SIXTEENTH WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT COURT
31 MARCH – 7 APRIL, 2019

Tsinghua University

--MEMORANDUM FOR RESPONDENT--

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INDEX OF ABBREVIATION

AC	Advisory Council
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC Op.	CISG Advisory Council Opinion
Cl.	CLAIMANT
DDP	Delivery Duty Paid
ed.	Edition
e.g.	exempli gratia
Ex.	Exhibit
EXW	Ex Works
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
i.e.	*id est* (that is)
Memo	Memorandum
No.	Number
NoA	Notice of Arbitration
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PO	Procedural Order

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
v	versus

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STATEMENT OF FACTS

1. Phar Lap Allevamento ('**CLAIMANT**') is a horse breeding company seated in Mediterraneo. Black Beauty Equestrian ('**RESPONDENT**') is a broodmare breeding company seated in Equatoriana.

2. On 21 **March 2017**, **RESPONDENT** contacted **CLAIMANT** to purchase 100 doses of frozen semen for **RESPONDENT**'s newly started breeding programme.

3. On **24 March 2017**, **CLAIMANT** offered to supply **RESPONDENT** with the 100 doses requested. **RESPONDENT** agreed with most terms in the offer, but (1) insisted on a delivery DDP, and (2) objected to Mediterranean law being applicable and Mediterranean courts having jurisdiction at the same time.

4. In reply, on **31 March 2017**, (1) **CLAIMANT** agreed to the delivery DDP term, but proposed to add a hardship clause into the contract in case of unforeseeable circumstances. (2) **CLAIMANT** rejected to change the jurisdiction.

5. On **10 April 2017**, **RESPONDENT** drafted and communicated an arbitration clause to **CLAIMANT**, in which **RESPONDENT** clearly stated that (1) the seat of arbitration shall be Equatoriana, and (2) the law of the arbitration clause shall be Equatorianian law.

6. In a reply on **11 April 2017**, (1) **CLAIMANT** suggested changing the seat of arbitration to Danubia. (2) **CLAIMANT** suggested that the law of the Sales Agreements shall be Mediterranean law. (3) **CLAIMANT** suggested reliance on the ICC-Hardship clause, which **RESPONDENT** considered to be too broad.

7. On **12 April 2017**, the two main negotiators, Ms. Julie Napravnik from **CLAIMANT** and Mr. Chris Antley from **RESPONDENT** conducted a short negotiation.

8. However, after the negotiation on **12 April 2017**, Ms. Napravnik and Mr. Antley were involved in a severe car accident, and were seriously injured. The negotiations of the contract were thereafter conducted by new negotiators from both parties.

9. On **6 May 2017**, the Parties signed the Frozen Semen Sales Agreement, which is agreed to be governed by Mediterranean law. The seat of arbitration is agreed to be Danubia. Clause 12 of the contract is a force majeure clause added with a hardship wording, with no possibility of adaptation by the arbitral tribunal.

10. On **19 December 2017**, the Government of Equatoriana announced an imposition of 30% tariff upon all agricultural goods from Mediterraneo.

11. On **January 20 2018, CLAIMANT** contacted **RESPONDENT** to find a solution as to the 30% tariff. On **21 January 2018**, Mr. Greg Shoemaker from **RESPONDENT** called back. Under **CLAIMANT** threat to stop delivery, Mr. Shoemaker could not reject adaptation of the price.

12. On **23 January 2018**, **CLAIMANT** delivered the remaining 50 doses of frozen semen.

SUMMARY OF THE ARGUMENT

13. Pursuant to the arbitration agreement, the arbitration rules and the arbitration law in this case, RESPONDENT respectfully submits that the Arbitral Tribunal is not competent to decide on adaptation of contract as CLAIMANT requested (**ISSUE A**, *see below paras. 16-54*). The arbitration agreement shall be interpreted under Danubian Law, which is the law impliedly agreed by the parties, in accordance with New York Convention and Danubian Arbitration Law, to apply to the separate arbitral clause. Under Danubian Law, the interpretation of the arbitration agreement shall be limited to the wording, and thus the clause in the present case does not include adaptation into the subject matters scope. Therefore, the Tribunal does not have the jurisdiction over the adaptation to the contract. Further, the Tribunal is neither granted the power of adaptation under the applicable law.

14. Further, the Tribunal is kindly requested not to admit the evidence that CLAIMANT is trying to submit relating to the other arbitration proceeding on the assumption that it was obtained illegally (**ISSUE B**, *see below paras. 55-82*). The Tribunal has the discretion to determine the admissibility of the evidence and the evidence rule. Based on the balancing of juridical interest, the evidence should not be admitted. On the one hand, admitting the evidence would violate the principle of good faith and the confidentiality of the arbitration. On the other hand, not admitting the evidence will not violate the parties' rights to be heard and treated equality but will promote the efficiency of the arbitration in accordance with the applicable rule.

15. Even if the Tribunal were to find the Claim to be admissible, it is kindly requested to find that CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaption of price (**ISSUE C**, *see below paras. 83-153*). Firstly, Clause 12 of the contract does not provide price adaption as a remedy under the circumstance of a 30% increase in tariff. Secondly, CISG does not provide price adaptation as a remedy. CLAIMANT is not entitled to claim the remedy for impediment under Article 79 CISG or any other CISG principles. Thirdly, even if the Tribunal were to find that there is a gap in CISG, CLAIMANT is not entitled to claim remedy under Section 6.2 of the UNIDROIT Principles.

ARGUMENT ON THE ISSUES

Issue A: The Tribunal Has No Jurisdiction Nor Power to Adapt the Contract

16. RESPONDENT respectfully submits that this Tribunal has no jurisdiction nor power to adapt the contract as CLAIMANT requested. CLAIMANT requested the Tribunal to adapt the price for the third delivery of semen. However, the tribunal cannot substitute itself for the parties to modify the contractual relations between the disputing parties, unless such jurisdiction and power are granted by the parties, or the applicable law [*Aminoil case, pp. 77-78, para. 74; Redfern/Hunter, p. 524; Szurski, p. 67; Steel bars case*; *Berger, p. 7-9; Frick, p. 190-191; Beisterner, p. 79; Nessi, p. 392*]. The arbitration agreement in the present case, which shall be interpreted under the law of Danubia (**I**), does not cover the adaptation to the contract in its scope of the subject matters (**II**). Neither can the grant of the power be found in the applicable law (**III**).

I. The Law Applicable to the Arbitration Agreement Shall Be the Law of Danubia

17. The primary issue to interpret an arbitration agreement' scope is the applicable law. According to the choice of law rules, the agreement shall be interpreted under Danubian law.

18. The interpretation of an international arbitration agreement is generally subject to the law applicable to the existence and substantive validity of the agreement [*Born, p. 1398; Gaillard/Savage, p. 475; Assignee of buyer case*]. Unlike CLAIMANT's allegation, the separability doctrine requires a separate conflict of law analysis on the law of arbitration agreement. The separate conflict of law rules that the law governing the arbitration agreement shall be the law chosen by the parties, and failing such agreement, shall be the law of the country where the award is made. The rules can be found in both Article V.1(a) of the New York Convention, and Article 34(2)(a)(i) and Article 36(1)(a)(i) Danubian Arbitration Law [*Born, p. 495; Nacimiento, p. 224; Lew/Mistelis/Kröll, p. 110; Rodopi case*].

19. CLAIMANT argued that the separability doctrine was irrelevant in determining the applicable law, and that the implied choice of the parties was the substantive law of underlying contract [*Cl. Memo paras. 7-8*]. However, one of the main effects of the separability doctrine is a separate law governing the arbitration agreement, which excludes the direct application of the law of main contract, i.e. Mediterranean law (**1**). According to the conflict of law rules, the law chosen by the parties in accordance with the New York Convention and Danubian Arbitration Law is the law of Danubia (**2**), and if the Tribunal finds that no agreement was reached by the parties regarding the law of arbitration agreement, Danubian law, as the law of the seat, shall be applied as the default rule (**3**).

1. The Law of Underlying Contract Cannot Be Directly Applied Because of the Separability Doctrine

20. CLAIMANT contended that the separability doctrine is irrelevant in this issue [*Cl. Memo para. 7*]. RESPONDENT submits the contrary that the separability doctrine prohibits the direct application of Mediterranean law as the substantive law of the underlying contract.

21. One of the main requirements of this doctrine is a separate conflict of law analysis instead of the direct application of substantive law of the underlying contract [*Born, p. 473*]. Such requirement is reflected in the New York Convention and the UNCITRAL Model law, as the rule to determine the law of arbitration agreement is stated separately in Article V and Article 34 and 36 respectively. Thus, to determine the law applicable to the arbitration agreement, the separability doctrine should be taken into consideration.

22. In the present case, unlike CLAIMANT's submission, the law of Mediterraneo cannot be applied merely on the basis that it is the law of underlying contract. The arbitral clause, Clause 15 of the Sales Agreement, concerns only the procedural matters and is completely separate from other clauses, i.e. the sales part of the contract. Further, the requirement of a separate law on the arbitration agreement was noticed by the parties, as RESPONDENT specified the law of arbitral clause to CLAIMANT in its draft on 10 April [*Ex. R1, p. 33, para. 2*]. Therefore, the separability doctrine applies and Clause 15 is a separate procedural contract which deserves a separate analysis on the applicable law.

2. The Law Governing the Arbitration Agreement Consented by the Parties Is Danubian Law

23. CLAIMANT postulated that the law of the underlying contract indicated the implied choice of the parties regardless of the details in the present case and true intention of the parties [*Cl. Memo para. 9*]. Contrary to CLAIMANT's allegations, the implied choice of law on arbitration agreement shall be the law of Danubia.

24. RESPONDENT submits that the practice in international commercial arbitration on determining the choice of law varied and that the substantive law, which was claimed by CLAIMANT, was not the only outcome of the prior decisions. The law of the seat was also deemed as the implied choice of the parties on the procedural matters (**a**). The parties here impliedly chose the law of Danubia because they intended to have a neutral law governing the procedural matters (**b**), and because Danubian law is the closest to the arbitration agreement (**c**).

a. The Choice of Seat Is An Indication of the Parties Consent on Choice of Law

25. CLAIMANT alleged that the substantive law is assumed to be a strong indication of the parties' intention based on several cases [*Cl. Memo para. 9*]. RESPONDENT submits the prior decisions in the practice were not consistent, and that the choice of the seat is also an indication on the choice of law.

26. CLAIMANT ignored the opposite decisions that the law of the seat is deemed as a stronger implied choice than the substantive law [*Cl. Memo para. 9*]. 'The arbitration agreements are procedural and therefore almost inevitably subject to the law of the arbitral seat' [*Firstlink case*]. As cited in *C v. D* case, under the lack of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible [*C v. D case*].

27. In the present case, the law of Danubia, which is the law of the seat, shall also be considered as the implied choice of the parties. To decide whether Mediterranean law as the underlying substantive law or Danubian law as the law of the seat shall prevail, further analysis on parties' actual intention is needed.

b. The Parties' Actual Intention Was to Have A Neutral Law Governing the Procedural Matters.

28. CLAIMANT postulated that the intention of the parties was to have the whole of their relationship governed by the same law system [*Cl. Memo para. 9*]. RESPONDENT submits the contrary. Although a starting point may be assuming that the substantive law governs the whole relationship between the parties, such assumption will be prevailed by parties' intention found in the facts of the particular case, as in *SulAmerica case* that CLAIMANT relied upon, where the indication of substantive law was denied [*SulAmerica case*].

29. The intention of the parties regarding choice of law is clear if one, as CLAIMANT wanted to do, looks at the drafting history [*NoA para. 15*]. In its email, RESPONDENT did not agree to have the arbitration in Mediterraneo and proposed the arbitration in Equatoriana instead [*Ex. R1, p. 33, para. 2*]. Here, RESPONDENT particularly chose the law of the seat as law applicable to arbitration agreement, and rejected any connection of proceeding matters to Mediterranean court, or its law. When later CLAIMANT raised a *neutral* place for arbitration after its internal discussion [*Ex. R2, p. 34, para. 1*], RESPONDENT agreed to the dispute resolution clause only because CLAIMANT had agreed that all the procedure matters would be addressed in a neutral

country, under a neutral law. Thus, the law of the underlying contract, i.e. the law of Mediterraneo, cannot be the law chosen by the parties. Instead, Danubian law is the mutual consent referred to in the dispute resolution clause.

c. Danubian Law is More Connected to the Arbitration Agreement

30. CLAIMANT alleged that the choice of law governing the substantive contract is a stronger indication than the seat. RESPONDENT submits the contrary [*Cl. Memo para. 10*]. The law that most connected with the arbitration agreement can also be deemed as the law impliedly chose by the parties [*SulAmerica case*]. In the province of international arbitration, the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement [*SulAmerica case; Arsonovia case*], without which the seed of an agreement would not grow into a full-fledged arbitration resulting in the fruit of an enforceable award. The assertion has been conformed in many following jurisdictions and cases [*FirstLink case; Premium Nafta case; Italian company case; Mozambican buyer case*].

31. In the present case, the only connection between the arbitration agreement and Mediterraneo is that the agreement was signed in Mediterraneo [*PO 2, para. 13*]. However, the arbitration agreement was to be enforced and performed under Danubian Law. Therefore, Danubian law is closer to this arbitration agreement and is thus the implied choice of the parties on the law of arbitration agreement.

3. Even If the Tribunal Found the Indication on Implied Choice of the Parties Not Clear Enough, the Default Rule of the Choice of Law Shall Be the Law of Danubia

32. Article V(1)(a) New York Convention and Article 34 and 36 Danubian Arbitration Law provide that 'the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'. The law governing the arbitration agreement shall be determined in accordance with the second scenario if there is no indication on the law of arbitration agreement. As a consequence, the law governing the proceeding matter, including but not limited to the validity, formation and interpretation shall be the law of the arbitral seat [*Born, p. 511*]. In the present case, if the tribunal finds the indication of the parties as to choice of law is not clear enough, and that the present case falls within the second scenario, the law governing the arbitration agreement shall be the law of Danubia, where the award is deemed to be made.

33. Therefore, the arbitration agreement shall be interpreted under the law of Danubia, that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon.

II. The Tribunal Has No Jurisdiction to Adapt Contract Since Adaptation Is Beyond the Scope of Subject Matters of the Arbitration Agreement

34. CLAIMANT alleged that the Tribunal has the jurisdiction over adaptation because it is not excluded from the arbitration agreement [*Cl. Memo para. 14*]. However, CLAIMANT twisted the essential principle of party autonomy in international arbitration, which requires the scope of the Tribunal's jurisdiction to be confined within the mutual consent between parties.

35. A tribunal cannot substitute itself for the parties to modify the contractual relations between the disputing parties, which will exceed the limits of its competence [*Aminoil case, pp. 77-78, para. 74; Redfern/Hunter, p. 524; Szurski, p. 67*]. Without parties' consent, the principle of *pacta sunt servanda* and principle of sanctity of contracts shall prevail the need of adaptation. The risk of changed circumstances is to be borne by the parties [*Steel bars case*; *Berger, p. 9; Frick, p. 191*]. Therefore, the Tribunal needs special authorization on adaptation of the contract [*Aminoil case; Berger, p. 5; Beisterner, p. 79*].

36. The consent of the parties embodied in the arbitral clause, according to Danubian law, shall be construed only on the wording of the clause (**1**). With such interpretation, the scope of the subject matters of the arbitral clause does not include adaptation of the contract (**2**).

1. The Extrinsic Evidence Shall Not Be Considered in Interpreting the Wording of the Arbitration Agreement

37. CLAIMANT relied on the negotiation process and an award where RESPONDENT is a party but CLAIMANT was not [*Cl. Memo para. 16*]. RESPONDENT submits that the interpretation shall start with and be limited to the wording of the clause without reference to parties' negotiation process.

38. In Danubian law, the intentions of the parties should first look to the wording of the agreement. The 'four corners rule' aims at minimizing the ambiguity by precluding all extraneous evidence for the interpretation of contracts [*McMeel, p. 483*]. Court will only deviate from the four corners of the document if the contractual language is ambiguous [*Krauss case*].

39. Insofar as the scope of the arbitration agreement is accurate and clear restricting the jurisdiction of the Tribunal within the existence, validity, interpretation, performance, breach or termination

thereof [*Ex. C5, p. 14, para. 15*], leaving no room for ambiguous interpretation. Thus, the scope of arbitration agreement shall be interpreted under four corners rule referring to the final written contract signed by the parties.

40. RESPONDENT further submits that the reliance of the award in the other arbitration should not be taken into consideration, since the admissibility of the evidence is yet to be determined by the tribunal [*PO 1, p. 53*].

2. The Wording in the Arbitration Agreement Does Not Include Adaptation Into the Subject Matters Scope

41. CLAIMANT contended that the adaptation fell within the scope of arbitration agreement [*Cl. Memo para. 20*]. RESPONDENT submits the contrary. The subject scope of arbitration agreement is 'any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof' [*Ex. C5, p. 14, para. 15*], without reference to 'adaptation to the contract'.

42. In order to include adaptation into the arbitration agreement, the clause shall read, 'all disputes arising out of the contract including a change of the contract itself' [*ICC No. 7544*]. Alternatively, for the agreement to include adaptation, a larger scope is provided in HKIAC model clause provides, 'any dispute, controversy, difference or claim arising out of or relating to this contract'.

43. It is clear that the clause in the present case does not have the word 'change' and deletes the term 'relating to' in the model clause. It is suggested that the phrase 'arising out of', as provided here, is less expensive than 'relating to', and 'arising out of' includes only contractual claims based on the terms of the parties' agreement [*Granite case; Born*]. The deviation from HKIAC model clause shows parties' intention to narrow the clause. Adaptation, which is not based on the terms of the parties' agreement, has been excluded as a matter of jurisdiction.

44. Therefore, contrary to what CLAIMANT submitted, adaptation is not within the jurisdiction of the Tribunal.

III. Neither Does The Tribunal Has The Power to Adapt Contract Under the Applicable Law

45. Although not raised by this CLAIMANT, a claimant might have argued the Tribunal has an interim power to adapt the contract under applicable law. RESPONDENT further submits that this Tribunal is neither the grated power to adapt the contract under law of Danubia (**1**). The

Tribunal shall not deviate from Danubian law to decide *ex aequo et bono* since it is not authorized by the parties (**2**).

1. Danubian Law Does Not Authorize the Tribunal to Adapt the Contract Without Parties' Agreement

46. The law of Danubia does not grant the Tribunal to adapt the contract in the present case. In absence of parties' consent, the Tribunal should be authorized by *lex arbitri* the power to adapt the contract under changed circumstances [*Beisterner, p. 79; Nessi, p. 392; Berger, p.7; Frick, p. 190*]. However, in the present case, Danubian Arbitration Law does not provide the power to adapt the contract (**a**). The contract law of Danubia also requires agreement of the parties for adaptation (**b**).

a. Danubian Arbitration Law Is Silent on the Tribunal's Power of Adaptation

47. Danubian Arbitration Law stays silent on whether to grant the Tribunal the power to adapt the contract without parties' consent. An arbitral tribunal may be able to consider the adaptation under the applicable contract law. But without procedural power, such decision becomes 'moot' and 'useless', because the tribunal will exceed its power and its award may be set aside under the *lex arbitri* [*Brunner, p. 493; Berger, p. 11; Kröll National Report, p. 19*]. It is *lex arbitri* that determines whether the arbitrators are procedurally authorized to decide on the contract adaptation [*Brunner, p. 493*; *Berger, p.10; Nessi, p. 392; Frick, p. 190; Kaplan/Morgan, p. 25*].

48. In the present case, *lex arbitri* is Danubian Arbitration Law, as the seat of the arbitration is in Danubia. Danubia adopted the UNCITRAL Model Law [*PO 1, p. 52, para. 4*], which does not include the topic of the power of adaptation [*A/CN.9/245; Holtzmann/Neuhaus, p. 1117; Szurski, p. 66*]. The working group of Model Law intentionally deleted the rule on adaptation of the contract in the draft, considering that in practice the procedures for adaptation and supplementation of contracts might be used to advantage of suppliers [*A/CN.9/245, p. 158, para. 22*]. Thus, Danubian Arbitration Law intentionally omitted the Tribunal's power to decide on adaptation of the contract. The Tribunal is not procedurally authorized to adapt the contract under *lex arbitri*.

b. The Tribunal Is Not Authorized by *Lex Fori* to Decide on Adaptation of the Contract

49. *Lex fori* does not grant the Tribunal to decide on adaptation as well. The principle of synchronized competences requires that the competence of an arbitral tribunal cannot be wider than a national court at the seat [*A/CN.9/WG. II/WP.44, p. 180, para. 14; Szurski, p. 67*].

50. In the present case, it is clearly regulated in *lex fori* that a court can only adapt a contract under changed circumstances if it is authorized [*PO 2, para. 35*]. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles [*PO 2, p. 61, para. 45*]. However, 'only if authorized' was particularly added to the rule for adaptation. Deviation from the original wording, *lex fori* took the position that a court needs a specific agreement on adaptation of a contract.

51. The court in arbitration seat has no power to adapt the contract without parties' consent. Thus, under the principle of synchronized competences, the Tribunal is not competent to adapt the contract.

2. The Tribunal Cannot Decide *Ex Aequo et Bono* Since Parties Had No Expressed Agreement

52. The Tribunal is neither authorized to disregard the requirement of parties' consent to adapt the contract in Danubian law and to decide *ex aequo et bono*. Danubian Arbitration Law provides in Article 28.3 that the Tribunal may decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. In absence of parties' express authorization, tribunal's decision on *ex aequo et bono* will expose its award to annulment and non-recognition on excess of authority grounds [*Born, pp. 2772-2773*].

53. In the present case, parties have never accepted the Tribunal to decide *ex aequo et bono*. Thus, the Tribunal is kindly requested not to deviate from the Danubian law's requirement of parties' consent on adaptation, and not to decide *ex aequo et bono* to adapt the contract.

IV. Conclusion

54. RESPONDENT respectfully submits that the law governing the arbitration agreement shall be the Danubian law, under which the arbitration agreement shall be interpreted that this Tribunal has no jurisdiction over the adaptation of the contract. Besides, Tribunal has no procedural power to adapt the contract between the parties under both arbitration agreement and the law.

Issue B: The Evidence on the Other Arbitration Proceedings Shall Not Be Admitted

55. The Tribunal is kindly requested not to admit the evidence related to the other arbitration proceeding between RESPONDENT and one of his customers submitted by CLAIMANT on the basis of the assumption that it was obtained illegally either through a breach of a confidentiality agreement or through an illegal hack.

56. Firstly, the exclusion of evidence is at the absolute discretion of the Tribunal which shall be based on balancing of juridical interests (**I**). Secondly, there are important interests to be protected through the exclusion of illegally obtained evidence (**II**). Thirdly, the evidence is irrelevance and immaterial to the present case (**III**).

I. The Tribunal Has Discretion to Dismiss Illegally Obtained Evidence Based on Balancing of Juridical Interests

57. CLAIMANT alleged the Tribunal should apply the IBA Rules [*Cl. Memo para. 27*]. However, as CLAIMANT noticed, the Tribunal has discretion to decide the admissibility of the evidence and the rules [*Cl. Memo para. 23*]. RESPONDENT submits that the applicable evidence rules falls within the Tribunal's discretion and the admissibility of evidence shall be considered with balance of juridical interest.

58. HKIAC Rules 2018 provides in Article 22.2 that 'the arbitral tribunal shall determine the admissibility […] of the evidence, including whether to apply strict rules of evidence (emphasis added)'. The HKIAC Rules thus give the Tribunal the discretion to decide on evidence rules that applied to consider the admissibility of evidence. Rules such as those against hearsay, extrinsic evidence or illegally obtained evidence may have application in an arbitration [*Hwang/Boo, p. 26*].

59. Since there is no mandatory principle according to which illicit evidence is to be considered generally inadmissible in procedures before international arbitral tribunals, a decision regarding the admissibility or non-admissibility of illicit evidence must be the result of balancing various juridical interests [*CAS, Belmonte Case*].

60. Following this, the Tribunal should balance two reasons and find the evidence non-admissible.

II. The Tribunal Should Exercise Its Discretion and Dismiss the Illegally Obtained Evidence Because There are Important Interests to Be Protected

61. Exercising its discretion, the Tribunal should dismiss the evidence submitted by the CLAIMANT on basis of the assumption that it was obtained illegally. Firstly, because there are important interests to be protected through the exclusion of illegally obtained evidence. In the present case, the interests underlying the present case are the integrity of the arbitral proceedings protected through the principle of good faith in international commercial arbitration (**a**) and confidentiality (**b**).

1. CLAIMANT Violated the Principle of Good Faith in Obtaining the Evidence

62. CLAIMANT alleged it was not directly involved in the illegal conduct [*Cl. Memo para. 35*]. RESPONDENT submits that, however, by buying the evidence, CLAIMANT violated the general principle of good faith in order to obtain the evidence.

63. Good faith as such a general duty in international arbitration was first described by the tribunal of the *Methanex case*. The Tribunal hold that in its view 'the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect […] the principle of […] procedural fairness' [*Methanex case, para. 54*]. In turn, arbitration institutions as well as the arbitrators themselves must fulfil their role in good faith, protecting the proceeding's integrity. This means that the principle of good faith affects the parties to the dispute as well as the arbitrators or arbitration institutions or, in general, any person participating in the arbitral proceeding [*Cremades*]. Such a duty to arbitrate in good faith is infringed upon when illegally obtained evidence is used [*Cremades; Bédard*]. This is even clearer if one, as CLAIMANT wants to do, looks at IBA Rules. It is required in the Preamble that taking of evidence shall be conducted on the principles that each Party shall act in good faith [*IBA Rules Preamble para. 3*].

64. In the present case, it was first impossible for Mr. Velazquez, who was a former employee of the counterparty in the other arbitration award [*PO 2, para. 40*], to be permitted to obtain the award. After learning that, CLAIMANT contacted the company with doubtful reputation as to the source of evidence to buy the Interim Award with 1000 USD [*PO 2, para. 41*]. CLAIMANT never concerned about the legality of the evidence, nor the consequence of exposing such confidential partial interim award. The evidence can only be obtained either through the breach of a confidentiality agreement or through a hack of a computer system. As a result, an admission of illegally obtained evidence like in the present case would infringe the integrity of the proceedings and therefore stand in conflict with the arbitrations' duty of integrity protection of the arbitral proceedings.

2. The Tribunal Should Protect the Confidentiality of the Arbitration

65. The evidence should not be admitted to protect the confidentially. CLAIMANT argued that there is greater transparency to be promoted [*Cl. Memo, para 46*]. However, there is no such objective in international commercial arbitration. The transparency, that CLAIMANT argued relying on UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [*Cl. Email, p. 50, para. 3*], as indicated in the name of the Rules, is an objective of state-investor arbitration instead of commercial arbitration like the present case.

66. On the contrary, an objective of international arbitration is to provide a confidential dispute resolution mechanism [*Born, p.89*]. Efficacy of a private arbitration would be damaged, even defeated, if proceedings in the arbitration were made public by the disclosure of documents relating to the arbitration [*Pryles, p. 420*]. This is also proved in the applicable arbitration rules that 'unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information' [*Art. 45.1 HKIAC Rules, Art. 42.1 HKIAC Rules 2013*].

67. In the present case, CLAIMANT alleged the award was already in public and relied on cases where the hacked evidence was admitted because they were already public through *Wikileaks* [*Cl. Memo para. 50; Caratube case*]. However, the criteria in the case relied on by CLAIMANT, was not whether a third party obtained the evidence, but whether it was in public domain and whether the public had already learnt it [*Caratube case*].

68. Based on the facts in this case, no one but only the company with doubtful reputation, who could only obtained the evidence by illegal means, had accessed to the evidence. CLAIMANT bought the evidence from this company with 1000 USD, instead of learning it from the public [*PO 2, para. 50*]. The facts that CLAIMANT is not in possession of the Partial Interim Award [*PO 2, para. 50*], but only got promise of the copy of the award and the relevant submissions indicate that the evidence is still not in public domain [*CLAIMANT's Email, p. 49, para. 3*]. It is unreasonable for CLAIMANT to argue that the evidence is not in confidential.

69. Problematic seems that the CLAIMANT is no party to RESPONDENT´s other arbitration and therefore not bound by any confidentiality agreement regarding that arbitration. However, the point is not a confidentiality obligation of either side concerning RESPONDENT's other arbitration, but rather the tribunals right and obligation to proceed in accordance with the HKIAC Rules, concerning their purpose as well as the documents general character of confidentiality.

70. In the light of Article 45 of the HKIAC Rules 2018 an arbitral tribunal allowing the disclosure of documents through a third party, while it had to dismiss such documents when submitted by one party to the concerned arbitration without the other parties consent, would give more rights to a third-party actor than to the concerned parties themselves and, therefore, undermine the confidentiality provisions of the HKIAC Rules.

71. In conclusion, admitting the evidence would violate the confidentiality of the arbitration.

III. Excluding The Evidence Will Not Violate The Requirements of Equality And Fairness

72. CLAIMANT alleged that the excluding the evidence would violate its rights to be heard and treated fairly [*Cl. Memo para. 52*]. However, the Interim Partial Award is not material to CLAIMANT's case, nor relevant to this case (**1**). Thus, when taking the efficiency of the proceedings into consideration, CLAIMANT's reasonable opportunity is not violated (**2**). On the contrary, if the evidence is not excluded, RESPONDENT would lost the opportunity to present its case and to be treated equally (**3**).

1. The Interim Partial Award Is Irrelevant and Immaterial to the Present Case

73. CLAIMANT alleged that admitting such evidence may prove and prohibit RESPONDENT' s contradictory behaviour [*Cl. Memo para. 31*]. However, RESPONDENT submits that, the behaviour is completely irrelevant to the present case and not material for CLAIMANT to present its case. As CLAIMANT noticed, the relevance means the evidence must be useful in supporting the party's factual allegations and materiality requires that the evidence is essential in determining whether factual allegations are true or not [*Raeschke-Kessler, p. 427*].

74. First, the Interim Partial Award from the other arbitration is irrelevant because the facts are of great difference regarding the scope of hardship and adaptation of the price. The scope of hardship was contained in the ICC Hardship Clause [*PO 2, para. 39*], which in the present case was narrowed down [*see below para. 89*]. That tribunal is granted the power to adapt the contract under the synchronized principle, since Mediterranean law grants its courts to adapt the contract [*PO 2, para. 39*]. It is not comparable to the present case [*see above paras. 49-51*].

75. Second, the contradictory behaviour alleged by CLAIMANT is immaterial for it to present its case. The prohibition of contradictory behaviour, as illustrated by case law, is only applicable when the other party relied on that behaviour and therefore had loss [*BMW case, China Nanhai Oil case*]. As in *Abrahim case*, where a party holds contradictory positions in litigation and arbitration with different parties, the tribunal decided that other proceedings are not relevant to the case in the arbitration at hand [*Abrahim case*]. Even if it is established that RESPONDENT has different position in that arbitration, taking different positions in different proceedings is not forbid.

76. Finally, CLAIMANT alleged the award will help to assess RESPONDENT's intention [*Cl. Memo para. 33*]. However, in the present case, it is the burden of CLAIMANT, not RESPONDENT to prove the existing of Tribunal's power to adapt the contract. RESPONDENT's intention,

especially in a completely different arbitration, should not be material for CLAIMANT to present its case.

2. CLAIMANT's Rights To Be Heard And Treated Equally Will Not Be Violated

77. CLAIMANT alleged that its right to its opportunity to present its case would be violated if the evidence were not to be admitted [*Cl. Memo para. 52*]. RESPONDENT submits the contrary.

78. The opportunity to present the case is subject to Article 13.1 HKIAC Rules, which grant a 'reasonable', instead of a 'full' opportunity. It is further provided that in Article 13.5 HKIAC Rules, that the arbitral tribunal as well as the parties have the duty to ensure a fair and efficient conduct of the arbitration. It is clearer if looks at IBA Rules, as CLAIMANT wanted, that Article 9(2)(a) states simply that the arbitral tribunal will deny the admittance of evidence or deny a document production request that is neither relevant nor material to the outcome of the dispute.

79. Given the Interim Partial Award is immaterial and irrelevant to the case, excluding the evidence will not violate any right of CLAIMANT. On the contrary, the reasonable opportunity in accordance with the HKIAC Rules will be given, and efficiency of the arbitration will be promoted.

3. Admitting the Evidence Would Violate the Equality of This Arbitration

80. On the contrary, RESPONDENT further submits that, RESPONDENT's right would be violated if the evidence is admitted. Article 18 Danubian Arbitration Law provides that the parties shall be treated with equality and be given full opportunity of presenting the case. As CLAIMANT well noticed, such principle is also provided in HKIAC Rules [*Cl. Memo para. 51*].

81. If the evidence is admitted, CLAIMANT would use it to prove RESPONDENT's behavior against RESPONDENT. However, as a party to that arbitration, RESPODNENT is bound by the confidential obligation and it is impossible for RESPONDENT to response any argument against it. It is thus deprived the right to be heard on the issue raised by CLAIMANT. Therefore, RESPONDENT's right to be heard and treated equally will then be violated.

IV. Conclusion

82. Counsel for CLAIMANT submits that the Tribunal has discretion to decide the inadmissibility of illegally obtained evidence, and that admitting the evidence relating to the other arbitration violates several interests, and the evidence has no relevance to the present case or irrelevant to prohibit contradictory behaviour of RESPONDENT.

ISSUE C: CLAIMANT Is Not Entitled To The Payment Of US$ 1,250,000 Resulting From An Adaption Of Price

83. Even if the Tribunal were to find the claim to be admissible, RESPONDENT kindly request the Tribunal to find that CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaption of the price. Firstly, Clause 12 of the contract does not provide an adaption of the price as a remedy under the circumstance of a 30% increase in tariff (**I**). Secondly, neither does CISG provide an adaption of price as a remedy (**II**). Thirdly, even if there is a 'gap' in CISG, CLAIMANT is not entitled to claim price adaptation under the UNIDROIT Principles (**III**).

I. Clause 12 Of the Contract Does Not Provide an Adaption of The Price as a Remedy Under the Circumstance of a 30% Increase in Tariff

84. Contrary to CLAIMANT's allegations [*NoA, p. 7, para. 18*], Clause 12 of the contract did not provide adaption of price as a remedy for the 30% tariff increase. In interpreting a party's statement or conduct related to a matter governed by CISG, the interpretative criteria set forth in Article 8 CISG are to be used [*Yarn case; Surface protective film case; Building materials case*]. Applying the interpretation criteria of Article 8 CISG, it can be firmly established that first, the 30% tariff increase was not 'hardship' under Clause 12 (**1**); secondly, Clause 12 did not include the remedy of adaption of price (**2**). In any case, the contract had never been modified (**3**).

1. A 30% Increase in Tariff Cannot Be Regarded as 'Hardship' Under Clause 12

85. CLAIMANT submitted that a 30% increase in tariff constituted a 'hardship' under Clause 12, and therefore CLAIMANT is entitled to the extra payment [*Cl. Memo, p. 20, para. 59*]. However, such an increase in tariff cannot be regarded as 'hardship' under Clause 12. This is evident from both a subjective interpretation of the parties' intentions (**a**), and an objective interpretation according to the understanding of a reasonable person(**b**). In both cases, pursuant to Article 8(3) CISG, the Tribunal should consider all relevant circumstances, including the parties' negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

a. RESPONDENT Did Not, And Could Not Have Been Aware of CLAIMANT's Intention to Include an Increase in Tariff as a Circumstance of 'Hardship' Under Clause 12

86. Contrary to what CLAIMANT submitted [*Cl. Memo, p. 20*], the parties had no intention to include an increase in tariff as 'hardship' under the contract. In determining the parties' intention,

the primary starting-point must be given to the wording of the statement [*Schlechtreim/Schwenzer, Art. 8, p. 151, para. 13*]. Article 8(1) CISG gives priority to the 'subjective' and 'real' intent of the parties, 'even if the parties did not engage in any objectively ascertainable means of registering this intent' [*Ceramica tiles case, Computer parts case; Supermarket goods case*]. The subjective intent shall be manifested by the parties; 'the intent that one party secretly had, is irrelevant' [*Textiles case*].

87. The parties' intent to include the word 'hardship' in the contract was clear. It may appear that Clause 12 does not provide an exclusive list of events which can be regarded as 'hardship', for it states '[...] hardship, caused by additional health and safety requirements *or comparable unforeseen events making the contract more onerous*' [*Ex. C5, p. 14*]. However, if the parties' previous experience in international trade and the negotiation process are taken into account, it is clear that the parties were not intending to include the situation of a tariff increase as a 'comparable unforeseen event'.

88. The only sort of risk CLAIMANT expressly intended to exclude was that of health and safety requirements. CLAIMANT stated in the e-mail on 31 March 2017 that 'we are not willing to take over any further risks', because 'from *past experience* unforeseeable additional health and safety requirements may make highly expensive tests necessary'. Therefore, CLAIMANT proposed that 'a hardship clause should be included into the contract to address *such subsequent changes*' [*Ex. C4, p. 12*]. The *past experience* pointed to CLAIMANT's previous trade with a farm in Danubia. In the trade conducted in 2014, shortly before CLAIMANT delivered the mares, a rare foot and mouth disease exploded in Danubia. The Danubian government immediately imposed policies which required additional tests and long quarantine time. Since CLAIMANT had agreed to a delivery DDP term in that transaction, it had to bear the burden of all the additional costs and losses, which increased the costs by up to 40% [*Ex. C4, p. 12; PO2, p. 58, para. 21*]. In this case, when agreeing to a delivery DDP term once again, CLAIMANT recalled the nightmare of 2014, and did not want the same nightmare to occur again. CLAIMANT proposed to add a hardship clause into the contract so that its profit would not be affect by some additional health and safety tests again. RESPONDENT agreed to such a proposal, as it knew what CLAIMANT suffered in 2014 [*PO2, p. 58, para. 21*].

89. However, RESPONDENT did not, and could not have been aware of CLAIMANT's intention to exclude the risk of tariff imposition. In the e-mail of 31 March 2017, CLAIMANT well accepted a delivery DDP for the contract [*Ex. C4, p. 12*]. DDP equals 'delivery-duty-paid', and is the only Incoterm that requires the S*eller* to pay for the import duty [*Incoterms 2010*]. DDP burdens heavy obligation on the Seller, indeed. But were CLAIMANT concern that much about tariff risks, it should have proposed another Incoterm, or alternatively, clearly specified the

allocation of tariff risks in the contract. However, CLAIMANT did neither. During the finalization of the contract, John Ferguson and Julian Krone, the representatives from both parties, agreed to include a narrow hardship reference, a clause without the wording of 'tariff' or 'duty' [*Ex. R3, p. 35*].

90. CLAIMANT was no doubt hopeful to throw any risk, including that of tariff, into the basket of '*comparable unforeseen events*' under Clause 12. But CLAIMANT had never expressed such hope to RESPONDENT.

91. Besides, the parties had never conducted any business before [*PO2, p. 55, para. 1*], nor had CLAIMANT ever sold semen for racehorse breeding in such a massive quantity [*PO2, para. 15*]. Thus, even if CLAIMANT did have concern about tariff imposition in its previous commercial practice, RESPONDENT could hardly know.

92. Therefore, the wording of Clause 12 itself and all the relevant circumstances indicated that Clause 12 was not intended to include tariff increase as a 'hardship'.

b. A Reasonable Person in Respondent's Position Would Not Regard the Increase in Tariff as 'Hardship' Under Clause 12

93. Even if the Tribunal may find it difficult to interpret the meaning of hardship under clause 12 according to the intention of the party, an objective interpretation of the parties' statements under Article 8(2) CISG yields the same result. A reasonable business person would not have regarded the additional tariffs as 'hardship' under Clause 12.

94. In international trade, a 30% increase in tariff would rarely be considered a severe suffering. A reasonable business person would know more or less about the well-known '50% threshold' written in the Official Comment to the 1994 edition of the UNIDROIT Principles. The Comment stated, 'if, the performances are capable of precise measurement in monetary terms, an alteration *amounting to 50% or more* of the cost of the value of the performance is likely to amount to a fundamental alteration' [*Vogenauer/Kleinheisterkamp, Art 6.2.2, pp. 182-183*]. Therefore, the 30% tariff increase in the present case would not be read as 'hardship'.

95. Furthermore, CLAIMANT well accepted RESPONDENT's proposal of a delivery DDP term [*Ex. C4, p. 12, para. 3*]. Under DDP, the Seller bears all the 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 [*ICC Guide* to *Incoterms, p. 149*]. Since DDP, among all Incoterms, represents the maximum obligation for the Seller, the parties are advised by ICC Guide to specify the allocation of risks 'as clearly as possible' [*ICC Guide to Incoterms, p. 149*]. ICC Guide clearly stated that 'if the

Seller wishes to avoid the obligation of clearing the goods for import, he should add the phrase "not cleared for import" after DDP' [*ICC Guide to Incoterms, p. 151*]. However, in this case, CLAIMANT had never communicated risk of import tariff - one of the essential risks the DDP term aims to allocate - with RESPONDENT. A reasonable seller involved in a big sale should have been more careful in accepting a DDP term into the contract, especially when it normally applies delivery EXW [*PO2, p. 56, para. 9*]. It is unreasonable to bind RESPONDENT to a tariff risk because of CLAIMANT's carelessness during contract conclusion. Accordingly, the Tribunal should find that a reasonable business person in RESPONDENT's position would understand the increase in tariff as not regulated under Clause 12.

2. The Contract Does Not Include the Remedy of Price Adaptation

96. Even if the Tribunal finds that the 30% tariff increase falls within the definition of 'hardship' under Clause 12, CLAIMANT still can get no relief. There is no provision in the contract that provides remedy of price adaptation. Pursuant to Article 8(1) CISG, CLAIMANT's intent of requesting an adaption of price as a remedy has not been aware to RESPONDENT (**a**). Pursuant to Article 8(2) CISG, a reasonable person in RESPONDENT's shoes would not understand Clause 12 to include an adaption of price as a remedy (**b**).

a. CLAIMANT's Intent of Requesting an Adaption of Price as a Remedy in Contract Had Not Been Aware to RESPONDENT

97. In interpreting contracts pursuant to Article 8(1) CISG, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail [*Machine for repair of bricks case*]. The subjective intent of a party shall be manifested in fashion, and would be irrelevant if 'secretly' owned [*Machine for repair of bricks case*].

98. In this case, Clause 12 clearly stated the remedy for CLAIMANT when hardship occurs, which is the exemption from liability for CLAIMANT [*Ex. C2, p. 14*]. The parties have never reached an agreement on an adaption of price as a remedy when hardship occurs. Although CLAIMANT once mentioned in the email that 'we are not willing to take over any further risks associated with such a change in delivery terms' [*Ex. C4, p. 12*], CLAIMANT failed to incorporate any other remedy for hardship other than exemption of liability into the contract [*Ex. C5, p. 14*]. Therefore, RESPONDENT could not have been aware of CLAIMANT's intention to include adaption of price as an additional remedy after the tariff increased.

b. A Reasonable Person in RESPONDENT's Position Would Not Understand the Contract as to Include Price Adaptation as a Remedy

99. Should the Tribunal find it difficult to find out the intent of the parties, the objective test under Article 8(2) CISG may assist in interpretation. Usual meaning of the words is attached with special weight in determining reasonable understanding [*Schlechtreim/Schwenzer, Art. 8, p. 163 para. 41; Clothes case*]. Due consideration is to be given to all relevant objective circumstances of the case [*Fruit and vegetables case*].

100. In this case, a reasonable person in RESPONDENT's shoes, after reading the Clause 12, will undoubtedly interpret from the contract's clear wording that the only remedy for hardship is an exemption for liability. Not a single word or phrase referring to the adaption of price is mentioned in the Clause 12 [*Ex. C5, p. 14*].

101. Additionally, a reasonable person would not leave the remedy blank when parties discussed a hardship clause. Although CLAIMANT wrote in the email that 'we are not willing to take over any further risks associated with such a change in delivery terms' [*Ex. C4, p. 12*], it did not provide any detailed remedy if hardship occurs. CLAIMANT could simply request to add the adaption of price as a remedy in Clause 12 if it was unwilling to take any risk or additional expense arising from hardship. But CLAIMANT remained silent towards the only remedy mentioned in Clause 12 during the negotiation of the contract.

102. Therefore, a reasonable person in RESPONDENT's position would not understand the contract to include price adaptation as a remedy due to the clear wording of the clause and the existence of alternative solutions.

3. The Contract Had Never Been Modified

103. CLAIMANT assumed Mr. Shoemaker's statement as an oral modification of contract [*Cl. Memo, p. 24*]. However, such statement was by no means a subsequent modification of the contract. No new offer was made during the phone call between Mr. Shoemaker and Ms. Napravnik [*Ex. C3, p. 18*]. Mr. Shoemaker from RESPONDENT, as a veterinary [*Ex. R4, p. 36*], was not authorized to make any modification on behalf of his employer company; and Ms. Napravnik was clearly aware of this [*Ex. C3, p. 18*]. More importantly, no intention to modify the price - the core term of the contract - could be found in Mr. Shoemaker's statement. By saying that 'we *will* find an agreement on the price' [*Ex. R4, p. 36*], Mr. Shoemaker merely indicated the possibility that the parties might seek for renegotiation sometime after [*Ex. R4, p. 36*].

II. CISG Does Not Provide Price Adaptation as A Remedy Under the Circumstance of A 30% Increase in Tariff

104. In any case, the Tribunal should not grant CLAIMANT a remedy to adapt the contract under CISG. The 30% tariff should not be regarded as an 'impediment' under Article 79 CISG (**1**). Even if it constitutes an 'impediment', Article 79 does not provide a remedy to adapt the contract (**2**). Furthermore, regardless of the scope of Article 79, this provision is derogated by the mutual agreement on particular hardship issue (**3**).

1. The Imposition of Tariff Is Not an Impediment Governed by Article 79 CISG

105. CLAIMENT alleged that the tariff imposition constituted an 'impediment' under Article 79 CISG [*Cl. Memo, p. 28*]. RESPONDENT disagree. Under Article 79, a party that wants to be excused from its non-performance shall prove that it suffered an 'impediment' [*CISG-AC Opinion No. 7*]. More specifically, the party shall prove the following: (1) that the reason for his non-performance lies in an impediment beyond his control; (2) that the impediment was not foreseeable at contract conclusion; (3) that he could not reasonably be expected to avoid or to surmount the consequences of this unforeseeable event. [*Kröll/Mistelis/Perales Viscasillas, p. 1071, para. 44*]. However, in the present case the imposition of the tariff was foreseeable at contract conclusion (**a**). Also, CLAIMANT could reasonably be expected to avoid or surmount the consequences of this unforeseeable event (**b**). Thus, the 30% tariff imposition is not an 'impediment' under Article 79 CISG.

a. The Impediment Was Foreseeable at Contract Conclusion

106. To satisfy the requirement for an exemption under Article 79 CISG, the impediment must not have been foreseen or foreseeable at the time of contract conclusion [*Kröll/Mistelis/Perales Viscasillas*]. Anything which falls within the ordinary range of commercial probability is foreseeable [*Kröll/Mistelis/Perales Viscasillas*]. As to foreseeability of cost fluctuation, in practice, several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract [*Steel ropes case*; *Steel bars case*; *Iron molybdenum case*; *Chinese goods case*].

107. In this case, the imposition of tariff should have been foreseen at the time of contract conclusion. CLAIMANT alleged that the imposition of tariff was unforeseeable because it was not imposed when the contract was formed [*Cl. Memo, p. 28, para. 100*]. However, the existence is never the standard of judging foreseeability. By the time the parties signed the contract, potential tariff instability was highly foreseeable. In this case, the parties signed the contract on 6 May 2017 [*Ex.*

C5, p. 14]. Just one day before, which was 5 May 2017, Mediterraneo's newly selected president had just appointed Ms. Cecil Frankel as his 'superminister' for agriculture, trade and economics. Ms. Cecil Frankel was one of the most ardent critics of free trade and had been an outspoken protectionist for years [*PO 2, p. 58, para. 23*]. Such an appointment, together with factors including the Mediterraneo's new president's continuous and explicit preference for a more protectionist approach in international trade [*Ex. C6, p. 15*], are adequate for a reasonable person to foresee that there may be barriers for the free trade system. The appointment of new officer and the preference of the new president together convey a strong signal of risk of change in free trade system to every reasonable business person. Besides, these things all happened before contract conclusion. Therefore, the imposition of tariff was foreseeable when the contract was signed.

108. CLAIMANT argued that it was not foreseeable that Equatoriana would take retaliation and impose a 30% tariff as a response to the increase in tariff started from Mediterraneo [*Cl. Memo, p. 28*]. However, the system of free trade had just been growing for years [*Ex. C6, p. 15*], which was not stable enough. It is a common phenomenon for the international trade system to suffer upheaval. Thus, Equatoriana, in response to the trade protectionism of Mediterraneo, was likely to take action against Mediterraneo. Besides, previous restrictions imposed by other countries affecting imports from Equatoriana had resulted in directed retaliatory measures [*Ex. C6, p. 15*]. Additionally, in Equatoriana's Ministry of Economics, there are some 'hardliners' who are more critical to free trade [*Ex. C6, p. 15*]. It can be reasonably assumed that the hardliners would encourage Equatoriana's Prime Minister to react strongly to other countries' restriction. Thus, Equatoriana's imposition of tariff was highly foreseeable at contract conclusion.

b. CLAIMANT Could Reasonably Be Expected to Avoid or Surmount the Consequences of This Unforeseeable Event

109. If parties may be reasonably expected to have avoided or surmounted certain situations, and thus to have fulfilled their contractual obligations, no impediment would be found by the tribunal [*Vine wax case*]. The obligor can be expected to overcome an impediment in order to perform the contract in the agreed manner, even when this incurs greatly increased costs and even a loss resulting from the transactions [*Schlechtriem/Schwenzer; Iron molybdenum case; Tomato concentrate case*]. In *tomato concentrate case*, for example, it was held that a seller of tomatoes was not exempt for its failure to deliver when heavy rainfalls damaged the tomato crop in the seller's country, causing an increase in market prices. The court ruled that, since the entire tomato crop had not been destroyed, the seller's performance was still possible, and the reduction of tomato supplies as

well as their increased cost were impediments that seller could overcome [*UNCITRAL Digest; Tomato concentrate case*].

110. In the present case, CLAIMANT could be expected to have overcome the consequences of the tariff increase. CLAIMANT shall pay for the imposed tariff of 30% in order to fulfil its contractual obligations, which is to deliver the semen to RESPONDENT's country [*Ex. C6, p. 15*]. CLAIMANT could not successfully argue that it was suffering bankruptcy, and that 30% tariff would seriously endanger its present restructuring plan [*PO 2, p. 59, para. 29*]. CLAIMANT could negotiate with its present creditors, or find someone else to negotiate a new credit line [*PO. 2, p. 59, para. 29*]. In any event, as stated in *tomato concentrate* case, as long as the performance to overcome the impediment was possible, the obligor should conduct the performance. Actually, CLAIMANT had already paid the 30% tariff [*Ex. C8 p. 18*], which is a steady proof of its economic ability. Therefore, CLAIMANT could reasonably be expected to surmount the consequences of the unforeseen tariff imposition.

111. In conclusion, the imposition of tariff is not an 'impediment' governed by Article 79 CISG.

2. Even If the Tribunal Finds That Tariff Imposition Is an 'Impediment' Governed by Article 79 CISG, Neither Article 79 Nor Any General Principle Underlying CISG Provides Any Remedy For CLAIMANT

112. CLAIMANT sought remedy on the ground of Article 79 and some general principles underlying CISG. However, such attempts could not succeed. The remedy in Article 79 is to exempt the aggravated party from the liability of failure to perform caused by impediment. CLAIMANT had already paid the 30% tariff. Such a performance is not provided with relief in Article 79 CISG (**a**). Secondly, no general principle underlying CISG can serve as a 'gap-filler' to provide remedy for the hardship situation in this case (**b**).

a. Having performed its obligation, CLAIMANT cannot seek remedy under Article 79

113. Article 79 exempts a party from liability for damages when that party failed to perform any of its obligations [*CISG-AC Opinion No. 7*]. The exemption only relates to the contractual obligation which has not been performed, [*Schlechtriem/Schwenzer, p. 1148, para. 50*] but provides nothing concerning remedies for performance.

114. In the present case, however, CLAIMANT had already paid the 30% tariff and overcome the impediment [*Ex. C8, p. 18*]. Thus, CLAIMANT can seek no relief under Article 79 CISG.

b. No general principles underlying CISG provides remedy for CLAIMANT

115. CLAIMANT relied on five general principles and claimed reimbursement under these principles [*Cl. Memo, p. 29*]. The five principles are, respectively, the principle of loss mitigation, *equitable estoppel*, good faith, cost of one's own obligation and simultaneous exchange of performance. However, none of the five principles raised by CLAIMANT could provide it with remedy.

116. Firstly, the principle of loss mitigation was mistakenly applied by the CLAIMANT. As CLAIMANT claimed in its memo, such principle provides that a party 'claiming the damage to mitigate the loss' shall be obliged to avoid the damages to the other party [*Cl. Memo, p. 29*]. However, RESPONDENT was not claiming any damage. Actually, this case has nothing to do with the principle of loss mitigation.

117. Secondly, the principle of *equitable* estoppel does not apply in this case. *Estoppel*, a principle coming from the Common Law tradition, is not explicitly mentioned in CISG [*Uçarı*lmaz]. Even if the Tribunal finds that *equitable estoppel* a CISG principle, such principle is not successfully established in this case. The principle requires that one party had relied on the promise of the other [*Uçarı*lmaz]. However, RESPONDENT had never made any 'promise' as to price adaptation in this case.

118. Thirdly, the principle of good faith could not provide remedy for CLAIMANT. CLAIMANT can claim, as it wish, itself a party in good faith as it paid the additional tariff. But in no way shall RESPONDENT compensate for CLAIMANT, for the additional tariff is one of the CLAIMANT's contractual obligations.

119. The fourth and fifth principles, respectively 'each party has to bear the costs of its obligation' [*Machines, devices and replacement parts case*] and 'simultaneous exchange of performance' [*Recycling machine case*], are used by CLAIMANT on the presumption that RESPONDENT bears an obligation to pay for the additional tariff. However, as has been elaborated in the previous paragraphs of this memo, RESPONDENT disagrees with such a presumption.

120. In conclusion, CLAIMANT's attempt to seek remedy through the general principles of CISG was a failure.

3. In Any Event, the Parties Have Excluded the Application of Article 79 CISG

121. Even if the Tribunal finds that Article 79 CISG does provide price adaption as a remedy, Article 79 is not applicable because it was excluded by the parties in the contract. Pursuant to Article 6 CISG, as long as the issue in dispute is not a matter concerned in Article 12 CISG, the parties have the right to 'derogate from' or 'vary' the effect of any provision of CISG [*UNCITRAL*

Digest 2016, p. 33; Tree case]. Since the parties had agreed on Clause 12, a special regulation on *force majeure* and hardship situations, Article 79 was already derogated **(a)**. Furthermore, even if Article 79 was not derogated, the parties had particularly limited the effects to the exemption of liabilities **(b)**.

a. Article 79 of CISG Was Derogated Since Both Parties Agreed on A Particular Hardship Situation

122. Article 6 CISG allows parties to derogate from the liability rules of CISG [*Ukraine No.48 case*]. Based on the *Ukraine arbitral award*, since the parties may exclude certain liability rules and thus set themselves free from the burden of assuming possible future liabilities, it would be likely to find that Article 6 also allows derogation from exemption rules.

123. CLAIMANT cited a list of cases and claimed them to be 'highly persuasive as they are directly mentioned in the CISG Digest regarding the inclusion of *force majeure* clause' [*Cl. Memo, p. 27, para. 91*]. However, all these cases stated one same conclusion: when not excluded by the parties, CISG applies to the sales contract between the parties; either party cannot claim that it intended to apply some domestic law only [*Société case, Building materials case 2004; BP Oil case; Asante Technologies case; Auto case 2006; Auto case 2007; American Mint LLC v. GOSoftware, Inc.*]. However, such a decision has little to do with the present case, let alone anything to do with '*force majuere*'.

124. CLAIMANT also argued, that both parties 'never [...] provide a clear, unequivocal nor affirmative message in the clause regarding the derogation of Art. 79' [*Cl. Memo, p. 27, para. 91*]. However, considering the wording of Clause 12 **(aa)** and the intention of both parties **(bb)**, a clear, unequivocal and affirmative agreement to derogate from Article 79 would be found.

aa. The wording of Clause 12 showed the parties' agreement of derogation

125. Pursuant to Article 6 CISG, the parties can alter the meaning of a certain term in CISG [*Packaging machine case*], or specify a notion in CISG [*Tree case*].

126. Clause 12 of the contract has altered and specified the notion of 'impediment' under Article 79 CISG. Article 79 is in the nature, a *force majeure* provision [*UNCITRAL Digest 2016, p. 373*]. It relieves a non-performing party from liability for damages if the failure to perform was due to an 'impediment' [*CISG, Art. 79*]. Clause 12, however, specified the situations that can be deemed as 'impediment', which included (1) 'lost semen shipments', (2)delivery delay beyond control, such as 'missed flight, weather delays, failure of third party service', (3) 'acts of God', and (4)'hardship', which is 'caused by additional health and safety requirements or comparable unforeseen events [...]' [*Ex. C5, p. 14*]. The above situations not only included those of *force majeure*, but also

hardship, which was not covered by CISG. Thus, Clause 12 constituted the parties' derogation from Article 79 of CISG.

bb. The negotiation process showed the parties' intent of derogation

127. A general review of the negotiation process would clearly show Both parties' intention to write a specific hardship clause into the contract. On 31 March 2017, CLAIMANT initiated to include a hardship clause in the contract [*Ex. C4, p. 12*]. On 11 April 2017, CLAIMANT took a further step: it suggested reliance on the ICC-Hardship clause [*Ex. R2, p. 34*]. Later in the discussion between Ms. Napravnik and Mr. Antley, there was a divergence over whether the ICC-Hardship clause was too broad [*Ex. R3, p. 35*]. Nevertheless there was no dispute over writing such a clause in the contract.

128. CISG was indisputably the governing law of the contract [*Ex. C4, p. 12*], and Article 79 CISG has provided a regulation for changed circumstances. However, both parties still tried to include a specific hardship clause. Such act was a clear evidence of their intention to derogate Article 79 of CISG.

129. Therefore, the parties had excluded the application of Article 79 CISG by including Clause 12 into the contract. According to Clause 12, when the changed circumstances occurred, the only effect was that 'seller shall not be responsible' [*Ex. C4, p. 12*]. Thus, CLAIMANT was not entitled to claim remedy from RESPONDENT.

b. Even if Article 79 Is Not Excluded, The Parties Had Limited Remedy to The Exemption of Liabilities

130. Even if the Tribunal regards that a clear agreement on exclusion of Article 79 was absent, it would be likely to find that the parties had altered the legal effect of Article 79. The parties may reach agreements on remedies different from what are provided in CISG [*Packaging machine case*].

131. Unlike Article 79(5) CISG, which allows the disadvantaged party to exercise some right other than to claim damages under CISG, Clause 12 of the contract explicitly stated that the only effect of a hardship situation was CLAIMANT's exemption of liabilities [*Ex. C4, p. 12*]. Although the employees on both sides who finalized were not involved in the negotiation of adaptation clause, they had full access to the prior emails [*PO 2, p. 55*] and must have considered the possibility of adaptation. Nevertheless, the parties reached no conclusion on the adaptation clause [*Ex. C8, p. 17*], and the contract did not include any adaptation clause [*Ex. C5, p. 14*].

132. Therefore, the remedy for the 30% tariff imposition, as one of the changed circumstances ruled by Clause 12, was limited to exemption of liabilities. CLAIMANT was not entitled to seek adaptation of price.

III. Even if there is a gap in CISG, CLAIMANT is not entitled to claim price adaptation under the UNIDROIT Principles

133. CLAIMANT resorted to Section 6.2 of the UNIDROIT Principles - the hardship provisions - to seek remedy [*Cl. Memo, p. 32*]. However, Section 6.2 cannot be invoked because no general principles underlying CISG could justify such a gap-filling (**1**). Even if Section 6.2 is to be applied, the tariff imposition did not meet the definition of 'hardship', and the situation in the present case failed to meet the requirements under Article 6.2.3 that can trigger an adaptation of price. Thus, CLAIMANT could not claim price adaptation under Section 6.2 (**2**).

1. Absence of related 'general principles underlying CISG', Section 6.2 of the UNIDROIT Principles cannot be invoked as a gap-filling technique of CISG.

134. CLAIMANT proposed that the UNIDROIT Principles regarding hardship can be invoked in this case [*CL. Memo, p. 32, para. 127*]. RESPONDENT disagree. While it is one thing to agree that the UNIDROIT Principles can play a gap-filling role under Article 7(2) CISG, it is quite another to automatically invoke **any** provision of the UNIDROIT Principles as a supplement to CISG. Pursuant to Article 7(2) CISG, a 'governed-but-not-settled' issue of CISG shall firstly be settled 'in conformity with the *general principles* on which [the Convention] is based' [*CISG Art. 7(2)*]. Firstly, the UNIDROIT Principles as a whole could not constitute '*general principles* on which CISG is based' [*Scott*] **(a)**. Secondly, there is no *general principle* underlying CISG that can justify applying the hardship provisions of the UNIDROIT Principles **(b)**. Thus, Section 6.2 of the UNIDROIT Principles cannot be automatically invoked to fill the gap of CISG.

a. The UNIDROIT Principles as a whole could not constitute 'general principles'

135. The text of Article 7(2) does not specifically provide for supplementation by international instruments beyond CISG itself. General principles on which CISG is based should be distilled from the text of the Convention itself [*Scott*]. Although various articles of the UNIDROIT Principles may indeed reflect general principles underlying CISG, interpreters of CISG should refrain from the temptation to use the Principles as a handbook of CISG general principles since some of the Principles' provisions even deviate from CISG and 'break fresh ground' [*Scott*]. Thus, the UNIDROIT Principles are not 'general principles on which CISG is based' under Article 7(2) CISG.

b. There is no 'general principle underlying CISG' that justifies applying the hardship provisions

136. While it is possible to use the UNIDROIT Principles as a mean of interpreting and supplementing CISG [*Bonell*], such application is not unconditional.

137. CLAIMANT listed several cases where Article 7.4.9 of the UNIDROIT Principles served as a gap-filler [*Cl. Memo., p. 32, para. 128*]. However, this does not prove that the hardship provisions (Article 6.2.1 - 6.2.3) of the UNIDROIT Principles can play the same role. In all the listed cases [*Chemical fertilizer case; Rolled metal sheets case; Electrical appliances case*], the dispute was about the interest rate. Article 78 CISG, while granting the right to interest, is silent on the question of the applicable rate [*Rolled metal sheets case*]. Therefore, the Tribunals all resorted to Article 7.4.9 of the UNIDROIT Principles to decide specific interest rates. However, in all these cases, never had the Tribunals said that the UNIDROIT Principles was the general principles. Rather, as stated in *rolled metal sheets case*, the related 'general principle' is 'full compensation' of the loss cause, which underlies Article 74 of CISG [*Rolled metal sheets case*].

138. Hence, the UNIDROIT Principles may be used to supplement CISG only as long as they help in clarifying or supporting *already existing general* principles underlying the Convention [*Anna*]. As to hardship, however, there is no such relevant general principle underlying CISG. The legislative history of CISG is replete with evidence showing that the Principles' hardship provisions are contrary to the spirit of the Convention [*Scott*]. It is also obviously incorrect to claim that the hardship provision in the UNIDROIT Principles itself constitutes a 'principle', as what CLAIMANT did in its memorandum [*Cl. Memo, p. 32, para. 129*].

2. Even if Section 6.2 of the UNIDROIT Principles is to be applied, CLAIMANT is not entitled to any additional payment.

139. The Tribunal may recognize what the Belgium Supreme Court once did: without explaining how 'general principles' were found, the Court directly affirmed using Section 6.2 of the UNIDROIT Principles as a gap-filler [*Steel tubes case*]. Such an approach, however, remains controversial [See *Amalina; Dai*]. Even if the Tribunal still chooses to follow the pathway of the *Steel tubes case* and apply Section 6.2, the present situation fails to meet the requirements of 'hardship' under Article 6.2.2 UNIDROIT Principles **(a)**. Even if there was a 'hardship' under Article 6.2.2 UNIDROIT Principles, CLAIMANT was not entitled to adapt the price **(b)** for there was no successful renegotiation, and the Tribunal was limited with power to adapt. Therefore, Section 6.2 of UNIDROIT Principles does not provide remedy for CLAIMANT.

a. Tariff imposition is not a 'hardship' under Article 6.2.2 of the UNIDROIT Principles

140. CLAIMANT argued that there is hardship under Article 6.2.2 of the UNIDROIT Principles in this case [*Cl. Memo, p. 33, para. 131*]. RESPONDENT disagree. Article 6.2.2 broke the definition of hardship into two elements. The first provides that there is hardship where the occurrence of events 'fundamentally alters the equilibrium of the contract'. The second consists of the four matters referred to in Article 6.2.2 (a)-(d) [*Vogenauer/Kleinheisterkamp, p. 717, para. 2*], respectively, first, known to the disadvantaged party after the conclusion of the contract; second, could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; third, beyond the control of the disadvantaged party; fourth, the risk of the events was not assumed by the disadvantaged party.

141. In the present case, however, the occurrence of the event did not 'fundamentally alter the equilibrium of the contract' (**aa**); it could be reasonably have been taken into account by CLAIMANT (**bb**); also, the risk of the event shall be assumed by CLAIMANT (**cc**). Therefore, the tariff imposition fails to meet the definition of 'hardship' under Article 6.2.2 of the UNIDROIT Principles, and thus, CLAIMANT cannot seek adaptation of price as a remedy.

aa. The Imposition of 30% Tariff Is Not a Fundamental Alteration of the Equilibrium of the Contract

142. The exceptional nature of hardship requires a 'fundamental alteration in the original contractual equilibrium, which means an otherwise disruption of the balance between performance and counter-performance [*Amin Dawwas*].

143. In determining what is a 'fundamental' alteration, the Official Comment to the 1994 edition of the UNIDROIT Principles provided some guidance. The Official Comment wrote: 'If, the performances are capable of precise measurement in monetary terms, *an alteration amounting to 50% or more of the cost of the value of the performance* is likely to amount to a fundamental alteration' [*Vogenauer/Kleinheisterkamp, Art 6.2.2, pp. 182-183*]. This sentence was dropped from the 2004 version of the UNIDROIT Principles because the figure of 50% has been criticized on the grounds that it was too low and was arbitrary [*Vogenauer/Kleinheisterkamp, p. 719, para. 8*]. Nevertheless, it can be well concluded that an alteration amounts to less than 50% of the cost of performance will not be fundamental. Such a threshold has already been supported by the international arbitration practice [*Nuova v. Fondmetall; Steel tubes case*]. The tariff imposition in this

case merely leads to a 30% price increase, which, under the 50% standard, is by no means fundamental.

144. Besides, unlike cases where the government policy would cause one party to make no profit for good [*U.S. oil company case*], CLAIMANT would make profit from transactions with RESPONDENT in the long run. RESPONDENT's investors had expressed a 'clear intention' to become one of the leading breeders for racehorses [*Ex. C3, p.11*]. To accomplish this goal, as a company originally focused on the broodmare lines [*NoA, p. 5*], RESPONDENT would have to seek cooperation with companies which have top-level stallions, so as to match its first-class mares. CLAIMANT, as a company particularly known for its breeding success regarding racehorses [*NoA, p. 4*], is RESPONDENT's second-to-none choice. RESPONDENT has confirmed [*Ex. C3, p. 11*] and repeatedly emphasized [*Ex. C8, p. 18*] its willingness to establish long-term relationship with CLAIMANT. RESPONDENT even explicitly introduced to CLAIMANT about its plans to buy another 50 doses from CLAIMANT's stallion [*Ex. C8, p. 18*]. Hence, CLAIMANT is very likely to recover from its financial situation in the near future.

bb. CLAIMANT Could Foresee the Tariff Imposition

145. The 30% tariff in the present case, is foreseeable considering the facts that (1)the Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to disease control [*NoA, p. 5*] and the lift of the ban was only temporary [*Ex. C1, p. 9*], which means the government may impose further restrictions on the transportation of animals, not surprisingly, the animal product like semen too. (2) As for the price, President of Mediterraneo announced a preference for a more protectionist approach to international trade in election, for agricultural products in particular [*Ex. C6, p. 15*].

cc. CLAIMANT Should Assume the Risk of the Tariff Imposition

146. The assumption of risk need not have been express; it can be inferred from the circumstances or from the nature of the contract [*Vogenauer/Kleinheisterkamp, p. 721, para. 15*]. In this case, CLAIMANT and RESPONDENT included a DDP term in the contract [*Ex. C6, p. 14*]. As an experienced international trade dealer, CLAIMANT was supposed to take the possible change of customs policies into consideration, especially when its home country did impose a tariff against Equatoriana products [*NoA, p. 6*].

147. In conclusion, the tariff imposition is not a hardship under Section 6.2 UNIDROIT Principles.

b. Even If The 30% Tariff Is A 'Hardship', CLAIMANT Is Not Entitled To The Payment

148. Even if the tariff imposition is a 'hardship' under the UNIDROIT Principles, and thus triggered the parties' right to seek remedy, CLAIMANT is still not entitled to the additional payment. Pursuant to Article 6.2.3 of the UNIDROIT Principles, the disadvantaged party can first, request renegotiations, and second, resort to the Tribunal. In the present case, contrary to what CLAIMANT propose in its memo [*Cl. Memo, p. 35, para. 140*], there was no renegotiation after CLAIMANT knew about the tariff imposition **(aa)**. Even if there was a renegotiation, the parties reached no agreement **(bb)**. Furthermore, if CLAIMANT would choose to resort to the Tribunal, the Tribunal shall not adapt the contract **(cc)**.

aa. There was no renegotiation after CLAIMANT was informed of the new tariff

149. CLAIMANT proposed that it had requested renegotiation after being informed of the tariff imposition [*Cl. Memo, p. 34, para. 141*]. RESPONDENT disagree. In the telephone meeting on 21 January 2018, Mr. Greg Shoemaker from RESPONDENT simply wanted to ensure that the remaining 50 doses were actually shipped [*Ex. R4, p. 36, para. 3*]. The parties were not re-negotiating over any term clearly established in the contract.

bb. Even if there was a renegotiation, the parties reached no agreement

150. Even if the telephone meeting was deemed as a renegotiation, the parties had never agreed that RESPONDENT should bear the obligation of the additional payment. CLAIMANT asserted that RESPONDENT should bear such an obligation without raising any specific proof [*Cl. Memo, p. 34, para. 144*]. Actually, during the meeting, Mr. Shoemaker simply stated that '***if*** *the contract provides for an increased price in the case of such a high additional tariff we* ***will*** *certainly find an agreement on the price*' [*Ex. R4, p. 36, para 4*]. As a person who had not been involved in the contract negotiation process, Mr. Shoemaker was not making promises. Rather, he was simply stating his personal ideas.

cc. The Tribunal was not granted with power to adapt the contact

151. In the present case, even if Article 6.2.3 (4) of the UNIDROIT Principles is triggered, the Tribunal is not entitled to adapt the contract. According to Article 28 (3) of Model Law, the Tribunal shall decide *ex aequo et bono* or *as amiable compositeur* 'only if the parties have expressly authorized it' to do so [*Reinsurance case*]. The parties had never expressly granted the Tribunal with power to adapt the contract in restoring equilibrium. Therefore, the Tribunal shall not take measures pursuant to Article 6.2.3(b) UNIDROIT Principles.

152. In conclusion, Section 6.2 of the UNIDROIT Principles does not provide remedy of adaptation of price for CLAIMANT.

IV. Conclusion

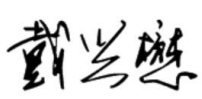
153. Counsel for RESPONDENT kindly requested the Tribunal to find that CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaption of the price.

PRAYER FOR RELIEF

Counsel for RESPONDENT respectfully request the Tribunal:

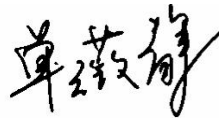
- To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
- To find that CLAIMANT is not entitled to submit evidence from other arbitration proceedings;
- To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;
- To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Respectfully submitted by Counsel for RESPONDENT,



DAI Xingmao

GUAN Wenyue



SHAN Weijing

TAN Yanfei

Weißenbruch, Nina

Beijing, 24 January 2019.

Certificate and Choice of Forum

To be attached to each Memorandum

I GUAN Wenyue, on behalf of the Team for (name of School) Tsinghua University hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

- [x] Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.
- [ ] Our School is competing in both Vis East Moot and Vienna Vis Moot.
  - [ ] We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

  - [ ] We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)
    - [ ] Vis East Moot in Hong Kong, or
    - [ ] Vienna Vis Moot

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

Name GUAN Wenyue

Signature