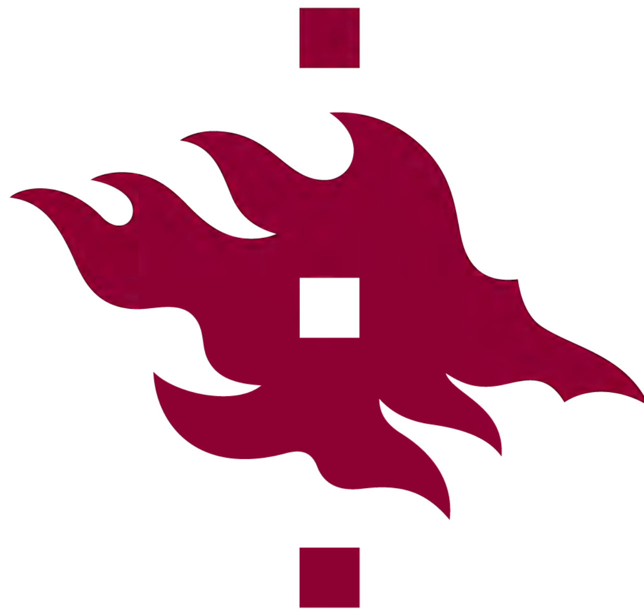
SIXTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, 31TH MARCH –7TH APRIL 2019

UNIVERSITY OF HELSINKI



MEMORANDUM FOR CLAIMANT

HKIAC/A18128

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

COUNCEL FOR CLAIMANT
OLGA JEGANOVA • REBECCA KRAMSU • SAARA-MARJA LAHTINEN • MALVIINA LINNINEN

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TABLE OF ABBREVIATIONS

%	per cent
a fortiori	with stronger reason
ANoA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
CE	CLAIMANT's Exhibit
CEO	Chief Executive Officer
cf.	confer (see)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG Advisory Council
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
de facto	in reality or fact
e.g.	exempli gratia (for example)
ed/eds	editor/editors
Email Fasttrack	Ms. Fasttrack's email of 3 October 2018
Email Langweiler	Mr. Langweiler's email of 2 October 2018
et seq./et seqq.	and the following one/s (et sequens/et sequentes)
HKIAC Rules	The 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
HKIAC 2013 Rules	The 2013 Hong Kong International Arbitration Centre Administered Arbitration Rules
i.e.	id est (that is)
ICCA	International Council for Commercial Arbitration (The Hague, The Netherlands)
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
in casu	in the case at hand
lex arbitri	the law of the seat of arbitration

lex causae	the law applicable to the substantive sales agreement
MCL	Mediterranean Contract Law
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
No.	number/numbers
NoA	CLAIMANT's Notice of Arbitration
p./pp.	page/pages
para./paras.	paragraph/paragraphs
Partial Interim Award	Partial Interim Award rendered in the arbitration between RESPONDENT and the Mediterranean buyer on 29 June 2018
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
RE	RESPONDENT's Exhibit
Sales Agreement	Frozen Semen Sales Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)
USD	United States Dollars
v.	versus (against)
Vol.	volume

TABLE OF AUTHORITIES

BASEDOW	Basedow Jürgen, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, Uniform Law Review, Vol. 5, Issue 1 (2000), pp. 129–39

in para. 119

BEISTEINER — Beisteiner Lisa, *Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective,* in: Klausegger Christian, Klein Peter et al. (eds), Austrian Yearbook on International Arbitration 2014, Austrian Yearbook on International Arbitration, Vol. 2014, Manz'sche Verlags- und Universitätsbuchhandlung (2014), pp. 77–122

in paras. 13, 21, 39

BERGER — *Berger Klaus Peter, Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense,* Arbitration International, Vol. 17, No. 1 (2001), pp. 1–18

in paras. 13, 14

BIANCA/BONELL — Bianca Cesare Massimo, Bonell Michael Joachim, *Commentary on the international Sales Law - The 1980 Vienna Sales Convention*, Giuffrè (1987)

in para. 116

BLAIR/GOJKOVIC — Blair Cherie, Gojkovic Ema Vidak, *WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence*, ICSID Review, Vol. 33, No. 1 (2018), pp. 235–59

in para. 78

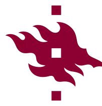
BORDACAHAR	Bordacahar Julián, *The Rule of Law As Created by Arbitrators – An Update on the Discussions At The Recent IBA Arbitration Day in Buenos Aires*, Kluwer Arbitration (April 8, 2018), available at: <http://arbitrationblog.kluwerarbitration.com/2018/04/08/iba-buenos-aires-report/>, visited: November 25, 2018 *in para. 13*
BONELL I	Bonell Michael Joachim, *An International Restatement of Contract Law*, Third Edition, Kluwer Law International (2005) *in para. 119*
BONELL II	Bonell Michael Joachim, *The UNIDROIT Principles in Practice: caselaw and bibliography on the UNIDROIT principles of international commercial contracts*, Second Edition, Transnational Publishers (2006) *in paras. 26, 95, 122*
BORN	Born B. Gary, *International Commercial Arbitration*, Second Edition, Kluwer Law International (2014) *in paras. 32, 50, 60*
BROCHES	Broches Aaron, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, Springer Netherlands (1990) *in para. 21*
BROWER	Charles N. Brower, *Evidence before International Tribunals: The Need for Some Standard Rules,* The International Lawyer, Vol. 28, No. 1 (1994), pp. 47–58

	in para. 54
BRUNNER	Brunner Christoph, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration,* Kluwer Law International (2009)
	in paras. 13, 26, 104, 116, 119, 128, 129, 135, 136
FERRARIO	Ferrario Pietro, *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*, Kluwer Law International (2017)
	in paras. 13, 14, 39
FUCCI	Fucci Frederick R., *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association (2006)
	in para. 129
GARRO	*Garro Alejandro M., The Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, Tulane Law Review, Vol. 69 (1995), pp. 1149–90
	in para. 119
GILLETTE/WALT	*Clayton P. Gillette, Steven D. Walt, The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*, Cambridge University Press (2016)
	in para. 112

HOLTZMANN/ FLEISCHHAUER/ NEUHAUS	Holtzmann Howard M., Fleischhauer Carl-August, Neuhaus Joseph E., *A Guide to the UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law and Taxation Publishers (1989) *in para. 50*
HUBER/MULLIS	Huber Peter, Mullis Alastrain, *The CISG: A new textbook for students and practitioners*, Sellier, European Law Publishers (2007) *in paras. 29, 102*
HUßLEIN-STICH	Hußlein-Stich, Gabriele, *Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit*, Heymann (1990) *in para. 50*
ISHIDA	Ishida Yasutoshi, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness - Full of Sound, And Fury, but Signifying Something.*, Pace International Law Review Vol. 30 (2018), pp. 331–82 *in paras. 115, 123*
JONES/ SCHLECHTRIEM	*Jones G. H., Schlechtriem Peter, Breach of Contract (Deficiencies in a Party's Performance*), in: von Mehren Arthur T. (ed), International Encyclopedia of Comparative Law, Volume VII Contracts, Mohr Siebeck (1999) *in para. 128*

KARTON	Karton Joshua D. H., *Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of Its Own Drummer?* University of New Brunswick Law Journal, Vol. 60 (2010), pp. 32–54 *in paras. 26, 122*
KOFOD	Kofod Rolf, *Hardship in International Sales CISG and the UNIDROIT Principles*, University of Copenhagen - Faculty of Law (2011) *in para. 119*
KRÖLL	Kröll Stefan, *The Renegotiation and Adaptation of Investment Contracts,* in: Horn Norbert, Kröll Stefan (eds), Arbitrating Foreign Investment Disputes (2004) *in para. 13*
KRÖLL/MISTELIS/ PERALES VISCASILLAS	Kröll Stefan, Mistelis Loukas A., Perales Viscasillas Maria del Pilar, *UN Convention on Contracts for the International Sale of Goods (CISG),* Hart Pub (2011) *in paras. 116, 122*
KUBALCZYK	Kubalczyk Anna Magdalena, *Evidentiary Rules in International Arbitration - A Comparative Analysis of Approaches and the Need for Regulation,* Groningen Journal of International Law, Vol. 3(1): International Arbitration and Procedure (2015), pp. 85–109 *in para. 54*
KURKELA/TURUNEN	Kurkela Matti S., Turunen Santtu, *Due Process in International Commercial Arbitration,* Oxford University Press (2010)

	in para. 50
LANDO	Lando Ole, *The Lex Mercatoria in International Commercial Arbitration*, International and Comparative Law Quarterly, Vol. 34 (1985), pp. 747–68
	in paras. 26, 122
LEW	Lew Julian D. M., *The law applicable to the form and substance of the arbitration clause,* in: Albert Jan van den Berg (ed), Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, Vol. 9, Kluwer Law International (1999), pp. 114–45
	in para. 31
LEW/MISTELIS/KRÖLL	Lew Julian D., Mistelis, Loukas A., Kröll, Stefan M., *Comparative international commercial arbitration,* Kluwer Law International (2003)
	in paras. 54, 60
LINDSTRÖM	*Lindström Niklas, Changed Circumstances and Hardship in the International Sale of Goods,* Nordic Journal of Commercial Law, Issue 1 (2006)
	in paras. 128, 129
LOOKOFSKY I	Lookofsky Joseph, *Understanding the CISG, A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods,* Fourth Edition, Kluwer Law International (2012)
	in para. 93



LOOKOFSKY II	Lookofsky Joseph, *Convention on Contractts for the International Sale of Goods (CISG)*, Kluwer Law International (2012) *in para. 29*
LOOKOFSKY III	Lookofsky Joseph, *Not Running Wild With the CISG*, Journal of Law and Commerce, Vol. 29 (2011), pp. 141–69 *in para. 114*
MAGNUS	Magnus Ulrich et al., *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG),* Sellier-de Gruyter (2005) *in paras. 116, 128*
MALACKA	Malacka Michal, *Evidence in International Commercial Arbitration,* International and Comparative Law Review, Vol. 13., No. 1 (2013), pp. 97–104 *in para. 54*
NEUMANN	Neumann Thomas, *The Duty to Cooparate in International Sales: The Scope and Role of Article 80 CISG*, Walter de Gruyter (2012) *in paras. 29, 101*
PARK	Park W. William, *Arbitrators and Accuracy*, Journal of International Dispute Setttlement, Vol. 1, Issue 1 (2010), pp. 25–53 *in para. 54*

PERALES VISCASILLAS I	*Perales Viscasillas Maria del Pilar, The Formation of Contracts & the Principles of European Contract Law*, Pace International Law Review, Vol. 3, Issue 2 (2006), pp. 371–97 *in para. 85*
PERALES VISCASILLAS II	*Perales Viscasillas Maria del Pilar, The Role of the UNIDROIT Principles and the PECL in the interpretation and gap-filling of CISG*, in: Janssen Andre, Meyer Olaf (eds), CISG Methodology, Sellier European Law Publishers (2009) *in para. 122*
PIETROWSKI	Pietrowski Robert*, Evidence in International Arbitration*, Arbitration International, Vol. 22, Issue 3 (2006), pp. 373–410 *in paras. 54, 60*
PIROZZI	Pirozzi Robert, *The Effect of Changing Circumstances in International Commercial Contracts: The Scaform Case,* Vindobona Journal of International Commercial Law and Arbitration, Vol. 2 (2012), pp. 208–19 *in para. 135*
REDFERN/HUNTER	Blackaby Nigel, Partasides Constantine, Redfern Alan, Hunter Martin, *Redfern and Hunter on International Arbitration*, Sixth Edition, Oxford University Press (2015) *in paras. 39, 54*

REUBEN	Reuben Richard C., *Confidentiality in Arbitration: Beyond the Myth*, Kansas Law Review, Vol. 54 (2006), pp. 1255–300 *in paras. 72, 73*
RIMKE	Rimke Joern, *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999–2000), pp. 197–243 *in para. 128*
ROTH	Roth Marianne, *Part 5: The UNCITRAL Model Law on International Commercial Arbitration*, in: Weigand Frank-Bernd (ed), Practitioner's Handbook on International Arbitration, Oxford University Press (2002) *in para. 50*
SCHLECHTRIEM/ SCHWENZER	Schlechtriem Peter, Schwenzer Ingeborg, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Third Edition, Oxford University Press (2010) *in paras. 29, 85, 89, 101, 102, 116, 128*
SCHLECHTRIEM I	Schlechtriem Peter, *Internationales UN-Kaufrecht: Ein Studien- Und Erläuterungsbuch Zum Übereinkommen Der Vereinten Nationen über Verträge über Den Internationalen Warenkauf (CISG),* Mohr (1996) *in para. 122*

SCHLECHTRIEM II	Schlechtriem Peter, *Transcript of a Workshop on Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse of Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more*, Journal of Law & Commerce (1999), pp. 191–258 *in para. 114*
SCHWENZER	Schwenzer Ingeborg, *Force Majeure and Hardship in International Sales Contracts*, Victoria University of Wellington Law Review, Vol. 39 (2009), pp. 709–25 *in paras. 116, 128, 129*
SIKIRIČ	Sikirič Hrvoje, *Confidentiality in Arbitral Proceedings*, Croatian Arbitration Yearbook, Vol. 13 (2006), pp. 131–66 *in para. 64*
SMEUREANU	Smeureanu Ileana M., *Confidentiality in International Commercial Arbitration,* International Arbitration Law Library, Vol. 22, Kluwer Law International (2011) *in paras. 64, 66, 71, 73*
STALEV	Stalev Zhivko, *Arbitration to adapt long-term international economic contracts to changed circumstances,* in: Sanders Pieter (ed), New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions, ICCA Congress Series, Vol. 1, Kluwer Law International (1983), pp. 199–209 *in para. 21*

VENIZIANO	Veniziano Anna, UNIDROIT Principles and CISG: *Change of Circumstances and duty to renegotiate according to the Belgian Supreme Court*, Uniform Law Review, Vol. 15, No. 1 (2010), pp. 137–51 *in para. 119*
WAINCYMER	Waincymer Jeff, *Procedure and Evidence in International Arbitration,* Kluwer Law International (2012) *in paras. 54, 60*

TABLE OF ARBITRAL AWARDS

Ad hoc arbitration

Methanex v. USA	Methanex Corporation v. United States of America August 3, 2005 *in para. 78*

ICC

Chemical fertilizer case	ICC Arbitration Case 8128 ICC International Court of Arbitration January 1, 1995 *in para. 119*
CISG/Unidroit Principles case	ICC Arbitration Case No. 12097 ICC International Court of Arbitration 2003 *in para. 119*

Coke case	ICC Arbitration Case 9187 ICC International Court of Arbitration June 1, 1999 CISG-online No. 705 *in para. 101*
Cowhides case	ICC Arbitration Case 7331 ICC International Court of Arbitration 1994 *in para. 102*
Magnesium case	ICC Arbitration Case 8324 ICC International Court of Arbitration 1995 CISG-online No. 569 *in para. 102*
Rice case	ICC Arbitration Case No. 8502 ICC International Court of Arbitration November, 1996 *in para. 26*
ICC case 2508	ICC Arbitration Case 2508 ICC International Court of Arbitration 1976 *in paras. 39, 129*
ICC case 2626	ICC Arbitration Case 2626 ICC International Court of Arbitration 1977 *in para. 31*

ICC case 5505	ICC Arbitration Case 5505 ICC International Court of Arbitration 1987 *in para. 31*
ICC case 5835	ICC Arbitration Case 5835 ICC International Court of Arbitration June, 1996 *in para. 26*
ICC case 6752	ICC Arbitration Case 6752 ICC International Court of Arbitration 1993 *in para. 31*
ICC case 6840	ICC Arbitration Case 6840 ICC International Court of Arbitration 1991 *in para. 31*
ICC case 7110	ICC Arbitration Case 7110 ICC International Court of Arbitration June, 1995 *in para. 122*
ICC case 7375	ICC Arbitration Case 7375 ICC International Court of Arbitration June 5, 1996 *in para. 26*

ICC case 9797	ICC Arbitration Case 9797 ICC International Court of Arbitration July 28, 2000 *in para. 122*

ICSID

Abi-Saab in ConocoPhillips v. Venezuela	Dissenting Opinion of Abi-Saab Georges, in: ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela International Centre for Settlement of Investment Disputes September 3, 2013 Case No. ARB/07/30 *in paras. 54, 78*
Caratube v. Kazakhstan	Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan International Centre for Settlement of Investment Disputes December 4, 2014 Case No. ARB/13/13 *in para. 78*

PCA

Yukos v. Russia	Yukos Universal Limited (Isle of Man) v. The Russian Federation Permanent Court of Arbitration Case No. AA 227 July 18, 2014

	in para. 78

SCC

SCC case 117	SCC Arbitration Case 117/1999 Stockholm Chamber of Commerce 1999 *in para. 122*

TABLE OF COURT DECISIONS

Austria

Panel Blank case	Oberster Gerichtshof June 29, 1999 CISG-online No. 483 *in para. 85*

Belgium

Steel Tubes case	Scafom International BV v. Lorraine Tubes S.A.S. Court of Cassation June 19, 2009 Case No. C.07.0289.N *in paras. 119, 128*

France

Intrafor Cofor v. Gagnant	Intrafor Corfor et Subtec Middle East Company v. M. Gagnant et consorts [1985] Rev Arb 299 Cour d'appeal de Paris

	March 12, 1985 Case No. 212/n98 *in para. 39*
Alain Veyron v. Ambrosio	Enterprise Alain Veyron v. Société E. Ambrosio Cour d'appel Grenoble April 26, 1995 Case No. 93/1613 *in para. 89*

Germany

Hearing implants case	Landgericht Aachen Germany May 14, 1993 CISG-online No. 86 *in para. 128*
Iron Molybdenum case	Hamburg Appelate Court of Germany February 28, 1997 CISG-online No. 261 *in para. 112*

Italy

Pizza boxes case	Scatolificio La Perla v. Martin Frischdients GmbH [2004] Tribunale di Padova March 31, 2004 Case No. 40466 *in para. 85*

Singapore

BCY v. BCZ	BCY v. BCZ [2016] SGHC 249 High Court of Singapore November 9, 2016 Case No. 502 of 2016 *in paras. 31, 32*
Cassa di Risparmio v. Rals	Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd [2016] 1 SLR 79 Singapore Court of Appeal April 25, 2016 Case No. 75 of 2015 *in para. 31*
Myanma Yaung v. Win Win Nu	Myanma Yaung Chi Oo Co. Ltd. v. Win Win Nu [2003] SGHC 124 High Court of Singapore June 6, 2003 Case No. 1357/2002, RA 115/2003 *in para. 71*
International Coal v. Kristle Trading	International Coal Pte Ltd. v. Kristle Trading Ltd. and Another and Another Suit [2008] SGHC 182 High Court of Singapore October 22, 2008 Case No. 11/2005 *in para. 66*
Piallo v. Yafriro	Piallo GmbH v. Yafriro International Pte Ltd [2014] 1 SLR 1028 High Court of Singapore

	July 2, 2013
	Case No. 354 of 2013
	in para. 31

Switzerland

Furniture case	Tribunale d'appello Ticino
	October 29, 2003
	CISG-online No. 912
	Case No. 12.2002.181
	in para. 89
Matresses case	Handelsgericht des Kantons Zürich
	October 24, 2003
	CISG-online No. 857
	Case No. HG010395/U/zs
	in para. 101
Summer cloth collection case	Summer cloth collection case
	OG Basel
	October 5, 1999
	Case No. 40-99160
	in para. 85
TETA case I	KGer Fribourg
	October 11, 2004
	CISG-online No. 964
	Case No. A1 2003-70
	in para. 89

United Kingdom

Ali Shipping v. Shipyard Trogir	Ali Shipping v. Shipyard Trogir [1998] 1 Lloyd's Rep. 643 Court of Appeal December 19, 1997 *in para. 71*
Arsanovia v. Cruz City	Arsanovia Ltd v. Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm) High Court Queen's Bench Division (Commercial Court) December 20, 2012 Case No. 111809 *in para. 31*
London & Leeds v. Paribas	London & Leeds Estates Ltd. v. Paribas Ltd. [1995] 1 EGLR 102 High Court Queen's Bench Division (Commercial Court) 1995 *in para. 71*
Michael Wilson v. Emmott	John Forster Emmott v. Michael Wilson & Partners Limited [2008] EWCA Civ 184 Court of Appeal March 12, 2008 Case No. 2007 Folio 1521 *in paras. 71, 72*

New Zealand shipping case	New Zealand Shipping Co v. Société des Ateliers et Chantiers de France [1919] AC 1 House of Lords 1919 *in para. 66*
Sonatrach v. Ferrell	Sonatrach Petroleum Corporation v. Ferrell International Ltd. [2001] WL 1476318 High Court Queen's Bench Division (Commercial Court) October 4, 2001 *in para. 31*
Sulamérica case	Sulamérica CIA Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 Court of Appeal May 16, 2012 Case No. A3/2012/0249 *in paras. 31, 32*

United States of America

Raw Materials v. Forberich	Raw Materials Inc. v. Manfred Forberich GmbH & Co. Federal District Court (Illinois) July 6, 2004 Case No. 03 C 1154 *in para. 85*
Marble case	MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino 29 US Federal Appellate Court (11th Circuit) June, 1998 Case No. 97-4250

	in para. 102

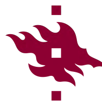
International cases

Persia International Bank v. Council	Persia International Bank Plc v. Council of European Union [2013] EUECJ Court of Justice of the European Union September 6, 2013 Case No. T-493/10 *in para. 78*

TABLE OF LEGAL SOURCES AND MATERIALS

CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)
CISG-AC 7	CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA (Wuhan, People's Republic of China, 12 October 2007)
COMMENTARY OF IBA RULES	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee.
HKIAC RULES	The 2018 HKIAC Administered Arbitration Rules
HKIAC 2013 RULES	The 2013 HKIAC Administered Arbitration Rules
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958)

UNCITRAL CASE DIGEST	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration
UNCITRAL MODEL LAW	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Vienna, 21 June 1985)
UNCITRAL SECRETARIAT GUIDE	UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, September 2016)



STATEMENT OF FACTS

Phar Lap Allevamento (“**CLAIMANT**”) is the oldest and most renown stud farm in Mediterraneo. It provides its champion stallions for breeding purposes both by natural coverage and artificial insemination.

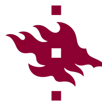
Black Beauty Equestrian (“**RESPONDENT**”) is a company specialized in horse breeding, incorporated in Equatoriana. It is famous for its broodmare lines and is currently building up its own racehorse breeding programme.

1. On **21 March 2017**, RESPONDENT, being impressed with CLAIMANT’s world class stallion Nijinsky III, sent a request for an offer for 100 doses of its frozen semen [*CE 1, p. 9*]. On **24 March 2017**, CLAIMANT offered RESPONDENT 100 doses of frozen semen to be picked at its premises [*CE 2, p. 10*].

2. On **28 March 2017**, RESPONDENT requested some modifications to the offer including a delivery of the doses on DDP terms due to CLAIMANT’s much greater experience in the delivery of frozen semen [*CE 3, p. 11*]. On **31 March 2017**, CLAIMANT agreed to a DDP delivery on the condition that a hardship clause is added in the agreement transferring certain risks normally associated with DDP to RESPONDENT [*CE 4, p. 12*]. RESPONDENT consented to that, and the parties concluded the Frozen Semen Sales Agreement (“**Sales Agreement**”) on **6 May 2017**.

3. In **November 2017**, Mediterraneo announced a 25 % tariff on agricultural products from Equatoriana. In response, Equatoriana announced a retaliatory 30 % tariff on agricultural products from Mediterraneo. The tariffs as well as their size were unexpected [*CE 6, p. 15*].

4. On **20 January 2018**, CLAIMANT learned that the 30 % tariffs affected also frozen racehorse semen. CLAIMANT immediately contacted RESPONDENT to find a solution regarding the additional tariffs. RESPONDENT appeared to accept the need for an adjustment of the Sales Agreement. Consequently, CLAIMANT authorized the last shipment of doses and temporarily paid the 30 % tariff [*CE 8, pp. 17–8*].



5. CLAIMANT requested a meeting to resolve the issue of adapting the Sales Agreement. The parties met on **12 February 2018**. Despite CLAIMANT's efforts to negotiate, RESPONDENT refused to pay any remuneration and cut of all further cooperation with CLAIMANT [*CE 8, pp. 17–8*]

6. On **31 July 2018**, CLAIMANT submitted its Notice of Arbitration ("**NoA**") to RESPONDENT, to which RESPONDENT filed its Answer to the Notice of Arbitration ("**ANoA**") on **24 August 2018**.

7. In preparation for the case management conference, CLAIMANT received on **2 October 2018** information about another arbitration RESPONDENT has been involved in [*Langweiler email, p. 49*]. CLAIMANT wants to submit the Partial Interim Award and the relevant submission rendered in that arbitration on **29 June 2018** as evidence in the current arbitration.

SUMMARY OF ARGUMENT

8. CLAIMANT is passionate to promote all areas of the equestrian sport through its teaching, research, and demonstration facility, and by trading semen of its world class stallions for breeding purposes. However, the past few years have been financially difficult for CLAIMANT. As it has barely been able to stay in business, CLAIMANT had hoped to have found a loyal and reliable long-term business partner in RESPONDENT. But right after the imposition of the considerable tariffs, RESPONDENT did not even attempt to keep its word on finding a solution. As if that were not enough, RESPONDENT is now doing its best to prevent CLAIMANT from receiving the remuneration rightly belonging to it.

9. With regard to the procedural issues, the arbitral tribunal has the jurisdiction and the powers to adapt the Sales Agreement (**I**). To present its case, CLAIMANT has the right to submit the Partial Interim Award and the relevant submission from the arbitral proceedings RESPONDENT has with its customer as evidence (**II**). On the merits, CLAIMANT is entitled to receive additional USD 1.25 million from RESPONDENT as remuneration for the tariffs (**III**).

ARGUMENT

I THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWERS TO ADAPT THE SALES AGREEMENT

10. It is undisputed that the parties have agreed to solve any dispute arising out of the Sales Agreement in arbitration. The Sales Agreement includes a hardship clause. Further, it is undisputed that the applicable substantive law to the Sales Agreement (*lex causae*) is the Mediterranean Contract Law ("**MCL**"), including the United Nations Convention on Contracts for the International Sale of Goods (1980) ("**CISG**"). It is as well undisputed that the law governing the arbitration (*lex arbitri*) is the Danubian Arbitration Law ("**DAL**"). MCL allows contract adaptation. Further, DAL does not limit the arbitral tribunal's powers to adapt the agreement. The arbitral tribunal has the power to enforce the Sales Agreement. This naturally includes the power to enforce the hardship clause **(A)**. Further, the arbitration clause does not restrict the arbitral tribunal's powers to adapt the agreement **(B)**.

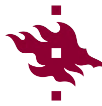
A. THE SALES AGREEMENT, THE *LEX CAUSAE* AND THE *LEX ARBITRI* EMPOWER THE ARBITRAL TRIBUNAL TO ADAPT THE AGREEMENT

11. The parties have included an arbitration clause as well as a hardship clause into the Sales Agreement. CLAIMANT's claim for an additional USD 1.25 million is based on the hardship clause and the applicable *lex causae*, which allows adapting the Sales Agreement **(1)**. Further, the applicable *lex arbitri* does not prevent but rather allows contract adaptation **(2)**.

1. The Sales Agreement and the *lex causae* allow contract adaptation

12. The arbitral tribunal's jurisdiction and powers to adapt the Sales Agreement derive from the hardship clause, the existence of an arbitration clause and MCL.

13. Whenever the applicable *lex causae* allows contract adaptation, the mandate of the arbitral tribunal will extend to adapting the contract [*Beisteiner, p. 110; cf. Ferrario, p. 76*]. Particularly, the power to adapt the contract can be derived from a hardship clause contained in the same agreement as a standard arbitration agreement [*Berger, p. 8; Beisteiner, p. 110;*



cf. Brunner, p. 496; Kröll, p. 457]. If the parties have included a hardship clause into their agreement, it reflects that they are willing to provide the arbitral tribunal also with the procedural power to adapt their contract in certain circumstances [*Bordacahar; Ferrario, p. 134; Beisteiner, p. 110; Brunner, p. 517*].

14. The principle of *pacta sunt servanda* does not speak against but rather in favour of the arbitral tribunal's competence to reshape the contract [*Berger, p. 5; Ferrario, p. 134*]. If the parties have expressed their will to adapt the agreement by including a hardship clause in their contract, the arbitral tribunal should uphold such will [*Ferrario, p. 134*].

15. The parties have agreed that the applicable *lex causae* is MCL, including the CISG. MCL is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**"). Art. 6.2.3 MCL provides that the arbitral tribunal may adapt a contract with a view to restoring its balance. As will be explained later [*paras. 113 et seqq.*], also the CISG allows contract adaptation. Thus, the arbitral tribunal's powers extend to adapting the Sales Agreement.

16. Further, the parties have included a hardship clause into the Sales Agreement [*CE 5, p. 14*]. CLAIMANT seeks the Sales Agreement to be adapted on the basis of the additional tariffs so that RESPONDENT is ordered to remunerate CLAIMANT the USD 1.25 million. The claim is based on the hardship clause under the Sales Agreement, and the *lex causae*. By including the hardship clause in their agreement, the parties have already committed to adjust their contractual obligations under changed circumstances. Thus, the parties have considered the fair distribution of mutual profits more important than the strict compliance of the unmodified contract terms.

17. CLAIMANT can reasonably expect that the arbitral tribunal can enforce the hardship clause and thus has the power to adapt the agreement. The arbitral tribunal is not asked to rewrite any complicated contract terms or to restructure a complex future partnership of the parties. Neither does the claim concern a matter only somehow relating to the agreement, such as non-contractual damages. Instead, CLAIMANT's claim concerns receiving payment for its performance, which is in the core of the Sales Agreement.

18. To conclude, the arbitral tribunal has the jurisdiction and the powers on the basis of the hardship clause, the arbitration clause and the *lex causae* to adapt the Sales Agreement. As the parties have prepared for changes in circumstances in the Sales Agreement, the arbitral tribunal should be able to uphold the agreement and enforce their substantive rights.

2. The *lex arbitri* does not limit the possibility for contract adaptation

19. The *lex arbitri* does not limit the arbitral tribunal's jurisdiction and powers to adapt the Sales Agreement. The seat of the arbitration is Vindobona, Danubia. Therefore, the applicable *lex arbitri* is DAL, which is a verbatim adoption of the Model Law.

20. No provision under DAL prevents the arbitral tribunal from adapting contracts. Instead, Art. 7 DAL provides that by including an arbitration clause into their agreement, the parties have agreed to submit all disputes arising between them and falling under the scope of the arbitration agreement to arbitration.

21. In fact, in preparatory stage of the Model Law, there was considerable support within the UNCITRAL Working Group for spelling out the power of an arbitrator to adapt contracts in the Model Law itself. However, the question of whether the arbitral process extends to the adaptation of contracts to changed circumstances was left to be governed by the national laws [*Broches, Art. 7 para. 3*]. Notably, it was acknowledged that it should be possible for the parties to grant the arbitral tribunal the power to adapt their contract [*Stalev, p. 199; Beisteiner, p. 106*].

22. In conclusion, DAL does not limit the arbitral tribunal's jurisdiction to decide the matter concerning contract adaptation. Thus, the arbitral tribunal has the jurisdiction and the powers to adapt the Sales Agreement.

B. THE ARBITRATION CLAUSE DOES NOT RESTRICT THE ARBITRAL TRIBUNAL'S MANDATE TO ADAPT THE SALES AGREEMENT

23. RESPONDENT acknowledges that the *lex causae* and the Sales Agreement provide adaptation. Therefore, RESPONDENT tries to artificially claim that the law governing the arbitration agreement is DCL. RESPONDENT alleges that under DCL the arbitration clause is to be interpreted narrowly, and thus it would not grant the arbitral tribunal the powers to

adapt the agreement. However, contrary to such allegations, the arbitration clause does not restrict the arbitral tribunal's powers to adapt the Sales Agreement.

24. When determining the parties' intent concerning the law governing the arbitration clause, the arbitral tribunal should apply the rules of contract formation and interpretation under the CISG and the UNIDROIT Principles **(1)**. In accordance with these rules, the law governing the arbitration clause is MCL, not DCL **(2)**. Pursuant to MCL, the arbitration clause grants the arbitral tribunal the power to adapt the Sales Agreement without requiring an express authorization **(3)**. Even if the arbitration clause were governed by DCL, the arbitral tribunal still has the jurisdiction and the powers to adapt the agreement **(4)**.

1. The law governing the arbitration agreement should be determined by applying the CISG and the UNIDROIT Principles

25. To determine what the parties have agreed on the law governing the arbitration clause, the arbitral tribunal should apply the rules of contract formation and interpretation under the CISG and the UNIDROIT Principles. Here, the applicable arbitration rules are the 2018 HKIAC Administered Arbitration Rules ("**HKIAC Rules**"). Pursuant to Art. 36.1 HKIAC Rules, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

26. The interpretation and contract formation rules under the UNIDROIT Principles and the CISG are appropriate on various grounds. The national laws of both Mediterraneo and Equatoriana are identical with the UNIDROIT Principles. Further, the UNIDROIT Principles reflect the general principles of international contract law [*Bonell II, p. 631; Brunner, p. 19; cf. Karton, p. 37*], and have consistently been applied in arbitral practice [*Bonell II, p. 631; Lando, p. 653; Karton, p. 37; SCC case 117/1999; ICC cases 5835, 7110, 7375, Rice case, 9797*]. Moreover, the Sales Agreement is governed by the law of Mediterraneo, including the CISG [*CE 5, p. 14*]. The interpretation rules of the CISG are widely accepted [*Brunner, p. 17*], and have been applied even in cases where the CISG is not directly applicable [*Karton, p. 37; cf. Lando, pp. 749–50*].

27. In conclusion, the arbitral tribunal should apply the rules of interpretation and contract formation under the CISG and the UNIDROIT Principles to determine the parties' intent on the law governing the arbitration agreement.

2. The arbitration clause is governed by the Mediterranean Contract Law

28. The law governing the arbitration clause is MCL. The parties expressly chose MCL to govern the Sales Agreement, including the arbitration clause. RESPONDENT's allegation that DCL would govern the arbitration clause lacks legal basis.

29. The parties' intent is of primary relevance for the interpretation of an agreement under Art. 8(1) CISG and Art. 4.1 UNIDROIT Principles. Here, it is decisive whether a party knew or could not have been unaware of the other party's intent [*Schlechtriem/Schwenzer, p. 153; cf. Lookofsky II, p. 58; Huber/Mullis, p. 12*]. The starting point in interpreting the parties' intent is the wording of the agreement [*Schlechtriem/Schwenzer, p. 153; Neumann, p. 51*].

30. Further, due consideration is to be given to all relevant circumstances, especially contract negotiations, pursuant to Art. 8(3) CISG and Art. 4.3 UNIDROIT Principles. If the parties' intent cannot be sufficiently established, an agreement has to be interpreted according to the objective standard of a reasonable person in accordance with Art. 8(2) CISG and Art. 4.1.2 UNIDROIT Principles.

31. When the arbitration agreement forms a part of the main agreement, it creates an assumption that the law governing the main agreement governs also the arbitration agreement [*Lew, p. 143; Sulamérica case; BCY v. BCZ; Sonatrach v. Ferrell; Piallo v. Yafriro; Cassa di Risparmio v. Rals; ICC cases 2626, 6752, 6840, 5505*]. The court held in *BCY v. BCZ* and *Arsanovia v. Cruz City* that when the agreement includes an express choice-of-law in favor of one system of law, the parties naturally intended the choice-of-law to govern also the arbitration clause contained within the agreement. The courts held that this presumption should be upheld especially since such clauses are typically negotiated as part of the main agreement and are unlikely to be negotiated independently.

32. Therefore, the doctrine of separability cannot be used to justify preferring the law of the seat over the law of the main agreement [*Sulamérica case; BCY v. BCZ*]. Instead, the idea of separability is that the arbitration clause survives the termination, voidance or invalidity of the main agreement. It does not mean that the law applicable to the arbitration agreement is different from the law governing the main agreement [*Born, p. 464*].

33. CLAIMANT made it clear to RESPONDENT during the contract negotiations that it could only consent to an agreement submitted to its own national law, i.e. MCL. Submitting any agreement to a foreign law would have required a special approval by the creditor's committee under CLAIMANT's internal policy. CLAIMANT's in-house counsel Ms. Napravnik expressly stated this to RESPONDENT's negotiator Mr. Antley in her email of 11 April 2017 [*RE 2, p. 34*]. Consequently, CLAIMANT only compromised to agree on arbitration in Danubia on condition that MCL remains the applicable law to the agreement [*RE 2, p. 34*]. As it was not possible for CLAIMANT to consent to any agreement subject to a foreign law, RESPONDENT must have understood that this condition referred also to the law governing the arbitration agreement.

34. The parties have made a choice-of-law that governs all clauses under the agreement. The clause 14 of the Sales Agreement states that "[*t*]*his Sales Agreement shall be governed by the law of Mediterraneo*" [*CE 5, p. 14*]. The parties' negotiated, drafted and concluded the arbitration clause at the same time and as part of the main agreement. Therefore, the parties' intended the choice-of-law to cover also the arbitration clause. Also, a reasonable person would by looking at the agreement understand that an express choice-of-law in favor of MCL covers all of its clauses, including the arbitration clause.

35. It is irrelevant that a separate reference to the law governing the arbitration clause was omitted from the agreement. Indeed, it would have been unnecessary. When Mr. Krone, RESPONDENT's negotiator, finalized the agreement he left out a separate reference to the law governing the arbitration clause as "*the draft of the contract already had* [...] *a choice of law clause in favor of the law of Mediterraneo*" [*RE 3, p. 35*]. Should Mr. Krone, as the head of the legal department, have considered a different law to apply to the arbitration agreement, he certainly would have understood to add such mention to the agreement. Therefore, he agreed with CLAIMANT that MCL governs also the arbitration clause.

36. By contrast, RESPONDENT's allegation that the arbitration clause is governed by DCL lacks legal basis. CLAIMANT did not know and could not have been aware of RESPONDENT's alleged intent to choose the law of the seat as the proper law. There was never a proposal for DCL as governing any part of the agreement. Neither did RESPONDENT in any other way express its intent to apply the law of the seat to the arbitration agreement. Merely the fact that

in RESPONDENT's first draft both the seat and the law governing the arbitration agreement were the law of Equatoriana, is not sufficient to establish such intent.

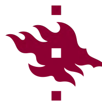
37. In the light of the above, the law governing the arbitration agreement is MCL. The parties intended that MCL governs all the clauses of the Sales Agreement, including the arbitration clause. From the objective perspective of a reasonable person, the law governing the arbitration clause is MCL.

3. The Mediterranean Contract Law favours contract adaptation

38. The arbitration clause does not restrict the arbitral tribunal's powers to adapt the agreement. As the arbitration clause is governed by MCL, the clause is to be interpreted broadly. Thus, the arbitral tribunal has the power to adapt the agreement without requiring an express empowerment.

39. Adding an arbitration clause governed by law that allows adaptation into the agreement is considered equal to including an express adaptation clause in the agreement [*Ferrario, p. 134; Beisteiner, pp. 110–1; ICC case 2508; Intrafor Cofor v. Gagnant; cf. Redfern/Hunter, pp. 308–9*]. Under Art. 6.2.3(4)(b) MCL, an arbitral tribunal may in case of changed circumstances adapt the contract with a view to restoring its balance. In the context of this provision, the consistent jurisprudence in Mediterraneo is that courts have the power to adapt contracts in cases of hardship [*PO2, para. 39*]. A standard arbitration agreement is considered to be sufficient to grant the arbitral tribunal the same powers as a court has under the same provision [*PO2, para. 39*].

40. The parties have agreed that "[*a*]*ny dispute arising out of this contract*" will be settled in arbitration [*CE 5, p. 14*]. Since the parties chose MCL to govern the arbitration agreement, which is in favour of contract adaptation, the arbitration clause does not narrow the arbitral tribunal's power to adapt the Sales Agreement. Moreover, CLAIMANT expressly informed RESPONDENT during the negotiations that it was important for CLAIMANT to have a mechanism in place which would ensure an adaptation of the agreement if the parties could not agree on an amendment [*CE 8, p. 17*]. RESPONDENT replied that according to its understanding, *"it should probably be the task of the arbitrators to adapt the contract if the*



parties could not agree" [*CE 8, p. 17*]. Thus, the parties did not intend to narrow the arbitral tribunal's power to adapt the agreement under the arbitration clause.

41. In the view of the above, the parties' arbitration agreement does not narrow the arbitral tribunal's jurisdiction or powers to adapt the Sales Agreement.

4. Even if the arbitration agreement were governed by the Danubian Contract Law, the arbitral tribunal may adapt the Sales Agreement

42. Should the arbitral tribunal find against all expectations that the arbitration agreement is governed by DCL, the arbitral tribunal still has the jurisdiction and the powers to adapt the Sales Agreement. In any case, the arbitration clause does not narrow the arbitral tribunal's power to adapt the agreement.

43. DCL recognizes the arbitral tribunal's powers to adapt contracts. According to Art. 6.2.3(4)(b) DCL, if the court finds hardship it may adapt the contract if authorized with a view to restore its balance. There is no consistent case law as to the meaning of the wording "*if authorized*" [*PO2, para. 45*]. Further, under DCL, an agreement is to be interpreted within its four corners. The four corners rule, as applied by the Danubian courts, does not prohibit using prior statements to interpret the writing of the agreement [*PO2, para. 45*].

44. The parties have agreed to settle in arbitration "[*a*]*ny dispute arising out of this contract*" [*CE 5, p. 14*]. The wording *"arising out of"* equals to an authorization upon the arbitral tribunal to decide CLAIMANT's claim on adapting the agreement. The parties concurred during the negotiations that "*it should probably be the task of the arbitrators to adapt the contract if the parties could not agree*" [*CE 8, p. 17*]. The parties did not intent to limit the arbitral tribunal's jurisdiction to adapt their agreement. In this light, it would be unreasonable and contrary to the parties' intent to hold that the parties had not authorized the arbitral tribunal to adapt the agreement. Thus, CLAIMANT's claim on contract adaptation arises out of the agreement and thus falls within the scope of the arbitration agreement.

45. In conclusion, should the arbitral tribunal find that the arbitration clause is governed by DCL, in any case, the arbitration clause does not narrow the arbitral tribunal's jurisdiction or the powers to adapt the Sales Agreement. The parties have given an authorization upon the arbitral

tribunal for contract adaptation. Therefore, the arbitral tribunal has the jurisdiction and the powers to adapt the Sales Agreement.

II. CLAIMANT IS ENTITLED TO SUBMIT THE DOCUMENTS FROM RESPONDENT'S OTHER ARBITRATION AS EVIDENCE

46. RESPONDENT has recently been involved in another arbitral proceedings with one of its customers concerning a sale of a mare. The circumstances of that dispute are very similar to the present case. The primary difference is that in the other case, RESPONDENT itself has been negatively affected by the tariffs imposed by Mediterraneo. Consequently, RESPONDENT invoked an unforeseeable change of circumstances and sought the right for an adaptation of the price [*PO2, para. 39*]. CLAIMANT seeks to submit the Partial Interim Award and the relevant submission from the other proceedings as evidence to prove its claim on adapting the Sales Agreement.

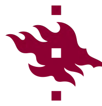
47. RESPONDENT claims that CLAIMANT should not be allowed to submit the documents as evidence in the current proceedings. RESPONDENT alleges that the documents have been obtained by illegal means. However, contrary to RESPONDENT's claims, the arbitral tribunal should admit all evidence CLAIMANT deems necessary to prove its claims **(A)**. In this respect, it is immaterial whether the evidence was obtained through a breach of confidentiality **(B)** or a hack of RESPONDENT's computer system **(C)**.

A. THE ARBITRAL TRIBUNAL SHOULD ADMIT ALL EVIDENCE

48. The arbitral tribunal should admit all evidence CLAIMANT deems necessary to prove its claims. CLAIMANT will demonstrate that not admitting the evidence would violate its procedural rights **(1)** and could lead to the award being based on false pretenses **(2)**

1. Not admitting all evidence would violate CLAIMANT's procedural rights

49. CLAIMANT has the right to present its case. This includes the right to submit all evidence CLAIMANT deems necessary to prove its claims. Not admitting the Partial Interim Award from the other arbitration as evidence would violate CLAIMANT's procedural rights. Therefore, the arbitral tribunal should allow CLAIMANT to submit the documents from the other arbitration as evidence.



50. According to Art. 18 DAL, *"each party shall be given a full opportunity of presenting his case"*. A similar provision is included in Art. 13(1) HKIAC Rules. Full opportunity to present one's case is the most fundamental requirement of due process [*Holtzmann/Fleischhauer/Neuhaus, p. 564*]. Full opportunity to present one's case includes the right to submit evidence in support of claims [*Born, p. 2173; Kurkela/Turunen, p. 188*]. Even though the right shall not be misused to e.g. delay proceedings by submitting irrelevant evidence, it provides each party the right to present all the facts it deems necessary. This norm is mandatory for arbitral tribunals to take into account [*Roth, p. 1228; Hußlein-Stich, p. 108*]. A failure to adhere to that right allows for the challenge of the award under Arts. 34(2) or refusal to enforce the award under 36(1) DAL and Art. V(1)(b) NYC.

51. CLAIMANT should be allowed to submit the documents to prove its claim on adapting the Sales Agreement. CLAIMANT wants to submit this evidence as it is disputed whether the imposed tariffs justify contract adaptation. As will be shown below [*para. 108*], the documents are necessary in particular to prove that the tariffs were unforeseen also from RESPONDENT's point of view. RESPONDENT is now opposing the opportunity to adapt the Sales Agreement only as it is disadvantageous to it. Such contradictory behaviour raises a doubt on the credibility of RESPONDENT's argumentation in these proceedings. Thus, the Partial Interim Award is relevant evidence for CLAIMANT. Only with these documents, arbitral tribunal can render an award which takes all relevant facts into account.

52. In the light of the above, the arbitral tribunal should allow CLAIMANT to submit the Partial Interim Award and the relevant submission as evidence. The evidence is necessary for CLAIMANT to be able to fully present its case.

2. Not admitting all evidence could lead to the award being based on false pretenses

53. If the documents were not admitted as evidence, there is a risk that the award rendered in this arbitration will be based on false pretenses. This would deprive CLAIMANT of its substantive rights and thus undermine the purpose of arbitration proceedings.

54. The arbitral tribunal's overriding task is to seek the truth [*Park, p. 26; Abi-Saab in ConocoPhillips v. Venezuela*]. Reaching the truth requires that the award is based on accurate facts. To establish the disputed facts, international arbitral tribunals generally admit all kind

of evidence [*Pietrowski, p. 408; Lew/Mistelis/Kröll, pp. 561–3; Waincymer, p. 793; Kubalczyk, p. 106; Malacka, p. 103; Brower, p. 48; Redfern/Hunter, pp. 377–8*]. The evidence is then subject to evaluation of its relevance, credibility and probative value [*Pietrowski, p. 378; Waincymer, p. 752; Kubalczyk, p. 106; Malacka, p. 103; Brower, p. 48*]. The accuracy in arbitration is particularly important because the appeal and other remedies in arbitration are limited [*Park, p. 42; cf. Brower, p. 48*]. If relevant evidence is excluded, there is a higher risk that the parties' substantive rights do not actualize.

55. The arbitral tribunal should admit the documents as evidence in order to have a proper understanding of the business dealings between the parties and whether there is a basis for adapting the Sales Agreement. The evidence is necessary to demonstrate that the imposed tariffs justify adaptation. If the evidence is not admitted, there is a risk that the award will be based on distorted facts.

56. The outcome of this arbitration is crucial to CLAIMANT's future in horse breeding business. Thus, achieving the truth is not only necessary by virtue but also has high relevance for CLAIMANT's financial situation. The last two years have been financially difficult for CLAIMANT. It has been able to stay in business only through extensive restructuring measures and a considerable cut of workforce. However, it would be impossible for it to bear the additional 30 % tariff [*CE 8, p. 17*]. Therefore, CLAIMANT has a lot at stake in this dispute.

57. To conclude, admitting the evidence from the other arbitration is necessary for CLAIMANT to reach its substantive rights. Not admitting the evidence could lead to the award being based on distorted facts. Accordingly, the arbitral tribunal should consider the evidence admissible.

B. THE ALLEGED BREACH OF CONFIDENTIALITY IS IMMATERIAL

58. RESPONDENT alleges that the documents from the other arbitration have been obtained through a breach of confidentiality, and thus they cannot be admitted as evidence. However, no rule in the DAL nor the HKIAC 2013 Rules prohibits the use of confidential documents as evidence (**1**). Furthermore, CLAIMANT has not breached any confidentiality obligation. Instead, the alleged breach has been committed either by a third party, or by RESPONDENT

itself **(2)**. In any case, irrespective of the alleged breach of confidentiality, protecting CLAIMANT's legitimate interests require admitting the documents as evidence **(3)**.

1. No rule prohibits CLAIMANT from using confidential documents as evidence

59. Irrespective of the alleged confidential nature of the submitted documents, CLAIMANT is entitled to use them as evidence to prove its claims. No rule prohibits submitting such documents. Therefore, the arbitral tribunal should admit the documents from the other arbitration.

60. No rule in the DAL nor the HKIAC Rules explicitly or implicitly prohibits the use of confidential documents as evidence in arbitration. Where the parties have not agreed on what kind of evidence they may submit, the arbitral tribunal retains a broad discretion with respect to determining the admissibility of evidence under Art. 19(2) DAL [*Born, p. 2307*]. In accordance with the principle of open evidence recognized by most national arbitration laws, including the DAL, all relevant material should be put before an arbitral tribunal to enable it to deal justly with a particular case [*cf. Pietrowski, p. 408; Lew/Mistelis/Kröll, pp. 561–3; Waincymer p. 793*]. A party may generally rely on any relevant information, including information protected by confidentiality, to prove its claims or rebut the other party's arguments.

61. RESPONDENT alleges that the documents from the other arbitration may not be used as evidence due to their confidentiality [*Fasttrack email, p. 50*]. According to RESPONDENT's investigation, the confidential documents have been disclosed by its own former employees. RESPONDENT's allegation is immaterial as it has no legal basis. The parties have not determined what kind of evidence they may or may not submit. Therefore, all submitted evidence should be admitted. Irrespective of whether they were protected by confidentiality, CLAIMANT may rely on the documents from the other arbitration.

62. To conclude, there is no legal basis to deny submitting the documents from the other arbitration. Therefore, the arbitral tribunal should admit the Partial Interim Award and the relevant submission as evidence.

2. The alleged breach is committed by a third party or by RESPONDENT itself

63. CLAIMANT has not breached any confidentiality obligation. Instead, the alleged breach of confidentiality is committed by RESPONDENT's former employees. The former employees, being a third party, are not bound by the confidentiality obligation under the applicable arbitration rules. In this regard, also the former employees' alleged breach of contractual confidentiality obligation is irrelevant in this arbitration. Should the former employees be considered to be a party to the arbitration, the party in breach is RESPONDENT itself.

64. The arbitration rules applicable to the arbitration between RESPONDENT and its customer are the HKIAC 2013 Rules [*Fasttrack email, p. 50*]. According to Art. 42 HKIAC 2013 Rules, *"no party may publish, disclose or communicate any information relating to: (a) the arbitration* [...] *or (b) an award"* (emphasis added). The article provides that only the parties to arbitration are bound to maintain the confidentiality of the arbitration. Third parties, such as witnesses, are not parties to the arbitration agreement, and thereby not bound by the confidentiality duty under the rules [*cf. Smeureanu, pp. 151–3; Sikirič, p. 153*].

65. RESPONDENT claims that submitting confidential documents as evidence would occur in violation of contractual and statutory confidentiality obligations [*Fasttrack email, p. 50*]. According to RESPONDENT's investigation, the confidential documents have been disclosed by its own former employees who had been witnesses in the other arbitration before they were fired on 6 July 2018 [*Fasttrack email, p. 50; PO2, para. 41, p. 61*]. The former employees are not parties to the arbitration agreement. Consequently, they are not bound by the confidentiality rules that the parties themselves have agreed to.

66. Even if there were a breach of confidentiality under Art. 42 HKIAC 2013 Rules, it should be considered by which party's action the confidential information was disclosed. A party to an arbitration cannot first breach the duty of confidentiality, and later itself rely on it to derive the desired legal consequence [*International Coal v. Kristle Trading; cf. Smeureanu, pp. 47–8*]. No party should be able to rely on its own breach of obligations to obtain any benefit under it [*New Zealand shipping case*]. It would be nonsensical if a party could preclude third parties from using confidential documents it had itself originally disclosed.

67. Should the arbitral tribunal against all expectations consider the former employees to be a party to the arbitration, it would mean that the party in breach is RESPONDENT itself. It

should not be accepted that RESPONDENT could first breach its confidentiality obligation and then rely on the same confidentiality to preclude CLAIMANT from submitting the documents as evidence.

68. Further, the former employees' alleged breach of their contractual obligation to keep the information about the other arbitral proceedings confidential is irrelevant. The confidentiality obligation is a contractual arrangement between RESPONDENT and its former employees. It has nothing to do with CLAIMANT and the current arbitration. RESPONDENT cannot rely on the existence of such contractual obligation to preclude CLAIMANT from using the documents as evidence.

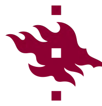
69. In conclusion, RESPONDENT cannot rely on a breach of confidentiality under the HKIAC 2013 Rules to preclude the disadvantageous evidence. This is notwithstanding whether RESPONDENT's former employees are considered to be a party or a third party in relation to the arbitration. Neither does a possible breach of a contractual confidentiality obligation between RESPONDENT and its former employees affect this consideration. Therefore, the arbitral tribunal should admit the evidence.

3. In any case, CLAIMANT's legitimate interests require admitting the evidence

70. In any case, there is no sufficient ground for protecting confidentiality of the information to exclude the documents from the current arbitration. RESPONDENT should not be allowed to misuse confidentiality to prevent unfavorable evidence from being submitted. Further, CLAIMANT's legitimate interest of proving its case requires the admission of the documents.

71. Confidential documents should be admitted as evidence particularly if a party's legitimate interests, such as protecting its fundamental procedural rights, require the submission. This has been held as a sufficient ground not only for admitting evidence but even for obliging the disclosure of confidential information [*Smeureanu, p. 124; Myanma Yaung v. Win Win; London & Leeds v. Paribas; Ali Shipping v. Shipyard Trogir; Michael Wilson v. Emmott*].

72. Confidentiality should not be allowed to be abused and used for normatively undesirable reasons such as the shielding of necessary evidence [*Reuben, p. 1278*]. It was held in *Michael Wilson v. Emmott* that limitation to confidentiality is justified to prevent the court to be misled



when a party's case is materially inconsistent in the previous and current proceedings. This is *a fortiori,* where the cases are essentially raising either the same or similar allegations and are proceeding in parallel.

73. Furthermore, protecting confidentiality requires that actual interests would be at risk if the confidential documents were admitted as evidence. A distinction should be made in this respect between seeking to use the confidential information as evidence in another confidential arbitration and making the information available to the general public [*cf. Reuben, p. 1260*]. In the former case, the circle of persons who will learn the information is limited to the arbitrators and the parties, and thereby any actual injury is unlikely to be caused [*cf. Smeureanu, p. 180*].

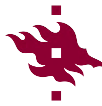
74. RESPONDENT is only attempting to misuse confidentiality to prevent evidence that might undermine the credibility of its arguments in this arbitration. RESPONDENT's claims concerning the possibility for contract adaptation on the basis of the tariffs are materially inconsistent in two separate yet very similar arbitrations. Should the arbitral tribunal not admit the evidence merely on the basis of confidentiality, that would undermine CLAIMANT's legitimate interest to prove its claim.

75. By contrast, RESPONDENT has not clarified any actual interest that would be endangered if the documents were admitted as evidence in these proceedings. It seems that RESPONDENT is only seeking to conceal evidence that is unfavourable to it. Further, the documents are only going to be used in confidential arbitral proceedings between the parties. Thus, they are protected from unlimited disclosure, and will not be revealed uncontrollably to general public.

76. In the light of the above, the arbitral tribunal should admit the use of documents irrespective of whether or not they are confidential. Confidentiality should not be ruled over CLAIMANT's right to present its case and reaching a fair and just result in this arbitration.

C. THE ALLEGED HACK OF RESPONDENT'S COMPUTER SYSTEM IS IMMATERIAL

77. When considering admissibility of the evidence, it is irrelevant whether the documents have been obtained illegally through a hack of RESPONDENT's computer system. Because

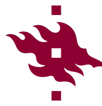


CLAIMANT has not in any way been involved in the hack, the documents cannot justly be excluded. Therefore, the arbitral tribunal should admit the evidence irrespective of whether it has been originally obtained by illegal means.

78. No article under the DAL or the HKIAC Rules forbids submitting illegally obtained evidence in arbitration. Even if the evidence had been obtained through an illegal act, that is not in itself a sufficient ground to exclude the evidence from consideration [*Blair/Gojkovic, pp. 256–8*]. When a party has not itself been involved in obtaining the evidence through illegal means, it is considered admissible [*Blair/Gojkovic, p. 256; Caratube v. Kazakhstan; Yukos v. Russia; Persia International Bank v. Council; Abi-Saab in ConocoPhillips v. Venezuela; Methanex v. USA*].

79. According to RESPONDENT, its computer system had been hacked in September 2018. RESPONDENT had an outdated firewall to protect its computer system, which made it exposed to hacks [*PO2, para. 42, p. 61*]. According to RESPONDENT's investigation, the hackers managed to retrieve a considerable amount of data [*Fasttrack email, p. 50*]. The Partial Interim Award may have been obtained through the hack [*Fasttrack email, p. 50*]. CLAIMANT has not been involved in the hack. Instead, CLAIMANT's CEO heard about the other arbitration at the annual breeding conference from Mr. Velazquez, the CEO of one of its regular customers [*PO2, para. 40, p. 60*]. Mr. Velazquez told CLAIMANT's CEO that a copy of the Partial Interim Award could be acquired from a company that provides intelligence on the horseracing industry.

80. Further, no public policy considerations prevent relying on illegally obtained evidence. Public policy is only violated where fundamental principles, such as client-attorney privilege or diplomatic immunity, are breached [*UNCITRAL Secretariat Guide on the NYC, p. 247*]. *In casu*, using the documents from the other arbitration as evidence does not breach any fundamental principles, and thereby is not against public policy. The documents concern a commercial dispute about a sale of a mare [*PO 2, para. 39*] They do not include any state secrets or politically sensitive material, nor do they impact the civil society or the general public at large.



81. In conclusion, the arbitral tribunal should admit the evidence irrespective of whether it had been obtained through an illegal hack of RESPONDENT's computer system. CLAIMANT has not been involved in the hack. Thus, there is no ground to exclude the evidence.

III. CLAIMANT IS ENTITLED TO RECEIVE ADDITIONAL USD 1.25 MILLION FROM RESPONDENT AS REMUNERATION FOR THE TARIFFS

82. CLAIMANT is entitled to USD 1.25 million as remuneration for the increased tariffs from RESPONDENT. The parties already adapted the Sales Agreement so that RESPONDENT will bear the additional costs due to the tariffs **(A)**. Should the arbitral tribunal find that the parties did not adapt the Sales Agreement, it should adapt the agreement on the basis of clause 12 **(B)**. Alternatively, the arbitral tribunal should adapt the Sales Agreement under the CISG **(C)**.

A. THE PARTIES ALREADY ADAPTED THE SALES AGREEMENT

83. The parties have orally agreed that RESPONDENT bears the imposed tariffs **(1).** Further, RESPONDENT is bound by Mr. Shoemaker's act amounting to an agreement **(2)**.

1. The parties orally agreed that RESPONDENT bears the tariffs

84. The parties adapted the Sales Agreement in a phone call on 21 January 2018. They agreed that RESPONDENT will bear the additional costs due to the imposed tariffs. CLAIMANT may rely on the modification of the Sales Agreement. Thus, RESPONDENT has a contractual obligation to pay USD 1.25 million as remuneration for the tariffs to CLAIMANT.

85. Pursuant to Art. 29(1) CISG, the parties may naturally modify the contract by a mutual agreement [*Raw Materials v. Forberich; Pizza boxes case*]. A modification may be made either orally, in writing, by acts, or even by silence or inaction [*Perales Viscasillas I, p. 376; Panel blank case; Summer cloth collection case*]. An agreement is formed when material consensus and the minimum contractual content are present even if the required offer and acceptance could not be clearly identified [*cf. Perales Viscasillas I, pp. 376–7; Schlechtriem/Schwenzer, p. 240*].

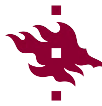
86. When determining whether an agreement was formed, a party's statements and other conduct are to be interpreted according to its intent subject to Art. 8 CISG. Whether the party receiving

such statement knew or could not have been unaware of the other party's intent is decisive. If the parties' intent cannot be established, the statements are to be interpreted objectively from the point of view of a reasonable person as provided under Art. 8(2) CISG. Irrespective of which standard is adopted, due consideration is to be given to all relevant circumstances under Art. 8(3), especially any subsequent conduct of a party.

87. The parties reached an agreement on adapting the Sales Agreement so that RESPONDENT will remunerate CLAIMANT for the tariffs. Ms. Napravnik emailed RESPONDENT's representative Mr. Shoemaker on 20 January 2018 about the newly imposed 30 % tariff on agricultural products, also applying to frozen racehorse semen. Ms. Napravnik explicitly stated in her email that the parties will have to find a solution regarding the tariffs before the last shipment could be sent [*CE 7, p. 16*]. Mr. Shoemaker called Ms. Napravnik back the next day. In the phone call, Ms. Napravnik emphasized that CLAIMANT could not shoulder the tariffs on its own [*CE 8, pp. 17–8*]. Therefore, Mr. Shoemaker knew or at least could not have been unaware of CLAIMANT's intent that it will only deliver the remaining doses if RESPONDENT bears the tariffs.

88. Consequently, Mr. Shoemaker assured that the parties "*will certainly find an agreement on the price*". This constitutes an acknowledgement of CLAIMANT's concerns presented above. At the same time, Mr. Shoemaker urged Ms. Napravnik to authorize delivery immediately, emphasizing RESPONDENT's urgent need for the doses [*RE 4, p. 36; CE 8, p. 18*]. Mr. Shoemaker's behaviour indicated that RESPONDENT accepted to bear the tariffs as long as the remaining doses would be delivered on time. Consequently, Ms. Napravnik authorized the delivery of the last shipment and paid the tariffs on behalf of RESPONDENT [*CE 8, p. 18*].

89. The justified reliance between the parties is protected by the reasonable person standard [*Schlechtriem/Schwenzer, p. 155; Furniture case; TETA case I*]. The standard of a reasonable person was applied in *Alain Veyron v. Ambrosio* to determine whether a party's conduct indicates acceptance of an offer. The court held that if the buyer accepts further deliveries without objection regarding a higher price demanded by the seller, an acceptance of the price increase can be presumed under Art. 8(2). The decision reflects the principle that a party cannot act inconsistently with the understanding it has caused to the other party. Such principle is also acknowledged in the UNIDROIT Principles under Art. 1.8, although they are not



directly applicable in this particular instance. The principle corresponds with the observance of good faith in international trade as required to be taken into account under Art. 7(1) CISG when applying the provisions of the CISG.

90. CLAIMANT relied on the agreement Ms. Napravnik and Mr. Shoemaker made on modifying the Sales Agreement and acted accordingly. Even if the parties' subjective intent could not sufficiently be established, a reasonable person would have assumed that RESPONDENT accepted to pay the tariffs. RESPONDENT accepted the final delivery without objecting to pay the additional amount. Thus, RESPONDENT committed to bear the tariffs. When RESPONDENT then refused to pay any additional amount, it acted in complete contradiction with the understanding it had first itself caused to CLAIMANT.

91. In the light of the above, the parties reached an agreement that RESPONDENT will pay USD 1.25 million as remuneration for the tariffs. CLAIMANT can justifiably rely on the modification. Thus, the arbitral tribunal should enforce the parties' agreement and order RESPONDENT to remunerate CLAIMANT for the tariffs.

2. RESPONDENT is bound by Mr. Shoemaker's act amounting to an agreement

92. Contrary to what RESPONDENT may claim, RESPONDENT is bound by Mr. Shoemaker's act amounting to an agreement. Mr. Shoemaker had the authority to modify the Sales Agreement. Even if Mr. Shoemaker had acted outside of his authority, CLAIMANT has the right to rely on his act. Thus, RESPONDENT is bound by the modification of the Sales Agreement.

93. Pursuant to Art. 4 CISG, the question of whether a contract (including its modification) is valid and binding lies outside the scope of the CISG [*Lookofsky I, p. 21*]. Therefore, the validity of the contract is determined on the basis of the applicable national law. Here, the parties have agreed under clause 14 of the Sales Agreement that the applicable law is MCL, which is a verbatim adoption of the UNIDROIT Principles.

94. A party is naturally bound by the acts of its authorised representatives. Under Art. 2.2.2(1) MCL, the representative's authority to act on behalf of a party can be also implied in certain circumstances. A representative is granted the authority to act when it is placed in a position

that entails such authority [*Comment 1 on Art. 2.2.2 UNIDROIT Principles*]. Under Art. 2.2.2(2) MCL, the scope of authority of the representative extends to all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

95. Even if a representative would not have the authority to act on behalf of the party, that party may still be bound by the representative's act pursuant to Art. 2.2.5 MCL. A party is prevented from invoking the lack of authority of its representative against another party, where its own conduct leads that party to reasonably believe that the representative had authority to act on its behalf. Whether the other party could reasonably rely on the authority of the representative depends on the circumstances of the case, such as the position occupied by the representative in the organisation's hierarchy [*Comment 2 on Art. 2.2.5 UNIDROIT Principles; Bonell II, p. 171*].

96. Pursuant to Art. 1.8 MCL, a party may be bound by the understanding it has caused to the other party, upon which that party has reasonably acted. Such understanding may lead to creation or modification of the parties' rights [*Comment 1 on Art. 1.8 UNIDROIT Principles*]. Thus, a party cannot first create an impression that its representative has an authority to make an agreement, only to later invoke the lack of such authority.

97. In the case at hand, Mr. Shoemaker is the person responsible for RESPONDENT's racehorse breeding program, including all questions relating to the Sales Agreement [*PO2, para. 32*]. He was specifically introduced to CLAIMANT as the primary contact in case any problems arose requiring urgent decision-making. Consequently, Mr. Shoemaker's authority was not limited to just answering questions related to the Sales Agreement. It factually extended also to modifying the contract, which was necessary to receive the doses within RESPONDENT's urgent schedule. Indeed, Mr. Shoemaker also acted accordingly by urging Ms. Napravnik to authorize delivery without discussing the matter with his superiors [*CE 8, p. 18; RE 4, p. 36*]. Therefore, he *de facto* had the authority to modify the contract.

98. Even if Mr. Shoemaker had acted outside the scope of his authority when modifying the contract, RESPONDENT is bound by his act. By introducing Mr. Shoemaker as the contact person responsible for the racehorse breeding program, RESPONDENT lead CLAIMANT to reasonably believe that he would have the authority to modify the contract on its behalf. It

would be inconsistent to introduce Mr. Shoemaker as a contact person if his commitments would be given under reservation. In this regard, it is irrelevant that Mr. Shoemaker mentioned that he could not directly authorize any additional payment [*CE 8, p. 18*]. However, until these proceedings, he has never stated, nor has he ever hinted that he would not have had the authority to modify the agreement. Therefore, CLAIMANT can rely on Mr. Shoemaker's commitment to bare the tariffs. RESPONDENT is prevented from invoking Mr. Shoemaker's lack of authority against CLAIMANT.

99. In the view of the above, RESPONDENT granted Mr. Shoemaker the authority to modify the Sales Agreement on its behalf. In any case, CLAIMANT can rely on the impression that he had the authority. Thus, RESPONDENT is bound by Mr. Shoemaker's act.

B. IN ANY CASE, THE ARBITRAL TRIBUNAL SHOULD ADAPT THE SALES AGREEMENT ON THE BASIS OF CLAUSE 12 OF THE AGREEMENT

100. Should the arbitral tribunal find that the parties did not validly agree on modifying the sale, the arbitral tribunal should adapt the agreement on the basis of the hardship clause, i.e. clause 12 of the Sales Agreement. The hardship clause covers also the additional tariffs. Therefore, the arbitral tribunal should oblige RESPONDENT to pay USD 1.25 million as remuneration for the tariffs to CLAIMANT.

101. When determining whether a certain situation is covered by a hardship clause, the interpretation starts from the intent of the parties under Art. 8(1) CISG. In establishing the parties' intent, the starting point is the wording of the clause [*Schlechtriem/Schwenzer, p. 153; Neumann, p. 51; Coke case; Matresses case*]. A special weight is to be given to the usual meaning of the words used by the parties [*Schlechtriem/Schwenzer, p. 165*]. Further, a due consideration is to be given to negotiations and any subsequent conduct of the parties under Art. 8(3) CISG.

102. If the parties' intent cannot be established, the question shall be decided in light of an objective interpretation. In this regard, the hypothetical understanding of a reasonable person of the same kind, placed in the same circumstances, is determining under Art. 8(2) CISG [*Schlechtriem/Schwenzer, p. 157; Huber/Mullis, pp. 12–3; Cowhides case; Magnesium case; Marble case*].

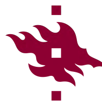
103. The clause 12 of the Sales Agreement states that:

> "S*eller shall not be responsible* […] *for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added).

104. By including the hardship clause and opting for MCL as the applicable *lex causae* which allows contract adaptation, the parties intended that the arbitral tribunal will adapt the agreement in case of hardship. In this regard, it would be nonsensical to assume that the parties had excluded the possibility for adaptation [*cf. Brunner, p. 517*]. Indeed, the parties concurred during the negotiations that "*it should probably be the task of the arbitrators to adapt the contract if the parties could not agree*" [*CE 8, p. 17*]. Therefore, adaptation is an available remedy in case of changed circumstances under the hardship clause.

105. The wording of the clause 12 covers the additional tariffs. The phrase "*comparable unforeseen events"* indicates that the list of events is open-ended. The additional health and safety requirements were only mentioned as an example of such event. Thus, the parties did not intend to define all the possible comparable events that would be left outside CLAIMANT's risk. Neither did the parties expressly exclude any particular events from the scope of the hardship clause. The additional tariffs are directly comparable to additional health and safety requirements. From a seller's perspective, they both cause additional fees to goods on importation and thus highly affect the profitability of the deal. Therefore, the increased tariffs are in the core of the hardship clause.

106. Further, the drafting history of the hardship clause proves that the parties intended the clause to cover also the tariffs. CLAIMANT agreed to RESPONDENT's suggestion on DDP delivery on the condition that at least a hardship clause would be added to the contract [*CE 4, p. 12*]. The hardship clause was included to limit CLAIMANT's risks associated with the DDP delivery terms. CLAIMANT stated in its email to RESPONDENT that it was *"not willing to take over any further risks* [...], *in particular not those associated with changes in customs regulation or import restrictions"* [*CE 4, p. 12*]. CLAIMANT could not have expressed more clearly its will to exclude additional tariffs from its risk. RESPONDENT could not have been unaware of this intent.



107. Further, the final purchase price for the doses was only USD 500 higher than in CLAIMANT's original offer, which did not include DDP delivery [CE 5, p. 13]. Such a low increase cannot imply that CLAIMANT had taken over all the risks other than those relating merely to health and safety requirements.

108. The tariffs were "*unforeseen*" as required under the hardship clause. Here, the evaluation is to be made based on whether the parties actually foresaw such event. It was a total surprise for the parties that frozen racehorse semen was listed as an agricultural product falling under the new tariffs-regime [*CE 7, p. 16; PO2, para. 26*]. After Ms. Napravnik found out about the tariffs affecting the delivery, she immediately emailed Mr. Shoemaker with a high priority stating that the tariffs *"include apparently all animal products, even if it is for the breeding of racehorses"* [*CE 7, p. 16*]. Further, as the Partial Interim Award and the relevant submission will show, RESPONDENT itself has held that the 25 % tariff imposed by Mediterraneo was unforeseen and thus justifies contract adaptation [*PO2, para. 39*]. Notably, the retaliatory tariff of 30 % imposed by Equatoriana was even less predictable and *de facto* not foreseen by the parties.

109. The hardship clause requires that the contract has been made *"more onerous"*. Such wording leaves the threshold for alteration low. It does not require that the contract had been made "*excessively onerous*" or set any other requirement for how much the balance of the contract must have been altered. The increased tariffs undoubtedly made the contract more onerous for CLAIMANT. Originally CLAIMANT had a 5 % profit margin on the doses [*PO2, para. 31*]. However, the tariffs made the shipment 30 % more expensive than anticipated [*CE 6, p. 15; CE 7, p. 16*]. In terms of dollars, the increase qualifies as an additional cost of USD 1.5 million, whereas CLAIMANT's profit on the last shipment was merely USD 250.000. Therefore, the tariffs did not only destroy CLAIMANT's profit margin but exceeded it fivefold, resulting in considerable hardship and further impairing CLAIMANT's financial stability.

110. In conclusion, the arbitral tribunal should adapt the Sales Agreement on basis of the hardship clause and oblige RESPONDENT to pay CLAIMANT the remuneration of USD 1.25 million. The hardship clause covers the additional tariffs. The tariffs are precisely the kind of event why CLAIMANT insisted on adding the hardship clause to the contract. Therefore, RESPONDENT bears the risk for the imposed tariffs.

C. ALTERNATIVELY, THE ARBITRAL TRIBUNAL SHOULD ADAPT THE SALES AGREEMENT UNDER THE CISG

111. Irrespective of whether clause 12 of the Sales Agreement allows contract adaptation on the basis of the tariffs, the arbitral tribunal should adapt the Sales Agreement under the CISG. The CISG provides the arbitral tribunal various grounds for adapting the Sales Agreement on the basis of the tariffs **(1)**. Further, the conditions for adapting the Sales Agreement under the CISG are met **(2)**.

112. For the sake of good order, contrary to RESPONDENT's allegation, the parties have not excluded the application of Art. 79 CISG. It was confirmed in *Iron molybdenum case* that the parties have not preempted Art. 79 by including a force majeure clause in the contract. When the contract clause does not expressly displace Art. 79, the parties' intent is decisive [*Gillette/Walt, p. 336*]. Here, by including clause 12 in the Sales Agreement, the parties' intent was not to derogate from Art. 79 but to have "*a mechanism in place to ensure an adaptation of the contract* [...]*, irrespective of the fact that from a legal point of view that was not necessary*" [*CE 8, p. 17*]. Therefore, Art. 79 CISG is applicable.

1. The CISG allows contract adaptation on various grounds

113. The arbitral tribunal can and should adapt the Sales Agreement. Adaptation is possible on various grounds under the CISG. First, Art. 79 directly permits adaptation due to changed circumstances altering the balance of the contract **(a)**. Alternatively, the arbitral tribunal may adapt the agreement on the basis of Art. 7(2) CISG **(b)**. Further, the arbitral tribunal's possibility to adapt the agreement may be derived from Art. 9(2) CISG **(c)**.

a. Art. 79 CISG directly permits contract adaptation

114. Art. 79 CISG provides reallocation of liability between the parties. According to the CISG Advisory Council, Art. 79 does not only regulate limitation to liability to pay damages but also provides the arbitral tribunal the possibility to grant further relief [*CISG-AC 7, opinion 3.2*]. Reference to "*further relief*" means that an adaptation of the contract falls within the category of available remedies in case of changed circumstances under Art. 79 [*Lookofsky III, p. 162*]. Respectively, nothing in Art. 79 prevents either party from exercising any right other

than to claim damages under the CISG. In this regard, Art. 79(5) may be relied upon to open up the possibility for an arbitral tribunal to adapt the terms of the contract to the changed circumstances [*CISG-AC 7, para. 40; Schlechtriem II, pp. 236–7*].

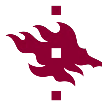
115. Art. 79(1) CISG provides that a party is not liable for an impediment it could not reasonably be expected to have taken into account or overcome. Whether a party could reasonably be expected to overcome an impediment is ultimately determined by an arbitral tribunal presiding over the case [*Ishida, p. 372*]. By this capacity, the arbitral tribunal can order a solution reasonably expected to be taken by adapting the contract. Thus, Art. 79 CISG presupposes the arbitral tribunal's possibility to adapt the contract to reach a reasonable solution [*Ishida, p. 372*].

116. According to Art. 7(1) CISG, in the interpretation of the CISG, regard is to be had to the need to promote uniformity in its application and the observance of good faith in international trade. Should it be considered that Art. 79 does not cover contract adaptation, the question would be left to disparate domestic legal rules and thus undermine the CISG's confessed purpose to promote uniformity [*CISG-AC 7, para. 35; Schwenzer, p. 713; Brunner, p. 215; Kröll/Mistelis/Perales Viscasillas, p. 1089*]. The aim of adapting a contract is in particular to achieve a reasonable solution bearable to both parties. Thus, the duty to restore the balance of the parties' performances can be inferred from the principle of good faith [*CISG-AC 7, para. 40; Brunner, pp. 218–9; Schlechtriem/Schwenzer, p. 825; Magnus, Art. 79, para. 24; cf. Bianca/Bonell, pp. 84–5*].

117. In the view of the above, Art. 79 allows the arbitral tribunal to adapt the Sales Agreement.

b. Alternatively, the possibility for contract adaptation can be derived from Art. 7(2) CISG

118. Should the arbitral tribunal consider that the CISG does not settle the contract adaptation directly, this constitutes an internal gap within the CISG. Pursuant to Art. 7(2), such gap is to be filled in conformity with the general principles underlying the CISG or, in absence of such principles, with national law.



119. The UNIDROIT Principles set forth general principles of international contract law upon which the CISG is based [*Garro, pp. 1183–4; Veniziano, pp. 141–2; Bonell I, p. 317; Basedow, pp. 136–7; Kofod, para. 3.2.3*; *CISG/Unidroit Principles case; Chemical fertilizer case; Steel Tubes case*]. Interpreting the CISG in light of these principles will respect its international character as required by Art. 7(1) CISG [*Garro, p. 1153*]. Therefore, the UNIDROIT Principles may be used to fill gaps in the CISG and complement Art. 79 with respect to cases of economic hardship [*Brunner, pp. 218, 419, 493; Kofod, para. 3.2.3; Garro, p. 1184; Veniziano, pp. 145–6; Steel Tubes case*]. In *Steel Tubes* case, the court applied the UNIDROIT Principles to supplement Art. 79 CISG. Consequently, the court held that Art. 79 justified an additional remedy other than exemption from liability for damages. It determined that the CISG required a court to adapt the terms of the parties' contracts in light of the seller's hardship and affirmed that the buyer was obliged to pay the increased price.

120. Should the arbitral tribunal find that the general principles underlying the CISG are not sufficient to settle the matter of adaptation, it should refer to the national law to fill the internal gap within the CISG. Art. 7(2) CISG mandates the arbitral tribunal to apply the national law applicable to the contract besides the CISG [*UNCITRAL Case Digest, p. 43*]. *In casu*, following the choice-of-law under clause 14 of the Sales Agreement, the applicable law is MCL, which is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 52*].

121. Therefore, both alternatives of Art. 7(2) CISG lead to the same result i.e. the application of the UNIDROIT Principles. The UNIDROIT Principles explicitly allow contract adaptation. According to Art. 6.2.3(4)(b) UNIDROIT Principles, the arbitral tribunal may adapt the contract to restore its balance.

c. Additionally, Art. 9(2) CISG binds the parties to trade usages allowing contract adaptation

122. The arbitral tribunal's possibility to adapt the Sales Agreement can be inferred from Art. 9(2). Pursuant to Art. 9(2) CISG, trade usages have been made impliedly applicable to the parties' contractual relationship when the usage is widely known and regularly observed in the particular trade. This includes the rules derived from international commercial practice as well as generally accepted international principles [*Kröll/Mistelis/Perales Viscasillas, p. 162;*

Perales Viscasillas II]. As the UNIDROIT Principles have a wide recognition and reflect the basic principles of commercial relations, they are to be taken into account as a trade usage within the meaning of Art. 9(2) CISG [*Schlechtriem I, para. 291; Bonell II, p. 413; Lando, p. 653; Karton, p. 37; Kröll/Mistelis/Perales Viscasillas, pp. 1091–2*; *SCC case 117; ICC cases 7110, 9797*].

123. It is business as usual for arbitral tribunals to rewrite, adapt or supplement a contract under the CISG [*cf. Ishida, p. 381*]. Art. 9(2) favors the idea of adaptation as a usage, since many industries are characterized by sudden changes. Arbitral tribunals should be able to adapt the terms of contracts governed by the CISG to meet the requirements of international transactions.

124. In conclusion, the arbitral tribunal's possibility to adapt the Sales Agreement can be derived from Art. 9(2) which leads to the application of the UNIDROIT Principles. Therefore, the arbitral tribunal may adapt the contract to restore its balance.

2. The criteria for adaptation under the CISG are met

125. The imposed tariffs entitle CLAIMANT for adaptation of the Sales Agreement. The criteria for adaptation are met since the tariffs qualify as an impediment under Art. 79 CISG **(a)**. Correspondingly, the tariffs justify adaptation of the Sales Agreement also under the criteria applicable through Art. 9(2) CISG **(b)**.

a. The tariffs are an impediment under Art. 79(1) CISG and justify adaptation of the Sales Agreement

126. The tariffs qualify as an impediment under Art. 79 CISG. Thus, CLAIMANT is entitled to resort to Art. 79 CISG to claim adaptation of the Sales Agreement. The arbitral tribunal should adapt the Sales Agreement and order RESPONDENT to pay CLAIMANT USD 1.25 million as remuneration for the increased tariffs.

127. Under Art. 79(1) CISG, the possibility to adapt the contract is present when there is an impediment beyond a party's control that it could not reasonably be expected to have taken into account at the time of the conclusion of the contract or to have avoided or overcome it. Further, the party whose performance is affected by the impediment is required to give notice

to the other party of the impediment and its effect on his ability to perform under Art. 79(4) CISG.

128. The language of Art. 79 does not require that a performance has become absolutely impossible [*CISG-AC 7, opinion 3.1*]. A party may invoke the provision when its performance would go beyond the "*limit of sacrifice*" [*CISG-AC 7, para. 38; Lindström, pp. 10, 13; Schlechtriem/Schwenzer, p. 1076; Rimke, p. 223; Brunner, p. 499*]. Indeed, the prevailing view is that a change of circumstances rendering the performance excessively onerous falls under the scope of Art. 79 CISG [*CISG-AC 7, 3.1; Schlechtriem/Schwenzer, p. 1076; Schwenzer, p. 713; Jones/Schlechtriem, p. 136; Brunner, p. 213; Magnus, Art. 79, para. 24; Steel Tubes case*]. Hence, there is no gap in the CISG regarding the so-called hardship situations [*Schwenzer, p. 713; Brunner, p. 218; Rimke, p. 219; Hearing implants case*].

129. The evaluation whether there is an impediment under Art. 79(1) CISG must be done case-by-case [*Schwenzer, p. 716; Lindström, p. 23*] and from the subjective point of view of the aggrieved party [*Fucci, p. 26; ICC case 2508*]. In particular, where an agreement represents a significant part of the party's revenues or the financial ruin of the party is imminent, a somewhat smaller alteration of the balance of the contract is sufficient [*Schwenzer, p. 716; Fucci, p. 26; Brunner, pp. 432–5*]. If one party would go bankrupt while the other party would exclusively benefit from the unforeseeable circumstances, it would be unreasonable to rely on the unmodified contract terms [*Brunner, p. 437*].

130. In the case at hand, CLAIMANT immediately gave notice to RESPONDENT after finding out about the imposed tariffs affecting the delivery of the doses [*para. 87; CE 7, p. 16*]. CLAIMANT stated that it could not shoulder the tariffs on its own and thus CLAIMANT could not deliver if it had to bear the tariffs on its own [*CE 8, pp. 17–8*].

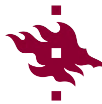
131. The tariffs were imposed by a public authority. Thus, they were naturally beyond CLAIMANT's control nor could CLAIMANT reasonably be expected to have avoided or overcome them. Further, CLAIMANT could not have taken the tariffs into account at the time of concluding the contract. The tariffs as well as their size came as a big surprise to the parties and even to informed circles [*CE 6, p. 15*]. The parties were especially astonished to hear that frozen semen was listed as an agricultural product that fell under the new tariffs-regime and

that this also applied to racehorse semen [*PO2, para. 26*]. Generally, racehorse breeding is categorized differently from typical agricultural products, such as pigs, sheep, or cattle [*NoA, p. 6*].

132. The imposed tariffs made the contract excessively onerous for CLAIMANT. They increased CLAIMANT's costs by 1.5 million. The last two years have already been financially difficult for CLAIMANT. It has been making losses since 2014 and has been able to stay in business only through extensive restructuring measures and a considerable cut of the workforce [*CE 8, p. 17; PO2, para. 29*]. CLAIMANT had finally managed to break even in 2017 [*PO2, para. 29*]. The Sales Agreement between the parties represents a significant part of CLAIMANT's revenue this year. With the revenues from the sale of the frozen semen, CLAIMANT had planned to make a profit of USD 300.000 in 2018 [*PO2, para. 29*]. However, the tariffs resulted in a significant loss of USD 1.25 million. Should CLAIMANT be forced to bear the tariffs on its own, its financial situation and even existence would be endangered.

133. By contrast, RESPONDENT would exclusively benefit from an inexpensive deal if it were not obliged to bear the bulk of the tariffs. Furthermore, RESPONDENT has against the resell prohibition resold 15 doses to other breeders at a price 20 % higher than the price it has itself initially paid for the doses [*PO2, para. 20*]. RESPONDENT has from the beginning planned to resell at least 25 doses per year to other breeders [*PO2, para. 11*]. This means that RESPONDENT is planning to make a profit of at least USD 1 million by reselling the doses. In this light, it would be only reasonable if RESPONDENT were obliged to bear the costs that incurred when the semen was delivered to it. By ordering RESPONDENT to bear the USD 1.25 million as remuneration for the tariffs, CLAIMANT would still suffer a non-existent profit from this deal but at least it would not suffer bankruptcy.

134. In the view of the above, the tariffs are an impediment under Art. 79 CISG. The criteria for contract adaptation under the CISG are met. Taking into account the size of the tariffs, CLAIMANT's financial situation and the profit RESPONDENT has made by breaching its resell prohibition, the arbitral tribunal should adapt the Sales Agreement to restore the balance of the agreement. Consequently, it should oblige RESPONDENT to pay CLAIMANT USD 1.25 million as remuneration for the tariffs.



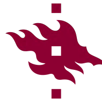
b. The tariffs justify adaptation of the Sales Agreement under the criteria applicable through Art. 9(2) CISG

135. Should the arbitral tribunal derive the possibility for contract adaptation from Art. 9(2) CISG, the criteria for adaptation are derived from the UNIDROIT Principles. The requirements of Art. 6.2.2 UNIDROIT Principles and Art. 79 CISG are essentially the same [*Brunner, pp. 218–9; Pirozzi, p. 217*]. Both provisions regulate situations of a party's difficulty to perform, such as the one at hand. As reasoned above [*paras. 126 et seqq.*], the tariffs justify adaptation of the Sales Agreement.

136. The only relevant addition under Art. 6.2.3 UNIDROIT Principles is that the disadvantaged party is entitled to request the other party to enter into renegotiation of the original contract terms with a view to adapting them to the changed circumstances. Upon failure to reach an agreement, the legal consequence is the adaptation of the contract [*Brunner, p. 392*].

137. CLAIMANT requested renegotiations with RESPONDENT to solve the issue of adaptation [*PO2, para. 35*]. The parties had a meeting on 12 February 2018 with the purpose to discuss the details of the remuneration. However, RESPONDENT's CEO announced that she was not willing to cooperate with CLAIMANT and immediately terminated the negotiations altogether [*CE 8, p. 18*]. Thus, CLAIMANT was forced to resort to arbitration and seek the arbitral tribunal to enforce CLAIMANT's right for adaptation of the Sales Agreement.

138. To conclude, the tariffs justify adaptation of the Sales Agreement also under Art. 9(2) CISG. Therefore, the arbitral tribunal should order RESPONDENT to pay CLAIMANT a remuneration of USD 1.25 million for the tariffs.



PRAYER FOR RELIEF

Counsel, on behalf of CLAIMANT, respectfully requests the arbitral tribunal:

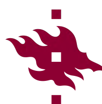
1) To find that the arbitral tribunal has the jurisdiction and the powers to adapt the Sales Agreement;

2) To admit Partial Interim Award and the relevant submission as evidence;

3) To order RESPONDENT to pay CLAIMANT an additional amount of USD 1.25 million due to the imposed tariffs;

4) To order RESPONDENT to bear all the costs arising from this arbitration

CLAIMANT reserves the right to amend its prayer for relief as may be required.



CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Helsinki, 6 December 2018,

Olga Jeganova

Rebecca Kramsu

Saara-Marja Lahtinen

Malviina Linninen