SOUTH CHINA NORMAL UNIVERSITY

SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR
31ST MARCH TO 7TH APRIL, 2019

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 FOR RESPONDENT:

JUNHAO ZHENG •WEIKANG JIANG • RUNKANG XIE • QISHENG QIU

NUOQING ZHAO • LIN CEN • QIANHUI JIN • JINGJIE ZOU

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

%	per cent
&	and
¶	Paragraph
AAA	American Arbitration Association
Art (s).	Art.(s)
Aug.	August
CISG	United Nations Convention on the International Sale of Goods
CISG-AC	CISG Advisory Council
Cl.	Claimant
CLOUT	Case Law On UNCITRAL Texts
Ex	Exhibit
IBA	The International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
Jan.	January
No.	Number(s)
P (p).	Pages
p.	Page
PRO	PROBLEM
Res.	Respondent
Sept.	September
U. S.	United States of America
UNICTRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus

INDEX OF AUTHORITIES

Eisenberg	Melvin A. Eisenberg, Impossibility, Impracticability, and Frustration, 1 J. of Legal Analysis 207 (2009);	122
Gaillard, Emmanuel & Savage, John, ¶ 416 212	Emmaunel Gallard & John savage, EdS., Fouchard Gaillard Goldman on International Commercial Arbitration, Gaillard, Emmanuel. Savage, John F., 1938- Fouchard, Philippe. Traité de l'arbitrage commercial international. Goldman, Berthold. Savage, John. The Hague ; Boston : Kluwer Law International, c1999.,1999	5
Grigera Naon , pp98-99	Choice of Law Problems in International Commercial Arbitration Horacio *Grigera Naon* *Recueil des Cours*, 2001	33
Gul	Ibrahim Gul, Freedom of Contract, Party Autonomy and Its Limit under CISG, 6 Hacettepe Hukuk Fak. Derg, ¶81~ ¶82	118
Gul	Ibrahim Gul, Freedom of Contract, Party Autonomy and Its Limit under CISG, 6 Hacettepe Hukuk Fak. Derg, ¶81~ ¶82	118
Handelskammer	Schiedsgericht der Handelskammer Hamburg, Germany (1996),available at	105

	<http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract>	
HANOTIAU	Bernard *HANOTIAU*, Complex Arbitrations, *Multi Party, Multi Contract, Multi-Issues and Class Actions*, The Hague: Kluwer Law International, 2005, 218	70
Honnold	John 0. Honnold, Documentary History Of The Uniform Law For International Sales: The Studies, Deliberations And Decisions That Led To The 1980 United Nations Convention With Introductions And Explanations ¶ 460, at 350	105
J Choong and J Romesh Weeramantry	*The Hong Kong Arbitration Ordinance: Commentary and Annotations, J Choong and J Romesh Weeramantry, Sweet & Maxwell, 2011*	64
Jenkins	Sarah Howard Jenkins Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles .. A Comparative Assessment, 72 Tul. L. Rev. 2015 (1998)	132
JF Poudret and S Besson	Comparative Law of International Arbitration, JEAN-FRANÇOIS POUDRET/SÉBASTIEN BESSON, 2nd ed., London, 2007.	10
Lew, Mistelis & Kröll 124	Comparative International Commercial Arbitration, Lew, Julian D. M. / Mistelis, Loukas A. / Kröll, Stefan M., Kluwer Law International, The Hague 2003	10
Lookofsky, 434	Joseph Lookofsky, Impediments and Hardship	108

	in International Sales: Commentary on Catherine Kessedjian's Competing Approaches to Force Majeure and Hardship, 25 INT'L REV. L. & ECON., 434	
M. McIlwrath & J. Savage	International Arbitration and Mediation: A Practical Guide, Michael McIlwrath, John Savage, Kluwer Law International , February 22, 2010	42
Markus Wirth	Written Evidence and Discovery in International Arbitration: New Issues and Tendencies (Giovannini and Mourre (eds), Markus Wirth, Kluwer Law International; International Chamber of Commerce (ICC) 2009	85
Michael&Simon	Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law? Michael Young and Simon Chapman, ASA Bulletin, 2009	75
MICHELLE BUHALO	*Restatement (Second) Conflict of Laws* MICHELLE BUHALO 1971-1789	39
Nacimiento 205; Schramm 37, 54;	*Arbitration in Germany: The Model Law in Practice* K.H. Böckstiegel, S. Kröll & P. *Nacimiento,* The Hague: Kluwer Law International, 2008	35
Perillo	Joseph M. Perillo Force Majeure and Hardship Under the UNIDROIT Principles of	132

Redfern 6-03	International Commercial Contracts Redfern and Hunter on international arbitration Nigel Blackaby Oxford University Press, 2015	15
Reto Marghitola	Interpretation of the IBA Rules, Reto Marghitola, Document Production in International Arbitration, International Arbitration Law Library， 2015	91
Rimke	Joern Rimke Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts	132
Schlechtriem I	Peter Schlechtriem, Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods (Manz, 1986)	114
Schramm, Geisinger & Pinsolle	Recognition and Enforcement of Foreign Arbitral Awards: a Commentary on the New York Convention, Schramm Geisinger Pinsolle, in Herbert Kronke, Patricia Nacimiento, Kluwer Law International	36
Schwenzer	Eds. Peter Schlechtriem, Ingeborg Schwenzer Commentary on the UN Convention on the international sale of goods(CISG), OXFORD UNIVERSITY PRESS , 2010	122
Schwenzer	Eds. Peter Schlechtriem, Ingeborg Schwenzer	122

	Commentary on the UN Convention on the international sale of goods(CISG), OXFORD UNIVERSITY PRESS , 2010	
Secretariat Commentary	Secretariat Commentary on article 5 of the 1978 Draft, ¶1	118
SHENTON	*International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration,* Yearbook Commercial Arbitration 1985 - Volume X Sanders (ed.); Kluwer Law International, Jan 1985	70
Silveira	Mercedeh Azerdo Da Silveira Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation	109
The law applicable to the arbitration agreement: towards transnational principles	The law applicable to the arbitration agreement: towards transnational principles, Renato Nazzini, 65 Int'l & Comp. L.Q. 681 (2016) / International and Comparative Law Quarterly, Vol. 65, Issue 3 (July 2016), pp. 681-704	33
Trukhtanov	*The Proper Law of Arbitration Agreement – A Farewell to Implied Choice*? Int'l Arb. L. Rev. 140 (2012)	28
UNCITRAL	UNCITRAL Working Group on International Sale of	3,13,64,98,9

	Goods (1971) Report of Work of Second Session (Cited: Secretariat Commentary)	9,120,124
UNCITRAL	UNCITRAL Working Group on International Sale of Goods (1971) Report of Work of Second Session (Cited: Secretariat Commentary)	
van den Berg	Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention Practice Albert Jan van den Berg A. Articles on the 1958 New York Convention, 2008 *B.*	34,36
W. Craig, W. Park & J. Paulsson	International Chamber of Commerce Arbitration W. Lawrence Craig William W. Park Jan Paulsson Laurence Craig, William Park, and Jan Paulsson Oceana TM,	36
Waincymer	*Procedure and Evidence in International Arbitration* Jeffrey Waincymer Kluwer Law International, 2012	33
Вестник Международного Коммерческого Арбитража	Seat (Legal Place) of International Commercial Arbitration *Вестник Международного Коммерческого Арбитража* Ассоциация исследователей международного частного и сравнительного права, 2017	52
Наталья Кислякова	*Using illegally obtained evidence in the Court of*	86

Arbitration for Sport, Наталья Кислякова, available at: http://young.modernarbitration.ru/blogs/40

INDEX OF CASES

Region	Cited as	Full citation	Cited in(¶)
America	Granite Rock Co. v. Int'l Bhd of Teamsters	SUPREME COURT OF THE UNITED STATES, U.S. S.Ct. 2010, June 24, 2010, available at: https://www.law.cornell.edu/supct/html/08-1214.ZS.html	14
America	KY Supreme Court 1995-CA-001813	United States Court of Appeals, Second Circuit, 1995-CA-001813, available at: http://162.114.92.72/COA/1995-CA-001813.pdf	59
Belgian	Frozen raspberries case	Vital Berry Marketing NV v. Dira-Frost NV Rechtbank van Koophandel, Hasselt 02 May 1995 Case No.: AR 1849/94, available at: http://www.unilex.info/case.cfm?id=263	105,107
Belgium	Scafom v. Lorraine	Scafom International BV v. Lorraine Tubes S.A.S. Hof van Cassatie [Court of Cassation = Supreme Court] 19 June 2009 Case No.: C.07.0289.N, available at:	132

		http://cisgw3.law.pace.edu/cases/090619b1.html	
France	Unknown Parties（FRA）	Cour d'Appel de Colmar 12 June 2001, available at：http://www.unilex.info/case.cfm?id=814	55
Germany	Tomato concentrate case	Oberlandesgericht Hamburg 04 July 1997 Case No.: 1 U 143/95 and 410 O 21/95, available at：http://www.unilex.info/case.cfm?id=438	105
Germany	Iron-molybdenum case	Oberlandesgericht Hamburg 28 February 1997 Case No.: 1 U 167/95, available at：http://www.uncitral.org/clout/clout/data/deu/clout_case_277_leg-1500.html	109
Germany	Judgment of 10 May 1984, NJW 2763, 2764	Swiss and German buyer v. German seller Germany No. 27 Federal Court of Justice of Germany 10 May 1984, available at: http://www.kluwerarbitration.com/document/ipn8126	27
Germany	Judgment of 30 January 1957	German Bundesgerichtshof, 23 BGHZ 198	17
India	Citation Infowares Ltd v. Equinox Corp.	Indian S.Ct., (2009) 7 SCC, 1 June 2009, available at: http://pk.vlex.com/vid/cross-name-ltd-vs-	36

		corporation-382722338	
India	Nat'l Thermal Power Corp. v. Singer Co.	Supreme Court of India, 1978, 7 May 1992, available at: http://www.kluwerarbitration.com/document/ipn4666	30
Italy	Nuova v. Fondmetal	Nuova Fucinati S.p.A. v. Fondmetal International A.B. Tribunale Civile di Monza 14 January 1993 Case No.: D95-6326, available at: http://www.uncitral.org/clout/clout/data/ita/clout_case_54_leg-1155.html	90
Japan	*Japan Educational Corporation v. Kenneth J.*	Supreme Court, Japan No. 6, 4 September 1997, available at: http://www.jcaa.or.jp/e/arbitration/docs/newsletter28.pdf	27
Japan	Judgment of 30 May 1994, XX Y.B. Comm. Arb. 745, 747 (Tokyo Koto Saibansho) (1995)	Japan Educational Corporation v. Kenneth J. Feld ,High Court of Tokyo, Japan No. 6, • 30 May 1994, available at: http://www.kluwerarbitration.com/document/ipn5515	36
Netherland	Petrasol BV (Netherlands) v. Stolt Spur Inc. (Liberia)	Court of First Instance of Rotterdam, Netherlands, 28 September 1995, available at: http://www.kluwerarbitration.com/document/ipn6437	27

Netherlands	Judgment of 24 November 1994	Isaac Glecer v. Moses Israel Glecer and, Estera Glecer-Nottman, President, Rechtbank, Court of First Instance, Rotterdam, Netherlands No. 19, 24 November 1994 Available at: http://www.kluwerarbitration.com/document/ipn5947	36
Netherlands	Judgment of 4 August 1993,	Owerri Commercial Inc. v. Dielle Srl, Court of Appeal The Hague, available at: http://www.kluwerarbitration.com/document/ipn5133?q=%22Owerri%20Commercial%20Inc.%20v.%20Dielle%20Srl%22	39,41
New Zealand	OMV v. Precinct	OMV New Zealand Limited v. Precinct Properties Holdings Limited, Court of Appeal of New Zealand, [2018] NZCA 240, 6 July 2018, available at: http://www.kluwerarbitration.com/document/kli-ka-ons-18-33-008?q=%22OMV%20New%20Zealand%20Limited%20v.%20Precinct%20Properties%20Holdings%20Limited%22	94
Singapore	PT Garuda Indonesia v. Birgen Air	Singapore Ct. App., [2002] SGCA 12, 2002, available at: https://lawexplores.com/7-selection-of-ar	43

		bitral-seat-in-international-arbitration/	
Singapore	FirstLink Investments Corp Ltd v. GT Payment Pte Ltd	Singapore High Court, [2014] SGHCR 12, 19 June 2014, available at: https://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2014]%20SGHCR%2012.pdf	43
Sweden	Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.	Swedish Supreme Court, T 1881-99, 27 October 2000,available at: https://heinonline.org/HOL/Page?handle=hein.kluwer/wtam0013&div=18	27
Swiss	JUDGMENT OF 7 OCTOBER 1933	Tobler v. Justizkommission des Kantons Schwyz, Swiss Federal Tribunal, DFT 59 I 177, 7 October 1933, available at: http://www.kluwerarbitration.com/document/kli-ka-born-2015005-n?q=%22Tobler%22	17
Swiss	Judgment of 28 May 1915	Jörg v. Jörg, Swiss Federal Tribunal, DFT 41 II 534, 538	17
Thailand	Football Club Metalist. v. UEFA & PAOK FC	Court of Arbitration for Sport, CAS 2013/A/3297, 29 November 2013, available at: https://jurisprudence.tas-cas.org/Shared%20Documents/3297.pdf	88
Ukraine	Corn case	International Commercial Arbitration at	118

		the Ukraine Chamber of Commerce and Trade 23 January 2012 Case No.: 218y/2011 Available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/120123u5.html	
United Kingdom	Sulamérica v. Enesais	Court of Appeal of England, A3/2012/0249, 12 May 2012, available at: http://www.kluwerarbitration.com/document/kli-ka-1252105-n?q=%22Sulam%C3%A9rica%20Cia%20Nacional%20de%20Seguros%20S.A%22	26
United Kingdom	*C v. D*	English Ct. App., [2007] EWCA Civ 1282, 29th & 30th October 2007, available at: http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2007/1282.html&query=(EWCA)+AND+(Civ)+AND+(1282)	40
United Kingdom	XL Insurance Ltd v Owens Corning	QUEEN'S BENCH DIVISION(COMMERCIAL COURT) , [2000] 2 Lloyd's Rep. 500,2000,available at: https://www.i-law.com/ilaw/doc/view.ht	26,41

		m?id=150679	
United Kingdom	Habas Sinai Ve v VSC Steel Company Ltd	England and Wales High Court of Justice, [2013] EWHC 4071 (Comm), 19 December 2013, available at: http://high-court-justice.vlex.co.uk/vid/2012-1055-482895810	41
United Kingdom	Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp.	English Ct. App., [1993] 2 Lloyd's Rep. 445,1993, available at: https://www.i-law.com/ilaw/doc/view.htm?id=149688	42
United Kingdom	Globe Motors Inc. & Ors. v. TRW Lucas Varity Electric Steering Ltd. & Anor.	England and Wales Court of Appeal (Civil Division) [2016] EWCA Civ 396 , 20 April 2016, available at: http://www.bailii.org/ew/cases/EWCA/Civ/2016/396.html	52
United Kingdom	Abuja Int'l Hotels Ltd v. Meridien SAS	Queen's Bench Division, Commercial Court, [2012] EWHC 87 (Comm), 26 January 2012, available at: http://www.bailii.org/ew/cases/EWHC/Comm/2012/87.html	41
United Kingdom	Halpern v. Halpern	English High Ct., [2006] EWHC 603, ¶55 (Comm), 24 MAY, 4 JULY 2006,	41

		available at: http://www.uniset.ca/other/cs6/2007QB8.html	
United Kingdom	All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd	Court of Appeal of Bermuda, Not Indicated, 7 July 1989, available at: http://www.kluwerarbitration.com/document/IPN7318	17
United Kingdom	James Miller Ltd. V. Whitworth Street Estates	HOUSE OF LORDS, [1970] 1 Lloyd's Rep. 269, 1970, available at: https://www.i-law.com/ilaw/doc/view.htm?id=146450	20
United Kingdom	Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.	English High Ct., [1998] 4 All ER 570 (QB), 1999, available at: https://www.i-law.com/ilaw/doc/view.htm?id=149280	10
United Kingdom	Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd	House of Lords, [1981] AC 909, [1981] 1 Lloyds Rep 253, available at: https://swarb.co.uk/bremer-vulkan-schiffbau-und-maschinenfabrik-v-south-india-shipping-corp-ltd-hl-1981/	24
United Kingdom	Judgment of 2 October 1931	Australia No. 9, Aerospatiale Holdings Australia Pty Ltd. and Eurocopter International Pacific Ltd. v. Elspan	36

International Pty Ltd., Peter Ellen and Associates Ltd. and others, Supreme Court of New South Wales, Common Law Division, 14 August 1992, 55053/92, available at: http://www.kluwerarbitration.com/document/ipn5091

INDEX OF ARBITRAL AWARDS

	2004), pp. 97-100	
ICC Award No.7373	Award in ICC Case No. 7373, discussed in Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, 289 Recueil des Cours 9, 71 (2001).	25
ICC Case No. 4131	Award in ICC Case No. 4131, Dow Chemical France (France), The Dow Chemical Company (USA), Dow Chemical A.G. (Swiss), Dow Chemical Europe (Swiss) v. ISOVER SAINT GOBAIN (France), 23 September, 1982, available at: https://www.trans-lex.org/204131/_/icc-award-no-4131-yca-1984-at-131-et-seq-/#toc_0	41
ICC Case No. 4367	Award in ICC Case No. 4367, U.S. Supplier v Indian Buyer, 16 November 1984, available at: http://www.kluwerarbitration.com/document/ipn2483?q=%22ICC%20Case%20No.%204367%22	39, 41
ICC Case No. 8938	Award in ICC Case No. 8938, Exclusive Agent v Manufacturer, 1996, available at: http://www.kluwerarbitration.com/document/IPN18078	14
ICSID Case No. ARB/07/23	*Railroad Development Corporation v. Republic of Guatemala (ICSID),* International Centre for Settlement of Investment Disputes, *18 May 2010, available at:*	70

	http://www.kluwerarbitration.com/document/kli-ka-1033015?q=%22Railroad%20Development%20Corporation%20v.%20Republic%20of%20Guatemala%22	
Interim Award in ICC Case (1995)	A & subsidiary B v C, Interim Award , 1995, available at: http://www.kluwerarbitration.com/document/kli-ka-1027632-n?title=ASA%20Bulletin	17
Interim Award in VIAC Case No. SGH-5024	A v B and C, Interim Award on Jurisdiction, VIAC Case No. SCH-5024 A, 97 J.D.I. (Clunet) 405 (1970), 5 August 2008, available at: http://www.kluwerarbitration.com/document/KLI-KA-1102548-n	17
Nuova Fucinati S.p.A. v. Fondmetal International A.B.	Tribunale Civile di Monza 14 January 1993 Case No.: D95-6326 Available at: http://www.uncitral.org/clout/clout/data/ita/clout_case_54_leg-1155.html	121
NV A.R. v. NV I.	Hof van Beroep [Appellate Court] Gent 15 May 2002 Case No.: 2001/AR/0180 Available at: http://cisgw3.law.pace.edu/cases/020515b1.html	118
SO.M.AGRI s.a.s. vs. Erzeugerorganisatio	SO.M.AGRI s.a.s. vs. Erzeugerorganisation Marchfeldgemuese Gmbh & Co. KG Tribunale di Padova - Sez. Este	118

n Marchfeldgemuese Gmbh & Co. KG	25 February 2004 Available at： http://www.unilex.info/case.cfm?id=972	
	Bulgarska turgosko-promishlena palata (Bulgarian Chamber of Commerce and Industry) 12 February 1998	
Steel ropes case	Case No.: 11/1996 Available at： http://www.unilex.info/case.cfm?pid=1&do=case&id=420&step=Abstract	105

INDEX OF LEGAL TEXTS

CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for The International Sale Of Goods
HKIAC Rules	Hong Kong International Arbitration Center Rules
IBA rules	*IBA Rules on the Taking of Evidence in International Arbitration*
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on international commercial arbitration
UNIDROIT	International Institute for The Unification of Private Law

SUMMARY OF FACTS

The RESPONDENT, Black Beauty Equestrian (Black Beauty), a company located in Oceanside, Equatoriana, which is known as its incredibly triumphant broodmare lines.

The CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company renowned for its horse care, breeding and riding/driving registered and located in Capital City, Mediterraneo.

2017

21 March	RESPONDENT contacted CLAIMANT, inquiring about the availability of the sales of frozen semen from Nijinsky III for its newly started breeding program.
24 March	Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen.
28 March	RESPONDENT accepted the general applicability of the general terms and conditions CLAIMANT offered, meanwhile CLAIMANT accepted the DDP-delivery term requiring CLAIMANT to undertake all of the risk.
31 March	CLAIMANT asked for the supplement of hardship clause into the contract but the specific consensus of hardship clause remained ambiguous.
10 April	RESPONDENT proposed that an arbitration agreement shall be governed by the law of the place of arbitration and not by the law of the contract in Mr. Antley`s latest draft.
11 April	CLAIMANT had changed the suggested place of arbitration but not objected to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement under the rules of the HKIAC.
12 April	The car accident happened to the agents of the Parties, both of

	whom were severely injured thus it is impossible for them to reach a consensus and sign the final contract.
6 May	CLAIMANT and RESPONDENT signed the FROZEN SEMEN SALES AGREEMENT.
20 May	First delivery of 25 doses by CLAIMANT.
3 October	Second delivery of 25 doses by CLAIMANT.
22 November	Mediterraneo`s newly elected president imposed 25 per cent tariffs on agricultural products from Equatoriana.

2018

20 January	E-mail from CLAIMANT to RESPONDENT suggested that CLAIMANT would not start the last shipment as the imposed tariffs that caused the delivery more expensive.
21 January	Telephone call from RESPONDENT to CLAIMANT by shoemaker informed that RESPONDENT would accept CLAIMENT's request outright and the last does shall be shipped as plan for the threat by CLAIMENT that third shipment would not deliver, which was not a certain consent for any adaptation of the price as no authority for shoemaker to do so.
23 January	CLAIMANT completed the third delivery of 50 doses after the telephone call by RESPONDENT as its obligation requires.
5 June	Napravnik, CLAIMANT's charge of this trade made a witness statement.
24 August	RESPONDENT submitted the Answer to the Notice of Arbitration to HKIAC.
3 October	RESPONDENT submitted an objection to CLAIMANT's material of other arbitral tribunal.

SUMMARY OF ARGUMENT

APPLICABLE LAW TO ARBITRATION AGREEMENT

1. RESPONDENT never agreed to have the arbitration agreement governed by the law of the Mediterraneo as the arbitration agreement is a legally separate agreement from the main contract, and the Parties did make an implied choice law of Danubia to govern the Arbitration Agreement. Meanwhile throughout the "closest connection or most significant relationship" test, the law of Danubia governs the arbitration agreement and its interpretation.

JURISDICTION TO ADAPT THE CONTRACT

2. The arbitral tribunal can only adapt the contract if it is expressly authorized by both parties, and there is no express empowerment of the adaptation of the contract. Hence, this tribunal has no jurisdiction or power to adapt the contract under the law of Danubia.

ADMISSIBILITY OF THE EVIDENCE

3. The Tribunal shall disregard the contested evidence. The contested evidence was obtained through a breach of a confidentiality and illegal hack. Also, it is irrelevant to this case and not material to its outcome. Meanwhile, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are not applicable in this arbitration as CLAIMANT alleged.

NON-ENTITLEMENT TO PAYMENT

4. CLAIMANT is not entitled to the payment of US$ 1,250,000 no matter under clause 12 of the contract or under the CISG. The imposition of tariffs does not fall into the scope of clause 12 because that was not the situation that the Parties intended to prevent. Since the imposition of the tariffs could be reasonably foreseen by the Parties and did not fundamentally alter the equilibrium of the contract, the event did not constitute hardship. Hardship issues are never regulated by CISG, and CLAIMANT`s claim cannot be supported even through the gap-filling. Since it was CLAIMANT`s obligation to bear the risk, CLAIMANT shall bear the full cost resulting from the tariffs, i.e. US$ 1,250,000.

ARGUMENT

I. THIS TRIBUNAL HAS NO JURISDICTION OR POWERS TO ADAPT THE CONTRACT AS THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

5. It is a "fundamental principle" of arbitration that "arbitrators have the power to rule on their own jurisdiction" *[Gaillard, Emmanuel & Savage, John, ¶ 416 212]*. This precept of *Kompetenz-Kompetenz* is borne out by the applicable arbitration rules in the present case *[Art. 19 HKIAC Rules]*. Moreover, the Tribunal has the authority to determine the scope of the arbitration clause *[Art. 19(1) HKIAC Rules]*. Finally, the present dispute is within the scope of the arbitration agreement and is arbitrable. Accordingly, the Tribunal has the authority to rule on RESPONDENT`s objections to jurisdiction.

6. For the purpose of this Tribunal to settle down the dispute due to the price changes caused by the new policy, RESPONDENT respectfully requests the Tribunal to find that, firstly, the law of Danubia governs the arbitration agreement and its interpretation **(A)**. Secondly, this tribunal has no jurisdiction or power to adapt the contract under the law of Danubia **(B).**

A. The law of Danubia governs the arbitration agreement and its interpretation.

7. RESPONDENT submitted follows: The Parties did choose the law of Danubia to govern the Arbitration Agreement **(1)**; Even if the tribunal found that Parties did not choose the law applicable to the Arbitration Agreement, the law of Danubia shall still be the governing law of Arbitration Agreement **(2)**.

1. The Parties did choose the law of Danubia to govern the Arbitration Agreement.

8. Party autonomy is a guiding principle in international commercial arbitration *[Redfern 6-03]* and dictates that parties to a contract are free to choose the law that shall be applied in any dispute arising between them *[Lew, Mistelis & Kröll 124]*. In the present case, RESPONDENT never expressly or impliedly agreed to have the arbitration agreement governed by the law of the Mediterraneo as the arbitration agreement is a legally separate agreement from the main contract **(a)**; the Parties have made an implied choice of the law of Danubia **(b)**.

a. RESPONDENT never expressly or impliedly agreed to have the arbitration agreement

governed by the law of the Mediterraneo as the arbitration agreement is a legally separate agreement from the main contract.

9. As CLAIMANT alleged that both parties have agreed on the applicable law to the arbitration agreement, is the law of Mediterraneo based on the main contract as well arbitration agreement as a whole. Contrary to this allegation, since the pre-condition would be proved properly in the followings that the arbitration agreement is a legally separate agreement from the container contract. RESPONDENT requests the tribunal to find that, there are legislative recognitions of the separability presumption **(i)**; The parties` intention constitutes the foundation for the separability presumption **(ii)**; The arbitration agreement distinguishes itself from main contract by their characterization **(iii)**. From the reasons above, the law of Mediterraneo chosen by parties governing to the main contract does not naturally and necessarily applicable to arbitration agreement, the RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract.

i. There are legislative recognitions of the separability presumption.

10. The separability presumption is of central significance in international commercial arbitration. Indeed, the presumption is one of the foundations of the contemporary legal regime applicable to international arbitration agreements, which is universally affirmed and almost never questioned *[JF Poudret and S Besson 258; Lew, Mistelis & Kröll, 106]*. Separability Presumption is that, the characteristics of an arbitration agreement…are in one sense independent of the underlying or substantive contract and have often led to the characterization of an arbitration agreement as a "separate contract", the law of the arbitration agreement did not have to be the same as the law governing the substantive contract *[Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.]*.

11. Initially, the parties selected the HKIAC Rules and designated Vindobona, Danubia as the seat of the arbitration. According to article 19.2 of HKIAC, an arbitration agreement which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract, which recognized the separate status of arbitration agreement.

12. Importantly, the cornerstone of the legal regime for international commercial arbitration proceedings is the New York Convention, which is in turn implemented by national arbitration legislation in most developed jurisdictions. Both Article II(1) and II(2) of the New York Convention rest on the

assumption that an "arbitral clause in a contract" is itself an "agreement," dealing with the subject of arbitration. Neither provision requires that such agreements always be treated as "separable," or even assumes that this will necessarily be the case. On the other hand, both provisions are most naturally understood as assuming that arbitration clauses will presumptively be separate agreements, capable of being treated as such.

13. In addition, the doctrine of separability is also explicitly acknowledged in Article 16 of the Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which. In a same vein, recognized by Article 16 of the UNCITRAL Model Law extends beyond the New York Convention, in limited respects, in giving effect to the separability presumption. Derived from Model Law provides an arbitration clause shall be treated as an agreement independent of the other terms of the contract.

14. More succinctly, "courts must treat the arbitration clause as severable from the contract in which it appears." *[Granite Rock Co. v. Int'l Bhd of Teamsters]* In the same vein, a frequently-cited arbitral award states the presumption as follows: "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained." *[ICC Case No. 8938]*

ii. The writing setting and paragraph arrangement from the Sales Agreement also indicates the separability.

15. The FROZEN SEMEN SALES AGREEMENT signed by parties is the best embodiment of parties` intention *[Redfern 6-03]*. As revealed in the FROZEN SEMEN SALES AGREEMENT, the term "separability" accurately directs attention to the central role of the parties` intentions, as a contractual matter, in forming a "separate" arbitration agreement, the separability of arbitration agreement could be easily found *[CLA Ex C5]* :

> ***14. This Sales Agreement*** *shall be governed by the law of Mediterraneo...*
>
> ***15.*** *Any dispute arising out of... [Dispute Resolution]*

16. By analyzing the writing setting and paragraph arrangement from the Sales Agreement, Clause 14, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" concludes the main contract, which is in a same way to show an ending to the main clause of container contract. Furthermore, Clause 15 is the arbitration clause provides a mechanic for dispute resolution. The obligation arising out of the Clause

14 shall merely be binding on and constrain the above terms, but not including Clause 15. It merely determines the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement.

iii. The arbitration agreement distinguishes itself from main contract by their characterization.

17. Universal decisions and cases can prove that the arbitration agreement was properly characterized as a "procedural contract" because of the separability doctrine. An arbitration clause, as a specific procedural and jurisdictional clause, requires particularly careful distinction to the main contract. *[See Interim Award in ICC Case (1995); Interim Award in VIAC Case No. SGH-5024 A;* Judgment of 7 October 1933*; Judgment of 28 May 1915; Judgment of 30 January 1957; All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd.]*

18. This characterization captured the underlying nature of the arbitration agreement, which is that of an ancillary agreement that provides a specific dispute resolution mechanism which is related to, but distinct from, the parties` substantive commercial contract. In such reasoning, it is critical to appreciate the "procedural" nature of the agreement to arbitrate, which according to explanations above, the arbitration clause is not an agreement of substantive law but of procedural nature. Even where the arbitration clause is contained in the same document as the substantive law contract to which it relates and therefore from the outside appears as a part of the main agreement, it still does not simply constitute a single provision of the main agreement but an independent agreement of a special nature.

19. One consequence of this analysis is to detach the "procedural" arbitration agreement from the "substantive" main contract: the differing natures and characterizations of the two agreements made it easy, indeed almost inevitable, to separate the arbitration agreement from main contract.

20. The separability of arbitration agreement is not only limit substance, but also limit procedure. In the *James Miller Ltd. V. Whitworth Street Estates*, the HOUSE of lords found that a Scottish arbitration which applied English law as the substantive law of the contract, was not bound by English procedural law. In that case, the court found that the arbitration was governed by the Scottish procedure law as Scotland was the place of arbitration. The House was unanimous in holding that the curial law of the

arbitration did not have to be the same as the law governing the substance of the contract.

21. To sum up, in the case at hand, since the arbitration agreement is legally independent, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement. Both Parties exclusively chose the law governing the contract, but there was never any deliberate choice in favor of the law of Mediterraneo to govern the arbitration agreement at the same time.

b. The Parties have made an implied choice of the law of Danubia.

22. The express choice of a place of arbitration shall be regarded as an implied choice of the law applicable to the Arbitration Agreement **(i)**; Further,the drafting history of the arbitration clause could also support such inference.**(ii)**

i. The express choice of a place of arbitration shall be regarded as an implied choice of the law applicable to the Arbitration Agreement.

23. As RESPONDENT has proved above, in the present case, the parties have not expressly chosen the law governing the Arbitration Agreements. However, the parties have expressly chosen Danubia as the arbitral seat *[CLA.EX.C5]*. The express choice of a place of arbitration shall be regarded as an implied choice of the law applicable to the Arbitration Agreement.

24. Where in the absence of an express choice of law governing the arbitration agreement in arbitration clause, authorities generally made an implied choice-of-law analysis *[Redfern 160]*. And such analysis frequently resulted in the application of the law of the seat *[Born 514]*.

25. As a frequently-cited arbitral award concluded: "Except in cases where the parties make an express choice concerning the law governing the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place." *[Award in ICC Case No. 7373]*

26. In the same vein, a famous case *Sulamérica v. Enesais* is similar to the present case, there are no clear terms to stipulate the law governing the arbitration agreement in Sales Agreement, the parties merely selected London as the seat of arbitration. Then, the determination of the law applicable to the arbitration agreement became a controversy. Under such circumstances, the English Court of Appeal

held that the choice of London as the seat of arbitration entailed acceptance by the parties that English law would apply to the conduct and supervision of the arbitration, which suggested that the parties intended English law to govern all aspects of the arbitration agreement. And the court was fortified on this point by two prior decisions, *C v D* and *XL Insurance Ltd v Owens Corning [Sulamérica v. Enesais; C v D; XL Insurance Ltd v Owens Corning]*.

27. Similarly, plenty of cases and awards from Netherlands, Swedish, German, Japan,have reached the same conclusion, by seating the arbitration in a particular state, the parties impliedly agreed that the arbitration clause should be governed by the law of the seat *[Judgment of 10 May 1984, NJW 2763, 2764; Japan Educational Corporation v. Kenneth J.; Petrasol BV v. Stolt Spur Inc.; Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.]*.

28. A few distinguish scholar also held the point that if there is no express choice of the law to govern arbitration agreement, but the parties have chosen the seat of arbitration, the contract will frequently be governed by the law of that country on the basis that the choice of the seat is to be regarded as an implied choice of the law governing the contract *[Dicey, Morris and Collins on The Conflict of Laws; Trukhtanov]*.

ii. The drafting history of the arbitration clause could also support the inference of parties' implied choice of law.

29. The first draft of the arbitration agreement actually contained an express choice of law provision for the arbitration clause. That choice provided for the application of the law of the place of arbitration, which was in that draft Equatoriana. *[RE.EX. R1]*

The seat of arbitration shall be Equatoriana.

The law of this arbitration clause shall be the law of Equatoriana.

30. It indicates that RESPONDENT intend to choose the law of the arbitral seat to govern the arbitration agreement. In the return email, CLAIMANT stated that "we would accept your proposal with an amendment as to the place of arbitration" *[RE.EX. R2]* As a matter of fact, CLAIMANT has no any objection to the governing law of the arbitration clause, it merely changed the seat of arbitration from Equatoriana to Danubia.

31. As for the absence of choice of law provision for the arbitration clause, it was subsequently merely forgotten to include. A better explanation is, CLAIMANT and RESPONDENT agreed to choose the

law same as the law of arbitral seat to govern the arbitration agreement therefore consider that it is no need to state an express provision of governing law of arbitration clause.

32. Hence, the circumstances in this case point to an implied intention to choose the law of arbitral seat to govern the arbitration agreement. While the tribunal making an implied choice-of-law analysis, the drafting history of the arbitration clause helps the arbitrators to infer that the parties imply chose the law of arbitral seat i.e. the law of Danubia to govern the arbitration agreement.

2. Even if the tribunal found that Parties did not choose the law applicable to the Arbitration Agreement, the law of Danubia shall still be the governing law of Arbitration Agreement.

33. If no choice of law applicable to the arbitration agreement has been made and it becomes necessary for arbitrate, the tribunal shall determine the law applicable to the arbitration agreement *[Redfern 158; Waincymer 987]*. The tribunal has the discretion to adopt the approach they found proper to determine the law applicable to the arbitration agreement *[Grigera Naon pp98-99]*. And the tribunal is requested to refer that the law of Danubia shall be the governing law of Arbitration Agreement by approach provided by New York Convention **(a)**; The law of Danubia shall be the governing law of Arbitration Agreement by approach of "closest connection or most significant relationship" test **(b).**

a. The law of Danubia shall be the governing law of Arbitration Agreement by an approach provided by New York Convention.

34. The cornerstone of the legal regime for international commercial arbitration proceedings is the New York Convention, which is in turn implemented by national arbitration legislation in most developed jurisdictions *[BORN 1529]*. Although the provisions of the New York Convention are only directly binding on the courts in the Member States and not on the arbitration tribunal, there are good reasons why an arbitration tribunal should base its decision on the New York Convention. The widespread applicability of the Convention and that enforcement under the Convention is only possible if the form requirement is met are strong arguments in favour of the application of Article II *[van den Berg, 189 et seq with further references]*.

35. Therefore, CLAIMANT respectfully submit that it makes prefer sense for the tribunal to adopt the approach to determine the applicable law governing the arbitration agreement which provided by New York Convention.

36. Article V(1)(a) of New York Convention prescribes a default choice-of-law rule, giving effect to an express or implied choice of law by the parties or, absent such choice, selecting the law of the arbitral seat, applies in proceedings under Article II to recognize and enforce international arbitration agreements. This rule is apparent from the language of Article V(1)(a), which provides that an award may be denied recognition if the underlying arbitration agreement was "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." *[See Nacimiento 205; Schramm 37, 54; A. van den Berg 282-283]* Commentary and court decisions are unanimous that Article V(1)(a)'s default rule, in the absence of a choice-of-law by the parties, is the law of the arbitral seat. *[Judgment of 2 October 1931; Judgment of 24 November 1994, Rotterdam Rechtbank; Judgment of 30 May 1994, Tokyo Koto Saibansho; Citation Infowares Ltd v. Equinox Corp.; W. Craig, W. Park & J. Paulsson ¶5.05; A. van den Berg 124]*

37. In the case at hand, the seat of arbitration is Danubia, as well as under the default choice-of-law rule of New York Convention, the tribunal could lead a conclusion that the applicable law of the Arbitration Agreement shall be the law of Danubia.

b. The law of Danubia shall be the governing law of Arbitration Agreement by an approach of "closest connection or most significant relationship" test.

38. CLAIMANT alleged that when determined the law governing the arbitration agreement, it shall be the law governing the underlying contract. However, an exclusive focus on the law governing the underlying contract, as applying to the arbitration agreement, suffered from grave defects. This analysis was in significant tension with the basic premises of the separability presumption, which treated the parties' underlying contract as distinct from the arbitration agreement [*van den Berg 145-146; BORN 517*].

39. Over the past several decades, authorities in a number of jurisdictions increasingly rejected an exclusive focus on the law of the underlying contract. Instead, these authorities turned to generally-applicable contemporary choice-of-law criteria, and particularly the "most significant relationship" and "closest connection" standards. *[see ICC Case No. 4367; Owerri Commercial Inc. v. Dielle Srl; E. Gaillard & J. Savage; MICHELLE BUHALO pp.187-88, 218].*

i. Most authorities in cases concluded that the law with the most significant relation to the arbitration agreement was the law of the arbitral seat.

40. Where the parties have not chosen a law governing the arbitration, the seat of the arbitration is undoubtedly considered to be the most significant factor in the determination of the applicable law. *[Gaillard and Savage 225]* As one English Court of Appeal decision reasoned, an international arbitration agreement is "more likely" to be governed by "the law of the seat of arbitration than the law of the underlying contract," because the arbitration agreement "will normally have a closer and more real connection" with the place of the seat. *[C v. D]*

41. In international practices, there is extremely rare case indicate that the law governing underlying contract has closest connection or most significant relationship to the arbitration agreement. *[See Habas Sinai Ve v VSC Steel Company Ltd]* Indeed, most authorities in cases concluded that the law with the most significant relation to the arbitration agreement was the law of the arbitral seat. *[See XL Insurance Ltd v Owens Corning; Abuja Int'l Hotels Ltd v. Meridien SAS; Halpern v. Halpern; ICC Case No. 4367; ICC Case No. 4131; Owerri Commercial Inc. v. Dielle Srl]*

ii. The arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement.

42. Firstly, the importance of the seat is recognized internationally, in particular in Article V (1)(a) of the New York Convention and Articles 36(1)(a)(i) and 34(2)(a) (i) of the UNCITAL Model Law. Exactly, the most important variable in an international arbitration clause is the seat of arbitration. *[M. McIlwrath & J. Savage 33]* Or, in the words of one English judicial decision: In international commercial arbitration the place or seat of arbitration is always of paramount importance. *[Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp.]*

43. Secondly, the law and courts of the place of arbitration will have authority and a supervisory role over the proceedings. As a consequence, a wide range of "internal" and "external" procedural issues relating to the arbitration will virtually always be governed by the law of the arbitral seat, including the annulment of awards, the selection, qualifications and removal of the arbitrators, the arbitrators' power to order provisional measures or disclosure, the allocation of competence to resolve jurisdictional disputes, the conduct of counsel or other party representatives in the arbitration, mandatory procedural requirements applicable in the arbitral proceedings, the form and publication of the arbitral award, and similar matters.*[BORN 2057]* As a leading Singaporean decision put it, "[t]he significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in that

state or territory. It identifies a state or territory whose laws will govern the arbitral process." *[PT Garuda Indonesia v. Birgen Air]* Moreover, the choice of seat determines the choice of remedies against the award, including the power of the courts to determine the jurisdiction of the arbitral tribunal *[FirstLink Investments Corp Ltd v. GT Payment Pte Ltd]*.

44. Thirdly, the validity of the arbitration clause is governed by the law in force in the country of the arbitral seat. Under the New York Convention and the principle of international arbitration widely accepted, an award would be invalid in case the tribunal` s procedures violated the law of the arbitral seat. Such award might be refused to recognize and enforce.
45. Therefore, undeniably, the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement.
46. In conclusion, it is reasonable for the tribunal to find that the arbitral seat is the strongest connecting factor to the arbitration agreement and the law of Danbia has closest and most real connection with the arbitration agreement. Hence, the applicable law of the arbitration agreement shall be the law of Danubia.

B. This tribunal has no jurisdiction or power to adapt the contract under the law of Danubia.

47. As RESPONDENT proved above, the law of Danubia governs the arbitration agreement and its interpretation. According to the law of Danubia, the arbitral tribunal can only adapt the contract if it is expressly authorized by both parties **(1)**. However, under the interpretation of arbitration agreement provided by the law of Danubia, there is no such express empowerment in the present arbitration agreement **(2)**. Therefore, the tribunal has no power to adapt the contract.

1. The arbitral tribunal can only adapt the contract if it is expressly authorized by both parties.

48. The law of recognizes that arbitrators may adapt contracts but requires an express empowerment for that. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with a relevant exception that Article 6.2.3 (4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized". There is no consistent case law as to the meaning of that addition *[P02 pp.45]*. Hence, the arbitral tribunal can only adapt the contract if it is expressly authorized by both parties.

2. There is no express empowerment of the adaptation of the contract in the present arbitration agreement under the interpretation of arbitration agreement provided by the law of Danubia,

49. According to Danubian Contract Law, which contains the "four corner rule" excluding all extraneous evidence for the interpretation of contacts and where arbitration agreements are interpreted narrowly. *[PO1 pp.2]* RESPONDENT submits that, the pre-contractual negotiations of the parties cannot be taken into account **(a)**; The wording of the dispute resolution clause demonstrates that the parties excluded empowerment of the adaptation of the contract **(b)**; The scope of the dispute shall be limited to the stated terms **(c)**.Thus, there is no express empowerment of the adaptation of the contract in this case.

a. The pre-contractual negotiations of the parties cannot be taken into account.

50. CLAIMANT may allege that, during the discussion, CLAIMANT mentioned the matters about the adaptation of the contract, the negotiator on RESPONDENT's side, Mr. Antley, replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree *[CL. EX. C8. P. 17]*. It may indicate that RESPONDENT intended to authorize a contract adaptation by the Arbitral Tribunal while interpreting the arbitration agreement.

51. Nevertheless, Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with an exception, i.e. the interpretation rule in Art. 4.3 is replaced for written contracts by the four corners rule. In substance the four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles of International Commercial Contracts. *[PO2 pp45]* Article 2.1.17 UNIDROIT Principles stipulate that "*A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements.*" It provides for the Parol Evidence Rule.

52. Danubia is a common law country, *[PO2 pp.44]* A peculiar and distinctive feature of common law, which is often ignored or overlooked by parties from civil law jurisdictions, is the exclusion of the so-called extrinsic evidence, often labelled "the Parol Evidence Rule" (hereinafter – PER). At its core, PER entails that where a written agreement between the parties exists, evidence concerning the

pre-contractual phase, typically concerning the negotiations between the parties, is inadmissible. It is quite often phrased as English courts being reluctant to consider evidence "outside the four corners of the contract". *[Вестник Международного Коммерческого Арбитража]* Similarly, as a Court of Appeal declared: "It is now clearly established by authority that the general rule is that the pre-contractual negotiations of the parties cannot be taken into account in interpreting its terms and determining what they mean." *[Globe Motors Inc. & Ors. v. TRW Lucas Varity Electric Steering Ltd. & Anor.]*

53. Therefore, while interpreting the arbitration agreement, the pre-contractual negotiations of the parties cannot be taken into account.

b. The wording of the dispute resolution clause demonstrates that the parties excluded empowerment of the adaptation of the contract.

54. In the present case, the Parties have adopted the Suggest Clause of HKIAC RULES almost in its entirety. [RE. EX. R1, P. 33] The Parties' intention to exclude empowerment of the adaptation of the contract becomes apparent when the Suggested Clause is compared to the Parties' Dispute Resolution Clause.

Suggested Clauses 【2013 HKIAC RULES】	**Dispute Resolution Clause** *[CL. EX. C 5, P. 14]*
Any dispute, ***controversy, difference or claim*** arising out of ***or relating to*** this contract, including the existence, validity, interpretation, performance, breach or termination thereof ***or any dispute regarding non-contractual obligations arising out of or relating to it*** shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC	Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

55. Comparing the two clauses demonstrates that the Parties' Dispute Resolution Clause is undeniably based on the Model Clause. Thus, what was inserted or deleted speaks to the intention behind the agreement. The modifications essentially relate to three points:

    1. The words "controversy, difference or claim" were deleted;
    2. The words "or relating to" [this contract] were deleted;
    3. The words "or any dispute regarding non-contractual obligations arising out of or relating to it" were deleted;

56. Modification 1. and Modification 2. represent the intent of parties, i.e. the scope of arbitration agreement is "restrictive". In particular, the deletion of words "or relating to" [this contract]. Courts in almost all jurisdictions have concluded that the phrase "relating to" extends an arbitration clause to a broad range of disputes *[B0RN 1349; Brian Tooley pp.2]*. Thus, the intentional deletion of this term by both parties is purposeful, explicitly reduced the broad wording which may be interpreted as an empowerment for contract adaptation.

57. Modification 3. is even more so. The parties deleted the sentence "or any dispute regarding non-contractual obligations arising out of or relating to it" provided by HKIAC Suggest Clause. In the case at hand, the parties have fulfilled all the obligations stated in contract, whether delivery, payment or conformity. It is no doubt that the adaptation of the contract requested by CLAIMANT here is a dispute regarding non-contractual obligation. The intentional deletion of this sentence by both parties distinctly indicates that they did not want to submit such non-contractual dispute to arbitration.

58. Hence，the Parties explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation. There is neither indication in the file nor any conceivable reason on why the Parties would have wanted to do this if they had not excluded the authorization for arbitrators to adapt the contract. Any reasonable person would therefore understand these modifications to represent the intention of the Parties to exclude empowerment of the adaptation of the contract.

c. The scope of the dispute shall be limited to the stated terms.

59. "Four corners rule" is the meaning of a written contract, will, or deed as represented solely by its textual content. As a case stated, construction of a deed is a matter of law, and the intention of the parties is to be gathered from the four corners of the instrument *[KY Supreme Court 1995-CA-001813]*. In the present case, "four corners" of dispute resolution clause is:

    Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration….

60. Further, taking into account the factors that the broad wording in arbitration agreement was deleted by the Parties and, under the law of Danubia arbitration agreements are interpreted narrowly, thus, the word "including" shall be interpreted as it is exclusive. The scope of dispute agreed by the Parties is limited to the stated terms i.e. merely the existence, validity, interpretation, performance, breach or termination. Obviously, the adaptation of the contract is not fall into these terms.

61. Hence, the scope of the dispute shall be limited to the stated terms, the adaptation of the contract did not fall into the scope of the arbitration agreement.

CONCLUSION OF THE FIRST ISSUE

Since RESPONDENT never agreed to have the arbitration agreement governed by the law of the Mediterraneo as the arbitration agreement is a legally separate agreement from the main contract, and the Parties did made an implied choice law of Danubia to govern the Arbitration Agreement. Meanwhile throughout the "closest connection or most significant relationship" test, the law of Danubia governs the arbitration agreement and its interpretation. Further, the arbitral tribunal can only adapt the contract if it is expressly authorized by both parties, and there is no express empowerment of the adaptation of the contract. Hence, this tribunal has no jurisdiction or power to adapt the contract under the law of Danubia.

II. THE TRIBUNAL SHALL DISREGARD CLAIMANT'S EVIDENCE ON THE BASIS THAT IT WAS ILLEGAL OBTAINED AND CONFIDENTIALITY-BREACHING.

A. The contested evidence should be disregarded by the Tribunal for it is obtained through a breach of a confidentiality.

62. The contested evidence is confidentiality-breaching from three perspectives. Firstly, the contested

evidence is obtained through a breach of contractual confidentiality obligation **(1)**. Secondly, the contested evidence is admissible under HKIAC Rules and IBA Rules for the breach of confidentiality **(2)**. Finally, confidentiality is a fundamental characteristic of international commercial arbitration **(3)**. To protect CLAIMANT`s contractual and statutory confidential interest, the contested evidence obtained through a breach of confidentiality shall be disregarded by the Tribunal.

1. The contested evidence has violated the contractual confidentiality obligation.

63. The contested evidence might be obtained through the former employees of RESPONDENT who were under a contractual confidentiality obligation. It is not clear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT. Both employees had been witnesses in the other arbitration before they were fired on 6 July 2018 and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential *[PO2 4]*.

2. The contested evidence is inadmissible under HKIAC Rules and IBA Rule.

a. HKIAC Rules places high value on confidentiality and the confidentiality obligation of the Parties or witnesses if provided under Art.45.1(a) and Art.45.2.

64. Hong Kong is one of a comparatively small number of jurisdictions to have incorporated express provisions on confidentiality in its arbitration legislation (the UNCITRAL Model Law (2006) does not contain any provision regarding confidentiality) *[J Choong and J Romesh Weeramantry, The Hong Kong Arbitration Ordinance: Commentary and Annotations (Sweet & Maxwell 2011) at 89]*.

65. Section 18 of the Arbitration Ordinance defines the scope of the duty of confidentiality and codifies a number of exceptions to such duty. Notably, sections 16 and 17 of the Arbitration Ordinance extend the scope of confidentiality to cover related court proceedings and judgments. As a result of these provisions, the Arbitration Ordinance offers the most comprehensive and robust protection of confidentiality in the region *[A Guide to the HKIAC Arbitration Rules]*.

66. According to Art.45.1 (a) HKIAC Rules, unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to the arbitration under the arbitration agreement.

67. In this case, CLAIMANT had never agreed on the disclosure of the award or other document in

another arbitration proceeding.

b. The contested evidence shall be excluded by the Tribunal under Art.2(13) of IBA Rules.

68. IBA Rules is applicable in this case **(i)**. The contested evidence violated the legal confidentiality obligation **(ii)**, and does not satisfy the conditions of exception provided in accordance with Art.2(13) of IBA Rules **(iii)**.

i. IBA Rules is applicable in this case.

69. The IBA Rules provide an efficient and fair process for the taking of evidence in international arbitration [O`MALLEY § 1.24]. Accordingly, they have found widespread acceptance within the arbitration community and are often referred to [VOSER, p. 116].

70. Even when not directly binding, tribunals consider them as guidelines as they reflect the experience of recognized professionals [Railroad Development Corporation v. Republic of Guatemala (ICSID); cf. Case No. 13225 (ICC); Case No. UN 5699 (LCIA)]. They can thus be regarded as best practice and can be applied as default rules for the taking of evidence [HANOTIAU p. 114; SHENTON p. 188]

71. In conclusion, the Tribunal would be in line with international practice when applying the IBA Rules as guidelines. Therefore, CLAIMANT endorses the Tribunal`s reference to the IBA Rules.

ii. The contested evidence violated the legal confidentiality obligation under Art.2 (13) of IBA Rules.

72. In accordance with Art.2 (13) of IBA Rules, any 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.** In this case, CLAIMANT`s evidence might be obtained through the former employees of RESPONDENT who were under a contractual confidentiality obligation, which constitutes a violation of the legal obligation of confidentiality.

iii. The contested evidence does not satisfy the conditions of exception provided in accordance with Art.2(13) of IBA Rules.

73. Art.2 (13) of IBA Rules provides that the confidentiality requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial

authority. The requirement shall be without prejudice to all other obligations of confidentiality in the arbitration. In this case, CLAIMANT did not prove that the the people from whom it obtained the contested evidence satisfy the above conditions of exception.

74. In conclusion, the contested evidence shall be excluded by the Tribunal under Art.2(13) of IBA Rules.

3. Confidentiality is a fundamental characteristic of international commercial arbitration.

75. Confidentiality, it arises as a necessary corollary to the private nature of arbitral proceedings. Meanwhile, that fact that arbitration is private is not disputed [Michael&Simon 28]. Besides, Confidentiality is based on the supposed expectation of the parties, which they impose on an confidentiality agreement to fulfill. In the Esso Australia case, In an expert report submitted by Stephen Bond in the Esso Australia case, the former Secretary-General of the ICC noted that users of ICC arbitration "place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration" and that parties had a"legitimate expectation of confidentiality in regard to the arbitration" *[Michael&Simon 29]*.

76. In the present case, the other arbitral proceeding between RESPONDENT and the other Party had an confidentiality agreement, which strongly indicates their expectation of confidentiality in the arbitration. CLAIMANT`s submission of evidence from the above arbitration is unethically against the Parties wishes and breaks its confidentiality.

77. Should the Tribunal, against all expectations, admits the contested evidence from the other arbitration proceedings, it would be regard as an encouragement to the deviation of confidentiality as a fundamental characteristic of international commercial arbitration and worse still, a flagrant impair to parties` legitimate expectation of confidentiality in regard to the arbitration.

B. The Tribunal should not admit the contested evidence on that it is obtained through an illegal hack of RESPONDENT`s Computer system.

78. The evidence CLAIMANT obtained through an illegal hack of RESPONDENT`s Computer System has infringed RESPONDENT`s commercial confidentiality, which shall be excluded under Art.9.2(e) of IBA Rules (1).

1. The evidence through an illegal hack shall be excluded under Art.9.2(e) of IBA

Rules.

79. Article.9.2(e) IBA Rules provides that the Arbitral Tribunal shall, at the request of a Party or on its own motion exclude from evidence on grounds of commercial confidentiality that the Arbitral Tribunal determines to be compelling.

80. Neither the IBA Rules nor the Commentary to the IBA Rules defines technical and commercial confidentiality. In spite of this, an analysis of comparative law can be helpful for the definition of commercial confidentiality. Under German and Swiss law, the definition of commercial confidentiality contains the following elements: 1) Business related facts; 2) Known only by a limited number of persons; 3) That are not obvious; 4) With regard to which the company has an economic interest to maintain secrecy; 5) That the company intend to keep secret *[Götz, 11 et seqq ;Stäuber, 11]*.

81. In this case, the evidence CLAIMANT obtained through an illegal hack of RESPONDENT`s Computer System has infringed RESPONDENT`s commercial confidentiality. Firstly, in this case, the content of contested evidence is primarily the business-related facts concerned with RESPONDENT`s transaction with another company. Secondly, there is a confidentiality agreement between RESPONDENT and its business partner which prevents the related information whether contractual or procedural from disclosure. In other words, the award of another arbitration proceedings which consists of the RESPONDENT`S business information shall not be disclosed.

82. Additionally, Section 1(4) US Uniform Trade Secrets Act (‘UTSA`), as amended in 1985, contains similar elements for the definition of a “trade secret”. The one element to be supplemented is that the company intends to keep secret, namely, the party`s subject of efforts that are reasonable under the circumstances to maintain its secrecy *[See Quinto & Singer, 3 et seqq.; cf. § 39 Restatement (Third) of Unfair Competition (1995) (US) (providing a more simple definition)]*.

83. Companies` intent to maintain evidence is typically shown by the companies` efforts. In the case at hand, the confidentiality agreement and the computer security system are evidence to prove RESPONDENT`s intent to maintain the secrecy of the content of another arbitration.

2. No exceptional circumstances legitimate an admission of the illegal evidence in this case.

84. Only in exceptional circumstances may a Tribunal admit illegal evidence. In this case, the evidence CLAINAT obtained through illegal hack of RESPONDENT`s Computer System is not an exceptional

circumstance.

85. In some jurisdictions, unlawfully obtained evidence is admissible as evidence before state courts in civil proceedings under certain limited conditions. In such jurisdictions, the state court must weigh the extent of the party's unlawful conduct in obtaining the evidence against that party's interest in producing the evidence and thereby assisting the judge's search for the truth *[Markus Wirth, Written Evidence and Discovery in International Arbitration: New Issues and Tendencies]*.

86. Swiss legislation provides that illegally obtained evidence shall be considered only in case of "overriding interest". According to Art. 152 of the Swiss Civil Procedure Code court shall consider illegally obtained evidence only if there is an overriding interest in finding the truth [*Using illegally obtained evidence in the Court of Arbitration for Sport*].This principle of requirement of "overriding interest" in adopting illegal obtained evidence could be a reference in this case to exclude the contested evidence.

87. In this case, CLAMANT`s interest in producing the evidence is not justified to weigh against its unlawful conduct in obtaining the evidence. On the one hand, the contested evidence is irrelevant to the fact-finding and has no material connection with the outcome of the case. On the other hand, these irrelevant evidences cannot serve as assistance to help the arbitrators to search for the truth and will only be the unnecessary burden due to its irrelevance.

88. Furthermore, the limited opening possibility of the Tribunal in international arbitration to admit the evidence obtained illegally is public interest, mostly applied in cases related to public policy like sports. In Football Club Metalist. v. UEFA & PAOK FC, 2013, the Swiss Federal Tribunal held that there is a major public interest in fair football and considering that the investigative tools of the state failed to enforce it, any illegally gathered evidence would always be admissible. However, in the case at hand, there exited no public interest for CLAIMANT to submit the contested evidence.

C. CLAIMANT is not justified to submit the contested evidence.

89. CLAIMANT is not justified to submit the contested evidence. For one hand, the contested evidence lacks sufficient relevance to this case or materiality to its outcome and accordingly shall be excluded **(1)**. For another, regarding the contested evidence would jeopardize the efficiency of this arbitration and cause unnecessary delay or expense to this arbitration **(2)**.

1. The contested evidence lacks sufficient relevance to this case or materiality to its outcome.

90. Pursuant to Art. 22.3 HKIAC Rules, the Parties are allowed or required to submit evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. Arbitral tribunals commonly refer to Article 3 of the IBA Rules of Evidence when conducting the document production process *[A Guide [9.156]]*, which similarly indicates that the evidence should be relevant to the case and material to its outcome. Furthermore, under Art. 9(2)(a) IBA Rules, the Tribunal shall exclude from evidence for the lack of sufficient relevance to the case or materiality to its outcome. Relevance and materiality are such important criteria that the drafters of the IBA Rules mention them twice as stated above as well as the HKIAC Rules *[Reto Marghitola 50]*.

91. According to IBA Rules, the purpose of the requirement 'relevant to the case` is to exclude documents that do not relate to the case, Furthermore, documents not sufficiently relevant are excluded. This means in particular that the requested document itself must be relevant. As for the materiality, a document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn *[Reto Marghitola 53]*.

92. In the case at hand, the contested evidence was from the other arbitration proceeding, which was totally independent from this case. Accordingly, it is of no use to the fact-finding exercise for the Tribunal to form a full picture of the case, not to mention the full picture has already completed. Furthermore, the opponent in the other arbitral proceedings authorized RESPONDENT to stated that the allegations by CLAIMANT do not reflect reality and are taken out of context *[PRO 50]*. Hence, the contested evidence is irrelevant to the case.

93. As outlined above, as the contested evidence is independent and irrelevant to the case, it is of no use to for the Tribunal to form a complete consideration of the factual issues to draw the legal conclusions upon it. Thus, the contested evidence lacks materiality to the outcome of the case.

94. In conclusion, CLAIMANT is not justified to submit the contested evidence for the lack of sufficient relevance to this case or materiality to its outcome which is unnecessary and accordingly shall be excluded from this arbitration. As a court recorded, an application to adduce further evidence in the High Court was withdrawn because it was rendered unnecessary *[OMV v. Precinct]*.

2. Regarding the contested evidence would jeopardize the efficiency of this arbitration.

95. Under Art. 13.1 HKIAC Rules, the need to avoid unnecessary delay or expense is an important factor for the arbitral tribunal to take into account when fixing the procedures. Notably, the requirement for the arbitral tribunal to adopt efficient and cost-effective procedures is a response to the growing concern about the speed and cost of international arbitration *[A Guide [9.09]]*. Also, Art. 13.5 HKIAC reflects a key objective of the HKIAC Rules to require all participants of an arbitration (including the parties, the arbitral tribunal and HKIAC) to safeguard and enhance procedural efficiency and fairness to settle the disputes by arbitration without unnecessary expense *[A Guide [9.48]]*.
96. When the parties choose arbitration to be the means of dispute settlement, it is one of their wishes that the dispute be settled efficiently and cost-effectively. The international arbitral process seeks to achieve a number of related objectives and the most significant of these is efficiency *[BORN § 15.01[A]]*.
97. As prescribed above, the contested evidence is of no use to this case. CLAIMANT`s improper submission of the contested evidence would undoubtedly frustrate the efficiency and cause unnecessary delay or expense to this arbitration.

D. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are not applicable in this arbitration.

98. According to Art.1.1 of the UNCITRAL Rules on Transparency, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise.
99. In this case, both Parties are companies. Thus, contrary to CLAIMANT`s allegation, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are not applicable in this arbitration.

CONCLUSION OF THE SECOND ISSUE

Firstly, the contested evidence was obtained through a breach of confidentiality agreement. Secondly, the contested was obtained through an illegal hack. Finally, CLAIMANT is not justified to submit the contested evidence. Hence, the Tribunal should not admit CLAIMANT`s evidence.

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE NEITHER UNDER CLAUSE 12 OF THE CONTRACT NOR CISG.

100. RESPONDENT submits that on the one hand, CLAIMANT has no right to ask for an adaptation of the contract under clause 12 of the contract **(A)**. And on the other, CLAIMANT is entitled to the payment resulting from an adaptation of the price under the CISG **(B)**. The imposition of tariffs was in the scope of the DDP-delivery term stimulated in the SALE ARGEEMENT **(C)**. Ultimately, CLAIMANT`s claim for an increased remuneration of US$ 1,250,000 is completely baseless.

A. CLAIMANT is not entitled to the payment resulting from an adaptation of the price under clause 12 of the contract.

101. RESPONDENT respectfully requests the Tribunal to find that the imposition of tariff did not fall into the scope of clause 12 of the Sales Agreement. Given the negotiations, the purpose of clause 12 of the contract is to temper the risks of customs regulation or import restrictions, which did not include the tariffs, i.e. the present case **(1)**. And even if the imposed tariff is governed by clause 12, it did not in itself materially constitute the hardship **(2)**. The interpretation of the contract leads to the conclusion that the Parties have never established a mechanism in the contract to adapt the contract **(3)**.

1. The imposition of the tariffs of 30 percent was not in the scope of clause 12 of the contract.

102. On 31 March 2017, CLAIMANT accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery against the risk of changing health and security requirements by a hardship clause in its email *[CL. Ex. C4]*. In other words, CLAIMANT tried to set up a hardship clause to cover any further risks arising from the changing term, however, this option was not acceptable for RESPONDENT who was not willing to pay a much higher price for receiving basically nothing. In the negotiations, RESPONDENT considered the ICC-hardship clause to be too broad. Thus, the Parties agreed that the clause 12 was taken to cover a number of possible risks directly such as the changing health and safety requirements.

103. Such intent was revealed by a hardship wording added to the existing force majeure clause, i.e. *"Seller shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events…" [Cl, Ex, C4]*. To protect CLAIMANT against the any potential risks,

CLAIMANT was responsible for the formulation of a particular contract term and clarified its statement to RESPONDENT. But CLAIMANT failed to do so due to the car accident so that the clause 12 of the contract was extremely ambiguous. Given that the previous Parties` intent, the wording "comparable unforeseen events" of clause 12 shall be interpreted narrowly. That is to say, the imposed tariff completely differs from health and safety requirements and should be excluded, otherwise the purpose of clause will never be realized and RESPONDENT`s legal interest will be harmed. Thus, the tariff was not in the scope of "comparable unforeseen events".

2. Even if the imposed tariff is governed by clause 12, it did not in itself materially constitute the hardship.

104. Given the negotiations, CLAMIANT had concerned the risks associated with changes in customs regulation or import restrictions, whose wording exactly indicated that CLAIMANT has foreseen the commercial risks including the present case with its knowledge of past business experiences. In other words, the imposed tariff did not constitute the hardship **(a)**. Even if the increased tariffs had made CLAIMANT a loss of 25 percent of the contract price, the amount of loss did not constitute the fundamental alteration of the equilibrium of the contract **(b)**. Thus, reliance on clause is baseless.

a. CLAIMANT should have foreseen the commercial risks including the imposition of tariffs.

105. The imposition of tariffs should have been taken into account by both of the Parties when concluding the contract. Generally, additional costs such as a price change are a commercial risk that the seller accepts when entering into a sales contract *[Schiedsgericht der Handelskammer (GER);Tomato concentrate case ;Steel ropes case; Unknown Parties (FRA);Frozen raspberries case; Nuovo v. Fondmetal]*. RESPONDENT submits that the retaliatory tariff policy shall fall into the sphere of CLAIMANT`s normal commercial risk, which CLAIMANT could see the sign before the last shipment *[Cl, Ex, C6]*.

106. CLAIMANT could have foreseen the conduct of imposing tariffs by Equatoriana authorities. Two months before the last shipment of remaining frozen semen was due Mediterraneo`s newly elected President announced 25 per cent tariffs on agricultural products from Equatoriana. Although the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries, Equatorianian still has great

possibility to take retaliatory measures while Prime Minister was from the National Party *[Cl, Ex, C6]*. Hence CLAIMANT should have a tacit assumption that the tariff of the goods would be changed due to the possible retaliatory measures.

107. In addition, to determine what extent of the increased cost CLAIMANT had ever foreseen, reference shall be made to the negotiation between the Parties. According to CLAIMANT`s statement, the reason that a hardship clause shall be incorporated into the contract is mainly because CLAIMANT would not bear the risk that a cost may be increased by up to 40%. It indicated the CLAIMANT had foreseen the cost may increase up to 40%. In the case at hand, the tariff merely caused a loss of 25%, which is in the sphere of 40% of the price. Hence CLAIMANT had foreseen such a cost resulting from the changing terms. Furthermore, fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities *[Frozen raspberries case]*.

b. Even if the increased tariffs had made CLAIMANT a loss, it did not constitute the fundamental alteration of the equilibrium of the contract.

108. Whether an alteration of the equilibrium of the contract is fundamental or not, or whether the performance for a party becomes more onerous in a given case "will of course depend on the circumstances" *[Lookofsky, 434]*. That is to say, the characterizing of above issue should be interpreted on case-by-case basis. Whereas a situation makes it more onerous for a party to perform its obligation did not certainly constitute a fundamental alternation of the contractual equilibrium.

109. Any commercial transaction contains a potential risk of loss of revenues but it does not necessarily constitute the fundamental alteration of the equilibrium of the contract. There is an approach called "Threshold Test of the Hardship Exemption". An alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a fundamental alteration *[Mercedeh Azerdo Da Silveira]*. Moreover, in contrast to the 50% threshold test suggested by the Comment on the UPICC in the 1994 edition, some legal commentators on the CISG propose that the required alteration should be at least 100%. *[Christoph Brunner Julian D. M. Lew]*.

3. CLAIMANT could not ask for an adaptation price since Interpretation of the contract under CISG indicated that the parties failed to establish a mechanism in the contract to adapt contract.

110. RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators. During the negotiation RESPONDENT was not willing to accept CLAIMANT`s original requests of 99,500 USD for the semen and an additional 1,000 USD for the change of the delivery terms. Whether explicitly or impliedly, the parties failed to establish a mechanism to ensure any adaption of the contract. RESPONDENT submits that subjective interpretation of the CISG indicated the parties failed to enter into contract which contains a mechanism **(a)**. Also the objective interpretation of the CISG also leads to the same conclusion that the contract did not stipulate such a mechanism **(b)**. In any case, the mechanism of adapting the contract was not incorporated into the contract since it was never explicitly referred to **(c).** Hence CLAIMANT`s claim for application of such mechanism is completely baseless.

a. Subjective interpretation of the contract under CISG compels the conclusion that the parties failed to enter into contract which contains a mechanism.

111. When specific terms are to be incorporated in a contract, the parties have to be clear about such terms. In regard to the resolution in case the Parties could not agree on amendment, the Parties indeed made a preliminary exchange of their view. However, RESPONDENT submits that the mere exchange did not lead to the inclusion of an adaptation clause. After the negotiation of the day of the car accident, Mr. Antley made a note in his negotiation file, which contains the issues were still open and what Mr. Antley had to address in the next negotiation *[Re, Ex, R3]*. The wording of point 3 is “connection of hardship clause with arbitration clause”. The only connection between “hardship clause” and “arbitration clause” is adapting the contract by the arbitral tribunal. The subsequent conduct of RESPONDENT may help to interpret that the mechanism of adapting the contract was never consented by the Parties *[Art. 8(3), CISG]*.

112. Since CLAIMANT`s intention of establishing a mechanism was not clearly reflected in the clause 12 of the contract, RESPONDENT submits that the Parties` intent was not clearly known to them so that clause 12 of the contract shall be interpreted that it the mechanism of adapting the contract was never included.

b. Objective interpretation of the contract under CISG compels the conclusion that the contract did not stipulate such a mechanism.

113. Because CLAIMANT failed to provide any evidence that RESPONDENT knew or could not have

been unaware of CLAIMANT`s intent of inclusion of a hardship clause, CISG Article 8(2) shall be applied to interpret the Sales Agreement. Art. 8(2) CISG reflects the general principle of reasonableness governing CISG: "one has to ask how a reasonable person in the shoes of the other party would have understood the statement." *[Schwenzer/Fountoulakis/Dimsey, 60]*. And in determining the hypothetical understanding of such a reasonable person, consideration must be given to all relevant circumstances under Art. 8.3 CISG.

114. In the whole negotiation period, although CLAIMANT stated that it was not willing to bear any risks relating to such a change in the delivery terms and managed to "have a mechanism in place which would ensure an adaptation of the contract" *[Cl, Ex, C8]*, RESPONDENT had never agreed on the broad wording of the ICC-Hardship Clause suggested by CLAIMANT. The tongue of RESPONDENT was extremely clear to CLAIMANT that had rejected the CLAIMANT`s opinions and it was not willing to entered into such a contract which may profited RESPONDENT nothing *[Re, Ex, R3]*. Unfortunately, the parties failed to come up with its own proposal afterwards because of the car accident. Moreover, Julian Krone, the subsequent negotiator, had expressed to object the mechanism proposed by CLAIMANT. Whether or not RESPONDENT intended to exclude any adaptation of the contract is substantial, as RESPONDENT`s intent "have been known by or, in any case, recognizable" to CLAIMANT *[Schlechtriem I, 38]*. Given the whole negotiation, a reasonable person had sufficient reasons to conclude that CLAIMANT`s intention failed to include in the finalized contract. Hence the contract did not contain such a mechanism.

115. Furthermore, considering subsequent conducts, as correctly stated by CLAIMANT, CLAIMANT had put the shipment on hold due to the imposed tariffs and asked for RESPONDENT`s solution. Taking the renegotiations after the imposition of tariff between the Parties into account, the Parties have never reached a consensus on adapting the price. Such knowledge was indicated in the Witness Statement made by Mr. Greg Shoemaker. Given that he was responsible for the development of the racehorse breeding program, in his recalling he merely informed CLAIMANT 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." and asked CLAIMANT to ship the remaining 50 doses which were urgently needed given that start of the "breeding season" *[Re, Ex 4]*. Mr. Greg Shoemaker, who was neither a lawyer nor the head of RESPONDENT, had not been involved in the negotiation of the contract. Any reasonable

person in his shoes could have known that whether the contract had stimulated such a mechanism. It was the word "if the contract provides for an increased price in the case of such a high additional tariff" that he just made the hypothesis out of cautious and had never agreed an adaptation of price *[Re, Ex R4]*. Consequently, a reasonable person could not know that both Parties reached the consensus an adaptation of price.

c. In any case, the mechanism of adapting the contract was not incorporated into the contract since it was never explicitly referred to.

116. CLAIMANT may invoke the concept of implied terms (supplying an omitted term) as a legal basis to request for an adaptation. However, although the possibility of implied terms is generally accepted, an adaptation clause can normally not be implied. Such an implied term requires that the contract includes a sufficiently specific and comprehensive indication as to how the parties would have dealt with a particular event *[Burner, Lew, page 421]*. Yet in the case at hand there was no such provision in the contract managed to do so.

B. CLAIMANT is not entitled to the payment under the CISG.

117. CLAIMANT can neither rely on the CISG to request for the payment because clause 12 constituted a derogation of article 79, the relevant provision of the CISG **(1)**. Even if clause 12 does not constitute a derogation of the CISG, hardship issue falls out of the scope of CISG **(2)**.

1. Clause 12 constituted a derogation of the CISG.

118. There is common ground that party autonomy is one of the general principles of the CISG *[SO.M.AGRI s.a.s. v. Erzeugerorganisation Marchfeldgemuese Gmbh & Co. KG, NV A.R. v. NV I.]*. Thus, scholars indicate that the CISG plays a supplementary role by providing answers to matters that parties have failed to solve in their contract *[Gul, p81-82]*. The Secretariat Commentary commented the draft of article 6 of the CISG reflects its non-mandatory character *[Secretariat Commentary]*. There is no difference between the draft and the official text thus the commentary should be relevant to the interpretation of article 6 of the CISG. Under article 6 the parties may exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention. An arbitral award ruled that, the contract provision prevails over the CISG where their solutions on a same issue distinguish *[Corn case]*. In the

case at hand, clause 12 constituted a special regulation different from CISG. Clause 12 used the sentence "shall not be responsible for…neither for…" Since no remedies were implemented, the sentence shall be interpreted by its plain meaning that CLAIMANT is not liable for several events that make his performance of obligation impossible or more onerous. In other word, Clause 12 was a clause with the virtue of exemption. In case the parties have established a different mechanism of exemptions, such a mechanism shall prevail over the counterpart of the CISG. In this sense the exemption provision of the CISG, i.e. Art. 79 was derogated or varied.

2. Even if clause 12 does not constitute a derogation of the CISG, hardship issue falls out of the scope of CISG.

a. Hardship does not constitute an "impediment" under the CISG.

119. RESPONDENT submits that, even if the imposition of tariffs has to do with hardship, which is not the case, hardship issue is not governed by the CISG.

120. To illustrate whether hardship issue is within the scope of the CISG, reference shall be made to its legislative history. During the review of the Working Group "Sales" draft in 1977 by UNCITRAL, an article governing hardship situations was proposed, which would have enabled a party facing hardship to modify or terminate the contract in a manner similar to that prescribed by the UNIDROIT Principles. However, the Committee did no retain this proposal *[Honnold, p350 para460]*.

121. In practice, several earlier decisions suggested that exemption under article 79 requires satisfaction of something akin to an "impossibility" standard *[Vital Berry Marketing NV v. Dira-Frost NV, Nuova Fucinati S.p.A. v. Fondmetal International A.B.]*. In those cases, the courts` judgments reflect the view that as long as the party is likely to deliver the goods or perform its obligation, the impediment can be overcome and thus cannot meet the criteria of "impediment" of the article 79. While no matter hardship issues or the present situation, i.e. the imposition of tariffs remains possibilities to perform.

b. Adapting the contract is not an applicable remedy under the CISG.

122. CLAIMANT unreasonably invoked article 79(5) as a legal basis to adapt the contract, while this shall not be granted. Article 79(5) is a right left to the promise to request for a specific performance *[Schwenzer, page 1150]*. In addition, the consequence of hardship may lead to a renegotiation and modification of the contract, while adjusting the contract may be inconsistent with the principle pacta sunt sevanda. If parties are too easily excused from their contractual undertakings or allowed to do

something less than what they promised, contracts lose much of their utility *[Eisenberg, page 208]*. In particular, the imposition of the tariffs merely brought an additional cost of 25% for the entire performance of the contract. Hence there is no reasonable ground for CLAIMANT to request for an adaptation of the contract.

3. In any case, CLAIMANT is not entitled to the remuneration under the CISG by any means, including gap fill.

123. CLAIMANT invoked article 7(2) of the CISG to fill up the gap that CISG`s not regulating hardship. RESPONDENT submits that neither of the approaches of gap-filling under article 7(2) led to the conclusion that CLAIMANT is entitled to the additional payment.

a. Gap-filling by general principles cannot support CLAIMANT`s claim.

124. Firstly, CLAIMANT cannot rely on the general principles that CISG bases on. As UNCITRAL Working Group stated during the draft of CISG, it was difficult and dangerous to attempt to solve problems by reference to unstated general principles *[UNCITRAL]*. Because there is nowhere in the CISG itself or other official documents (such as the Secretariat`s Commentary) are these principles actually labeled or explained. Scholars` opinions vary thus those general principles extrapolated from international case law in the UNCITRAL Digest become the most reliable ones. However, the principle "Changed circumstances and right to renegotiate" merely leads to a renegotiation of the contract *[Scafom International BV v. Lorraine Tubes S.A.S.]*.

b. Gap-filling by rules of private international law cannot support CLAIMANT`s claim.

125. Relying on the rules of private international law does not lead to a different conclusion. Since the Parties explicitly referred the law of Mediterraneo as their choice of law, the domestic law of Mediterraneo *[Cl, Ex, C5]*, i.e. UNIDROIT shall play the role. As is argued above, CLAIMANT failed to fulfill the criteria of hardship under article 6.2.2, since it should have foreseen the event and the increase of the cost did not suffice to fundamentally alter the equilibrium of the contract.

C. Contrarily, CLAIMANT shall comply with its obligation and burden the additional payment of US$ 1,250,000.

126. RESPONDENT submits that CLAIMANT shall not be entitled to the payment, instead it shall bear the

full cost since it is CLAIMANT`s contractual obligations under the DDP delivery term **(1)**, and it was incumbent upon CLAIMANT to bear the imposed tariff for the principle of *pacta sunt servanda* **(2)**.

1. **CLAIMANT should not be excused from its contractual obligations under the DDP delivery term.**

127. Under the DDP delivery term, CLAIMANT is obliged to burden the imposition of tariff **(a)**. And the obligation of CLAIMANT under DDP shall not be derogated by the intent of RESPONDENT **(b)**.

   a. **CLAIMANT is obliged to burden the imposition of tariff according to DDP-delivery term under INCOTERMS.**

128. Commonly, INCOTERMS is treated as international trade usages and customs *[ICC case 8502]*. Indeed, general principles and trade usages are always directly applicable as long as they do not contravene the provisions of the governing law of the contract *[Chukwumerije, p. 116]*. The INCOTERMS makes it clear that "DDP" is defined as "Delivered Duty Paid", which means that it imposes upon the seller the obligation to pay for the tariff before delivering *[INCOTERMS 2010]*. Hence, based on the DDP-delivery term alone, any amount of tariff should be burden by the seller.

129. In this case, when CLAIMANT and RESPONDENT entered into the semen contract, they agreed to accept it on the delivery on the basis of DDP *[CL. Ex. C5]*.

130. As RESPONDENT insisted on the DDP-delivery term, CLAIMANT clearly replied that it would accept for the contract a delivery DDP *[CL. Ex. C4]*. The Parties had reached a consensus on the DDP-delivery term, which is unequivocally included in the contract. Thus, CLAIMANT was, under Frozen Semen Sales Agreement, obliged to shoulder the tariff, including the imposition of the tariff of 30 percent. RESPONDENT, the buyer, should not be asked to bear the expense combined with the delivery DDP.

   b. **The obligation of CLAIMANT under DDP shall not be derogated by the intent of RESPONDENT.**

131. CLAIMANT may submit that it was not willing to bear any risks relating to such a change in the delivery terms since the purpose of using the DDP clause was only to take advantage of the experience of CLAIMANT. However, the obligation of CLAIMANT under DDP shall not be derogated. During the negotiation between the Parties, CLAIMANT demonstrated its will to suffer the cost related to the change of delivery terms, since it asked for an additional cost associated with a DDP delivery, which

indicated that it will assume the risk relating to the DDP clause *[Cl. Ex. C4]*. Since the consequences of the imposed tariff were part of the CLAIMANT`s contractual risk, it cannot qualify to ask RESPONDENT to pay. Meanwhile, nowhere does the contract provisions state that the DDP terms differs from the common definition stated in the INCOTERMS. CLAIMANT could and should have to bear the imposition of tariff under the DDP-delivery term in the contract.

2. It was incumbent upon CLAIMANT to bear the imposed tariff for the principle of *pacta sunt servanda*.

132. On 6 May 2017, the Parties entered into a contract for the sale of horses` semen. CLAIMANT was required to make the third shipment before 23 January 2018. Article 79 CISG reflects the traditional view of contracts: *pacta sunt servanda*, agreements must be kept through the heavens fall *[Jenkins, 2019; Perillo, 112; Rimke, § I]*. From the moment onward, each party must perform that which was agreed between the parties *[Scafom v. Lorraine]*. Since article 29 CISG sets the requirements as to the rule of *pacta sunt servanda*, CLAIMANT should bear the imposed tariff under the agreement between the Parties *[Scafom v. Lorraine; CISG Art.29]*. Although CLAIMANT may suggest that it should be excused from performance, it fails to show that it satisfies the necessary requirements for excuse under Article 79 CISG as stated. The imposed tariff, which defined as a commercial risk, does not obstruct CLAIMANT` s performance. The risk for not being able to meet contractual obligations should lie with CLAIMANT, who bore the risk of the imposed tariff.

133. Furthermore, Article 33 of the CISG expressly provides that if a period of time is fixed by or determinable from the contract, the seller must deliver at any time within that period *[CISG Art.33]*. Pursuant to art. 22 CISG, CLAIMANT was required to deliver the last shipment in time, otherwise, it will fundamentally breach the agreement by substantially depriving RESPONDENT of what it was "entitled to expect under the contract" *[CISG Art.22]*. CLAIMANT —or a reasonable person in its position—knew, or ought to have known, that RESPONDENT required an urgent delivery to fight for a permanent lifting of the ban *[Cl. Ex. C3]*. Thus, CLAIMANT was legally obliged to perform obligation under CISG, which means to bear the imposed tariff in order to deliver in time.

CONCLUSION OF THE THIRD ISSUE

On the one hand, CLAIMANT cannot rely on clause 12 since the imposition of tariffs did not constitute hardship, and it even did not fall into the scope of clause 12. On the other, hardship does not constitute "impediment" under Art.79 CISG and CISG does not regulate hardship. As bearing the risks is CLAIMANT`s obligation of the contract, CLAIMANT is not entitled to the payment of US$ 1,250,000.

REQUEST FOR RELIEF

In light of the above RESPONDENT respectfully requests the Arbitral Tribunal:

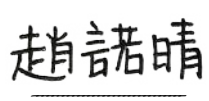
1. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
2. To reject the claim for additional remuneration in the amount of US $ 1,250,000 raised by CLAIMANT;
3. To order CLAIMANT to pay RESPONDENT’s costs incurred in this arbitration.

華南師範大學
SOUTH CHINA NORMAL UNIVERSITY

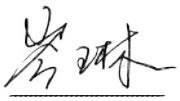
CERTIFICATE

We confirm that the following memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person who is not the member of this team.

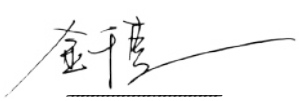
January 24, 2019



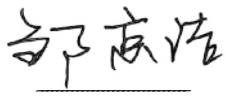
NUOQING ZHAO



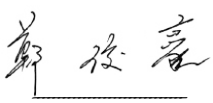
LIN CEN



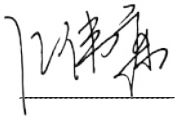
QIANHUI JIN



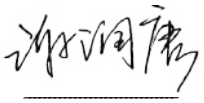
JINGJIE ZOU



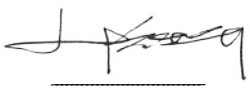
JUNHAO ZHENG



WEIKANG JIANG



RUNKANG XIE



QISHENG QIU

SOUTH CHINA NORMAL UNIVERSITY TEAM MEMBERS CONTACT INFORMATION	
Nuoqing ZHAO	835253429@qq.com
Lin CEN	631296801@qq.com
Qianhui JIN	601238429@qq.com
Jingjie ZOU	390296106@qq.com
Junhao ZHENG	969367942@qq.com
Weikang JIANG	425587716@qq.com
Runkang XIE	792077504@qq.com
Qisheng QIU	413503791@qq.com

Certificate and Choice of Forum

To be attached to each Memorandum

I _____**Zheng Junhao**_____, on behalf of the Team for (name of School)

_**South China Normal 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:

☑ 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) __**South China Normal University**_____

Name_____**Zheng Junhao**_____

Signature _____