SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong SAR

MARCH 31ST – APRIL 7TH, 2019

HANDONG INTERNATIONAL LAW SCHOOL

MEMORANDUM FOR RESPONDENT

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

COUNSEL:

SEONMIN KIM • KANGWOO LEE

SHARAD KUMAR SHARMA • YESOL MIN • GYUNGHEE KIM

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Fucci, Federick R. *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance*, April 2006, at https://www.cisg.law.pace.edu/cisg/biblio/fucci.html#ii
Cited as: *Fucci*
In paragraph: 89, 90, 91

Gusy, Martin F. and Corinne Montineri A Guide to the ICDR International Arbitration Rules, 2nd Edition
Oxford University Press (2011)
Cited as: *Gusy*
In paragraph: 25

Huber, Peter and Mullis, Alaister *The CISG : A new textbook for students and practitioners*
Sellier (2007)
Cited as: Huber
In paragraphs: 74, 77, 99

O'Sullivan, Nikki *Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?* (2017)
Available at: http://arbitrationblog.practicallaw.com/lagging-behind-is-there-a-clear-set-of-rules-for-the-treatment-of-illegally-obtained-evidence-in-international-arbitrations/
Cited as: *O'Sullivan*
In paragraph: 57

Ortiz, Ricardo Calvillo

Admissibility of Hacked Emails as Evidence in Arbitration. (2018)

Available at: https://blogs.law.nyu.edu/transnational/2018/05/admissibility-of-hacked-emails-as-evidence-in-arbitration/

Cited as: *Ortiz*

In paragraph: 58

Perillo, Joseph

Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts, 5 Tul. J. Int'L. & Comp. 5 (1997)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/783

Cited as: *Perillo*

In paragraph: 89

Purnell, Edward

Hardship and Contract Modification: Framing Ex Ante Expectations and Making Contract Adjustments Using Discounted Cash Flow Technique (2016)

Korea University L.Rev. 20.

Cited as: Purnell

In paragraph: 89

Redfern, Alan; Hunter, Martin; Blackaby, Nigel; Partasides, Constantine

Law and Practice of International Commercial Arbitration, 6th Edition, Oxford (2015)

Cited as: *Redfern*

In paragraph: 25

Rimke, Joem *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts* (2011)

Available at https://www.cisg.law.pace.edu/cisg/biblio/rimke.html
Cited as: *Rimke*

In paragraphs: 103, 110

Salasky, Julia and Montineri, Corinne *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, (2013) Association Suisse de l'Arbitrage Bulleting, Vol. 31, Issue 4, pp. 774-796.

Cited as: *Salasky and Montineri*

In paragraphs: 40, 68.

Schwenzer, Ingeborg Force Majeure and Hardship in International Sales Contracts" [2008] VUWLawRw 39; (2008) 39(4) Victoria University of Wellington Law Review 709
Cited as: *Schwener*
In paragraph: 85, 100, 109

Webster, Thomas H. and Buhler, Michael W. *Handbook of ICC Arbitration – Commentary, Precedents, and Material*, 3rd Edition,

Thomson Reuters (2014)

Cited as: *Webster and Buhler*

In paragraph 44

Wetter, Gillis J. *Salient Features of Swedish Arbitration Clauses, Swedish and International Arbitration*

[1983] 33 at pp. 33–34.

Cited as: *Gillis*

In paragraph: 8

INDEX OF COURT CASES

United Kingdom

C v. D
[2008] EWCA Civ 1282, 1 All ER (Comm) 1001
Cited as: *C v. D*
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[2013], EWHC 4071 (Comm).
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499 F Supp 53 (WD Pa, 1980)
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Louisiana Power & Light Co., supra (quoting Gulf Oil Corp. v. Federal Power Commission,
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UN Convention on Contracts on the International Sale of Goods (CISG), München (2011)
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HKIAC Rules

2018 HKIAC Administered Arbitration Rules
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ICSID Rules

ICSID Convention Arbitration Rules
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UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency Cited as: UNCITRAL Rules on Transparency In paragraphs: 65, 66, 67
WIPO Rules	WIPO Arbitration Rules Cited as: WIPO In paragraph: 21

OTHER LEGAL SOURCES

ICC Hardship Clause	ICC Hardship Clause (2003) Cited as: *ICC Hardship* In paragraph: 33
New York Convention	The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Cited as: New York Convention In paragraphs: 7, 9, 12, 16, 22
UNCITRAL Model Law	*UNCITRAL Model Law on International Commercial Arbitration* (1985) Cited as: UNCITRAL Model Law In paragraphs: 7, 9, 12, 16, 22, 24, 43
UNIDROIT Principles	*UNIDROIT Principles of International Commercial Contracts* (2016) Cited as: UNIDROIT In paragraphs: 98, 116

LIST OF ABBREVIATIONS

%	Percent
&	And
Art(s).	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Cl. Ex.	CLAIMANT's Exhibit
cmt.	Commentary
CONTRACT	Frozen Semen Sales Agreement
DDP	Delivery Duty Paid
FN	Footnote
HKIAC	Hong Kong International Arbitration Centre
i.e.	id est (that is)
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes

LCIA	London Court of International Arbitration
Mr.	Mister
Ms.	Miss
NAFTA	North American Free Trade Agreement
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards (1958)
No.	Number
p./pp.	page/pages
para.	paragraph(s)
PICC	UNIDROIT Principles on International Commercial Contracts
PO1	Procedural Order No.1
PO2	Procedural Order No.2
Rs. Ex.	RESPONDENT's Exhibit
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

USD	United States Dollar
v.	Versus
WIPO	World Intellectual Property Organization

STATEMENT OF FACTS

1. The Parties to this arbitration are Black Beauty Equestrian ("RESPONDENT") and Phar Lap Allevamento ("CLAIMANT"). RESPONDENT is a medium sized mare farm in Equatoriana. CLAIMANT is a large sized racehorse farm business in Mediterraneo.

24 Mar. 2017 *Exhibit C2*	RESPONDENT agreed to purchase a hundred doses of frozen semen of a champion stallion from CLAIMANT at the price of 99,500 USD per dose.
31 Mar. 2017 *Exhibit C4*	CLAIMANT accepted a Delivered Duty Paid ("DDP") under a condition to include a hardship clause as to additional unforeseeable health and safety requirements, in particular. Given the additional costs associated with a DDP delivery, CLAIMANT was seeing a need to increase the sales price.
11 Apr. 2017 *Exhibit R2*	CLAIMANT sent an email to RESPONDENT, suggesting arbitration in a neutral country.
5 May 2017 *Procedural Order No.2*	President of Mediterraneo appointed Ms. Cecil Frankel, who had been advocating for the restriction on foreign agricultural products as a minister.
6 May 2017 *Exhibit C5*	The Parties entered into the Frozen Semen Sales Agreement (the "Agreement"), reaching the final price at 100,000 USD per dose. The Agreement includes a hardship clause and an arbitration agreement which specifies the seat of arbitration as Danubia.
20 May 2017; 3 Oct. 2017 *Notice of Arbitration*	CLAIMANT sent the first, and the second shipment of 25 doses respectively.
15 Nov. 2017 *Procedural Order No.2*	The government of Mediterraneo imposed tariffs of twenty-five (25) per cent on foreign agricultural products by executive order.
19 Dec. 2017 *Procedural Order No.2*	The government of Equatoriana announced the imposition of thirty (30) per cent tariffs upon all agricultural goods by executive order.

21 Jan. 2018 *Exhibit R4*	While discussing regarding the issue of tariffs on the phone, Mr. Shoemaker of CLAIMANT notified Ms. Napravnik of RESPONDENT that he was not authorized to make decisions nor involved in the negotiation. Also, he told her that he had to talk to the legal department to answer the problem.
22 Jan. 2018 *Exhibit C8*	CLAIMANT authorized the final shipment.
31 Jul. 2018 *Notice of Arbitration*	CLAIMANT filed a Notice of Arbitration to Hong Kong International Arbitration Centre ("HKIAC").
24 Aug. 2018 *Answer to Notice of Arbitration*	RESPONDENT submitted the Response to Notice of Arbitration.
2 Oct. 2018 *Letter by Langweiler*	CLAIMANT urged to submit a copy of the award and the relevant submission from RESPONDENT's other arbitration proceedings.
3 Oct. 2018 *Letter by Fasttrack*	RESPONDENT made an objection to the submission of materials from the other arbitration proceedings.

SUMMARY OF ARGUMENTS

2. RESPONDENT state that Clause 15 of the Sales Agreement ("Arbitration Agreement") cannot empower the Tribunal to adapt the Sales Agreement because the Arbitration Agreement is governed by the law of Danubia which requires an express empowerment. Considering absence of the express empowerment and the Parties' intent to choose the law of Danubia as a governing law of the Arbitration Agreement, the Tribunal, therefore, does not have the power to adapt the Sales Agreement under the Arbitration Agreement. (**Issue 1**)

3. The Tribunal should exclude the impermissible evidence that CLAIMANT is seeking in accordance with the international arbitration rules including HKIAC and IBA. Moreover, the potential ways of illicit obtainment of the documents such as hacking should be barred under the arbitration rules and international practice. On the other hand, the CLAIMANT's contention on the Documents' relevancy and materiality is meritless since the evidence does not reach to the extent to the relevancy and materiality that the rule requires. Moreover, even if it might be relevant and material to the outcome of this arbitration, it does not outweigh the Respondent's contractual rights regarding confidentiality under the arbitration rules. Presumably, admission of the evidence against the confidentiality agreement would cause internal conflict of laws within the institutional framework, HKIAC. In addition, CLAIMANT may pursue joinder of additional parties or other procedural methods to enter the evidence from the other arbitral proceedings. However, it would not be allowed under HKIAC rules. Even if CLAIMANT triggers UNCITRAL Arbitration Rules for admission of the evidence, it would also be inapplicable in our case. (**Issue II**)

4. RESPONDENT argues neither the Hardship Clause nor Art. 79 CISG entitles CLAIMANT an adaptation of the Price. Firstly, the narrowly tailored hardship clause of the Agreement is not applicable to a 30% increase in tariffs (A). Also, Art. 79 CISG is inapplicable here as is derogated by the Parties; even if not, the elements of hardship are not met thereunder (B). Lastly, RESPONDENT has never agreed to the adaptation in the first place, nor defeated his duty to act in good faith (C). Thus, RESPONDENT respectfully asks the tribunal to dismiss the CLAIMANT's motion, and order CLAIMANT to pay RESPONDENT costs incurred in this arbitration. (**Issue III**)

ARGUMENT

I. THE TRIBUNAL DOES NOT HAS THE POWER TO ADAPT THE SALES AGREEMENT.

5. The Tribunal does not have jurisdiction and/or power to adapt the Sales Agreement based on the Arbitration Agreement. The Arbitration Agreement is governed by the law of Danubia which only allows a narrow interpretation, so the Tribunal is not empowered to adapt the Sales Agreement. (**A**) Even if the law of Mediterraneo governs the Arbitration Agreement, because of the intention of the Parties, the Tribunal does not have the power to adapt the Sales Agreement. (**B**) Moreover, The Tribunal should consider the terms "arising out of" as a narrow meaning. (**C**)

A. Under the law of Danubia, the Arbitration Agreement cannot empower the Tribunal to adapt the Sales Agreement.

6. The Arbitration Agreement, governed by the law of Danubia, cannot empower the Tribunal to adapt the Sales Agreement. In the present case, in the absence of an express choice, the governing law of the Arbitration Agreement is the law of Danubia where the arbitration would be executed. (1) Under the law of Danubia, the Tribunal is not authorized to adapt the Sales Agreement by the Arbitration Agreement. (2).

1. Under UNCITRAL Model Law, the governing law of the Arbitration Agreement is the law Danubia, which is the law of the Seat of arbitration.

7. The New York Convention Article V(1)(a) and UNCITRAL Model Law Article 36(1)(a)(i) provides a clear choice of law analysis for the governing law of arbitration agreements in the absence of parties' express choice of law. Because the Arbitration Agreement is separable from the main contract, same law does not have to govern the Sales Agreement and the Arbitration Agreement. (i) The Parties chose the law of Danubia as a governing law of the Arbitration Agreement. (ii) Moreover, the law of the seat overrides the law of the contract as a default rule. (iii)

i. The Arbitration Agreement is separable from the main contract.

8. An international arbitration agreement is always treated as presumptively separable from the main contract. [*Born*] CLAIMANT argues that because the purpose of the separability presumption is to protect the arbitration agreement where the main contract

is invalid, separability is only applied in validity issue. However, the separability presumption has closely-related consequence relating to issue of choice of law. [*Ibid]*. Therefore, 'where the arbitration agreement is separable from the underlying contract, it may be governed by a different law from the underlying contract'. [*Born*]. Gillis Wetter also commented that 'the notion (of separability) implies an assumption to the effect that each time ... two parties enter into any sort of business contract which contains an arbitration clause they conclude not one but two contracts.' [*Gillis*]

9. Article 8 of the UNCITRAL Model Law does not expressly indicate choice-of-law issues like Article II of the New York Convention. But 'as with Articles II and V(1)(a) of the Convention, these provisions acknowledge the presumptive separability of international arbitration agreements for choice-of-law purposes.' [*Born*]. 'Consistent with these provisions, judicial authority in Model Law jurisdictions has uniformly recognized that international arbitration agreements may be, and often are, governed by a different law than that governing the underlying contract.' [*Born*]

10. For example, in the *Bulbank* case, the Supreme Court ignored the parties' choice of Austrian law to govern the underlying contract, considering that the arbitration clause ought to be treated as a separate agreement subject to a separate law. Indeed, referring to *PO2 no.39*, when RESPONDENT made a contract with a buyer in Mediterraneo, in the contract, there are both a choice of law clause and the law to be applicable to the arbitration agreement. In one main contract containing the arbitration agreement, there are two choice of law clause. It means that underlying contract and the arbitration agreement are presumptively treated as separate agreement. Moreover, three countries, Danubia, Mediterraneo and Equatoriana, have adopted the Hague Principles on Choice of Law in International Commercial Contracts. Even though Hague Principles deals with main contract, it does not address the law governing arbitration agreements. In other words, they presume that the main contract and the arbitration agreement are two different agreement. In present case, therefore, separability presumption is still applicable to the arbitration agreement in spite of non-validity issue.

ii. The Parties chose the law of Danubia to govern the Arbitration.

11. As CLAIMANT argues that under CISG, the parties' intention should be considered, Danubia also adopts the CISG and we agree with them. Contrary to the CLAIMANT's argument, however, in the present case, the Parties intended to choose the law of Danubia

as a governing law of Arbitration Agreement. (**a**) In addition, there is implied choice of law in their Arbitration Agreement. (**b**)

a. They intended to choose the law of Danubia as a governing law of Arbitration Agreement.

12. Gary Born recognized that 'the UNCITRAL Model Law parallels the New York Convention in its treatment of the parties' autonomy to choose the law governing their arbitration agreement'. [*Born*, p. 568]. New York Convention Article V(1)(a) and UNCITRAL Model Law Article 36(1)(a)(i) provide that an arbitral award may be annulled or denied recognition if the parties' arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of [the state where the award was made]." These provisions adopt the same two-prong standard as that of Article V(1)(a) of the Convention, 'giving effect to any express or implied choice-of-law by the parties and, failing such agreement, prescribing a default rule, selecting the law of the arbitral seat'. [*Born*, p. 526]. Its first prong says to apply the "law to which the parties have subjected" the arbitration agreement. Commentators have noted that since the text does not require an express choice of law, the first prong applies to both express and implied choice of law by the parties [*Born*, p. 564].

13. In the present case, the parties intended to choose the law of Danubia to govern the arbitration agreement because the intention of the parties to choose the law of a neutral country is clear from their negotiating history. In their negotiations, they chose Danubia as a seat of arbitration because Danubia was neutral country. Each party initially wanted to apply their respective country's jurisdiction and law to potential litigation or arbitration. As CLAIMANT originally offered to apply its law in its courts in case of litigation [*Cl. Ex. C2*], RESPONDENT also wanted their country's courts to have jurisdiction [*Cl. Ex. C3*]. Also, as CLAIMANT said they would consider arbitrating in their country's courts [*Cl. Ex. C4*], RESPONDENT also wanted to arbitrate in their own country and have their laws govern the arbitration contract "in light of the fact that the sales agreement is governed by the law of Mediterraneo," (CLAIMANT'S country) [*Rs. Ex. R1*] and then CLAIMANT finally offered, before the car accident, that they should settle for a neutral seat by saying that 'it would be possible to agree on arbitration in a neutral country'. [*Rs. Ex. R2*].

14. It is clear from RESPONDENT's words "in light of the fact that the sales agreement is

governed by the law of Mediterraneo" (CLAIMANT'S country), that RESPONDENT wanted the arbitral seat and the law governing the arbitration agreement to be different from that of Mediterraneo. And since its original position was met with opposition, its intention and desire could only have been arbitral seat and law of Danubia.

15. More importantly, the same desire/intention for a neutral country can be seen from the CLAIMANT. CLAIMANT argues that their intention was only to follow the internal policy of their company (that is to say, they only chose Danubia as the arbitral seat because their policy required a consent from the company's creditors for dispute resolution in counterparty's country or for contract submitted to a foreign law and since a neutral country like Danubia was exempted from the consent requirement, they chose Danubia) *[Rs. Ex. R2*; *see also PO2*]. However, this line of argument only asserts RESPONDENT's position that CLAIMANT had a strong incentive to arbitrate in a neutral country and to use a neutral country's laws to govern the arbitration agreement.

16. Even if this tribunal find that the parties did not intend and hence did not subject their arbitration agreement to law of Danubia, the applicable law under the New York Convention Article V(1)(a) standard is the law of Danubia. The second prong of the relevant articles of New York Convention and the UNCITRAL Model Law requires that the law of the seat of arbitration should be applied where the parties have not agreed upon a body of law to govern the arbitration agreement either expressly or impliedly. The default rule is the law of the arbitration seat, not the law governing the underlying contract. [*Born, p. 499*]. Therefore, it is clear, according to the second prong, that the law applicable for the arbitration agreement is the law of Danubia, the seat of arbitration.

b. There is implied choice of law in their Arbitration Agreement.

17. In *SulAmérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors*, The English Court of Appeal held that the law of the arbitration agreement should be determined by application of the three-stage enquiry. Pursuant to this test, an arbitration agreement is governed by (1) an express choice of law, (2) where the parties fail expressly to specify the law, it is governed by an implied choice of law, or (3) in absence of both express and implied choice of law, it is governed by the law with the 'closest and most real connection' with the arbitration agreement. [*SulAmérica*].

18. In *SulAmérica*, the English high court was faced with a choice of law problem where parties had chosen Brazilian law to govern their main contract and had chosen England as

the seat of arbitration, without choosing a law governing the arbitration agreement [*Ibid*]. The court held that English law was the governing law of an arbitration agreement, even though it appeared in a contract that was governed by Brazilian law [*Ibid*]. Moreover, in both *C v. D* and *XL Insurance Ltd v Owens Corning* cases, they recognized that the choice of the seat of the arbitration implied a choice of law as the law governing the arbitration agreement when they concerned main contracts containing a New York applicable law clause, along with a clause providing for arbitration in London under the English Arbitration Act 1996.

19. In present case, in the arbitration agreement, there is no express choice of law governing the arbitration agreement, but Danubia is stipulated as a seat of arbitration. Even though the law of the underlying contract is the law of Meditteraneo, due to separability, there is nothing wrong with different law is applied to the arbitration agreement. Referring to above cases, the law of the seat would be the implied choice of law. Therefore, the law of Danubia is implied as the law governing the arbitration agreement.

20. Even if there is no implied law, the law of the closest connection would be law of Danubia. The third stage of the test is where there is no both express and implied choice of law, the law with the 'closest and most real connection' with the arbitration agreement would be a governing law. An English court states that, where the main contract had no governing law agreement, but the arbitration agreement stipulated a seat, 'the law of the seat was a strong candidate for the system of law which has the closet and most real connection'. (*Habas v. VSC*). The English Court of Appeal held that 'the arbitration agreement had its closest and most real connection with the law of the place where the arbitration was to be held'. In other words, it is indicating that the seat of arbitration has 'closet and most real connection' with the arbitration agreement. The law of the Danubia which is the seat of arbitration, therefore, has 'closet and most real connection' with the arbitration agreement and would be the governing law.

iii. The law of the seat of arbitration overrides the law of the contract as a default rule

21. According to *Dicey, Morris & Collins*, "there is no international consensus on the choice of law rule applicable to an arbitration agreement". But several arbitral rules provide that the law of the seat would be applicable law governing the arbitration agreement. Section 48 of the Swedish Arbitration Act provides that where the parties have not reached an

agreement which law should govern the arbitration agreement, 'the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place'. Interestingly, Article 61 of the WIPO arbitration rules and Article 16(4) of the LCIA rules provide the same.

22. As discussed above, Articles 34(2)(a)(i) and 36(1)(a)(i) of the Model Law parallel Article V(1)(a) of the New York Convention. They provide two-prong standard to determine the law governing the arbitration agreement and suggest the law of the seat as a default choice-of-law. Evidently, in a Belgian case, where the laws of the State of Wisconsin had been chosen by the parties to apply to the underlying contract, the law of the place of arbitration, Belgium, was applied to arbitration agreement, because the Brussels Tribunal de Commerce considered V(2)(a) of the New York Convention. [*Matermaco v PPM Cranes*].

23. Moreover, this approach in favor of the governing law of the seat is adopted in many jurisdictions. In English, the Court of Appeal also recognized that 'it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration'. (*C v. D*). In Sweden, the Supreme Court of Sweden recognized that the law of the state in which the arbitration proceedings have taken place is the governing law rather than the law of underlying contract where there was no particular provision concerning the applicable law for the arbitration agreement. [*Bulgarian Foreign Trade Bank*]. In present case, in the absence of the express choice-of-law governing the arbitration agreement, therefore, the law of the seat which is Danubian law is the governing law as a default law.

2. Under the law of Danubia, the Tribunal is not authorized to adapt the Sales Agreement by the Arbitration Agreement.

24. Applying the law of Danubia as governing law of the arbitration agreement, the tribunal does not have the power to adapt the contract. Under the Article 28 (3) of the Danubian Arbitration Law which is identical to UNCITRAL Model Law, an authorization via express conferral of powers by the parties is required for the arbitral tribunal to adapt contracts. Here, in the arbitration agreement, no such express empowerment was given to the tribunal.

25. Powers of an arbitral tribunal are conferred by the parties within the limit allowed by the law governing the arbitration agreement [*Redfurn, p. 306*]. Article 28 (3) of the Danubian

Arbitration law (i.e., the law governing the arbitration agreement) reads, "(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so." [*UNCITRAL Model Law]* It means that the tribunal can decide based on principles of fairness and equity (as opposed to the principle of rule of law) given that parties gave express permission for the tribunal to do [*Gusy, p. 25*]. Likewise, Danubian courts are of the view that "while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required" [*PO2, 36*].

26. In present case, there was simply no "express" conferral of powers by the parties to the tribunal for an adaptation in the sales contract or in the arbitration agreement, nor did the CLAIMANT make such claim (under the law of Danubia). Hence, this arbitral tribunal lacks the necessary powers to adapt the contract under the law of Danubia. Finally, it should be noted that under the law of Danubia, arbitration agreements are interpreted narrowly because it requires an express empowerment for adaptation of the Sales Agreement, and "there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal" [*PO1*].

B. Even if the law of Mediterraneo governs the Arbitration Agreement, the Tribunal does not have the power to adapt the Sales Agreement because it would against the intention of the Parties.

27. The CLAIMANT argues that the Arbitration Agreement authorizes the Tribunal to adapt the Sales Agreement based on the parties' intentions. CLAIMANT reasons that the parties have reached consensus on adaption of the contract which was proven by the main negotiations and communications. [*CL Memo. p. 7, paras. 11-14*]. However, the CLAIMANT's allegations are not true for the following two reasons: first, there has never been a consent between the Parties on adaptation of the contracts, given the evidence and circumstances. (**1**) Second, mere communications on adaptability does not satisfy the standard of intention to form an agreement under CISG. (**2**)

1. There was no consensus between two parties about adaptation of the Sales agreement

28. The final version of meeting of minds, does not contain an adaptation clause. Even though there were an unexpected accident, if both parties strongly intended to confer the power to adapt the agreement to the Tribunal, they might have added or amended anytime later. Since the hardship clause in the agreement is not effective in terms of

adaption of the increased price, the connection with hardship clause with arbitration clause does not have any significance to interpret the intention of both parties regarding this matter. [*Rs. Ex. 3, p.35*]. Ms. Krone also admitted that she was not clearly aware of the intentions of the parties. [*Ibid*]. According to Mr. Krone, if she had known about this issue, she "would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion." [*Ibid*]. Contrary to the CLAIMANT's claim on both parties' intention, RESPONDENT has never agreed to any adaptation since the CLAIMANT's request in January 2018. [Rs. Answer, p. 30, para. 10].

29. Mr. Shoemaker also shows the Respondent's intention on adaptation through his telephone conversation, stating that CLAIMANT had to bear the costs. [*Ibid*]. Whether purposeful or not, such omission or absence of the adaptation clause shows that the parties did not reach an agreement on the issue.

2. There was no intention required under CISG but mere communication about adaptation between parties.

30. Considering the aforementioned facts, there is insufficient indicia of 'intent' as CISG Article 8 requires. According to Article 8(1), intent can be found "where the other party knew or could not have been unaware what that intent was." [CISG, Art. 8(1)]. In order to determine the intent, all relevant circumstances of the cases including the negotiations, practices, usages and any subsequent conduct of the parties should be considered. [CISG, Art. 8(3)]. It is undisputed that CLAIMANT intended to have the Tribunal decide this adaptation issue. At the same time, the Respondent's disagreement on this issue can be proven through the discussions and subsequent conduct after the CLAIMANT's request for adaptation. Therefore, there was no shared intention of the parties to let the Tribunal decide the adaptation.

C. Because matter of adaptation of Sales Agreement is non-contractual issue, this issue is not covered by the narrow scope of "arising out of" the Arbitration Agreement.

31. The phrase "arising out of" in the arbitration agreement has a narrow scope for the arbitration agreement. (**1**) While more expansive phrase "relating to" makes the arbitration agreement to have even non-contractual claims, the narrower phrase "arising out of" can only cover contractual claims, the claims that derive from the agreement made by the Parties. Furthermore, the adaptation of purchase price cannot be a

contractual claim because the wording of the hardship clause in the Sale Agreement, which is CLAIMANT's legal basis from such claims, does not provide a claim for CLAIMANT within the contract. (**2**)

1. The "arising out of" language has a narrower scope for the arbitration agreement than the phrase "relating to."

32. Contrary to CLAIMANT's contention in its memorandum that there is no substantive different between "arising out of" and "relating to," the language "arising out of" is a narrower formulation than "relating to." Born explains that some courts have ruled that non-contractual claims do not "arising under" the parties' agreement, whereas more expansive phrases like "relating to" are "generally held to extend broadly" to non-contractual claims [*Born*]. The phrase "arising under" is equivalent to "arising out of" in their scope [*Tracer v. Environmental Services*]. CLAIMANT also acknowledges the difference in scope in their memorandum [*Cl's Memorandum, para. 18*]. Thus, the language "arising out of" indicates a narrower scope for the arbitration agreement by covering only contractual claims.

2. Adapting the price is non-contractual claims which is not covered by the narrow scope of "arising out of" for the arbitration agreement.

33. CLAIMANT argues that "price adaptation is to adjust the obligations deriving from the contract" and thus adopting the price under the hardship clause is considered contractual claims. However, the wording of the hardship clause that "Seller shall not be responsible for hardship" does not include a right to demand more money than what is originally agreed by the Parties in the Sales Agreement [*Record*, p. 14]. Other hardship clauses such as ICC Hardship Clause 2003, likewise, do not impose obligations on any party to compensate the loss of the other party that is caused by hardship. Rather, ICC Hardship Clause 2003 gives a party a room for not performing their obligations in situation of hardship [*ICC Hardship, para. 2*].

34. Thus, the matter of price adaptation under the hardship clause does not derive from the Sales Agreement. As stated above, a non-contractual claim is not covered by the narrow scope of "arising out of" the Arbitration Agreement.

CONCLUSION OF ISSUE I

The Tribunal does not have jurisdiction and/or power to adapt the Sales Agreement based on

the Arbitration Agreement. Under the law of Danubia, the Arbitration Agreement cannot empower the Tribunal to adapt the Sales Agreement. Even if the law of Mediterraneo governs the Arbitration Agreement, the Tribunal does not have the power to adapt the Sales Agreement because it would against the intention of the Parties. Lastly, matter of adaptation of Sales Agreement is not covered by the narrow scope of "arising out of" the Arbitration Agreement because it is non-contractual issue.

II. CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS.

35. Pursuant to the evidentiary rules regarding confidentiality agreement under HKIAC and IBA, the Tribunal should exclude the impermissible evidence that CLAIMANT is seeking (**A**). In addition, the ways of obtaining the documents such as computer hacking are inappropriate and should be barred under the arbitration rules and international practice (**B**). Contrary to CLAIMANT's argument of the Documents' relevancy and materiality, the claim is baseless and it does not outweigh the Respondent's contractual rights guaranteed by the rules of arbitration (**C**). If the Tribunal admits such evidence, it would cause internal conflict of laws within the same set of arbitration rules.

36. Additionally, CLAIMANT may pursue joinder of additional parties or other procedural methods to bring the evidence from the other arbitral proceedings. However, it would not be permitted under HKIAC rules (**D**). Even if CLAIMANT triggers UNCITRAL Arbitration Rules for admission of the evidence, it would also be inapplicable in our case (**E**).

A. The evidence itself would be impermissible under confidentiality rules of arbitration.

37. CLAIMANT argues that the Documents should be brought in pursuant to HKIAC rules and IBA rules. However, the CLAIMANT's claim disregards confidentiality provisions in each rule. Thus, the evidence is impermissible for the following reasons. First, HKIAC Article 45 clearly provides confidential obligation of the other arbitral proceedings. Second, IBA Rule also requires the Tribunal and the other parties to keep confidentiality of information in the arbitration "without prejudice".

1. Pursuant to HKIAC Article 45, the admission of the evidence would constitute a violation of confidential obligation of the other arbitral proceedings.

38. HKIAC Rules, 2018, Article 45.1 (substantially similar to HKIAC Rules 2013 Article 42) addresses confidentiality of any information relating to the arbitration and its agreement. According to Article 45.1 (a) specifically notes that "*an award* or Emergency Decision made in the arbitration*" shall not be published, disclosed or communicated by any party* or party representative unless otherwise agreed by the parties. (*emphasis added*). Here, none of the parties including RESPONDENT in the other proceedings agreed to publish, disclose or communicate the information sought by CLAIMANT. Regardless of who leaks the information, the documents should be protected and kept confidential under this arbitration rule and this rule should govern this Tribunal.

i. No party in the other arbitration permits the Documents to be used for this arbitration, and RESPONDENT as a concerned party objects to disclosure of the confidential information.

39. HKIAC Article 45.3 lists the exceptional cases to permit publication, disclosure and communication of information referred to in Article 45.1. The rule gives the involving parties the authority to decide whether to disclose their confidential information from their arbitral proceeding. Here, none of the parties desires to disclose the confidential information to a third party or in an irrelevant proceeding such as our case.

40. The parties' authority with respect to control the parameters of confidential information in their arbitration is also stipulated in ICSID Rules. [*ICSID, Rule 48(4). 98*]. ICSID Rules indicate that arbitral awards "can only be made public *with the consent of the parties*." [*Ibid*] (*emphasis added*). According to *Salasky and Montineri,* commercial arbitral rules including ICSID give the parties primary control to determine openness of their arbitral information and in this regard the tribunal can make the appropriate procedural arrangements in accordance with arbitral rules. [*Salasky and Montineri,* pp. 774 – 796].

41. Here in our case, neither RESPONDENT nor its opponent in the other proceedings agrees to waive or consent to publicize their products from the proceedings. In fact, the Respondent's opponent in the other arbitral proceedings formally consented to the fact

that CLAIMANT's allegations are arbitrarily taken out of a context that does not reflect reality [*Record, p. 50*]. RESPONDENT and their opponent in the other proceedings have never authorized CLAIMANT to use their arbitration award and any relevant documents according to its confidential agreement under the rules. If the evidence were brought in this arbitration despite the rule, the admission of such confidential information would infringe the Respondent's contractual rights. Therefore, the Tribunal should protect the contractual right of RESPONDENT and its opponent to keep their confidential business records.

ii. The admission of the documents would not meet any exceptions to disclosure of such documents under HKIAC rules.

42. None of exceptions enumerated in Article 45.3 is applicable in the disclosure of the Document for a third party like CLAIMANT who is not relevant to the other proceeding at all. Moreover, given the list of exceptions, the rule assumes exceptional allowance of confidential information in a case needed to protect a party's legal right [*HKIAC, Art. 45.3(a)*]. In our case, there is a high likelihood of prejudicial and adverse use of the document against Respondent's legal right and its interests. In order to protect Respondent's legal rights, the evidence should be excluded.

43. In the same context, Article 45.4 states "*the deliberations of the arbitral tribunal are confidential*." (emphasis added) As CLAIMANT argues, the Tribunal's discretion to determine the admissibility of the evidence is not disputable [*HKIAC, Art. 22.2; UNCITRAL Model Law, Art. 19(2)*]. However, this explicit obligation to keep the proceedings confidential is the guideline that this Tribunal should uphold rather than yield up its control to a disinterested party like CLAIMANT to the other proceedings.

2. IBA Rule along with other international arbitration frameworks requires the Tribunal and the other parties to keep confidentiality of information in the arbitration as "without prejudice" obligation of confidentiality.

44. Article 3.13 of IBA Rules state that "*[a]ny Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential* by the Arbitral Tribunal and the other Parties, and shall *be used only in connection with the arbitration*." (*emphasis added*). This requirement shall apply to "all other obligations of confidentiality in the arbitration" "*without prejudice*."[*IBA, Art. 3.13*]

(*emphasis added*). With respect to the documents produced "in connection with the arbitration," ICC rules also has the same requirement regarding the confidential product of arbitration. [ICC rules, Art. 22(3)] According to *Webster* and *Buhler*, arbitrators are generally considered as subject to the confidentiality obligation. [*Webster* and *Buhler*, p.338, para. 22-46].

45. Here, there is no evidence that the evidence was open in the public domain. More importantly, as provided by the rule, such evidence should be used only in connection with the concerned arbitration. [*Ibid*.] It is crystal-clear that the other proceedings and this arbitration has no connection except the mere fact that RESPONDENT is a party in both proceedings. Other arbitration arose out of a different sales agreement and transaction with Respondent's client who is unknown to CLAIMANT. Due to the clearly distinguishable nature of the arbitration and our case, the documents from other proceedings should be only used for that proceeding and they should not interrupt this arbitration as commanded by the rule.

46. According to IBA Rules Article 9.2, "[t]he Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (b) legal impediment or *privilege* under the *legal or ethical rules* determined by the Arbitral Tribunal to be applicable." (*emphasis added*) Article 9.3 (b) further specifies a necessity to protect the confidentiality of "a *document created or statement or oral communication made in connection with and for the purpose of settlement negotiations*." (*emphasis added*). In our case, the documents that CLAIMANT is seeking were made for the purpose of 'settlement negotiations' which are confidential under HKIAC Rule Article 45. The evidence squarely fits the rule of exclusion since it was a part of an arbitration proceeding.

47. The documents that CLAIMANT seeks contains all confidential information of sales price and business concerns and they are based on its confidentiality agreement. Therefore, the information should be kept confidential by following IBA Rules and the express confidentiality rules of HKIAC adopted by both arbitration proceedings.

B. The way of obtaining such documents are improper and prohibited under the arbitration rules and international practice.

48. Danubia is a common law country, the IBA Rules would be the most compatible with Danubian legal system. [*PO2,* para. 44] There are no specific evidentiary rules in Danubian arbitration laws in terms of evidence obtained in breach of contractual obligation or by illicit means. [*PO2,* para. 46] However it has adopted the UNCITRAL Model Law on International Commercial Arbitration. [*PO1,* III. para. 4] Article 19(2) of UNCITRAL Model Law Chapter V notes that he Tribunal's power to determine the admissibility of any evidence.

49. CLAIMANT might have obtained the information through either a breach of an agreement or an illegal act. Under international law, there has been an established principle '*Nullus Commodum Capere De Sua Injuria Propria'* which means nobody can take advantage of his own wrong. [*Cheng*, at 149-158]. Under this principle, the legal status of a breach of a confidentiality agreement and an illegal act of hacking are treated impermissible. There is no limiting factor applicable in those cases.

50. In the same context, Article 3.9 of IBA Rules also put an emphasis on appropriateness as follows:

    "If a Party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may… ask it to take whatever steps are *legally available* to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. … The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers *appropriate*…" (*emphasis added*).

51. The rule underscores the manner to acquire the evidence through the phrases for instance, steps are "legally available" or "appropriate." [*IBA,* Art. 3.9; Art. 9.4]. Moreover, Article 9.2 of the IBA Rules enumerates a number of grounds including confidentiality as well as broader considerations such as fairness and equality. [*IBA*, Art. 9.2; *Born*, p.2311].

1. Illegally hacked information should not be admitted based on case law since there is no indication that the documents were open to the public domain.

52. Under the aforementioned IBA rule regarding confidentiality, the only exception is the case when the document in the public domain. Here, there is no evidence that the Award and other relevant information in the other proceedings were open in the public domain. Rather, CLAIMANT is planning to acquire the "Partial Interim Award" from a company that has a suspicious reputation. [*PO2*, para. 41].

53. According to the most cited cases dealing with a third-party hacking, it requires public availability in order for such information to be admitted as evidence. The *Caratube* case would be factually analogous to our case. In *Caratube* case, the CLAIMANT sought to bring in the evidence obtained through email hacking against Kazakhstan government and published on a website called Kazakhleaks which was an open forum. The tribunal found admissibility of the evidence on the ground that the information was published on a legally accessible website thus it was in public domain even though contractual confidentiality should be respected in consideration of fairness of admitting such information into evidence. The tribunal admitted non-privileged documents and information while excluded the rest. [*Caratube*, para. 1261]

54. Here, Respondent's confidential information from the other proceedings is not published on a website or public domain like *Caratube*. Without properly taking procedural steps to request such information from Respondent, CLAIMANT is pursing to acquire such confidential information from a company which may be related to a recent illegal hack to Respondent's computer system. [*PO2*, para. 41]. In this regard, unless there is any proof that the confidential information was obtained legally, such confidential information in accordance with arbitral institutional rules of confidentiality should be protected.

2. Admission of the evidence would violate the doctrine of good faith and fairness to deter illegal obtainment of information.

55. Under IBA Article 9.2, the Tribunal would consider various reasons such as relevancy and legal impediment or privilege to decide exclusion of evidence. Amidst the list, subsection (g) addresses that "considerations of procedural economy, proportionality, *fairness or equality* of the Parties that the Arbitral Tribunal determines to be compelling." [*IBA*, Art. 9.2 (g)] (*emphasis added*). In our case, if the documents were admitted, arguendo, as CLAIMANT desires, there must have been no doubt that it would be

prejudicial and adverse to Respondent's position as well as its reputation. In that case, RESPONDENT who has never attempted to seek the CLAIMANT's other arbitration proceedings or confidential business information would be placed in an inferior and unfair situation.

56. Considering issues of legal impediment or privilege under IBA 9.2(b), the tribunal may take into account a number of factors in determining admissibility of the evidence in Article 9.3. One of the grounds is "the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules." [*IBA*, Art. 9.3(e)] The principles such as good faith, equality and fairness can be found not only in the institutional rules but also in case law.

57. In *Methanex Corporation v. United States of America*, where the CLAIMANT attempted to submit evidence of documents which were found by rummaging through wastepaper and rubbish bins. The tribunal denied its admission holding that "it would be wrong to allow [CLAIMANT] to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that [CLAIMANT]'s conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration." [*Methanex Corp.*, para. 59]. In spite of the CLAIMANT's knowledge of the informant's doubtful reputation, if CLAIMANT actively pursues the other party's confidential information which may have been a result of an illegal hack should be deemed as a misconduct. This behavior is likely to be a violation of good faith, fairness and equality. [*O'Sullivan*] Similarly, in *Libananco Holdings Co Ltd v Republic of Turkey*, the tribunal held that even though the Turkish government exercising its sovereign right intercepted the CLAIMANT company's confidential and privileged emails, the emails should be excluded from the arbitration proceedings due to the information's outweighing confidentiality and the CLAIMANT's right. [*Libananco*, para. 384]

58. Not to mention, many legal scholars and professionals show great concern over the possibility of a party to a dispute soliciting a third-party hacker to release the hacked information. [*Ortiz*] According to *Ortiz*, illegally hacked information should only be accepted with the consent of both parties in order to deter illegal obtainment of information and to protect fairness and equality. [*Id.*] Based on these reasonings, it is only fair for the Tribunal to deny and exclude the proposed evidence from entering in.

C. Even if the Documents are relevant and material, *arguendo,* their relevancy and materiality do not override the Respondent's rights under both its contract with the third party and the arbitration rules.

59. Unlike, the CLAIMANT's allegation, the Documents are neither sufficiently relevant nor material under HKIAC rules. Furthermore, even if the documents are relevant and material to meet the standard, it cannot take over the RESPONDENT's right to keep its other arbitral information confidential.

1. The Documents do not sufficiently satisfy the requirement of relevancy and materiality under HKIAC rules for admission.

60. CLAIMANT argues that HKIAC allows such information is relevant to the case and material to its outcome. [*HKIAC,* Art.22.3]. Contrary to CLAIMANT's contention, the Documents are not relevant nor material to change the outcome of our case. This is because the hardship clauses in the contracts respectively in our case and in Respondent's other arbitration proceedings have a different scope.

61. In the other arbitration proceedings, the Parties adopted the ICC Hardship Clause 2003 in their contract [*PO2,* para. 39]. Here, a narrower hardship clause than ICC Hardship Clause 2003 is used in the contract in our case, limiting the scope of hardship clause only to the hardship caused by health and safety requirements or related unforeseen events. [*Record*, p. 14]. The hardship clause in our case is stating that "Seller shall not be responsible . . . neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" (italics in the original) [*Ibid*]. Due to the difference in the scope of the hardship clause in both contracts, it is reasonably expected that the legal position of RESPONDENT be different in each case and the outcome of the proceedings can be totally different. Thus, because the documents of other arbitration proceedings are not relevant and material to the outcome of our case, the documents should not be admitted.

2. Even if the documents are relevant and material to meet the standard, *arguendo,* it does not outweigh the Respondent's right to keep its other arbitral information confidential.

62. CLAIMANT argues that even if the submission of the evidence might violate the arbitral rules of confidentiality, the evidence should be admissible due to its relevancy and

materiality to the outcome of the case. [*Memo for Cl.*, p. 16-17] CLAIMANT reasons that both arbitration proceedings are governed by HKIAC and are factually similar. [*PO2*, para. 39]. In addition, it also contends that the documents reveal Respondent's intention toward the adaptation of the contract. [*Memo for Cl.*, p. 17, para. 35]. Seemingly, it may be viewed as factually analogous. However, that does not guarantee sufficient level of relevancy and materiality which can affect the outcome of our proceeding. Although both arbitrations are conducted under HKIAC rules, each contract has different terms of agreement and set of rules which may bring a totally different outcome of the arbitration. CLAIMANT's allegation of RESPONDENT's intention of the other proceedings should be distinguished from this case as a different transaction with its own client. Fundamentally, they completely ignore the rule that arbitral award and confidential information should only be used for the arbitration unless both parties agree to disclose them.

63. Furthermore, if CLAIMANT has a right to present the proposed evidence from other proceedings, it would engender an internal conflict within a set of rules between confidentiality and admissibility. The confidential obligation to protect the arbitral information is directly borne out of and promised by the HKIAC Rules along with other frameworks of arbitral institutions. Even if the Tribunal finds a conflict of rules or legal rights despite the stipulation of confidentiality rules, the Tribunal should exclude the piece of evidence in order to uphold consistent and sound rulings to avoid the conflict for the following reasons. First, there is no legitimate legal basis in favor of dismissing confidentiality. There is nothing in the rules that give a clear guideline when two clauses are in clash with one another which clause shall obey or concede to the other. However, if denial of confidentiality is carried on without any legitimate modification or addition to one exception provided, it would be weakening authority of the rule itself. Secondly, evidence clause in HKIAC Rules only states the Tribunal has the authority to admit evidence and not states it must admit. This scenario is perfectly functioning without any compromise. Only legitimate use of discretionary power the rules given to the Tribunal can be found.

D. The CLAIMANT's claim on joinder of additional parties or other procedural methods would not be permitted.

64. Article 27.1 (a) of HKIAC Rules articulates the arbitral tribunal's power to allow an

additional party to be joined to the arbitration in a case of prima facie. If the additional party is bound by an arbitration agreement under HKIAC Rules giving rise to the arbitration, the additional party can join the proceeding. However, the other proceeding did not arise under the same arbitration agreement with our case, even though both proceedings are under HKIAC Rules [*Record*, p. 50]. So long as the opponent does not agree to join or officially disclose the documents, CLAIMANT's prayer for joinder should not be allowed. In the same vein, the other procedure in order to bring the improper evidence should be restricted due to confidentiality obligations of arbitral rules as aforementioned.

E. UNCITRAL Rules on Transparency are not applicable.

65. One of the potential arguments that CLAIMANT may raise is the admission of the evidence under UNCITRAL Arbitration Rules. However, it would not be operative in our case since the other proceedings do not involve any investor- state relationship that required by the UNCITRAL Rules. Moreover, even if UNCITRAL Rules are applicable, the cases fall under one of the exceptions provided in Article 7 of UNCITRAL Rules.

1. The other proceedings do not involve any investor- state relationship that required by UNCITRAL Rules on Transparency.

66. UNCITRAL Rules on Transparency Article 1(1) clearly notes that it applies "to investor-State arbitration initiated under the UNCITRAL Arbitration Rules" and its purpose is "for the protection of investments or investors." In our case, none of the parties in the other proceedings are investors or States. The subject matter is not of investment but of a purchase agreement between two private companies. There is no state- investor relationship requiring special consideration for fair transactions and deals under institutional guidance. Moreover, because the rules were aimed to even out the asymmetry between state and a foreign private business entity, applying it where there is none will likely to create an imbalance of power thus making the proceeding unfair. Therefore, the Rules of Transparency should not apply here. Instead, it clarified the Tribunal has the authority on choosing the rules of evidence.

2. Even if UNCITRAL Rules are applicable, the cases fall under one of the exceptions provided in Article 7 of UNCITRAL Rules.

67. Under article 3 of UNCITRAL Rules on Transparency, certain documents, including the

award, shall be publicized and made available to the public, unless the documents fall into one of the exceptions provided in Article 7 of the Rule. These exceptions exist to protect confidential or protected information such as "confidential business information." [UNCITRAL Rules, Art. 7.2].

68. Regarding the definition of "confidential business information" in Article 7.2, UNCITRAL has never belabored the rule and concept. In fact, neither the UNCITRAL Model Law on International Commercial Arbitration nor the UNCITRAL Arbitration Rules provide a definition of confidentiality. According to *Salasky and Montineri*, "confidential or protected information" as contained in article 7(2) was adopted from existing investment treaties, and there has been a prolonged debate over this issue within the Working Group. [*Salasky and Montineri*, pp. 774 – 796]. However, it has never reached consensus. [*Ibid*].

69. On the other hand, ICSID Rules insinuate that "protected information" in investment arbitrations should only be determined by the parties themselves in terms of publication. [*Ibid*]. Here, RESPONDENT strongly believes that the documents regarding the other proceedings should be treated as confidential business information. The information contains business deals with its client and sale prices that are customarily considered as business secrete against its competitors in a market. If the Tribunal allows CLAIMANT to bring the evidence, it would affect any party in commercial arbitration to find its opponent's other arbitral history or records to use the data for their own purpose in the absence of limitation or regulations. Thus, this information as confidential business information in Article 7.2 should not be admitted to this arbitration.

CONCLUSION OF ISSUE II

Under the international arbitration rules, the evidence from the Respondent's other arbitral proceedings should be protected and inadmissible in our case due to its confidentiality. As the rules clearly elaborate the appropriate steps to determine admissibility of evidence, RESPONDENT did not waive, consent, disclose or made affirmative use of the information. If the evidence was from illegal hacking, the legal and ethical aspect is questionable at best. Any effort to obtain confidential evidence is fruitless based on the rule of good faith and equality. Moreover, the evidence relevancy and materiality is not strong enough to strike

Respondent's contractual rights. If the Tribunal permits CLAIMANT's attempt to bring the evidence, it would cause an unnecessary internal conflict in relation to the HKIAC Rules' own confidentiality clause. The claim on joinder of additional parties or other procedural methods fall short to satisfy the relevant rules and UNCITRAL Rules are not applicable in our case. Therefore, our sub-claim should prevail.

ISSUE III. RESPONDENT IS NOT LIABLE FOR ADDITIONAL PAYMENT OF US$ 1,250,000 FROM AN ADAPTATION OF THE CONTRACT.

70. The argument made by the CLAIMANT is baseless, as it omits some important details of the facts. RESPONDENT is not liable for additional payment of US$ 1,250,000 and any other costs of Arbitration claimed by the CLAIMANT. Firstly, the narrowly tailored hardship clause of the Agreement is not applicable to a 30% increase in tariffs (A). Also, Art. 79 CISG is inapplicable here as is derogated by the Parties; even if not, the elements of hardship are not met thereunder (B). Lastly, RESPONDENT has never agreed to an adaptation of the contract price in the first place, nor defeated his duty to act in good faith (C). Thus, RESPONDENT respectfully asks the tribunal to dismiss the CLAIMANT's motion, and order CLAIMANT to pay RESPONDENT costs incurred in this arbitration.

A. The Hardship Clause, which is Narrowly Worded by the Parties, is Not Applicable to a 30% Increase in Tariffs.

71. CLAIMANT's argument that Mr. Antley agreed on an adaptation mechanism into the Agreement by adding the hardship clause is not true. The arbitral tribunal should consider, first, that whether the Parties intended to apply the hardship clause to the issue of an increase in tariffs.

72. Not any and all obstacle, i.e. change in tariffs, are covered by the hardship clause. The Parties intended to narrow down the scope of application of the hardship clause to certain exceptional circumstances (**1**). Moreover, CLAIMANT failed to prove a 30% increase in tariffs constitutes hardship set forth therein (**2**). Not to mention that the hardship clause does not provide the remedy, an adaptation by the arbitral tribunal (**3**). Thus, the RESPONDENT is not responsible for the additional payment under the hardship clause.

1. The Parties intended to narrow down the scope of application of hardship clause to certain exceptional circumstances.

73. The hardship clause does not exempt the CLAIMANT from any risk. The Parties did not intend the hardship clause to cover the issue of an increase in tariffs. It is evidenced by the Party's subjective intent, to narrow down the scope of the application of the hardship clause, which was known to another party (**a**). Furthermore, both Parties had objective intent to limit the scope of risks applicable to it (**b**).

a. Subjective Intent of the Parties

74. Under the Art. 8(1) CISG, "statements or conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was… This would amount to a "subjective meeting of the minds" [*Huber, p. 12*].

75. Here, there was a subjective meeting of the minds by both Parties to narrow down the scope of the application of the hardship clause. On April 12, 2017, Mr. Antley, RESPONDENT, wrote down a memo that "ICC hardship clause suggested by CLAIMANT too broad" after the short meeting with Ms. Napravnik, CLAIMANT [*Rs. Ex., R 3*]. On May 6, 2017, understanding Mr. Antley's concern, Ms. Julian Krone, RESPONDENT, concluded the Agreement on "an inclusion of a narrow hardship reference into the force majeure clause" [*Rs. Ex., R 3*]. The narrowly tailored hardship clause in the Agreement proves that the RESPONDENT has subjective intent of narrowing the scope of its applicability.

76. Moreover, Mr. John Ferguson, CLAIMANT, knew or could have known of such intent, when he agreed on the inclusion of the narrow hardship clause [*Rs. Ex., R 3*]. Upon CLAIMANT's request, they Parties included the health and safety requirements, in particular, into the hardship clause, and made their own version by revising the ICC hardship clause. [*Cl. Ex., C 4; C 5*]. Therefore, CLAIMANT knew or could have known of the RESPONDENT's intent to narrowly tailor the hardship clause.

b. Objective Intent of the Parties

77. According to Art. 8 (2) CISG, "[an objective intent of the Parties] will be considerably more important in practice because it will often be difficult to prove the actual intent of the declaring party (let alone a common intent of both parties)" [*Huber, p. 13*].

78. Here, the Parties had a common intent to narrow down the scope of risks applicable in the hardship clause. In the email March 24, 2017, the CLAIMANT initially offered a price of 99,500 USD per dose [*Cl. Ex. C 2*]. On March 31, 2017, the CLAIMANT accepted a DDP delivery under the condition that a hardship clause is included [*Cl. Ex. C 4*]. He also asked to increase the price by US$ 1,000 per dose, given the additional costs associated with a DDP delivery [*Cl. Ex. C 4*]. A DDP delivery costs CLAIMANT US$ 200 only [*PO2, p. 56, para 8*]. In other words, the CLAIMANT expected that he may have to take some possible risks regarding the DDP delivery, knowing the hardship clause does not cover any and all risks; thus, he asked for extra fees beyond what a DDP delivery actually costs.

79. Although the CLAIMANT asked to be relieved from all risks associated with such a delivery, or at least to be protected against the risk of additional health and security requirements by a hardship clause, such request was not accepted [*Cl. Ex. C 4*]. Only the latter was included in the hardship clause because the RESPONDENT would not want to take all and any responsibilities that the CLAIMANT should bear under a DDP delivery contract [*Cl. Ex. C 5*].

80. Thus, it is evidenced that the Parties had common intent to narrow down the scope of the application of the hardship clause to exceptional circumstances.

2. A 30% increase in tariffs does not constitute "hardship" in the clause 12.

81. In contrast to CLAIMANT's statement, not every obstacle is a hardship. A 30% increase in tariffs does not meet the requirements of the hardship clause. It sets forth that hardship must be "*caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Cl. Ex. C 5*]. Here, such change in tariffs is not comparable to additional health and safety requirements (a), not an unforeseeable event (b), nor makes the contract more onerous (c). Therefore, CLAIMANT is not entitled to the remedy.

a. The Legal Term "Comparable" Must be Interpreted in the Legal Context.

82. CLAIMANT's argument that change in tariffs was comparable to Health and Safety Requirements lacks legal basis. To determine this issue, a legal term "comparable" should be interpreted in a legal context to promote legal uniformity, instead of borrowing

the non-legal concepts. UNCITRAL, UNIDROIT, and ICC have been working to bring together of legal systems under one shared roof [*Andersen, p. 912*]. UNIDROIT defines this as the removal of legal barriers in and the development of international trade [*Id.*].

83. Here, the language in the contract must be interpreted in a proper legal context because particular words have particular meaning and effect in a contract. "Comparable to additional health and safety requirements" must have a particular meaning in commercial context, and not refer to any change to the course of dealing. CLAIMANT failed to provide the appropriate legal definition of the term "comparable," therefore, its argument that change is tariff is comparable to health and safety requirements should not be accepted.

b. Change in Tariff is not unforeseeable.

84. Despite its contention, CLAIMANT could have reasonably taken a 30% increase in tariff into account at the time of contracting. The 30% increase in tariff is not unforeseeable event, because the *Scafom* case is factually different from our case. In the *Scafom* case, the Seller had faced a 70% increase of the contract price, whereas in our case only 30% has been increased [*Scafom, para. 6*]. The magnitude of change of circumstances is incomparable. Moreover, *Scafom* granted the adaptation not only because the 70 % increase was unforeseeable, but also because the Seller acted in good faith while the Buyer was not [*Scafom, Basis for the further Appellate Court Ruling of 15 February 2007, para.* 16-17]. Therefore, a mere 30% increase in tariffs should not be considered unforeseeable without looking into the evidential circumstances.

85. CLAIMANT could not have unforeseen the change of tariff considering the evidence. Even if change in circumstances occurs after the conclusion of the contract, if the disadvantaged party could reasonably have taken such circumstances into account at the conclusion of the contract, such cannot cause hardship [*UNIDROIT 6.2.2*]. To determine whether the party has taken it into account, the contract terms, applicable practices and trade usages, along with all relevant circumstances, must be considered [*Schwenzer p. 567*].

86. In this case, an increase of tariffs by Equatoriana was not reasonably unforeseeable, because the anti-free trade in Mediterraneo has begun before the conclusion of the Agreement. In January 2017, the newly elected President of Mediterraneo announced his

preference for a more protectionist approach to international trade in relation to agricultural products [*Cl. Ex. C 6*]. After his election, he also appointed minister for agriculture, trade and economics, who had been an outspoken protectionist for years, on May 5, 2017 [*PO2, para. 23*]. The following day, on May 6, 2017, the Parties entered into the Sales Agreement [*Cl. Ex. C 5*].

87. In addition, CLAIMANT has reasonably foreseen such increase because it suggested to include "import restrictions" in the hardship clause, although not accepted by RESPONDENT [*Cl. Ex. C 4*]. The fact that the CLAIMANT attempted to include import restrictions the hardship clause indicates the CLAIMANT could reasonably have foreseen or was contemplating such risks of an increase in tariffs. It is more so, when CLAIMANT had an experience of taking responsibilities of an 40% increase in price due to policy change previously [*Cl. Ex. C 4*].

88. Considering the legal and factual aspects, such import restrictions could not reasonably have been unforeseen by the CLAIMANT at the time of the conclusion of the contract.

c. The change does not make the contract more onerous.

89. CLAIMANT's argument based on *ALCOA,* is incomplete and factually distinctive from our case. Hardship can only be found if the performance of the contract has become excessively onerous. [*Perillo, p. 25*]. In *ALCOA*, firstly, the court granted a relief for the Seller when the costs of alumni arose 600% from 1968 to 1978 [*Fucci, (II)(B)(a), para. 11]*. In those American cases in which commercial impracticability has been found, price changes must be "especially severe and unreasonable" before relief can be granted [*Fucci, (II)(B)(a), para. 7* quoting *Louisiana Power*]. There apparently are no cases "where something less than a 100% cost increase has been held to make a seller's performance 'impracticable' [*Fucci, (II)(B)(a), para. 7* quoting *Publicker; Purnell, p. 52*].

90. Moreover, in *ALCOA*, "an important factor influencing the court's decision was the fact that the loss suffered by *ALCOA* was matched by a windfall to Essex [the Buyer]" *[Fucci, (II)(B)(a), para. 12; ALCOA at 59, 66, 79]*. In this case, however, the RESPONDENT did not benefit anything from the additional costs incurred to the CLAIMANT.

91. Even considering the financial situation of CLAIMANT, the additional costs do not make the contract excessively onerous. To constitute undue hardship, the French court requires a contracting party to "risk ruin" in continuing to perform [*Fucci, (II)(C), para. 8*].

92. Here, the CLAIMANT's business will unlikely to be in ruin without the adaptation of the Price. Although CLAIMANT contends that it may have difficulty in getting new credit line to pay off the additional costs because the bank would probably make the sale of the dressage part of CLAIMANT a condition for it, CLAIMANT is not certain that the bank will require the CLAIMANT to sell its entire business [*PO2, p. 59, para. 29*]. Therefore, any additional costs to the contract price, including the present tariff increase, do not make the contract more onerous.

3. The clause 12 does not provide the requested remedy, such as an adaptation of the price by the Arbitral Tribunal.

93. Even if hardship is found, CLAIMANT cannot rely on the hardship clause to obtain the adaptation by Tribunal, because the hardship clause does not provide such remedy. The clause 12 only states that "Seller shall not be responsible for lost semen shipments… *neither for hardship* …" [*Cl. Ex. C 5*]. It only excuses the CLAIMANT from the obligation to perform in case of exceptional circumstances, set forth therein [*Cl. Ex. C 5*]. However, nothing in the Clause entitles the Seller to renegotiate nor to adapt the contract Price by the Tribunal. Therefore, the narrowly tailored hardship clause cannot be a basis to provide remedies to CLAIMANT, because it is silent about it.

B. CLAIMANT cannot rely on Art. 79 CISG, as it is inapplicable to the 30% Tariff, to seek a Price Adaptation.

94. The Parties agreed that CISG is the governing law of the contract; thus, may be applicable here [*Cl. Ex. C 5*]. However, the CLAIMANT is not entitled to the additional amount under the Art. 79 CISG for the following reasons. The Parties implicitly agreed to derogate the provision of the Art. 79 by including the narrowly tailored hardship clause (1). Also, CISG Art. 79 is meant to cover the force majeure cases and does not regulate hardship (2). Even if applicable, CLAIMANT fails to prove hardship under the Article (3). Neither does it provide the remedy requested by the CLAIMANT (4). Therefore, the relief sought by CLAIMANT should not be granted.

1. The Parties derogate the provisions of Art. 79 CISG by including the hardship clause to govern the related issues.

95. The parties have autonomy "to agree upon the provisions which derogate from provisions of the Convention, or even completely exclude its application" [*UNCITRAL Digest, p.*

43].

96. In the present case, RESPONDENT and CLAIMANT implicitly excluded the application of Art. 79 CISG by including the narrowly tailored hardship clause. The RESPONDENT discussed with the CLAIMANT that the ICC-hardship clause is too broad [*Rs. Ex. R 3*]. The CLAIMANT requested particularly to include protection from risks of change in "health and safety requirements" by a hardship clause [*Cl. Ex. C 4*]. After negotiation, the Parties came up with the current hardship clause, addressing needs and interests of each of the Parties. Thus, it is fairly sound that the Parties intended to apply the hardship clause exclusively and directly to such changed circumstances. In short, the Parties agreed to implicitly exclude the application of CISG Art. 79 provisions, thus CLAIMANT's contention about applicability of the Art. 79 is unacceptable.

2. CISG Art. 79 is designed to regulate the force majeure cases, and not hardship.

97. Contrary the CLAIMANT'S argument, the drafting history actually supports the narrower scope of application of Art. 79 CISG. "The UNCITRAL debates show that the CISG drafters were opposed to allowing commercial or economic hardship as an excuse for non-performance" [*Ziegel, II(1)(c), para. 2*]. Consequently, the drafters adopted the requirement of an impediment as a precondition for relief in place of the change of circumstances test [*Id.*].

98. Also, the use of the UNIDROIT Principles ("UNIDROIT") interpretational method may be acceptable as conceded by CLAIMANT. UNIDROIT draw a sharp distinction between cases of hardship (in Art. 6.2.3) and cases of force majeure (in Art. 7.1.7) [*Id. at FN 10*]. The CISG and UNIDROIT's provision are similarly structured with regard to exemption of obligation to perform on basis of an impediment [*Id. at FN 10*]. This similarity further supports for the conclusion that CISG Art. 79 does not apply to cases of hardship, and that the failure to address hardship cases was intentional [*Id. at FN 10*].

3. Even if applicable, CLAIMANT fails to prove hardship under CISG Art. 79.

99. Hardship cases, compare to objectively impossible cases, should be dealt with by "a stricter application of the criteria" set out in Art. 79 CISG [*Huber, p. 195*]. CLAIMANT still fails to prove the requirements of hardship under Art. 79 CISG, even if it is applicable. Firstly, CLAIMANT fails to meet the burden of proof that hardship exists (a).

The 30% tariff does not satisfy the requirements of hardship under Art. 79 (b). Therefore, the tribunal should not accept the relevance of the application of the Art. 79 CISG.

a. CLAIMANT fails to meet the burden of proof that hardship exists.

100. CLAIMANT should provide sufficient legal and factual evidence that hardship exists. "The wording and purpose of Article 79 clearly indicate that the party in breach needs to prove that an exempting impediment exists" [*Schwenzer, p. 1154*]. Here, CLAIMANT is the party seeking the exemption and remedy under Art. 79 CISG. Thus, CLAIMANT bears the burden of proof that change in tariffs constitutes hardship defined in Art. 79, which CLAIMANT fails to do so.

b. The 30% tariff does not satisfy the requirements of hardship under Art. 79.

101. Despite the CLAIMANT's discussion, the 30% tariff does not meet the requirements of hardship set forth in Art. 79 CISG. Tariff increase is not an impediment (**i**). Change of tariffs is not unforeseeable (**ii**). Therefore, CLAIMANT is not entitled to the relief.

i. Tariff increase is not an impediment.

102. Not every additional cost is an "impediment." Impediment in the context of Art. 79 CISG requires changed circumstances to cause something akin to an "impossibility" standard [*UNCITRAL Digest, p. 389; Bulgarian Chamber*]. Even if some courts may find the impediment to be more lenient than "impossibility," yet another court found a prohibition on exports by the seller's country may constitute an "impediment" within the meaning of Article 79 [*Id.*]. UNCITRAL further suggests that the tribunals are convinced that the impediment requirement of article 79 in those cases included: refusal by state officials to permit importation of the goods into the buyer's country; the manufacture of defective goods; the seller's supplier; the failure of the carrier to meet a guarantee that the goods would be delivered on time [*Id. at 390*].

103. For instance, in *Nuova v. Fondmetall International A.B.*, a price increase of iron chrome by 30% was not enough to grant the relief, an adjustment or a termination of the contract, for the Seller (Nuova) under Art. 79 ICSG [*Rimke, (IV)(D)(8)(a), para. 2-3*]. The Italian Court in *Nuova* did not find an "unreasonable hardship" from the changed event amounting to the 30% increase of the price *[Id.*].

104. In this case, imposition of 30% tariff is unlikely render CLAIMANT's performance impossible nor excessively onerous, as disputed by CLAIMANT. The tariff imposed by Equatoriana resulted in an increase of contract price by 30% [*Cl. Ex. C 6*]. As explained in ISSUE III(A)(2)(c), CLAIMANT's business will not be in ruin for paying the additional tariff although its reconstruction plan for a new credit line may be endangered [*PO2, p.59, para. 29*]. Accordingly, CLAIMANT would not incur extraordinary and disproportionate burden under the circumstances.

105. Furthermore, the 30% tariff does not constitute fundamental alteration within the meaning of Art. 6.2.3 of the Principles, because it does not reach the threshold for at least 50% increase of the original price. Not to mention, as suggested by the Italian Court, the increased tariff is not undue hardship; thus, it is likely to be insufficient to constitute "impediment" within the meaning of Art. 79. Therefore, the 30% additional tariff does not amount to "impediment" under Art. 79.

ii. Change of tariffs is not unforeseeable.

106. CLAIMANT could have reasonably taken a 30% increase in tariff into account when it concluded the contract. "A party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract" [*UNCITRAL Digest p. 391*]. Such price fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities" [*Id*. FN 70].

107. The court denied a seller an exemption after the market price for the goods tripled. It held that "it was incumbent upon the seller to bear the risk of increasing market prices."

108. In this case, as aforementioned in ISSUE III(A)(2)(b), there is sufficient evidence that the additional costs were not unforeseeable by CLAIMANT. Many courts are in the same opinion that changes in costs are foreseeable and normal risks of international trade. Therefore, CLAIMANT should have been taken such possibility of the change into account when the contract was concluded.

4. Art. 79 CISG does not provide the remedy requested by the CLAIMANT.

109. Art. 79 CISG entitles CLAIMANT only exemption of obligation to perform when the unforeseen impediment is found, however it does not provide other remedy [*Schwenzer, p. 1151*]. CLAIMANT may argue that such exemptive effect of an impediment within the meaning of Art. 79 may terminate CLAIMANT's obligation to pay the additional costs.

However, "the exemption only relates to the contractual obligation which has not been performed" [*Id. at 1149*].

110. Specifically, the court in *Nuova* excluded the application of Art. 79 for hardship regardless of its supervening excessive onerousness. In *Nuova*, the court denied the Seller's request for dissolution of the contract on the basis of supervening excessive onerousness caused by a 30% increase [*Rimke, (IV)(D)(8)(a), para. 2-3*]. It reasoned that Art. 79 did not provide for an exemption for hardship as defined in the domestic Italian doctrine of *eccesiva onerosita sopravvenuta* (supervening excessive onerousness) [*Id.*]. According to the court, Art.79 does not seem to contemplate the remedy of dissolution of contract for supervening excessive onerousness [*Id.*].

111. Here, a party has not performed his contractual duty to seek for the relief under Art. 79. The facts show that CLAIMANT performed his contractual duty by authorizing the last shipment of the remaining 50 doses on January 23, 2018 [*Cl. Ex. C 4*]. On July 31, 2018, CLAIMANT files this arbitration and is seeking for a relief, adaptation by the tribunal. Therefore, CLAIMANT is not entitled to any remedy under Art. 79 because it already performed its contractual duty.

112. In this case, the court excludes application of Art. 79 if it does not contemplate the remedy for supervening excessive onerousness. As mentioned above, Art. 79 does not contemplate the remedy such as an adaptation of the Price sought by CLAIMANT. Therefore, the tribunal should exclude application of Art. 79 to the present issue, regardless of the claimed supervening excessive onerousness, because the Article does not contemplate the remedy of an adaptation.

C. Even if hardship clause or Art. 79 CISG is applicable, RESPONDENT never agreed to adopt the Agreement in the first place.

113. CLAIMANT shipped the last delivery assuming the risks on his own. RESPONDENT never expressly or implicitly agreed on the adaptation of the contract price (1). CLAIMANT lost his chance of renegotiation when the CLAIMANT delivered the remaining frozen semen without RESPONDENT's confirmation on the adaptation of the Agreement (2). In addition, CLAIMANT's claim that RESPONDENT breached any contractual provision is not true (3).

1. Mr. Shoemaker, RESPONDENT, was not the authorized person to negotiate the price modification, nor was his statement made with intent to create binding promise.

114. Any modification to the contract can only be done by the authorized person of each party. However, Mr. Shoemaker is responsible for the development of the racehorse breeding program and has never been involved in the negotiation process with the CLAIMANT. He is not a lawyer and never had real or apparent authority to make decisions regarding price adaptation. While CISG Article 11 allows for oral agreements, Mr. Shoemaker made clear in his telephone conversation with CLAIMANT that his understanding of the contract was that CLAIMANT had to bear the costs and also pointed out that he had no authority to agree on an adaptation [*Rs. Ex. R4*]. A reasonable person would not rely on the statements made by Mr. Shoemaker over the phone and claim price modification, who was not authorized by the RESPONDENT to represent them in any legal matter.

115. Furthermore, the statement itself was not made with an intent to create a binding promise. Verbal contracts can be enforced if the parties are found to have intended to make such a promise [*CISG Article 11*]. In our case, Mr. Shoemaker was very clear that he did not have the authority nor made any commitment to price adaptation. As such, the contract modification is not valid. Thus, the RESPONDENTS have already successfully fulfilled their contract obligations.

2. Hardship relevant only to performance not yet rendered

116. By its very nature hardship can only become of relevance with respect to performances still to be rendered. There are only two remedies if court finds hardship under the UNIDROIT Principles. Either the contract is to be terminated or adaptation of price [*UNDROIT 6.2.3*]. Once a party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance it receives as a consequence of a change in circumstances which occurs after such performance.

117. If the fundamental alteration in the equilibrium of the contract occurs at a time when performance has been only partially rendered, hardship can be of relevance only to the parts of the performance still to be rendered. However, in our case, the contract is not a long-term contract of a continuous nature and there is no more price adaptation that can

be possible nor is it allowed to split the losses for a contract that has been performed.

3. RESPONDENT did not violate any contractual provisions as the contract does not contain any resale prohibition.

118. The allegations made against the RESPONDENT that they violated the contractual provision by resale of the semen at a higher price is baseless as there is nothing in the contract which prohibits the resale of the semen. The semen was a property of the RESPONDENT after successful transactions and thereby the RESPONDENT is allowed to use them as they deem fit.

119. Furthermore, the RESPONDENT being involved in another suit regarding the price adaptation is irrelevant to the matter at hand. [*Record, p. 49*]. The issue was brought up by a breach of confidentiality in a completely separate matter with a different set of facts which is not applicable to the case at hand. The outcome of that tribunal in no way affects or is related to the current case.

CONCLUSION OF ISSUE III

Neither under the narrowly tailored hardship clause nor Art. 79 of the CISG is the CLAIMANT is entitled to US$1,250,000 from an adaptation of the contract price. Given that RESPONDENT has never agreed to the adaptation, CLAIMANT should take responsibilities of the increase costs under a DDP delivery contract.

REQUEST FOR RELIEF

In light of the submissions made above, Counsel for RESPONDENT respectfully requests the Tribunal to:

1) dismiss the claim as inadmissible for a lack of jurisdiction and powers;

2) reject the submission of the materials from RESPONDENT's other arbitration proceedings, requested by the CLAIMANT;

3) reject the claim for additional remuneration in the amount of USD 1,250,000 raised by the CLAIMANT; and

4) order CLAIMANT to pay RESPONDENT’s costs incurred in this arbitration.

CERTIFICATE OF VERIFICATION

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

SEONMIN KIM

KANGWOO LEE

SHARAD KUMAR SHARMA

YESOL MIN

GYUNGHEE KIM