SIXTEEN ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 March –7 April 2019

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:	**AGAINST:**
Black Beauty Equestrian	Phar Lap Allevamento
2 Seabiscuit Drive	Run Frankel 1
Oceanside, Equatoriana	Capital City, Mediterraneo
RESPONDENT	**CLAIMANT**

COUNSELS

Han Leyi♦ He Xinyue ♦Jiang Mengmeng ♦ Pan Yutang♦Wang Haowen ♦Wang Jing

Tang Jiayi♦ Shi Yedong ♦ Yang Baoyi ♦Zhang Lutao ♦ Zhong Jinghui

INDEX OF AUTHORITIES

STATUTES AND RULES

Provisions of the Supreme People's Court	Provisions of the Supreme People's Court on Several Issues Concerning Trial of Cases Involving Judicial Review of Arbitration Artivle13	¶ 15
Model Clause	Note of Arbitration under the HKIAC Administered Arbitration Rules http://www.hkiac.org/arbitration/model-clauses	¶ 10, 17
Incoterm 2010	Incoterm 2010 or International Commercial Terms 2010 published by the International Chamber of Commerce (ICC)	¶ 72, 73, 76
ICC—hardship	ICC Hardship Clause 2003; ICC Publication No. 650	¶¶ 72，76
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980	¶¶ 62, 63,64,67,79,85,98, 110,111,119,120,121,126,134,135
UNIDROIT Principles	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2010	¶¶ 30,63,110,113,115,135
UNCITRAL Rules	United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (as revised in 2010), 15 December 1976	¶ 41

COMMENTARY

CITED AS	DETAILS	CITED IN
Redfern and Hunter	Redfern, Alan; Hunter, Martin et al., Redfern and Hunter on International Arbitration, Oxford University Press (2015)	¶ 18
Lew, Mistelis and Kröll	Lew, Julian; Mistelis, Loukas; Kröll, Stefan, Comparative International Commercial Arbitration, Kluwer Law International (2003)	¶ 14, 15,16
Born 2001	Born, Gary, International Commercial Arbitration: International and USA Spectscommentary and Materials, Kluwer Law International (2001)	¶ 5,9
Born 2014	Born, Gary, International Commercial Arbitration, Kluwer Law International (2014)	¶ 14, 16,18
Harisankar K.S.	Harisankar K.S., International Commercial Arbitration in Asia and the Choice of Law Determination, 30 Journal of International Arbitration (2013)	¶ 19
Bernardini	Bernardini, Piero, Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause, in ICCA Congress Series no. 9	¶ 6

Beisteiner	Beisteiner, Lisa, The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract - The Austrian Perspective, in Austrian Yearbook on International Arbitration 2014 ((Klausegger, Klein, Kremslehner, et al.)	¶ 28
Scott and Kraus	Scott, Robert E; Kraus, Jody S, Contract Law and Theory, LexisNexis (2013)	¶ 31
Yang Liangyi	Yang Liangyi, Arbitration Law: from 1996 British Arbitration Law to International Business Arbitration, Law Press China (2006)	¶ 36
Thoma	Thoma, Ioanna, Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature, Volume 25, Issue 3, Kluwer Law International (2008)	¶ 38
Smeureanu	Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration, Volume 22, Kluwer Law International (2011)	¶ 38
Koroway	Koroway, Edward. Confdentiality in the Law of Evidence, Osgoode Hall Law Journal 16.2 (1978)	¶ 38
Blackaby & Partasides	Blackaby, Nigel & Partasides, Constanine with Redfren, Alan & Hunter, Martin, Redfern and Hunter On International Arbitration, Oxford University Press (2009)	¶ 41

Victoria	Victoria Pernt, How Much (More) Transparency Does Commercial Arbitration Really Need? (2017)	¶ 42
Böckstiegel	Karl-Heinz Böckstiegel, Public Policy as a Limit to Arbitration and its Enforcement, IBA Journal of Dispute resolution, ‚The New York Convention – 50 Years (2008)	¶ 44
O'Malley	Rules of Evidence in International Arbitration. An Annotated Guide Informa, London (2012)	¶ 49
Guilherme	Guilherme Rizzo Amaral, Prague Rules v. IBA Rules :Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills (2018)	¶ 49
Moses	Margaret Moses, 'Is Good Faith in the IBA Evidence Rules Good?', Kluwer Arbitration Blog (2012)	¶ 50
2018 Queen Mary Survey	2018 International Arbitration Survey Queen Mary UoL, London (2018)	¶ 49
A Guide to HKIAC	Moser, Michanel; Bao, Chiann, A Guide to the HKIAC Arbitration Rule (2017)	¶ 44

JOHN W. Head	Global Business Law: Principles and Practice of International Commerce and Investment Carolina Academic Pr; 3 (2012)	¶ 72
Schwenzer	Current Issues in the CISG and arbitration, Ingeborg Schwenzer, Eleven International Publishing (2014)	¶¶ 76
Schwenzer/Hachem	See Article 7 CISG and Schwenzer/Hachem, Commentary (n. 10), Art. 7, par. 32	¶ 86
Schlechtriem/ Schwenzer	Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford University Press (2016)	¶ 92
CISG Digest	United Nations Commission on International Trade Law	¶¶ 98, 112,120,126
Peter Schlechtriem	Peter Schlechtriem, Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More, 18 J. L. & Com. 191, 238 (1999).	¶ 112, 136

CISG AC-Op No. 7	CISG Advisory Council Opinion No.7 : Exemption of Liability for Damages Under Article 79 of the CISG	¶ 91
CISG AC-Op. No.3	CISG Advisory Council Opinion No.3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG	¶ 68
Mercedeh Azeredo	Mercedeh Azeredo da Silveira, Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Wolters Kluwer Law & Business (2014).	¶ 112
Barry Nicholas	Barry Nicholas, Progress Report of the Working Group on the International Sale of Goods on the Work of its Fifth Session, Annex III, UNCITRAL YEARBOOK (1975)	¶ 118

CASES

CITED AS	DETAILS	CITED IN
Japan No. 6	Japan No. 6, Japan Educational Corporation v. Kenneth J. Feld, High Court, Tokyo, Not Indicated, 30 May 1994 Yearbook Commercial Arbitration 1995 - Volume XX (van den Berg (ed.); Jan 1995)	¶ 14
C v. D case	C v. D, [2007] EWCA Civ 1282	¶ 19
No. 245 of the Shanghai Higher People's Court	(2001) Hu Gao Min Zhong Zi No. 245	¶ 15
Hamlyn case	Hamlyn v. Talisker Distilleries [1894] AC 202	¶ 22
Compagnie Maritime case	Compagnie d' Armement Maritime SA v. Compagnie Tunisienne de Navigation [1971] AC 572	¶ 22
XL case	XL Insurance Ltd v. Owens Corning [2011] 1 All ER (Comm) 530	¶ 22

Firstlink case	FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others [2014] SGHCR 12	¶ 24
Aminoil	Kuwait v. Am. Indep. Oil Co., Final Award, Mar. 24, 1982, 21 I.L.M (1982)	¶ 28
Hassneh case	Hassneh Insurance Co. of Israel v. Steuart J. Mew [1993] 2 Lloyd's Rep. 243	¶ 38, 39
Dolling-Baker case	Dolling-Baker v. Merrett, [1991] 2 All E.R. 890 (C.A.)	¶ 39
Ali Shipping Case	Ali Shipping Co. Ltd. v. Shipyard Trogir, [1998] 2 All E.R. 136 (C.A.).	¶ 38, 39
AEGIS case	Associated Electric & Gas Insurance Services Ltd v. European Reinsurance of Zurich, [2003] UKPC 11	¶ 37
Methanex case	Methanex Corporation v United States of America, (UNCITRAL) Award on Jurisdiction and Merits of 3 August 2005 [CA-11 and RA-28]	¶ 53

Mitchell case	Mitchell v News Group Newspapers Ltd [2014] EWHC 3590 (QB) (31 October 2014)	¶ 60
GREECE case	Greece 2009 Decision 4505/2009 of the Multi-Member Court of First Instance of Athens (Bullet-proof vest case) Cite as: http://cisgw3.law.pace.edu/cases/094505gr.html	¶ 65
CLOUT case No. 251	CLOUT case No. 251, SWITZERLAND Handelsgericht des Kantons Zürich 30 November 1998	¶ 79
CLOUT case No. 151	CLOUT case No. 151, FRANCE Cour d'appel de Grenoble 26 April 1995	¶ 83
CLOUT case No. 93	CLOUT case No. 93, AUSTRIA Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft -- Wien 15 June 1994	¶ 85
CLOUT case No. 248	CLOUT case No. 248, SWITZERLAND Bundesgericht 28 October 1998	¶ 92
Inc. v. Ceramica case	MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., supra note 16, 114 F.3d at 1391	¶ 68

Scafom International BV case	Scafom International BV v. Lorraine Tubes SAS, Hofvan Cassatie (Supreme Court), Belgium, 19 June 2009, CISG-online 1963.	¶ 129
Hof van Cassatie	Hof van Cassatie, Belgium, 19 June 2009, English translation available on the Internet at www.cisg.law.pace.edu.	¶ 127
Toepfer v. Cremer	ALFRED C. TOEPFER v. PETER CREMER, [1975] 2 Lloyd's Rep. 118	¶ 94
CLOUT case No. 849	Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL (Recurso No. 681/2007)	¶ 122
SWITZERLAND	SWITZERLAND Amtgericht Sursee 12 September 2008 http://cisgw3.law.pace.edu/cases/080912s1.html	¶ 122

ARBITRATION AWARDS

CITED AS	DETAILS	CITED IN
Giovanna case	Giovanna A. Beccara and Others v. Argentina, ICSID Case No. ARB/07/5 (27 January 2010)	¶ 39,42,46
Vestey Group Ltd case	Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4 (15 April 2016)	¶ 61
Liabanaco Holdings case	Liabanaco Holdings v. Turkey (Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8 (23 June 2008)	¶ 53
ICC case No.3267/1975	ICC case No.3267/1975, Collection of ICC Arbitral Awards 1974–1985 76, 85 (partial award 1975); ICC case n. 2404/1975, Collection of ICC Arbitral Awards 1974– 1985 280, 281 (1975)	¶ 107
ICC case No.7373/2004	ICC case No.7373/2004, ICC International Court of Arbitration Bulletin 72 (Final Award)	¶ 22

TABLE OF ABBREVIATIONS

Agreement	Frozen Semen Sales Agreement
&	And
§ / §§	Section / Sections
ANA	Answer to the Notice of Arbitration (24 August 2018)
Art. / Arts.	Article / Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claim(ant)
Dec	December
Ed. / eds.	Editor / editors, or edition
e.g.	exemplum gratia (for example)
Ex.	Exhibit
Resp.	Respondent
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Rules	International Chamber of Commerce and Industry Rules 1998
Id.	Idem
i.e.	id est (that is)
Letter by Fasttrack	Letter by Fasttrack (3 October 2018)
Letter by Langweiler	Letter by Langweiler (2 October 2018)
Mr.	Mister
note.	Note / Footnote
No. /Nos.	Number/Numbers
NoA	Notice of Arbitration (31 July 2018)
Para. / Paras	Paragraph and paragraphs

Parties	CLAIMANT and RESPONDENT
PO1	Procedural Order 1 (5 October 2018)
Resp. Ex.	RESPONDENT Exhibit
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus (against)
vol.	Volume
PO2	PROCEDURAL ORDER NO 2 of 2 November 2018

STATEMENT OF FACTS

Phar Lap Allevamento ("CLAIMANT") is a company located in Mediterraneo, dedicated in racehorse breeding business. Black Beauty Equestrian ("RESPONDENT") is an Equatoriana company that mainly operates broodmare lines. Since 2014, RESPONDENT has been expanding its racehorse stable. In 2017, the government in Equatoriana temporary lifted the ban on frozen racehorse semen, which directly motivated RESPONDENT to build business relationship with CLAIMANT.

21 March 2017	RESPONDENT emailed CLAIMANT to inquire about the available of Nijinsky III's frozen semen. To make the most of temporary lift, RESPONDENT came up with the proposal of 100 doses.
2**4 March 2017**	CLAIMANT replied with a formal offer and attached its price terms general conditions.
28 March 2017	RESPONDENT replied and varied the delivery term into DDP. Taking the amount of doses into account, RESPONDENT pointed out that the price should be more favorable.
31 March 2017	CLAIMANT agreed with the incorporation of DDP, and raised the price term accordingly. As for the transportation, CLAIMANT did not mention about tariff fees, but designated other hardship.
10 April 2017	RESPONDENT proposed with an arbitration agreement, in which the law of Equatoriana was designated as the applicable law.
11 April 2017	CLAIMANT replied with a shorter version, without appointing any applicable law for arbitration agreement.
12 April 2017	Mr. Antley and Mr. Napravnik met in persons and discussed the contract in detail. Mr. Napravnik brought up with the

	incorporation of adaptation-clause and hardship-clause, to which Mr. Antley didn't expressly agree but only promise to redraft some parts of the contract. However, before Mr. Antley managed to do that, the car accident happened and left the two negotiators in coma.
6 May 2017	New negotiators agreed on the final version of the contract and CEO from both parties signed on the Sales Agreement.
19 December 2017	Following the tariff increase firstly put by Mediterraneo, the government of Equatoriana increased the tariff of "agricultural products" by 30%, and the racehorse semen was included.
15 January 2017	The tariff came into effects, till then, no additional tariff was charged.
20 January 2017	CLAIMANT finally found that the impact of tariff involved racehorse semen, and informed RESPONDENT with such change and on hold the third shipment.
21 January 2017	In the telephone call, Mr. Napravnik threatened to not deliver, so Mr. Shoemaker relied with ambiguity and gave no explicit promise in adjustment of price. RESPONDENT paid off the price under contractual terms.
23 January 2017	CLAIMANT released the third shipment according to its contractual duty and cleared the tariff fees.

PART I: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW GOVERNING THE ARBITRATION AGREEMENT SHALL BE THE LAW OF DANUBIA.

1. The law of Danubia shall be the governing law of the arbitration agreement **(I)**. Under such prerequisite, the Tribunal has no jurisdiction over the case and the powers under the arbitration agreement to adapt the contract **(II)**.

I. The law of Danubia is the governing law of the arbitration agreement.

2. First of all, parties had no mutual agreement in regard to the applicable law of the arbitration agreement **(A)**. In the absence of parties' agreement, the law of Danubia shall be the governing law of the arbitration agreement **(B)**. Even if parties did reach an agreement, the law of Danubia shall apply **(C)**.

A. Parties had no mutual agreement in regard to the applicable law of the arbitration agreement.

3. An arbitration agreement is a separate and autonomous agreement **(1)**. Parties intended to separate the choice-of-law of the main contract from the choice-of-law of the arbitration agreement **(2)**. Parties did not agree on the law of the arbitration agreement **(3)**.

(1) An arbitration agreement is a separate and autonomous agreement.

4. The doctrine of separability states that an arbitration agreement which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract *[Art. 19.2 HKIAC 2018 Rules]*. It is also acknowledged by both Mediterranean and Danubian Arbitration law *[Notice of Arbitration]*.
5. The effect of the doctrine of separability entails that even though the arbitration agreement is physically contained in a contract, it remains a separate and autonomous agreement, which permits different substantive laws applying to the arbitration agreement and the underlying contract separately *[Born 2001]*.
6. It has once been stated that even where the parties have chosen the law governing their contract it does not necessarily follow that this law applies to the arbitration agreement as well, since the autonomy of the arbitration agreement constitutes an obstacle for doing so

[Bernardini]. Therefore, the law of arbitration agreement would require a closer examination in light of the parties' true intention, even under the circumstances that the law of the main contract has already been chosen.

(2) Parties chose the law of the arbitration agreement separately from the law of the main contract.

7. The Model Clause provided by the HKIAC includes a sentence specifying the applicable law of the arbitration agreement. However, such expression is not included in the current agreement. In other words, parties did not include an express choice of law of the arbitration agreement.
8. As a matter of fact, during the drafting history, parties had held a discussion specifically on the issue of which law shall be applicable to the arbitration clause, even though the law governing the substance of the dispute had already been chosen by the parties *[Resp. Ex. 1]*. It indicates that parties intended to treat the selection of the governing laws of the arbitration clause and the main agreement separately, and the effect of the choice-of-law of the main contract should not automatically expand to the arbitration clause.
9. Additionally, the expression of the choice-of-law clause in the underlying agreement is that "This Sales Agreement shall be governed by ...". It would have different result compared with the expression of "All of the provisions of this contract shall be governed by ...". Under the current situation, the clause was drafted narrowly, which could not encompass a separable arbitration agreement contained within the underlying contract *[Born 2001]*.

(3) Through negotiation, parties failed to reach an agreement.

10. RESPONDENT firstly provided a draft of the arbitration clause based on the Model Clause of HKIAC and intended to subject the arbitration clause to the law of Equatoriana *[Resp. Ex. 1]*. It indicates that the RESPONDENT intended to set the place of arbitration in a country other than Mediterraneo, and the applicable law shall be subject to the law of that place accordingly.
11. Even though it would require additional procedure to submit a contract to a foreign law, the CLAIMANT merely eliminate the choice-of-law part in the agreement without

specifying it. Meanwhile, it cannot be inferred from an e-mail sent by the CLAIMANT that the RESPONDENT agreed to accept the law of Mediterraneo as the law of the arbitration agreement, which leaves a blank in regard to the the applicable law.

12. It is further evidenced by the note of Mr. Antley, which lists clarification of the neutral venue and applicable law in arbitration clause as an unsettled issue for further negotiation following the draft provided by the CLAIMANT *[Resp. Ex. 3]*.

B. In the absence of parties' agreement, the law of Danubia shall be the law governing the arbitration agreement.

13. Danubia is the country in which the award is to be made **(1)**. Danubia has the closet connection with the arbitration agreement **(2)**.

(1) Danubia is the country in which the award is to be made.

14. Article V(1)(a) in *NY Convention* and Article 36(1)(a)(i) in *Model Law*, which provides that enforcement may be refused where the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. These provisions adopt the two-prong standard that giving effect to any express or implied choice-of-law by the parties and, failing such agreement, prescribing a default rule, selecting the law of the arbitral seat *[Lew, Mistelis and Kröll]*. This approach was also reflected in a 1994 decision of the Tokyo High Court, which reasoned if the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply *[Born 2014; Japan No.6]*.

15. The two-prong rule can be considered as a general rule of private international law as a result of the broad international influence of the Convention. In addition, it has also been recognized and adopted by some civil law countries *[Lew, Mistelis and Kröll]*. For example, practices in China recognized the differentiation between the applicable law for the contractual disputes and that for determining the validity of foreign-related arbitration agreements*[Interpretation of the Supreme People's Court; Provisions of the Supreme People's Court]*. The choice-of-law of the contract shall only be deemed as the law of the

main contract, instead of the law of the arbitration agreement, and if parties failed to reach an agreement, the law of the seat of arbitration shall apply according to the *NY Convention [No. 245 of the Shanghai Higher People's Court]*.

16. Though these provisions address the issue only from the perspective of the annulment or enforcement judge, there is a strong argument in favour of applying the same criteria at the pre-award stage *[Lew, Mistelis and Kröll]*. In our case, there was in the absence of parties' agreement on the law of the arbitration agreement as stated above, the arbitration agreement shall thus be subjected to the law of the place of-where the award is to be made *[Born 2014]*. According to *Model Law* Article 31(3), the award shall be deemed to have been made at the place of arbitration which was determined by the parties.
17. In conclusion, under the *NY Convention* and *Model Law*, in the absence of parties' agreement, the law of Danubia in this case shall govern the arbitration agreement.

(2) Danubia has the closet connection with the arbitration agreement.

18. The place or seat of the arbitration is not merely a geographic concept. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated *[Redfern and Hunter]*. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators. The seat of arbitration is thus intended to be its center of gravity, also the relationship between the seat of arbitration and the law governing arbitration is an integral one. Otherwise, the parties' selection of seat in one country would be overridden when the law of another country governing the arbitration agreement *[Born 2014]*.
19. The arbitration agreement concerns many obligations between the parties and the arbitrators, while the main obligation under the arbitration agreement is to solve disputes. Since this obligation to undertake an arbitration procedure to resolve a dispute appears much more closely related to the place where the procedure will happen *[Harisankar K.S.]*, which means the place/seat of arbitration appears much closer to the arbitration agreement. This position can also be seen in the *C v. D case*, where Longmore LJ held that *"an agreement to arbitrate will normally have a closer and more real connection with the*

place where the parties have chosen to arbitrate" [C v. D case].

20. In this case at hand, the parties agreed on "The seat of arbitration shall be Vindobona, Danubia" expressly *[Article 15, Cl. Ex. 5],* and there is no choice of applicable law in the arbitration agreement. Therefore, pursuant to the closet connection test, the appropriate governing law of the arbitration agreement shall be the law of Danubia.

C. <u>Even if parties did reach an agreement, the law of Danubia shall apply.</u>

21. Even if the parties have reached an implicit agreement on the governing law of the arbitration agreement, the law of the seat of arbitration shall be treated as an implied choice **(1)**. Further, applying the law of Danubia can meet both parties' pursuit for neutrality **(2)**.

(1) The choice of a seat of arbitration can be treated as an implied choice of law for the arbitration agreement.

22. When the arbitration agreement itself does not contain an express choice-of-law, the seat of arbitration designated by the parties could be viewed as an implied choice. In this regard, several cases supported this conclusion. In *Hamlyn* case, it was the designation of seat could reflect parties' choice of law that Lord Herschell LC applied the law of the seat to the arbitration agreement, but not applied a default legal rule (such as "closest connection") to determine that the governing law shall be the law of seat *[Hamlyn case]*. And this approach was adopted by other courts *[Compagnie Maritime case; XL case]*. Except for that, as a frequently-cited arbitral award concluded: "Except in cases where the parties make an express choice concerning the law governing the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place *[ICC case No.7373/2004]*." Therefore, it is reasonable to regard the choice of seat as the connecting factor to determine parties' implied intention.

23. When there was an express choice in the main contract, the English authorities have, however, adopted what is effectively a rebuttable presumption to the contrary*[Ian Glick]*. Put it differently, for there was something over and above the choice of a different seat which shows the parties did not intend the arbitration agreement to be governed by the law of the main contract, the presumption that the arbitration agreement originally would be

governed by the express choice-of-law in the main contract may be disturbed. In our case, the parties intended to separate the applicable law of the main contract and arbitration agreement, and further negotiation showed that agreement on applying the law of Mediterraneo had not reached. In this regard the choice of seat in the arbitration agreement can be deemed as the parties' implied choice to apply the law of Danubia to the arbitration agreement.

(2) **Applying the law of Danubia can meet both parties' pursuit for neutrality.**

24. When commercial relationships break down and parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution *[Firstlink case]*. In our case, it is a reasonable presumption that the neutral law is acceptable for the CLAIMANT since Danubia is a neutral country appointed by the CLAIMANT at first *[Resp. Ex. 2]*. Further, applying the law of Danubia can meet the desire for neutrality of both parties under the commercial relationship.

25. Therefore, under the circumstance that the choice of seat can reflect parties' choice-of- law and the seat at hand is a neutral country, it is reasonable to conclude that the law of the seat of arbitration in our case can be deemed as parties' implied choice.

II. The Tribunal has no jurisdiction over the case and the powers under the arbitration agreement to adapt the contract.

A. Contract adaptation is beyond the scope of arbitration.

26. The agreement lacks an express empowerment of the adaptation as required under the Danubia law **(1)**. By narrowing down the wording of the model clause of HKIAC, RESPONDENT excluded any indication of contract adaptation from the arbitration agreement **(2)**.

(1) The express empowerment for arbitrators to adapt the contract, as is required under the law of Danubia, is missing in the agreement.

27. A general dispute resolution clause is not equivalent to an express empowerment of contract adaptation **(a)**. Under Four Corners Rule and parol evidence rule, extraneous evidence contradicting or supplementing with the written agreement shall not be taken into account **(b)**.

(a) A general dispute resolution clause is not equivalent to an express empowerment of contract adaptation.

28. The express empowerment requires that there is clear wording to entrust the arbitration tribunal with the task of adaptation of the contract, such as the expression that "all disputes arising out of this contract including a change of contract itself", or in the form of an adaptation clause like "falling agreement on the adaptation between the parties, the arbitral tribunal shall decide on the adaptation of the contract" *[Beisteiner]*. However, the current arbitration agreement does not specify that adaptation is within the tribunal's powers. A general dispute resolution clause refers to disputes arising under the contract is not equivalent to an express empowerment for adaptation. As is affirmed in one case, even though the arbitration agreement provided that "any difference or dispute" was capable of being settled by arbitration, the tribunal considered that the right of adapt can only be conferred by law or the express consent of parties *[Aminoil]*.

29. As illustrated above, the Danubian law prohibits the extrinsic evidence from supplementing and contradicting with the written agreement. Therefore, since the wording of the arbitration agreement does not contain a reference to adaptation, the arbitration agreement cannot be interpreted as conferring the Tribunal such power.

(b) Under the Four Corners Rule, extrinsic evidence contradicting or supplementing with the written agreement shall not be taken into account.

30. Four Corners Rule means that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon. In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear *[Answer to the Notice of Arbitration]*. The four corners rule under the Danubian Contract Law as

applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles *[PO2, Article 45]*. According to the UNIDROIT Principles, it indicates that the writing completely embodies the terms on which the parties have agreed, which cannot be contradicted or supplemented by evidence of prior statements or agreements *[Art. 2.1.17 UNIDROIT Principles]*.

31. Moreover, as also a rule adopted by Danubia, the parol evidenve rule prevents parties who have reduced their agreement to a final written document from later introducing external evidence as evidence of a different intent as to the terms of the contract *[Scott and Kraus]*.
32. The CLAIMANT may claim that Mr. Antley once mentioned the possibility of the adaptation by the arbitrators *[Cl. Ex. 8]*. Nevertheless, it was merely a proposal instead of a formal agreement. And since it was not reflected in the written agreement, the effect of which shall not be taken into account.

PART II CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

33. The submission of the evidence should not be allowed; otherwise it will not only destroy the confidentiality of the former arbitration between RESPONDENT and its customer **(I)**, but also violate the procedural fairness by depriving RESPONDENT of its right to be equally treated **(II)**. Moreover, the evidence was obtained by CLAIMANT through a manner contrary to good faith **(III)**, and all of the information is just hearsay and lacks the relevance and materiality required by relevant evidence rules **(IX)**.

I. CLAIMANT's submission of the award will destroy the confidentiality of the former arbitration.

34. Confidentiality has long been regarded as an important advantage of arbitral proceedings. CLAIMANT as well as the Tribunal, though not directly bound by the confidentiality provision, is under an implied obligation to respect the confidentiality nature of the award of another arbitration **(A)**. Furthermore, the Transparency Rules does not apply to

commercial arbitrations commenced by private entities, and thus provides no merits for this submission **(B)**.

A. CLAIMANT, as well as the Tribunal is under an implied obligation to respect the confidentiality nature of the award of the former arbitration.

35. In the case at hand, the evidence CLAIMANT asking to submit is an award from a former arbitration between RESPONDENT and one of its customers [hereinafter the former arbitration]. Since that arbitration was conducted under the HKIAC 2013 Rules where a confidentiality provision was incorporated, the award was originated in a confidence that they would not be disclosed and thus was inherently a confidential one.
36. As emphasized by Professor Yang Liangyi, the award of an arbitral proceeding is the "property" privately owned by the disputing parties thereof *[Yang Liangyi]*. For RESPONDENT, the award of the former arbitration which contained a lot of business details and information, is no doubt of significant business value. To keep this "property" in confidentiality was one of the main reasons why RESPONDENT chose the arbitration as a way to resolve their dispute.
37. In addition, since "it's a common concern of disputing parties that documentation exchanged or generated during the arbitration included information and material that could be of value to persons with interests adverse to those of the parties" *[AEGIS Case]*, RESPONDENT has adopted several measures to protect its "property": RESPONDENT has entered into a confidentiality agreement with the two former employees who had been witnesses in the former arbitral proceeding, setting a contractual obligation for them to keep all information about the arbitration confidential. RESPONDENT also used a firewall to protect the information *[Procedure Order No.2]*. Both of these protection measures showed RESPONDENT's desire to keep this award in well confidentiality.
38. In fact, the confidentiality represents an important advantage of arbitration over the courts as a means of dispute resolution *[Hassneh Case]*. One of the reasons why businessmen prefer arbitrations to hearings in court is that "the arbitrator does not sit in public and therefore is not called upon to wash soiled linen in public or to disclose their business to other people" *[Thoma]*. Meanwhile, an English court held that confidentiality obligation is

implied in every arbitral agreement as "an essential corollary of the privacy of arbitration proceedings" *[Ali Shipping Case]*. This obligation applies not only to the outcome, but also to all "pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration" *[Smeureanu]*.

39. In light of the confidentiality of arbitration, any casual disclosure of the documents presented in the oral proceedings of arbitration to any third party "would almost be equivalent to opening the door to the hearing room of the arbitration to that third party" *[Hassneh Case]*. "The quest for truth should not be hindered unnecessarily, but neither should the private exchanges of individuals be unduly exposed. Where adequate alternative evidence is available, there is no need to pry" *[Koroway]*. In practice, therefore, only when there were special concerns such as party autonomy or a third party's justified interest would tribunals accept the submission of an award from other arbitration proceedings *[Art.42.1&42.5 HKIAC 2013 Rules; Ali Shipping case; Hannseh case; Dolling case; Abaclat case]*, otherwise any document presented in a former arbitral proceeding shall be rejected.

40. However, in the case at hand, no party in the former arbitration has consented to disclose the award of their arbitration, nor would the award contribute to the interest of a certain third party. There is no reasonable ground to permit such submission. On the contrary, the acceptance of the submission would dramatically destroy the confidentiality of the former arbitration while benefits nothing. Therefore, if the Tribunal were to accept CLAIMANT's submission of the award, it might be "highly offensive to basic principles of arbitral property" *[Gilles]*. Similarly, CLAIMANT, though not directly bound by the confidentiality provision required by the HKIAC 2013 Rules, is under an obligation to respect RESPONDENT's private ownership on the award by respecting the confidentiality nature of the award and stopping trying to submit it.

B. The Transparency Rules provides no merits for CLAIMANT's submission.

41. International investors invented the Transparency Rule mainly to "foster stability and predictability" *[Catherine]*. The Transparency Rule, whose full tile is UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, is mainly used in

Treaty-Bound parties and aims to protect the private investors against the countries as a public power. On the contrary, in international commercial arbitrations where there is no involvement with the public authority *[Blackaby & Partasides]*, it is not proper to refer to the Transparency Rule as alleged by CLAIMANT.

42. Even though in recent years the "transparency" as a principle was partly introduced into commercial arbitrations, it never means to disclose all the information or materials of the whole arbitrations without metes or bounds. In particular, transparency considerations may not prevail over the protection of information *[Abaclat case]*. Just as commentator Victoria Pernt has clarified, "If commercial arbitration introduces mandatory transparency of proceedings comparable to the UNCITRAL regime, parties may opt to resolve their disputes in mediation or State courts instead. Transparency concerns thus should be properly tended to, albeit without sacrificing one key selling point of commercial arbitration: confidential proceedings" *[Victoria]*.

43. Therefore, the Transparency Rules does not apply to the former commercial arbitration, and thus provides no merits for CLAIMANT's submission of the award.

II. The permission by the Tribunal of CLAIMANT's submission will violate the procedural fairness.

44. Professor Karl-Heinz once clarified "the principle of procedural public policy has been recognized widely by national courts, if the proceedings deviate from basic principles of procedural law in such a way that they cannot any more be considered as a fair trial or due process, particularly in cases of...unequal treatment of the parties regarding...the submission of evidence" *[Karl-Heinz Böckstiegel]*. With the same concern, the HKIAC 2018 Rules requires the arbitral tribunal to adopt suitable procedures for the conduct of the arbitration…provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case *[Art.13.1 & 13.5 HKIAC 2018 Rules]*. The right to be equally treated and the right to reasonably present a case "are two bedrock principles of arbitration". The arbitral tribunal cannot derogate these principles when fixing the procedures for the arbitration; otherwise the tribunal's award may be vulnerable to challenge under the law of the seat or

non-enforcement under Art. V(1)(b) of the New York Convention *[A Guide to HKIAC Arbitration Rules]*.

45. In the case at hand, CLAIMANT, with the partial information heard at a conference, alleged that in the former arbitration RESPONDENT had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances when it has been negatively affected by the tariffs, and criticized RESPONDENT acted contradictorily in recognizing an additional tariff in the former case is sufficient to justify a request for adaptation while the tariff allegedly does not justify an adaptation in this case *[Letter by Langweiler (2 October 2018)]*. Nevertheless, as the opponent in the former arbitration has clarified, such allegations by CLAIMANT did not reflect reality and were taken out of context.

46. If the Tribunal decides to accept CLAIMANT's submission, CLAIMANT, who is not directly bound by the confidentiality obligation, will be free to extract and present anything favorable to its own benefits; while RESPONDENT, limited by the confidentiality obligation, will be restricted from disclosing or communicating any detailed information about the former arbitration. As the tribunal in Abaclat case has once pointed out, such "uneven publication or distribution carry the risk of giving a misleading impression about these proceedings" *[Abaclat case]*.

47. Thus, if this evidence were to be submitted, it would, to some extent, deprive RESPONDENT of its procedural right to be equally treated as well as to present the case, and would bring the Tribunal unnecessary concerns and misleading information, affecting its impartiality and justice on this case. This is undoubtedly detrimental to RESPONDENT's benefit, and may result in a violation of procedural fairness principle required by the HKIAC 2018 Rules or even, a challenge of this Tribunal's award. Therefore, in order to ensure the fair and efficient conduct of the arbitration, CLAIMANT's submission should be deemed inadmissible by the Tribunal.

III. Evidence obtained in a manner that is contrary to good faith shall not be admissible.

48. Although the Tribunal has a wide discretion of the admissibility of the evidence, it does not mean there are no barriers at all. In fact, it is widely recognized by IBA Rules **(A)**

and by arbitration practitioners that the evidence obtained in a manner that is contrary to good faith shall not be admissible **(B)**.

A. The IBA Rules should be taken as guidance by the Tribunal when evaluating on the submission of evidence.

49. The HKIAC 2018 Rules provides that "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" *[Art.22.2 HKIAC 2018 Rules]*, while there is no further guidance outlining what factors the Tribunal shall consider or how the evidence can be evaluated. For reference, the Tribunal may turn to the IBA Rules, the most frequently used and highly rated guideline *[2018 Queen Mary Survey]* which provides an efficient and fair process for the taking of evidence in international arbitration *[O'Malley]*. In most practice, the IBA Rules are commonly accepted to be an efficient tool for the taking of evidence in international arbitration, regardless of an express choice for the IBA Rules in the terms of reference by the parties *[Guilherme]*.

B. Admission of illegally obtained evidence is inconsistent with the principle of good faith that inheres in the IBA Rules.

50. As is required by IBA Rules, the taking of evidence shall be conducted on the principles that each party shall act in good faith *[para.3 Preamble of IBA Rules]*. At its discretion, the arbitral tribunal may sanction parties for failures of conducting in good faith by way of the apportionment of costs or any other means available under rules *[Art.9.7 IBA Rules]*. This adoption of a good faith requirement by IBA Rules "appears to be part of a trend toward viewing good faith conduct as a general principle in international transactions. A requirement of good faith is more acceptable today than, for example, when the CISG was promulgated in the 1980's" *[Moses]*.

51. However, in the case at hand, RESPONDEN's investigation has disclosed that the only source of CLAIMANT's promised information could either be two former employees of RESPONDENT who breach their confidentiality agreement or a hack of RESPONDENT's computer system which violate the law *[Letter by Fasttrack (3 October 2018)]*. In both situations the evidence would have been initially obtained by

improper means that contrary to the fairness principles. Irrespective of whether or not CLAIMANT had any involvement in obtaining the document or whether they have been made available elsewhere in the worldwide web, the evidential materials should not be allowed to submit.

52. What's more, CLAIMANT itself even arranged to acquire a copy of the "Partial Interim Award" in the former arbitration against payment of 1000 USD from a company with a doubtful reputation as to where it got its information from and had refused to disclose its sources *[Procedural Order No.2]*. Such behaviors obviously contravened the fundamental principle of acting in good faith expressly included in IBA Rules.

53. In other cases, international tribunals will most likely refuse to admit evidential material stolen or otherwise unlawfully obtained on the grounds of good faith *[Methanex case; Liabanaco Holdings case]*. As one of the NAFTA tribunal has clearly stated, it would be wrong for a disputing party to introduce evidential materials obtained unlawfully, because it owed its opponent and the tribunal a general duty to conduct itself in good faith and to respect the equality of arms *[Methanex case]*.

54. Therefore, pursuant the arbitration rules as well as the precedents, CLAIMANT's submission of the illegally obtained evidence should not be allowed by the Tribunal.

IX. All information CLAIMANT got is merely hearsay and lacks the relevance and materiality required by the HKIAC 2018 Rules.

55. CLAIMANT's submission failed to meet the requirements of evidence under the HKIAC 2018 Rules, because the evidential material as hearsay does not realize the burden of proof **(A)**, and is neither relevant to the case nor material to its outcome **(B)**.

A. CLAIMANT failed to bear the required burden of proof for its submission.

56. During the arbitral proceeding, each party shall bear the burden of adducing relevant evidence to prove the facts of its case *[Art. 22.1 HKIAC 2018 Rules]*. Furthermore, it is wildly accepted that an arbitral tribunal should apply the normal standard of proof in civil cases, for example, the "balance of probability" *[Guide to HKIAC]*.

57. However, in the case at hand, all information CLAIMANT got was insufficient hearsay evidence. Till now the CLAIMANT just heard certain issue in dispute of the former arbitration from its regular customer's new CEO who has not been involved in the arbitration and was not in possession of the exact "Partial Interim Award" [Procedural Order No.2]. In fact, for the former arbitration, an award on the merits has not yet been rendered and the RESPONDENT's opponent in the arbitral proceedings also has clarified that the allegations by CLAIMANT do not reflect reality and are taken out of context *[Letter by Fasttrack (3 October 2018)]*. Thus the information CLAIMANT got lack the basic credibility and authenticity. Besides, involving the RESPONDENT's opponent in the former arbitration in joining this arbitral proceeding, as CLAIMANT proposed *[Letter by Langweiler (2 October 2018)]*, is not allowable without RESPONDEN's consent *[Art.27.1 HKIAC 2018 Rules]*.

58. Therefore, CLAIMANT failed to meet the required standard of proof, and its hearsay evidence shall be deemed inadmissible.

B. The evidential material is not relevant or material to this case and thus should be excluded by the Tribunal.

59. The HKIAC 2018 Rules concerning the evidence provides that "the tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral Tribunal determines to be relevant to the case and material to its outcome" *[Art. 22.3 HKIAC 2018 Rules]*. In the case at hand, however, CLAIMANT's submission does not meet the requirements of relevance and materiality.

60. CLAIMANT seemed to rely on similar facts in previous awards to conclude that same solution, specifically an adaption of price, should be adopted in present case. However, "in the test of admissibility for similar fact evidence, such evidence is admissible only when it is potentially probative of an issue in the action" *[Mitchell case]*. While in the case at hand, the facts relating to previous arbitration do not constitute any probative value and is obviously irrelevant.

61. As an independent business entity, the RESPONDENT has the right to act for its own benefits and interest, and does not bear any obligation to behave in the same in different

trades. Also, different from courts under common law system which have to *stare decisis*, the Tribunal is by no means bound by any previous decisions of other arbitration but is "always subject to...circumstances of each particular case" *[Vestey Group Ltd case]*. Therefore, the evidential material CLAIMANT asking to submit lacks the relevance and materiality to this case and should be excluded by the Tribunal.

PART III: THERE IS NO LEGAL GROUND FOR AN ADAPTATION OF PRICE THROUGH PARTIES' AUTONOMY OR CISG.

62. Surprised by CLAIMANT's groundless plea for a price adaptation of 1,250,000 USD, RESPONDENT believes that CLAIMANT bears the obligation and the risk to clear the tariff. To settle the dispute, the substantive issue of this case shall be illustrated in light of CISG **(I)**; under which we find that the Frozen Semen Sales Agreement (hereinafter *the Agreement*) **(II)**, and Art.79 of CISG **(III)** both prevent CLAIMANT from charging additional fee from RESPONDENT.

I. CISG and the Law of Mediterraneo govern the Agreement.

63. As a result of parties' autonomy, it is clearly stipulated in Art.14 of the Agreement, that the law of Mediterraneo and CISG shall govern the substantive issues. Based on Art.1(1)(a), CISG also embodies automatic binding force to substantive matters of this contract. As for the content of Mediterraneo law, it is evident that the law of Mediterraneo is in accordance with the UNIDROIT Principles *[PO1 Para.4]*.

64. With regard to the *Uniformity* requirement as a general principle in Art.7(1) CISG, "the Convention must be applied and interpreted exclusively on its own terms[..]Recourse to domestic case law is to be avoided." Therefore, when resolving the case, the tribunal is required to invoke CISG prior to domestic law.

II. Under the Agreement, CLAIMANT is not entitled to price-adaptation.

65. In this Agreement *[Cl.Ex.5]*, parties designated their obligations and rights in a written form, which included the use of Incoterms. Thus, the tribunal must firstly apply the contract itself to settle the dispute. As the court in one case selected by *Digest* states: "the fundamental principle of private autonomy is confirmed. It allows the parties to agree

upon provisions which derogate from the provisions of the Convention."*[GREECE case]*

66. Under this contract, we conclude that CLAIMANT itself bears the contractual responsibility to clear the tariff fees, which undoubtedly includes tariff increase**(A)**; even if such obligation has been exempted, the adaptation remedy resorted by CLAIMANT has no legal ground in the Agreement**(B).**

A. Under delivery DDP, CLAIMANT is obligated to clear the tariff.

67. To fully and precisely understand those contractual terms, Art.8 CISG provides us with the basic interpretation norms. According to Art.8 CISG, contract terms must be fully interpreted in view of: subjective intent of the party *[Art.8(1)]*; and objective intent that a reasonable person must have *[Art.8(2)]*. Moreover, according to Art.8(3), the tribunal must make thorough observation of all relevant circumstances when examining such intent.

68. Contrary to the contention from CLAIMANT that both parties designed the contract to be interpreted in a broad way *[Cl. Memo ¶100],* we believe the provisions shall be given its literal meaning. Regarding parties' true intent, the last sentence of the contract, "The parties hereto understand and agree to abide by the terms and conditions set forth in this Agreement", functions as a "merger clause", which derogates from norms of interpretation and evidence contained in the CISG. It embodies the effect of preventing a party from relying on extrinsic evidence of statements or agreements not contained in the writing. CISG recognizes and authorize parties' voluntary choice of a merger clause *[CISG AC-Op. No.3]*. There is persuasive authority for the proposition that a properly worded Merger Clause bars the consideration of extrinsic evidence *[Inc. v. Ceramica case]*.

69. Under these contractual terms and conditions, we believe that it is CLAIMANT's contractual duty to pay off the tariff fees in accordance with DDP **(1)**; and even with Art.12, considering that CLAIMANT had not been exempt from such duty **(2)**.

(1) CLAIMANT is responsible to pay off tariff fees, under Art.8 of the Agreement.

70. The contract's wording and relevant evidences consistently reveal that it is CLAIMANT's contractual duty to finish the shipment and clear the tariff fees, since DDP has been successfully incorporated into the contract**(a)**; with no valid variation of DDP in concern

with seller's tariff-risk**(b)**, it is more reasonable for CLAIMANT to bear the risk with such high payment**(c)**; CLAIMANT's voluntary conduct also prevents itself from denying it**(d)**.

(a) Delivery DDP in Incoterm 2010 was successfully incorporated into the contract.

71. It is indisputable that, in this goods transaction, the delivery term is DDP. Thus relevant provisions in Incoterm 2010 shall be incorporated into the contract. *[PO2 Para.10]*. CLAIMANT had expressly accepted DDP *[Cl.Ex.4]*, and the final version of contract also expressly chose DDP for all three installments in Art.8*[Cl.Ex.5]*. Thus, all evidences suggest that contracting parties voluntarily chose DDP to allocate their responsibility for the transportation of semen.

72. Incoterm is the standard delivery term widely acknowledged among merchants. It is stated that, Incoterm functions in the way harmonizing the countless variations among such delivery terms as they have evolved differently in different countries and setting *[JOHN W. head]*. According to ICC, the purpose of Incoterm is "to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade."*[Incoterm 2010]* DDP, namely "Delivered Duty Paid", has such a nature that it represents the maximum obligation for the seller. It is most notable that the seller has an obligation to clear the tariff not only for export but also for *import*, and to carry out all customs formalities.

73. Therefore, by voluntarily accepting DDP, CLAIMANT's intention to be legally bound by the obligations under DDP is obvious. Supposedly, it is clearly advised in Incoterm 2010 that, "If the parties wish the buyer to bear all risks and costs of import clearance, the DAP rule should be used." The choice of DDP rather than DAT or any other term, strongly proves that parties had agreed on the seller to undertake the risks and costs of import tariff.

74. In conclusion, the delivery term as DDP puts the disputable contractual duty on CLAIMANT; till then, all risks are born by CLAIMANT itself.

(b) No valid variation of Delivery DDP concerned with the tariff-risk had been made in the Agreement.

75. Although Incoterm does not have prevailing binding force, any valid variation from that must reflect parties' true meeting of minds and not causing too much ambiguity.

76. As put forward by Schwenzer: "There is a further risk that confusion may arise when an Incoterms rules is used as a basis, but then modified by the parties"*[Schwenzer]*. To avoid ambiguity, parties must be certain about such variation, so as the tribunal. It is advised by ICC, that the contract must be explicit enough to describe parties' intentions, to avoid unnecessary trouble and cost *[Incoterm 2010]*; and it is required specifically under the provision of DDP, that if the parties wish to exclude from the seller's obligations in costs payable upon import of the goods, this should be made clear by adding explicit wording to this effect in the contract of sale. Therefore, any variation especially of the tariff risks in DDP must be clear and explicit enough, which is not the case in this contract.
77. In this case, CLAIMANT had brought about the necessity of avoiding risks in customs *[Cl. Memo ¶80]*. However, such intent was recorded only once, to which RESPONDENT made no clear acceptance. Since then, both parties remained silence about risk-exemption involving tariff, and the final contract clearly did not include such exemption.
78. In conclusion, merely one email has not changed DDP, and as a result, CLAIMANT still bears the importing risk designated by DDP.

(c) By receiving such high payment, CLAIMANT shall be responsible for tariff risks.

79. CISG Art.8(2) sets the "reasonable person" test. One court decided that in determining such "a presumptive" or "normative" intent, there is a need for certainty in commercial transactions and from the principle of good faith, which also applies when interpreting the parties' statements or other conduct *[CLOUT case No. 251]*.
80. Given the price term of 100,000USD per dose, it is an unusual high price even for a luxury industry such as racehorse. Even after the negotiation, the profit margin is still very high, and according to CLAIMANT itself, the price of this contract can reverse its financial status. Thus, the overwhelmingly high profit makes it more than reasonable that CLAIMANT shall shoulder the tariff cost, but not RESPONDENT who had paid high price in full.
81. Moreover, the contractual amount is 100 doses, which is an abnormally huge amount and places heavy financial burden on my client *[Cl.Ex.2]*. Thus, it is apparent that my client was expecting CLAIMANT to take care of the whole transportation; otherwise,

RESPONDENT would not have accepted such high price while still burdened itself with high risks.

82. In conclusion, taking the transaction's nature and the overwhelmingly high price into account, CLAIMANT shall bear more risks, including import tariff.

(d) CLAIMANT's voluntary conduct shall not be reversed.

83. It is provided by Digest of Art.8(3) CISG, that subsequent conduct of parties can also supplement their real intent. In one case, the buyer took delivery of the goods without contesting the price specified by the seller. The court interpreted this conduct as acceptance of the seller's price *[CLOUT case No. 151]*. Thus, a party must take responsibility of its own conduct, even not directly reflected in the contract.

84. Art.5 of the Agreement clearly stated that: "no semen will be shipped until *all fees* have been paid". Thus, the sequence of performance is designated as such that seller can withhold shipment until all fees are paid. Once CLAIMANT found the payment not satisfying, it could always reject to send the shipment; nevertheless, CLAIMANT sent it after receiving the contractual price, which also demonstrated that the payment was completed.

85. Art.7(2) CISG expressly regards *Estoppel* as one general principle, naming that parties must be consistent and take due responsibility for what it said and did *[CLOUT case No. 93]*. CLAIMANT released the goods and cleared the tariff according to its contractual terms and free will, now it is estoppelled from turning against those contractual terms and denying its own conducts.

86. To prohibit abuse of rights and contradictory behavior (*venire contra factum proprium*), CLAIMANT cannot contradict itself by voluntarily releasing the goods without agreement being reached, and then seeks additional fees *[*Schwenzer */ Hachem]*.

87. In conclusion, both parties performed according to their free and real intent under the Agreement; thus, it would be against original contractual terms and good faith for CLAIMANT to allege for any additional reimbursement.

(2) Art.12 does not exclude tariff risks from CLAIMANT’s liability.

88. Now that it is well established that CLAIMANT bears the costs and risks involving

importation tariff. To relief the seller from certain radical changes of circumstances, the Agreement incorporated Art.12 as an exclusion-clause. However, Art.12 only provides a narrow scope for exception**(a)**. Tariff increase happened in this case, has not fallen with Art.12. For one, tariff increase is not a force majeure in the first part of Art.12**(b)**; for another, tariff increase is not a hardship in the second part of Art.12, neither**(c)**; meanwhile, when the term is ambiguous, the burden of proof shall be considered**(d)**.

(a) Art.12 of the Agreement is an exclusion-clause with a limited scope.

89. Art.12 of the Agreement serves as an exclusion-clause by stating that "seller shall not be responsible for […]" incorporating certain force majeure and hardship circumstances. We believe that Art.12 only has a limited and narrow exception scope.

90. Subjectively, both parties had agreed on that "the final version of Art.12, as a force majeure rule with a narrow-worded hardship clause."*[Resp.Ex.3]* Thus, limitation of the scope of such exclusion-clause is in accordance with parties' subjective intent. As for the incorporation of this term, although it came from the template provided by CLAIMANT, it had been thoroughly discussed and modified by both parties *[PO2 Para.4]*.

91. Objectively, when interpreting such an exclusion-clause, CISG gives certain test. According to CISG Advisory Council Opinion No.17, CISG governs the incorporation and interpretation of clauses providing for the limitation and exclusion of liability of the obligor for failure to perform a contract for the international sale of goods ("limitation and exclusion clauses").

92. When interpreting these provisions, exemption or limitation clauses are invalid when they are unreasonable. RESPONDENT is not trying to challenge the validity of Art.12, as there is *Favor contractus* principle in Art.7(2) CISG *[CLOUT case No. 248]*. Thus, the scope and function of such exclusion-clause must comply with the Reasonable and Fairness test set in CISG. In the meantime, the well-signed written-form contract itself certainly constitutes an important fact of a transaction. Numbers of commentators agreed that "a contractual writing will often receive special consideration under the CISG.41"*[Schlechtriem / Schwenzer]*.

93. To conclude, the last sentence and the formation of this written contract shall have

prevailing weight in determining parties' obligation; therefore, the scope of Art.12 must be limited within the wording itself.

(b) The tariff increase did not constitute a force majeure as the contract had been successfully performed.

94. Clearly, a force majeure must be some intervention so severe that renders the performance totally impossible *[Toepfer v. Cremer]*. As the CLAIMANT had overcome the burden of tariff increase and delivered the goods to my client, it's evident that tariff increase was not a force majeure and CLAIMANT could not invoke the force majeure rule in Art.12 to relieve itself.

(c) The tariff increase did not meet the descriptions of hardship in clause 12 of the contract either.

95. The second part of Art.12 of the Agreement is a narrow-worded hardship clause, which targets specifically at "additional health and safety service, or comparable unforeseen events making the contract more onerous."

96. Firstly, the standard of such a "comparable events" lies in another event happened in 2014, in which the seller's cost was raised by 40%. Consequently, a 30% increase in tariff here has not constituted a "comparable" obstacle. Moreover, the involved amount in that deal is as much as 8 million, which resulted in 3.2 million missed, but the loss in this semen case is actually 1.5 million. Moreover, "health and safety requirement" has such nature to regulate the custom in a scientific way; in contrast, the tariff increase is measured by the government to regulate the custom in a political way. They are two identically different types of boarding restrictions. Thus, the imposition tariff is not comparable to the standard.

97. Secondly, there is another requirement that the event must be "unforeseen" to certain extent. However, in this case, it is reported that *[PO2 Para.23]* the chief administrator Ms. Cecil Frankel, in Mediterraneo, who was appointed on 25 April 2017, was actually an ardent protectionist, especially in the field of agricultural products. And such tariff measure had been seen in the history of Mediterraneo once.

98. Thirdly, the situation encountered by CLAIMANT was by no means an excessively

onerous one. For one, CLAIMANT spent no time initiating the shipment and overcame the burden of tariff with ease. Only if the CLAIMANT must borrow money or cannot gather the fund to pay off, then it may constitute an onerous obstacle. For another, it was suggested by Digest under Art.79 CISG, that the increase in cost and fluctuation involving relevant documentary are usually not considered as an onerous obstacle *[CISG Digest]*.

99. In conclusion, the tariff increase in the case at hand did not fall within the scope designated in Art.12 of the Agreement. Thus, CLAIMANT could not invoke Art.12 to excuse itself from contractual liability discussed above, i.e., duties under DDP.

B. Moreover, CLAIMANT cannot request for adaption remedy without any valid adaptation-clause in the contract.

100. Even if CLAIMANT has excuse in tariff increase, there is no adaptation remedy provided because the contract does not have an adaptation-clause **(1)**; and without an explicit adaptation-clause, the tribunal shall take cautious to intervene parties' autonomy **(2).**

(1) No explicit or implicit adaptation clause had incorporated into the Agreement.

101. According to the Agreement *[Cl. Ex. 5]*, the parties did not include any adaptation clause into their final contract. Therefore, the Parties shall still be bound by the contract itself.

102. The evidence in negotiation is by no means a clearly mutual understanding that an adaptation clause is in place, as asserted by CLAIMANT *[Cl. Memo ¶94]*. The only reference here is CLAIMANT's witness statement, which shows that the RESPONDENT's previous negotiator Mr. Antley had said, "It should probably be the task of the arbitrators to adapt the contract." *[Cl. Ex. 8]*. Supposing the statement has authenticity, the reply of Mr. Antley here only constituted proposal, instead of any exact promise, "Mr. Antley promised that he would come back with a proposal the next morning.", which means the parties had not reach any promise or even plan of the specific amendment.

103. Meanwhile, the typical adaptation clause in a commercial contract has to offer the tribunal enough information and formula to decide how to adapt the price. Therefore, only a simply mention cannot qualify the formal agreement on adaptation.

104. In conclusion, the evidences at hand show there is no adaptation-clause incorporated into

the contract.

(2) In the absence of such clause, the Tribunal must be very cautious in intervening parties' real intent reflected in the contract terms.

105. In general, the prevailing position in international commercial arbitration is to strictly apply the principle of *pacta sunt servanda* and, consequently, arbitrators tend not to intervene on the contract in case of hardship, unless it provides for an adaptation clause, or, at least, the applicable law allows them to do so.

106. The main reason behind such strict approach is that parties in international commercial contracts are presumed to be skilled and competent professionals and thus, to have the capacity to include in the agreement all the necessary clauses. It follows that, in the lack of such provisions, parties are considered as having accepted the risk that during the contract life, its equilibrium might change and that such risk will be borne by the disadvantaged party. Here, the parties both are professional businessmen and have relative experience in international trading. As a result, the written-form contract can assumingly include both parties' intention on risk-exemption. Without a successful adaption clause, it's not appropriate for tribunal to interfere directly.

107. The only exception is the suspension or termination of the contract when the supervening circumstance is a force majeure event making the performance impossible. However, even towards such events the approach in international commercial arbitration is strict and, consequently, the relevant remedy is only granted in exceptional circumstances *[ICC case No.3267/1975]*.

108. As for the necessity of adaptation in a long-term contract alleged by CLAIMANT *[Cl Memo ¶¶100-101]*, merely three shipment finished in one year shall not be deemed as a "long-term" contract, let alone the fact that the increase of tariff only happened before the third shipment.

109. In conclusion, in absence of adaptation clause, the tribunal shall avoid rewriting the contract for parties and take caution in using adaptation.

III. CISG provides no legal ground for CLAIMANT's prayer for price adaptation, neither does UNIDROIT Principles.

110. The second submission of CLAIMANT is also groundless. The application of Art.79 CISG has been derogated because of parties' autonomy, even if applicable, Art.79 CISG doesn't govern hardship scenario **(A)**; due to the existing gap in the CISG, the UNIDROIT Principles as a gap-filler is the applicable law (**B**); while the threshold of hardship under the UNIDROIT Principles still cannot be met; **(C)**; even if hardship is triggered, the adaptation remedy is not available neither in CISG nor UNDROIT Principles. **(D)**.

A. Art.79 of CISG had been derogated according to parties' autonomy under Art.6 of CISG; even if applicable, Art.79 is not designated to govern situations like hardship.

111. According to Art.6 of CISG, parties' autonomy shall prevail any provision under CISG(**1**); even if the CISG is applicable, the word "impediment" under Art.79 CISG does not include hardship, and it is consistently reflected in the plain wording of Art.79 **(2).** Case laws and scholars also implied that hardship is not included in in Art. 79 **(3)**.

(1) Art.6 of CISG gives parties freedom to derogate from its provisions, including Art.79.

112. The rule in Art.6 of CISG empowered the parties to "derogate from or vary the effect of" provisions of the Convention, so did Art.79 CISG *[CISG Digest]*. Parties can alter the prerequisites under Art.79 CISG *[Peter Schlechtriem]*. Parties may derogate contractually from Art.79 CISG, provided that their agreement be valid *[Mercedeh Azeredo]*.

(2) Even if the CISG is applicable, the language of Art.79 of CISG did not expressly settle "hardship".

113. Art.79 mentioned nothing about "hardship" in its plain word. Instead, CISG chooses the word "impediment" to construct this article, and we insist that Art.79 is actually a force majeure rule, which is regulated by the UNIDROIT Principles Art. 7.1.7.

114. The illustration about "impediment" in CISG, is identically the same as Art.7.1.7 of the UNIDROIT Principles, compared with "non-performance by a party is excused if […] due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have

avoided or overcome its consequences." It's clear that the elements that constitute an "impediment" and a force majeure of the UNIDROIT Principles Art. 7.1.7 are nearly the same.

115. And the legal effect of impediment is totally exempt the obligor from further performance, which is exactly the same as force majeure. While the legal effect followed with "hardship" is fundamentally different *[UNIDROIT Principles Art.6.2.3]*, which required for a renegotiation without undue delay and a court-ordered adjustment, so it's hard to conclude that the Art.79 of CISG expressly settled "hardship".

116. In sum, both the component and effect of "impediment" are more closely related to force majeure than hardship, and the Art.79 of CISG did not expressly settle "hardship".

(3) Case law and scholars also imply that hardship is not included in Art.79 of CISG.

117. In court's practice, the tendency to burden the obligor with the risk of changing circumstances is prevailing. Numerous decisions have suggested that significant changing in cost or price as a result of "hardship" won't exempt an obligor from non-performance.

118. Also, scholars' opinions are in favor of an exclusion of hardship under CISG, as *"there is no place in the CISG for any relief on account of economic hardship" [Barry Nicholas]*.

B. The UNIDROIT Principles hereby as a gap-filler are applicable in the present case.

119. The derogated Art.79 of CISG does not expressly settle "hardship" by nature. Due to the existing gap in the CISG, the UNIDROIT Principles hereby as a gap-filler are applicable, for they are not only universal principles which can be used to fill up the gap in the CISG (**1**), but adopted by both Equatoriana and Mediterraneo as domestic general contract law (**2**).

(1) The UNIDROIT Principles are universal principle which can be used to gap-fill the CISG.

120. Hardship is an existing gap in the regulatory of the CISG and as per the Art.7 of CISG, questions concerning matters, as "hardship" herein, governed by this Convention which are not expressly settled in it, are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. *[CISG Digest Art.7]*.

121. As for the Convention's international character and promotion of uniformity of world trade, the UNIDROIT Principles are international principles should be used. According to one tribunal, “the UNIDROIT Principles are principles in the sense of Art.7(2) CISG" *[NETHERLANDS]*, which can prove that the UNIDROIT Principles hereby as a principle is a gap-filler in the present case.

(2) The UNIDROIT Principles herein are also domestic general contract law adopted by both Equatoriana and Mediterraneo.

122. As mentioned above, pursuant to Art.7 of CISG, matters the Convention does not govern at all, which some courts label "external gaps" *[SWITZERLAND],* are resolved on the basis of the domestic law applicable pursuant to the rules of private international law of the forum, *[CLOUT case No. 849]* or, where applicable, other uniform law conventions.

123. The UNIDROIT Principles are also domestic general contract law adopted by both Equatoriana and Mediterraneo *[Procedure Order No.1]* and therefore can act as a uniform law convention for both countries, proving that the UNIDROIT Principles are applicable in the present case.

C. The tariff increase did not satisfy the criteria of hardship under the UNIDROIT Principles.

124. The UNIDROIT principles set the definition of a hardship in Art. 6.2.2, that a hardship must be (i) the events occur or become known to the disadvantaged party after the conclusion of the contract; (ii) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (iii) the events are beyond the control of the disadvantaged party; and (iv) the risk of the events was not assumed by the disadvantaged party.

125. In this case, the equilibrium of the contract had not been upset by an extraordinary disproportionate burden, and thus the 30% tariff increase was not dramatical enough to be “more onerous” **(1)**; moreover, the consequences of the impediment were avoidable and surmountable **(2)**; CLAIMANT is possible to foresee such increase of tariff and has the obligation to foresee as well **(3)**

(1) The 30% tariff increase was not dramatical enough to be "more onerous" .

126. Although the requirement of an extraordinary and disproportionate burden *[CISG Digest 374 ¶5]* on CLAIMANT is not explicitly expressed in the wording of the Convention, it can be concluded in a manner consistent with the CISG and the general principles on which it is based, which is a basic approach to fill the internal gap, promoting its uniformity of interpretation *[Art. 7 CISG]*.

127. The general principles of the Convention are incorporated, inter alia, in the UNIDROIT Principles of International Commercial Contracts *[Hof van Cassatie]*.Accordance with the general principle of "good faith and fair dealing", there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished *[UNIDROIT principles Art. 6.2.2]*.

128. In the case, the newly imposed tariff retaliation made the shipment 30% more expensive *[Cl. Ex. 7]*. While circumstances in each particular case must primarily be considered, if "the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration." That monetary standard was taken out from the Official Comment on the 2004 and 2010 editions of the UNIDROIT Principles for the reason that "50%" may be too low and rather arbitrary *[UNIDROIT 2003 Study]*. For one, the tariff increase was imposed before the last shipment was performed, but before that, CLAIMANT was not influenced by the alteration. For another, 30% more of the cost is unlikely to amount to a fundamental change, since the threshold tends to be sat at a higher level.

129. Meanwhile, it is notable that a matter of economic hardship does not make the performance absolutely impossible, and thus performing the contract must involve an extraordinary and disproportionate burden under the circumstances *[Scafom International BV case]*. To sum up, in our case, the equilibrium of the contract had not been upset by an extraordinary and disproportionate burden.

(2) The consequences of the increased tariff were avoidable and surmountable for CLAIMANT.

130. Even if the tariff measure in this case is somewhat not consistent with both governments' history, there is early sign of such change, and CLAIMANT did have great chance to avoid such tariff increase. The formal announcement of tariff retaliation came on Dec.19th 2017; however, it is not until 16 January 2018 that it came into effect *[PO2. para25]*. There is sufficient time before the tariff fee actually rises. Thus, if CLAIMANT itself take minimum cautious to check out the tariff regulations.

131. As for the surmountable element, we believe that CLAIMANT could overcome such obstacle, and the "financial ruin" mentioned by CLAIMANT *[Cl Memo ¶113]* is irrelevant. It's reasonable for a merchant, an experienced seller, to bear a 30% fluctuation in the cost and even with a loss.

(3) It is possible for CLAIMANT to foresee such increase of tariff and has the obligation to foresee as well.

132. Although state intervention was beyond the control of CLAIMANT, the requirement of an impediment still failed to be met because the increased tariff could have been reasonably foreseen at the time of the conclusion of the contract. It is also admitted by CLAIMANT that previous restrictions imposed by other countries affecting imports from Equatoriana have resulted in retaliation measures once. *[Cl Memo ¶112]* The retaliation surprised most analysts as they went beyond the worst expectations *[Cl. Ex. 6, p. 15]*. The information above indicates that although the measure was rare and surprising, but it could have been taken into account because it happened in the history and analysts had their bad expectations, only that the figure of 30% was a little bit higher than they anticipated.

133. In conclusion, the 30% increase of the tariff is not serious enough to deem as "more onerous". Meanwhile, the consequence is both foreseeable and avoidable for CLAIMANT. Thus, the tariff increase did not satisfy the criteria under the UNIDROIT Principles, which means it cannot constitute a hardship at the first place.

D. The remedy of adaptation is not available neither in CISG, nor in the UNIDROIT Principles.

134. Even if a hardship actually occurred, there is no remedy as adaptation given by CISG **(1)**. The UNIDROIT Principles set the rule for the disadvantaged party to seek for an adaptation: the disadvantaged party must firstly renegotiate in time. Unfortunately, CLAIMANT had not duly renegotiation in good faith **(2)**. Moreover, CLAIMANT chose to deliver the third goods before the Parties reach any clear agreement, which can be deem as a waiver to the adaptation **(3)**.

(1) CISG Art.79 does not provide adaptation remedy.

135. CLAIMANT has wrongly claimed that there is underlying adaptation granted by CISG *[Cl Memo ¶¶119&120]*. The remedy provided by Art.79 CISG is exemption from non-performance of contractual obligations. The kind of remedies parties alleging hardship seek for, which are termination or adjustment of a contract, may be regarded in some legal systems as a validity-related issue, so that it may be argued that the adaptation issue is excluded from the scope of application of the CISG by virtue of Article 4*[J. Lookofsky]*. However, the Convention does not govern the validity of the contract.

136. Price adaptation of the contract was never a part of CISG in respect of its legislative history *[Peter Schlechtriem]*. Adaptation remedy is unlikely to be rendered when lacking a general rule of adjustment in hardship cases.

137. In conclusion, there is no legal ground in Art.79 CISG that CLAIMANT can harness to claim price adaptation, in concern with the tariff increase happened in this case.

(2) Failure to initiate renegotiation prevents CLAIMANT from seeking the remedy of adaptation in UNIDOROIT Principles.

138. According to the UNIDROIT Principles, the request for re-negotiation must be made as quickly as possible after the time at which hardship is alleged to have occurred. In our case, CLAIMANT did not request the renegotiation “without undue delay” and “indicate the grounds on which it is based”, in accordance with the requirement under UNIDROIT Principles *[UNIDROIT Art. 6.2.3 (1)]*.

139. Firstly, CLAIMANT had not actively requested for renegotiation, as quickly as possible

after realizing that a hardship occurred. The government of Equatoriana increased the tariff of "agricultural products" by 30%, which included the frozen racehorse semen, in 19 December 2017*[Cl. Ex. 6]*. As an experienced seller in international transactions, it is reasonable for CLAIMANT to update themselves with the current tariff regulations. On opposite, CLAIMANT was informed by the customs authorities that 30 per cent more tariffs on racehorse semen on 20 January 2018 *[Cl. Ex. 7]*, which is about a month later than the tariff has been increased. Moreover, it was one day before the agreed third shipment shall be delivered, which put the renegotiation in a very disadvantageous position.

140. Besides, CLAIMANT did not act in good faith in renegotiation and “threats to stop delivery”. In the first place, renegotiation has to be based on willingness and trust. Constructive and cooperative renegotiation cannot be forced upon the parties by coercion *[CH Beck, Munich]*. The wording given by CLAIMANT during the telephone, “we will have to find a solution in that regard before we can start the shipment” was anxious and indicated of potential threat *[Cl. Ex. 7]*. Thus, Mr. Shoemaker could not reject CLAIMANT’s request outright in afraid of the great loss by the delay shipment was understandable.

141. Thus, CLAIMANT had not duly renegotiated in good faith with RESPONDENT.

(3) CLAIMANT voluntarily delivered the third goods before the Parties reached any clear agreement, which made CLAIMANT loss the legal ground for adaptation.

142. It was admitted by Mr. Napravnik that he released the goods "even before an arrangement on the details had been reached."*[Cl.Ex.8]* Thus, it was understood by both parties that there was no new agreement on an adjustment of price or any other compensation. CLAIMANT was acting on its free will to release the goods and complete the performance.

143. In conclusion, RESPONDENT contended that the tariff increase does not constitute a hardship; moreover, the remedy of adaptation is not granted by any applicable law.

PRAYER FOR RELIEF

In light of the submissions above, counsel for RESPONDENT respectfully requests the Tribunal to decide that:

1. The tribunal lacks the jurisdiction to rule this case;
2. The evidence from another arbitration is inadmissible;
3. CLAIMANT is not entitled for a price adaptation of 1,250,000USD.

Hong Kong International Arbitration Center

20, January 2019

Respectfully submitted,