Sixteenth Annual

Willem C. Vis (East) International Commercial Arbitration Moot

2018-2019

MEMORANDUM FOR RESPONDENT

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

MOROKOTH CHHUON • ANH NGAN PHAN

HINAKO SERENE SAKAIRI • ANH HOANG TRAN

NAGOYA • JAPAN

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INDEX OF AUTHORITIES

Berger 2003

Berger Peter K.

Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators

36 Vanderbilt Journal of Transnational Law (2003), pp. 1347-1379

Cited in: ¶33

Berger 2015

Berger Peter K.

Private International Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, Third Edition

Kluwer Law International (2015)

Cited in: ¶¶58, 59

Bernadini 1998

Bernadini Piero

The Renegotiation of the Investment Contract

13(2) ICSID Review (1998), pp. 411-425

Cited in: ¶26

Bernadini 1999

Bernadini Piero

Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause

in: Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, pp. 197-201

Kluwer Law International (1999)

Cited in: ¶9

Black's Law Dictionary	Henry Campbell Black, M.A. *Black's Law Dictionary*, Fifth Edition West Publishing Company (1979) Cited in: ¶99
Blair/Vidak Gojković	Blair Cherie, Vidak Gojković Ema *WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence* 33(1) ICSID Review-Foreign Investment Law Journal (2018), pp. 235-259 Cited in: ¶¶48, 74, 76, 77, 78
Bond	Bond Stephen *Expert Report of Stephen Bond Esq* in: *Esso/BHP v. Plowman* 11(3) Arbitration International (1995), pp. 273-282 Cited in: ¶53
Bonell	Bonell Joachim M. *Article 6* in: Bianca Massimo C., Bonell Joachim M. (eds.) *Commentary on the International Sales Law* ¶*2.1* Giuffrè (1997) Cited in: ¶114

Born 2013

Born Gary B.

International Arbitration and Forum Selection Agreements: Drafting and Enforcing, Fourth Edition

Kluwer Law International (2013)

Cited in: ¶¶12, 20, 21, 37, 42

Born 2014

Born Gary B.

International Commercial Arbitration, Second Edition

Kluwer Law International (2014)

Cited in: ¶¶8, 9, 19, 21, 31, 48, 49, 54

Brown

Brown Charles G.

The Doctrine of Impossibility of Performance and the Foreseeability Test

6(3) Loyola University Chicago Law Journal (1975), pp. 575-593

Available at:

https://pdfs.semanticscholar.org/f1a8/8819c2ed346c803936e757322a6d913b7ebf.pdf

Cited in: ¶99

Bund

Bund Jennifer M.

Force majeure Clauses: Drafting Advice for the CISG Practitioner

17 Journal of Law and Commerce (1998), pp. 381-413

Available at:

https://www.cisg.law.pace.edu/cisg/biblio/bund.html

Cited in: ¶98

Carlsen — Carlsen Anja

Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law?

Pace Essay Submission (1998)

Available at:

https://www.cisg.law.pace.edu/cisg/biblio/carlsen.html

Cited in: ¶¶118, 119

Carmody — Carmody Matthew

Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration

19 International Trade and Business Law Review (2015), pp. 96-179

Cited in: ¶58

CISG Digest — United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2012 Edition

Cited in: ¶¶90, 95, 114, 115

Dicey/Morris/Collins — Dicey Albert V., Morris John H.C., Collins Lawrence A.

Dicey, Morris and Collins on the Conflict of Laws, Fifteenth Edition

Sweet & Maxwell (2012)

Cited in: ¶15, 18, 25, 26

Duhl	Duhl Gregory M. *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies* University of Pittsburgh Law Review (2009), pp 71-116 Cited in: ¶105
Enderlein/Maskow	Enderlein Fritz, Maskow Dietrich W. *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods* Oceania Publications (1992) Cited in: ¶121
Fenyves	Fenyves Attila Der Einflussgeänderter Verhältnisse auf Langzeitverträge: Gutachten Manz (1997) Cited in: ¶40
Flambouras 2001	Flambouras Dionysios *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law – A Comparative Analysis* 13 Pace International Law Review (2001), pp. 261-293 Cited in: ¶119

Flambouras 2002

Flambouras Dionysios

Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108 (2002)

Available at:

http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html

Cited in: ¶118

Frick

Frick Joachim

Arbitration and Complex International Contracts

Kluwer Law International (2001)

Cited in: ¶¶32, 34

Friedland

Friedland Paul D.

Arbitration Clauses for International Contracts, Second Edition

JurisNet, LLC (2007)

Cited in: ¶21

Fucci

Fucci Frederick R.

Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts

American Bar Association Section of International Law Spring Meeting (2006)

Cited in: ¶102

Gaillard/Savage — Gaillard Emmanuel, Savage John

Fouchard Gaillard Goldman on International Commercial Arbitration

Kluwer Law International (1999)

Cited in: ¶¶8, 40

Gélinas — Gélinas Paul A.

Arbitration Clauses: Achieving Effectiveness

in: Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, pp. 47-66

Kluwer Law International (1999)

Cited in: ¶42

Gomard/Rechnagel — Gomard Bernhard, Rechnagel Hardy

International Kobelov

Jurist-og Okonomforbundets Forlag (1990)

Cited in: ¶121

Goode — Goode Roy

The Role of the Lex Loci Arbitri in International Commercial Arbitration

17(1) Arbitration International (2001), pp. 19-40

Cited in: ¶¶20, 21, 26

Goodfriend — Goodfriend Douglas E.

After the Damage is Done: Risk of Loss Under the United Nations

Convention on Contracts for the International Sale of Goods

22 Columbia Journal of Transnational Law (1984)

Cited in: ¶115

Greenberg et al.

Greenberg Simon, Kee Christopher, Weeramantry Romesh

International Commercial Arbitration: An Asia-Pacific Perspective

Cambridge University Press (2011)

Cited in: ¶¶12, 15, 20, 21, 26, 42

Havalic/Boykin

Havalic Malik, Boykin James H.

Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration

12(5) Transnational Dispute Management (2015), pp. 1-38

Cited in: ¶¶67, 78

Hellner

Hellner Jan

The Vienna Convention and Standard Form Contracts

in: Sarcevic Petar Volken Paul, *International Sale of Goods: Dubrovnik lectures* (1986)

Cited in: ¶115

Honnold 1989

Honnold John O.

Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions that Led to the 1980 United Nations Convention with Introductions and Explanations or Documentary History, First Edition

Springer Netherlands (1989)

Cited at: ¶118

Honnold 1991 — Honnold John O.

Uniform Law for the International Sales under the 1980 United Nations Convention, Second Edition

Kluwer Law and Taxation Publishers (1991)

Cited in: ¶121

Honnold 1999 — Honnold John O.

Uniform Law for International Sales under the 1980 United Nations Convention, Third Edition

Kluwer Law International (1999)

Available at:

http://www.cisg.law.pace.edu/cisg/biblio/honnold.html

Cited in: ¶119

Honnold/Flechtner — Honnold John O., Flechtner Harry M.

Uniform law for international sales under the 1980 United Nations Convention, Fourth Edition

Kluwer Law International (2009)

Cited in: ¶¶114, 115

Horn — Horn Norbert

Adaptation and Renegotiation of Contracts in International Trade and Finance

Kluwer Law International (1985)

Cited in: ¶¶40, 44

Horvath — Horvath Gunther J.

Duty of the Tribunal to Render an Enforceable Award

18 (2) Journal of International Arbitration (2001) pp. 135-158

Cited in: ¶16

Huber — Huber Peter

Some introductory remarks on the CISG

6(6) Internationales Handelsrecht (2006), pp. 228–238

Available at:

https://www.cisg.law.pace.edu/cisg/biblio/huber-08.html

Cited in: ¶¶105, 109

Huber/Mullis — Huber Peter, Mullis Alastair

The CISG: A New Textbook for Students and Practitioners

European Law Publication (2007)

Cited in: ¶105

Hwang/Chung — Hwang Michael S.C., Chung Katie

Defining the Indefinable: Practical Problems of Confidentiality in Arbitration

26(5) Journal of International Arbitration (2009), pp. 609-645

Cited in: ¶61

ICC Report

International Chamber of Commerce

Final Report of the Commission on International Arbitration (1991)

Cited in: ¶37

Infantino

Infantino Marta

International Arbitral Awards' Reasons: Surveying the State-of-the-Art in Commercial and Investment International Dispute Settlements

5(1) Journal of International Dispute Settlement (2014), pp. 175-197

Cited in: ¶¶58, 59, 60

Jarrosson

Jarrosson Charles

La notion de l'arbitrage

Libr. générale de droit et de jurisprudence (1987)

Cited in: ¶40

Jenkins

Jenkins Sarah H.

Exemption for Non-performance: UCC, CISG, UNIDROIT Principles-A Comparative Assessment

72 Tulane Law Review (1998), pp. 2015-2030

Cited in: ¶119

Kaufmann-Kohler

Kaufmann-Kohler Gabrielle

Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture

23(3) Arbitration International (2007), pp. 357-378

Cited in: ¶60

Kirby

Kirby M.

Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts

24 Statute Law Review (2003), pp 95-111

Cited in: ¶109

Kröll

Kröll Stefan

Contractual Gap-Filling by Arbitration Tribunals

2 International Arbitration Law Review (1999)

Cited in: ¶40

Lando

Lando Ole

The CISG and the UNIDROIT Principles in a Global Commercial Code

Melanges Offertsa Marcel Fontaine (2003)

Cited in: ¶121

Lew

Lew Julian

The Law Applicable to the Form and Substance of the Arbitration Clause

in: Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention,* pp. 114-145

Kluwer International Law (1999)

Cited in: ¶9

Lew et al.

Lew Julian, Mistelis Loukas, Kröll Stefan

Comparative International Commercial Arbitration

Kluwer Law International (2003)

Cited in: ¶¶8, 12, 16, 18, 20, 26, 40

Lindström

Lindström Niklas

Changed Circumstances and Hardship in the International Sale of Goods

1 Nordic Journal of Commercial Law (2006)

Available at:

https://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html#46

Cited in: ¶121

Liu

Liu Chengwei

Remedies for Non-performance: Perspective from CISG, UNIDROIT Principles & PECL

Available at:

http://www.cisg.law.pace.edu/cisg/biblio/chengwei-79.html#*

Cited in: ¶¶96, 97

Lookofsky 2000

Lookofsky Joseph M.

The 1980 United Nations Convention on Contracts for the International Sale of Goods: Article 8 Interpretation of Statements by Parties

in: Herbots J., Blanpain R., *International Encyclopaedia of Laws-Contracts* (2000) Suppl. 29, pp. 1-192

Cited in: ¶90

Lookofsky 2008 — Lookofsky Joseph M.

Understanding the CISG - A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, Third Edition

Kluwer Law International (2008)

Cited in: ¶115

Lord — Lord Richard A.

Williston on Contracts, Fourth Edition

West Group (2009)

Cited in: ¶105

McAllister/Bloom — McAllister Bruce A., Bloom Amy

Evidence in Arbitration

34(1) Journal of Maritime Law and Commerce (2003), pp. 35-54

Cited in: ¶¶72, 73

Merkin — Merkin Robert M.

Arbitration Law

LLP (2004)

Cited in: ¶16

Miller — Miller David S.

Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine

88(8) Columbia Law Review (1988), pp. 1849-1872

Cited in: ¶¶105, 109

Motulsky

Motulsky Henri

Écrits, études et notes sur l'arbitrage

Dalloz (2010)

Cited in: ¶40

Nicholas

Nicholas Barry

Progress Report of the Working Group on the International Sale of Goods on the Work of its Fifth Session

in: *United Nations Commission on International Trade Law Yearbook* (1975)

Cited in: ¶119

O'Malley

O'Malley Nathan D.

Rules of Evidence in International Arbitration: An Annotated Guide, First Edition

Informa Law from Routledge (2012)

Cited in: ¶¶48, 55, 65, 57, 58, 72, 73, 80

Orsinger

Orsinger Richard R.

The Law of Interpreting Contracts

in: State Bar of Texas, *21st Annual Advanced Civil Appellate Practice Course* (2007)

Cited in: ¶¶96, 97, 98, 99

Paulsson 1983 — Paulsson Jan

Delocalisation of International Commercial Arbitration: When and Why It Matters

32(1) International & Comparative Law Quarterly (1983), pp. 52-61

Cited in: ¶20

Paulsson 1984 — Paulsson Jan

L'Adaption du Contrat

1 Review Arbitration (1984), pp. 249 -252

Cited in: ¶40

Pietrowski — Pietrowski Robert

Evidence in International Arbitration

22(3) Arbitration International (2006), pp. 373-410

Cited in: ¶48

Pilkov — Pilkov Konstantin

Evidence in International Arbitration: Criteria for Admission and Evaluation

80(2) Arbitration (2014), pp. 147-155

Cited in: ¶74

Platte — Platte Martin

Arbitrator's Duty to Render Enforceable Awards

20(3) Journal of International Arbitration (2003), pp. 307-314

Cited in: ¶16

Poudret/Besson

Poudret Jean-François, Besson Sébastien

Droit comparé de l'arbitrage international

Bruylant (2002)

Cited in: ¶38

Povrzenic

Povrzenic Nives

*Interpretation and Gap-filling Under the United Nations Convention on Contracts for the International Sale of Good*s (1998)

Available at:

https://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html

Cited in: ¶118

Pryles

Pryles Michael

Drafting Arbitration Agreements

15(5) Adelaide Law Review (1993), pp. 5-24

Cited in: ¶37

Queen Mary University 2018 Survey

School of International Arbitration at Queen Mary University of London, White & Case LLP

2018 International Arbitration Survey: The Evolution of International Arbitration (2018)

Cited in: ¶¶49, 53

Ramberg 2005

Ramberg Jan

To What Extent Do INCOTERMLS 2000 Vary Articles 67(2), 68 and 69?

25 Journal of Law and Commerce (2005) pp. 219-222

Cited in: ¶115

Ramberg 2008

Ramberg Jan

CISG and INCOTERMIS 2000 in Connection with International Commercial Transactions

in: Andersen Camilla B., Schroeter Ulrich G. (eds.) *Sharing International Commercial Law across National Boundaries* (2008)

Cited in: ¶115

Rau

Rau Alan S.

"Gap Filling" by Arbitrators

in: Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, pp. 935-1005

Kluwer Law International (2015)

Cited in: ¶38

Redfern/Hunter

Redfern Alan, Hunter Martin, Blackaby Nigel, Partasides Constantine

Law and Practice of International Commercial Arbitration, Fourth Edition

Sweet & Maxwell (2004)

Cited in: ¶¶9, 20, 21, 32, 42

Reisman/Freedman

Reisman Michael W., Freedman Eric

The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication

Faculty Scholarship Series (1982), pp. 737-753

Cited in: ¶¶72, 74

Rimke

Rimke Joern

Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts

in: *Pace Review of the Convention on Contracts for the International Sale of Goods*, pp. 197-243

Kluwer Law International (1999-2000)

Cited in: ¶¶118, 121

Rouche et al.

Rouche Jean, Pointon Gerald H., Delvolvé Jean-Louis

French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration, Second Edition

Kluwer Law International (2009)

Cited in: ¶38

Rowley

Rowley Keith A.

Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)

69 Mississippi Law Journal (1999), pp. 73-344

Cited in: ¶99

Sanders — Sanders Pieter

L'arbitragedans les transactions commerciales à long terme

1 Revue de l'Arbitrage (1975)

Cited in: ¶40

Schwenzer — Schwenzer Ingeborg

Sale of Goods (CISG), Second Edition

Oxford (2005)

Cited in: ¶105

Schwenzer/Hachem — Schwenzer Ingeborg, Hachem Pascal

Article 6

in: Schlechtriem Peter, Schwenzer Ingeborg, *Commentary on the UN Convention on the International Sale of Goods (CISG)*

Oxford University Press (2016)

Cited in: ¶¶114, 115

Slater — Slater Scott D.

Overcome by Hardship: The Inapplicability of The UNIDROIT Principles' Hardship Provisions to CISG

12 Florida Journal of International Law (1998), pp. 231-262

Available at:

https://cisgw3.law.pace.edu/cisg/biblio/slater.html

Cited in: ¶118

Smeureanu	Smeureanu Ileana M. *Confidentiality in International Commercial Arbitration* Kluwer Law International (2011) Cited in: ¶¶51, 53, 58
Sykes	Sykes Andrew *The Contra Proferentem Rule* 8(1) Vindobona Journal of International Commercial Law & Arbitration (2004), pp 65-79 Cited in: ¶109
Trakman	Trakman Leon E. *Confidentiality in International Commercial Arbitration* 18(1) Arbitration International (2002), pp. 1-18 Cited in: ¶49
UNCITRAL, Notes on Organization Arbitral Proceedings	United Nations Commission on International Trade Law *Notes on Organizing Arbitral Proceedings* (2016) Cited in: ¶49
UNCITRAL Arbitration Rules Report	Report of the Secretary General *Revised draft set of arbitration rules for optional use in ad hoc relating to international trade (UNCITRAL Arbitration Rules)* in: *Yearbook of the United Nations Commission on International Trade Law,* Volume VII, pp. 157-166

United Nations Publication (1976)

Cited in: ¶9

Vogenauer

Vogenauer Stefan

Commentary on the UNIDROIT Principles of International Commercial Contracts

Oxford University Press (2009)

Cited in: ¶106

Zeller

Zeller Bruno

Determining the Contractual Intent of Parties under the CISG and Common Law - A Comparative Analysis

4(4) European Journal of Law Reform (2002), pp. 629-643

Cited in: ¶95

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Cited as	Reference
AD HOC ARBITRATION	
UNCITRAL Award 1999	Ad Hoc Tribunal (UNCITRAL) Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara 04 May 1999 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2000, Volume XXV, pp. 11-432 Cited in: ¶40
Methanex Corporation v. USA	Ad Hoc Tribunal (UNCITRAL) Methanex Corporation v. United States of America 03 August 2015 Case No. 44 ILM 1345 Cited in: ¶¶68, 72, 73, 77
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Cysteine Case	CIETAC People's Republic of China Seller v. Germany Buyer 07 January 2000 Case No. CISG/2000/06

	Available at: http://cisgw3.law.pace.edu/cases/000107c1.html Cited in: ¶105

HAMBURG CHAMBER OF COMMERCE

Hamburg Final Award 1996	Hamburg Arbitration Proceedings Seller v. Buyer 21 March 1996 In: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1997, Volume XXII, pp. 35-50 Cited in: ¶15

INTERNATIONAL COURT OF ARBITRATION OF THE CHAMBER OF INDUSTRY AND COMMERCE OF THE RUSSIAN FEDERATION

Equipment Case	ICAC Case No. 123/1992 17 October 1995 Available at: http://cisgw3.law.pace.edu/cases/951017r1.html Cited in: ¶115
All-Union v. Joc Oil	ICAC Case No. 109/1980 All-Union Foreign Trade Association "Sojuznefteexport" v. Joc Oil Limited 09 July 1984 In: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1993,

Volume XVIII, Yearbook Commercial Arbitration, pp. 92-110

Cited in: ¶9

INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

ICC Case No. 1507	ICC Case No. 1507 in: S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1974-1985 (1990), pp. 215-216 Cited in: ¶10
ICC Case No. 1512	ICC Case No. 1512 of 1971 An Indian cement Company v. A Pakistani bank in: Pieter Sanders (ed.), Yearbook Commercial Arbitration 1980, Volume V, p. 170 Cited in: ¶40
ICC Case No. 2216	ICC Case No. 2216 Journal du droit international (Clunet) (1975) Cited in: ¶40
ICC Case No. 2404	ICC Case No. 2404 Journal du droit international (Clunet) (1976) Cited in: ¶40

ICC Case No. 2708	ICC Case No. 2708 Journal du droit international (Clunet) (1977) Cited in: ¶40
ICC Case No. 3099	ICC Case No. 3099 Algerian State enterprise, seller v. African State enterprise, buyer 30 May 1979 in: Pieter Sanders (ed.), Yearbook Commercial Arbitration 1982, Volume VII, pp. 87-95 Cited in: ¶40
ICC Case No. 3100	ICC Case No. 3100 Algerian State enterprise, seller v. African State enterprise, buyer 30 May 1979 in: Pieter Sanders (ed.), Yearbook Commercial Arbitration 1982, Volume VII, pp. 87-95 Cited in: ¶40
ICC Case No. 4367	ICC Case No. 4367 U.S. Supplier v. Indian Buyer 16 November 1984 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1986, Volume XI, pp. 134-139 Cited in: ¶25

ICC Case No. 5294

ICC Case No. 5294

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22 February 1988

in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1989, Volume XIV, pp. 137-145

Cited in: ¶25

ICC Case No. 5832

ICC Case No. 5832

Journal du droit international (Clunet) (1988)

Cited in: ¶10

ICC Case No. 6149

ICC Case No. 6149 of 1990

Seller v. Buyer

in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1995, Volume XX, pp. 41-57

Cited in: ¶19

ICC Case No. 6281

ICC Case No. 6281 of 1989

Available at: http://cisgw3.law.pace.edu/cases/896281i1.html#cd

Cited in: ¶40

ICC Case No. 6309

ICC Case No. 6309 of 1991

Journal du droit international (Clunet) (1991)

Cited in: ¶37

ICC Case No. 6719	ICC Case No. 6719 of 1991 Journal du droit international (Clunet) (1994) Cited in: ¶25
ICC Case No. 7544	ICC Case No. 7544 Journal du droit international (Clunet) (1999) Cited in: ¶33
ICC Case No. 8873	ICC Case No. 8873 July 1997 Available at: http://www.unilex.info/case.cfm?id=641 Cited in: ¶119
ICC Case No. 9887	ICC Case No. 9887 of 1999 Available at: http://cisgw3.law.pace.edu/cases/999887i1.html Cited in: ¶25
ICC Case No. 14046	ICC Case No. 14046 Company A (Italy) v. 6 Respondents (Italy) in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2010, Volume XXXV, pp. 241-271 Cited in: ¶19

Philippines v. Philippine International Air Terminals Co Inc	ICC Arbitration Philippines v. Philippine International Air Terminals Co Inc in: Greenberg et al., International Commercial Arbitration: An Asia-Pacific Perspective, pp. 162-163 Cited in: ¶26

INTERNATIONAL CENTRE FOR SETTLEMENT

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VIENNA INTERNATIONAL ARBITRAL CENTRE

VIAC Case No. SCH-5024 A	VIAC Case No. SCH-5024 A A v. B and C 05 August 2008 in: 2(2) International Journal of Arab Arbitration 2010, pp. 341-354 Cited in: ¶9

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AUSTRIA

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Ashburton v. Pape	Court of Appeal Lord Ashburton v. Pape 29 June 1913 Case No. [1913] 2 Ch. 469 Cited in: ¶73
Frozen Lobster Tails Case	Court of Appeal Canadian Seller v. U.S Buyer 12 April 2011 Case No. 200-09-007265-116 (110-17-000481-102) Available at: http://cisgw3.law.pace.edu/cases/110412c4.html Cited in: ¶90
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	Cited in: ¶77

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General Motors France v. Societé Champs	Supreme Court of France
	General Motors France v. Societé Champs de Mars automobile
	15 December 2010
	Available at: Review de l'Arb, pp. 436-38 (2011)
	Cited in: ¶38

GERMANY	
Automobile Case	Stuttgart Court of Appeal 31 March 2008 Case No. 6 U 220/07 Available at: http://cisgw3.law.pace.edu/cases/080331g1.html Cited in: ¶105
Hanseatisches Oberlandesgericht	Hanseatic Court of Appeal 30 September 1999 Case No. (2) Sch 04/99 Available at: Bremen (ed.), XXXI Yearbook Commercial Arbitration, p. 647(2006) Cited in: ¶68
ITALY	
Italy No. 113 Case	Court of Appeal of Genoa Della Sanara Kustvaart – Bevrachting & Overslagbedrijf BV v. Fallimento Cap. Govanni Coppola srl 03 February 1990 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1992, Volume XVII, Kluwer Law International, pp. 542-544 Cited in: ¶18

INTERNATIONAL COURT OF JUSTICE

USA v. Iran	International Court of Justice United States of America v. Iran (United States Diplomatic and Consular Staff in Tehran) 24 May 1980 Case No. 1980ICJ REP. 1 Cited in: ¶77

JAPAN

Japan No. 6 Case	High Court of Tokyo Japan Educational Corporation v. Kenneth J. Feld 30 May 1994 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1995, Volume XX, pp. 745 – 749 Cited in: ¶10

SINGAPORE

AAY v. AAZ	High Court AAY and others v. AAZ 15 June 2009 Case No. [2009] SGHC 142 Cited in: ¶54

BCY v. BCZ	High Court BCY v. BCZ 09 November 2016 Case No. [2016] SGHC 249 Cited in: ¶12
First Link Case	High Court First Link Investments Corp Ltd v. GT Payment Pte Ltd and others 19 June 2014 Case No. [2014] SGHCR 12 Cited in: ¶15
Garuda v. Birgen	Court of Appeal PT Garuda Indonesia v. Birgen Air 06 March 2002 Case No. [2002] 1 SLR 393 Cited in: ¶21
International Coal v. Kristle Trading	High Court International Coal Pte Ltd v. Kristle Trading Ltd and Another and Another Suit 22 October 2008 Case No. [2008] SGHC 182 Cited in: ¶54
Myanma Yaung Chi v. Win Win Nu	High Court Myanma Yaung Chi Oo Co. Ltd v. Win Win Nu and Another

06 June 2003

Case No. [2003] SGHC 124

Cited in: ¶54

SWITZERLAND

X. Ltd v. Y.GmbH, Z.GmbH	Swiss Federal Tribunal 07 January 2004 Case No. 4P.196/2003 in: 22 ASA Bulletin (2004), pp. 592-597 Cited in: ¶¶67,80
Fruit and Vegetables Case	Commercial Court 26 November 2008 Case No. HOR.2006.79 / AC / tv Available at: http://cisgw3.law.pace.edu/cases/081126s1.html Cited in: ¶90

THE NETHERLANDS

Owerri v. Dielle	Court of Appeal of the Hague Owerri Commercial Inc. v. Dielle 04 August 1993 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1994, Volume XIX, pp. 703-707 Cited in: ¶25
Petrasol BV v. Stolt Spur	District Court of Rotterdam Petrasol BV v. Stolt Spur Inc 28 September 1995 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1997, Volume XXII, pp. 762-765 Cited in: ¶15

UNITED KINGDOM

Abuja Int'l Hotels v. Meridien Sas	High Court (Commercial Court) Abuja International Hotels Ltd. v. Meridien Sas 26 January 2012 Case No. [2012] EWHC 87 (Comm) Cited in: ¶¶15, 25

AEGIS v. European Re	Privy Council Associated Electric and Gas Insurance Services Ltd.v. European Reinsurance Company of Zurich 29 January 2003 Case No. [2003] 1W.L. R 1041 Cited in: ¶¶54, 81
Ali Shipping Corp. v. Shipyard Trogir	Court of Appeal Ali Shipping Corporation v. Shipyard Trogir 19 December 1997 Case No. [1998] 1 Lloyd's Rep 643 Cited in: ¶¶54, 81
Arnold v. Britton	Supreme Court Arnold v. Britton & others 10 June 2015 Case No. [2015] UKSC 36 Cited in: ¶28
Arsanovia v. Cruz City	High Court (Commercial Court) Arsanovia Ltd and others v. Cruz City 1 Mauritius Holdings 20 December 2012 Case No. [2012] EWHC 3702 (Comm) Cited in: ¶12

Black Clawson Case	High Court Black Clawson International Limited v. Papierwerke Case No. [1981] 2 Lloyd's Rep 446 Cited in: ¶23
C v. D	Court of Appeal (Civil Division) C v. D 05 December 2007 Case No. A3/2007/1697 Cited in: ¶25
Channel Tunnel v. Balfour Beatty	High Court Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd & Others 17 February 1993 Case No. [1993] Adj.L.R. 01/21 Cited in: ¶25
Dolling-Baker v. Merret	Court of Appeal Dolling-Baker v. Merrett and Another 21 March 1990 Case No. [1990] 1 W.L.R. 1205 Cited in: ¶¶51, 54

Fiona Trust Case	Court of Appeal Fiona Trust & Holding Corporation & Ors v. Yuri Privalov. & Ors 24 January 2007 Case No. [2007] EWCA Civ. 20 Cited in: ¶9
Habas Sinai v. VSC Steel	High Court (Commercial Court) Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi as v. VSC Steel Company Ltd 19 December 2013 Case No. [2013] EWHC 4071 (Comm) Cited in: ¶25
Halpern v. Halpern	Court of Appeal Halpern v. Halpern 03 April 2007 Case No. [2007] EWCA Civ 291 Cited in: ¶15
Hassneh Insurance Co. of Israel v. Mew	High Court Hassneh Insurance Co of Israel and Others v. Stewart J. Mew 22 December 1992 Case No. [1993] 2 Lloyd's Rep 243 Cited in: ¶54

In Re Sigma Case	Supreme Court In Re Sigma Finance Corporation (in administrative receivership) and In Re the Solvency Act 1986 (Conjoined Appeals) 29 October 2009 Case No. [2009] UKSC 2 Cited in: ¶28
Insurance Co. v. Lloyd's Syndicate	High Court (Commercial Court) Insurance Company v. Lloyd's Syndicate 08 November 1994 Case No. [1995] 1 Lloyd's Rep. 272 Cited in: ¶¶61, 81
Naviera Amazonica Case	Court of Appeal Naviera Amazonica Peruana v. Compania Internacional de Seguros del Peru Case No. [1988] 1 Lloyd's Rep. 116 Cited in: ¶21
OK Petroleum v. Vitol Energy	High Court (Commercial Court) OK Petroleum AB v. Vitol Energy SA 05 May 1995 Cited in: ¶9

Rainy Sky Case	Supreme Court Rainy Sky S.A. and others v. Kookmin Bank 02 November 2011 Case No. [2011] UKSC 50 Cited in: ¶28
Shashoua & Ors v. Sharma	High Court (Commercial Court) Roger Shashoua & Others v. Mukesh Sharma 07 May 2009 Case No. [2009] EWHC 957 (Comm) Cited in: ¶25
Sonatrach Petroleum Case	Court of Appeal Sonatrach Petroleum Corporation (BVI) v. Ferrell International Ltd 04 October 2001 Case No. [2001] APP.L.R. 10/04 Cited in: ¶25
SulAmerica Case	Court of Appeal Sulamerica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors 16 May 2012 Case No. [2012] EWCA Civ. 638 Cited in: ¶¶12, 21, 23, 25

Union Marine. v. Cormoros	High Court (Commercial Court) Union Marine Classification Services LLC v. The Government of the Union of Comoros 06 March 2015 Case No. [2015] EWHC 508 (Comm) Cited in: ¶25
Union of India v. McDonnell Douglas	High Court (Commercial Court) Union of India v. McDonnell Douglas Case No. [1993] 2 Lloyd's Rep. 48 (Comm) Cited in: ¶21
Westacre Investment v. Jugoimport	Court of Appeal Westacre Investments Inc. v. Jugoimport-SDRP Holding Company Limited 12 May 1999 Case No. [1999] EWCA Civ 1401 Cited in: ¶9
Wood v. Capita	Supreme Court Wood v. Capita Insurance Services Limited 29 March 2017 Case No. [2017] UKSC 24 Cited in: ¶28

XL Insurance Ltd v. Owens Corning	High Court (Commercial Court) XL Insurance Ltd v. Owens Corning 28 July 1999 in: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2001, Volume XXVI, pp. 869-885 Cited in: ¶15

UNITED STATES

American Fidelity Fire Insurance Co. v. Hancock	Supreme Court of Mississippi American Fidelity Fire Insurance Co. v. Hancock 16 May 1966 Case No. 186 So. 2d 212 (Miss. 1966) Available at: https://casetext.com/case/american-fidelity-fire-insurance-co-v-hancock Cited in: ¶100
Atwood v. Newmont Gold Co, Inc.	U.S. Court of Appeals (Ninth Circuit) Atwood v. Newmont Gold Co, Inc. 18 Jan 1995 Case No. 93-15811 Available at: Westlaw Cited in: ¶108

Bergesen v. Lindhom	U.S. District Court (Connecticut) Bergesen v. Lindhom & Others 03 April 1991 Case No. Civ. No. B-90-610 (JAC) Cited in: ¶15
Circuit City Stores, Inc. v. Adams	U.S Court of Appeals (Ninth Circuit) Circuit City Stores, Inc. v. Adams 21 March 2001 Case No. 194 F.3d 1070 Available at: https://www.law.cornell.edu/supct/html/99-1379.ZO.html Cited in: ¶96
Excelsior Motor Mfg. & Supply Co. Et Al. v. Sound Equipment Inc	U.S. Court of Appeals (Seventh Circuit) Excelsior Motor Mfg. & Supply Co. et al. v. Sound Equipment Inc 15 November 1934 Case No. 73 F.2d 725 (1934) Available at: https://law.justia.com/cases/federal/appellate-courts/F2/73/725/1547140/ Cited in: ¶99

Forest Oil Corp v. Strata Energy Inc	U.S. Court of Appeals (Fifth Circuit) Forest Oil Corp v. Strata Energy Inc 26 April 1991 Case No. 88-6174 Cited in: ¶¶96, 97
Karaha Bodas v. Pertamina	U.S. Court of Appeals (Fifth Circuit) Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 23 March 2004 Case No. 03-20602 Cited in: ¶21
Lebanon Chem. v. PlantFood	U.S. Court of Appeals (Eight Circuit) Lebanon Chemical Corporation v. United Farmers Plant Food Inc Ag 16 June 1999 Case No. 98-3340 Cited in: ¶37
Lucy v. Zehmer	Virginia Supreme Court Lucy v. Zehmer 22 November 1954 Case No.196 Va. 493; 84 S.E.2d 51

Cited in: ¶90

Lummus Global v. Aguaytia Energy	U.S. District Court (Texas) Lummus Global Amazonas v. Aguaytia Energy Del Peru 14 June 2002 Case No. 256 F. Supp. 2d 594 Cited in: ¶68
Mastrobuono v. Shearson	U.S. Supreme Court Mastrobuono et al. v. Shearson Lehman Hutton, Inc., et al. 06 March 1995 Case No. 94-18 Cited in: ¶9
MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino	U.S. Court of Appeals (Eleventh Circuit) MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino 29 June 1998 Cases No. 97-4250 Available at: https://cisgw3.law.pace.edu/cases/980629u1.html Cited in: ¶95
Pennzoil Exploration v. Ramco Energy	U.S. Court of Appeals (Fifth Circuit) Pennzoil Exploration and Production Company v. Ramco Energy

	Limited 13 May 1998 Case No. 96-20497 Cited in: ¶37
Reddam v. KPMG	U.S. Court of Appeals (Ninth Circuit) Reddam v. KPMG LLP 10 August 2006 Case No. 457 F.3d 1054 Cited in: ¶37
Sellers v. Bles	Supreme Court of Virginia Sellers v. Bles April 23, 1956 Case No. 198 Va. 49 (1956) Available at: https://law.justia.com/cases/virginia/supreme-court/1956/4445-1.html Cited in: ¶99
Terra Intern Inc. v. Mississippi Chemical Corp	U.S. Court of Appeals (Eighth Circuit) Terra Intern Inc. v. Mississippi Chemical Corp 11 July 1997 Case No. 96-2140

Cited in: ¶105

Treibacher Industrie, A.G. v. Allegheny Technologies, Inc	U.S. Court of Appeals (Eleventh Circuit) Treibacher Industrie, A.G. v. Allegheny Technologies, Inc 12 September 2006 Case No. 05-13995 Available at: http://cisgw3.law.pace.edu/cases/060912u1.html Cited in: ¶90
Vetco Sales v. Vinar	U.S. Court of Appeals (Fifth Circuit) Vetco Sales, Inc. Vance Vinar, SR., Barbara v. Vinar, Cable Connection & Supply Co. Inc 28 January 2004 Case No. 03-10527 Cited in: ¶37

INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
arbiter non substituit	arbitrators cannot make contracts
Art(s).	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods
DDP	Delivered Duty Paid (INCOTERM)
e.g.	*exempli gratia (for example)*
ed(s).	Editor(s)
et al.	*et alii* (and others)
ex post facto	in retrospect
ex turpi cause non oritur actio	no action can be founded on illegal or immoral conduct
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Hong Kong International Arbitration Centre Administered Rules (2018)
i.e.	*id est* (that is)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)

ibid	*ibidem* (in the same place)
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
in casu	in the present case
infra	below
LCIA Rules	London Court of International Arbitration Rules (2014)
Letter by Fasttrack	Ms. Fasttrack's letter of 3 October 2018
Letter by Langweiler	Mr. Langweiler's letter of 2 October 2018
lex arbitri	law of the arbitration
lex contractus	law of the contract
lex loci arbitri	law of the seat of arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
No.	Number(s)
NoA	CLAIMANT's Notice of Arbitration

p./pp.	page/pages
PO1	Procedural Order No 1 of 05 October 2018
PO2	Procedural Order No 2 of 02 November 2018
pro futuro	in the future
RNoA	RESPONDENT's Answer to the Notice of Arbitration
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
US$	United States Dollars
v.	*versus* (against)

ACTORS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"; together the "**PARTIES**"). RESPONDENT, famous for its broodmare lines, is a company incorporated in Equatoriana. CLAIMANT is a renowned stud farm company based in Mediterraneo.

STATEMENT OF FACTS

21 Mar 2017 RESPONDENT contacted CLAIMANT inquiring about Nijinsky III's frozen semen for RESPONDENT's new breeding program after a ban on artificial insemination for racehorses had been temporarily lifted in Equatoriana.

24 Mar 2017 CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen on the basis that the Frozen Semen Sales Agreement ("**the Agreement**") be in compliance with the Mediterraneo Guidelines for Semen Production and Quality Standards (the "Guidelines").

28 Mar 2017 RESPONDENT objected to the forum selection clause in the Guidelines, wherein Mediterranean law applies, and Mediterranean courts have jurisdiction. Respectively, RESPONDENT asked for jurisdiction of Equatorianian courts to apply and requested INCOTERM DDP delivery.

31 Mar 2017 CLAIMANT agreed to the INCOTERM DDP and proposed that a hardship clause be included in the Agreement. CLAIMANT additionally suggested arbitration in Mediterraneo as the dispute resolution mechanism.

10 Apr 2017 RESPONDENT proposed an arbitration clause ("**Arbitration Agreement**") based on the Model Clause of the Hong Kong International Arbitration Centre Rules ("**HKIAC Rules**"). RESPONDENT explicitly stated that the seat of arbitration be in Equatoriana, and the governing law be the law of Equatoriana. RESPONDENT modified the Model Clause by removing any reference that could be interpreted as empowering contract adaptation.

11 Apr 2017 CLAIMANT proposed to change the seat of arbitration to Danubia but was silent on the applicable law to the Arbitration Agreement.

12 Apr 2017 The two main negotiators of the PARTIES were involved in a car accident that disrupted all further negotiations.

06 May 2017 Two lawyers who were uninvolved in the preliminary negotiations finalized the Agreement. The hardship clause was narrowed down from the suggested

ICC-hardship clause as the PARTIES decided to regulate specific risks in the Agreement. The Agreement contains a clause stating that "*the Sales Agreement shall be governed by the law of Mediterraneo*" including the CISG but provides for arbitration in Danubia under HKIAC Rules. The Arbitration Agreement also does not empower the arbitral tribunal ("**the Tribunal**") to adapt the Agreement.

20 Jan 2018 Ms. Napravnik, CLAIMANT's negotiator, contacted Mr. Shoemaker, the person in charge of the racehorse breeding program of RESPONDENT, to inquire about the price adjustment after the Equatorianian government imposed 30% tariffs on animal products exported to Equatoriana.

21 Jan 2018 Mr. Shoemaker contacted Ms. Napravnik to inform her that as he is in no position to authorize a price adaptation, confirmation from his superiors is necessary. Additionally, he made clear that according to his understanding, the Contract requires CLAIMANT to cover risks associated with DDP.

23 Jan 2018 CLAIMANT sent the last shipment of 50 doses before any agreement on a new price has been reached.

31 Jul 2018 CLAIMANT initiated arbitration proceedings against RESPONDENT to claim for the increased price, including the 30% increase in tariffs.

02 Oct 2018 CLAIMANT asked that a partial interim award and other submissions from a separate arbitration be submitted as evidence.

03 Oct 2018 RESPONDENT objected to CLAIMANT's submission of said evidence because it would breach the duty of confidentiality. RESPONDENT later discovered that CLAIMANT is trying to acquire the necessary documents by paying US $1,000 to a horseracing intelligence company with dubious sources.

INTRODUCTION

1 With the intention to become a leading racehorse breeder, RESPONDENT entered into an agreement on the sale of horse semen with CLAIMANT. At the heart of their agreement was a reciprocal commitment to maintain mutual benefits. PARTIES each made compromises; CLAIMANT assumed the liability associated with DDP and RESPONDENT paid a premium on the price of each dose. However, when experiencing a loss of profit resulting from its own assumed risks, CLAIMANT asked for a price adaptation. CLAIMANT further tried to prejudice the Tribunal against RESPONDENT by submitting evidence that is confidential and illegally obtained.

2 RESPONDENT respectfully requests the Tribunal to consider the scope of power pursuant to the Arbitration Agreement. The correct interpretation of the Arbitration Agreement as per the governing law, Danubian law, does not contain any express authorization of adaptation. Moreover, the Tribunal cannot interpret beyond what is literally provided for in the Arbitration Agreement, which clearly excludes adaptation. In the interest of issuing a valid and enforceable award, the Tribunal should respect the intention of the PARTIES and refrain from adapting the price in the Agreement (**ISSUE 1**).

3 CLAIMANT also attempts to submit confidential evidence from other arbitration proceedings to which CLAIMANT is not a party. Such evidence should not be admitted preserving the principle of confidentiality, one of the cornerstones of international commercial arbitration ("**ICA**"). Moreover, CLAIMANT is willing to go to great lengths, even by illegal means, to obtain the irrelevant, immaterial evidence. Therefore, the Tribunal should not admit the evidence from the other arbitration proceedings as submitted by CLAIMANT (**ISSUE 2**).

4 Furthermore, RESPONDENT has no duty to remunerate CLAIMANT for the 30% increase in tariffs. Contrary to its assertion, CLAIMANT is not entitled to the requested US$ 1,250,000 under the Agreement and the CISG. First, CLAIMANT undertook the risks associated with tariffs as part of its acceptance to DDP delivery under Clause 12 of the Agreement. Second, hardship is not allowed under the CISG. Even if the Tribunal were to entertain the applicability of hardship, CLAIMANT's circumstances simply do not satisfy the hardship requirements. CLAIMANT also lacks support under the UNIDROIT Principles, even when the principles are used as a supplement to gaps in the CISG or to Mediterranean domestic law. Hence, CLAIMANT's request for US$ 1,250,000 should not be granted (**ISSUE 3).**

ARGUMENTS

ISSUE 1. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE AGREEMENT

5 RESPONDENT submits that the law governing the Arbitration Agreement is Danubian law (I). Accordingly, the Tribunal does not have the power to adapt the Agreement (**II**).

6 *In casu*, the PARTIES are bound by the Frozen Semen Sales Agreement ("**the Agreement**") signed on 06 May 2017. Clause 14 provides that "*This Sales Agreement is governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (CISG)*". The Mediterranean Contract Law is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**"). Additionally, Clause 15 ("**Arbitration Agreement**") provides for arbitration administered under the Hong Kong International Arbitration Centre Administered Arbitration Rules ("**HKIAC Rules**"), with its seat in Danubia, a country that has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments ("**Model Law**") [*PO1, p. 52, ¶4*].

I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

7 Contrary to what CLAIMANT contends [*Memo C., pp. 5-7, ¶5-11*], RESPONDENT submits that due to the procedural nature of the Arbitration Agreement, its governing law is not the same as that of the substantive part ("**Sales Agreement**") but of the seat (**A**). Alternatively, Danubian law, which was impliedly chosen by the PARTIES, shall be applied to the Arbitration Agreement (**B**). The closest connection test also provides for the applicability of Danubian law to the Arbitration Agreement (**C**). Ultimately, based on the facts of the case, Mediterranean law only applies to the "*Sales*" part of the Agreement, excluding the Arbitration Agreement (**D**).

A. Due to the Procedural Nature of the Arbitration Agreement, Its Governing Law Shall Be Danubian Law

8 CLAIMANT argues that Mediterranean law governs all provisions of the Agreement, including both the Sales Agreement and the Arbitration Agreement [*Memo C., pp. 5-6, ¶¶5-6*]. However, the principle of separability codified in Art. 19 of the HKIAC Rules serves as the starting point to determine the applicable law of the Arbitration Agreement [*Born 2014, p. 475; Redfern/Hunter, p. 159, ¶3-15*]. One of many possible consequences of separability is that the Arbitration Agreement may be governed by a law different from that of the substantive part [*Born 2014, p. 350; Lew et al., p. 107, ¶6-23; Gaillard/Savage, p. 212, ¶¶412-414*].

9 Furthermore, due to the procedural nature of the Arbitration Agreement, it must be governed by the seat law *i.e.* Danubian law. The separability presumption rests partly on the very premise that a commercial contract and an arbitration agreement are different in nature; the former is substantive, and the latter is procedural [*Redfern/Hunter, p. 163, ¶3-61; Born 2014, p. 360; UNCITRAL Arbitration Rules Report*]. Similarly, the Supreme Court of the USA in the case *Mastrobuono v. Shearson Lehman* distinguished "*the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration, neither provisions intrude upon each other.*" An arbitration agreement is characterized as "procedural" because it is ancillary to the main contract, for its purpose is only to provide machinery to resolve disputes [*Lew, p. 118; Bernadini 1999, p. 200; Born 2014, p. 396; All-Union v. Joc Oil; VIAC Case No. SGH-5024 A; Fiona Trust Case; Westacre Investment v. Jugoimport; OK Petroleum v. Vitol Energy*]. Therefore, the Arbitration Agreement cannot be treated similarly to other substantive rights in the Agreement [*Memo C., p. 6, ¶5*].

10 Consequently, as a matter of principle, arbitral awards and court cases have demonstrated that the seat law is directly applicable to arbitration agreements due to their procedural nature [*ICC Case No. 1507; ICC Case No. 5832; Japan No. 6 Case;* among others]. Such a rigorous approach is embraced by many arbitral institutional rules: absent a choice made by the parties to an arbitration agreement, the seat law automatically applies [*Resolutions by Institut De Droit International; Swedish Arbitration Act;* among others]. Art. 16.4 of the London Court of International Arbitration Rules ("**LCIA Rules**") best expresses this position: "*The law applicable to the Arbitration Agreement [...] the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law…*" [*emphasis added*].

11 *In casu*, as there is no express choice of governing law, due to its procedural nature, the Arbitration Agreement must be governed by Danubian law.

B. Danubian Law Applies to the Arbitration Agreement as this Was the Implied Intention of the PARTIES

12 Even if the abovesaid approach based on the mandatory procedural nature of the Arbitration Agreement is not applicable, RESPONDENT submits that the implied choice of the PARTIES in favour of Danubian law shall be respected. Scholars and case law strongly advocate such an approach that gives effect to parties [*Born 2013, p. 434; SulAmerica Case; Arsanovia v. Cruz City; BCY v. BCZ*] because party autonomy is the cornerstone of ICA [*Lew et al., p. 124, ¶¶6-24; Greenberg, p. 160; ¶4.51*]. This is particularly the case when available choice-of-law rules in all

relevant countries *e.g.* the Hague Principles do not provide any guidance to choosing the applicable law of the Arbitration Agreement [*PO2, p. 61, ¶43; Hague Principles Art. 1(3)*].

13 RESPONDENT submits that the PARTIES implicitly chose Danubian law to ensure the enforceability of the award (***1***). Moreover, PARTIES might have wanted to submit all aspects of the Arbitration Agreement to the same law that governs its formal validity (***2***) and the arbitral proceedings (***3***). Furthermore, the PARTIES are not by any means precluded from choosing Danubian law (***4***).

14 CLAIMANT argued that the choice of Mediterranean law in the Sales Agreement means an implied choice of the law for the Arbitration Agreement because the PARTIES may have wanted their entire legal relationship to be under the same law [*Memo C., p. 6, ¶13*]. However, the Sales Agreement and the Arbitration Agreement are distinct because "*the latter happens after the former has broken down irretrievably*" [*First Link Case*]. *In casu*, the duty to arbitrate only emerged after the commercial relationship between the PARTIES suffered from irreconcilable differences.

15 RESPONDENT respectfully directs the Tribunal's attention to the *First Link Case* wherein the Judge similarly had to choose between the law of the merits and the seat law for the arbitration agreement. The Judge correctly observed that the natural starting point should be the seat law. This is because when the parties descend into the realm of dispute resolution, the "*desire for neutrality comes to the fore, thus primacy should be given to the neutral law selected to govern the proceedings of dispute resolution*" and "*the mere fact of an express choice of substantive law in the main contract, would not in and of itself be enough to displace the parties' intention to have the seat law be the proper law of the arbitration agreement".* Therefore, a choice of the seat in Danubia is a strong pointer to the law of the Arbitration Agreement [*Dicey/Morris/Collins, ¶16-020; Greenberg et al., p. 160, ¶4-54; Hamburg Final Award 1996; Bergesen v. Lindhom; Petrasol BV v. Stolt Spur Inc; XL Insurance Ltd v. Owens Corning; Halpern v. Halpern; Abuja Int'l Hotels v. Meridien Sas*].

1. PARTIES intended to ensure enforceability of the award by applying Danubian law

16 Danubian law shall be applied to the Arbitration Agreement instead of Mediterranean law to accommodate for the PARTIES' wish to have a valid and enforceable award. The PARTIES, as rational business people, have the legitimate expectation of an enforceable arbitral award as they went through the trouble of the arbitration proceedings, not counting the *ex post facto* view of the losing party [*First Link Case*]. In line with party autonomy, the Tribunal bears a duty to render an enforceable award [*Lew et al., p. 125, ¶6-70; Merkin, ¶10.53; Horvath, p. 137; Platte, p. 310*].

17 CLAIMANT argues that Mediterranean law applies to the Arbitration Agreement, whereby the Tribunal is likely to interpret the Arbitration Agreement broadly then assume jurisdiction to adapt the Agreement [*Memo C., pp. 8-20, ¶1-47*]. However, as per the "express authorization requirement" in Danubian procedural law, the Tribunal cannot adapt it without specifically stipulating so in the Agreement [*infra* ¶¶*32-34*]. Therefore, applying Mediterranean law instead of Danubian law to the Arbitration Agreement will highly likely result in adaptation, which contradicts the arbitral procedure of Danubia *i.e.* the arbitral seat. Under Art. V.1(d) of the Convention on the Recognition and Enforcement of Arbitral Awards ("**NYC**"), the award will bear high risks of unenforceability at the enforcement country *i.e.* Equatoriana.

2. The PARTIES intended to submit every aspect of the arbitration to Danubian law which governs the validity of the Arbitration Agreement

18 The seat law *i.e.* Danubian law governs the formal validity of the Arbitration Agreement. This is because under Art. V.1(a) of the NYC and Art. 34(2)(i) of Danubian Arbitration Law (verbatim adoption of the Model Law), the arbitral award may be set aside, refused recognition and enforcement, if the arbitration agreement is invalid under the seat law. Even though these may seem like valid concerns only at the annulment/enforcement stage, the same consideration should be applied even at the pre-award stage to ensure predictability [*Born, p. 497; Lew et al., p. 126, ¶6-72; Dicey/Morris/Collins, ¶4-034; Italy No. 113 Case*].

19 The PARTIES would benefit from having the seat law *i.e.* Danubian law as the proper law of the Arbitration Agreement, as it raises uniformity across all aspects of the Arbitration Agreement including its formal validity [*Born 2014, p. 1597*]. Hence, there have been many cases where the seat law was directly applied because it governs the validity of the arbitration agreement [*ICC Case No. 6149, ICC Case No. 14046*; among others].

3. PARTIES Intended to Submit the Entirety of The Arbitration Agreement to Danubian Law Which Governs the Arbitral Proceedings

20 CLAIMANT argues that the PARTIES "*delocalized*" the arbitration by seating the arbitration in a neutral country and choosing HKIAC Rules as procedural rules [*Memo C., pp. 8-9, ¶23-25*]. However, specific matters that are not governed by HKIAC Rules will be directly governed by the *lex loci arbitri i.e.* Danubian law, *e.g.* court assistance during the arbitration, objective arbitrability [*Born 2013, pp 68-69*]. HKIAC Rules prevails over the *lex loci arbitri* in case of conflicts, except mandatory provisions [*Lew et al., p. 29, ¶2-44; Greenberg et al., p. 65, ¶2.34*]. The "*delocalization*" supporters argue for a limited role of the seat law which only applies at the final

stage of award enforcement [*Paulsson 1983, p. 57*]. However, the seat law is necessary to confer its nationality on the arbitral award to benefit from any international treaties to which the seat country is a party *e.g.* the NYC [*Redfern/Hunter, p. 91, ¶2-27; Goode, p. 37*].

21 The PARTIES should be presumed to have chosen Danubian law for the supervision and conduct of the arbitration the moment they chose Danubia as the seat [*Born 2014, p. 1533; Friedland, p. 90; Sulamerica Case; Union of India v. McDonnell Douglas; Garuda v. Birgen*]. Authors like Redfern and Hunter even went as far as saying that the seat law applies regardless of any choice by the parties [*Redfern/Hunter, pp. 84-87; Goode, pp. 29-30*]. Admittedly, the PARTIES are free to choose a different procedural law from that of the seat, only if they established so in very clear language in the Agreement [*Born 2013, p. 88; Greenberg et al., p. 61, ¶¶2-22*; *Karaha Bodas v. Pertamina*]. Otherwise, it makes no sense to create complexities by arbitrating in one country and applying the procedural law of another [*Redfern/Hunter, p. 87, ¶¶2-20; Union of India v. McDonnell Douglas; Naviera Amazonica Case*]. Even if the PARTIES really chose a foreign procedural law, it still does not supplant but rather operates within the arbitration legislation of the seat [*Born 2014, p. 1534; Goode, p. 30*].

22 Indeed, Ms. Napravnik, CLAIMANT's lead negotiator, clearly knew and was prepared for the arbitration to be governed by Danubian Arbitration Law because she was aware it was a largely verbatim adoption of the Model Law, thus proceeded to choose Danubia as the forum [*PO2, p. 57, ¶14*]. In the present Agreement, there is no indicator of another procedural law other than that of Danubia [*Exh. C5, pp. 13-14*]. Also, in the length of negotiations, neither of the PARTIES ever expressed any intention to choose any set of procedural law other than that of the seat.

23 Since the PARTIES clearly accepted that Danubian law would apply the arbitration proceedings, it must be naturally inferred that they intended for Danubian law to govern all aspects of the Arbitration Agreement [*Sulamerica Case; Black Clawson Case; XL Insurance v Owens*].

4. Nothing precludes the PARTIES from choosing Danubian law

24 CLAIMANT states that it needed consent from the Creditors' Committee if the Arbitration Agreement were to be subject to a foreign law [*Memo C., p. 8, ¶19*]. However, the Creditors' Committee declared there was no need to seek approval from them as long as the seat of arbitration was in a neutral country with a functioning judiciary system [*PO2, pp. 56-57, ¶14*]. The Sales Agreement was the only thing subject to their assent [*Exh. R2, p. 34*]. Therefore, because the Creditors' Committee never objected to Danubian law as the law governing the Arbitration Agreement, CLAIMANT could freely choose to opt for arbitration under Danubian law.

C. Danubian Law Shall Be Applied as It Has the Closest and Most Real Connection to the Arbitration Agreement

25 The alternative to an express/implied intention by the PARTIES is the "*closest and most real connection*" test [*Dicey/Morris/Collins, p. 829; SulAmerica Case; Sonatrach Petroleum Case*]. RESPONDENT respectfully submits that Danubian law, bearing the relationship with the arbitration, has the closest connection with the Arbitration Agreement despite CLAIMANT's baseless claim on "*delocalization*" [*supra* ¶¶*20-23*]. It has been decided almost unanimously that the seat law bears the closest connection with the arbitration agreement [*ICC Case No. 5294; ICC Case No. 4367; ICC Case No. 6719; ICC Case No. 9887; Owerri v. Dielle; SulAmerica Case; C v. D; Abuja Int'l Hotels Ltd v. Meridien SAS; Channel Tunnel v. Balfour Beatty; Shashoua & Ors v. Sharma; Union Marine. v Cormoros; Habas Sinai v. VSC Steel*].

26 CLAIMANT attempted to mention many substantive factors to prove Mediterranean law has the closest connection with the Arbitration Agreement [*Memo C., pp. 8-9,* ¶¶*21-22*]. However, all of the factors raised by CLAIMANT are related to the commercial rights & obligations of the Sales Agreement, the purpose of which is completely different from that of the Arbitration Agreement [*supra* ¶*9*]. On the other hand, because the obligation to arbitrate is performed exclusively in Danubia; the Arbitration Agreement's existence might be tested in setting aside procedures also in Danubia, the law having the closest connection with the Arbitration Agreement remains Danubian law [*Greenberg et al., p. 161,* ¶*4-55; Lew et al., p. 122,* ¶*6-62; Dicey/Morris/Collins, p. 598; Bernadini 1998, p. 201; Goode, p. 33*]. Likewise, in the award rendered in the case *Philippines v. Philippine International Air Terminals Co Inc*, the tribunal chose the seat law *i.e.* Singaporean law for the arbitration agreement, despite all other substantive factors belonging to the Philippines.

D. Based on the Facts of the Case, Mediterranean Law Only Applies to the Sales Agreement

27 Unlike what CLAIMANT argues [*Memo C., p. 6,* ¶*6*], the PARTIES never expressly intended for Mediterranean law to govern all terms in the Agreement. On the contrary, the Agreement itself (***1***) and communications between the PARTIES (***2***) indicate that the term "*Sales Agreement*" in Clause 14 can only be construed to mean the "*Sales*" part of the Agreement. Thus, from the wording of Clause 14, "*This Sales Agreement shall be governed by the law of Mediterraneo...*" [*Exh. C5, p. 14*], Mediterranean law applies only to the substantive part, not the Arbitration Agreement.

1. When Read in Conjunction with Other Terms in the Agreement, the Term "Sales Agreement" Denotes Only the "Sales" Part

28 Contractual interpretation is a "*unitary exercise*" whereby contractual terms are to be interpreted in light of their "*business common sense*" [*Wood v. Capita*]. Accordingly, where there are rival meanings to the same term, each suggested interpretation should be checked against the provisions of the same contract [*UNIDROIT Principles, Art. 4.4*; *Rainy Sky Case; In Re Sigma Case; Arnold v. Britton*].

29 The term "*Sales Agreement*" in general may mean either the entire Agreement, or only the "*Sales*" part. However, the term "*Sales Agreement*" here only refers to the "*Sales*" part. There is very consistent use of the term "*Agreement*" in Clause 2, Clause 5, and especially at the beginning: "*This Agreement is made this sixth day of May 2017...*" and at the end of the Agreement: "T*he parties hereto understand and agree to abide by the terms and conditions as set forth in this Agreement*" [*Exh. C5, pp. 13-14*]. Since the term "*Agreement*" appears after and covers every other Clause of the Agreement, it must mean the whole Agreement encompassing all terms. Therefore, the different term "*Sales Agreement*", only used in Clause 14, must be construed to bear a different meaning, which is the "*Sales*" part *i.e.* the substantive part.

2. The PARTIES Intended to Use the Term "Sales Agreement" to Denote Only the "Sales" Part

30 The aforementioned construction of the term "*Sales Agreement*" is even more reasonable if one looks at the drafting history of the Arbitration Agreement, as CLAIMANT insists. RESPONDENT, in its email dated 10 April 2017, made its understanding clear to CLAIMANT that "*the Sales Agreement is governed by the law of Mediterraneo*" and proposed an arbitration clause governed by a separate law "*the law of this arbitration clause shall be the law of Equatoriana*" [*Exh. R1, p. 33*]. In so doing, RESPONDENT had already associated the term "*Sales Agreement*" with the part of the Agreement excluding the Arbitration Agreement. CLAIMANT confirmed such an understanding of RESPONDENT by replying "*the law applicable to the Sales Agreement remains the law of Mediterraneo*" while not objecting to the separateness of the Arbitration Agreement [*Exh. R2, p. 34*]. The term "Sales Agreement" is then used to finalize the Agreement.

II. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT UNDER DANUBIAN LAW

31 As previously manifested, the proper law of the Arbitration Agreement is Danubian law which governs its interpretation [*Born 2014, p. 1398*]. RESPONDENT will demonstrate that, the Tribunal lacks the power to adapt the Agreement under Danubian law (**A**) and as a result of a proper interpretation of the Arbitration Agreement (**B**).

A. As Per the Requirement for Express Authorization and the Parol Evidence Rule in Danubian Law, the Tribunal Cannot Adapt the Agreement

32 The powers that the PARTIES may have conferred upon the Tribunal, especially with regard to adaptation, are restricted within the limits of the applicable law [*Redfern/Hunter, p. 237, ¶5-09; Frick, p. 197; Berger 2001, p. 10*]**.** *In casu*, the parol evidence rule and the "express authorization" requirement in Danubian law render the Tribunal unable to adapt the Agreement.

33 The "four-corners rule" of Danubian law, equivalent to a "merger clause" under Art. 2.1.17 of the UNIDROIT Principles, provides for interpretation of the Arbitration Agreement solely based on its plain wording, excluding any contradictory extrinsic evidence [*RNoA, p. 32, ¶16*]. Indeed, the Arbitration Agreement does not contain any express authorization, unlike other cases *e.g.* ICC Case No. 7544 wherein the parties did specify in the arbitration clause "*all disputes arising out of this contract including a change of the contract itself*", or any referral to arbitration upon a failure of agreement as found in *e.g.* the Model Exploration and Production Sharing Agreement of Qatar [*discussed at Berger 2003, p. 1360*]. The presence of the Arbitration Agreement alone cannot substitute such an "express" allocation of powers [*Berger 2003, p. 1379*]. The Tribunal also cannot consider any evidence introduced by CLAIMANT that contradicts such a literal interpretation of the Arbitration Agreement [*Memo C., pp. 11-12, ¶¶38-42*].

34 In Danubia, there is constant jurisprudence to the effect that the Tribunal may only adapt if expressly authorized in the Agreement [*RNoA, p. 32, ¶44*]. These court opinions form part of Danubian procedural law, a common law country [*PO2, p. 61, ¶44*]. As such, even though the *lex contractus i.e.* Mediterranean law allows for adaptation, lacking specific wording in the Agreement that allows adaptation, the Tribunal still cannot proceed to adapt it as its powers are restricted under Danubian procedural law [*Frick, p. 193; Berger 2000, p. 88*].

B. Under a Proper Interpretation of the Arbitration Agreement, the Tribunal Still Cannot Adapt the Agreement

35 RESPONDENT further argues that a proper interpretation of the Arbitration Agreement does not give the Tribunal the power to adapt. That is because price adaptation does not fall under the scope of a "dispute" (*1*) nor does it follow from a "breach" (*2*) in the Arbitration Agreement.

1. Price Adaptation Does Not Constitute a "Dispute" Specified in the Arbitration Agreement

36 Contrary to CLAIMANT's contention [*Memo C., pp. 12-13, ¶¶43-47*], RESPONDENT submits that the term "*any dispute arising out of*" covers only "*disputes*" within the Agreement (*i*), thus a

creative task as price adaptation cannot be taken by the Tribunal (*ii*). Prior evidence, if any is to be considered, further supports this interpretation (*iii*).

i. The phrase "any dispute arising out of" is limited to disputes within the Agreement

37 The phrase "*any dispute*" has been generally construed to mean a more limited scope of matters than other wider terms such as "*any dispute, controversy, difference, or claim*". Similarly, "*arising out of*" is more restricted than other expansive wordings *e.g.* "*arising out of and in relation to*" [*Born 2013, p. 40; Pryles, p. 12; ICC Report, pp. 115-116*]. Therefore, in many arbitral awards and judicial decisions, the phrase "*any dispute arising out of*" was taken to mean only the contractual obligations that are regulated within the contract [*ICC Case No. 6309; Vetco Sales Inc v. Vinar Pennzoil Exploration v. Ramco Energy; Lebanon Chem. v. PlantFood; Reddam v. KPMG*].

38 A dispute happens when: parties have already staked out irreconcilable positions; have exchanged contradictory pleadings; and are seeking a judgment of liability founded on reasoning from legal texts [*Rau, p. 925*]. It only exists in the presence of two contradictory claims [*General Motors v. Societé Champs*]. On the contrary, the setting of the price is not settling a contradiction between claims but is the act of fixing one of the contract's "essential elements", and thus participates in the completion of the contract [*Rau, p. 925; Rouche et al., p. 23, ¶40; Poudret/Besson, p. 17*].

39 CLAIMANT contends that adaptation by the Tribunal is not a creation of new rights but a restoration of the "*economic equilibrium*" of the Agreement [*Memo C., p. 14, ¶44*]. However, said "*economic equilibrium*" can only be asserted should CLAIMANT prevail on the merits. Thus, price adaptation of the Agreement does not constitute a "*dispute*" in "*any dispute arising out of*".

ii. Arbitrators cannot adapt the contractual price due to it not being a "dispute"

40 Because arbitrators can only ***decide*** legal ***disputes*** *(emphasis added)*, their role is limited to "*judicial acts*" including ascertaining and validating rights of parties that are stipulated in the contract [*Jarrosson, p. 232; Kröll, p. 12; Gaillard/Savage, p. 25, ¶34*]. Price adaptation, as explained, requires the making of rights *pro futuro,* thus constitutes an exclusively creative task instead of a judicial act [*Kröll, p. 12*; *Lew et al., p. 170, ¶8-17; Paulsson 1984, p. 250; Motulsky, p. 47*]. Due to the maxim *arbiter non substituit* - arbitrators cannot make contracts, it has been traditionally perceived that arbitrators cannot revise contracts as well [*Beisteiner, p. 78; Sanders, p. 85*]. Therefore, the task of adaptation rather belongs to "experts" or "third party interveners" instead of arbitrators [*Berger 2001, p. 3*; *Paulsson 1984, p. 249-251; Bernardini 1998, p. 421*; *Fenyves, p. 126; OGH Case*]. One possible consequence of price adaptation will be the risks of the award being unenforceable under Art. I and Art. II of the NY Convention, as the process of rendering the award must be done by

arbitrators, regarding *differences* between the parties [*original emphasis*, *Beisteiner, p. 85; Horn, p. 178*]. As such, arbitral tribunals in the world have been extremely reticent in varying contracts without a solid contractual basis [*ICC Case No. 1512*; *ICC Case No. 2708; ICC Case No. 2216; ICC Case No. 2404; ICC Case No. 3099; ICC Case No. 3100; ICC Case No. 6281; UNCITRAL Award 1999*].

iii. The PARTIES even mutually limited the scope of the Arbitration Agreement

41 The parol evidence rule of Danubian Contract Law bears the same effect as Art. 2.1.17 of the UNIDROIT Principles [*PO2, p. 61, ¶41*] which excludes contradictory evidence but allows for the use of prior evidence to interpret written contracts. In this regard, the Tribunal shall only examine evidence that corroborate the PARTIES' mutual intent of exclusion of price adaptation.

42 RESPONDENT, while suggesting the wording the Arbitration Agreement, clearly told CLAIMANT that it "*narrowed down and streamline a little the fairly broad wording of the Clause*" [*emphasis added*]. The proposed clause was considerably subtracted from the Model Clause of the HKIAC Rules: "*any dispute, controversy, difference or claim*" changed to "*any dispute*"; "*arising out of or relating to this contract*" changed to "*arising out of this contract*". The term "*any dispute regarding non-contractual obligations arising out of or relating to it*" was deleted entirely [*Exh. R1, p. 33*]. CLAIMANT, after being aware of such limits of the scope of the Arbitration Agreement, still accepted those changes and changed the seat of arbitration. Having done so, the PARTIES should be taken to have altered or departed from the scope pre-designated by the HKIAC Rules [*Born 2013, p. 38*; *Gélinas, pp. 56-57; Greenberg et al., p. 193, ¶4.162; Redfern/Hunter, p. 154, ¶3-39*].

2. Price Adaptation Does Not Follow From a "Breach" in the Arbitration Agreement

43 CLAIMANT argues that Clause 12 of the Agreement is a hardship clause that, based on good faith, gives rise to a duty to renegotiate the Agreement. When said duty was allegedly breached by RESPONDENT, it constitutes a breach of contractual obligation and falls under the scope of the Arbitration Agreement [*Memo C., pp. 9-10, ¶¶29-33*].

44 However, said duty to renegotiate only arises after establishment of hardship [*UNIDROIT Principles, Art. 6.2.3*; *Horn, p. 138*]. As it will be proved by RESPONDENT that hardship does not occur *[see ISSUE 3*], no duty to renegotiate and no adaptation by the Tribunal follows.

CONCLUSION ON ISSUE 1

45 RESPONDENT has fully demonstrated that the law applicable to the Arbitration Agreement shall be Danubian law, as a result of the procedural nature of the Arbitration Agreement, the

implied intention of the PARTIES, the closest connection test or based on the facts of the case. Consequently, interpretation of the Arbitration Agreement under Danubian law indicates no authorization for the Tribunal to adapt the Agreement. Therefore, incompliance with its duty to render enforceable awards and party autonomy, the Tribunal must not adapt the Agreement.

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

46 CLAIMANT is trying to submit as evidence a Partial Interim Award and relevant submission of other arbitration proceedings that RESPONDENT is a party to (collectively referred to as "**the evidence**") [*Letter by Langweiler, p. 50*]. In addition, CLAIMANT wants to pay US$ 1,000 to acquire the evidence from a horseracing intelligence company which sourced the evidence either from a hacker or two former employees of RESPONDENT who were under a contractual duty to keep confidential all information of the other arbitration [*PO2, pp. 41-42, ¶50*].

47 RESPONDENT submits that CLAIMANT is not entitled to submit the evidence from the other arbitration proceedings for it is confidential (**I**), neither relevant nor material (**II**), and illegally obtained (**III**). Even in the unlikely event the Tribunal finds that the confidential, irrelevant, immaterial, illegally obtained evidence is to be taken into consideration, the evidence does not pass the balancing test (**IV**). Alternatively, nothing precludes the exclusion of the evidence (**V**).

48 It is a widely acknowledged principle in international arbitration that the arbitral tribunal has the authority to assess the admissibility, weight, relevance and materiality of evidence [*O'Malley, p. 193, ¶7.01; Born 2014, p. 2309; Pietrowski, p. 374; Blair/Vidak Gojković, pp. 237-239*]. Pursuant to the agreement of the PARTIES to subject the arbitration to the HKIAC Rules, the Tribunal *in casu* is conferred with said power in accordance to Art. 22 of the HKIAC Rules [*Exh C5, p. 13, Clause 15; HKIAC Rules, Art. 22.2*]. RESPONDENT submits that the Tribunal exercise this power by excluding the evidence based on the following arguments.

I. THE EVIDENCE SHOULD BE EXCLUDED BASED ON THE PRINCIPLE OF CONFIDENTIALITY

49 Confidentiality is an important principle and one of the most important advantages of arbitration as a mode of dispute resolution [*Born 2014, p. 2815; Queen Mary University 2018 Survey; UNCITRAL, Notes on Organizing Arbitral Proceedings, ¶31; Trakman, p. 5*]. RESPONDENT submits that the evidence, composing of confidential documents from other arbitration proceedings, should not be admitted because of an express duty of confidentiality (**A**) and confidentiality, a cornerstone principle of ICA, should be upheld (**B**).

A. The Express Duty of Confidentiality Prevents the Admission of The Evidence

50 CLAIMANT should not be entitled to submit evidence bound by an express duty of confidentiality. CLAIMANT sought to submit a copy of the award and relevant submissions from another arbitration conducted under the HKIAC Rules, to which RESPONDENT is a party [*Letter by Langweiler, p. 49*]. Art. 42 of the HKIAC 2013 Rules states that "*unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; Or (b) an award or Emergency Decision made in the arbitration*", thus, the evidence falls under the scope of this duty of confidentiality.

51 The parties in the other arbitration have never consented to disclose, communicate, or use the evidence [*Letter by Fasttrack, p. 50*]. As the other arbitration is subject to the HKIAC Rules containing an express provision of confidentiality, all information relating to the arbitration and the award are protected from the risk of being disclosed or used outside of that arbitration [*Smeureanu, p. 10*]. Courts have also acknowledged that the confidentiality duty extends to not only the parties directly bounded by it but also other persons who possessed that confidential information [*Arvay, p. 458; Slavutych v. Baker; Fraser v. Evans*]. In the leading *Dolling-Baker v. Merret Case*, the plaintiff sought a disclosure order from the court of many confidential materials including the award of another arbitration in which the defendant was a party. The plaintiff alleged that the confidential materials from the other proceedings concerned a similar issue to the court proceedings, an allegation analogous to CLAIMANT's. However, the English Court of Appeal rejected such disclosure on the basis of an implied confidentiality duty inherent in the private nature of arbitration. *In casu*, the duty of confidentiality is even an express one. Thus, it is no doubt the evidence should be excluded.

B. Confidentiality is a Cornerstone Principle in Commercial Arbitration

52 CLAIMANT claimed that, unlike good faith and privilege, confidentiality is not a public policy goal important enough for the tribunal to exclude confidential information. However, CLAIMANT relied on investor-state and sports arbitrations to downplay the importance of confidentiality as a policy goal in private ICA [*Memo C., pp. 16-17 ¶¶67-71*]. RESPONDENT submits that the evidence should not be admitted here because confidentiality is an important principle, policy goal in ICA (***1***). In addition, confidentiality overrides transparency in ICA (***2***).

1. Evidence should not be admitted at the cost of confidentiality, a policy goal in international commercial arbitration

53 RESPONDENT submits that the evidence should not be admitted because confidentiality is a paramount issue in ICA and should be upheld [*Smeureanu, p. xvi*]. A former ICC Secretary General acknowledged that "*the users of ICA [...] place the highest value upon confidentiality as a fundamental characteristic of ICA*" [*Bond, p. 273, ¶6*]. This notion is confirmed by the Queen Mary University 2018 International Arbitration survey in which 87% of respondents believe that confidentiality in ICA is of importance. In addition, confidentiality and privacy have consistently ranked in the top five most valuable characteristics of arbitration for years, which suggests that they are one of "*the true central pillars of the entire arbitral system and that they are likely to continue to be seen as its most significant strengths in the future as well*" [*Queen Mary University 2018 survey, p. 7*].

54 The English courts have long considered confidentiality as an inherent characteristic of arbitration, an implied obligation originated from the agreement to arbitrate [*Dolling-Baker v. Merret; Hassneh Insurance Co. of Israel v. Mew; Ali Shipping Corp. v. Shipyard Trogir, AEGIS v. European Re;* among others]. This position is followed by courts in other jurisdictions such as Singapore [*Myanma Yaung Chi v. Win Win Nu; International Coal v. Kristle Trading; AAY v. AAZ*]. Many arbitration rules and institutional arbitration rules also contain provision on confidentiality, especially with regard to the award [*LCIA Rules, Art. 30; Swiss Rules, Art. 44; SIAC Rules, Rule 39; HKIAC Rules, Art.45; Hong Kong Arbitration Ordinance, Art.18(1); New Zealand Arbitration Act, Art. 14B(1); Spanish Arbitration Act, Art. 24(2);* among others]. There is also a trend in recent revisions of institutional arbitration rules and national arbitration laws to enhance the confidentiality obligations [*Born 2014, p. 2815; LCIA Rules, Art. 30; 2012 Swiss Rules, Art. 44(1); 2013 VIAC Rules, Art. 16(2); WIPO Rules, Arts. 73-76; arbitration legislation in France, New Zealand, Scotland*]. Suggestion to recognize the confidentiality as an implied obligation arising out of the agreement to arbitrate has also been raised [*Born 2014, p. 2815*]. Thus, upholding the principle of confidentiality is seen as desirable especially in ICA.

55 To reflect its importance, the confidentiality principle has been recognized as one of the grounds for exclusion of evidence in Art. 9.2.e. of the IBA Rules. The Rules also has provisions to protect confidential information, *e.g.* Arts. 3.8, 3.13. Tribunals also exclude evidence subject to confidentiality agreement with a third party [*O'Malley, p. 302, ¶9.86*]. Thus, a breach of the duty of confidentiality is a reasonable ground for exclusion of evidence. Therefore, contrary to CLAIMANT's arguments [*Memo C., p. 18 ¶¶85-88*], *in casu*, the evidence which is obtained through a breach of confidentiality should not be admitted.

56 With confidentiality as one of the attractions for ICA, the recognition of confidentiality as an implied duty arising from an agreement to arbitrate and the breach of confidentiality recognized as a ground for exclusion of evidence, the Tribunal should exclude the evidence.

2. Confidentiality overrides transparency in international commercial arbitration

57 CLAIMANT uses the principle of transparency to support the admission of the evidence [*Letter by Langweiler, p. 50*]. However, RESPONDENT will demonstrate that confidentiality overrides transparency in ICA due to its nature and purpose (*i*) and such confidential nature limits the use of prior awards in ICA (*ii*).

i. Confidentiality overrides transparency due the nature and purpose of international commercial arbitration

58 The difference in the nature of investor-state, sports arbitrations and ICA explains why transparency is the rule in the former, but confidentiality is the rule in the latter. In investor-state and sport arbitrations, issues that affect the public such as vital economic sectors (*e.g.* gas, water, oil), moral conducts (*e.g.* use of doping, match fixing), behaviour of public servants, courts are at stake [*Smeureanu, p. 94; Berger 2015, p. 320*]. In addition, the outcomes of investor-state and sport arbitrations usually involve tax money, public policies, state regulations and even the state's reputation [*Berger 2015, p. 320; Infantino, pp. 179-180*]. Therefore, it is difficult to justify confidentiality in investor-state and sports arbitrations, where transparency of proceedings and awards is the rule [*Smeureanu, p. 94, Berger 2015, p. 320, Carmody, pp. 119-126*].

59 However, in ICA between private parties such as in the present case, where there is no such element of "public interest", confidentiality is the rule [*Berger 2015, p. 321; Infantino, p. 181*]. The outcome of a commercial arbitration usually only affects the parties and does not have any implication for public issues or public policy [*Infantino, p. 180*]. The main concern of businesses is to keep confidential documents submitted in the course of the proceedings and the arbitral award outside the reach of the public as a measure to protect their business secrets, strategies and reputation [*Berger 2015, p. 321*]. Therefore, due to the nature and purpose of ICA, it is important to uphold confidentiality as it reflects the reasonable expectation of the users.

ii. The confidential nature of commercial arbitration limits the use of prior awards in commercial arbitration

60 While tribunals in investor-state and sports arbitrations heavily rely and cite prior awards in their decision, tribunals in ICA do not follow the same practice or perceive prior awards as having the same precedential weight [*Kaufmann-Kohler, pp. 365, 375-376, Infantino, p. 186*]. Due to the

confidential nature of ICA, the award is only rendered to solve one specific dispute and is not meant to be disseminated to anyone outside that arbitration [*Infantino, p. 185*]. The interest of commercially attuned arbitrators is solving the dispute before them in light of the unique facts of each dispute [*Infantino, p. 184*]. It is the arbitrators' sweeping freedom to decide on the matter of evidence that allows them to consider the specific details of each case without being bound by the prior awards or precedents or the need for consistent rules [*Kaufmann-Kohler, pp. 365, 376*]. In deed, "*arbitrators do what they want with past cases and there is no clear practice [of precedent] in the field [of ICA]*" [*Kaufmann-Kohler, p. 362*].

61 Moreover, the evidence sought to be admitted by CLAIMANT does not serve to clarify the facts of the present case or is not material to the outcome of the case [*infra* ¶¶*68-69*], which gives it no precedential value to the current arbitration. Such evidence should not be admitted in the arbitration proceedings [*Insurance Co. v. Lloyd's Syndicate; Hwang/Chung, p. 616*]

62 Therefore, the Tribunal should not admit the evidence because confidentiality prevails over transparency in ICA. Furthermore, the Tribunal is not bound by the award in the other arbitration and the evidence has no precedential value.

II. THE EVIDENCE IS NEITHER RELEVANT NOR MATERIAL TO THE CASE AT HAND

63 Relevance and materiality are important values with any evidence. The lack of relevance and materiality is recognized as one of the grounds for objection to admit the evidence under the IBA Rules, Art. 9.2.a. Moreover, CLAIMANT claims that tribunals take a liberal approach in the admission of evidence [*Memo C., p. 15,* ¶*57-58*]. However, the Tribunal can deny the admission of evidence if the evidence is not helpful to resolve the case [*O' Malley, p. 269,* ¶*9.08*]. *In casu*, without clear elaboration, CLAIMANT claimed that the evidence is material to the case [*Memo C., p. 18,* ¶*74*]. RESPONDENT will demonstrate that the evidence is neither relevant (**A**) nor material (**B**) and thus, should be excluded in the current proceedings.

A. The Evidence Is Not Relevant to The Case

64 RESPONDENT submits that the evidence is irrelevant because the facts of the two arbitrations are different (**1**) and the evidence is not necessary for CLAIMANT to prove its allegation (**2**).

1. The facts of the two arbitrations are different

65 The evidence is irrelevant because the facts in the dispute presented by the evidence and the facts in this case are different. Tribunals often weigh evidence and will not deal with evidence that lacks relevance to the case [*Tradex Hella SA v. Albania; O'Malley, p. 199*].

66 The other dispute involves RESPONDENT and a third-party buyer on the sale of a mare to Mediterraneo. The contract provided for DDP Mediterraneo, contained the ICC Hardship Clause 2003, Mediterranean law as the governing law and the Model HKIAC-Arbitration Clause with all additions [*PO2, p. 60, ¶39*]. However, *in casu*, the Agreement provides for DDP Equatoriana, a hardship clause worded much more specifically and narrowly than the ICC Hardship Clause 2003, Mediterranean law as the law governing the "Sales" part while Danubian law as the law governing the arbitration, an Arbitration Agreement worded much narrower and not including all additions from the Model HKIAC-Arbitration Clause [*supra ¶¶41-42; Exh C5, p. 13; PO2, p. 36, ¶12*]. Therefore, the two arbitrations are founded on different grounds, making the evidence irrelevant *in casu*.

2. The evidence is not necessary to prove CLAIMANT's allegation

67 The relevance of the evidence is also determined by how necessary it is to prove the facts of the case [*O'Malley, p. 270, ¶9.09*]. RESPONDENT submits that the evidence is not the only evidence available and necessary for CLAIMANT to prove various issues in its case. The issues that CLAIMANT can raise with the evidence can be established with other already available evidence. The issue concerning the power of the Tribunal to adapt the contract can be proven with other evidence [*see ISSUE 1*]. The issue concerning whether the tariffs constitute hardship or whether CLAIMANT is entitled to price adaptation can be established with other available evidence [*see ISSUE 3*]. Thus, when the claims made by CLAIMANT can already be established by other available facts, the evidence is deemed irrelevant and there is no need for the Tribunal to admit the evidence [*Havalic/Boykin, p. 38; X. Ltd v. Y.GmbH, Z.GmbH*].

B. The Evidence Is Not Material to the Case

68 The materiality of the evidence is determined based on whether it will affect the deliberation of the tribunal in reaching a final award [*O'Malley, p. 272, ¶9.13*]. Accordingly, tribunals often exclude such unhelpful evidence [*O' Malley, p. 57, note 100; Methanex Corporation v. USA; Lummus Global v. Aguaytia Energy; Hanseatisches Oberlandesgericht*].

69 RESPONDENT submits that the evidence is unhelpful for the Tribunal to reach the final decision *in casu*. CLAIMANT's purpose in submitting the evidence is not to prove a fact or an

allegation, but to prejudice the Tribunal against RESPONDENT by claiming that RESPONDENT has different stances on allegedly similar issues [*Letter by Langweiler, p. 49*]. However, even if at first glance, the disputes in the two arbitrations appear similar, the facts of each case are different [*supra* ¶¶*65-66*]. As observed by skilled arbitrators, each arbitration is unique, and the position of the parties must be put into the context of that arbitration to determine whether it is truly inconsistent [*Giovanna v. Argentina*]. Moreover, the outcome of the other arbitration cannot affect the Tribunal's final decision because the two arbitrations are founded on different facts, circumstances, with different parties and counsels.

70 Thus, the evidence, which is neither relevant nor material to the case, has no probative value and should be excluded.

III. THE ILLEGALLY OBTAINED EVIDENCE SHOULD NOT BE ADMITTED IN THE CURRENT PROCEEDINGS

71 CLAIMANT wants to acquire the evidence by paying US$ 1,000 from a horseracing industry intelligence company which either sourced the evidence from a hacker or two former employees of RESPONDENT who were under contractual obligations to keep confidential all information about the other arbitration [*Letter by Fasttrack, p. 50; PO2, pp. 41-42,* ¶*50*]. RESPONDENT submits that the illegally obtained evidence should not be admitted *in casu* to protect due process in arbitration (**A**). The exclusion of the evidence will also serve the interest of justice (**B**).

A. Protection of Due Process Leads to The Exclusion of The Evidence

72 The exclusion of the illegally obtained evidence ensures procedural fairness in international arbitration. CLAIMANT claims that illegally obtained evidence should be admitted because rules governing the admissibility of evidence before national courts, including the rules excluding illegally obtained evidence, cannot be applied in international arbitration [*Memo C., pp. 15-17,* ¶¶*59-66*]. However, this is a misleading position. Arbitrators often apply evidentiary rules, including exclusionary rules, because they acknowledge the general principles behind such rules [*O'Malley, p. 3,* ¶*1.08-1.09; McAllister/Bloom, p. 35*]. Procedural fairness is one of those considerations and restrictions to the admissibility of evidence in arbitration [*Reisman/Freedman, p. 741, O'Malley, p. 193,* ¶*7.01*]. The IBA Rules also recognize "*consideration of fairness or equality*" as a ground for exclusion of evidence [*Arts. 9.2.g, 9.7*].

73 Evidence gathered through illegal means, such as the evidence *in casu*, is a violation of procedural fairness or the "*equality of arms*" principle in ICA [*O'Malley, pp. 321-322,* ¶¶*9.117-9.119*]. This claim is evident in the ICSID Tribunal's line of reasoning in the *Methanex Corporation v. USA*. The

tribunal refused to admit evidence obtained through Methanex's "*successive and multiple acts of trespass*" into the office of the head of a lobbying organization and searches of internal trash cans. The reason was "*Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration*" [*emphasis added, Methanex Corporation v. USA*]. Other tribunals and courts also hold that the procedural fairness prevents admission of illegally obtained evidence [*EDF Services Ltd v. Romania; Libananco Holdings v. Turkey;* among others]. Moreover, courts can set aside arbitral awards if the arbitrators admitted illegally obtained confidential evidence, such as the evidence *in casu*, because "*the broad principle of equity [mandates] that he who has received the information in confidence shall not take unfair advantage of it*" [*Arvay, p. 461; McAllister/Bloom, p. 52; Slavutych v. Baker; Ashburton v. Pape*].

B. The Exclusion of The Illegally Obtained Evidence Serves the Interest of Justice

74 The exclusion of the evidence serves as a deterrence to over-zealous parties who will break or ignore the rules to obtain favourable evidence [*Blair/Vidak Gojković, p. 256; Reisman/Freedman, pp. 737, 752*]. The inadmissibility of illegally obtained evidence will also comply with public policy rules [*Pilkov, p. 154*]. CLAIMANT, though knowing that the evidence is obtained either through illegal means or a breach of confidentiality or both, ignores the rules and even arranges to pay a company with doubtful reputation to obtain the evidence [*PO2, pp. 60-61, ¶41*]. Moreover, CLAIMANT's purpose of submitting the evidence is to prejudice RESPONDENT in front of the Tribunal [*supra ¶¶68-69*]. This is not an act in good faith, a fundamental principle of international arbitration.

75 Thus, the Tribunal should exclude the evidence to ensure procedural fairness in the arbitration and deter actions that trample on laws and the principle of good faith.

IV. THE EVIDENCE DOES NOT PASS THE BALANCING TEST

76 Unlike CLAIMANT's claim [*Memo C., pp. 17-18, ¶¶72-76*], RESPONDENT argues that the evidence fails the balancing test. The three-stage test used by CLAIMANT is proposed by Blair and Vidak Gojković to determine whether evidence obtained illegally and/or in breach of confidentiality can still be considered. The stages are: 1. "*Has the evidence been obtained unlawfully by a party who seeks to benefit from it?*" 2. "*Does public interest favour of rejecting the wrongfully disclosed document as inadmissible?*" and, 3. "*Does the interest of justice favour the admission of the wrongfully disclosed document?*". To admit such evidence, the answers should be "*No*", "*No*", and "*Yes*" respectively [*Blair/Vidak Gojković, pp. 256-258*].

77 RESPONDENT argues that the evidence fails the test at the very first stage. The first stage emphasizes the clean hands approach, which maintains that the party seeking to introduce the illegally obtained evidence should not play any part in the procurement of that evidence [*Blair/Vidak Gojković, p. 256*]. This doctrine is widely used by tribunals in determining evidence admissibility [*USA v. Iran; Methanex Corporation v. USA; Persia International Bank v. Council*].

78 In casu, CLAIMANT played a significant role in the procurement of the illegally obtained evidence. CLAIMANT wants to pay US$ 1,000 to obtain the evidence while knowing well that it is obtained through a breach of confidentiality and unlawful means [*PO2, pp. 60-61, ¶41*]. Such voluntary involvement of CLAIMANT in the procurement of said evidence violates the clean hands doctrine. Allowing the admission of such "*fruit of the poisonous tree*" will run counter to the principle of *ex turpi causa non oritur actio*, a right cannot stem from a wrong [*Blair/Vidak Gojković, p. 256; Havalic/Boykin, p. 1*]. Therefore, even in the unlikely event the Tribunal finds that evidence obtained through illegal means and/or out if a breach of confidentiality can be considered, the evidence should not be admitted for it fails the balancing test.

V. NOTHING PREVENTS THE EXCLUSION OF THE EVIDENCE

79 RESPONDENT submits that there are no further reasons for the Tribunal to admit the evidence. First, the exclusion of the evidence does not violate the right to be heard of CLAIMANT (**A**). Second, the evidence does not constitute an exception to the duty of confidentiality (**B**). Last, the admission of the evidence is barred by the IBA Rules (**C**).

A. The Exclusion of the Evidence Does Not Violate the Right to Be Heard of CLAIMANT

80 In contrast to CLAIMANT's claim that the exclusion of the evidence will violate CLAIMANT's right to be heard [*Memo C., pp. 18-19, ¶¶77-79*], excluding irrelevant, immaterial, confidential and illegally obtained evidence is a legitimate exercise of the arbitrators' discretion [*O'Malley, p. 269, ¶9.09; X. Ltd v. Y.GmbH, Z.GmbH*]. In addition, the evidence is not the only evidence with which CLAIMANT can prove its case [*supra ¶¶65-69*]. Thus, its exclusion will not have any effect on CLAIMANT's right to be heard.

B. The Evidence Does Not Constitute an Exception to the Duty of Confidentiality

81 Moreover, CLAIMANT is also in no position to invoke the exceptions to the duty of confidentiality. According to Art. 42.3 of the HKIAC Rules, a party can only disclose confidential materials in the arbitration "*(a) to protect or pursue a legal right or interest of the party or to enforce or challenge the award referred to in Article 42.1 in legal proceedings before a court or other judicial authority; (b) to*

any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or (c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert." The provisions listed in Art.42.3 also covers the exceptions to the duty of confidentiality in the majority of cases [*Insurance Co. v. Lloyd's Syndicate; Ali Shipping Corp. v. Shipyard Trogir; AEGIS v. European Re*]. Thus, CLAIMANT cannot invoke the exceptions to the duty of confidentiality because these exceptions are only applicable to the parties of the other arbitration. Moreover, the situation *in casu* does not fall under any of the exceptions.

C. The Admission of the Evidence is Barred by the IBA Rules

82 Opposed to CLAIMANT's claim that there is nothing in the IBA Rules that prevents the admission of the evidence [*Memo C., p. 19, ¶¶80-84*], there are definite grounds for the exclusion of the evidence in the IBA Rules, namely Art. 9.2.a, Art. 9.2.g, Art. 9.7 [*supra ¶¶63,72*]. Therefore, the evidence should be excluded based on aforementioned grounds.

CONCLUSION ON ISSUE 2

83 The Tribunal should exercise its discretion over matters of admissibility by excluding the evidence. The evidence is protected by the confidentiality principle, a cornerstone in ICA. Moreover, the evidence has no probative value because it is neither relevant nor material *in casu*. Furthermore, exclusion of the illegally obtained evidence will ensure due process and the interests of justice. Even in the unlikely event that the Tribunal decides to consider the evidence, it does not pass the balancing test due to CLAIMANT's violation of the "*clean hands*" doctrine. Additionally, there are no other grounds to admit the evidence.

ISSUE 3. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT UNDER CLAUSE 12 OF THE CONTRACT UNDER THE CISG

84 Prior to the last shipment on the 22nd of December 2018, the implementation of a tariff brought about a 30% rise in the cost of delivery [*Exh. C6, p. 15*]. RESPONDENT made clear to CLAIMANT well before the concluding of the Agreement that RESPONDENT is not willing to be responsible for the coverage of risks associated with DDP [*Exh. C5, p. 14, Clause 12*].

85 RESPONDENT respectfully requests the Tribunal to find that CLAIMANT is not entitled to the increased price under Clause 12 of the Agreement as CLAIMANT is not exempted from bearing the cost of tariffs (**I**). In the event that the Tribunal finds otherwise, CLAIMANT is still not entitled to the increased price under the CISG (**II**).

I. CLAUSE 12 OF THE AGREEMENT DOES NOT COVER IMPORT TARIFFS

86 Clause 12 specifically states: "Seller shall not be responsible for lost horse semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third-party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*C5, p. 14, Clause 12*]. Regardless of what is actually stated, CLAIMANT argues applicability of Clause 12 to the implemented 30% tariffs through inference of subjective intent under Art. 8(1) of the CISG, objective intent under Art. 8(2) of the CISG. CLAIMANT also argues that Clause 12 is ambiguous and should find application of the ejusdem generis principle to interpret the tariffs experienced as a "comparable unforeseen events" to that of a term "health and safety requirement" [*Memo C., pp. 25-26, ¶¶118-122*]. In the case that the Tribunal finds no grounds for the application of this principle, which they rightfully should not, CLAIMANT pleads application of the contra proferentem rule instead [*ibid*].

87 However, the tariffs under the current case fall outside the scope of Clause 12 as the tariffs experienced fall under risks associated with DDP (**A**). Furthermore, the clarity of Clause 12 and the foreseeability of the current event will reflect the inapplicability of the *ejusdem generis* principle (**B**). Finally, RESPONDENT proves how CLAIMANT fails to prove relevance of the contra proferentem rule as neither of the requirements for application according to Art. 4.5 of the UNDROIT principles have been met under the current case (**C**).

88 Therefore, despite insistent efforts by CLAIMANT to find any means, no matter how imprecise, to include tariffs under Clause 12, RESPONDENT contends that the 30% retaliatory tariffs do not constitute any of terms listed including hardship within Clause 12 of the contract and hence does not entitle CLAIMANT to any increase in price.

A. Tariffs Fall Under Risks Associated with DDP and Fall Outside the Scope of Clause 12

89 According to the ICC INCOTERMS of DDP, "The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities" which the tariffs in the current case fall under. PARTIES agreed to not transfer such risks to RESPONDENT and this subjective intent can be found through the conduct of the PARTIES (*1*) [*PO2, p. 56, ¶14; Exh. C4, p. 12*]. Furthermore, the cost of tariffs would objectively be assumed to fall under the risks associated with DDP by any reasonable

person (*2*). Therefore, RESPONDENT should not be held liable for any increase in price as Clause 12 is of complete irrelevance to the experienced retaliatory tariffs.

1. Subjective intent for the exclusion of tariffs can be found through PARTIES' conduct

90 In essence, Art. 8 of the CISG dictates for contracts to be carried out according to the true intention of the parties, with subjective interpretation of a contract holding the greatest importance under Art. 8(1). Additionally, Art. 8(3) stresses the importance of considering all surrounding evidence in order to realize this subjective intent [*Lookofsky 2000 p. 55; Lucy v. Zehmer; CISG Digest*]. This includes the conduct of the PARTIES [*CISG, Art. 8(3); Fruit and Vegetables Case; Treibacher Industrie v. Allegheny Technologies; Frozen Lobster Tails Case*].

91 CLAIMANT attempts to misconstrue RESPONDENT's position by stating "*RESPONDENT had the intention to include import tariff under the hardship clause*" [*Memo C, p. 25, ¶¶119*]. However, such is a false claim as RESPONDENT had no such intention, and if such intention was present, RESPONDENT would have been clear on the matter by specifically stating so within the Agreement like any other reasonable person.

92 The intent for tariffs to not be included under Clause 12 can again be seen throughout all presented evidence. On the morning of the 12th of April in 2017, RESPONDENT's lead negotiator, Mr. Antley, entered discussion with CLAIMANT's lead negotiator, Ms. Napravnik, to revise the initial draft proposed by CLAIMANT on the previous day [*Exh. R3, p. 35*]. Unfortunately, due to the accident, the issues RESPONDENT found with this draft could not be fully resolved, but during this discussion, the concern of the ICC-hardship clause being too broad was expressly made and is the reason for the decision to narrow its scope through listing only the risks RESPONDENT was willing to cover. These were those not associated with DDP delivery such as the mentioned missed flights, weather delays, failure of third-party service, acts of God or hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Exh. R4, p. 36; RNoA, p. 30, ¶4; PO2, p. 56, ¶12*]. Therefore, RESPONDENT never intended to take on the risks associated with DDP that encompass tariffs and made such intention clear to CLAIMANT through revision of the contract and prior discussions with CLAIMANT's lead negotiator. Hence, under subjective intent, the inclusion of tariffs should not be found.

93 Furthermore, CLAIMANT argues that as they made their position of wanting tariffs to be included under Clause 12 clear enough, RESPONDENT should re-interpret what the PARTIES

originally agreed upon. RESPONDENT finds this unreasonable of CLAIMANT to expect. RESPONDENT also made just as clear to CLAIMANT that relieving CLAIMANT from all risks associated with DDP delivery whilst also providing for the inclusion of a hardship clause is not an option, especially given the much higher price [*RNoA, p. 30, ¶4*]. Subsequently, as a form of compromise, RESPONDENT agreed to include the hardship clause in exchange for the slight reduction in price and still paid an extra US$200 per dose to CLAIMANT in return for not excusing them from the risks associated with DDP [*PO2, p. 56, ¶14*]. CLAIMANT showed agreeance towards these terms by signing the contract after these changes were made.

94 Therefore, by incorporating Art. 8(3) in considering the conduct of the parties, the subjective intent under Art. 8(1) can be found where PARTIES had already agreed that the tariffs which fall under DPP will not be covered by RESPONDENT thereby holding that CLAIMANT is not entitled to an increase in price.

2. Tariffs objectively constitute a risk under DDP and therefore lay outside of the scope of Clause 12

95 Under Art. 8(2) of the CISG, when subjective intent cannot be found or agreed upon, an objective approach to interpreting the contract as any reasonable third party would be to be undertaken [*Zeller p. 256; MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino; CISG Digest*]. As previously established, PARTIES agreed upon the ICC INCOTERMS of DDP with the specific inclusion of only hardship experienced by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*PO2, p. 30, ¶4; Exh. C4, p. 12; Exh. C5, p. 13; Exh. C5, p. 14*]. Officially stated under this INCOTERM of DDP is that "*the seller … has an obligation… to pay any duty for both export and import and to carry out all customs formalities*" [*ICC INCOTERMS*]. The reasonable person would therefore assume that the retaliatory tariffs experienced in the present case constitute an import duty and therefore fall under the mentioned risks associated with DDP thereby to be rightfully covered by CLAIMANT not RESPONDENT. The reasonable person would therefore assume that the retaliatory tariffs experienced in the present case constitute an import duty and therefore fall under the mentioned risks associated with DDP thereby to be rightfully covered by CLAIMANT not RESPONDENT.

B. Ejusdem Generis principle Does Not Apply

96 CLAIMANT argues applicability of the Ejusdem Generis principle, which states that a situation in which "general words follow specific words in a statutory enumeration, the general words are

construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" [*Memo C., p. 26, ¶122; Circuit City Stores, Inc. v. Adams*], to encompass the 30% tariffs as an event that was comparably unforeseeable to that of the listed health and safety requirements. However, the Ejusdem Generis principle is a principle of last resort for instances only where ambiguities exist [*Liu; Orsinger; Forest Oil Corp v. Strata Energy*]. In this aspect, RESPONDENT sees no such ambiguities and even if found, the CISG well alleviates the need to resort to this principle (***1***). Even if PARTIES were to adopt this principle, tariffs would still not be encompassed under clause 12 as there is no similarity in the unforeseeability of the two events (***2***). Therefore, the Ejusdem Generis principle is of no relevance under the current case hence CLAIMANT has no grounds to claim the payment of US$ 1,250,000 or any other amount.

1. There is no ambiguity in Clause 12 hence finds no grounds for the use of the Ejusdem Generis principle

97 As previously stated, it is clear that the tariffs experienced falls under DDP; hence is not intended to be encompassed under Clause 12 [*supra ¶¶89-95*]. CLAIMANT failed to illustrate in what sense ambiguities exist and RESPONDENT contends no such ambiguities exist. Furthermore, even if tools of interpretations were required to better fulfil contractual obligations, this principle is a means of last resort [*Liu; Orsinger; Forest Oil Corp v. Strata Energy*]. Art. 8 of the CISG satisfies the function of clarifying any ambiguities in the clauses as previously demonstrated [*supra ¶¶89-95*].

98 Furthermore, the CISG is binding where PARTIES must adhere to what is stated, unlike the *Ejusdem Generis* principle which is just a mere law of construction [*Bund; Orsinger*]. Therefore, given the clarity of Clause 12 and the availability of alternative means of clarifying interpretations even in the case of such ambiguities, there is no need to resort to this principle.

2. Tariff do not constitute a comparably unforeseeable event to that of a health and safety requirement

99 CLAIMANT argues through application of the *Ejusdem Generis* principle, the 30% retaliatory tariffs is an event which is comparably unforeseeable to a health and safety requirements and is therefore relieved from covering the cost [*Memo C., p. 26, ¶122*]. However, it is important to note that the Ejusdem Generis principle holds an exclusionary function and means to confine the applicability of clauses to only matters of the same kind as those enumerated [*Black's Law Dictionary; Orsinger; Rowley; Sellers v. Bles*]. Therefore, despite a term being of literal relevance, the Ejusdem Generis Rule was not applied for cases which found that the intended common core

characteristic was missing from the situation being considered [*Rowley; Brown; Excelsior Motor Mfg. & Supply Co. Et Al. v. Sound Equipment Inc*].

100 Illustrating this is the *American Fidelity Fire Insurance Co. v. Hancock* case, where on the 2nd of September 1961 the driver of the truck-tractor being purchased went to sleep behind the wheel which led to a collision with the side of a concrete bridge. However, under the given the collision insurance policy *"liability [is only relieved] if the vehicle was subject to a bailment lease, conditional sales contract purchase agreement, mortgage, or other encumbrance*." The truck was subject to a lease-but not a bailment lease and hence did not constitute an "*other encumbrance*" as it was not considered as being similar to the previously mentioned bailment lease, conditional sale, purchase agreement, or mortgage [*American Fidelity Fire Insurance Co. v. Hancock*].

101 Here, this common characteristic is considered as that of unforeseeability. However, the extent of unforeseeability between those of health and safety requirements and those of retaliatory tariffs are wholly different. Health and safety requirements are rarely revised, and the implementation of such new policies arise out of unexpected events that are considered to be acts of god [*The Animal Health Act 1981; the Animal Gatherings Order 2010; Meat Inspection Act of 1906*]. An example of this would be the sudden spread of Mad Cow Disease (bovine spongiform encephalopathy) that led to the need for all seller's test for contamination [*UK Department for Environment, Food & Rural Affair*s]. A more relevant example of this is the foot and mouth disease experienced by Equatoriana which had led to the imposition of serious restrictions on the transportation of all living animals [*NoA p. 5, ¶5; Exh. C1, p. 9; PO2, p. 58, ¶21*]. RESPONDENT under such a case would be liable to cover the sudden costs as it clearly falls under the scope of a health and safety requirement and such breakouts of disease are clearly unforeseeable.

102 However, under the present case, the chances of an imposition of tariffs are always present due to it being a matter of politics [*Fucci; CMS Gas Transmission Company v. The Argentine Republic*] Certain events such as the transfer of governments can therefore, easily bring about instability and risk of market fluctuations. An indication of this potential political tension was seen prior to the conclusion of the contract where CLAIMANT's government had already made clear his preferences for a more protectionist approach in January of the same year [*Exh. C6, p. 15*]. The President's intent to implement protectionist measures could have been also assumed through the appointment of Ms Ceil Frankel who "*has been an outspoken protectionist for years*" [*PO2, p. 58, ¶23*]. This is especially so, since a number of influential politicians in the Ministry of Economics were already known for their belligerent stand on imposing retaliation measures [*Exh. C6, p. 15*].

103 Despite Equatoriana being known for their general amicable stance in dispute resolution, assumption that such a position would continue should be considered as negligence as matters of politics or policy are always subject to change. This is evident from the fact that a retaliatory approach has been adopted by the Equatorianian government in the past and should have therefore further indicated the chance for similar measures to be taken again [*Exh. C6, p. 15*].

104 Therefore, the tariff implementation was not unforeseeable especially to the extent of an additional health and safety requirement and thereby does not constitute a comparable unforeseeable event under Clause 12 of the Agreement.

C. CLARITY OF CLAUSE 12 INVALIDATES USE OF CONTRA PROFERENTEM

105 The contra proferentem rule was originally applied in order to protect consumers from cunning insurance companies which tended to be the drafters of contracts [*Miller, p. 1849*]. Therefore, the function of this rule is to prevent parties with a greater vantage point from taking advantage of any ambiguities through interpreted the ambiguous clause against the party which has more leverage, which in most cases is the drafter [*Huber, p. 237; Duhl, pp. 96-97; Lord p. 32:12; Terra Intern Inc. v. Mississippi Chemical Corp; Miller p. 1854; Honnold, p. 107.1; Schwenzer, p. 18, Art. 14 p. 49; Huber/Mullis, p. 236; Cysteine Case; Automobile Case*].

106 CLAIMANT argues the applicability of this rule [*Memo C., p. 26, ¶123*]. According to Art. 4.6 of the UNIDROIT Principles, there are two requirements to be met for the rule to apply. One of these is that there is an "*irremediable ambiguity*" whereby the said clause has "at least two different meanings". The other is that the said clause was drafted by only one party [*Vogenauer, p. 528*].

107 Given these two requirements, RESPONDENT contends that no such irremediable ambiguity exists (***1***) and that drafters in fact include both PARTIES (***2***).

1. The first requirement is not fulfilled as there is no ambiguity in the Clause

108 Despite arguing that Clause 12 is unclear, CLAIMANT fails to point out specifically in what sense ambiguities exist and instead merely states Clause 12 means to include the experienced tariffs as a comparably unforeseeable event to that of a health and safety requirement. Firstly, the *contra proferentem* rule does not apply to "*terms that are merely vague or indefinite*" [*Atwood v. Newmont Gold Co, Inc*]. Clause 12 only has one meaning and clearly never intended for the experienced retaliatory tariffs to fall upon RESPONDENT [*supra ¶¶89-95*]. An ambiguity which leads to a dual meaning under Clause 12 does not exist and hence there is no relevance of the Contra proferentem rule in the present case.

i. Even if ambiguities exist, application of the CISG takes precedence

109 The *contra proferentem* rule should only be applied when no other means of resolving interpretation issues exist [*Miller, p. 1851; Sykes, p. 68; Davis; Kirby, p. 105*]. *In casu*, Art. 8 of the CISG provides a thorough means of clarifying Clause 12 and emphasises that a contract is to be read according to the understanding of "*a reasonable person of the same kind*" [*Honnold, p. 107.1*] and should be utilised first [*Huber, p. 237*]. As already established, the conduct of the PARTIES well-represent the meaning and it was understood by both PARTIES that Clause 12 did not include the experienced retaliatory tariffs [*supra* ¶¶*89-95*]. Since the PARTIES' intent is discernible through application of Art. 8 of the CISG, there is no need to resort to the contra proferentem rule.

2. The second requirement is not fulfilled as PARTIES were involved in drafting

110 *In casu*, in terms of drafting, both PARTIES were involved thereby failing to meet the second condition for the *contra proferentem* principle to apply. As a result, Clause 12 should not be interpreted in such a way that would disadvantage RESPONDENT but should be interpreted as was originally intended.

111 The fact that both PARTIES were mutually responsible for the drafting of Clause 12 is evident by the statement "*they (Mr. Ferguson and Mr. Krone both) used the pre-existing file and merely made the necessary changes and additions to Clauses 6 – 15 to reflect their agreement*" [*PO2, p. 55,* ¶*4*]. Clause 12 was also reworded to incorporate force majeure along with the risks mentioned by Ms. Napravnik thereby incorporating both the PARTIES' ideas for the draft [*PO2, p. 56; Exh. C4, p. 12*]. The note written by Mr. Antley states during his early negotiations with CLAIMANT prior to the accident "*List of issues for further negotiations following draft by Phar Lap of 11 April*" with "*the ICC hardship clause suggested by Claimant too broad*" and "*connection of hardship clause with arbitration clause*" being areas of concern for RESPONDENT [*Exh. R3, p. 35*]. However, PARTIES came to a consensus upon the "*the exchange of several drafts*" hence reflecting the mutual collaboration in drafting [*PO2, p. 6*]. Therefore, PARTIES were both involved in the constructing of Clause 12 thereby also not meeting the second requirement for the application of this rule. The contra proferentem rule, hence, holds no relevance in the current case in any way.

II. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER THE CISG

112 Two months prior to the last shipment of frozen semen to RESPONDENT, Mediterraneo announced 25% tariffs on agricultural products from Equatoriana [*Notice of Arbitration, p. 6,* ¶*9*]. As a retaliatory measure, the Government of Equatoriana also announced a tariff of 30% upon

all agricultural goods from Mediterraneo [*Exh. C6, p. 15*]. In its memorandum, CLAIMANT has argued for the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under the CISG [*Memo C., Issue III (2), pp. 27-34*].

113 However, RESPONDENT submits that PARTIES derogate from the CISG by the inclusion of the hardship clause in the Agreement **(A)**. Even if the CISG applies, the imposition of a tariff does not amount to an impediment under the CISG **(B)**. In any event, there is no hardship under the UNIDROIT Principles **(C)**.

A. PARTIES Derogated from Art. 79 of the CISG by the Inclusion of DDP INCOTERM and the Hardship Clause

114 Art. 6 of the CISG provides freedom to the parties to derogate from the entire CISG or vary from any of its provisions. One of the core underlying principles of the CISG is that of party autonomy [*CISG Digest, p. 43*]. This principle corroborates with the opportunity given by Art. 6 of the CISG to opt out of or vary the effect of any of its provisions. This means that parties can both deviate from the effect of a particular rule or totally exclude a provision and replace it by their own regulation [*Schwenzer/Hachem, pp. 102-103; Bonell, ¶2.1; Honnold/Flechtner, ¶74*].

115 In derogating from the CISG, parties can choose both explicit and implicit means [*Flechtner/Honnold, pp. 108-110, ¶77.1; Bridge, p. 65; Machinery Case; Milking Machinery Case; Ceramic Baking Dishes Case*]. Where there is an express agreement on INCOTERMS, they will prevail over the CISG's default law on delivery and the passing of risk [*Schwenzer/Hachem, p. 109; Berman/Ladd, pp. 423-424; Lookofsky 2008, p. 101; Honnold/Flechtner, ¶363; Ramberg 2008, p. 400; Goodfriend, p. 578; Ramberg 2005*]. The logical rationale is that INCOTERMS are adequate and sufficient regarding delivery and the passing of risk, and that there is no need to supplement them with provisions from the CISG [*Hellner*]. In addition, if the contract provisions clearly provide for an exhaustive list of exempting circumstances (*force majeure* or hardship clause, for instance), such provisions also supersede the CISG [*Equipment Case*]. Parties need not write exactly the wording that they opt out from the CISG or its provisions. Only in the absence thereof could parties refer to the provision laid down under the CISG [*CISG Digest, p. 393*].

116 *In casu*, PARTIES agreed on the DDP delivery terms and hardship clause in their Agreement [*Exh. C5, p. 14, Clause 8 and Clause 12*]. RESPONDENT made clear that it would be unacceptable to relieve CLAIMANT from all the risks associated with the delivery. Consequently, the hardship clause was included in the Agreement [*RNoA, p. 30, ¶4*]. The said hardship clause explicitly regulates events exempting seller from liability including acts of God

and hardship among others [*Exh. C5, p. 14, Clause 12*]. Such inclusion constitutes a derogation from the CISG otherwise it would be meaningless to have a specific hardship clause in the Agreement. Hence, the application of Art. 79 is overridden by the inclusion of DDP and hardship clause.

B. The Imposition of Tariffs does not Constitute an Impediment under Art. 79 of the CISG

117 Assuming that Art. 79 of the CISG is applicable *in casu*, CLAIMANT is still not entitled to the price adaptation as requested. First, hardship is not allowed under the CISG (*1*). Second, even if the Tribunal finds that the CISG governs hardship, the event encountered by CLAIMANT did not meet the requirements of hardship (*2*).

1. Hardship is not allowed under the CISG

118 According to the UNCITRAL Working Group during the drafting of the CISG, there is no place within the CISG for hardship [*Honnold 1989, p. 350, ¶450; Slater, pp. 259-260*]. In deciding whether the CISG regulates hardship, the Tribunal should take into account the *travaux préparatoires* of the CISG [*Povrzenic, ¶3A*]. The legislative history of the CISG reveals that the Working Group expressly rejected the proposal to include hardship to the CISG because the hardship provision under the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS), the predecessor of the CISG, created a loophole by allowing a party to escape contractual obligations too easily [*Carlsen, 1998; Flambouras 2002, ¶3; Rimke, ¶B2; Ziegel, ¶1C*].

119 Correspondingly, the Working Group's rejection of the hardship provision discloses that the CISG does not allow performance to be excused or contract to be adapted for mere economic difficulty [*Flambouras 2001, p. 278*]. Indeed, the term *"impediment"* under the CISG is limited only to events resulting in impossibility of performance [*Jenkins, p. 2024; Flambouras 2001, p. 277; Ferrochrome Case*]. There is also no place within Art. 79 of the CISG to encompass economic hardship [*Ferrochrome Case; ICC 8873; Carlsen, ¶¶I–IV; Nicholas, p. 66; CISG AC Opinion No. 7, ¶26*]. Unlike other jurisdictions, the drafter of the CISG did not incorporate the term *"frustration"* which allows excuse merely on the ground of economic impossibility [*Honnold 1999, ¶¶442-443*]. Thus, RESPONDENT submits that the CISG does not allow the application of hardship.

2. Even if the CISG allows the application of hardship, the imposition of tariff does not amount to hardship as CLAIMANT could have overcome the impediment

120 Even if the Tribunal finds that hardship is allowed under the CISG, CLAIMANT's situation did not meet the requirements under Art. 79(1) of the CISG to prove hardship. One among the three

requirements under the CISG is the fact that the party encountering hardship could not overcome such impediment [*CISG, Art. 79(1)*].

121 In performing its contractual obligation, a party shall do what is possible and reasonable to overcome the impediment [*Gomard/Rechnagel, p. 223*]. Based on the legislative history of Art. 79 of the CISG and scholars, a party cannot invoke the said article merely on the ground that performance has become more difficult or unprofitable [*Rimke, p. 223; Honnold 1991, p. 543; Enderlein/Maskow, p. 325; Lando, p. 465*]. In evaluating what amounts to an impediment that can be overcome, regards should be paid to the limit of sacrifice [*Lindström*]. Accordingly, the limit of sacrifice has not been reached if performance is still possible [*Brunner, p. 58*].

122 *In casu*, CLAIMANT asks for price adaptation after paying for the increased tariff on the ground that it will destroy its profit margin of 5% and make the performance more expensive [*NoA, p. 7, ¶18*]. As previously stated, a party cannot claim hardship just because the business is not profitable. The limit of sacrifice has not been met as CLAIMANT was still able to pay and actually has already paid the amount of the increased tariff [*NoA, p. 6, ¶13*]. Thus, there is no sort of impossibility and CLAIMANT did not suffer from hardship under the CISG.

123 Therefore, RESPONDENT requests the Tribunal to find that the imposition of tariff does not amount to impediment as the CISG does not permit the application of hardship and even if it does, the event experienced by CLAIMANT did not meet the hardship requirement of the CISG.

C. In any Event, the Event Encountered by CLAIMANT did not Satisfy the Hardship Requirements of the UNIDROIT Principles

124 CLAIMANT argued for UNIDROIT Principles to apply in case of hardship by means of gap filling as the CISG has an internal gap and by the applicable domestic Mediterranean contract law [*Memo C., Issue III (2), pp. 29-33*]. However, whether UNIDROIT Principles functions as a gap filling or domestic law of Mediterraneo is not significant as the event encountered by CLAIMANT did not satisfy hardship under Art. 6.2.2 of the UNIDROIT Principles.

125 According to the said article, hardship is defined as event which "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*]. In determining what constitutes a fundamental change, an assessment of circumstances of each individual case is needed [*UNIDROIT Principles, Art. 6.2.2, Comment No. 2*]. The commentary suggests that if the performance is measurable in monetary terms, a disruption

of balance amounting to more than 50% of the cost or value of the performance may likely be regarded as a fundamental alteration [*Ibid*].

126 In claiming for hardship, CLAIMANT has to prove that all elements under UNIDROIT Principles were met. In fact, three of the four requirements of the UNIDROIT Principles are the same to those of the CISG [*CISG, Art. 79(1); UNIDROIT Principles, Art. 6.2.2*]. However, as previously proven, CLAIMANT could have and had already overcome the impediment by paying the amount of the increased tariff [*supra* ¶¶*121-122*]. Therefore, the event experienced by CLAIMANT did not suffice the hardship requirements under the UNIDROIT Principles.

127 With regards to price adaptation, party can only claim for it once hardship is proven. Therefore, RESPONDENT submits that CLAIMANT is not entitled to price adaptation under the CISG or the UNIDROIT Principles as the event faced by CLAIMANT does not amount to hardship.

CONCLUSION ON ISSUE 3

128 CLAIMANT is not entitled to the increased price under Clause 12 of the Agreement or the CISG, hence does not entail price adaptation. PARTIES have already regulated risks associated with DDP in their Agreement. Tariffs fall under the regulated risk making CLAIMANT not entitled to the increased price. Additionally, CLAIMANT is not entitled to the increased price under the CISG. First, PARTIES has derogated from the CIGS by the inclusion of DDP and hardship clause. Second, Art. 79 of the CISG does not regulate hardship. Even if it does, the situation of CLAIMANT does not amount to impediment as CLAIMANT had overcome the impediment. In any event, CLAIMANT is still not entitled to the remuneration under the UNIDROIT Principles as event encountered by CLAIMANT did not meet the requirements of hardship. Therefore, the Tribunal should not grant the requested US$ 1,250,000 to CLAIMANT.

REQUEST FOR RELIEF

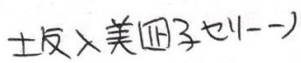
On the basis of the foregoing submissions, RESPONDENT respectfully requests the Tribunal to find that:

1) The Tribunal does not have the jurisdiction and power under the arbitration agreement to adapt the contract;
2) CLAIMANT is not 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;
3) CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Clause 12 and the CISG.

Nagoya, Japan
24 January 2019

Respectfully submitted,

MOROKOTH CHHUON



HINAKO SERENE SAKAIRI

ANH NGAN PHAN

ANH HOANG TRAN

Counsels for RESPONDENT