. The denial of due and fair process arises only when "a significant and material mistake in the course of the proceedings should be sufficient to lead the court to conclude that there was a denial of 'due process' [*Redfern & Hunter, Para. 11.74*]. In the *Decision of the Bremen Court of Appeal*, the German court held that a tribunal's refusal to hear evidence cannot breach the right to be heard only if such evidence is irrelevant [*Bremen's Case*].

41. Further, the right to a full opportunity to present a case and to adversarial proceedings does not presumptively override a tribunal's power to determine admissibility or weight of evidence. The DAL Art. 18 states that parties shall be treated with equality and be given a *full opportunity* to present their case. This is also epitomised in the *HKIAC 2018 Rules* that also provide that parties are treated equally but that the difference is a *reasonable opportunity* to present their case rather than a full opportunity [*HKIAC 2018 Rules, Art. 13.1*].

42. The distinction between full and reasonable is important. Leading treaties on international have argued that a 'full opportunity to be heard' could lead to difficult situations for the arbitrators to prevent unnecessary or repetitive procedures such as duplicative testimony or excessive witnesses without risking challenge to the award. This was also the reason the drafters of the Arbitration Ordinance adopted the 'reasonable' terminology as opposed to 'full'. The 'reasonable' threshold allows the tribunal to take a proportionate and pragmatic approach in exercising their discretion to include or exclude evidence [*Bao & Moser, Para. 9.15-9.18*].

43. Even then, the term full does not come without limitations. It must be balanced with the need for procedural efficiency and fairness. The threshold must be reasonable rather than exhaustive [*Redfern & Hunter, Para. 11.73*].

44. Excluding the evidence CLAIMANT wishes to admit will not prevent them from a reasonable or full opportunity to present their case. Excluding this improperly obtained evidence would not be inconsistent with these principles. The purpose of Art 18 of the DAL is to protect parties from being subjected to injudicious conduct by a tribunal. It is not to protect a party from its strategic choices. CLAIMANT has improperly obtained evidence and should not be protected by Art. 18 of the DAL to admit such evidence. [*Re Corporacion* Case**]**

II. The Tribunal should exercise its jurisdiction by excluding the evidence on which CLAIMANT wishes to rely.

A. The evidence is of limited relevance.

45. Evidence from RESPONDENT's other HKIAC Arbitration Proceedings has limited relevance in these proceedings and must be excluded accordingly. Whilst RESPONDENT accepts it cannot point to CLAIMANT as responsible for the leak of the evidence, there is no other way CLAIMANT could obtain the information but through a breach of confidentiality.

46. Pursuant to Art 9. (2) (a) of the *IBA Rules*, the tribunal shall exclude documentary evidence from the arbitration due to the lack of sufficient relevance to the case and/or the lack of materiality to the outcome [*IBA Rules, Art, 9(2)(a)*]. In the *Methanex Case*, the tribunal reasoned that, "[a]s a general principle, therefore, just as it would be wrong for the USA *ex hypothesi* to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully" [*Methanex Case*]. The *Methanex* tribunal's reasoning was firmly grounded in the duty of good faith that parties to an arbitration owe each other and the tribunal.

47. Contrary to CLAIMANT'S assertion that the evidence is indispensable for the opportunity of the CLAIMANT to present its case [*HU Memo, Para 46*], even if the tribunal accepts that the evidence has relevance to this arbitration, it does not change the award that RESPOSDENT is entitled to.

B. The evidence has been obtained by CLAIMANT through an improper disclosure in breach of the HKIAC Rules

48. Pursuant to Art. 42.1 of the *HKIAC 2018 Rules* 'unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to (a) the arbitration under the arbitration agreement(s); or an award made in the arbitration' [*HKIAC 2018 Rules, Art. 42.1*].

49. By agreeing to arbitrate under the *HKIAC 2018 Rules* [*PO 1, Pg. 52, Para 2.1*] CLAIMANT is bound by an express duty of confidentiality [*HKIAC 2018 Rules, Art 42.1*]. This Art. provides that CLAIMANT is prohibited from publishing, disclosing, or communicating any information that is related either to arbitral proceedings, correspondence, written statements, evidence, awards, and orders.

50. Further, pursuant to Article 42.2 of the *HKIAC 2018 Rules*, the duty of confidentiality extends to cover the arbitral tribunal, the emergency arbitrator, expert witness, witnesses of fact, the secretary of the tribunal, and the HKIAC [*HKIAC 2018 Rules, Art. 42.2*].

51. Contrary to the submission made by CLAIMANT, if RESPONDENT does not satisfy Art 9.2 (b) of the IBA rules it does not mean that the evidence is admissible. The RESPONDENT relies on Art 9.2 (a) of the IBA rules instead.

52. CLAIMANT may seek to rely on Article 42.3 (a) as an exception to the duty of confidentiality [*HKIAC 2018 Rules, Art. 42.3 (a)*]. It states, "the provisions of Article 42.1 do not prevent the publication, disclosure or communication of information referred to in Article 42.1 by a party; to protect or pursue a legal right or interest of the party." However, this

article does not support CLAIMANT'S argument because the operation of Article 42.3 (a) only allows for a party to institute legal proceedings to protect or pursue its own legal interest. The details pertaining the other arbitration are not in the interests of the CLAIMANT in this arbitration.

C. Even if CLAIMANT has not been directly involved in the improper disclosure of the evidence, CLAIMANT nonetheless cannot make use of evidence which has been improperly obtained.

53. The desire for confidentiality prevails over the need for transparency. This is because confidentiality goes further than privacy and refers to the parties' asserted obligations not to disclose information concerning the arbitration to third parties. [*Kyriaki Noussa, Pg. 40*].

D. Arbitral rules which contain confidentiality provisions (such as the HKIAC Rules) should be interpreted and applied in a manner which protects and promotes confidentiality.

54. The tribunal must interpret the *HKIAC 2018 Rules* in a manner that promotes and protects confidentiality. Pursuant to Art. 9(3)(b) of the *IBA Rules*, the tribunal may take into account any need to protect the confidentiality of a document created or statement or oral communication made in connection with and for the purpose of settlement negotiations [*IBA Rules. Art. 9(3)(b)*].

55. RESPONDENT submits that the principle of confidentiality in international commercial arbitration is crucial for the integrity and procedure of the arbitration. This high standard greatly outweighs CLAIMANTS desire for transparency in that confidentiality seeks to ensure scrutiny and evaluation of decision-making process, consequently promoting their legitimacy [*Rogers*].

56. The Tribunals broad discretion pursuant to Art 18 of the *DAL* means the discretion to exclude evidence as well as to include evidence. Confidentiality is an important component of international arbitration. In 2018, 87% of respondents attach a degree of importance relating to confidentiality in international arbitration, with 73% voting as 'quite important' or 'very important' [*White & Case Survey*]. CLAIMANT has breached its obligations of confidentiality pursuant to *HKIAC 2018 Rules*, and RESPONDENT thus seeks interim relief from the Arbitral Tribunal pursuant Art. 23 of the *HKIAC 2018 Rules*, to restrain CLAIMANT from disclosing further confidential information [*HKIAC 2018 Rules, Art. 23*].

III. The exclusion of the improperly obtained evidence will not result in recognition of the Award being put at risk.

57. A ground to challenge an arbitration award is if "the party against whom the award is invoked…was otherwise unable to present his [or her] case" [*New York Convention, Art. V(1)(b)*]. Contrary to CLAIMANT'S written submissions that CLAIMANT argues that that the award will not be enforceable if the evidence is excluded however this is not the case [*HU Memo, Para 62*].

58. The exclusion of the evidence will not enable the award to be challenged. The threshold for challenging an award on procedural grounds is very high. They will rarely succeed unless there has been a serious or egregious breach of natural justice. [*Bao & Moser, Para. 9.18*].

59. CLAIMANT has argued that if the evidence is set aside, the Tribunal's award can be set aside or its recognition in other countries can be refused on the basis of CLAIMANT allegedly being "unable to present his case." [*HU Memo, Para 62*] However only a significant and material mistake in the course of proceedings should be sufficient to lead the

court to conclude there was a denial of due process [*Redfern & Hunter, Para. 11.74*]. The principles of a fair hearing does not suggest that CLAIMANT must be given the every single opportunity or pursue every single avenue to present this improperly obtained evidence in which its irrelevancy and lack of integrity has already been argued.

60. CLAIMANT has the burden of proof to demonstrate that they have been unable to present their case. Cases challenged on similar procedural grounds are rarely successful because they do not generally constitute serious procedural defences that had a material effect on the proceedings because procedural decisions determined to be within tribunal's discretion [*Born, Pg. 540 & 541*]. To constitute misconduct to warrant vacation of an award requires more than just an error of law but a ground that affected the hearing to the extent that there was no longer a fair hearing [*Prakash, Pg. 10, Para. 15*].

61. CLAIMANT's dire financial situation may have led CLAIMANT to absorb more risks than ideal such as buying 33 doses for only three mares. The avenue for challenging the arbitration award is not available for parties that have made detrimental strategic decisions and now face the effects of taking on such risks.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF $US1.25MILLION AS A RESULT OF THE ADAPTION OF THE PRICE FOR THE THIRD DELIVERY

I. CLAIMANT is not entitled to price adaptation under Clause 12 of the FSS Agreement.

A. On the proper construction of Clause 12 of the FSS Agreement, the tariffs are neither "a health and safety requirement" nor "a comparable unforeseen event".

62. The proper construction of Clause 12 may be interpreted in observing each party's intent. Art. 8(1) of the CISG allows the clause of an agreement to be interpreted according to RESPONDENT's intent where CLAIMANT knew or could not have been unaware what that intent was. RESPONDENT's intent in drafting the wording of this clause was to provide it with a narrow interpretation so as to fulfil the requirements of a *force majeure* clause, rather than an hardship clause as argued by CLAIMANT.

63. This is evident in Mr Julian Krone's Witness Statement where he states that CLAIMANT's Mr John Ferguson and he agreed to the inclusions of a narrow hardship reference into the existing *force majeure* clause and regulated some other risks directly in the contract [*Resp. Ex. R3*]. This epitomises RESPONDENT's intent of Clause 12 being construed as a *force majeure* clause, with a mere hardship reference.

64. Therefore, the imposition of duties/tariffs from the Equatorianan government with such a narrow interpretation of the *force majeure* clause could not be so wide to be inclusive of an "health and safety requirement" nor a "comparable unforeseen event". Rather, the "hardship" reference in Clause 12 – being a *force majeure* clause – was only intended to apply to hardships, which approach the burden of *force majeure* that is to reach impossibility of completing contractual obligations.

B. CLAIMANT's attempts to secure a broad hardship clause were rejected and accordingly, Clause 12 of the FSS Agreement should be construed narrowly.

65. The proper construction of Clause 12 should be that of a *force majeure* clause rather than CLAIMANT's proposition of a hardship clause. This is supported in two instances where it is evident that CLAIMANT sought, but was not successful in achieving the ICC hardship clause:

(i) First, in RESPONDENT's Answer to Notice of Arbitration [*Pg. 30, Para. 4*], RESPONDENT considered the originally suggested ICC hardship clause to be too broad and thus altered it to merely add a hardship working to the existing *force majeure* clause;

(ii) Secondly, Mr Antley's note after meeting with Ms Napravnik on 12 April 2017 stated that the ICC hardship clause suggested by CLAIMANT was too broad [*Resp. Ex. R3*].

66. Furthermore, Mr Julian Krone's Witness Statement (albeit not being involved in the early part of the negotiations) states that CLAIMANT and he agreed to the inclusions of a narrow hardship reference into the existing *force majeure* clause and regulated some other risks directly in the contract [*Resp. Ex. R3*]. Mr Julian Krone's suggestion of the wording to be added in Clause 12 (that is the wording in italics) provides a narrowly worded clause in that 'unforeseen events making the contract more onerous' does not amount to an hardship, but rather a *force majeure*. In saying this, the words 'more onerous' in clause 12 should be interpreted as meaning "so onerous as to approach impossibility", or "excessively onerous" rather than "a bit more onerous".

C. Both parties were aware that by accepting the obligation of the DDP Incoterm, CLAIMANT was assuming the risk of payment of duties (including those imposed in the form of tariffs).

67. CLAIMANT has assumed the risk of payment of duties. Clause 8 of the FSS Agreement between CLAIMANT and RESPONDENT clearly states that the three instalments to be shipped by CLAIMANT were DDP, with the last shipment being by 23 January 2018. It is also important to note that clause 12 of the FSS Agreement states that CLAIMANT will not be responsible for "unforeseen events". This wording although broad in nature can be construed narrowly for the reasons that follow.

68. First, DDP Incoterm stands for "Delivery Duty Paid". The risks associated with this particular Incoterm were inclusive in the contract and CLAIMANT ought to have been aware of this risk. CLAIMANT also agreed to this method of delivery [*Cl. Ex. C4*]. According to the International Chamber of Commerce, this model of agreement binds CLAIMANT to bearing the costs and risks involved with bringing the goods to the place of destination, as well as the clearing of the goods for export and then import [Incoterms]. Further, the seller bears the costs, or 'duty' associated with both exportation and importation.

69. Secondly, had CLAIMANT taken issue with this particular Incoterm, CLAIMANT could have rejected its incorporation into the FSS Agreement, or, instead could have incorporated DAP (Delivery at Place) into the FSS Agreement. Therefore, had CLAIMANT not wanted to run the risk of duties/tariffs being imposed upon the delivery of the frozen semen, there were other Incoterms it could have used. Therefore, it cannot be disputed that CLAIMANT did not accept the obligations of DDP Incoterm. It is evident that CLAIMANT assumed the risk of payment of duties/tariffs by accepting the DDP delivery method;

70. Scholarly opinion also supports the argument that CLAIMANT pursued an assumption of risk. This is epitomised by Brunner where he states that

'*the risk of performance becoming more expensive or burdensome, even if this could not have been reasonably foreseen at the time of contracting, is generally borne by the obliger*" which in this case is CLAIMANT [*Brunner, Pg. 214*]. Therefore, CLAIMANT bears the risk of undertaking their duties as per the FSS Agreement and the prospect of those duties becoming more expensive – inclusive of the implementation of duties/tariffs.

D. As CLAIMANT was aware that it was liable to pay duties in the form of tariffs, the unusual way in which the duties were imposed did not make the duties "unforeseen".

71. The unusual way in which the duties were imposed did not make them "unforeseen" as argued by CLAIMANT. CLAIMANT relies on the historical ties between Mediterraneo and Equatoriana pertaining to free trade to argue that the imposed duties were unforeseen [*Cl. Ex. 6*]. However, the Peak Business News Article also highlights that Mr Brouckaert (the newly elected President of Mediterraneo as at April 2017) undertook a "protectionist" approach to international trade with respect to agricultural products [*Cl. Ex. 6*]. Further, the "outspoken protectionist" "superminister" elected on 5 May 2017 [*PO 2, Pg. 58, Para. 23*] (a day prior to the signing of the FSS Agreement between CLAIMANT and RESPONDENT) also supported this "protectionist" policy due to Mediterrenean farmers' poor treatment incurred in other markets. It is also noteworthy that the Minister - Ms Cecil Frankel - is described as being an ardent critic of free trade, further supporting her drive to implement such duties/tariffs to protect Mediteranean farmers. Therefore, having highlighted the above facts, as CLAIMANT is located in Mediterraneo, CLAIMANT ought to be aware and is in a better position to assess the risks of political decisions taken in Mediterraneo than RESPONDENT; thus making the risk of the imposition of duties/tariffs foreseeable.

72. Furthermore, having said that, as CLAIMANT's host country has gratuitously implemented duties/tariffs of this nature – given the

historical free trade between the States – it cannot be expected that a State may not retaliate against the measures implemented by Mediterraneo; thus making it infinitesimally foreseeable. Brunner's aforementioned notion of CLAIMANT's assumption of risk is again supportive of these arguments [*Brunner, Pg. 214*]. A rising duty/tariff would mean a change in market price, and as this is a foreseeable event, CLAIMANT cannot be successful in pursuing an exemption through Article 79, or the in-acting of a *force majeure*.

73. Be that as it may, the Equatorianan retaliatory duties/tariffs must also be addressed in light of CLAIMANT's arguments [*HU Memo, Para. 69*]. Having highlighted the measures taken by the Mediterrenean government, the inevitability of a trade war was naturally brewing. It cannot be said that it was unforeseen that a trade war would eventually materialise following the fecundating duties/tariffs implemented by the Mediterrenean government. Any reasonable party in CLAIMANT's position would have accepted the risk of having to pay duties/tariffs in Equatoriana having accepted a DDP contract with RESPONDENT in addition to the knowledge of the Mediterrenean political climate. Having said that, CLAIMANT's argument pertaining to unforseeability is baseless, as any reasonable party in these circumstances would have foreseen such an outcome coming to fruition.

74. In analysing the facts of the case, CLAIMANT unfoundedly asserts that Clause 12 is supposedly an "onerous" hardship clause and attaches this interpretation of Clause 12 to its out-of-pocket loss [*HU Memo, Para. 74*]. First, it is important to note that Nijinsky III was fully booked for natural coverings for the breeding season of 2017 [*PO 2, Para. 11*]. Secondly, the supposed variable costs were actually only $USD15,000 per dose [*PO 2, Para. 31*]. These two facts provide support for Mr Antley's statement in that the FSS Agreement would be 'on top of what fees could be earned with Nijinsky III through natural coverage' [*Cl. Ex. C3*]. This alleviates RESPONDENT's blame for CLAIMANT's out-of-pocket loss seeing the FSS Agreement extends beyond the natural

coverage of Nijinsky III, therefore making the deal more lucrative in comparison to others. Furthermore, it has also been established that CLAIMANT has been making losses since 2014 as a result of its loan repayments in financing its new stables [*PO 2, Para. 29*]. RESPONDENT therefore rejects any argument put forward by CLAIMANT connecting the former with the latter's out-of-pocket loss and experiencing hardship.

75. Following this factual analysis about CLAIMANT's various complaints about the consequences of performance of the contract, the threshold of "hardship" is not satisfied, which is necessary to engage relief under Clause 12 of the FSS Agreement. CLAIMANT interprets "hardship" for the purposes of Clause 12 to mean "a considerable impediment" (*HU Memo, Para. 75*). RESPONDENT submits that this interpretation is unduly generous to CLAIMANT.

76. However, even if CLAIMANT's proposed intepretation is correct, it does not satisfy it. As the above factual analysis shows, the circumstances of this case do not "onerously" disclose "a considerable impediment to CLAIMANT" as a result of the duties/tariffs being greater than CLAIMANT's profit margin because it fails to account for the profit margin's calculation [*HU Memo, Para. 76*]. In particular, the significant difference between so-called "fixed costs" (which would have been incurred whether or not the FSS Agreement had been performed) and the actual cost to CLAIMANT of delivering goods under the FSS Agreement indicates that the position of duty did not involve a "substantial or fundamental unbalance". RESPONDENT thus rejects CLAIMANT's interpretation of Clause 12 of the FSS Agreement being an "onerous" hardship clause.

II. Further, CLAIMANT is not entitled to price adaptation under the CISG.

A. Clause 12 of the FSS Agreement is a derogation under Article 6 of the CISG which would deny CLAIMANT a remedy under Article 79.

77. Article 79 is no exception to the rule found in Article 6 of the CISG. Article 6 states that 'the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'. This article only applies in cases of unforeseeable circumstances.

78. If an unforeseeable circumstance came to fruition, Article 6 provides CLAIMANT with the power to exclude the application of the CISG or derogate from or vary the effect of any of the CISG provisions. In analysing the effect of Article 6, Schlechtriem & Schwenzer comment although parties may find the CISG generally suitable for their sales contract, they may not be satisfied by some of its provisions, and in these circumstances Article 6 allows CLAIMANT and RESPONDENT to either derogate from Article 79 or to generally have it applied but change its effect [*Schlechtriem & Schwenzer, Pg. 115, Para. 27*]. Therefore, this would be inclusive of the exemption provided for under Article 79 – pertaining to CLAIMANT's argument that the duties/tariffs constituted an impediment beyond its control therefore relieving CLAIMANT from performing its contractual obligation. RESPONDENT rejects this argument as the imposition of the duties/tariffs were not unforeseeable, meaning CLAIMANT cannot rely on this remedy.

79. Unforeseeable duties/tariffs (or state interventions) have also been rejected by decisions of numerous tribunals. Schlechtriem & Schwenzer comment that in relation to State interventions not forming an exemption is evidenced by Russian and Chinese arbitral tribunals being much more severe in the assessment of this issue where a number of decisions have denied exemption in cases of denial of export or import licences or issuing of export or import bans [*Shirt Case*; *Schlechtriem & Schwenzer, Pg. 1137, Para. 18*]. Therefore, RESPONDENT rejects the argument that the duties/tariffs (as a method of state intervention) provide a basis for exemption under Article 79.

80. Furthermore, with respect to the above, recourse is often made to foreseeability at the time of the conclusion of the contract [*Shirt Case*]. At the time of the conclusion of the contract (6 May 2017), the President of Mediterraneo had already been elected in April 2017 and undertook a "protectionist" approach to international trade with respect to agricultural products [*Cl. Ex. 6*]. Further, the "outspoken protectionist" "superminister" had also been elected on 5 May 2017 [*PO 2, Pg. 58, Para. 23*]. For this reason, CLAIMANT was in a position to 'be well advised to arrange for the allocation of risk for State interventions, namely in regard to import and export licences, by means of contractual agreements' [*Schlechtriem & Schwenzer, Pg. 1137, Para. 18*]. This further enhances the notion of CLAIMANT's assumption of risk at the time of the conclusion of the contract, and was also in a position to decipher the foreseeability of future trade restrictions between Equatoriana and Mediterraneo. RESPONDENT therefore rejects CLAIMANT's argument to derogate from Article 79 as the circumstances were clearly foreseeable.

B. ***Article 79 only permits adaptation when the impediment prevents performance, or becomes impossible.***

81. Article 79 provides an exemption for CLAIMANT if the duties/tariffs amounted to an impediment *beyond its control.* When interpreting the meaning of 'impediment' as provided for under Article 79, it is necessary to define what it may *impede* upon. RESPONDENT submits that the impediment must be to the performance of CLAIMANT's obligations under the CISG. Therefore, before considering what may have impeded upon CLAIMANT, it is first necessary to identify its obligations under the FSS Agreement. In order for CLAIMANT's obligations to be fulfilled under the FSS Agreement, and to adhere to Article 30 of the CISG (in its obligations to deliver the goods), CLAIMANT must transfer the goods to RESPONDENT as per Clause 8 of the FSS Agreement: 'seller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen. The first shipment of 25 doses DDP will be on 20 May 2017; the

second shipment of 25 doses will be DDP on 3 October 2017; the third and last shipment of 50 doses will be DDP on 23 January 2018'. Article 29 of CISG provides that both parties must agree upon the modification or termination of a contract. CLAIMANT therefore cannot enforce a 30% price increase due to increased duties/tariffs - bearing in mind that DDP is inclusive of government taxes - considering that RESPONDENT has not agreed to the price modification.

82. When interpreting the CISG, regard should be held towards Article 7(1), which provides that regard should be had to its international character as well as the need to promote uniformity in its application. Therefore, the CISG should be interpreted in favour of RESPONDENT for the reasons that follow.

83. Schlechtriem & Schwenzer interpret in order for an impediment to constitute beyond CLAIMANT's control, the impediment must lie 'outside of the promisor's sphere of control' (that is, CLAIMANT's sphere) and lead to exemption under Article 79 [*Schlechtriem & Schwenzer, Pg. 1137, Para. 12*]. The term "impediment" should ensure a narrow and objective understanding of the grounds for exemption; therefore, only objective circumstances that prevent performance [*Schlechtriem & Schwenzer, Pg. 1137, Para. 12*]. Using this as a guide to interpret Article 79, the implementation of the duties/tariffs do not necessarily "prevent performance" of the sale of the semen from CLAIMANT to RESPONDENT, but rather make it more onerous in that CLAIMANT inherits a duty/tariff in completing the transaction.

84. The *Tribunale Civile di Monza* also undertook this reasoning where it stated that Article 79 does not deal with circumstances of excessive onerousness but rather with situations in which performance has become impossible [*Nuova Fucinati Case*]. RESPONDENT therefore rejects CLAIMANT's argument that the imposition of the duties/tariffs creates a circumstance in which it is prevented from performing its duties under the FSS Agreement, or making performance impossible.

85. This particular argument as to reach impossibility vis-à-vis Article 79 was also considered by the Provincial Court of Appeal of Hamburg where in the case of Iron Molybdenum the Court held that 'the Seller is not exempted if its supplier has not delivered, even if the supplier's action was unforeseeable and a breach of contract. Such an impediment can be overcome by the Seller as long as there are replacement goods available on the market' [*Iron Molybdenum Case*]. Therefore, in that case, the exemption would have applied if the goods in question were not of a comparable quality for the Seller to provide the Buyer, thus creating an impediment beyond the former's control. This further supports the argument pertaining to an exemption under Article 79 only being invoked if the impediment beyond CLAIMANT's control actually creates a circumstance in which it would be virtually impossible to continue carrying out its contractual obligations for the exemption to apply; rather than merely being more onerous as a result of the duties/tariffs being implemented. In saying this, the implemented duties/tariffs do not create an impediment beyond its control so as to create impossibility for CLAIMANT to proceed with its contractual obligations.

C. ***In the alternative, Article 79 does not permit price adaptation in the manner sought by CLAIMANT.***

86. In the alternative to "impossibility", CLAIMANT's performance under the FSS Agreement following the implementation of the duties/tariffs can be differentiated between "more onerous" situations and "excessively onerous" situations. Brunner draws a distinction between situations in which performance for CLAIMANT becomes *more onerous* as opposed to situations where performance becomes *excessively onerous*: 'the *force majeure* or hardship exemption is only applicable in the latter case' [*Brunner, Pg. 214*]. This would thus result in CLAIMANT's discharge from its performance duty. RESPONDENT asserts that the implementation of the duties/tariffs create a circumstance in which

CLAIMANT's performance becomes *more onerous*, instead of *excessively onerous*.

87. There are a number of arbitral decisions that also conclude that in CLAIMANT's circumstances, it cannot be exempted under Article 79. The decision in Iron Molybdenum [*Iron Molybdenum Case*], found that the seller was in fact not exempt for the failure of delivering goods under either Article 79 or under a contractual *force majeure* clause. This suggests that the parties have not pre-empted Article 79 into their FSS Agreement by simply agreeing to a contractual provision. Di Matteo states that as per the decision in the FCF Case, a party cannot simply rely on the exemptions allowed under Article 79 on the grounds that performance has become unforeseeably more difficult or unprofitable [*FCF Case*; *Di Matteo, Pg. 159*]. CLAIMANT wishes to increase the purchase price by 30% simply due to the rising duties/tariffs which will make them less profitable and are trying to utilise Article 79 in a way which it was not intended. Further, an arbitration panel found that a seller could not be relieved of their obligation to deliver goods at the contract price due to a change in market price [*Steel Bars Case*]. RESPONDENT submits that these authorities provide a precedent as to why CLAIMANT cannot be exempted under Article 79 in the circumstances of implemented duties/tariffs.

88. Additional scholarly works have also taken the view that impediments need to be assessed with the relevant circumstances at the time of the conclusion of the FSS Agreement between CLAIMANT and RESPONDENT. Da Silveira states that 'the common feature of situations of impediment and situations of hardship is that the circumstances surrounding performance differ from those that were in place at the time of the conclusion of the contract' [*Da Silveira, Pg. 329, Para. 494*]. This is supported by Brunner who states that 'the hardship exemption may be considered as a particular group of cases under the *force majeure* excuse*'* [*Brunner, Pg. 392*]. In further support of this argument in Article 79 not permitting price adaptation as sought by CLAIMANT, Professor Tallon

states ‘that the Convention has opted for a unitary conception of exemption and has set aside the theory of “changed circumstances”’ [*Professor Tallon, Pg. 594, Para. 3.1.2*]. The general scholarly consensus as well as numerous decisions by arbitral tribunals seem to portray the fact that in order for CLAIMANT to successfully be exempted under Art 79, it needs to be as a result of reaching impossibility to continue with its performance duty under the contract. The implementation of duties/tariffs merely creates a circumstance of the contractual duties being more onerous, rather than excessively onerous, or preventing performance so as to reach impossibility.

REQUESTS FOR RELIEF

For the reasons stated above, RESPONDENT respectfully requests that the Arbitral Tribunal make the following orders:

(a) Dismiss the claim as inadmissible for a lack of jurisdiction and powers;

(b) Reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT; and

(c) Order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Signed:

Gianluca Rossi

Molly McLinden

Wei Wen Phang

Mary Nguyen

Liam Casey

George El-Mourani

TABLE OF AUTHORITIES, STATUTES AND RULES

Abbreviation	Citation	Paragraph cited
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980	6, 8, 58, 73, 74, 77, 78
HKIAC 2018 Rules	HKIAC Administered Arbitration Rules, 2018	21, 30, 39, 45, 46, 47, 48, 50, 52
HKIAC 2013 Rules	HKIAC Administered Arbitration Rules, 2013	36
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)	53
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985	17
DAL	*Danubian Arbitration Law*	30, 38, 39, 42, 52
IBA Rules	International Bar Association Rules	34, 35, 37, 44, 50

TABLE OF COMMENTARY

Abbreviation	Citation	Paragraph cited
Blair QC	C.Blair & E.V Gojkovic (2018) '*WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence'* ICSID Review, Col. 33, No 1, 235-239.	31, 33
Born	Gary Born, International Commercial Arbitration (Kluwer Law International 2014) 636.	16, 20, 27, 56
Brunner	Christoph Brunner, "Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration" Kluwer Law International (2008)	66, 68, 82, 84
Czernich	Dietmar Czernich, 'Chapter I: The Arbitration Agreement and Arbitrability, The Law Applicable to the Arbitration Agreement', in Christian Klausegger , Peter Klein , et al. (eds), Austrian Yearbook on International Arbitration 2015, (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2015) pp. 73 - 86	26, 27
Di Matteo	Larry A. Di Matteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer & Marisa Pagnattaro, "International Sales Law: A Critical Analysis of CISG Jurisprudence", Cambridge University Press (2005)	83
Da Silveira	Mercedeh Azerdo Da Silveira, *Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation*, (Kluwer Law International 2014)	84
Kyriaki Noussia	"*Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law*" (Springer Science and Business Media, 2010)	40

Moser and Bao	Michael J Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford, Oxford University Press, 2017).	40
Prakash	Justice Judith Prakash, '*Challenging Arbitration Awards for Breach of the Rules of Natural Justice'* (Speech delivered at the CIArb International Arbitration Conference, Malaysia, 24 August 2013) <<https://www.supremecourt.gov.sg/Data/Editor/Documents/Judith%20Prakash%20J%20speech%20delivered%20at%20%20CIArb%20International%20Arbitration%20Conference%202013.pdf>	56
Schwenzer & Schlectriem	Schwenzer, Ingeborg, *Schlectriem and Schwenzer; Commentary on the Convention on Contracts for the International Sale of Goods*, 4th ed. Oxford University Press (2016)	74, 75, 76, 79
Redfern and Hunter	Nigel Blackaby and Martin Hunter, *Redfern and Hunter on International Arbitration (Sixth Edition)* (Oxford, Oxford University Press, 2015)	7, 9, 38, 41, 55
Rogers	Catherine A. Rogers argues in "Transparency in International Commercial Arbitration", 54 U.Kan.L.Rev 1301 (2006)	51
White & Case	International Arbitration Survey: "The evolution of Arbitration", White & Case, 2018	52

TABLE OF CASES AND ARBITRATION AWARDS

Abbreviation	Citation	Paragraph cited
BCY Case	*BCY v BCZ* [2016] SGHC 249	15
Bremen's Case	Decision of the Bremen Court of Appeal, 30 September 1999, (2001) 4 Intl ALR N-26.	38
FCF Case	*FCF S.A v. Adriafil Commerciale S.r.l.*, BGE 4C.105/2000, Sept. 15, 2000, (Switz)	
Fiona Trust Case	*Fiona Trust & Holding Corp & Ors v Privalov & Ors* [2007] UKHL 4.	19
Harbour Case	Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd. and Others, our de cassation, 7 May 1963.	17
Iron Molybdenum Case	*Iron Molybdenum Case*, Appellate Court Hamburg, CLOUT case No. 277 (Oberlandesgericht Hamburg, Germany, 28 February 1997)	44, 81, 83
Libananco Case	*Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8 72.	6
Methanex Case	*Methanex Corporation v. United States of America*, Award, 55 (NAFTA Ch. 11 Arb. Trib. 2005).	32, 44
Nuova Fucinati Case	*Nuova Fucinati SpA (Avv. Bassi, Santamaria) v. Fondmetall International AB (Avv. Bianchi, Ginelli, Rossi)*, Tribunale Civile di Monza, Italy, 14 January 1993, Journal of Law and Commerce 1995-1996 pp. 153 *et seq.*, CISG-online 540	80
Re Corporacion case	*Re Corporacion Transnacional de Inversiones*, S.A. de C.V. et al. and STET International, S.p.A. et al. Original in English Published in English: 45 O.R. (3d) 183, affirmed (2000) 49 O.R. (3d) 414, O.J. No. 3408 (C.A., Catzman, Abella & Rosenberg JJ.A.), leave to appeal to the Supreme Court of Canada sought: [2000] S.C.C.A. No. 581	42

Shirt Case	China 15 December 1998 CIETAC Arbitration proceeding *(Shirt case)*, Available at: http://cisgw3.law.pace.edu/cases/981215c1.html	75, 76
Steel Bars Case	*International Chamber of Commerce on ICC International Court of Arbitration No. 6281 (1989)*	83
Sulamerica Case	*Sulamerica CIA Nacional De Seguros S.A. v Enesa Engenharia SA* [2012] EWCA Civ 638	2, 3, 5, 19

CERTIFICATE

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

24 January 2019

Signed:

Gianluca Rossi

Molly McLinden

Wei Wen Phang

Mary Nguyen

Liam Casey

George El-Mourani